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

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Section A

THE LIMITS OF TRANSMITTING INTANGIBLE ELEMENTS OF THE BUSINESS THROUGH SUCCESSION

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Abstract

The present study is a continuation in an in-depth manner of the researches we have undertaken on the successional transmission of property and business.

The transfer of business components (elements), due to their specificity, entails in certain cases ***restrictions*** *(prohibitions) and, in other cases,* ***legal*** *and sometimes* ***conventional limits****.*

The intangible elements of the business are, according to the expression of the legislator: the company, the emblem, the clients, the good custom, patents of inventions. In our opinion, the enumeration made by the legislator is not limiting, knowing that, in the business, traditionally, there may be other elements such as: authorizations, approvals necessary for the exploitation by the professional of the business, know-ho (savoire faire) etc, and in French law the right of bail (use) on the space where the business is exploited in its entirety.

Although in the case of the transfer by succession of a goodwill it can be accepted that together with it the clientele is also transferred (especially since it is evaluated), however, in practice, this cannot be transmitted „tale quale" from the owner of the business (de cuius) to the heirs who accept the continuation of the activity.

The business in its entirety as well as its intangible elements (assets) can be transmitted through succession with the limits analyzed, in particular, those related to the company, which can only be transmitted together with the entire goodwill, and those relating to the clientele regarding which the professional has no subjective right, but which has a value that can be transmitted through succession.

Kaywords *business, firm, clientele, transmission, succession, limits*

Introduction

The present study is a continuation, in an in-depth manner, of the research I undertook on the successional transmission of property and business[1].

As I stated[2], from a notional point of view, the „goodwill" (as a legal institution) is not confused with the „patrimony of affection", the legislator himself making this distinction. Thus, according to Article 3 (1) r) of Law no. 265/2022 on the trade register and for the amendment and completion of other normative acts affecting registration in the trade register[3] with application from November 26, 2022, the goodwill is „*the set of movable and immovable, tangible and intangible assets – brands, companies, emblems, invention patents,*

[1] A se vedea, S. Angheni, Transmiterea pe cale succesorală a patrimoniului de afectațiune și a business", Conferinţa Internaţională de Drept, Studii Europene şi Relaţii Internaţionale, Facultatea de Drept, Universitatea Titu Maiorescu, mai 2022;

[2] A se vedea S. Angheni, Drept comercial. Tratat, Ed. C.H. Beck, 2022, p. 105 și urm.;

[3] M.Of. nr. 750 din 26 iulie 2022;

good custom –, used by an economic operator in order to carry out its activity and to attract and maintain clientele".

Regarding the patrimony of affection, in accordance with Article 31 (2) related to Article 31 (1) of the Civil Code, it is represented by „*fiduciary patrimonial assets constitute, according to the provisions of Title IV of Book III, those affected by the exercise of an authorized profession, as well as other assets determined according to the law*".

Comparing the two definitions, it is clear that the business cannot be confused with the affected patrimony, the difference being that, while the **business** is composed of a „set of assets" it therefore meets the conditions of a „*de facto* universality"[4] within the patrimony of an economic operator (according to the expression of the legislator) but who can also be an authorized professional other than an economic operator (trader), **patrimony of affection** it is composed of rights and obligations of „fiduciary patrimonial masses", so it is a „legal universality" specific to the legal concept of patrimony.

But, both business and patrimony of affection can be transmitted through succession (inheritance), whether this transmission is legal or testamentary.

As long as these concepts with the component goods can be transmitted through legal acts „*inter vivos*" (sale, donation etc.) we consider that they can also be transmitted through legal documents „*mortis casa*" (testament) and „a *fortiori*" can be transmitted through legal devolution.

However, the transfer of business components (elements), due to their specificity, entails in certain cases **restrictions** (prohibitions) and, in other cases, **legal** and sometimes **conventional limits**.

1. Specific elements of goodwill – intangible assets

As follows from the legal definition of goodwill, which refers to its elements[5], it follows that goodwill is composed of both **tangible and intangible assets.**

Regarding **tangible assets, the legislator „accepts"** that both movable and immovable assets **can exist** in goodwill. Regarding immovable assets, in the absence of a specification of the law, we consider that there can be both immovable assets by their nature, according to Article 537 of the Civil Code, immovable assets by the object to which they apply and immovables by destination (Article 538, 542 of the Civil Code).

Tangible movable assets can be: materials, machinery, equipment used by the professional in carrying out the declared and, under the law, authorized object of activity.

The holder of the business can have either a right of ownership or only a right of use over the movable assets.

If with regard to the right of ownership, its transmission through succession, as a rule, does not create problems; on the other hand, if the owner of the business only has the right of use over one or some goods (such as the user's right over some goods that he uses under a leasing contract), the transmission of this right to the heirs can only be done in the conditions of the special law.[6]

[4] Pentru argumentele legale privind „teoria universalității de fapt" a business, a se vedea S. Angheni, Drept Comercial. Tratat, op. cit., p. 115;

[5] A se vedea, supra, p. 1

[6] A se vedea, O.G. nr. 51/1997 privind operațiunile de leasing și societățile de leasing, republicată (M.Of. nr. 9 din 12 ianuarie 2000);

Regarding the tangible elements (**tangible goods**) of the business, they can be transmitted by succession according to the regulations of the common law regarding their circulation.

Conversely, in the case of intangible elements (**intangible goods)** that are specific to business there may be certain legal and sometimes even conventional limits (prohibitions).

In order to identify the limits of the successional transfer of the business, we must, in advance, specify the following aspects, of principle, regarding the successional devolution.

First of all, in the case of the existence of a goodwill that has been exploited and that belonged to „*de cuius*" it is possible that, if there are several heirs, one or some of them may want to continue the activity, if it meets the conditions of the special legislation applicable to the respective category of professionals, and the other or the other heirs do not want to continue the activity or do not meet the conditions of the specific legislation to be able to carry out the respective activity: for example, „*de cuius*" was a doctor, the business he exploited cannot be passed on to the heirs who are not doctors.

In practice there may be different situations. Thus, it is possible that, in the case of the heir/heirs who fulfills the conditions of the legislation specific to the respective field, they will receive goodwill in kind (following the inheritance division), and, following its assessment, the other heirs receive in money the value of the inheritance share due to them from the deceased's estate.

Another situation that can exist is when the heirs accept the taking over of the business, through succession, but to put it into use (exploitation) and even ownership by another person who meets the conditions of the special legislation regarding the respective profession.

Both in the first situation and in the second, there is the question of the „limits" of the inheritance of the intangible elements (intangible goods) of the business.

The intangible elements of the business are, according to the expression of the legislator[7]: the company, the emblem, the clientele, the good custom, invention patents. In our opinion, the enumeration made by the legislator is not limiting, knowing that, in business, traditionally, there may be other elements such as: authorizations, approvals necessary for the exploitation by the professional of the business, *know-how* (*savoire faire*) etc, and in French law the right of *bail*[8] (use) on the space where business is exploited in its integrity.

Therefore, it is important to specify that business does not contain only the intangible assets mentioned by the legislator because, in the case of the inheritance of the business, it is possible that, for some of these components, there is no possibility of their transmission.

For example, *intuitu personae* contracts closely related to the person of the deceased will obviously cease with his death. It is the case of medical practices, concluded contracts cannot be automatically passed on to the heir(s).

For example, the notices or, as the case may be, the authorizations issued for the exercise of a certain activity and which were dependent on the person of the deceased cannot be transmitted through succession.

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[7] A se vedea, Article 3 (1) lit. r din Legea nr. 265/2022 supra, p. 1;

[8] A se vedea, M.de Juglart, B. Ippolito, Traité de droit commercial, Tome Premier, 4e édition, Ed. Montchrestien, Paris, 1988, p. 728 și urm.; Y. Guyon, Droit des affaires; Tom I, 6e édition, Ed. Economica, Paris, 1990, p. 648 și urm.

But, as a rule, all the intangible assets that are part of the business can be transferred both by „*inter vivos*" and „*mortis causa*" legal acts.

The legal problem arises in the situation when only some intangible assets are transferred through succession or „*inter vivos*" legal acts. In the law, in this case there are limitations qualified as even prohibitions.

2. Transfer of the company – legal conditions

In accordance with Article 48 (3) of Law no. 265/2022, the company can only be transferred together with the entire goodwill, which means that in no case can it be transferred separately, as a distinct element of business.

The explanation of the prohibition of the separate transmission of the company lies in the fact that it represents the identification attribute of the professional (*de cuius*) who organized and carried out his activity during his lifetime.

The same reasoning also exists in the case of the prohibition of bringing to the share capital of a company that constitutes the company owned by an associate, whether it is acquired through succession, or whether it exists in another individual or associative professional structure of the owner of the respective company.

If the company is passed on through succession, obviously, together with business, the notion of „successor" must be added to its content.

At the same time, it cannot be transmitted and exploited separately, the reputation (*goodwill*) or the surplus value of the company which is determined by the value, the reputation of the business, in its integrity.[9] From a conceptual point of view, reputation (*goodwill*) forms the substance of another concept, namely that of business[10] of which goodwill would be part.

The concept of „goodwill" is important, above all, from an accounting point of view and for determining the value of business, in the case of its transmission, including through succession.

The intangible elements of the goodwill are related either to the clientele, such as: loyalty, number, quality of the clientele, the perspective of its development; elements related to the quality of suppliers of delivered products or services provided; elements related to the salaried staff and the quality of relations between employees (employees/workers) and the management of the enterprise, elements related to the patrimony of the immovable, mobile enterprise, the reputation of product brands, intellectual property rights, in general.

All these elements, in their dynamics, influence the value of the goodwill determining the reputation or goodwill of the professional in particular, the trader.

Therefore, the company viewed separately as well as its reputation (goodwill) cannot be transferred separately but only together with the entire business.

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[9] A se vedea, L. Bercea, D.A. Cărămidariu, Reputaţia comercială. O discuţie despre compensarea prejudiciului reputaţional în contractele de afaceri, în R.R. D.P. nr. 3/2020, p. 29-60;

[10] N. Feleagă, L. Feleagă, Controverse privind politicile de evaluare, depreciere și contabilizare a fondului comercial, ASE București; E. Iordache, Recunoașterea fondului comercial negativ în situațiile financiare, Revista Idei, Sugestii, Experiențe, anul 2, nr. 4/2013; Itsuo Sakuma, Will the concept of goodwill go well with national accounting?, EURONA — Eurostat Review on National Accounts and Macroeconomic Indicators; RF Reilly, CPA, Goodwill Valuation Approaches, Methods, and Procedures, Financial Advisory Services Insights (www.willamette.com); pentru analiză amplă a reputației comerciantului, inclusiv a termenului „good will", a se vedea L. Bercea, D.A. Cărămidariu, Reputația comercială. O discuție despre compensarea prejudiciului reputațional în contractele de afaceri, în R.R.D.P. nr. 3/2020, p. 29-60;

3. Transmission of clientele

In Romanian legislation, there is no definition of clientele, this having meaning from an accounting point of view, expressed in the **form of a number.**

However, a legal interpretation of the term „clientele" can be formulated as being the totality of natural and/or legal persons who are in legal relations with a commercial professional.

In order to establish to what extent the clientele can be passed on through succession, some seemingly theoretical clarifications are required but, in reality, with multiple practical implications.

Thus, a first clarification refers to the place that the clientele occupies within the „business" concept. In other words, is the clientele a component part of the business or, on the contrary, is it attached to a business through all its tangible/intangible elements?

The problem arose in French doctrine[11], starting from the idea that, in fact, a merchant cannot claim to have a subjective right over the clientele. Each customer is free to address (supply) from any merchant. The clientele cannot be the „property" of the business holder, so it cannot be valued and assigned.

In another opinion[12], the clientele is a component part of the business to which it belongs, denoting the people who usually get supplies from a certain store, depending on all the business elements, an opinion which, moreover, is in accordance with the French Law of March 17, 1909.

Regarding the Romanian Law (Law no. 265/2022), we note that Article 3 (1) r) does not explicitly state that the clientele is an element of business, but from the expression of the legislator*"... used by an economic operator in order to carry out its activity and to attract and maintain clientele*", it can be concluded that this (clientele) is a component of the business and that can be evaluated at the time of its transmission, transmission is via succession.

But, **in order to be assessed and transmitted**, the clientele must be **personal** to the one who operates an enterprise and is not personal to the clientele of traders who have shops installed in the premises of a **collective** store, a situation in which what is assessed and transmitted is another element of business, respectively the good custom (*achallandage*).

At the same time, it is not an own clientele that is „passing" through the collective store or when there is a **material and legal dependence** of a trader on another trader, thus there is also a dependence of a trader's clientele on the existence of the other trader[13].

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[11] *R. Sabatier, J.M. Laloup*, Droit commercial, Actes de commerce, commerçants, fonds de commerce, ed. a 3-a, Paris, 1993, p. 281-284; *M. de Uglart, B. Ippolito*, Cours de Droit commercial, vol. I, ed. a 8-a, Actes de commerce et commerçants, Fonds de commerce et entreprises, Effets de commerce, Paris, 1984, p. 344-345

[12] *G. Ripert*, Traité elementaire de droit commercial, ed. a 13-a, L.G.D.J., Paris, 1989, nr. 522 definește goodwill ca fiind o proprietate incorporală care constă în dreptul asupra clientelei care este atașată fondului prin elemente care servesc la exploatarea lui, definiție care este explicată mai detaliat în *G. Ripert, R. Roblot*, Traité de droit commercial, vol. I, ed. a 15-a, L.G.D.J., Paris, 1993, p. 463. Comerciantul nu are dreptul exclusiv de a exploata o clientelă, pentru că nu are un monopol. Dar, în fapt, deține suficiente elemente pentru a considera că o anumită clientelă îi aparține și, eventual, să o dezvolte. Este suficient să mențină aceste elemente pentru a menține sau transmite clientela; *Idem*, *A. Jauffret*, Repertoire de droit commercial, Fonds de commerce, Lamy, 1977, p. 321.

[13] Pentru detalii privind dependența materială și juridică a clientelei, a se vedea, S. Angheni, op. cit., p. 125-126;

Although in the case of passing on a business through succession, it can be accepted that along with it, the clientele should also be passed on (especially since it is evaluated). However, in practice this cannot be transmitted „*tale quale*" from the business owner (*de cuius*) to the heirs who accept the continuation of the activity.

Punctually, it is the **case of medical practices** whose patients have concluded a healthcare contract with the person who owned and exploited the business.

In this case, the legal regime established by special regulations regarding the conditions of exploitation of the person as a doctor, the authorizations he holds, the „*intuitu personae*" nature of the contracts concluded with patients (clients) does not allow the transmission of the contracts through succession; not even in the situation where the heir or heirs who accept the continuation of the activity of the deceased and meet the conditions of the special legislation.

These heirs will conclude contracts in their own name with the patients who belonged to „*de cuius*". Using the argument of formal „*a fortiori*" logic these contracts will not be taken over by the employees (salaried employees) of the doctor who ceased his activity as a result of the death.

Even if doctors can organize and carry out their activity in the form of a legal institution „Authorized natural person" or as „Individual enterprise", from the point of view of the content of the activity, they cannot be considered „traders" and will obviously be subject to the special regulation of the medical profession.

A similar, but nuanced, problem could also arise in the case of limited liability companies established for the exercise of the lawyer profession, although, in that case, the client concludes a legal assistance contract with the law firm represented by X lawyer who, by the time the legal assistance contract is terminated, dies.

In this situation, we must distinguish according to the activity that the lawyer will carry out within the contract. If it is a consulting activity, we consider that this contract can be transmitted to the other lawyers within the law firm, on the other hand, if the activity consists of representation (conventional mandate) being an „*intuitur personae*" contract of mandate, it ceases with the death of the trustee, even if there may be some effects that will also occur on account of his heirs.

In general, „*intuitu persoane*" contracts and any legal acts concluded in consideration of the person and quality of the business owner and which are related to business, cease with his death.

In conclusion

The business in its entirety as well as its intangible elements (assets) can be transferred through succession with the limits analyzed, in particular, those related to the company, which can only be transferred together with the entire business, and those related to the clientele regarding to which the professional has no subjective right over, but which has a transmissible value through succession.

STATE SUCCESSION IN REGIONAL INTERNATIONAL ORGANIZATIONS

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Abstract

The succession of states to membership of a regional international organisation presents numerous challenges, even today, for both the States and the international organisation concerned. The international practice is enormously abundant, although the birth and disappearance of States is not a very frequent occurrence on the international scenario. There are continents where in recent years there have been more cases of dissolution, merger, or separation (negotiated or not agreed) of States (Africa or Europe). There are others where, for historical reasons, there have been practically no changes, except for the incorporation of new States that have emerged from the latest waves of decolonisation (America). Added to this is the proliferation of independence movements in practically every corner of our planet. Throughout this Chapter, we will look for the most salient points and commonalities in the practice of the international organisations created in Africa, Asia and Oceania, the Americas, and Europe.

Keywords: *States; international organizations; succession*

1. General considerations on the succession of States to membership of regional international organizations

International organizations are secondary international legal subjects that owe their existence to a prior legal act – normally a treaty – negotiated by States that voluntarily wish to create a new international entity with its own institutions and competences to achieve common interests. The birth, existence and disappearance of international organizations are very much conditioned by the will of the member States. This will is also very much present in the case of the succession of States in the status of member of an international organization.

The succession of States in membership of regional international organizations is an overly broad and heterogeneous phenomenon, which consists of more than three hundred international organizations with very different and varied membership, purposes and competences. These organizations introduce certain objective or subjective conditions for membership. In some cases, these conditions are very restrictive, requiring, for example, that the candidate State be previously recognized by the members of the international organization and that both the institutions of the organization and its member States give a favorable opinion, and, in some cases, the latter must do so unanimously. In other cases, the requirements are lighter and the admission process simpler. In many situations, this is due to the colonial past of its members or is the result of the complex constitutional and

administrative relationship of European countries – such as France, the Netherlands and the United Kingdom – with these territories, or even the fact that European countries still maintain a sphere of influence in these lands that are so far away from the European continent.

In any case, the diversity of the processes of cooperation and, to a large extent, of regional integration make it necessary to look at the specific legal order of each of the international organizations and examine „the rules of the organization"[1] to determine how they have resolved the succession of States in their membership, in order to learn about the practice of these regional international organizations with the aim of seeing if there are points in common and similar concerns. Furthermore, it should be noted that many regional international organizations have not faced the complex situation of succession in their membership, either because they were created after the emergence as States of those who are now members, or because the cases of succession refer to States that had not previously been members. This is undoubtedly an extremely broad field.

As is well known, membership of an international organization is a constituent element of the organization. Its original law determines the procedure to be followed to become a member, and the processes of succession of States to membership are obviously linked to this reality. Hence, when examining succession to membership of an international organization, one must start from the conditions for membership of that international organization.

Throughout this Chapter, we will focus on the case of those international organizations at the regional level that have faced situations arising from the succession of States, which have had implications for membership in an international organization, or that have particular characteristics arising from the conditions required by regional international organizations for admitting new members.

Given the considerable number of processes of institutionalization of regional cooperation in which States participate, throughout this Chapter we will focus only on those regional international organizations that we consider are the most representative from the perspective of the succession of States in the membership status. To this end, we will refer, firstly, to the African continent *(2)*; secondly, to the Asian continent and Oceania *(3)*; thirdly, to the American continent and the Caribbean *(4)*; and, fourthly, to the European continent *(5)*. Therefore, the problem of the succession of States in the membership of intercontinental international organizations will not be analyzed in this Chapter, otherwise we would exceed the limits set for this Chapter.

2. State succession to membership of regional international organizations in Africa

The African continent has been – and continues to be today – the scene of bloody wars, both inter-ethnic and inter-State,[2] which have led the United Nations (UN) to establish

[1] For a further development of the scope of the expression „rules of the organisation", see: Cortés Martín, J.M. (2008). Las Organizaciones Internacionales: Codificación y Desarrollo Progresivo de su Responsabilidad Internacional, Ed. Instituto Andaluz de Administración Pública, p. 159; Sobrino Heredia, J.M. (2010). El estatuto jurídico de las Organizaciones internacionales. In Diez de Velasco, M. (Sobrino Heredia, J.M. coord.) (2010). Las Organizaciones Internacionales, 16th ed., Tecnos, pp. 59-61.

[2] According to the report presented in 1998 by the UN Secretary-General to the Security Council, in the last three decades of the twentieth century alone there were some thirty armed conflicts on the African continent. In

numerous peacekeeping operations and even, in 1994, to create an international criminal court to prosecute flagrant violations of the rights of the population of an African State or of the nationals of that State in neighboring countries.[3] Subsequently, in 2000, this organization also signed an agreement with an African country badly affected by civil war for the creation of a hybrid international tribunal, made up of national and international judges with jurisdiction to try crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under the national law of that country that had been committed in the territory of the country in question.[4]

The African geographic space has also been a true laboratory for the development of ideas of regional and sub-regional cooperation and integration, which have ultimately sought to achieve African unity. Numerous international institutions have been created, transformed, or disappeared, especially since the 1960s, when more and more African States began to emerge as a result of the decolonization process initiated by the ÚN after the adoption of the so-called Magna Carta of Decolonization.[5]

Regional and sub-regional cooperation and integration processes in Africa have perhaps also been driven by the ethnic and religious complexity that exists in the vast majority of African States, where members of the same ethnic group often have different nationalities from neighboring countries.[6] Perhaps this has led to the desire of African States to work together and to pool the interests they share and which require joint responses, and also not to recognize, in principle, the right of secession of any African people without respecting the constitutional order of each country.

In the author's view, apart from the independence of the former African colonies that have achieved Statehood after the decolonization process of the entire African continent – only Ethiopia, Liberia, Egypt and South Africa never became colonized[7] – few State succession attempts have actually been successfully carried out in Africa so far. This is striking, as there have been numerous attempts at secession on the African map in recent decades.

For the purposes of this Chapter, the following processes that are the result of secession or separation of parts of a State's territory leading to the formation of one or several successor/continuing States, unification of States or the dissolution of States seem to us to be relevant: the dismemberment in 1960 of the Federation of Mali and the subsequent emergence as States of Mali and Senegal; the creation of Tanzania in 1964 following the union of Tanganyika and Zanzibar; the independence of Zambia, Zimbabwe and Malawi following the dissolution of the Federation of Rhodesia-Nyasaland which had existed as a subject of international law for a decade (1953-1963); the separation of Eritrea from Ethiopia in 1993; and the separation of South Sudan from Sudan in 2011. Therefore, the

this regard, see: „The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa. Report of the Secretary-General", A/52/871-S/1998/318, 13 April 1998.

[3] We are referring to the International Criminal Tribunal for Rwanda.

[4] This is the Special Court for Sierra Leone.

[5] General Assembly resolution 1514 (XV) of 14 December 1960.

[6] Ouguergouz, F. and Tehindrazanarivelo, D.L. (2006). The question of secession in Africa. In Kohen, M.G. (ed.). Secession. International Law Perspectives, Cambridge University Press, pp. 257 and 261.

[7] Egypt became formally independent, while South Africa was considered an autonomous domain of a colonial empire. In this sense, see: Maluwa, T. (2013). La transition de l'Organisation de l'unité africaine à l'Union Africaine. In Yusuf, A.A. and Ouguergouz, F. (dirs.). L'Union africaine. Cadre juridique et institutionnel. Manuel sur l'Organisation panafricaine, Ed. Pedone, p. 35.

independence achieved by Namibia after the end of UN administration in 1990,[8] and the Western Sahara issue will not receive special attention, although references will be made to them when appropriate.

The continental international organizations in Africa that are of most interest from the perspective of State succession to membership are: the AU (with its predecessor OAU), the African Economic Community (AEC), as well as the so-called „Regional Economic Communities" that were at the basis of the constitution of the future AEC in 1991.

3. State succession to membership of regional international organizations in Asia and Oceania

Asia and Oceania have been the scene of numerous succession scenarios, some of them peaceful, others less so, and contemporary international law has tried to find a legal framework for them. However, at present, there are still separatist tensions which, in the not too distant future, may enrich this practice: Tibet, Manchuria, Hong Kong and Taiwan in China, Kashmir in India, Aceh on the Indonesian island of Sumatra, Kurdistan – which would affect the current territories of Iran, Iraq and Turkey –, the Moros in the Philippines, the Tamils in Sri Lanka, New Caledonia or French Polynesia of France, Bougainville in Papua New Guinea, etc.

It is a vast geographical area, inhabited by more than three billion ethnically diverse people, in which countries with vast territorial extensions (China, Mongolia, Australia...) and some of the smallest countries and non-self-governing territories in the world (Nauru, Tokelau, Cook Islands...) coexist. Many of these countries and non-self-governing territories share a common colonial past, having been part of the Spanish, Portuguese, French, Dutch or British empires and, later, of the United States.[9] It is perhaps this colonial past that lies at the root of many of the succession scenarios in Asia and Oceania, which have resulted in the emergence of new States on the international scene and numerous implications for membership of international organizations, including those at the regional level.

There are several international organizations, bodies, and forums in which Asian and Oceanian countries participate and which are characterized by great socio-political diversity. But they also include those non-self-governing territories dependent on powers outside the region, in various fields such as foreign policy, defense and trade relations.[10] However, in the author's view, there are very few voluntary associations created by them through an

[8] For a study of the international trusteeship regime and non-self-governing territories within the United Nations, see: Virally, M. (1972). L'Organisation mondiale, Librairie Armand Colin, pp. 232-241. With regard to the particular case of Namibia within the United Nations before its independence, it is worth mentioning that on 27 October 1966 Namibia came under the mandate of this Organisation, by virtue of Article 77 of the Charter, ending, from a legal point of view, South African control over the territory of Namibia.

[9] For a presentation of the characteristics of some of these territories with a special status in contemporary international law, see: Sobrino Heredia, J.M. (2018). The European Union and the Principle of Self-Determination of Peoples: Territories with Special Status in the European Union and Pending Cases of Decolonization. Spanish Yearbook of International Law 22, pp. 313-345.

[10] Some of these territories have been included by the Special Committee on Decolonisation (created by the United Nations) in a List of Non-Self-Governing Territories (e.g. Guam, New Caledonia, French Polynesia, Tokelau), while others are overseas collectivities, territories or countries that are considered – for example by the EU – as Outermost Regions or Overseas Countries and Territories (e.g. Wallis and Fortuna, the French Southern and Antarctic Territories). For an interesting study of these issues, see: Sobrino Heredia, J.M. (2018). Derecho del mar y Territorios No Autónomos. In Oanta, G.A. (coord.). El Derecho del Mar y las Personas y Grupos Vulnerables, Bosch Editor, pp. 353-358.

international treaty laying the foundations for an international organization on a continental scale in these parts of the world, and which, moreover, present significant data for the problem of succession to membership of one of these organizations.

Considering, on the one hand, the time of their establishment, few international organizations are of real interest for the purposes of this Chapter, and, on the other hand, the timing of the succession scenarios that occurred in Asia and Oceania after the Second World War, lead us to pay special attention to: the secession of Bangladesh from Pakistan in 1971, the merger of Vietnam in 1976 and Yemen in 1990, the independence achieved by several former Soviet republics in 1991,[11] and the independence of several island States in the Pacific – Samoa in 1962, Nauru in 1968, Fiji and Tonga in 1970, Papua New Guinea in 1975, the Solomon Islands and Tuvalu in 1978, Kiribati in 1979, the Marshall Islands and Micronesia in 1986, Palau in 1994 and East Timor in 2002.

To this should be added the particular case of the Non-Self-Governing Territories, such as: Guam, the Northern Mariana Islands, the Lesser Mariana Islands and American Samoa which are dependent on the United States; Christmas Island, the Ashmore and Cartier Islands, the Cocos Islands, the Coral Sea Islands and Norfolk Island which are dependent on Australia; the aforementioned Cook Islands and Niue, and Tokelau which are dependent on New Zealand; the Pitcairn Islands which are dependent on the United Kingdom; and New Caledonia, French Polynesia and Wallis and Fortuna which are dependent on France. This complex and varied picture is completed by a number of oceanic territories that are part of non-oceanic States, such as: Hawaii, which is part of the United States; Easter Island, which belongs to Chile; and Moluccas, North Moluccas, Papua and West Papua, over which Indonesia has sovereignty.

Against this background, in the author's view, the Pacific Community and the Pacific Islands Forum are the regional international organizations of most interest for the purposes of this Chapter.

4. State succession in the membership of regional international organizations in the Americas

America is a continent where, in general terms, the States that have emerged have maintained the borders that existed before their decolonization and where there have been no situations of secession.[12] There have been several exceptions and there may be some new cases.

In the first case are certain Caribbean territories which, on gaining independence from the United Kingdom, have created federations or States, and then disintegrated. In this section, reference should also be made to the historic case of the Central American Republic, which was short-lived and soon dismembered into the current Central American Republics, which occurred before the existence of international organizations in the region. To this should be added the case of Panama, which declared its independence from

[11] For an interesting study on power-sharing among various countries in Asia and Oceania after the break-up of the former USSR and their participation in various regional organisations and collaboration mechanisms, see: Schellhorn, K.M. (1992). Asia After the End of the Cold War. Southeast Asian Affairs, pp. 58-70.

[12] For a general presentation of the process of decolonisation of the American colonies during the independence process, see: Armas Pfirter, F. and González Napolitano, S. (2006). Secession and international law: Latin American practice. In Kohen, M.G. (ed.). Secession. International Law Perspectives, Cambridge University Press, pp. 374-415.

Colombia on 4 November 1903, a clear example of the secession of part of the territory of a pre-existing State.[13]

More recently, there have been changes in the legal status of certain Caribbean island entities within the administrative organization of the Netherlands. We are referring to Aruba, Curaçao, Sint Maarten, Bonaire, Sint Eustatius, and Saba. Indeed, until 10 October 2010, Curaçao, Sint Maarten, Bonaire, Sint Eustatius, and Saba formed the Netherlands Antilles, from which, in 1986, Aruba separated and became an autonomous territory within the Dutch State. Following the dissolution of the Netherlands Antilles, the islands of Bonaire, Sint Eustatius, and Saba have begun to enjoy the status of special integrated municipalities of the Netherlands and the Caribbean, while Curaçao and Sint Maarten have begun their journey as autonomous territories of the Kingdom of the Netherlands, as Aruba has been since 1986. However, it is our understanding that these changes in the legal status of these Dutch territories in the Caribbean have had no impact on the succession to membership of the Caribbean regional international organizations. Nor has the fact that French Guiana, Guadeloupe, or Martinique are overseas regions of France in the same maritime space had any influence on the problems addressed in this Chapter.

In the field of new situations, the most illustrative example is that of Quebec.[14] The two referendums held in this Canadian province (on 20 May 1980 and 30 October 1995), without the federal government objecting to their organization, came close to achieving Quebec's independence from Canada: in the first, the „No" vote was won by 59.56% of the votes, while in the second, 50.58% of the votes were in favor of remaining part of the Canadian State. These referendums raised several questions regarding: the compatibility with international law of a unilateral declaration of independence, the majority threshold – whether 50%+1 would suffice –, and the territorial integrity of the seceding entity. These questions were referred to the Supreme Court of Canada which, in its opinion of 20 August 1998, held that secession can only be achieved through negotiation and never through a unilateral declaration of independence. To which Canada's highest judicial body added that the terms of negotiation cannot be decided exclusively by the Quebec government. As a result, Canada's competent legislative authorities drafted, in 2000, the Clarity Act, which reflects these ideas.[15] Given that the possible secession would be with the consent of the predecessor State, such a situation would undoubtedly facilitate the accession of an independent Quebec State to American international organizations.

[13] Panama had emancipated itself from the Kingdom of Spain in 1821 to become part of Gran Colombia until its disintegration (1829-1831) when it was incorporated into Nueva Granada, which would later be called Colombia.

[14] For a comprehensive presentation of the Quebec issue and its relevance to the issue of state succession, see: Buchanan, A. (2003). The Quebec Secession Issue: Democracy, Minority Rights, and the Rule of Law. In Macedo, S. and Buchanan, A. (eds.). Secession and Self-determination, New York University Press, pp. 238-271; Dumberry, P. (2006). Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada. In Kohen, M.G. (ed.). Secession. International Law Perspectives, Cambridge University Press, pp. 416-452; Young, R.A. (1998), The Secession of Quebec and the Future of Canada. Revised and Expanded Edition, McGill-Queen's University Press.

[15] For a study on the Clarity Act, see: Turp, D. (2003). Québec's Right to Secessionist Self-determination: the Colliding Paths of Canada's Clarity Act and Québec's Fundamental Rights Act. In Dahlitz, J. (ed.). Secession and International Law. Conflict Avoidance – Regional Appraisals, Springer/Asser Press, pp. 167-206.

The case of Puerto Rico, which is currently a free-associated State of the United States, is also within the realm of possibilities. Although, in the author's view, a regional scenario with an independent Puerto Rico is, for the time being, quite distant.[16]

Regarding the problem of State succession in relation to membership of international organizations on the American continent, it can be concluded that, to date, no real cases of succession have been recorded and, therefore, no regional international organization in the Americas has had to pronounce itself, for the time being, on the problem of State succession in relation to membership of the American regional international organizations.

5. State succession in the membership of regional international organizations in Europe

The European continent has seen the birth of various international organizations. It should not be forgotten that the first international institutions – such as the Central Commission of the Rhine or the European Commission of the Danube – were created precisely in Europe.[17] From the perspective of the succession of States in the membership of regional international organizations, the Council of Europe (CoE) and the European Union (EU), respectively, are noteworthy.

As far as the *CoE* is concerned, the Statute of this international organization does not contain any reference to the succession of States to its membership. However, it does provide for the possibility for one of its member States to withdraw from the organization.[18] So far, the CoE has been confronted with two withdrawal situations on the occasion of the disappearance of two of its member States from the international scene. We are referring to the dissolution of Czechoslovakia, on the one hand, and the separation of Montenegro from the Former Republic of Yugoslavia (Serbia and Montenegro), on the other hand.

Firstly, regarding the disappearance of the former Czechoslovakia, it should be mentioned that both the Czech Republic and Slovakia were considered by the CoE as successor States and not as continuators of the predecessor State. Therefore, they had to apply for membership of this regional organization in accordance with Article 4 of the CoE Statute. The two successor States of the former Czechoslovakia have been considered as members of the CoE with legal effect as of 1 January 1993 following the meeting of the Ministers of the CoE member States in Strasbourg on 8 January 1993.[19]

Secondly, with regard to the separation of Montenegro from the Former Republic of Yugoslavia (Serbia and Montenegro) on 3 June 2006, the CoE considered Serbia to be a continuator State to the predecessor State – and it did not have to apply for admission in order to remain a member of this Organization –, while Montenegro was subject to the entire procedure for the admission of new States to the CoE, having been considered a successor State by the latter. Montenegro's membership in the CoE became effective on 11 May

[16] For a general overview, see: De Passalaqua, J.L.A. (2003). Secession in North America: the United States & Puerto Rico. In Dahlitz, J. (ed.). Secession and International Law. Conflict Avoidance – Regional Appraisals, Springer/Asser Press, pp. 207-226.

[17] See: Kotzur, M. (2008). Regional Co-operation and Organization: European States, Max Planck Encyclopedias of Public International Law, points 3 and 7-8; Daillier, P.; Forteau, M. and Pellet, A. (2009). Droit international public, 8e éd, L.G.D.J., pp. 638-644.

[18] According to Art. 7 of the CoE Statute.

[19] „Conclusions of the 484th Meeting of the Ministers' Deputies", Council of Europe, Strabourg, 8 January 1993; text available at: https://rm.coe.int/native/09000016804cf088 (last accessed on 5 May 2023)

2007,[20] following the favorable report of the Parliamentary Assembly of the CoE adopted on 12 March 2007.[21]

In short, the CoE has applied the same general rule as the UN in relation to the succession of States to membership by not recognizing an automatic succession to membership by the successor State. Thus, so far it has respected the distinction between a continuator State, on the one hand, and a successor State, on the other hand.

The *EU*, for its part, is facing real challenges and complex situations caused, among others, by the situation experienced in Kosovo[22] as well as by different sources of tension caused by the failed attempt to secede Catalonia from Spain, the situation in Scotland after the withdrawal of the United Kingdom from the EU, the eventual separation of Transylvania from Romania and the potential reunification of Romania and Moldova or that of Ireland with Northern Ireland – which is now part of the United Kingdom – or the possible disintegration of Belgium, etc.

All these cases are clearly distinguishable from the situation that arose in the 1990s within the then European Economic Community when the Eastern part of Germany was incorporated into the Federal Republic of Germany. It is interesting to note that Article 12(3) of the Treaty of unification of the two Germanys provided that in cases in which competences transferred by the Federal Republic of Germany to the EU institutions were affected, and as a consequence of the previous membership of the Federal Republic of Germany in international organizations to which it had not been a party, an agreement had to be reached between the then EU and the parties to these organizations.

It should be added that the situations experienced by the EU on the occasion of Algeria's independence from France, or the adoption of the new legal statuses of Greenland and Bartholomew Island have put the Union in a very different position from what it might face in the future if, for example, Scotland were to become independent from the United Kingdom, or if Catalonia were to separate from Spain, or if Transylvania were to dissociate itself from Romania. In the case of these separatist movements, it is striking that they intend to remain linked to the EU, but outside the territorial scope of the State through which they came to participate in this organization.[23] This has been described by part of the doctrine as a paradoxical situation.[24] These movements consider – and, in fact, this is what they convey to their supporters – that they would automatically remain part of the Union once the act of

[20] Data available in: Crawford, J. and Boyle, A. (2012). Annex A. Opinion: Referendum on the Independence of Scotland – International Law Aspects, pp. 95-98.

[21] In this regard, see: „Accession of the Republic of Montenegro to the Council of Europe. Report", Parliamentary Assembly, doc. 11204, 12 March 2007; available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11457&Lang=EN (last accessed on 5 May 2023)

[22] On EU-Kosovo relations in general, see: Mayer, A.M. and Stockhammer, C. (2004). Kosovo: An Example for a Successful European Foreign Policy?. In Mahncke, D.; Ambos, A. and Reynolds, C. (eds.). European Foreign Policy. From Rhetoric to Reality?, P.I.E.-Peter Lang, pp. 241-254.

[23] In this regard, see: Ridao Martì, J. and González Bondía, A. (2014/2015). La Unión Europea ante la eventual creación de nuevos Estados surgidos de la sececesión de Estados miembros. Revista de Derecho de la Unión Europea 27, pp. 363-390. For a general overview of possible implications of some secessionist trends in some EU Member States, see: Piris, J-C. (2017). Political and Legal Aspects of Recent Regional Secessionist Trends in some EU Member States. In Closa, C. (ed.). Secession from a Member State and Withdrawal from the European Union. Troubled Membership, Cambridge University Press, pp. 69-105.

[24] In this regard, see: Sobrino Heredia, J.M. (2019). Unité de l'État, sécession et construction européenne. Revue du Droit de l'Union Européenne, p. 107.

secession has been consummated, since it is a form of internal enlargement of the EU.[25] This has been described by part of the Spanish doctrine as absurd.[26]

To date, the EU has not yet experienced situations of secession of a part of the territory of one of its Member States. Hence, this international organization has not had to pronounce on whether a new independent State resulting from secession – unilateral or negotiated – would automatically acquire membership in the Union. Normally, a member State of an international organization that loses part of its territory is subject to the principle of continuity of membership in that organization, thus retaining its international personality and its international rights and obligations. For its part, the new State will have to decide whether it wants to join the international organization that it had to leave when it separated from the predecessor State. If its decision were positive, and it were a regional international organization such as the EU, for example, the problem of recognition of the entity in question as a sovereign and independent State by the EU's Member States would arise, and it would be very difficult for the EU's Member State affected by the separation of part of its territory to recognize the new legal entity as a State in the event of a non-agreed separation.[27]

All this leads us to consider that the processes of secession of States arising from a separation or secession of part of the territory of the Member State that might take place within the EU will be facilitated as long as this separation takes place in accordance with the constitutional framework of the Member State. This could happen in due course regarding Scotland as it would be based on the recognition of the predecessor State – the United Kingdom – itself. But even then, it would have to go through the prior recognition of all EU member States, since only one State can be a member of the Union, and all member States would first have to ratify the accession treaty. The situation would be more complex if secession is carried out in violation of the constitutional order of the Member State, since in such a case it would be difficult to comply with the requirements of Art. 49 of the Treaty on European Union. Therefore, in these cases it is not possible to speak of an automatic enlargement resulting from the continuity of the separated territory in the EU, but rather it will be necessary for this new entity to undergo the process of accession to the Union as sets out by the above-mentioned Art. 49.

In short, given this panorama, regarding the problem of the succession of States to the status of member State of an international organization, we can affirm that the EU, as is also the case with the CoE, does not recognize an automatic succession in its membership by the successor State.

6. Final considerations

The current lack of rules agreed by the States within the framework of the International Law Commission or by the international organizations themselves regarding the situations that may arise for international organizations in relation to the problem of the succession to membership of one of their member States means that there is no general theory in this

[25] Ibid., pp. 107-108.

[26] In this regard, Mangas Martín, A. (2013). La secesión de territorios en un Estado miembro: efectos en el Derecho de la Unión Europea. Revista de Derecho de la Unión Europea 25, p. 60.

[27] For a general discussion of the case of the separation of part of the territory of a Member State from an international organisation and its possible legal consequences, see: White, N.D. (2017). The law of international organisations, 3rd ed., Manchester University Press, pp. 54-60.

respect. The possible scenarios are very varied, also given the diversity of cases that can arise and the different solutions that can be found with respect to membership of an international organization: continued membership of the international organization, reinstatement of membership, admission of a new member (either as a newly independent State or by being considered the successor State of a predecessor State that may have disappeared or may still exist), replacement of membership, etc. In the absence of unanimously accepted general rules in this regard, this question is resolved through the specific practice of each organization and the political context in which the succession takes place. That is to say by resort to the „rules of the organization".

Practice shows us that the international organizations created in the Americas and the Caribbean have rarely been confronted, after the Second World War, with cases of succession of States in their membership status, since, in general, the States in this region have maintained the borders existing before their decolonization, and since then there have been no situations of secession or separation. In the case of Africa, it can be said that the construction of a regional integration bloc in this continent still seems to be a pending task. However, both the African Union and some regional organizations have been confronted with the succession of States: in the case of the African Union, since there is a simple majority, there is no barrier to this, while in regional organizations, on the other hand, either unanimity or consensus of the member States is required. Institutionalized cooperation in Asia takes the form of various associations of States, preferably economic ones, which seek to safeguard State interests.

With respect to Europe, it could be argued that since 1945 and up to the present day it has been the scene of interesting State succession scenarios, which, at the regional level, have not, however, posed major challenges for European international organizations. Perhaps of greatest interest now are the scenarios occasioned by Kosovo and Crimea, and the various secessionist reveries that have resurfaced in recent years in different parts of Europe, drawing the tension between automatic enlargement (continued membership of the seceding territory) and an accession procedure, which can be very rigorous and would start, *prima facie*, with prior recognition of the separate entity as a State and then unanimous acceptance by member States of such accession.

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FLEXIBLE WORK SCHEDULES IN THE EUROPEAN AND NATIONAL „SUCCESSION" OF REGULATIONS[1]

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Abstract

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council[2] Directive 2010/18/EU establishes a new right for workers with children up to a certain age and carers to request flexible working arrangements for care purposes.

While the flexibility of working relation is one of the main objectives of EU policies[3], EU law has begun to provide the right for workers to benefit from flexible arrangements regarding working time through gradual, fragmented attempts. The regulations have been strengthened following the impact of the COVID pandemic on the organization of working time.

Art. 3 letter (f) of Directive 2019/1158 defines flexible working arrangements as „the possibility for workers to adjust their working patterns, including through the use of remote working arrangements, flexible working schedules, or reduced working hours".

With this study, we aim to examine the right to request flexible working arrangements as regulated by the Directive, to mention other measures that already exist in European law and to establish a connection with them, as well as to analyze the evolution of national rules in order to identify how flexible working time arrangements can be applied.

Keywords: *flexible work, Directive (EU) 2019/1158*

1. The right to request „flexible working arrangements" according to Directive 2019/1158

The „work-life balance" concept was included for the first time in 2008 on the European Commission's agenda[4]. Within this framework, Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC was adopted and repealing Directive 96/34/EC[5], however, the Commission's proposal for a revision of Directive 92/85/EEC on the protection of maternity has not been adopted. In 2017, the Commission presented a set of legislative and non-legislative actions aimed to modernize the legal and policy framework

[1] This study was held at the International Conference of Law, European Studies and International Relations on the topic of *Patent universality of Succession Law. Lex successionis between legislative tradition and modern values,* a scientific event that took place between May 18th and May 19th, 2023 at the Faculty of Law of Titu Maiorescu University of Bucharest.

[2] Published in L188/79 of OJEU

[3] European Pillar of Social Rights, item 9 „Work-life balance".

[4] Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the Regions, *A better work-life balance: stronger support for reconciling professional, private and family life*, Brussels, 3.10.2008 COM(2008) 635 final, https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52008DC0635.

[5] Published in L 68/13 of OJEU.

of the European Union, to promote work-life balance for men and women with caring responsibilities and a fairer use of leave and flexible working arrangements[6]. The proposal for a Directive on work-life balance was formulated in the context of the launch of the Social Pillar. In this context, there has been a relatively rapid process, with the main points of the directive being politically agreed by the institutions in January 2019. The impact assessment of the proposal for a directive has shown that the lack of flexible means of work could lead some workers, particularly women, to give up jobs if care responsibilities occurred[7]. As such, the possibility of requiring flexible working arrangements was proposed for inclusion in the Directive. The Commission's summary on the impact assessment related to this proposal states that the employer is under no obligation to approve the worker's request and that he or she is entitled to return to his or her original working model at the end of the agreed period. On this ground, workers who have applied for or have accepted flexible working arrangements are protected against discrimination[8]. Employers are thus required to consider demanding flexible working arrangements, but are not required to accept a potential request. The recognition of an absolute right to „demand flexible work" has been waived, as serious restrictions would have been created for employers in determining how work is organized. The Directive provides some guidance on the factors that employers should take into account when deciding on a request and specifies that a balance of interests is necessary „as long as both the needs of the employer and those of the worker are taken into account". Recital 36 of the preamble to the Directive also indicates that the employer should be able to take into account, inter alia, „the duration of the flexible working arrangements requested and the employers' resources and operational capacity to offer such arrangements".

For the purposes of the Directive, the right to request flexible working arrangements is recognized to parents that have children aged 8 or over, as well as to carers. „Carer" means „a worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State"[9].

Art. 9 (4) of Directive 2019/1158 allows Member States to restrict the possibility of requesting flexible working arrangements for care purposes for workers who have worked

[6] Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the Regions, *An initiative to support work-life balance for working parents and carers,* Brussels, 26.4.2017 COM(2017) 252 final, https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52017DC0252

[7] Commission staff working document Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, Brussels, 26.4.2017 SWD(2017) 202 final, https://eur-lex.europa.eu/legal-content/ EN/TXT/PDF/?uri=CELEX:52017SC0202

[8] Art. 9 (3) and Article 11 of EU Directive 2019/1158.

[9] Art. 3 (1) letter d) of Directive 2019/1158. It should be noted that in the original proposal, the definition of „carer" was more restrictive in that it referred only to relatives, not to persons living in the same household as the worker.

The definitions contained in Article 3 have been criticized by several civil organizations, the main criticism being the limitation to the nuclear family model based on traditional ties, and do not recognize the diverse and complex relationships and responsibilities for care that may exist, such as caring for other family members, neighbors or friends. This would otherwise result in a restriction of the right of workers to request flexible working arrangements. See Michelle Weldon-Johns, *EU work-family policies revisited: Finally challenging caring roles?*, European Labor Law Journal, volume 12, 2020, pp. 304-306.

for an employer for a certain period of time, which may not exceed six months. In the case of successive fixed-term contracts within the meaning of Directive 1999/70/EC with the same employer, the sum of those contracts shall be taken into account for the calculation of the period requirement.

In relation to the regulation of EU Directive 2019/1158 on the right to benefit from flexible working arrangements, a few points should be made:

- The European rule refers to the possibility of requesting flexible arrangements only for workers that are caring for a child aged 8 or over, or those that meet the conditions of „carer", excluding other situations.

- The introduction of a period of up to six months of seniority with the employer to be able to request flexible forms of work could lead to the exclusion of workers working under a non-standard (atypical) form of employment[10].

- While it is provided that the employer has considered and analyzed and responds within a reasonable time to the request for a flexible arrangement, the Directive does not indicate a procedure to that effect. It was considered that issuing and communicating a written decision is a way for the employer to prove that he or she has analyzed the request and that the worker has been able to effectively exercise his or her rights[11]. In any case, Member States may provide for such a procedure and lay down the requirement to state reasons for refusal to approve a flexible arrangement.

- Workers must be informed of the employer's decision in writing when a request for a change of employment status has been made. As such, employers must respond within one month from receipt of a request for transition to another, more predictable and secure form of employment and the answer must consist of a „reasoned written response"[12]. Such a deadline has not been laid down as a minimum requirement in the Directive on work-life balance regarding the request for flexible working arrangements.

- The Directive does not cover the extent of the employer's obligation to justify his or her refusal of flexible working arrangements and it is not established whether the refusal may be subject to judicial review or not.

2. The right to request flexible working arrangements in light of other European regulations

a. The possibility for workers to request flexible working arrangements is not entirely new in the European regulation. To this end, rules were contained in the Council Directive

[10] Elisa Chieregato, *A Work-Life Balance for All? Assessing the Inclusiveness of EU Directive 2019/1158* (2020) vol. 36 International Journal of Comparative Labor Law and Industrial Relations pp. 59, 75.

[11] A´ lvaro Oliviera, Miguel De La Corte-Rodr´ıguez and Fabian Lu¨tz, *The New Directive on Work-life Balance: Towards a New Paradigm of Family Care and Equality?* (2020) 45 EL Rev pp. 295, 297.

[12] Article 12 of EU Directive 2019/1152 – Transition to another form of employment

"(1) Member States shall ensure that a worker with at least six months' service with the same employer, who has completed his or her probationary period, if any, may request a form of employment with more predictable and secure working conditions where available and receive a reasoned written reply. Member States may limit the frequency of requests triggering the obligation under this Article.

(2) Member States shall ensure that the employer provides the reasoned written reply referred to in paragraph 1 within one month of the request. With respect to natural persons acting as employers and micro, small, or medium enterprises, Member States may provide for that deadline to be extended to no more than three months and allow for an oral reply to a subsequent similar request submitted by the same worker if the justification for the reply as regards the situation of the worker remains unchanged".

2010/18/UE of 8 March 2010 implementing the *revised Framework Agreement on parental leave* concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/CE[13] and which was replaced by EU Directive 2019/1158. The Directive on parental leave provided for workers returning from leave to apply for changes in their schedule and/or working rhythm for a certain period (Clause 6.1). The employer was granted the right to examine the requests and to respond to them taking into account both his or her own needs and those of the workers. In interpreting that rule, the CJEU has stated that the directive cannot be invoked by a parent that wishes to change his or her working hours in a shift system, working in a fixed schedule rather than in a variable one[14]. In such circumstances, it should be noted that neither Directive 2010/18 nor the Framework Agreement on parental leave contained provisions that could impose on the Member States, in the context of a request for parental leave, to grant the applicant the right to work according to a fixed schedule if his or her usual working program is of the type of variable-time shift work. Under the Directive on parental leave, the Court also ruled that a reference for a preliminary ruling relating to a mother who had requested a change in her mode of work after her return from maternity, rather than parental leave, was inadmissible, since it could not „be regarded as a request to change the working hours or working pattern after „a return from parental leave" within the meaning of clause 6 (1) of the revised Framework Agreement [Directive on parental leave]".

Moreover, the new Directive does not explicitly refer to the provision of work in a fixed schedule as a form of flexible working arrangement, but it may nevertheless be a means of adjusting working patterns within the meaning of Article 3 (1) letter (f).

According to the Directive on work-life balance, the request for flexible working arrangements can be made at any time subject to a maximum age (determined nationally) of the child, which cannot be less than eight years.

b. The *part-time work Directive* requires employers to take into account the demands of workers to switch from full-time to part-time work and vice versa „as far as possible", so there is a certain degree of flexibility[15]. As far as the obligation to justify the refusal to comply with such a request is concerned, the CJEU did not pay much attention to the employer's obligations to justify his or her decisions for refusal. In its case-law, the Court held that the Directive does not preclude national legislation under which the employer may order the conversion of a part-time employment contract into a full-time employment contract without the consent of the worker concerned[16]. It was considered in the doctrine that the lack of a Court examination of the reason why the employer ordered the conversion of the form of employment indicates that certain assessment conditions (importance, urgency) are not required and even less that the interests of the worker are important[17].

[13] Published in L 68/13 of the Official Journal of the European Union.

[14] Case C-366/18, *José Manuel Ortiz Mesonero v UTE Luz Madrid Centro*, par. 47.

[15] Clause 5 of Council Directive 97/81/EC of 15 December 1997 on the Framework Agreement on part-time work concluded by UCIPE, CEIP and ETUC.

[16] C-221/13, *Teresa Mascellani v Ministero della Giustizia;* in this case, the applicant was an employee of the Ministero della Giustizia that challenged the employer's decision to convert her position from a part-time position to a full-time position. In the present case, the referring court decision raised the question whether the conversion of the part-time employment contract into a full-time employment contract without the consent of the applicant was contrary to the provisions of the Framework Agreement.

[17] Christina Hiessl, *Caring for Balance? Legal Approaches to Those Who Struggle to Juggle Work and Adult Care,*

c. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)[18] prohibits discrimination in access to employment, promotion and training, working conditions, including remuneration and professional social security systems. The directive does not specifically refer to flexible work schedules. However, in its case-law, the CJEU has held that where an employer treats an employee who is not himself disabled less favorably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favorable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination[19]. In this case, the applicant claimed she had been treated poorly following the employer's refusal to „grant her the same flexibility as regards the working hours … as that of her peers who [were] parents of children without disabilities."

In the context of equal treatment, it should also be mentioned that European law requires the employer to provide reasonable accommodation to persons with disabilities. Article 5 – Reasonable accommodation for disabled persons in *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*[20] provides that

"In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

In its preamble, the Directive provides that Member States are to provide for effective and practical measures in order to adapt the workplace to the disability, e. g. adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources. The obligation to offer flexible work schedules is not unlimited, but must particularly take into account the financial and other costs involved, the size and financial resources of the organization or undertaking and the possibility of obtaining public funds or any other aid.

It should be noted that the Directive does not allow Member States to restrict the right to benefit from reasonable accommodation for persons with disabilities of a minimum period of employment.

International Journal of Comparative Labor Law and Industrial Relations, vol. 36, 2020, pp. 107, 111.

[18] Published in L 204/23 of the Official Journal of the European Union.

[19] Case C-303/06, *S. Coleman v Attridge Law and Steve Law*; in this case, on the return of applicant Coleman from maternity leave, her former employer refused to reinstate her in the position she had previously held, in circumstances where the parents of children without disabilities would have been allowed to resume their old positions, also refusing to grant her the same flexibility of schedule and working conditions as those granted to her colleagues who are parents of children without disabilities and labeling the applicant as „lazy" when she requested free time to care for her child, although such an advantage had been granted to parents of children without disabilities.

[20] Published in L 303/16 of the Official Journal of the European Union.

In conclusion, while the right to request flexible working arrangements can be considered as a right to request some form of accommodation, the right is less extended than the right to reasonable accommodation provided for in the Employment Equality Directive, which equates to a right to receive accommodation, unless this would result in a „disproportionate burden" for the employer. However, a comparison of the two rights reveals a number of similarities, including the balancing of interests that is necessary in response to a request and the fact that both rights fail to bring about large-scale structural changes.

d. The preamble to the Directive on work-life balance refers to two provisions of the *Charter of Fundamental Rights of the European Union*: Article 23 on equality between women and men and Article 33 on balance between family and professional life[21]. With reference to Article 33, the novelty brought by the Directive on work-life balance consists in the inclusion of carers (not only of parents) and the emphasis on their possibility to continue working, rather than the exclusive granting of care leave.

The connection between the two European acts appears to be relevant from the perspective of the interpretations that the European court will make regarding the right to request flexible working arrangements[22] in the context of the interpretation of the new directive. It remains to be seen whether the Court's interpretation will claim that the right to request flexible working arrangements is an articulation of the rights provided for in the Charter. However, it should be recognized that the right to request flexible working arrangements involves a balance between the interests of the workers and those of the employer[23]. Therefore, the right to request flexible working arrangements must not be interpreted unilaterally in the interests of workers, but also in relation to those of employers.

3. The individualized work programs in the regulation of the Romanian Labor Code

For the transposition into national law of the provisions of Directive (EU) 2019/1158 on work-life balance for parents and carers and Directive (EU) 2019/1152 of the European

[21] Article 33 – Family and professional life of the Charter of Fundamental Rights of the European Union provides: „(1) The family shall enjoy legal, economic and social protection. (2) To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child".

[22] In the C– Case C-129/20 *Caisse pour l'avenir des enfants (Emploi a` la naissance),* the Court referred to Articles 23 and 33 of the Charter of Fundamental Rights of the European Union, as regards Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, the CEEP and the ETUC aim both to promote equality between men and women in terms of labor market opportunities and treatment at work in the entire Union and to enable a better reconciliation between work, private and family life for working parents.

[23] In its case-law, in cases where rules that could affect the interests of employers were called into question, the Court also invoked the provisions of Article 16 of the Charter – Freedom to conduct a business. Thus, in case C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding împotriva G4S Secure Solutions N*, which referred to the prohibition imposed on workers to wear religious, political or philosophical symbols, the Court held that an employer's desire to design an image of neutrality toward customers refers to the freedom to conduct a business which is recognized in Article 16 of the Charter. Point. 38 of the Judgment – „an employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognized in Article 16 of the Charter and is, in principle, legitimate, in particular where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers".

Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union[24], the Labor Code has undergone numerous amendments approved by Law no. 283/2022 amending and supplementing Law no. 53/2003 – Labor Code, as well as Government Emergency Ordinance no. 57/2019 regarding the Administrative Code[25].

In order to create a picture on flexible working time arrangements, we mention the relevant legal norms of the Labor Code:

Art. 111... „(2) The working time is the model of the organization of the activity, which determines the hours and days when the work begins and ends.

(3) The model for work organization is the form of organization of working time and its distribution according to a certain model established by the employer".

Art. 118. „(1) The employer can establish individualized work programs for all employees, including those who benefit from carer's leave with the consent or at the request of the employee, which may have a limited duration.

(2) The individualized work schedules shall involve a flexible organization of the working time.

(3) The daily length of the working time shall be divided into two periods: a fixed period where the entire personnel are simultaneously present at the workplace and a variable, mobile period where the employee chooses the time of arrival and departure, in compliance with the daily working time.

(4) The individualized work schedule may only operate in compliance with the provisions of Articles 112 and 114.

(5) Any refusal of the request provided for in para. (1) must be motivated by the employer in writing within 5 working days of receiving the request.

(6) If the individualized work program has a limited duration, the employee has the right to return to his or her original work program at the end of the agreed period. In case of change of circumstances that led to the establishment of the individualized program, the employee has the right to return to his or her original work program before the end of the agreed period.

(7) „Flexible way of organizing working time" is defined as representing the possibility for employees to adapt their work schedule, including through the use of remote work formulas, flexible work schedules, individualized work schedules or part-time work schedules".

At first reading of the legal texts, one can understand that the legislator intends to make working relations more flexible and allow for flexible working time arrangements. However, the method of completing the previously existing Article 118 and introducing new regulations (art. 152 ind. 1) denotes ambiguity on the legislator's part and causes confusion in regards to implementation. Further on, let us highlight some such regulations while suggesting methods of interpretation in order to render them effective.

First, the individualized work schedule is provided (paragraph 1) and defined as „the flexible organization of working time" in which the individualized work schedule is one of the means.

[24] Published in L 186/105 of the Official Journal of the European Union.

[25] Published in the Official Gazette of Romania, part I, no. 1013 of 19 October 2022.

Secondly, all employees including those who benefit from carers' leave can benefit from individualized work schedule by amending paragraph (1) of Article 118. Thus, the right to benefit from individualized programs is recognized to all employees without imposing any conditions of seniority.

For the transposition of the same Directive, Article 153 ind. 1 paragraph (2) in conjunction with Article 152 ind. 1 of the Code regulates carers' leave as 'leave from work for workers in order to provide personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason'. If the employee requests such leave in writing, the employer is obliged to grant it having a duration of 5 working days in a calendar year[26]. The provision „including those who benefit from carers' leave" thus proves to be nonsense as these employees do not perform the work during the leave. In conjunction with paragraph (1) and paragraph (8) of Article 118, we consider that flexible work programs including individualized schedules may be available to employees who would be entitled to request carers' leave, but who would opt for a flexible schedule rather than for days off.

Third, the recognition of the right to benefit from flexible work programs is not conditioned by proof for any reason. The Code makes no reference to the reasons for which employees would like to change/individualize their working schedule and thus this is not a factor that is relevant to the employer's decision to accept the application or not. In the absence of express rules, it is considered that the application must be made in writing and that the national regulation or collective labor agreement, where appropriate, provide for a deadline for forms and an obligation to provide precise information on the change.

Under the Directive on work-life balance, employers are not required to approve the application, but are required to give reasons in writing within 5 working days from receipt of the application. Among the justified reasons for refusal, we consider that operational management, occupational safety, legitimate commercial considerations and proof of difficulties in organizing work equating to a „disproportionate burden" could be raised as serious problems.

We also note that the Directive takes on different approaches to regulating the refusal to grant permission for flexible working conditions compared to parental leave.

[26] Art. 152 ind. 1 paragraph (2) provides that „by special laws or the collective labor agreement, a longer period of care leave may be established for carers other than the one provided for in paragraph (1)" (5 working days).

TIME NEITHER OFFERS NOR DEMANDS RENT. DEATH OF A PARTY TO THE LEASE AGREEMENT

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Abstract

In periods characterized by economic recession, of rising inflation, which culminate in the set of events included in the notion of economic or financial crisis, in which the value of the assets decreases, the transmission of the use of the goods can represent, on the one hand, a means of valuing the patrimonial rights held whose market value does not satisfy the owner's economic interests in the event of a transfer and on the other hand, the means of obtaining the satisfaction of the necessity to use some goods without incurring the costs of acquiring real rights. In this context of increasing costs of production or construction of some goods, the need for stability in the exercise of the right of use by the heirs of the lessee or by other persons designated ex lege becomes a social value that involves increased legislative attention. The present study observes past and present legislative solutions, noting some social relations that may in the future fall within the scope of some interests of legislative regulation.

Keywords: *lease, death, tenant, lessor, lessee, unilateral termination, lease.*

1. Is time the enemy of the lease? The binding legal relationship is influenced by the effects of time.

The lease contract is inextricably linked to time, being essentially a contract with successive execution. Without positioning ourselves in a drift towards the plane of metaphysics, we cannot but objectively observe the corrosive action of time on legal ties. In the narrow plan of obligation relations, time modifies, weakens or even ends the legal ties between the creditor and the debtor. In order to immediately observe the action of time in substantive law, we do not have to go further than the institution of limitation periods which, acting on the secondary right to obtain the judgment of the debtor or the execution of the obligation by him, degenerates perfect obligations into natural obligations [Article 2.500 (1) of the Civil Code]. Continuing the observational process, in the stability of bilateral binding legal relationships generated by the principle of the binding force of the contract, time brings the storm of unpredictability that will come to deform or extinguish the binding legal relationship [Article 1.271 of the Civil Code]. Evidence of this phenomenon is the legislative and jurisprudential boom which occurred after 2016. By its force, time does not limit its scope of action solely to the content of the binding legal relations, but also, constantly and irreversibly, to the parties. Forty-nine years [Article 1.783 of the Civil Code – the maximum duration of a lease], is presented as an ideal duration in order for the legal relation generated by the lease agreement to present changes, either due to the transformations brought onto the object of performance of the parties [*e.g.,* the occurrence of a partial impossibility of using the asset which would attract a proportional reduction in the rent] either due to the changes brought to the sphere of the latter-mentioned. When time creates the legal problem of the death of a party, the law is called before its remaining subjects to convincingly implement its solution. In order to answer the non-rhetorical

question in the name of this section, it is necessary to look at the tradition of legislative solutions adopted so far regarding the death of the parties to the lease contract, in order to finally determine whether other future regulatory directions could be identified from the range of solutions found in civil law.

2. A succession of laws but also a constant solution? Traceability of solutions in the matter of the death of the parties to the lease contract

1.1. *The old Civil Code, Law 114/1996 and traditional solutions.*

The configuration of the leasing contract of goods in the old Civil Code reveals: (i) a common law legal regime [Article 1.410 – Article 1.445 of the Civil Code of 1864] (ii) a special legal regime related to renting (lease of buildings and movable property) [Article 1.446 – 1453 of the Civil Code of 1864], as well as (iii) a special legal regime for agricultural leasing (lease of rural funds) [Article 1.454 – 1469 of the Civil Code of 1864]. A special legal regime was later added to these legal regimes in the matter of housing leasing through Chapter III of Law 114/1996 – Housing law (Article 21 – 33 of Law 114/1996) [1].

In the mosaic of legal regimes of a single lease contract, the provisions of Article 1.440 of the Civil Code of 1864 seemed to bring a singular solution in the event of the death of the lessee or the lessor: the lease contract is not terminated by the death of the lessee, nor by that of the lessor, i.e. death does not affect the continuity of the contract (its future effectiveness) [2]. Two natural legal consequences can be deduced from the previously discussed provisions: (i) the characterization of the lease contract as not being, in principle, a contract burdened by an *intuitutu personae* character, as well as (ii) the application of the rules for the successional transmission of patrimonial rights in order to identify the scope of the persons who are to take over the contractual position of the deceased [4]. Despite an apparent lack of tolerance of the provisions of Article 1440 of the Civil Code of 1864 regarding exceptions to the rule, indirectly, as a result of death and directly as a result of the *mortis causa* transmission of the rights and obligations resulting from the rental contract, the termination of the contract by confusion was recognized when „the lessor becomes the heir of the lessee, or *vice versa*" [3].

Law 114/1996 – the housing law generated from the moment of its entry into force a new legal regime with applicability in the matter of renting housing in the event of the death of the lessee (not the lessor). As a rule, the continuation [5] of the rental contract was maintained, however, establishing the scope of continuing persons and the conditions that must be met. Thus, the scope of entitled persons was configured by: (a) the lessee's husband or wife, if they lived together with the holder; (b) descendants (children, grandchildren, etc.) or ascendants (parents, grandparents, etc.) if they lived with the owner; (c) for the benefit of other persons who have had the same domicile as the holder for at least one year and who were entered in the rental contract [Article 27 (1) of Law 114/1996]. In the absence of persons meeting the conditions to apply for the home, the rental contract was to terminate within 30 days from the date of registration of the death.

1.2. *With the same mast towards a new horizon. The solutions of the new Civil Code.*

De lege lata, the lease contract benefits from: (i) a general legal regime [Article 1.777 – 1.823 of the Civil Code], (ii) a particular legal regime applicable to housing rentals [Article 1824 – 1835], (iii) a particular legal regime applicable in the matter of agricultural leasing

[Article 1.836 of the Civil Code] as well as by a particular legal regime applicable to the rental of premises intended for the activity of a professional configured by the applicability of the general rules, *i.e.,* of the common law in the matter of the rental contract as well as by the legal transplantation of some special rules in the matter of housing rental [Article 1.824 of the Civil Code, – the lease made for an indefinite period; Article 1828 of the Civil Code, – the tenant's right of preference in the lease, Article 1829 of the Civil Code, – use of common parts and facilities of the building, 1830 of the Civil Code, – termination of the contract, Article 1831 of the Civil Code, – evicting the tenant].

1.2.1. *The general rule and lease contracts concluded for an indefinite period*

Within the general lease regime, capitalizing on the compatibility of the principle of relativity of contract effects with the transmission of contractual rights and obligations in the event of the death of a party, when the law, the stipulation of the parties or the nature of the contract does not require the opposite solution [Article 1.282 of the Civil Code], the new regulation generally kept the traditional solution: the lease does not end with the death of the lessor or the lessee [6] – [Article 1.820 (1) of the Civil Code] apparently limiting its scope of applicability to lease contracts concluded for an indefinite period. From two distinct perspectives of the practice of law, we can affirm with some precision the fact that the conclusion of a lease contract without indicating the duration is not part of the substratum of the current domestic legal subconscious. Most of the time, the parties aim to precisely regulate their legal relationship generated by the lease contract, the duration of the contract being often essential even from the stage of pre-contractual negotiations [Article 1.185 of the Civil Code]. However, the scope of applicability of general rules should not be underestimated. Even the parties who regulated, within the limits of the law, in the smallest detail the effects of the lease contract; they can be found in the hypothesis of a lease contract concluded for an indefinite period when tacit relocation intervenes [Article 1.810 (2) of the Civil Code].

1.2.2. *The general rule and fixed-term lease contracts*

The transmission of rights and obligations to the entitled successors of the parties to the lease contract remains a principled solution (the rule in the matter) also in the case when the lessor or the lessee of a fixed-term contract dies. However, when the tenant's death occurs, the provisions of Article 1.820 (2) acknowledge to the *successors* thereof the potestative right to unilaterally terminate the contract within 60 days from the date on which they became aware cumulatively of: (i) the death of the lessee and (ii) the existence of the lease. In addition, the legal doctrine states that the term does not run until all the successors have ascertained the lessee's death and the existence of the lease [7]. The legal nature of the term is that of a term of forfeiture from the right to unilaterally terminate the contract, a typical sanction for potestative rights. The unilateral denunciation mechanism recognized by the heirs does not derogate from the requirement to comply with a reasonable notice period [Article 1.276 (2) of the Civil Code] [8].

1.2.3. *General rule and subleases*

Although the provisions of Article 1.820 of the Civil Code make no reference to the sublease, they also find appropriate applicability when the lessee concludes, in turn, as the lessor this time, a lease contract by which he transfers the use of the asset to another person.

The death of the lessor in the primary contract will have no effect on the effectiveness of the sublease which will continue in the manner configured by the parties. However, the death of the tenant-lessor must be analyzed from the perspective of its double quality. In the event that the primary lease contract is concluded for a fixed period and the lessee-lessor dies, and it will terminate as a result of the exercise of the potestative right of the successors, the sublease contract will terminate as a result of the termination of the lessor's title, under the conditions of Article 1.819 of the Civil Code. If the sub-lessee was in good faith at the conclusion of the sublease, it may survive the original lease until the expiration of the contractual period without exceeding one year from the exercise of the potestative right of the heirs of the original lessee.

1.2.4. *The general rule and house rental contracts*

The death of the lessor does not trigger, even in the case of housing rental contracts, the termination of the lease, the provisions of Article 1.834 of the Civil Code regulating only the hypothesis of the death of the lessee as a reason that can have the effect of terminating the contract.

Despite the appearance that could be created by the provisions of Article 1.834 (1) which seem to implement as a rule the termination of the contract in the event of the death of the tenant of a home and the continuation of the contract to represent the exception [Article 1.834 (2) of the Civil Code], we believe that the rule remains unchanged because the termination of the contract remains the subsidiary solution, applicable only in the case where the conditions provided by law for the continuation of the lease are not met or the entitled persons do not opt for the continuation of the lease contract. In addition, in order to support this statement, two additional arguments can be made: (i) the continuation of the contract assuming the fulfillment of the legal conditions does not depend on the lessor's consent but will result from the exercise of a potestative right by the entitled persons, (ii) although the provisions of Article 1.834 (2)-(3) have their own mechanism by which the entitled persons must exercise their option to continue the lease, they also refer to the provisions of Article 323 (3) of the Civil Code, which concern the right of the surviving spouse to *de jure* continue the exercise of his residential right, this time establishing an abdication mechanism to prevent the continuation of the contractual relationship.

Home rental contracts are contracts that involve a special legal regime, the new provisions of Article 1.834 (2)-(3) including the solution to the continuation of the rental contract under certain conditions concretely determining the scope of the persons who can take the place of the tenant: (i) the descendants and (ii) the ascendants of the tenant, if they opt for this, if the following two cumulative conditions can also be verified in their person: (a) to have been previously mentioned in the rental contract and (b) to have lived together with the tenant prior to his death.

1.2.5. *The general rule and agricultural leases*

The same general rule that allows the continuation of the contractual relationship is applicable in the event of the lessee's death within the agricultural lease agreement, in the absence of a legal text derogating from it.

In the case of agricultural lease contracts, when the lessee dies, the solution adopted at the legislative level is diametrically opposed and absolute in content. The lease contract

terminates in the event of the lessee's death, being considered to have an *intuitu personae* character with regard to him.

3. Continuation of the lease following the death of a party. Positive poles, negative poles and magnetic (attractive) solutions.

We appreciate that the provisions of Article 1.820 of the Civil Code are dispositive [9] the parties being able to imbue the right of claim that allows the use of the asset a non-transferable character and by way of consequence *intuitu personae*, which will lead to the termination of the contract in the event of the lessee's death. The parties may also establish that the lease terminates in the event of the death of the lessor, based on the principle of contractual freedom [10], even if it occurs before the expiration of the term.

On the opposite pole, the provisions of Article 1.834 are mandatory norms, from which the parties cannot derogate, based on a contrary convention [Article 11 of the Civil Code]. Thus, the following are prohibited: (i) clauses by which the term of exercise of the discretionary right to continue renting the house would be modified (even if it were increased), the legal provisions protecting not only the legitimate rights and interests of the deceased lessee's successors but also of the lessor who aims to stabilize the legal relationship and eliminate the uncertainty created by the potestative nature; (ii) the clauses by which the parties would configure through the contract another sphere of persons who will be allowed to continue the lease contract. E.g.: it would stipulate that this right does not belong to all the people who live *de facto* with him at the time of his death even if they are not mentioned in the contract.

We also appreciate that, through a will, the right of use resulting from the rental contract of the house cannot be transferred to other people or only to certain people among those who would be entitled.

3.1. ***Death of the lessor and settlement of the continuation of the lease.***

The legislative solution of the continuation of the lease in case of the death of the lessor seems to be able to be classified in the category of those inspired by equity, ensuring the protection of the mediated cause considered by the parties when concluding the contract. The contract concluded between the lessor and the lessee continues to produce the same effects between their successors in rights. Thus, in consideration of the onerous nature of the contract, but also in consideration of other factors that led the original parties to conclude the contract, the possibility of the lessee to continue to exercise his right of claim in the event of the lessor's death is ensured first and foremost [11]. Even if the interests of the heirs of the original parties may be contrary to their author (in the sense that they would not have concluded the contract or would not have concluded it under the same legal or economic conditions), by continuing the lease, not only the lessee's rights are protected, but also the possibility of the lessee's heirs to benefit from the civil fruits of the inherited goods is ensured.

3.1.1. *Rent payment following the death of the lessor*

Despite the naturalness that characterizes the solution of the transfer of rights and obligations derived from leases, the practical difficulties of continuing the legal relationship in the event of the lessor's death cannot be ignored. The most obvious difficulty is that of paying the rent, the main and essential obligation of the tenant that can attract the sanction of

contract termination [12] as well as other sanctions provided by law or by the parties (e.g.: interest-moratorium damages, activation of a penal clause, extinguishment of a conventional right of preemption which is conditional on the compliant execution of the lessee's obligations, etc.). The debtor can seek by payment to avoid the effects of an indexation clause according to the rate of inflation which can considerably increase the amount of the rent. Not knowing the lessor's heirs and not completing the succession procedure can be real impediments to making a liberating payment by the lessee. If the payment made by the lessee to a successor [13], at his request, before the completion of the succession procedure can be considered in certain situations as a payment made to an apparent creditor [Article 1.478 of the Civil Code], without incurring the risk of a repetition of the payment, the lack of knowledge of the heirs really raises the issue of the impossibility of making the payment. Could the provisions of Article 1.510 – 1.515 of the Civil Code governing the delay of the creditor and the provisions of Article 1.006 – 1.1012 of the Civil Procedure Code governing the procedure of payment offer and registration be applied? At first glance, we notice that the hypothesis of Article 1.510 of the Civil Code and Article 1.006 of the Civil Procedure Code is that of a creditor who unjustifiably refuses a payment (or the fulfillment of some acts preceding it without which the debtor cannot make the payment) In the case of not knowing the creditor, the thesis of a refusal can hardly be accepted, even implicitly. Moreover, the conditions of the civil action that must be met even for the initiation of the procedure of offer to pay followed by registration do not allow it to be initiated against a deceased person. It could be triggered prior to the completion of the succession debate only in opposition to a seizinary heir. In addition, if it were initiated against a known person who falls within the scope of the successors without having the capacity of seizinary heir, i.e., has a general vocation to inherit the deceased lessor without benefiting from seizin the issue of a refusal thereof during the procedure which could be justified could arise. *E.g.:* (i) if the sued successor shows that he intends to renounce the inheritance within the legal term, or even renounced it, including during the course of the procedure [14] (ii) if the successor shows that he is part of a class of heirs which could be disinherited by another class of heirs, knowing that they exist but not knowing their identity data, etc.

Although difficult, a *de lege lata* solution can be the opening of the lessor's succession procedure by the lessee himself or in front of the notary [Article 103 of Law 36/1995] or before the court. If the succession is opened on the basis of a notary public; it is possible to request the appointment of a special curator of the estate (in the terminology of the Civil Code) curator of the succession (in the terminology of the Civil Procedure Code) who can receive the payment and against whom the actions regarding the succession can be brought, including a possible offer of payment followed by a deposit[15].

Another interpretation that would start from the provisions of Article 2.533 (2) of the Civil Code, which provide that the limitation period does not run against the heirs of the deceased as long as they have not accepted the inheritance or a curator of the estate has not been appointed, can be the one in which the obligation to pay the rent is postponed after the death of the lessor until the acceptance of the inheritance by the heirs. In this case, the lessee would be protected from legal sanctions until the date of acceptance of the inheritance. However, the acceptance of the succession may remain a legal fact (*lato sensu*) unknown to him and the elapse of the limitation period against the heirs following the acceptance of the succession by them is not conditioned in any way by the knowledge of the acceptance by the creditors.

In our opinion, the lessor's death should not make the lessee's situation worse. *De lege fernenda* we propose to identify and regulate an easy way to release debtors from a deceased creditor by reconfiguring the procedure of the payment offer followed by the deposit given in the jurisdiction of the bailiff, which is not based on an unjustified refusal of the creditor but on the need to to free himself from the debtor's obligational ties. This can be carried out adversarially with the heirs of the deceased creditor (generally and abstractly) represented by a special curator for that procedure appointed by the court of the last domicile of the creditor under the conditions of Article 58 of the Civil Procedure Code [solution inspired by the provisions of Article 687-689 of the Civil Procedure Code]. After the discharge of the debtor, the bailiff should proceed to register the claim in the National Notarial Register of Evidence of Creditors, Individuals and of Oppositions to the Execution of Succession Distribution (RNNEC) under the remarks column [16].

3.1.2. *Death of the lessor. Reason for discouragement for the lessee*

A practical problem in the case of the lessor's death can be represented by the need to carry out capital repairs that are the responsibility of the lessor [Article 1.788 (3) – (4) of the Civil Code]. Not knowing the heirs, the lessee cannot fulfill his obligation to inform if he decides to carry out the repairs himself. He may also be reluctant to perform them even if they need to be performed urgently, not knowing if there is enough patrimonial asset to recover the expenses thus incurred. In our opinion, if the lessor is not also the owner of the asset, the lessee could also proceed against the owner either on the basis of business management or, alternatively, on the basis of unjust enrichment.

3.1.3. *Death of Lessor and Eviction*

The lessor's death may make it impossible for the lessee to bring the heirs into proceedings if a third party claims a right to the leased property. In the context where the lessee does not know the lessor's heirs [17], he cannot fulfill his obligation to bring them into the case in the event of an action that would lead to the recognition in favor of a third party of rights over the leased property.

3.1.4. *Death of the lessor and exceptions to the rule of continuation of the lease*

The death of the lessor may, however, constitute a case of early termination of the lease contract when he was not the owner of the property right over the leased immovable property but the owner of a right of usufruct. In this situation, the opposition of the lease contract against the owner will have a maximum duration of 3 years from the termination of the usufruct [Article 715 (2) of the Civil Code], and if before the lifetime usufruct is extinguished by the death of the lessor– usufructuary, he renewed the lease without its execution having begun, the opposition of the lease vis-à-vis the owner or his heirs is limited to 6 months or, as the case may be, one year [Article 715 (3) of the Civil Code].

Also, if the lessor owner dies and is inherited by the lessee, the lease can be extinguished by confusion of rights [Article 1.624 (1) of the Civil Code]. However, we appreciate that the termination of the contract does not occur by confusion when the lessee is not the sole heir of the lessor. In this case, the proportional reduction of the rent with the share acquired from the inheritance asset represents the fair solution until the inheritance division is carried out. If the property is assigned to the lessee in the successional division procedure, then the lease will cease due to confusion of rights. However, if the asset is

assigned to another heir, he will be required to respect the lease, and there may be a possible compensation between the interest owed by the other heirs to the lessee and the rent owed to them.

In the context where the death of the lessor extinguishes the right that allowed him to transfer the use to the lessee, then the lease will terminate under the conditions of Article 1.819 of the Civil Code, by termination the lessee's title.

3.2. ***Vexatae quaestiones – the death of the lessee and the general solution of continuation of the lease.***

The solution found within the general legal regime of the lease of continuation of the contractual legal relationship with the successors in rights of the lessee can often prove to be fair and in accordance with the interests of his heirs as well as the lessor. In order to bring more balance between the right of the lessor to obtain the payment of the rent and the legitimate interests of the heirs of the lessee who may not find an advantage in the continuation of the lease, the latter's optional right to terminate the contract was established. Often, however, in the practical sphere, simple and general assumptions can prove difficult to apply.

3.2.1. *The continuation of the Lease. The Scope of the Successors.*

First of all, the issue arises of the persons who become (co)holders of the right of claim arising from the lease contract as well as of the right to terminate it and the moment from which they can exercise their rights and obligations transmitted by their author. Can they have the status of simple successors of the lessee or must they have the status of heir established by an heir certificate, as an heir or by a court decision? In this matter, neither the doctrinal opinions that mention the need for all heirs to be aware of the lessee's death and the existence of the lease in order to exercise the right of unilateral termination provide additional clarification and certainty to the lessor or his successors, regarding the continuity of the legal relationship generated by the lease contract.

If the hypothesis of some heirs whose quality has been recognized by a certificate of the quality of heir, heir or by a court decision is the one that would correspond to the literal notion of heir, we appreciate that this would make the mechanism of continuing the lease contract totally ineffective, and, in addition, it would make at least bizarre the need to wait for the finalization of the succession procedure in order to benefit from the right to terminate the contract that will fully produce its effects throughout this period (death-debate succession). Thus, after the death of the lessor, if the heirs have to wait for the succession debate to benefit from the right of use generated by the lease contract, it would mean that the use cannot be exercised during the entire period of the succession debate procedure until its completion. Under these conditions, the successor acceptors would not even be able to exercise the right of unilateral termination of the contract.

Against these considerations and considering the principles of succession law that do not accept the idea of an estate without an owner, we consider that the succession debate is not necessary for the continuation of the lease by the heirs of the deceased lessee [18]. The hypothesis seems to be easy to accept in the case of rightful heirs who have the right to administer the estate of the deceased and to exercise his rights and actions [Article 1.125 of the Civil Code] even more difficult when we consider the existence of non-seizinary heirs [Article 1.127 of the Civil Code] who acquire seizin through the issuance of the heir

certificate. However, we must note that the provisions of Article 1820 (1) do not distinguish the continuation of the lease from the existence of a certain category of heirs.

In the hypothesis in which the use of the property is exercised without right by a successor who later proves not to have the capacity of heir, he will respond on extra-contractual grounds to those who have been recognized with this capacity through the procedure of the succession debate.

3.2.2. *Continuation of the lease. A difficult choice?*

As a preliminary, we must note that, in relation to the provisions of Article 1.834 (2) of the Civil Code, where the continuation of the rental by several people is plausible in relation to the legal nature of the asset that allows its joint use by several people, and considering the fact that they previously lived together (also with the deceased tenant), the assumption of the provisions of Article 1.820 (2)-(3) of the Civil Code, involves the joint exercise of the use of an asset by several people who previously did not exercise it in this way. The lack of an agreement regarding the exercise of the right of use can become a destabilizing factor in the relations between the heirs. Likewise, the situation in which the right of use concerns an asset that by its nature cannot be used simultaneously by several people, but possibly only successively, should not be overlooked. E.g.: renting a car, an agricultural machine, a high-performance computer, etc.

In our opinion, without making value judgments on the theory of ownership of claims, the acquired right is unique and in case of a misunderstanding between the heirs, the provisions of Article 639 of the Civil Code can be applied by analogy, from the matter of co-ownership, which provide that the way of using the common good is determined by the agreement of the co-owners, and in case of disagreement, by a court decision.

Secondly, there is the issue of different rights exercised differently, as well as the correct way in which these rights should be exercised in the context of the lease contract. Concretely, the question will arise whether the right to unilaterally terminate the lease contract is an individual one that must be exercised jointly by the heirs, or can each exercise this right separately?

We appreciate that, in the current configuration, the right of unilateral denunciation of the heirs that arises from the date of knowledge of the death and the location is also an individual one, and it is not possible to exercise, *distinctly* or *differentiatedly*, the right of unilateral denunciation. The provisions of Article 1.820 (2) of the Civil Code, use the plural of the noun *heir*, attributing this right to the heirs and not to a specific heir. Thus, legal solutions must be identified in the event that the lessee's heirs do not reach an agreement regarding the continuation or termination of the lease contract. In support of this thesis, the difference between the mechanism of transmission of contractual rights and obligations to the heirs, which involves a derivative acquisition of the right to use an asset from their author, and the right of continuation recognized to certain persons, which has the legal nature of an own right, must be noted.

De lege lata, we are of the opinion that in the absence of an agreement of the heirs regarding the unilateral termination of the contract, the declaration of termination of the contract made by one of them (even by the heirs who hold the majority of the shares) has no effect.

The most important theoretical and practical implication of the configuration of the sphere of persons who acquire the right of use of an asset through successional transmission,

as well as the manner of exercising it together with the potestative right of unilateral termination concerns the issue of the liability of the lessee's heirs for the contractual obligations due both before the death of the lessee and after the transfer of the use of the leased property by succession. Thus, in the case of the continuation of the lease by the lessee's heirs, are they responsible for the execution of the contractual obligations with the acquired inheritance asset or with their own patrimonial assets? The answer is of high practical importance from the perspective of the rules for satisfying the rent by the lessor creditor.

As far as we are concerned, we are of the opinion that all obligations due prior to the lessee's death will be satisfied only from the goods that are part of the inheritance, in proportion to the share of each heir [Article 1.114 (2) of the Civil Code]. An issue can be raised regarding the rent payable after the inheritance. Three views can be configured:

In a first opinion, considering that the right of use generated by the rental contract is part of the estate, the provisions of Article 1.114 (2) of the Civil Code will be applicable, the rent being an obligation which continues to arise in the estate of the heirs. This theory would protect the lessee's heirs from the assumption that the lessor would not terminate the lease after the lessee's death and his heirs would not know of the existence of the lease. The obligation to pay rent survives the death of the tenant and can be enforced against them [Article 1.159 of the Civil Code]. However, it could generate economic inconvenience to the lessor who, in the event that the estate asset would not include sufficient elements to cover the rent, the heirs could not be pursued personally under the lease.

In a second opinion, from the moment of death the heirs will be personally responsible for the obligation to pay the rent since the use is exercised personally by them who take over the place of the lessee in the rental contract from the date of death. In this context, the rules of Article 2.324 (1) of the Civil Code will be applicable, which provide that the person who is personally liable is liable with all his movable and immovable assets, present and future. They serve as a joint guarantee of his creditors. This opinion has the merit of allowing the lessor to satisfy the rent from the estate to the heirs who used the property without bearing the eventual insolvency of the estate. The negative consequence of such an interpretation consists in affecting the personal patrimony of some heirs who do not know and do not exercise or do not wish to exercise the rights resulting from the lease concluded by their author as lessee.

In a third, mixed opinion, the liability of the heirs could be limited to the estate asset until the moment they became aware of the death of their leased and leased car and the 60-day term of termination of the contract and personal is fulfilled after that moment. And this theory retains the inconvenience of having to bear the cost of rent by heirs who do not wish to continue the lease.

We can conclude by observing all the practical difficulties presented, which start from the existence of conflicting interests of the tenant's heirs, the lessor's interest in being a party to a legal relationship unaffected by the insecurity generated by the death of the lessee and concluding with the legislator's interest to effectively regulate the civil legal relationships generated by the lease contract that, *de lege ferenda*, the provisions of Article 1.820 of the Civil Code, may be subject to a legislative reconsideration. The traditional solution of the continuation of the lease following the death of the lessee can be maintained, but the hypothesis of contrary interests of some heirs who would not want the continuation of the lease can be regulated, of the method of taking over the right of use by the heirs who wish to

do so, of the form of liability for the payment of the rent, of the manner of exercising the right of use by them in case of competing or contrary interests that also consider the legal nature of the property.

3.2.3. *Termination of the contract following the death of the lessee*

The death of the lessee who has no heirs or they have not maintained the relationship during their lifetime can give rise to the very plausible hypothesis of non-payment of rent. In this case, the question will arise of the persons who can be recipients of: (i) defaulting, if it has not been stipulated that the debtor is legally in default by not paying the rent on time; (ii) notice of termination. The tenant has the possibility to check the R.N.N.E.O.S. to verify whether declarations of acceptance of the succession have been entered and to transmit to such persons the aforementioned notices. However, in many situations the express acceptance of succession by her may be lacking. Neither the filing of a lawsuit for the payment of the rent or the restitution of the property can be filed against the deceased tenant (since the conditions of the civil action are not met) nor generally against the inheritance. The solution may consist in the opening of succession proceedings and the appointment of a custodian of the succession by the notary public.

De lege lata, in the event that the lessor does not know the lessee's heirs, he may, however, file an enforcement action for the payment of the rent at the terms and under the conditions set forth in the contract, since the rules set forth in Article 687-689 of the Civil Procedure Code; allow the enforcement to be triggered in conflict with the heirs of the deceased debtor's estate (without being individualized) who will be represented by a special custodian for enforcement.

3.3. ***The death of the lessee and the solution to the continuation of the rental of a home***

Unlike the provisions of Article 1.820 which generically provide for the continuation of the lease in a generic way, with the heirs of the original parties, similar to the provisions of Article 27 of Law 114/1995, the new provisions of Article 1,834 distanced themselves from the notion of heir by establishing *expressis verbis* and in a more restricted manner, the scope of persons who can request the continuation of the rental contract until the expiration of the term. This determination aims to remove the difficulties of identifying the tenant's heirs.

With regard to the surviving spouse (the previous capacity of spouse and not that of heir after the death of the other spouse is taken into account), the provisions of Article 323 (3) of the Civil Code, provide for the solution of continuing to exercise their (own) tenancy right. However, the surviving spouse can renounce it within the 30-day statute of limitations from the registration of the death. In the event of a divorce, if the ex-spouses continue to live together (Article 324 of the Civil Code) and the lessee dies, there is no sufficient protection of the surviving ex-spouse who does not benefit from the right to request the continuation of the lease contract. It is also possible for ex-spouses to live together in a house rented by one of them after the divorce, in which case there is no residential right of the ex-spouse.

The notion of registering a death must be understood as an event (legal act *lato sensu*) and not as a legal operation of registering the death by declaring it and drawing up the death certificate by the competent authorities. We appreciate that this time, the surviving spouse's abdication option made within the 30-day period must not be accompanied by a reasonable notice as in the case of Article 1820 (2) of the Civil Code. Also, the internal rules do not

provide for the condition that the home has effectively served as a place of cohabitation of the spouses, contrary to the provisions of Article 1.751 of the French Civil Code (qui sert effectivement à l'habitation de deux époux).

The right of option for the continuation of the rental contract may also belong to the ascendants and descendants of the tenant if they lived with the tenant (regardless of the duration of cohabitation) and if they are mentioned in the contract. The new regulation eliminates the 1-year term found in French law (and previously in Law 114/1996), and instead of establishing the „same domicile" condition, it clarifies that protection is granted to persons who actually lived together with the deceased tenant, regardless of their legal domicile. However, in relation to the provisions of Article 1.832 (1) Civil Code, which establishes (i) the possibility of other people to live together with the tenant, (ii) their solidarity with the tenant for the execution of any obligations arising from the contract during the period of use exercised, the requirement to mention them in the contract seems disproportionate. We believe that the condition of mentioning ascendants or descendants in the contract should not be understood in the sense that they must appear as „parties" but as co-occupants.

Likewise, the narrow scope of persons (descendants and ascendants only) may affect legitimate legal situations (which create the appearance of a right) by leaving them outside the protection of the law. *E.g.: the cohabitant, life partner, ex-husband, brother or sister of the lessee is deprived of the right to request the continuation of the lease (although between the latter there is an obligation of maintenance)*

Thus, *de lege ferenda,* we appreciate that the scope of the persons who are allowed to continue the lease until the contractual or legal term is fulfilled can be widened. However, if there is a person entitled to continue the lease exercising his right of option and an ineligible person, nothing is opposed as, where there is no express prohibition, that the latter person also continues to live in the building based on the provisions of Article 1.832 of the Civil Code

Unlike the old regulation found in Article 27 of Law 114/1996 which provided for the solution for the court to issue a decision in the case of several requests for continuation of the lease, a diametrically opposite approach can be identified: the appointment of a common representative to sign the lease in place of the deceased tenant. By living together until the death of the lessee, it is assumed that several people can live together after the death of the lessee, without the need for a court decision assigning the continuation of the tenancy to a certain person. We appreciate that the person who signs the rental contract is in reality a genuine representative of the other persons who will appear as parties and this provision finds its rationale only in the context in which the tenant lived with more than one person who has the quality of ascendant or descendant prior to death. In this situation, the personal liability of the persons continuing the lease is obvious. If those who have exercised their option to continue the lease do not reach an agreement on the person who is to sign the contract, the designation will be made by the lessor. However, nothing prevents all these persons from signing the contract without resorting to representation.

The signing of the rental contract by these persons, who may not always have the capacity of heir of the lessee, protects the rights of the lessor who, in the event of non-payment of rent, may benefit from the character of an enforceable title under the terms of the law.

In the absence of exercise of the right of option by the entitled persons, the lease ceases.

If the tenancy ends, the subletting consented to by the deceased tenant will also end. Although the second sentence of the provisions of Article 1.834 of the Civil Code is deficient, we appreciate that the text wanted to regulate the fact that, the person who signed the rental contract (on behalf of himself and the other entitled persons) will also have the right to sign the sublease contract in place of the deceased lessor-tenant.

4. Conclusion

Although ignored by the DCFR [19], the hypothesis of the death of the parties to the lease contract is not only a problem specific to special contracts but involves a multilateral legal analysis both from the perspectives of succession law, the law of obligations and civil procedural law. The legal mechanisms that derogate from a *mortis causa* transmission of the rights and obligations arising from the lease contract such as the one under Article 1.834 of the Civil Code have the benefit of eliminating the difficulties generated by the identification of the continuing heirs of the obligatory legal relationship, however, a limited scope of beneficiaries of the right to continue the contract makes the legal protection sought by the legal norm often ineffective or insufficient. Last but not least, the solutions for continuing the lease must also be doubled by procedural regulations that allow the parties to exercise their rights without the need to know the heirs because otherwise, the execution of obligations may become more onerous through the death of one of the parties.

References

[1] The chapter was repealed by Article 230, letter s) of chapter X of Law 71/2011 for the implementation of Law no. 287/2009 on the Civil Code.] thus marking the desirability of a substantial reform with complete and unitary regulations.

[2] A solution rooted in the history of Romanian law. The Caragea Code provided in Part III, Chapter. IV – „Pentru închiriere sèŭ arendă", Article 11, the solution of the continuation of the rental or lease in the event of the death of the owner of the thing and the continuation of the bargaining until the completion of the due date (term): „If the master rents or gives in the arena the thing to someone, with a limited date, and before that time he dies, then the heir is obliged to respect the agreement until the due date".

[3] The transfer *morits causa* of the rights and obligations resulting from the contract is recognized even if the assignment of the contract has been prohibited or restricted. D. Alexandresco, *Explicațiunea teoretică și practică a dreptului civil,* T. IX, Ed. Atelierele Grafice Socec & Co, Bucharest, 1910, p. 221.

[4] D. Alexandresco, *op cit*., p. 216. We note that, in this hypothesis, it is not the death of one of the parties that actually causes the termination of the contract, but the confusion that occurs as a result of the transfer of the party's rights and obligations from the leasing contract to the heirs.

[5] A similar but not identical solution can be found even today in French law. Thus, according to Article 14 of Law 89-462 of July 6, 1989 [Loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986], when the lessee dies, the lease contract (which has a home as a derivative object) is *transferred* to:

– the surviving spouse, without prejudice to article 1.751 of the Civil Code which, in turn, provides for the rental of a non-professional or commercial home that effectively serves as a home for two spouses, an exclusive right to it in favor of the surviving spouse or

the partner bound by a civil joint solidarity pact of the rental contract, unless he expressly waives it.

– descendants who lived with him for at least one year on the date of death;

– the tenant's partner bound by a civil solidarity pact;

– the descendants, the known partner or dependents who lived with him for at least one year on the date of death;

In the case of multiple requests, the judge decides according to the interests involved;

In the absence of persons who meet the conditions provided by law, the lease contract terminates by law upon the death of the lessee (est résilié de plein droit).

In Italian law, Article 6 of Law 392 of July 27, 1978 – Disciplina delle locazioni di immobili urbani – stipulates that in the event of the tenant's death, his spouse, heirs, parents and relatives who usually lived with him will succeed him in the contract: „In caso di morte del conduttore, gli succedono nel contratto il coniuge, gli eredi ed i parenti ed affini con lui abitualmente conviventi".

[6] We also find this solution:

– in French law: „Le contrat de louage n'est point résolu par la mort du bailleur ni par celle du preneur" (Article 1742 of the Civil Code fr.). For the doctrine, see: François Collart Dutilleul, Philippe Delebecque, *Contrats civils et commerciaux,* Ed. Dalloz, Paris, 2019, pp. 410, 418, 490.

– under the law of the province of Quebec: Le décès de l'une des parties n'emporte pas résiliation du bail (Article 1.884 of the Civil Code Quebec)

[7] L. Mihai în Fr. Deak, L. Mihai, R. Popescu, *Tratat de drept civil. Contracte speciale,* Vol. II, Universul Juridic Publishing House, Bucharest, 2021, p. 91.

[8] The doctrine also supported the application by analogy of the provisions of Article 1.812 (2) of the Civil Code, for determining the duration of the notice period. See in this regard. R. Dincă, p. 192.

[9] In Article 1.278 of the Civil Code of the Republic of Moldova it is stated: „the lease does not end with the death of the lessee, nor with the death of the lessor, unless the contract provides otherwise or in the case where, depending on the circumstances, the contract can no longer be maintained."

[10] Contra: L. Mihai în Fr. Deak, L. Mihai, R. Popescu, *Tratat de drept civil. Contracte speciale,* Vol. II, Universul Juridic Publishing House, Bucharest, 2021, p. 91. However, the author shows, by way of example, that the parties can establish the lease term depending on the date of death

[11] It can be considered that the will of the lessor expressed before his death is also respected in this way.

[12] The risk of termination is reduced in the case of the necessity of delaying the debtor tenant and granting an additional period of execution, since once the notification is received, he can make the liberating payment.

[13] We appreciate that after the completion of the succession debate procedure, if the obligation to pay the rent is not stipulated as indivisible, it can be requested by the heirs only by reference to the share acquired from the right over the property that constitutes the derivative object of the lease contract.

[14] These situations, once encountered during the procedure of the payment offer followed by registration, could give rise to a refusal by the bailiff to continue the procedure, if the lessee debtor does not waive it.

[15] Not the custodian of the estate, who has a passive procedural capacity in the actions directed against him, being only a representative of the inheritance. Thus, he will not be able to be personally obliged to pay court costs. They will be borne by the heirs who acquire the assets and liabilities of the inheritance.

[16] R.N.N.E.C. it is a register of the deceased's creditors and not of his debtors, however, in the absence of another register we appreciate that it could fulfill the necessary publicity towards the successors in the succession procedure.

[17] See also the Minutes of the meeting of the representatives of the Superior Council of Magistracy with the presidents of the civil sections of the High Court of Cassation and Justice and the Courts of Appeal from November 14-15, 2019, p. 33, available on https://inm-lex.ro/drept-civil-si-drept-procesual-civil-2/ in which it is shown „The seizin therefore confers the function of active and passive legal representation of the estate's interests. As an effect of the seizin, from the date of the opening of the succession, the heirs designated as such by law replace the deceased, being entitled to file any petition or possessory action belonging to him, and on the other hand, to be defendants in the actions brought by third parties against the succession."

[18] Such a continuation of the lease may have the legal nature of a tacit acceptance [Article 1.110 of the Civil Code].

[19] See [Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR) – Interim Edition, p. 667 available online on www.ccbe.eu. „Neither has it been found necessary to include rules on extraordinary termination in the case of the lessee's death. Such rules are found in some jurisdictions, but under this Part general rules on termination by notice and on specific performance will apply."

THE FAMILY DOCTOR – AN ATYPICAL ACTOR IN THE PLAY OF PASSING ON ONE'S OWN INHERITANCE

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Abstract

The present study brings to the spotlight the situation of the transfer of the family medicine practice through succession, as well as the assumptions related to this transfer frequently encountered in the activity of notary offices and courts of law. The Order of the Minister of Public Health no. 1322/2006 represents the main landmark used as basis to consolidate the relationships involving the transfer of family medicine practice between living persons as well as through succession, either legal or testamentary. As it will be observed throughout the entire study, the analysis considers the transfer of an atypical patrimony of affectation both by the purpose for which it was established, by its temporality, and by the method in which the continuity of the medical service is achieved, being in fact a link between the quality of the former holder and the current successor.

Keywords: *family doctor, family medicine practice, legal heir, certificate of inheritance, patrimony of affectation, office infrastructure, patients.*

1. Some introductory clarifications regarding the transfer of a family medicine practice

In an attempt to distinguish the rationale of the legislator concerning the regulation of the transmission of the family medicine practice, either as a result of the holder's death, or through inter vivos acts done by its holder, it is necessary to familiarize ourselves with some legal notions which, in such a specialized matter, receive from the legislation different and we can even say autonomous connotations when compared to those found in common law.

As it is specified in the content of art. 953 of the Civil Code, at the time of the death of a natural person, his patrimony is transferred to one or more living persons, which in fact implies that at the same time that the succession is opened, the patrimony of the deceased with all its components, active – passive, it is transmitted to his/her successors who accept it, becoming heirs with retroactive effect from the date of their predecessor's death.

The situation of the transmission of the patrimony upon the death of the doctor specialized in the field of family medicine appears in a note of atypicality, more precisely subject to a special regulation, derogating from the aspects aimed at continuing the personality of the deceased person in the patrimonial sphere only to his/her legal or testamentary heirs. The patrimony of affectation, as it is regulated today in the content of art. 31 paragraph (3) of the Civil Code represents that fiduciary patrimonial mass, constituted according to the provisions in matters of fiduciary trust and affected by the exercise of an authorized profession, as well as other patrimony determined according to the law. So, as rightly appreciated in the relevant specialized literature[1] „the patrimony remains ours *(nostrum patrimonium),* even if it is divided into several masses of pecuniary rights and obligations, each with a distinct legal regime".

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In the case of the transmission of the patrimony of affectation belonging to a family doctor, the legislator qualified such a structure as a component element of the medical practice alongside the infrastructure and clientele of the practice, the practice being in fact assimilated to the notion of patrimony intended for the exercise of an authorized profession, as the latter can be found in the provisions of the 2009 Civil Code.

We emphasize the definition of the notion of family medicine practice found in the content of art. 1 of the Order of the Minister of Public Health no. 1322/2006 on the Approval of the Rules for Establishing the Criteria and Methodology for Taking Over the Activity of an Existing Practice (Order no. 1322/2006)[2] which involves the reunification of the „patrimony of professional affectation, the infrastructure of the practice and the clientele represented by the patients and other beneficiaries of the services offered by the medical office". Within the same order, another element of the medical practice, more precisely the infrastructure of the practice, is defined in art. 2, respectively art.3, as being represented by „the premises/buildings where the activity of the office/offices and the work point/points with the annexes and the related land is carried out", infrastructure which „can be owned by the doctor or by his/her practice or it can be used by the doctor in one of the forms provided by law."

At first glance, in the already mentioned order, we find a partial definition of the essential notions in the matter of the transfer of medical practice, which is supplemented by the provisions of art. 64 letter h), respectively i) of Law no. 95/2006 on the Healthcare Reform, republished[3], where the notion of patrimony of professional affectation is defined as representing „all the goods, rights and obligations of the doctor affected by the purpose of exercising his/her profession, constituted as a distinct fraction of the doctor's patrimony, separated from the general pledge of his creditors", while the family medicine practice „brings together the patrimony of professional affectation, the office infrastructure, owned or used by the doctor, and the clientele".

We find that the notion of patrimony of professional affectation, in the context of the transmission of the family medicine practice, does not include, as we would have been tempted to say, the infrastructure of the medical office, bringing together as often mentioned in the notarial practice: the furniture, the medical equipment and any other assets existing in the medical office and is used by the family doctor for the purpose of carrying out his/her activity, but without including in this sphere the premises/buildings in which the activity of the office is carried out, the latter representing a separate category atypically regulated. The specialized literature[4] establishes that „the infrastructure and the clientele are components of the patrimony of affectation" and not individual elements as they are described in the content of Order no. 1322/2006.

However, the transmission of medical practice is carried out unitarily by indicating the element of the patrimony of professional affectation, by specifying and describing the component elements of the office's infrastructure, as well as by mentioning the clientele represented by the patients and the other beneficiaries of the services offered by the medical office.

2. Transfer of the medical practice following the death of its owner

The termination of the activity of the medical doctor who practices his/her activity independently in a practice can occur through retirement, death, termination of activity before retirement (because of illness, disability, prohibition to practice the profession, own

decision), or change of residence. In order to continue to offer medical services, after the death of the owner of the medical office with only one doctor, the activity can be taken over under one of the following conditions: in the first case, if the legal heirs meet the qualification of medical doctors with a specialization in family medicine, are natural persons, or carry out their activity in a health unit with a family medicine profile, in the organization forms provided by law, through the legal representative, in which at least one doctor is confirmed as a family medicine specialist or, in a second case, if the legal heirs do not meet the condition provided by art. 6 of Order no. 1322/2006 and already mentioned in the first case, they can decide in accordance with the provisions of art. 5 of the same Order on the method of taking over the activity by a family doctor who meets the conditions expressly provided by the law or can at least decide to hire a substitute family doctor for a certain period. In both cases, according to art. 7 of Order no. 1322/2006, the doctors, natural persons or the health units, must prove the right to practice the profession, respectively the registration into the Unique Register of Medical Practices at the public health authority of the county or of the municipality of Bucharest.

First, it is possible to achieve the continuity of the medical service and implicitly the full preservation of the medical practice through its takeover by any legal heir established based on the criteria of inheritance devolution who is a family medicine specialist at the date of his/her predecessor's death or will become one within a maximum period of one year from the date of the death of the former owner, as it is stipulated by the provisions of art. 17 of Order no. 1322/2006. We believe that the legal heir can obtain the capacity of specialist physician as natural person or in a medical unit with a family medicine profile within one year from the death of the owner of the medical practice, and the period between the decease of the latter and the takeover of the practice by his/her legal heir can be governed by a substitute family doctor employed for this determined period, intervening here a transmission of the medical practice under the suspensive condition of acquiring the capacity of doctor. Furthermore, the situation can be similar if there are several legal heirs who hold the capacity of family doctor in any of the forms expressly provided by the law and who have not not yet reached to an agreement regarding the takeover of the medical practice of the former owner, the solution being represented by the temporary employment of a family medicine specialist for the duration of the one-year time limit until the legal situation is finalized.

The second hypothesis concerning the takeover of the the medical practice in any of the forms stipulated in art. 5 of Order no. 1322/2006, more precisely the sale under the conditions provided for in title III of Law no. 95/2006, the exchange, the bequest, the lease, the loan, the usufruct, the contribution to the social capital can only be carried out if the legal heirs do not meet the conditions provided by art. 6 of the same Order. At the same time, we consider that even in this hypothetical case, in which the legal heirs hold the capacity of family medicine specialists, but do not want, or cannot [5] continue the activity in the office of the former owner, they can agree on the takeover of the activity by a family doctor who meets the conditions expressly provided by the law or for a temporary period can decide to employ a substitute family doctor.

We cannot fail to note among the methods of taking over the activity of a practice, in the express case specified in art. 17, the possibility of acquiring it through bequest. The solution embraced by the legislator is applicable only to limited hypotheses, taking into account the purpose envisaged in the same article 17, more precisely the finalization of the

takeover of the activity of the medical practice by a new doctor within one year from the death of the former owner, a period which in the case of the legacy can only be respected when the disposer – the acquirer of the medical practice, as the legal heir of the former owner, dies as well during the one year from the time of the death of the original holder of the medical practice, and the legatee fulfills all the conditions for taking it over until the fulfillment of the already mentioned time limit.

A third case of transmission of the family medicine practice through *mortis causa* acts, as described in art. 5 letter c) of Order no. 1322/2006, refers to the possibility of the owner of the medical practice to dispose in a testament its transfer to the beneficiary by bequest. The legatee in such a situation can be a person who is a family doctor or even a health unit with a family medicine profile organized in the forms provided by the law, through a legal representative, in which at least one doctor is a family medicine specialist or it can be another person who does not have such a capacity and to whom, we consider, that the same conditions expressly provided in the content of art. 17 lit. b) from the aforementioned Order[6] can be applied analogically.

The debate on the succession procedure assumes, in the hypothesis of the deceased being a family doctor, that the content of the heir's certificate mentions the existence of the medical practice to be transmitted to his successors as a result of accepting the inheritance, even if only one of them has the capacity required by the legislator, more precisely is a family medicine specialist, and fulfills the condition of continuing the medical activity in the same office. The effective transmission of the medical practice only to the person meeting the conditions expressly required by the law is not carried out on the basis of the heir certificate, but as a result of the division and handover of the practice to the qualified heir.

The entire patrimony of affectation, more precisely the family medicine practice, in its entirety, i.e. indivisible, including its assets and liabilities, is transmitted to the same qualified heir,. The simple fact of issuing an heir's certificate without making the division under the conditions of assigning the medical practice to one of the heirs does not imply the fulfillment of the requirement provided in art. 17 last sentence of Order no. 1322/2006, more precisely the finalization of the takeover of the practice's activity by a new doctor within one year after the former owner's death.

In the event that the legal heirs do not fulfill the condition of taking over the medical practice, the existence of the medical practice will be mentioned in the content of the heir's certificate with the obligation to enter the aspects related to the duty of the accepting successors to transmit the medical practice, within the time limit of one year expressly provided by the legislator, to a familiy medicine specialist doctor, a natural person or a health unit with a family medicine profile organized in one the forms provided by law through a legal representative in which at least one doctor is a confirmed family medicine specialist. In this last case, unlike the hypothesis in which the family medicine practice is to be taken over by one of the heirs, no partition deed for the assignment of this patrimonial mass of affectation will be drawn.

The sanction, as we have already mentioned, which could occur in the event of non-compliance with the specified time period, involves the establishment of a new family medicine practice with a new owner as a result of the steps taken by the local authorities in collaboration with the public health authorities with which the original office was registered, thus excluding any benefit that the heirs, whether legal or testamentary, would have received as a result of the former owner's death. The mentioned one-year period is a prescriptive

periof running from the date of the inheritance opening and not from the date the succession procedure is opened.

In judicial practice, it has been established that in the event of such a sanction „the differentiation between the various assets that are part of the doctor's practice shall be made, considering the way they hey will or will not be affected by the imposed sanction. Thus, the actual clientele will cease to exist, but the various rights and obligations, which do not have an *intuitu personae* character and do not involve the exercise of the profession of family doctor being components of the patrimony of professional affectation (furniture, equipment, etc.), as well as the infrastructure of the medical practice are kept" [7].

Another hypothesis considered by the legislator in the case that the owner of the family medicine practice dies, considers the non-existence of legal heirs, and according to our assumption, the the non-existence of the testamentary ones as well, leading to the establishing of a new family medicine office with a new owner as a result of the collaborative efforts between the local authorities and the public health authorities with which the initial practice was registered, similar to the hypothesis envisaged as a sanction in case of non-compliance with the one-year prescriptive period.

In a last case concerning the family doctor as the owner of a practice which is part of an associative organizational structure, if there are no express provisions in the statutes of health units with legal personality, respectively in the contracts of association, the same provisions of art. 17 of Order 1322/2006 shall apply to the assignment of the medical practice in the event of the existence or non-existence of legal or testamentary heirs, being in such a case a subsidiary applicability of the special law, giving precedence to the statutes or contracts of association.

3. Brief comparative aspects between the transfer of medical practice by documents between the owner and the beneficiary, but also as a result of the death of the family doctor

Among the causes expressly mentioned by the provisions of art. 4 of the Order no. 1322/2006 for the termination of the activity of a family doctor besides his/her death we can mention: the retirement, the termination of the activity prior to retirement (because of illness, disability, prohibition to practice the profession, own decision) and the change of domicile. In any of the cases already described, the transfer of the medical practice to a new owner happens. If in the previous sections we envisaged the analysis of the transmission of the medical practice as a result of the death of its owner – a family doctor, we proposed to consider also a brief observation on the elements that make up the transmission stage of the patrimony of affectation through inter vivos acts, directly concluded between the family medicine doctor and another family medicine specialist, natural person or a health unit with a family medicine profile, in the forms of organization provided by law, through a legal representative, in which at least one doctor is specialized in family medicine.

Througout the Order no. 1322/2006, the Legislator does not maintain the terminological coherence when, in art. 5 of the same normative document, the transmission of the medical practice is mentioned as representing the object of taking over the medical practice as patrimony of professional affectation, but without including its other two constitutive elements, more precisely the infrastructure and the clientele.

At the same time, depending on the organization form of the health unit with a family medicine profile, the transfer intention or offer will be communicated, by the doctor who

ceases his/her activity, as the case may be, to the following preemptors: the doctors employed at the medical office, regardless of its form of organization; the doctors who are members of the association/group of associated/grouped medical offices;the doctors who are members of the civil medical society; the associated/shareholder doctors of offices with legal personality organized as commercial companies; the private doctors/offices with legal personality located in the same building and/or with shared spaces in the same building. Furthermore, a similar situation, which involves going through the preemption stage, can be identified in the case of the death of the family doctor, his activity being able to be temporarily resumed by another family medicine specialist, who assumes the capacity of preemptor in order to take over the medical practice from the heirs of its former owner, as it it is provided in art. 11 letter e) of the Order no. 1322/2006. In the same procedure regarding the transfer intention or offer, the Romanian College of Doctors shall be compulsorily notified, having the obligation to display it both at its own headquarters and at the headquarters of the County Colleges of Doctors, respectively of the Bucharest College of Doctors, within 15 days from the date of receipt. Moreover, the intention/offer to transfer can be published in the central and local medical and non-medical media or it can be made known through any other means of communication considered appropriate, another procedure, this time optional, being needed.

Another common element identified, in the case of both family medicine practice transfer procedures, either between the owner and the beneficiary, or between the heirs of the former owner and the beneficiary, is represented by the takeover by the new acquirer, in any of the forms stipulated in art. 6 of Order no. 1322/2006, of the ongoing contracts that are part of the professional heritage, aimed at the employees, the clientele, the service and utility providers, which in fact means, as it was already mentioned, the integral, undivided takeover of the entire medical practice.

After taking over the medical practice, regardless of the method, the new owner will inform the territorial public health authorities, the health insurance companies, respectively the patients, of the takeover of the practice, according to the provisions of art. 73 paragraph (3) of Law no. 95/2006, republished. Therefore, the transmission and the takeover of the family medicine practice require the completion of some procedural steps both on the part of the titular doctor or his/her heirs in case of death, and on the part of the new acquirer, the procedural aspects including the fulfillment of the publicity formalities[8].

4. Final notes

Throughout the study, an analysis of the procedure for the transmission of the family medicine practice was performed, both in the case that this transfer intervenes between the owner and the acquirer, as well as in the event that the owner has died, and his patrimony intended for the exercise of the medical profession has been taken over by the heirs permanently or only temporarily and in the latter case being subsequently transferred to a new owner.

The takeover of the medical practice, as discovered, is carried out under specific conditions, governed by special legislation, more precisely by the provisions of Order 1322/2006 and Law no. 95/2006, republished, thus excluding the provisions of the 2009 Civil Code on the transmission of patrimony intended for the exercise of a profession. At the same time, the applicability of some procedures involving aspects related to preference, the priority in chosing the continuators of the medical activity was observed. This means, that,

in case of death, the legal or testamentary heirs of the former owner have priority and only if they do not meet the criteria expressly mentioned by the legislator and analyzed in this study, the medical practice is to be transmitted under the suspensive condition of finalizing its takeover to another entity with activity in the field of family medicine, natural or legal person, within the one-year prescriptive period. Furthermore, the applicability of a preemtive procedure when determining the successor of the family medical service is also encountered when the transfer is made directly between the owner of the medical practice, during his/her lifetime, and the new acquirer.

As a last aspect found in the practice of the courts[7] with clear implications in the field of the transmission of the medical practice following the death of its owner, it was considered that the announcement of the intention to continue the medical activity, doubled by the submission of the death certificate of the doctor-former owner of the medical practice, to the competent public health authorities and the actual takeover of the medical practice within one year of the death of the former family doctor represents an act of tacit acceptance of the inheritance.

References

[1] Stoica, V. (2021). Civil law. Principal Real Rights (4th Edition), C. H. Beck Publishing House, p. 4; Sferdian, I. (2021). Civil law. Principal Real Rights. In-depth study, Hamangiu Publishing House, p. 11.

[2] Published in the Official Gazette. No. 929 of 16 November 2006.

[3] Published in the Official Gazette. No 652 of 28 August 2015.

[4] Sferdian, I. (2022). Some observations on the mortis causa transmission of some patrimony of affectation, Annals of the West University of Timișoara – Law Series, 103 (2), p. 112.

[5] Art. 75 paragraph (1) – (3) of Law No. 95/2006 on the Healthcare Reform, republished, *(1) A family doctor can be the owner of only one office. (2) Family medicine offices can open at most two secondary branches if the applicant ensures a fractional schedule of at least 10 hours per week of his/her basic workload or above his/her basic workload. (3) Branches can be opened in the countryisde, in the same administrative-territorial unit or in other units where there is a shortage of doctors nominated by a commission organized at the level of the county of Bucharest public health directorate, made up of: – a representative of the county or of Bucharest health insurance company; – a representative of the county or of Bucharest public health department; – a representative of the county or Bucharest College of Doctors.*

[6] See as well Russ N. S., Transmission of a medical practice by inheritance, available [Online] at https://www.medichub.ro/reviste/medic-ro/transmiterea-unui-praxis-medical-prin-mostenire-id-647-cmsid-51, accessed on 01.April.2023.

[7] Iași Court of Law, Civil Section I, Decision no. 423/2015, available [Online] at www.rolii.ro, accessed on 01 April 2023.

[8] See as well Tuleașcă, L. (2014). Patrimony of affectation – Tool for conducting business, Romanian Business Law Review 44 (6), Wolters Kluwer, pp. 44 și urm.

THE IMPACT OF ART. 887 PARA. (3) CIVIL CODE ON THE NOTARIAL SUCCESSION PROCEDURE

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Abstract

The subject of this study is a norm in the application of which sometimes the notarial succession debate intersects with the rules of the land register. It is about art. 887 para. (3) Civil Code, according to which the holder of the real estate right acquired by inheritance will not be able to dispose of it through the land register until after the right has been registered.

In the following lines, we try to critically analyze the practice of the courts of law regarding the mentioned text, in order to demonstrate that the legal norm that regulates this situation must be interpreted and applied in a different key.

Keywords: *land register, public notary, notarial succession procedure, certificate of heirship*

1. Posing the problem

According to art. 887 of the Civil Code[1]:

„(1) Real rights are acquired without registration in the land register 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.

(2) However, in the case of forced sale, if the foreclosure of the real estate was not previously noted in the land register, the real rights thus acquired will not be able to be opposed to third parties acquiring in good faith.

(3) In the cases provided for in para. (1), the owner of the rights thus acquired will not be able to dispose of them through the land register until after the registration has been made"[2].

In a relatively recent judicial case that came to our attention[3], the Bucharest Court of Appeal resolved an appeal filed by the Ministry of Justice against a case [that involved a

[1] Law no. 287/2009 on the Civil Code (hereinafter: „CC") was republished in Of. M. no. 505 of July 15th, 2011 and entered into force on October 1st, 2011, according to art. 220 para. (1) from Law no. 71/2011 for the implementation of Law no. 287/2009 (published in Of. M. no. 409 of June 10th, 2011 and hereinafter cited: „LPA").

[2] The text is inspired by art. 656 of the Swiss Civil Code according to which: „(1) The acquisition of land ownership must be recorded in the land register. (2) In the case of appropriation, inheritance, compulsory purchase, debt enforcement or court judgment, the acquirer becomes the owner even before registration in the land register but obtains the power of disposal over the immovable property only once he or she has been recorded as the owner in the land register". See also V. Rossel, F.-H. Mentha, *Manuel du droit civil suisse*, t. 2, *Des droits réels – Titre final – Lois et ordonnances complémentaires. Tables*, Librairie Payot & Cie, Lausanne, 1911, p. 7, respectively pp. 361-385.

To our knowledge, a similar (*not* identical) solution to the one in art. 656 para. (2) of the Swiss Civil Code is also found in the ABGB system. See Ș. Mircioiu, *Transfer of ownership by sale. Study of comparative law*, Universul Juridic, Bucharest, 2014, p. 248.

decision of the Disciplinary Council of the National Union of Public Notaries in Romania (hereinafter: „Union")] resolved by the Union Council[4]. Initially, the Ministry of Justice had contested the decision of the Disciplinary Council, and the Union Council rejected the first appeal, which is why the Ministry of Justice filed a second appeal.

It is interesting that, although, in this case, a public notary from the Oradea Chamber of Public Notaries was caught committing disciplinary violations, and he was fined, the Ministry of Justice did not challenge the sanction, but only the fact that he was not detained a greater number of violations: five more than those found by the Disciplinary Council. The Court of Appeal ruled in favor of the Ministry of Justice regarding all five situations and held them to be disciplinary violations. We will discuss the last of them in the following lines.

The notary that was disciplinary sanctioned issued, on March 8th, 2017, an heirship certificate regarding the deceased J.P. In the estate, there was an immovable registered in the land register in the name of the deceased, and, for the notarial file, an extract from the land register had been obtained for authentication. On the same day, the notary authenticated a donation contract, by which the heir donated the real estate to another person. The authentication was carried out based on art. 213 para. (9) of the Regulation on approval, reception and registration in the records of cadastre and land register[5] in force on that date, text according to which: „Based on the valid authentication extract, the public notary can perform successive acts only on the same day".

Regarding these, the Ministry of Justice claimed the following: «According to art. 887 para. (1) of the Civil Code, real rights are acquired without registration in the Land Register: „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", and according to paragraph (3) of the same article, „in the cases provided for in para. (1), the owner of the rights thus acquired will not be able to dispose of them through the land register until after the registration has been made".

(...) it is not applicable in the case, not being likely to remove the application of the provisions of art. 887 para. (1) of the Civil Code, the legal basis invoked by the public notary (…) regarding the incidence of the provisions of art. 213 para. (9) from Order no. 700/2014 (...).

The mentioned legal provision refers to assets registered in the Land Register, which are alienated through successive acts, for the authentication of contracts being necessary to request the extract of the Land Register for authentication. For example: an immovable asset registered in the Land Register is the subject of a sales contract, and subsequently the same asset is donated by its acquirer. If the two documents are authenticated on the same day, the first land register extract obtained by the public notary can be used for authentication».

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[3] Bucharest C. Ap., 9th section of administrative and fiscal litigation, civil decision no. 2689 of December 9th, 2021, unpublished.

[4] Appeals against the decisions of the Disciplinary Council within the Union are regulated by art. 75 of Law no. 36/1995 of public notaries and notarial activity, republished in Of. M. no. 237 of March 19th, 2018 (hereinafter: „LNP").

[5] Approved by the Order of the general director of the National Agency for Cadastre and Real Estate Publicity (hereinafter: „ANCPI") no. 700/2014 (published in Of. M. no. 571 bis of July 31st, 2014) and repealed by Order of the general director of ANCPI no. 600/2023 for the approval of the Regulation of reception and registration in the cadastre and land register records (published in Of. M. no. 125 bis of February 14th, 2023). In the following, the regulation will be cited: „ANCPI Regulation".

The Court of Appeal held the following: «The Court considers to be correct the appellant's claim according to which, in the case of the alienation of an asset acquired by inheritance, the transmission of the ownership of the asset is possible only after the entry in the land register of the right acquired by succession by the one who wishes to alienate the asset, being in accordance with art. 887 Civil Code. (…)

It follows that, in order to alienate, the donor who had acquired the property through succession, had to first register the right thus acquired in the Land Register and only afterwards could the donation be authenticated.

The Court cannot agree with the opinion of the respondent according to which it is in accordance with the law to draw up a deed of transfer of ownership by a person who acquired that right on the basis of an heirship certificate issued on the same day, without having previously been registered in the land register the right acquired by inheritance, on the grounds that the law would allow „the use of the same extract from the land register for several operations as well as the successive registrations".

The fact that art. 213 para. (9) from Order no. 700/2014 (…) allows that, based on the valid authentication extract, the public notary can perform successive acts (only) on the same day does not amount to a derogation from art. 887 Civil Code. Art. 213 para. (9) considers an extract regarding an asset that is registered in the Land Register in the name of the true owner and regarding which, on the same day, successive acts can be concluded; the norm considers the validity of the extract for one day, and not the way to dispose of an asset not registered in the name of the real owner. Therefore, both the purpose of the two norms is different, as well as their premises, art. 213 allowing that, in the case of an asset registered in the name of the owner and in respect of which an extract is issued certifying this quality, several operations can be concluded on the same day; in the case of art. 887, in the absence of the registration of the person who acquired the asset through succession, the extract will not reflect the true owner, so that there can be no talk of successive operations based on the same extract».

Is it really the truth, what the Court of Appeal thinks? We think not. We will try to argue our position.

2. The manner of application of art. 887 para. (3) Civil Code

It should first of all be said that although, in this case, the Disciplinary Council invoked art. 894 CC („In the event that a right subject to registration in the land register has been subject to successive assignments without the registrations having been made, the last entitled person will not be able to request the registration of the right in his favor unless he requests, together with its registration, the registration of the previous successive acquisitions that he will prove with original documents or legalized copies, as the case may be"), neither the Ministry of Justice nor the Court of Appeal discusses the incidence of this text.

The reading of the court decision quoted above surprises even more when it is observed that, in its argumentation, the Disciplinary Council invoked the high scientific authority opinion of Prof. Marian Nicolae, and even made a very precise reference to it[6], aspect that was, as well, unnoticed, it seems, by the Court of Appeal.

[6] M. Nicolae, *Treaty of real estate publicity*, vol. II, *The new land books*, Universul Juridic, Bucharest, 2006, p. 302 and the following.

Professor Marian Nicolae explained very clearly that the sanction for non-compliance with the former art. 26 para. (1) from Law no. 7/1996 of the cadastre and real estate publicity[7] (which, at that time, had the following content: „The property right and other real rights are opposable to third parties, without registration in the land register, when they come from succession, accession, forced sale and usucapion. These rights will be registered, beforehand, if the holder understands to dispose of them") was not nullity (as some argued in the legal literature), but non-enforceability towards third parties, since art. 26 para. (1) did not establish a case of conditional unavailability of real estate included in the land register (hereinafter: „l.r."), *but only established the way to achieve the principle of relativity of land register entries*.

From this point of view – Prof. Nicolae continued to point out – if the holder of a real estate right opposable without registration in the l.r. transmits this right without having previously been registered in the l.r., automatically became incidental the provisions of art. 23 of Law no. 7/1996, which, at that time, showed that „If several persons have successively transferred to each other the real right over a real estate, and the entries have not been made, the last entitled person will be able to request the entry of the successive acquisitions together with that of his right, proving with original documents the entire series of legal deeds on which the registrations are based"[8].

In other words, translating this solution to the norms of the Civil Code, art. 887 para. (3) CC does nothing but act as a bridge to art. 893 CC, which enshrines the principle of relativity of l.r. entries [„The registration of a real right can only be carried out: a) against the one who, on the date of registration of the request, is registered as the owner of the right which the registration is to be made about; b) against the one who, before being registered, encumbered his right, if both registrations are requested at the same time"][9].

Indeed, art. 887 para. (3) CC *does not* tell us that „the owner of the rights thus acquired will not be able to dispose of them until after the registration has been made", but that „the owner of the rights thus acquired will not be able to dispose of them *through the land register* until after the registration has been made" (o.u., A.A.M.)[10]. It is therefore not about a general-abstract ability to dispose of the asset, which could raise the question of an

[7] Republished in Of. M. no. 720 of September 24th, 2015.

[8] M. Nicolae, *op. cit.*, p. 304. The opinion is also shared by C. Cucu, *Legislation of cadastre and real estate publicity. Commentaries and explanations*, 2nd ed., C. H. Beck, Bucharest, 2007, p. 124 (however *ibidem*, pp. 122-123, contain some imprecise specifications). *Adde* I. Albu, *The new land books*, Lumina Lex, Bucharest, 1997, p. 86.

[9] For this idea, see also A.-A. Chiș, *Real estate publicity in the conception of the new Civil Code*, Hamangiu, Bucharest, 2012, p. 86, respectively p. 208.

It is, therefore, erroneous to say that „the holders of these rights cannot dispose of them, through the land register, until after the registration has been made, *and any disposition deed outside the land register has no legal value*" (o.u., A.A.M.) [A. Trăilescu, *Commentary on art. 887 CC*, in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *The Civil Code. Commentary of the articles*, 3rd ed., C.H. Beck, Bucharest, 2021, p. 1069].

[10] The nuance is sometimes lost in the legal literature, but also in the practice of the Constitutional Court.

See, e.g. (but without influencing, we believe, the solution supported by the author), Tr. Dârjan, *Note* to Cluj C. Ap., 1st civil section, dec. no. 3938 of October 10th, 2013, in R.R.D.J. no. 1/2014, available at www.sintact.ro, last accessed on February 21st, 2023.

Adde Constitutional Court, dec. no. 73 of February 8th, 2007, published in Of. M. no. 198 of March 22nd, 2007, where it is written, regarding the former art. 26 para. (1) from Law no. 7/1996, that „(...) although opposable to third parties, no deed of disposition can be concluded by the holder of this right without making the publicity established by Law no. 7/1996 (…)".

incapacity or inalienability, but about an obstacle in disposing of the asset *through the l.r. system*, therefore, about a procedural obstacle or, in other words, about an obstacle of l.r.

There are situations in which the real estate rights are acquired without registration in the l.r., but, to ensure the functions of the l.r. system, especially for compliance with the principles of integral publicity and material publicity, which contribute decisively to the development of real estate credit[11], the l.r. must also ensure the record of all operations of establishment and transfer of real estate rights[12]. However, this cannot be achieved if the l.r. does not contain a record of the string of owners. Consequently, the violation of art. 887 para. (3) CC will make applicable art. 894 CC[13].

The only objection that could possibly arise regarding the application of art. 894 CC is about the wording of this text, which refers to „assignments", which seems to refer only to legal deeds between living persons. But, in reality, the imperative of accurate publicity of ownership changes implies that we interpret the word „assignments" as referring to „transmissions"[14].

Consequently, it is totally erroneous the above-cited finding of the Court of Appeal (which practically does nothing but confirm the interpretation of the Ministry of Justice): „the purpose of the two norms is different, as well as their premises, art. 213 (from the former ANCPI Regulation – o.p., A.A.M.) allowing that, in the case of an asset registered in the name of the owner and in respect of which an extract is issued certifying this quality, several operations can be concluded on the same day; in the case of art. 887, in the absence of the registration of the person who acquired the asset through succession, the extract will not reflect the true owner, so that there can be no talk of successive operations based on the same extract".

This opinion is wrong. First of all, it should be noted that there is no difference, regarding the registration of transmissions in the l.r., between the situation where in the l.r. the deceased is registered, and then follows the registration of two transmissions (from the deceased to the heirs, and then from the heirs to third parties), and the situation where in the l.r. a living person is registered who, on one day, concludes a deed of transfer of ownership,

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[11] See also J. Popu, *Directions for the preparatory works for the introduction of land books in Transylvania, written for Romanian owners*, J. Stein, Cluj, 1868, p. 2.

[12] For some details, see A. Herlea, *The development of land publicity systems*, in The Social-economic Observatory no. 4-6/1944, pp. 570-572.

[13] A rule similar to art. 894 CC can be found in Austrian law, in art. 22 GBG, in an even more effective form in our opinion. As it was shown (Ș. Mircioiu, *op. cit.*, p. 250), although in the end the same result is reached as art. 894 CC, the latter requires the registration of successive acquisitions, while Austrian law does not have a similar procedural provision and *only the last acquirer is registered*, despite the submission of supporting documents for all successive acquisitions.

It is also important that art. 22 GBG is seen in the Austrian legal literature (*ibidem*) not as an exception to the principle of registration in the l.r., but possibly as an exception to the principle of relativity of l.r. entries.

[14] For an excellent application of this idea, see Court of Calafat, civil judgement no. 1136 of October 13th, 2015, available at the address www.rolii.ro, last accessed on March 22nd, 2023: „the court considers (contrary to the opinion argued by the cadastre and real estate publicity office – o.p., A.A.M.) that there was no impediment to the registration of the deed of voluntary partition, as long as the request for the registration of the certificate of heirship regarding a real estate for which the land book is established was admitted (…), the legal basis for the registration of the act of voluntary partition being art. 894 of the New Civil Code (…) the estate of the deceased NM went in equal shares to the two heirs, CE and NV, and they, on the day of the debate of the author's succession and after the issuance of the heirship certificate, agreed to end the co-ownership by concluding the act of voluntary partition (…)".

followed, on the same day, by another deed of transfer, from the first acquirer to another person.

Secondly, if art. 894 CC does not have the role to convince (although it does!), we only have to look towards art. 893 letter b) CC that allows registration in the l.r. „against the one who, before being registered, encumbered his right, if both registrations are requested at the same time", that is precisely against a person *not* registered in the l.r. An objection cannot be received in the sense that art. 893 letter b) CC should be ignored in this discussion, as it refers to an encumbrance and not to a transmission. In reality, both the encumbrance and the transmission are acts of disposition on the real real estate right, the correlation with art. 894 CC being harmonious.

3. Some historical aspects

Art. 887 CC does not have the quality of absolute novelty in our law. We saw that the norm was found in essence in former versions of Law no. 7/1996. In addition, previously, art. 26 of Decree-law no. 115/1938 for the unification of provisions regarding the land register[15] provided the following: „Real rights will be acquired without registration in the land book in case of death, accession, forced sale, and expropriation; however, the holder will be able to dispose of them through the land book only after the registration has been made".

Regarding the application of this text, the following was written: „It is true that the text of art. 26 (…) specifies that the owner of real rights acquired through inheritance will not be able to dispose of them through the land register until after the registration has been made; but these provisions cannot constitute an impediment in ending the co-ownership even before the registration in the land register. The meaning of the prohibition provided by this legal provision is that, in case of alienation of the rights acquired by the means referred to in the text – among which is the succession, the registration in the name of the subsequent acquirer can only be done after the rights of the one who acquired under the conditions of art. 26 of the law were registered: *the act of transfer is valid, but the acquirer can register his property in the land register, only after the transferor's right has been registered*. From here we can draw the conclusion that the ending of co-ownership (both amicably and through the court) can take place validly even without registration in the land register, and the one who acquired any real right following the partition will have the opportunity to request together with the registration of his right also the registration of previous transmissions" (o.u. – A.A.M.)[16].

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[15] Published in Of. M. no. 95 of April 27th, 1938 and repealed by art. 230 letter g) LPA.

[16] G. Kovacs, *Note* to Sibiu County Trib., Dec. no. 1083 of December 23rd, 1969, in I.-D. Chiș, *The Land Book*, vol. II, *The New Civil Code, Jurisprudence and doctrine from Romanian legal periodicals. 1886-2011*, Universul Juridic, Bucharest, 2012, p. 376.

The decision of the court in this case was wrong [„if in the land register regime the real rights can only be transmitted after the registration in the land register, the end of the state of co-ownership can not take place without this entry (...)"], which was rather surprising considering that, under the Land Register Regulations of 1855 and 1870 (hereinafter: „Rcf.") applicable in the territories where Hungarian and Austrian law were in force, the practice of the courts was quite stable on this matter. See, for example, Cas., 1st section, dec. no. 1847 of July 11th, 1929, in *ibidem*, pp. 325-326: „the universal successor being considered the owner by law, before his right gained through universal succession is registered, it follows that, since he received the decree sending him to the possession of the succession, he can ask for the exit from the co-ownership that exists between him and other persons regarding the immovables belonging to the succession, even before the registration of the rights

In any case, regarding the interpretation and application of Decree-law no. 115/1938, an important role must be given to the opinion of Prof. Salvator Brădeanu, a draftsman of this decree. The reputed author specifies the following: «However, there are cases (...) when (...) the acquisition takes place independently of the existence of the registration (art. 26). However, even in these cases, publicity being necessary to know the exact legal situation of the real estate, its fulfillment is ensured with the help of the „principle of relativity" (art. 19 and 20). According to this principle, the registration of a right can only be acquired against the person who, at the time of submitting the application for registration, is the owner of the real estate right which is the object of the transaction, and if the latter consents»[17].

The legislation of l.r. prior to Decree-Law no. 115/1938 was not more burdensome. On the contrary, under Rcf., the following was written: „in order for a person to acquire any land register right, so that his right can be registered, it is necessary that the person from whom he acquired the right be registered in the land book, *or at least to be registered at the same time*, because no one can transfer more rights to another than he himself has.

From this rule, the following exceptions are allowed:

(...) *the real estate registered in the name of the deceased, is registered, based on the contract concluded with the heirs, directly to the buyers, without making the transcription from the deceased, to the heirs* (...)" (o.u. – A.A.M.)[18].

In addition, Prof. Camil Negrea (who, too, contributed to the drafting of Decree-Law no. 115/1938) saw, similarly, under Rcf., the prohibition to dispose by l.r. as an expression of the „relative of inscription"[19] principle, i.e. of the principle of relativity of l.r. entries.

Based on all these opinions, it is therefore difficult to see otherwise the application of art. 887 para. (3) CC.

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recognized by that decree". Similar, but under the rule of the Bucovina Civil Code, see Cas., 1st section, dec. no. 3103 of December 14th, 1938, in *ibidem*, pp. 357-362.

The matter is particularly important, because the situation in which the deceased is registered in the l.r., the succession was finalised (without the heirs being registered in the l.r.), and finally a partition action is formulated in court, should not differ from a situation with the same premise, but in which at the end it is submitted to the notary a request for the authentication of a deed of partition between the heirs. Basically, notarial procedures are special forms of non-contentious procedures, and art. 165 LNP provides that this law is supplemented by the provisions of the Code of Civil Procedure.

Unfortunately, as we could see, with some exceptions, the practice of the courts (although it seemed stable under Rcf.) is regressing; see also Alba-Iulia C. Ap., dec. no. 638 of April 27th, 1998, in *ibidem*, p. 382, but also Court of Cluj-Napoca, civil judgement no. 7015 of October 13th, 2017, available at www.rolii.ro, last accessed on March 22nd, 2023, where it is noted that upon „conclusion of the partition agreement, the rights arising from the Title of Property (...), from the certificate of heirship (…) and from the additional heirship certificates (…) should have already been entered in the l.r., in order to comply with the provisions of art. 887 para. (3) CC".

[17] S. A. Brădeanu, *Towards a new land legislation*, „Literary Life", Bucharest, 1938, p. 83.

[18] L. I. Anca, *The Land Book. Manual for the courses and examinations of land register officers including: the management and administration of land registers, the provisions regarding stamp duties and the collection of statistical data*, The Land Book Fund, Cluj, 1924, p. 17.

This solution is of some practical utility and should be adopted in our legal system, especially since it exists in German law. See F. Bauer, *German Land Books*, in R.R.D.P. no. 4/2007, p. 26, text and note 35, where the author offers, as an exception to the principle of relativity of l.r. entries, the case of art. 40 of the GBO (Grundbuchordnung) according to which, if an heir wants to alienate an inherited real right over an immovable, he can transfer ownership of it without his prior registration, so the heir „does not have to start the procedure of his registration which is of no use to him if he immediately loses his right".

[19] C. Negrea, *Local civil legislation remaining in force after the extension of the civil legislation of the Old Kingdom. Book I. Introduction. Part I: land books. Course held at the Faculty of Law in Cluj-Sibiu, in the school year 1943/1944*, „Cartea românească din Cluj" bookstore, Sibiu, 1944, p. 105.

4. The need for the tax attestation certificate

Following these considerations, we are of the opinion that, in the case mentioned above, resolved by the Bucharest Court of Appeal, the notary was not at fault at all regarding the application of art. 887 para. (3) CC. This does not mean, however, that the situation in question was flawlessly managed by him.

In the court decision there are no references to additional analyzes, but, in our opinion, it would have been more interesting to be checked by the inspectors from the Ministry of Justice the compliance with art. 159 para. (5) from the Fiscal Procedure Code[20]: „For the alienation of the ownership of buildings, land and means of transport, the owners of the assets being alienated must present tax attestation certificates certifying the payment of all payment obligations owed to the local budget of the administrative-territorial unit in which range the property being disposed of is tax registered, according to para. (2). For the asset that is being alienated, the owner of the asset must pay the tax due for the year in which the asset is alienated, unless for the asset that is alienated the tax is owed by a person other than the owner".

This article is the reason why, in general, notaries do not authenticate, on the same day that an heirship certificate was issued, deeds of transfer of ownership by which the heirs alienate real estate or means of transport included in the estate.

It is therefore not about the fear of art. 887 para. (3) CC, but the need for the alienator from a transfer of ownership of an immovable property or means of transport to present a tax attestation certificate. As can be seen from the reading of art. 159 para. (5) Fiscal Procedure Code the tax attestation certificate must be obtained *by the owner* and certify that the payment obligations owed to the local budget of the administrative-territorial unit in whose jurisdiction the asset being sold is registered have been paid, *also by the same owner*. These obligations may not only be related to the property alienated, but – because the text does not distinguish – they can be any kind of obligations owed by that owner to the local budget, such as, for example, taxes due for *other* assets than the alienated one or fines.

However, for instrumenting the heirship certificate, the tax attestation certificate necessary for the debate of the succession procedure is issued in the name of the deceased and certifies the payment *by the deceased* of the obligations owed to the local budget. In addition, this tax attestation certificate has a partially different legal regime (e.g., according to art. 160 Fiscal Procedure Code). Consequently, this tax attestation certificate obtained for the succession debate cannot be used by the heirs for alienation, for the simple reason that, the heirs being the owners following the inheritance, there are no tax attestation certificates issued in their name (yet).

That being the case, in order to comply with art. 159 para. (5) Fiscal Procedure Code, after the issuance of the heirship certificate, the heirs must appear before the local taxes and duties department and request the modification of the fiscal registration. Then, if they still wish to dispose of the immovable property or means of transport included in the estate, they must request tax attestation certificates for the transfer, in which they appear as owners. Only then can the deed of alienation of the respective property be executed.

It is therefore very unlikely that all these operations can be carried out in one day[21]. However, it is not impossible. As an exception (especially in smaller towns), there may be

[20] Law no. 207/2015 on the Fiscal Procedure Code was published in Of. M. no. 547 of July 23rd, 2015.

[21] For this reason (and *not* for the reason that the final minute would not be an authentic document, as art. 113 par. (2) LNP is erroneously interpreted in notarial or judicial practice; e.g., Court of Marghita, civil judgement no. 891 of June 24th, 2014, available at www.rolii.ro, last accessed on March 22nd, 2023) neither

cases in which, for example, the heirship certificate is issued in the course of one morning, then the heirs present themselves at the local taxes and duties department and succeed in changing the fiscal registration and obtaining new tax attestation certificates, so that, in the afternoon or evening, the property in question can be transferred. It all depends on the efficiency of civil servants and their workload.

5. Conclusions

According to art. 35 para. (2) from Law no. 7/1996, on the basis of the l.r. extract for authentication, the public notary can perform all the notarial operations necessary to draw up the act for which it was requested.

Art. 887 para. (3) CC *does not* stop, in our opinion (unfortunately, contrary to an important segment of the practice of the courts), the authentication of deeds of transfer of real estate rights that have been included in the inheritance estate mentioned in a certificate of heirship issued on the same day as the one on which the authentication is desired. This is thanks to art. 893 letter b) and art. 894 CC, which enshrine, in order to respect the principle of relativity of l.r. entries, the possibility for a person to register his right in the l.r. following successive transmissions, provided that all successive acquisitions are registered simultaneously.

art. 113 para. (3) LNP can be used: „If the heirs have divided their assets by will, in the minute (the final minute from the notarial succession procedure – o.p., A.A.M.) the method of partition and the inheritance assets assigned to each will be shown. The deed of partition may be included in the final minute or may be drawn up separately, in one of the forms prescribed by law".

THE PROCEDURE FOR ASCERTAINING THE UNWORTHINESS OF THE HEIR AND THE PRINCIPLE OF THE PRESUMPTION OF INNOCENCE – COMPATIBILITY EXAMINATION FROM THE PERSPECTIVE OF THE E.CT.H.R.. STANDARDS

Alin Petrea[1]

Abstract

Succession indignity presents the features of a civil penalty. Some cases of indignity are based on the commission of illegal acts which, at the same time, meet the constitutive elements of a crime; for the latter cases of indignity, the Civil Code establishes the possibility of their detention by the civil court in the event that the criminal process has been completed by pronouncing a solution of classification/termination of the criminal process derived from the death of the perpetrator, the incidence of pre-conviction amnesty or as a result of the intervention of the prescription of criminal liability. Therefore, the civil court has the task of verifying the commission of the deed and its criminal character in order to be able to establish, respectively declare the unworthiness of the defendant, a context in which the presumption of innocence of the perpetrator becomes applicable. The right to respect the presumption of innocence implies, among other things, the obligation of the public authorities, including the courts, not to pronounce on the criminal guilt of a person in a procedure other than the criminal one, whenever the criminal process directed against the perpetrator was terminated without pronouncing his conviction. There is, therefore, a normative tension between art. 958 para. (2) and art. 959 para. (4) of the Civil Code, on the one hand, and art. 6 par. 2 E.C.H.R.., on the other hand. Thus, it is necessary to identify a compromise solution that allows the harmonization of the national provisions listed in art. 958 para. (2) and in art. 959 para. (4) of the Civil Code with the principle of presumption of innocence. The solution identified by us is that of the compliant interpretation of art. 958 para. (2) and of art. 959 para. (4) of the Civil Code, related to art. 6 par. 2 E.C.H.R.

Keywords: *indignity, presumption, innocence, compatibility.*

1. Introductory considerations regarding inheritance indignity

1.1. The history and legal nature of the institution of indignity of succession

The matter of inheritances has presented a constant interest for legislators over time, as through this institution the preservation of properties within the family is ensured and, thus, the cult of family solidarity is perpetuated[2].

Starting with Hammurabi's Code[3] and passing through Roman imperialism[4], succession

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[2] F. Laurent, *Principes de droit civil français, ed. 4th,* vol. VIII, Brussels-Paris, 1887, pp. 559-560, *apud.* M. Eliescu, *Inheritance and its devolution under the law of the Romanian Socialist Republic*, Publishing House of the Academy of the Socialist Republic of Romania, Bucharest, 1966, pp. 21-22.

[3] For the transliteration of the text, see R.F. Harper, *The Code of Hammurabi, King of Babylon*, The University of Chicago Press, Callaghan & Company, Chicago, 1904.

[4] R. Zimmermann, in Reid, Kenneth G.C., et al., editors, *Exploring the Law of Succession: Studies National, Historical and Comparative*, Edinburgh University Press, 2007, pp. 27-48, JSTOR, http://www.jstor.org/stable/10.3366/j.ctt1r2553, accessed 05/02/2023.

law, as a species of civil law, appeared in late Romanian feudalism through custom and imperial rules[5], in order to later consolidate its status as written law through the adoption, under the influence of the western French and Austrian codifications, of the Callimachus Code in 1817, in Moldova, as well as the Caragea Legislation in 1818, in Wallachia[6]. The continuity of the regulation was ensured by the adoption of the Civil Code of 1864[7] and, recently, of the new Civil Code[8].

In tandem with the emergence and development of succession law, the institution of indignity of succession was also regulated. Thus, within paragraph 158 of Hammurabi's Code, the expulsion from the house of the son who, after his father's death, maintains love relations with his father's main wife who gave birth to children is provided for.[9]

In Roman law, successional indignity was not regulated in the imperial period[10], being codified for the first time during the reign of Emperor Justinian, who used the concept of *indignity*[11] in the Codex and Digeste[12], a concept under the dome of which entered the most diverse acts, starting with causing death the deceased[13] or insulting him[14], and up to the deed of the unworthy to exercise acts of illicit trade[15].

The old Romanian law only partially knew the institution of indignity of succession. While the Callimachus Code allocated paragraph 695 to the unworthiness (unworthiness) of succession[16], which included in the sphere of unworthiness facts such as the intentional injury of the physical integrity of the deceased, his wife or his children by the unworthy, slandering the deceased or embezzlement of his wealth, the Caragea Legislation only regulated the institution of disinheritance[17].

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[5] D. Alexandresco, *Principles of Romanian civil law, vol. II*, SOCEC & Co., Bucharest, 1926, p. 14.

[6] A. Murphy, *Indignity of succession and disinheritance*, Universul Juridic Publishing House, Bucharest, 2022, p. 23.

[7] The Civil Code was decreed on November 26, 1864, promulgated on December 4, 1864 and implemented on December 1, 186, according to https://legislatie.just.ro/Public/DetaliiDocument/1.

[8] Law no. 287/2009 regarding the Civil Code, republished in M. Of. no. 505 of July 15, 2011, rectified in M. Of. no. 246 of April 29, 2013.

[9] According to R.F. Harper, op. cit., „*If a man. after (the death of) his father, be taken in the bosom of the chief wife (of his father) who has borne children, that man shall be cut off from his father's house*".

[10] MD Bob, *Inheritance problems in the old and new Civil Code*, Universul Juridic Publishing House, Bucharest, 2012, p. 111.

[11] To which the etymon *indignis* corresponds.

[12] A. Murphy, *idem*, p. 14. For the exposition of the assumptions of indignity, see the list elaborated by the author on pages 15-17 of the work. For the opinion according to which indignity originates from the concept of ereptorium, constituting, initially, a presumed disinheritance, see M. Eliescu, *idem*, p. 72.

[13] *Digests*, 34.9.2, 38.2.16.5, *apud.* A. Murphy, *idem*, p. 15.

[14] *Digests*, 34.9.9.1, *apud.* A. Murphy, *idem*, p. 15.

[15] *Digests*, 34.9.1, *apud.* A. Murphy, *idem*, p. 15.

[16] According to which „*those who with bad conscience harmed or were tempted to harm the honor, body or property of the one from whom they inherited, the children, parents or his wife, and thereby made themselves worthy of lawful punishment, he is considered unworthy of that inheritance until then, until it is clearly proven from the circumstances that they have forgiven him (§§ 30, 31 and 1734); and those who did not try in every way to disenslave his relatives, who had fallen into slavery, is considered unworthy of his inheritance (§ 978)*" – A. Rădulescu (coordinator), A. Costin, V. Grecu, V. Gaftoescu, C. Tegăneanu, G. Vlădescu-Răcoasa, A. Sava, E. Herovanu, N. Daşcovici, V. Dongoroz, I. Rosetti-Bălănescu, M. Clarian, N. Cojan, A. Teodorescu, G. Cronţ, R. Dimiu, O. Sachelarie, G. Nicolaiasa, *The Calimachian Code, Critical Edition*, Publishing House of the Academy of the Romanian People's Republic, 1958, p. 291.

[17] D. Alexandresco, *idem*, p. 35. The digital version of this legislation can be consulted at https://bcub.ro/lib2life/Legiuirea%20Caragea_Stoenescu%20Dem_Craiova_1905.pdf, where the work is available under the name *Legiuirea Caragea (after the 1818 edition), preceded by the documents regarding its*

In the old Civil Code, inheritance indignity was regulated under art. 655-658 as a negative condition of the right to inherit. Qualified legally as a civil penalty[18], the indignity of succession operates when: 1. the unworthy was convicted for the intentional murder of the deceased[19], 2. the unworthy made a capital accusation against the deceased which was found to be slanderous by a judgment final judicial decision[20] and 3. the unworthy person did not denounce to the justice, by formulating a complaint, the commission of the crime of murder against the deceased by another person[21]. In essence, the function of the unworthiness of the successor was to remove from the inheritance the successor who, through various illegal actions or inactions committed against the deceased or in connection with his death, proved not to deserve, from a moral perspective, the benefit of reaping the fruits of labor the deceased.

The new Civil Code significantly innovates in the matter of indignity of succession, whose legal seat is represented by the provisions of art. 958 – art. 961. Thus, through the process of legal acculturation[22], the editors of Law no. 287/2009 regarding the Civil Code established two distinct categories of indignity, namely: legal indignity (art. 958 of the new Civil Code[23]), respectively judicial indignity (art. 959 of the new Civil Code[24]). The cases of indignity regulated by the two categories consist, in essence, in the commission by the unworthy, with intention, against the *de cujus* or another successor, of serious acts of physical or mental violence, or of intentional acts, animated by bad faith, by which the unworthy seeks to hide, alter, destroy or falsify the will of the deceased, or to prevent the bequeather from drawing up, modifying or revoking the will. The differences between the two categories of indignity are only in terms of the legal regime, not in terms of the effects produced, in the sense that, while legal indignity operates by virtue of the law, the role of the court being only that of ascertaining it upon request, unlimited in time, of any interested

preparation and annotated with the jurisprudence of the High Court of Cassation from 1879 –1900 and with the various amending legislations.

[18] M. Eliescu, *idem*, p. 73; St.D. Cărpenaru, *Civil Law, Intellectual Creation Rights, Successions*, Didactic and Pedagogical Publishing House, Bucharest, 1971, p. 174; D. Chirică, *Civil law. Successions and wills*, Rosetti Publishing House, Bucharest, 2003, p. 50.

[19] We have in mind the crime of simple murder, especially serious or any other crime that absorbs in its content murder, regardless of whether the deed was consummated or remained in the stage of attempt and regardless of the form of criminal participation held in the charge of the unworthy – author, co-author, instigation or complicity.

[20] The decision could be criminal, as a consequence of committing the offense of slander, or civil, as a consequence of a civil suit filed in this regard by the deceased against the unworthy, given that the law does not distinguish.

[21] For the analysis of these assumptions of indignity, see, e.g., M. Eliescu, *idem*, pp. 73-75, A. Murphy, *idem*, pp. 51-63.

[22] The sources of inspiration were, according to the Statement of Reasons (available in Word format at www.juridice.ro.), the French Civil Code and the Quebec Civil Code.

[23] Which provides, in para. (1), the following: „*It is legally unworthy to inherit: a) a person criminally convicted for committing a crime with the intention of killing the person leaving the inheritance; b) 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 would have restricted the vocation to the inheritance of the perpetrator „*.

[24] Which disposes, at para. (1), that „*The following may be declared unworthy of inheriting: a) a person criminally convicted for committing, with intent, against the bequeather 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 deceit or violence, prevented the one leaving the inheritance from drawing up, modifying or revoking the will*".

person or even ex officio, the judicial indignity is declared only at the request of an interested successor, within a one-year statute of limitations, and both produce, as an effect, the removal of the indignity both from the legal inheritance and from the testamentary, unworthy who will not be able to collect even the inheritance reserve. It is also regulated under art. 961 para. (1) from the new Civil Code, the possibility of the bequeather to forgive the unworthy, with the consequence of removing the effects of the unworthy. The two elements of novelty, previously evoked, are intended to outline the legislator's vision in the matter, namely moderate legislation, a process that involves harmonizing the public interest, expressed through the need to protect public morals, with the private interest of the competing heirs, embodied here in the right to collect the inheritance or a larger share of it.

The normative reconfiguration of the indignity of succession in the new Civil Code brought back to the center of doctrinal debates the issue of the legal qualification of the institution[25], the opinions expressed gravitating around three possible qualifications: civil sanction, civil penalty and presumption of disinheritance. We appreciate, as a preliminary, that *the presumption of disinheritance* cannot be joined, as an alternative, to the first two legal qualifications, since, methodologically, such a joining cannot be accepted; we consider that, in the process of determining the legal nature of a concept, the candidate legal categories must be part of the same set of elements. However, here, *the sanction* and *the civil penalty* are notions of material law, while *the presumption* is a notion of procedural law, which is why they cannot be joined to reach, by exclusion, the determination of the legal nature of the unworthiness of succession. We consider that, since the indignity of succession is, through the prism of the effects produced, an institution of substantive law, its legal nature must also be borrowed from the matter of substantive law; therefore, it remains to determine whether the disinheritance is a civil sanction or a civil penalty. The differences between the two legal concepts – the civil sanction and the civil penalty – are located in two planes of reference: the effects produced[26], respectively the function exercised. In concrete terms, civil sanctions have a patrimonial character and exercise a predominantly reparative function; instead, civil penalties have a personal character and the main function is to punish the culprit. Given that the inheritance unworthiness only concerns the unworthy, its legal effects not being transmissible *mortis causa* and not affecting persons other than the unworthy, and taking into account that the purpose pursued by its regulation is, first of all, to remove the unworthy from the inheritance lui de cujus, *i.e.* to punish evil with evil, we appreciate that the legal qualification of the analyzed institution as a *civil penalty* is correct[27].

[25] For a synthesis of these debates, see A. Murphy, *idem*, pp. 86-87.

[26] In the same sense, J. Kocsis, P. Vasilescu, *Civil Law. Successions*, Hamangiu Publishing House, Bucharest, 2016, p. 17.

[27] In the same sense, but citing other reasons, see C. Macovei, M.C. Dobrila, in Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *New Civil Code. Commentary on articles*, Ed. C.H. Beck, Bucharest, 2014, p. 1079, respectively B. Pătraşcu, I. Genoiu, in M. Uliescu (coordinator), *New Civil Code. Studies and comments, vol. II*, Universul Juridic Publishing House, Bucharest, 2013, pp. 607-608. In the opposite sense, see F. Deak, R. Popescu, *Treaty of Succession Law. Vol. I. Legal inheritance, 3rd edition, updated and completed*, Universul Juridic Publishing House, Bucharest, 2013, pp. 95-96, footnote no. 3.

1.2. The relevance of the historical exposition and the legal nature of the succession indignity in the present study

In the preceding, I noticed that, regardless of the analyzed historical period, the assumptions of unworthiness are based, in essence, on the lack of moral probity of the successive unworthy person in relation to his family, so on a moral imperative that requires respect for family relationships and, correlatively, the punishment of those who violate them.

At the same time, we found that, having as its main purpose the punishment of the unworthy, the successional unworthiness falls under the category of civil penalties.

Having this foundation and pursuing this goal, inheritance indignity is often located at the confluence of civil law and criminal law. The proof of this positioning is, moreover, the inclusion of some assumptions of indignity both in the sphere of civil law and in the sphere of criminal law[28]. In other words, it often happens that the illegal-civil deed that attracts the finding, respectively the declaration of the unworthiness of the successor constitutes, at the same time, a crime.

In this context, the problem arises of delimiting the procedure for ascertaining/declaring the hypothesis of unworthiness to inherit from the criminal procedure that aims to hold the unworthy person criminally liable for the crime that causes his unworthiness, as well as, if necessary, the problem of applying some concepts specific to criminal law in the perimeter of procedural and substantive civil law.

First of all, we mention that, in the civil process, the finding/declaration of unfitness to inherit is carried out exclusively in order to remove the unfitness from the *de cujus'* inheritance. This characteristic is extremely important, since its appropriation allows the finding that the analysis of the civil court regarding the hypothesis of incident indignity must not, however, exceed the scope of civil law, both at the level of formal discourse and, as we will find, at the level analytical. Instead, the purpose of the criminal process is to hold the unworthy person criminally liable, so to punish him, without having any importance, in this framework, the effects of his deed in terms of succession law.

Secondly, we note that, although indignity is a specific institution of civil law, it becomes effective, sometimes, through specific institutions of criminal law – *crime*, conviction. From this it follows that the civil process, although it is distinct from the criminal one, must take into account some elements of criminal law or, in other words, the civil court entrusted with the finding/declaration of unworthiness is obliged to take into account the rulings of the criminal court.

Finally, we appreciate that the borrowing of some concepts of criminal law to be applied in the civil process with the object of ascertaining/declaring unworthiness should not only concern the level of substantive law. On the contrary, the analysis of material law concepts, in a civil process, must be accompanied by the criminal procedural guarantees that protect the individual freedom of man, guarantees that include the right to respect the presumption of innocence.

As such, in the judicial procedure for ascertaining/declaring the unworthiness to inherit, the civil court is required, when analyzing the existence of the illegal act committed by the

[28] We consider, in the context of the new Civil Code, the provisions of art. 958 para. (1) and of art. 959 para. (1) lit. a). Of course, subject to the fulfillment of certain conditions, including the assumptions of indignity regulated by art. 959 para. (1) lit. b) and c) may constitute forms of criminal offence.

unworthy, an act capable of qualifying as a crime, to respect, within certain limits, the guarantees proceedings of the accused in the criminal trial.

2. The legal procedure for ascertaining/declaring the unworthiness of the successor

With a preliminary title, we specify that, in the context of this analysis, only the procedure for ascertaining/declaring the unworthiness of the successor is of interest for those cases of unworthiness that can wear, at the same time, both the legal garment of civil wrongdoing and that of criminal wrongdoing. At the same time, only the procedural framework of finding/declaring indignity is relevant, not the legal regime for invoking the assumptions of indignity.

The old Civil Code did not contain any express regulation of the procedure for ascertaining/declaring the unworthiness of the heir. The doctrine states, however, that for the *attempt on the life of the deceased*, respectively *the slanderous capital charge*, the unworthiness of the successor could only be established to the extent that he had been convicted, by a final criminal decision, for the action, consummated or remaining in the attempt stage, for having killed the author of the succession or for slanderous denunciation[29]; the termination of the criminal action by prescription, the death of the perpetrator or his acquittal prevented the finding of indignity[30]. On the other hand, for the third hypothesis of unworthiness to inherit, namely the act of the unworthy not to denounce the murder of which the deceased was the victim, the doctrine does not resume this condition, considering that, in this case, the definitive criminal conviction of the successor is no longer necessary[31]. The previous considerations allow us to conclude that, under the empire of the old civil regulations, the hypotheses of unworthiness of succession could be ascertained/declared as follows: exclusively through a final criminal judgment of conviction, for the hypotheses regulated by art. 665 para. (1) and (2) of the old Civil Code; directly, by pronouncing a final criminal conviction, or incidentally or directly, during the civil process, for the hypothesis regulated by art. 665 para. (3) from the old Civil Code.

Unlike the old Civil Code, in the new Civil Code the procedure for ascertaining/ declaring the unworthiness of the successor is expressly regulated, being deduced from the corroborated interpretation of the provisions of art. 958 para. (1) and (2), respectively of the provisions of art. 959 para. (1) and (4) of the new Civil Code.

Thus, in the content of art. 958 para. (1) lit. a) and b) from the new Civil Code[32], as well as in the content of art. 959 para. (1) lit. a) from the new Civil Code[33], the phrase *criminally convicted person* is used, from which we deduce that, in order to retain these cases of indignity, the definitive conviction of the successor for the acts that attract indignity is

[29] M. Eliescu, *idem*, pp. 74-75.

[30] *Ibidem*, p. 74.

[31] *Ibidem*, p. 75.

[32] According to which, „*It is legally unworthy to inherit: a) a person criminally convicted for committing a crime with the intention of killing the one who leaves the inheritance; b) 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 the inheritance of the perpetrator*".

[33] According to which, „*The following may be declared unworthy to inherit: a) a person criminally convicted for committing, with intent, against the bequeather serious acts of violence, physical or moral, or, as the case may be, acts that resulted in the death of the victim*".

required, following the civil court, in the process of debating of the de cujus' succession, to ascertain/declare the unworthiness of the successor incidentally[34]. Therefore, as a rule, the assumptions of indignity regulated by art. 958 para. (1) lit. a) and b) and art. 959 para. (1) lit. a) from the new Civil Code, they derive from the criminal judgment of conviction, the civil court not doing anything other than to ascertain what the criminal court has already retained and, subsequently, to frame the factual hypothesis in a case of indignity[35]. Practically, in these situations, the judicial investigation necessary for the purpose of clarifying the circumstances of the case relative to the cases of indignity, which should have been carried out by the civil court, is replaced by the findings of the criminal court.

It may happen, however, that the criminal process directed against the potentially unworthy successor ends prematurely or cannot be initiated as a result of the emergence of some procedural impediments, such as the death of the successor, the prescription of criminal liability, the withdrawal of the prior complaint, the pre-conviction amnesty, the incidence of a causes of non-punishment etc.[36] In such situations, the pronouncement of a definitive criminal judgment condemning the successor for the commission of acts that would attract his indignity appears to be impossible, with the consequence, difficult to accept, of opening the possibility of the successor to collect the inheritance of his *de cujus* despite the commission by this of reprehensible acts against the deceased or a successor competitor. Anticipating these potential prejudicial and unfair consequences, as well as out of the desire to rectify the shortcomings of the old legislation[37], the editors of the new Civil Code provided, within art. 958 para. (2), respectively art. 959 para. (4) sentence I, that, when the conviction for the facts mentioned in art. 958 para. (1), as well as in art. 959 para. (1) lit. a) is prevented by the death of the author of the deed, by amnesty or by the prescription of criminal liability[38], indignity operates/can be declared if those facts were ascertained by a final civil court decision. In this way, the obligation[39], respectively the possibility[40] of the

[34] We believe that it is not necessary to formulate a separate claim with the object of ascertaining/declaring the unworthiness of the guilty successor, as long as the court has already been charged with debating the succession of the deceased, an operation that presupposes, according to art. 984 para. (1) C.proc.civ., establishing the quality of the successor and the share-parts, thus including the verification, in the person of the successors, of the meeting of the three conditions necessary to come to the inheritance, conditions among which is that of not be unworthy and resulting from the criminal judgment.

[35] In the same sense, F. Deak, R. Popescu*, idem*, pp. 107-108.

[36] The reasons for the termination of the criminal process are regulated by art. 16, para. (1), lit. e) – j) C.proc.pen. For a detailed analysis of them, see I. Kuglay, in M. Udroiu (coord.), *Criminal Procedure Code. Commentary on articles, ed. 3rd*, Ed. C.H. Beck, Bucharest, 2020, pp. 152-166.

[37] In the same sense, F. Deak, R. Popescu, *idem*, p. 97.

[38] We consider that, for the sake of reason and in order to guarantee an effective and concrete right to the de cujus' heirs to remove the unworthy from the inheritance, the solutions regulated by art. 958 para. (2), respectively of art. 959 para. (4) sentence I of the new Civil Code must be extended to the other cases of termination of the criminal process stipulated by art. 16 para. e) – j) C.proc.pen. Until the time of rectification of the legislation in this sense, the lack of regulation can be remedied by the compliant interpretation of art. 958 para. (2), respectively of art. 959 para. (4) sentence I of the new Civil Code, with art. 1 of Protocol no. 1 to the European Convention on Human Rights, which guarantees the right to property, the right to property which includes, as a species, the right of the heirs to collect the part of the inheritance due to them after the death of the deceased, in the sense of being appreciated, in the practice of the courts, that the right of the heirs to collect the *de cujus'* inheritance is concrete and effective only to the extent that art. 958 para. (2), and art. 959 para. (4) sentence I of the new Civil Code applies in the event of the occurrence of any procedural impediment that puts an end to the criminal process.

[39] In the case of legal indignity.

civil court to establish/declare the unworthiness of the succession is established [for the commission by the successor of those acts that could have attracted criminal liability and which, at the same time, are circumscribed to the cases of unworthiness regulated by Art. 958 para. (1) lit. a) and b) and art. 959 para. (1) lit. a) from the new Civil Code] directly, in the framework of a civil process in which, as a single object[41] or through a separate end of the request[42], the finding/declaration of the unworthiness of the successor of the guilty party is requested[43].

It is noted, therefore, that the hypotheses of unworthiness of succession which presuppose the commission by the unworthy person of a crime against the deceased or a competing successor can be retained either as a result of the pronouncement of a criminal judgment of conviction, or as a result of the pronouncement of a civil judgment[44]. In the latter case, the civil court partially subrogates the criminal court, being forced to ascertain the commission and criminal character of the acts that attract the indignity of succession.

3. The applicative values of the principle of the presumption of innocence in matters of succession

The presumption of innocence is the expression of a fundamental principle of the criminal process. In this sense, art. 4 para. (1) of the Code of Criminal Procedure[45] provides that „*Any person is considered innocent until his guilt is established by a final criminal decision*". The right to respect the presumption of innocence also has constitutional value, being regulated under art. 23 para. (11) of the Constitution of Romania, according to which „*Until the conviction is final, the person is considered innocent*".

The predominant field of application of the principle of the presumption of innocence is the criminal trial[46], considering that this constitutes a procedural guarantee, predominantly of evidence that benefits the accused, and which essentially assumes that the burden of proving the guilt of the accused rests with the Public Ministry, the accused taking advantage of any doubt that hovers over the accusatory act[47].

The presumption of innocence, however, exceeds the boundaries of a simple procedural right enjoyed by accused persons in criminal trials, having the legal nature of a fundamental right, given that, in the absence of such a categorization, the individual freedom of man could be put, often with great ease, under the question mark[48]. As proof of the fundamental

[40] In the case of judicial indignity.

[41] n this regard, see civil sentence no. 1292/2021, pronounced by the Petroşani Court on 07.08.2021, as well as civil decision no. 1615/2020, pronounced by the Gorj Court on 10.12.2020, both available at www.rejust.ro.

[42] The possibility of formulating an action with two distinct claims, the first having as its object the declaration of judicial unworthiness, and the second another request in matters of succession (e.g., the succession debate) was also admitted in the doctrine developed under the empire of the new Civil Code – C. Macovei, M.C. Dobrila, *idem*, p. 1008.

[43] In the same sense, F. Deak, R. Popescu, *idem*, p. 102.

[44] In a similar sense, see D. Chirică, *Treaty of civil law. Successions and liberalities*, Publishing House C.H. Beck, Bucharest, 2014, pp. 24, 26; A. Murphy, *idem*, pp. 93-94, 96.

[45] Law no. 135/2010, published in M. Of. no. 486 of July 15, 2010.

[46] In this sense, see G.Gr. Theodoru, I.-P. Chiş, *Treaty of Criminal Procedural Law, 4th Edition*, Hamangiu Publishing House, Bucharest 2020, p. 101. For the opinion that the presumption of innocence applies beyond the strict framework of the criminal process, see M. Udroiu, in M Udroiu (coordinator), *idem*, pp. 23-46.

[47] M. Udroiu, in M. Udroiu (coordinator), *idem*, pp. 29-41.

[48] In a similar sense, J.-F. Renucci, *European Treaty on Human Rights*, Hamangiu Publishing House, Bucharest, 2009, p. 496.

dimension of the right to respect the presumption of innocence, we remind you that this right is regulated in several international treaties, such as art. 6 par. 2 of the European Convention on Human Rights, art. 14 par. 2 of the International Covenant on Civil and Political Rights, art. 48 par. 1 of the Charter of Fundamental Rights of the European Union, art. 11 of the Universal Declaration of Human Rights.

By virtue of the qualification of the presumption of innocence as a fundamental human right, its field of application has gradually expanded to other areas of the law than the criminal one. Thus, the application of this principle was recognised, praetorian, in administrative[49], fiscal[50], customs[51] or competition law[52] matters, subject to the fact that the administrative/fiscal/customs/competition sanction applied constitutes, according to E.Ct.H.R.. jurisprudence. in the case of Engel v. The Netherlands[53], the expression of a *criminal charge*. The extension was made by the European Court of Human Rights in the process of interpreting art. 6 par. 2 E.C.H.R., according to which „*Any person accused of a crime is presumed innocent until his guilt is legally established*".

The expansionist current of the applicability of the principle of the presumption of innocence did not stop at the matters of repressive law. On the contrary, E.Ct.H.R. held that the right to be presumed innocent also applies in a civil trial, under certain conditions. Specifically, in the case of Agapov v. Russia[54], the Court held, in essence, that art. 6 par. 2 of the Convention protects, first of all, the right of any person to be presumed innocent until his guilt is proven according to the law, a right seen as a procedural guarantee applicable in the strict context of the criminal process; secondly, the Court held that the purpose of art. 6 par. 2 of the Convention is also to ensure the protection of persons who have been acquitted or in respect of whom the criminal process has ceased against them from being treated by the officials and public authorities of the state as if they were, in fact, guilty of the crime of which they were accused in the criminal trial, a context in which the person's right to reputation comes into question, as a component of the principle of the presumption of innocence; further, the Court rules that art. 6 par. 2 E.C.H.R.. it is also applicable in a civil procedure subsequent to the criminal one, provided, however, that there is a close connection between the two procedures[55]. Therefore, we note that art. 6 par. 2 of the European Convention on Human Rights, dedicated to the right to be presumed innocent, also guarantees the right of the accused to be presumed innocent in a civil trial subject to the following four conditions being met:

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[49] See, e.g., the Case of Lutz v. Germany, application no. 9912/82, Judgment of August 25, 1987, par. 54, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57531%22]}.

[50] For the application of the right to a fair trial, which subsumes the right to respect the presumption of innocence, in fiscal matters, see the Case of Bendenoun v. France, application no. 12547/86, Judgment of February 24, 1994, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57863%22]}.

[51] Case of Salabiaku v. France, no. 10519/83, Judgment of October 7, 1988, available online at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57570%22]}.

[52] Case A. Menarini Diagnostics SRL v. Italy, application no. 43509/08, Decision of September 27, 2011, available online at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-106438%22]}.

[53] The case of Engel v. The Netherlands, the requests brought together with no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, Judgment of June 8, 1976, par. 80-88, available at https://hudoc.echr.coe.int/eng#{%22 itemid%22:[%22001-57479%22]}.

[54] Request no. 52464/15, Judgment of October 6, 2020, available at https://hudoc.echr.coe.int/eng#{%22 itemid%22:[%22001-204848%22]}.

[55] The previous conclusions are derived from the considerations found in paragraphs 31-33 of the previously cited decision.

1. the accused has been the subject of a judicial procedure in which a *criminal charge* has been formulated against him in the autonomous meaning assigned to this phrase by the E.Ct.H.R.[56];

2. the judicial procedure based on the „accusation in the criminal matter" must have ended with the pronouncement of an acquittal or termination of the criminal process;

3. initiation of a new procedure against the accused, of a civil nature this time;

4. the existence of a direct link between the initial *criminal procedure* and the subsequent civil procedure.

Therefore, we note, with the title of a preliminary conclusion, that, despite the appearances derived from the legal regulation, the principle of the presumption of innocence has the vocation to be applied in a civil procedure as well.

The finding, respectively the declaration of unworthiness to inherit, as regulated by art. 958 para. (2) and art. 959 para. (4) Civil Code, they are the subject of a civil procedure, being governed by the rules of the civil process.

Corroborating the previous conclusions, it follows that, for the application of the principle of presumption of innocence in the legal procedure for ascertaining/declaring the unworthiness of the successor, it is necessary to fulfill the four previously mentioned conditions. We believe that all four conditions are met.

Thus, first of all, we note that the applicability of art. 958 para. (2) and art. 959 para. (4) Civil Code is dependent on the prior formulation of a criminal charge against the unworthy successor, an accusation which, however, becomes void as a result of the intervention of the death of the unworthy successor, the prescription of his criminal liability or the incidence of pre-conviction amnesty. As such, since the first two of the four conditions play the role of prerequisites for the application of art. 958 para. (2) and art. 959 para. (4) Civil Code, the conditions are met, since in the absence of their fulfillment the question of applying art. 958 para. (2) and art. 959 para. (4) Civil Code.

Secondly, we have already found, previously, that the successional indignity based on the hypotheses regulated by art. 958 para. (1), respectively art. 959 para. (1) lit. a) from the new Civil Code it is established/declared in a civil procedure subsequent to the *criminal* one, either through the formulation of a main claim in this regard, or, as the case may be, incidentally, in a process having as its object debating the succession of the deceased. As such, the third condition is also met.

As for the last of the four conditions, namely the existence of a direct connection between the initial „criminal" procedure and the subsequent civil procedure, the Court considers that such a connection exists in those cases where, after the conclusion of the criminal process by pronouncing an acquittal or termination of the criminal process, the accused claims compensation for the damages caused to him during the criminal process[57]. We deduce, thus, that the referential element considered by the Court in determining the existence of the *direct link* between the two procedures is represented by the existence of an identity or, at least, connections between the cause of the civil action subsequently promoted and the relevant events produced during the criminal trial process (indicting the accused, sending him to court, his preventive arrest or at home, etc.). Applying this algorithm in the

[56] See the Engel v. Netherlands case, cited above.

[57] M. Udroiu, in M. Udroiu (coordinator), *idem*, p. 41, together with the jurisprudence and doctrine cited by the author.

context of our analysis, we observe that between the factual cause of the criminal accusation formulated within the criminal process completed by pronouncing a solution to terminate the criminal process, on the one hand, and the factual cause of the civil action having as its object the finding/declaration of unworthiness successors according to art. 958 para. (1), respectively art. 959 para. (1) lit. a) from the new Civil Code, for the cases of indignity regulated by art. 958 para. (1) and art. 959 para. (1) lit. a) from the new Civil Code, there is a perfect identity, the facts that justified the formulation of the criminal accusation being the same as those for the commission of which the finding/declaration of the unworthiness of the heir is requested. We consider, therefore, that the fourth condition is also met.

In conclusion, we note that the principle of the presumption of innocence has a general vocation to be applied within the legal, civil procedure for ascertaining/declaring the unworthiness of the heir.

4. Compatibility of art. 958 para. (2) and of art. 959 para. (4) of the Civil Code with the right to respect the presumption of innocence

When we analyze the compatibility of an internal legal norm with a conventional norm, stipulated in the E.C.H.R., we consider, in essence, whether the application of the internal norm by the national courts[58] is carried out in such a way as to prejudice the fundamental right established by the conventional norm. In other words, in the compatibility analysis, both the abstract configuration of the domestic legal norm is of interest[59], but especially the way in which the rule stipulated by the domestic law norm acquires efficiency when it is applied by the courts; for this reason, the compatibility of art. 958 para. (2) and of art. 959 para. (4) of the Civil Code with the right to respect the presumption of innocence must be investigated from two perspectives: i. the abstract configuration of art. 958 para. (2) and of art. 959 para. (4) of the Civil Code, respectively ii. the way in which art. 958 para. (2) and art. 959 para. (4) of the Civil Code are applied in jurisprudence.

In order to determine the compatibility relationship between two norms, one national and the other conventional, it is also necessary, separately from the previously mentioned checks, to outline the positive and negative obligations deriving from the conventional norm or, in other words, to determine the content of the conventional norm. Only after the prior establishment of the content of the two norms can they be viewed comparatively, and the analytical picture complete with the conclusion of the comparison.

Therefore, in the following we will analyze the compatibility between the norms promoting a reasoning in four stages: 1. determining the abstract configuration of art. 958 para. (2) and of art. 959 para. (4) of the Civil Code, 2. establishing the manner in which art. 958 para. (2) and art. 959 para. (4) of the Civil Code are applied in jurisprudence, 3. outlining the content of the principle of the presumption of innocence from the perspective of the treated subject and 4. formulating a conclusion on compatibility.

[58] And not only that, the consideration being valid also for the cases in which the application of the national norm is carried out by any other public authority vested with prerogatives of public law by the Romanian State, other than the courts.

[59] Which, as a rule, do not show signs of obvious incompatibility. An example of obvious incompatibility would be the regulation of an absolute legal presumption of guilt, which, being absolute, does not allow the accused to prove the contrary, with the consequence of flagrant violation of the right to respect the presumption of innocence and his right to defense.

4.1. The abstract configuration of art. 958 para. (2) and of art. 959 para. (4) of the Civil Code

According to art. 958 para. (2) of the new Civil Code, „*If the conviction for the facts mentioned in para. (1) is prevented by the death of the author of the deed, by amnesty or by the prescription of criminal liability, the indignity operates if those facts were ascertained by a final civil court decision*". In a similar sense, art. 959 para. (4) sentence I, according to which „*When the conviction for the facts mentioned in para. (1) lit. a) is prevented by the death of the author of the deed, by amnesty or by the prescription of criminal liability, indignity can be declared if those facts were ascertained by a final civil court decision*".

A first finding is that both legal norms contain references to cases of indignity that constitute the premise of their application. As such, art. 958 para. (2) and art. 959 para. (4) sentence I of the new Civil Code needs to be interpreted in conjunction with art. 958 para. (1), on the one hand, respectively with art. 959 para. (1) lit. a) from the new Civil Code, on the other hand.

Secondly, we note that both art. 958 para. (2), as well as art. 959 para. (4) sentence I of the new Civil uses, in two lines, in different contexts, the term facts, as follows: „*conviction for the facts mentioned in para. (1) lit. a)*", respectively „*indignity can be declared if those facts*". In the first context, the term facts is referred to the statement of the hypothesis of the rule – if the facts did not attract conviction and, therefore, were not found and qualified as crimes, while in the second context, for the statement of the provision of the rule – then the commission the facts and their criminal nature are ascertained by the civil court. Although the contexts of stating the term facts are different, we find that the mentioned facts must be the same, factually and legally, for the application of the rules.

Interpreting in conjunction with paragraph 958. (2) and art. 959 para. (4) sentence I of the new Civil Code, with art. 958 para. (1) and art. 959 para. (1) lit. a) from the new Civil Code, we come to the conclusion that the facts mentioned in art. 958 para. (2) and art. 959 para. (4) sentence I of the new Civil Code are the offenses for which the conviction referred to in 958 para. (1) and art. 959 para. (1) lit. a) from the new Civil Code. From here it follows that, in fact, the vested civil court, based on art. Art. 958 para. (2) and art. 959 para. (4) sentence I of the new Civil Code, with the finding/declaration of ineligibility to inherit for the hypotheses regulated by art. 958 para. (1) and art. 959 para. (1) lit. a) from the new Civil Code, must arrive at the following findings in order to postulate the indignity of the successor: i. the commission of the deed of indignity by the successor, in the version described by any of the hypotheses within art. Art. 958 para. (1) and art. 959 para. (1) lit. a) from the new Civil Code, ii. the criminal nature of this act. Practically, the civil court will have to rule on the criminal guilt[60] of the unworthy.

4.2. The manner in which art. 958 para. (2) and art. 959 para. (4) of the Civil Code are accepted in jurisprudence

In the national jurisprudence, I could identify only two decisions in which the issue discussed by us was analyzed. Therefore, we appreciate that, regardless of the content of these decisions, the rarity of the cases mentioned below prevents the formulation of a peremptory conclusion.

[60] Understood in a broad sense, as representing all the conditions of objective, subjective typicality, anti-legality and imputability required by art. 15 para. (1) of the Criminal Code for qualifying an act as a crime.

Thus, by civil sentence no. 1292/2021, pronounced by the Petroşani Court in file number 4788/278/2021[61], the court, investigating the existence of the case of indignity regulated by art. 958 para. (1) lit. a) from the new Civil Code, retained the following:

„From the economy of the provisions of art. 958 of the Civil Code, it follows that, in addition to the conditions related to the field, the finding of indignity requires the existence of a criminal judgment of conviction or, in the situation where the committed acts – alleged to attract indignity can no longer be the subject of a criminal file – the death of the perpetrator, amnesty, prescription, the indignity operates if those facts were ascertained by a civil court decision. Examining the files, the claims of the plaintiffs and the evidence administered in the case, the court notes that there is clear evidence that the said V.I. killed the named V.A.G., and later committed suicide, which is why the classification order was issued on 22.07.2020. As in the case it was proved that the defendant committed a crime which resulted in the death of the victim V.A.G., the conditions for indignity of succession being met, according to art. 958 para. 2 Civil Code, the court will admit the action and order the removal of the said V.I. from the succession of the deceased V.A.G., last domiciled in Petroşani, for disinheritance".

Upon a simple reading of the considerations, we notice that the court motivates its decision by holding the defendant responsible for committing a crime that resulted in the death of the victim, thus by using language specific to criminal matters.

In another case, the Gorj Court, pronouncing decision no. 1615/2020 in file number 18654/318/2019[62], noted the following:

„*The court also notes that, from the economy of the provisions of art. 958 of the Civil Code, it follows that, in addition to the conditions related to the field, the finding of indignity requires the existence of a criminal conviction or, in the situation where the committed acts – alleged to attract indignity can no longer be the subject of a criminal file – the death of the perpetrator, amnesty, prescription, the indignity operates if those facts were ascertained by a civil court decision. Practically, the existence of the act of killing and the attitude of the perpetrator's conscience and will in relation to what he committed must be established by a final civil decision, only in this way can the finding of legal unworthiness be requested*".

It can be seen how, in the second example, the court prefers a more moderate language, specific to civil law rather than criminal law, using expressions such as *the existence of the act of murder* in order to verify the condition of committing the act and *the attitude of the conscience and will of the author of the acts* in relation to what he committed in order to highlight the condition regarding the form of guilt with which the unworthy must have acted.

4.3. The content of the principle of the presumption of innocence

In the context of the present analysis, the content of the principle of presumption of innocence is relevant in procedures other than criminal ones, but which are related to the criminal one and are closely related to it.

The essence of this content is reproduced in the case of Minelli v. Switzerland[63], where the Court holds, in principle, that the presumption of innocence is violated when, without the

[61] Available at www.rejust.ro.

[62] Available at www.rejust.ro.

[63] Cererea nr. 8660/79, Hotărârea din 25 martie 1983, par. 37, disponibilă la adresa https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57540%22]}.

criminal guilt of the accused being previously established according to the law, as well as without having had the opportunity to defend himself, a court decision targeting him reflects the opinion that he is guilty; further, the Court shows that the presumption of innocence will be violated even if, formally, the criminal guilt of the accused has not been established, but part of the reasoning of the decision indicates that the court regarded the plaintiff/defendant (the accused in the criminal trial) as if would have been guilty. In the same sense, the doctrine states that the presumption of innocence imposes on the contracting states „the positive obligation to take the necessary measures to guarantee that, as long as the guilt of a suspected or accused person has not been proven according to the law, the public statements made by public authorities and judicial decisions, other than those relating to guilt, do not refer to that person as guilty"[64].

In particular, the Court established that a decision of a national court rejecting the applicant's (former accused) request for payment of compensation for his preventive arrest during the criminal trial that was terminated against him, motivated by the fact that, if the criminal trial would have continued, the administered evidence would have led, most likely, to the conviction of the accused, contrary to the presumption of innocence[65].

On the other hand, the Court established that the civil action having as its object the payment of compensations derived from the commission of an illegal act which meets, at the same time, the constitutive elements of a crime, is admissible, and can be filed by the victim of the illegal act in a civil process, contrary to the author of the illegal act, the accused against whom the initial criminal process was terminated[66].

The conclusions that can be drawn from the practice of E.Ct.H.R. are the following: 1. it is admissible to file a civil action based on an illegal act which, previously, constituted the cause of a criminal action extinguished by pronouncing a solution to terminate the criminal process, 2. within a civil process, connected to an terminated criminal process against the defendant/accused, the civil court, even if it analyzes the commission of the illegal act and the guilt of the author, cannot bring into question the criminal character of the act committed by the accused/defendant, not being able to establish, even incidentally, nor suggest his criminal guilt.

4.4. Conclusions on the compatibility of norms

Looking comparatively at the conclusions stated in points 1, 2 and 3, we deduce the following:

1. the legal configuration of art. 958 para. (2) and of art. 959 para. (4) of the Civil Code requires the civil courts to find, incidentally, that the unworthy has committed a crime with the form of guilt claimed by the criminal law, a finding that is incompatible with the jurisprudence of the E.Ct.H.R. developed around the principle of the presumption of innocence;

2. the jurisprudential echo of art. 958 para. (2) and of art. 959 para. (4) of the Civil Code is a timid and, at the same time, polyphonic one, the courts either venturing into cataloging, without reservations, the deed committed by the unworthy as a crime, or showing discretion

[64] M. Udroiu în M. Udroiu (coordonator), *idem*, p. 26.

[65] The case of Englert v. Germany, application no. 10282/83, Judgment of August 25, 1987, par. 37-39, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57480%22]}.

[66] The case of Ringvold v. Norway, application no. 3496/97, judgment of February 11, 2003, par. 37-38, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60933%22]}.

by converting the conditions of employment of criminal liability into conditions of engaging in tortious civil liability, an operation carried out by changing the linguistic tools used; as such, it cannot be concluded, at this point, that the practice

3. national courts would be compliant or non-compliant with E.Ct.H.R. standards, as there is a lack of significant jurisprudence on the issue.

5. Instead of conclusions – the compliant interpretation of art. 958 para. (2) and of art. 959 para. (4) of the Civil Code, by reference to art. 6 par. 2 E.C.H.R..

The compromise solution that we foresee in order to harmonize the national provisions listed in art. 958 para. (2) and in art. 959 para. (4) of the Civil Code with the principle of presumption of innocence is that of promoting, in judicial practice, a technique of compliant interpretation.

Thus, according to art. 20 para. (1) of the Romanian Constitution, „*The constitutional provisions regarding the rights and freedoms of citizens will be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party*". The constitutional norm regulates the rule of the compliant interpretation of the positive law by taking into account the norms of international law by which legislation is enacted in the matter of human rights and freedoms. More precisely, the rule requires that, whenever a national norm establishes a standard of protection of individual rights and freedoms lower than that established by an international treaty in the field of human rights, the national norm must be interpreted in the sense promoted by the international norm, in this way achieving a harmonization between the two legal orders – national and international.

The application of the rule of conforming interpretation within the present analysis requires the interpretation of art. 958 para. (2) and of art. 959 para. (4) of the Civil Code in conjunction with the standards imposed by art. 6 par. 2 E.C.H.R.. in the matter, as well as by referring to the relevant jurisprudence of E.Ct.H.R.

Specifically, to be able to interpret according to art. 958 para. (2) and art. 959 para. (4) of the Civil Code with art. 6 par. 2 C.E.D.O. it is necessary, first, to disclose the prejudicial consequences to the presumption of innocence that the application of art. 958 para. (2) and art. 959 para. (4) of the Civil Code by the national courts, and then identifying a solution to prevent their production.

We previously noted that the normative substance of art. 958 para. (2) and art. 959 para. (4) of the Civil Code creates the risk that, in jurisprudence, the national courts, in the process of analyzing the hypotheses of indignity regulated by art. 958 para. (1) and art. 959 para. (1) lit. a) from the new Civil Code, to verify the fulfillment of the conditions of employment of criminal liability in the charge of the unworthy and, also, within this verification, to use a language specific to the criminal matter from the repertoire which includes terms such as *crime*, *criminal resolution*, *immediate consequence*, *criminal guilt* etc. As such, a compliant interpretation of art. 958 para. (2) and art. 959 para. (4) of the Civil Code could be realized only to the extent that this risk would be excluded or, at least, reduced.

In order to be able to exclude or, at least, reduce the previously foreseen risk and, at the same time, to ensure to the competing heirs the possibility of removing the unworthy person

from the *de cujus* inheritance, so to be able to harmonize the two contradictory interests[67], we propose the following solution: 1. changing the legal object of the analysis of the civil court charged with verifying the incidence of one of the cases of indignity stipulated by art. 958 para. (1) and art. 959 para. (1) lit. a) from the new Civil Code, in the sense that the court's analysis will cover, specific to the case, the conditions of tortious civil liability instead of the conditions for engaging in criminal liability, as well as, subsequently, 2. the use by the court, in the argumentative process, of a language specific to civil law and tort liability. For example, for the case of indignity stipulated by art. 958 para. (1) lit. a) from the new Civil Code, the civil court must analyze: 1. whether *an illegal act* was committed consisting in the *killing* of the deceased by the successor whose unworthiness is requested to be ascertained, or, at least, whether *an attempt was made to kill* the deceased, 2. if the illegal act was committed with the form of guilt of the intention regulated by art. 16 para. (2) of the new Civil Code, 3. if the successor acted with *discernment*, in relation to *art. 1366 of the new Civil Code* and, finally, 4. if in the litigation there is no incident *exonerating liability* among those regulated by *art. 1351 – art. [68]1353*, respectively of *art. 1360[69], art. 1361[70], art. 1364[71] of the new Civil Code*.

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[67] The interest of the unworthy to have his presumption of innocence respected, respectively the interest of the competing heirs to remove the unworthy from the inheritance.

[68] Which regulates the following causes exonerating liability: force majeure, fortuitous event, exercise of rights.

[69] Self-defense.

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THE EFFECTS OF THE OPENING OF THE SUCCESSION OF THE PARTIES TO THE CONTRACT OF MANDATE ON THE PERFORMANCE OF SUCH AGREEMENT

Fabian-Eduard Crețu

Abstract

The death of a party is an event which can have significant repercussions on the contractual relationship in progress at that time. There are contracts which cannot continue, just as there are agreements which survive, being performed by the successors of the deceased parties, the successors being reputed as „continuators of the personality" of the deceased.

With regard to the mandate agreement, the death of the principal or of the proxy entails, in principle, the termination (in Romanian to be read as „caducitatea" and in French as „caducité") of the mandate contract, by virtue of its intuitu personae character. The solution is not a fixed, absolute one. The parties are free to provide contractually for the survival of the mandate in such a scenario.

At the same time, positive law enshrines certain exceptions where the mandate survives post-mortem, even in the absence of a contractual clause, justified by various practical reasons. The urgency of continuing to execute the mandate is one such reason for maintaining the mandate, but it is not the only one. In this material we have set out to analyse these hypotheses.

Keywords: *mandate; succession; deceased; termination; principal; proxy*

1. PRELIMINARY CONSIDERATIONS

The death of a natural person entails multiple consequences, both legal and non-legal. The legal effects are also varied. The opening of a succession brings with it a number of questions that need to be clarified. For example, a common question is: who are the heirs and how much is due to each? It's not the only one, of course. Before a successor exercises his or her right of inheritance option, he or she is tempted to analyze the content of the inheritance patrimony. In other words, the heirs are inclined to examine the desirability of accepting the inheritance.

As is well known, the Romanian legislator has adopted the theory of uniqueness of patrimony (in Romanian „teoria unicității patrimoniului"). A natural person is the holder of a single patrimony, as firmly stated in art. 31 para. (1) of the Romanian Civil Code. But what does a patrimony comprise? The same legal provision gives us the answer: a patrimony includes rights and obligations that can be evaluated in money.

Therefore, when opening the succession of a natural person, the transmission of the inheritance patrimony to the successors of the deceased will be in question. This inheritance is composed of the rights and obligations of the deceased. These rights and obligations may arise from several sources. In this material a particular aspect of the transmission of contractual rights and obligations will be dealt with.

The causes of termination of contracts are listed in art. 1321 of the Romanian Civil Code:

„*The contract shall terminate, under the law, by performance, agreement of the parties, unilateral termination, expiry of the term, fulfilment or, as the case may be, non-fulfilment of the condition, fortuitous impossibility of performance, as well as for any other cause provided for by law.*"

It is clear from the wording of this legal provision that we are in the presence of a simple non-exhaustive list, as the legislator did not intend to include in a single provision all the grounds for termination of agreements. This is a natural choice. This does not mean that the enumeration is immune from criticism, as various objections to the legislator's choice can be imagined. For example, it should be noted that (i) termination of conditional contracts through fulfilment of the resolutory condition or failure to fulfil the suspensive condition is distinguished from (ii) termination of contracts through the occurrence of the fortuitous impossibility of performance. Rigour, however, leads us to identify two manifestations of a single cause of termination[1], that would be designated in Romanian as „caducitatea" and in French as „caducité". From now on, we will refer to this specific case of termination of contracts by the term „caducity".

Although it does not enjoy a legal definition, unlike the French Civil Code, the existence of caducity in Romanian civil law as a legal institution in its own right is, we believe, indisputable. The Romanian civil legislator refers on many occasions to the caducity of certain legal acts[2]. It is necessary to point out that it is not only in these explicit hypotheses that caducity can be retained.

A general definition of caducity[3] that can be taken into consideration is that provided by the French Civil Code. Art. 1186 para. (1) provides as follows:

„*A validly formed contract is affected by caducity if one of its essential elements disappears.*"

The hypothesis of the death of a party is also subsumed by the caducity[3]. Of course, not all agreements are automatically terminated by the mere fact of the death of one of the parties. There are agreements which survive the death of the contracting parties, being performed by the heirs of the deceased party. However, there may be contracts which can no longer be continued. The idea is expressed by art. 1282 para. (2) of the Romanian Civil Code:

„*On the death of a party, his contractual rights and obligations pass to his universal successors, unless the law, the stipulation of the parties or the nature of the contract provides otherwise.*"

In the following we shall analyze the impact of the death of the principal or proxy on the fate of the contract of mandate.

2. THE CADUCITY OF THE MANDATE FOLLOWING THE DEATH OF THE PARTIES. CASES OF POST-MORTEM SURVIVAL OF THE MANDATE

Traditionally, it is considered that the contract of mandate constitutes an intuitu personae agreement, as it would be based on „*the trust that the principal has in the proxy*"[4]. Thus, the contract of mandate „*is concluded in consideration of the person of the proxy, because such proxy is entrusted with the conclusion of legal acts on behalf of and in the name of the principal*"[5].

This feature also explains the legal solution enshrined in art. 2030 para. (1) lit. c) first sentence of the Romanian Civil Code, which states that the mandate also ceases upon „*the death, incapacity or bankruptcy of the principal or the proxy"*[6].

But things are not that simple. Despite the intuitu personae character of the mandate, the legislator has established certain derogatory hypotheses, in which the death of the principal or of the proxy does not determine the caducity of the agreement, and the mandate continues to exist after the unfortunate event. As we shall see, these exceptions are designed to meet frequently encountered practical needs.

A first derogatory hypothesis can be found in the last sentence of art. 2030 para. (1) letter c) of the Romanian Civil Code, which states:

„*(...) when it concerns the conclusion of successive acts in the context of an activity of a continuing nature, the mandate shall not cease if this activity is in progress, without prejudice to the right of revocation or waiver of the parties or their heirs.*"

It should be noted that, in an appeal in the interest of the law, the High Court of Cassation and Justice has ruled[7], with general binding effect, that this last sentence corresponds only to the cases of termination of the mandate provided for in letter c) of para. (1) of art. 2030 of the Romanian Civil Code, not those of points a) and b).

Various examples that would correspond to this provision have been illustrated in the doctrine[8]. For example, the case of the attorney-at-law who has undertaken the obligation to take certain steps in the name and on behalf of the client in order to obtain the restitution of immovable property under special remedial laws. Even if the principal is deceased, the lawyer is bound to continue to carry out the agreed operations. It goes without saying that if the principal has no heirs, the contract can no longer continue and is terminated following the death of the principal (i.e. the client). Another illustration is that of the proxy who has undertaken to purchase building materials, in the name and on behalf of the principal, in order to make them regularly available to the person who is renovating a house for the principal. Thus, „*the proxy is obliged to continue the execution of the mandate, even if the principal is deceased, when the construction of the house requires it (for example, if the roof boards are not fitted immediately, the walls and attic of the house would suffer from rain*"[9]. This last mention, linked to the need to execute the mandate because of urgency, fits better in the scenario described in art. 2035 para. (2) of the Romanian Civil Code, which we will analyse later.

The essential elements for the retention of this case of post-mortem „extension" of the mandate are therefore (i) the succession of acts and (ii) the carrying out of a continuous activity. The recurrence of legal acts implied by the last sentence of art. 2030 para. (1) letter c) of the Romanian Civil Code inevitably leads us to think of the notion of professional, dealt with in art. 3 para. (2) and (3) of the Romanian Civil Code:

„*All those who operate a business are considered professionals.*

The systematic pursuit by one or more persons of an organised activity consisting in the production, management or disposal of goods or the provision of services, whether or not for profit, constitutes the operation of a business."

Thus, this consecutive nature of the acts shows that at least the proxy is, in most cases, a professional, and it is irrelevant whether or not he is registered in one of the legally prescribed forms.

It is important to point out that the two conditions mentioned above are cumulative, so that a one-off operation, although it may involve several steps, is not sufficient for the survival of the mandate after death. For example, the Romanian case law has ruled as follows:

„*First of all, the Court finds, contrary to the defendant's submissions, that the object of the mandate is not the conclusion of successive acts as part of a continuous activity, but the conclusion of the sale agreement, which, even if it requires the completion of certain formalities, does not involve a continuous activity and successive operations.*"[10]

In the present case, the defendant-proxy argued in his defence that the mandate had subsisted after the death of the principal, since he had been empowered to carry out multiple formalities, such as registering the ownership of the property in the land register and obtaining the tax certificate, and not only the conclusion of the sales contract, but this argument was rejected by the first instance, and the decision was upheld on appeal.

With regard to procedural mandates conferred by natural persons to lawyers, art. 88 para. (1) of the Romanian Civil Procedure Code[11] can be seen as an application of the more general rule enshrined in art. 2030 para. (1) lit.c) last sentence of the Romanian Civil Code, the activity of a lawyer throughout a trial being clearly characterized by continuity and involving a series of procedural acts necessary to be performed.

The legal rule analysed, i.e. art. 2030 para. (1) lit. c) of the Romanian Civil Code, is unquestionably of a suppletive nature[12], the principal and the proxy being free to contractually arrange the effects of the death of either of them on the mandate. For example, we do not see any obstacle to the validity of a clause whereby the parties stipulate that, for example, the death of either of them entails the caducity of the mandate, regardless of its complexity. Such a clause would have the effect of excluding the last sentence of art. 2030 para. (1) letter c) of the Romanian Civil Code, which is permitted by the nature of the rule. Similarly, the parties could also decide to allow the contract to continue in the case of a mandate for a one-off operation, which would mean that the contract would no longer be affected by caducity following the death of the principal or of the proxy.

It should be noted that the activity of the deceased proxy must be able to be continued by his heirs, otherwise the mandate will not subsist, even in spite of (i) a clause that would provide for the continuation of the execution of the mandate by the heirs of the proxy and/or (ii) a legal provision, such as art. 2030 para. (1) letter c) last sentence of the Romanian Civil Code. We refer in particular to the situation of the deceased proxy, who was exercising through the agreement a certain profession authorised by law: lawyer, accountant, technical expert etc. In these situations, it is indisputable that the mandatary's heirs cannot be legally (i.e. validly) obliged to execute a mandate for which they do not have the legal „authorisation". The acts specific to the activity of a lawyer performed by a person who does not hold this quality are void. Moreover, forcing the heirs of deceased proxy to carry out acts specific to authorised professions without having such qualities would lead to the offence of exercising a profession or activity without right, as criminalised by art. 348 of the Romanian Criminal Code. No one can be legally, and therefore validly, bound to perform an obligation the performance of which would make him a criminal.

The second legal hypothesis in which the mandate survives after the death of one of the parties is enshrined in art. 2035 para. (2) first sentence of the Romanian Civil Code:

„*In the case referred to in paragraph. (1), the proxy or his/her heirs or representatives shall be obliged to continue the execution of the mandate if its delay risks jeopardising the interests of the principal or his/her heirs.*"

In this case, the post-mortem survival of the mandate is justified by the urgency of continuing to execute the mandate. Otherwise, the interests of the principal or his/her heirs would be in danger of being prejudiced. This is the case of a lawyer who, despite the death

of the client-principal, must continue to exercise the mandate offered by making a specific request whose time limit is about to expire in order to prevent the sanction which would affect the rights of the client's heirs. From this point of view, article 88 para. (2) of the Romanian Civil Procedure Code can also be analyzed as a particular application of art. 2035 para. (2) of the Romanian Civil Code.

A similar solution exists in art. 1991 para. (2) of the French Civil Code, which states that the proxy „*is bound on the death of the principal to complete the work begun if there is danger in delay"*[13]. It should be noted that the French legal provision refers only to the death of the principal, not that of the proxy, whereas art. 2035 para. (2) of the Romanian Civil Code applies to both hypotheses.

Like the first legal hypothesis analysed, art. 2035 para. (2) of the Romanian Civil Code is suppletive in nature and can therefore be modified by the parties, by virtue of their freedom of contract.

It could also be argued that the mandate continues in the event of the death of the principal, as long as the proxy is not aware of this. The survival of the mandate would seem to be enshrined in art. 2036 of the Romanian Civil Code:

„*Anything done by the proxy in the name of the principal before he knew or could have known of the cause of termination of the mandate shall be deemed to have been validly done in the performance of the contract.*"

Assuming that the other two derogatory hypotheses analyzed above or a contrary stipulation by the parties do not apply, the mandate automatically terminates upon the death of the principal, regardless of whether or not the proxy has knowledge of this event. This solution follows from the very nature of the caducity, which entails an automatic termination of the agreement. As has been pointed out, „*it is indeed possible for automaticity to be established as a genuine principle governing the regime of caducity*"[14]. But what does this automaticity mean? The answer is intuitive: „*The automaticity of caducity implies that the act is extinguished independently of any manifestation of the will of the parties*"[15].

Continuing this reasoning, one may conclude that art. 2036 of the Romanian Civil Code does not reflect a genuine hypothesis of post-mortem survival of the mandate. As we have seen, the mandate is terminated following the death of the principal, the termination being automatic. However, the legislator could not ignore the unfair consequences that the automatic termination of the mandate could have for the ignorant proxy and for bona fide third parties who would have contracted with the proxy after the principal's death. For these reasons, the acts concluded in legitimate ignorance of the death of the principal are „*deemed*" valid. For example, a bona fide proxy may claim payment of remuneration for acts concluded after the death of the principal, just as bona fide third parties may also rely on the acts concluded after that time. If the death of the principal would cause the caducity of the contract only from the moment when the proxy had actual knowledge of the unfortunate event, then there would have been no need to provide explicitly in a legal provision that acts concluded post-mortem would be „*deemed*" valid. In reality, the text enshrines a tempering, a mitigation of the consequences of the termination of the mandate, similar to the theory of apparent authority. Of course, article 2036 of the Romanian Civil Code does not only concern the hypothesis of the caducity of the mandate due to the death of the principal, since the reference is general (i.e. „*cause of termination of the mandate*"), but this particular application has been taken into account for the purpose of this material.

Finally, it should be noted that the mere fact that a mandate terminates upon the death of one of the parties does not mean that all the obligations of the parties are extinguished. The principal's heirs could, for example, be obliged to pay the remuneration due for the work performed by the proxy until the mandate terminates. The obligation to render an account incumbent on the proxy or his/her heirs is not extinguished either, as explicitly stated in art. 2037 of the Romanian Civil Code. The examples could go on.

3. CONCLUSIONS

The death of a party does not necessarily entail the caducity of the contract, which may be continued, as appropriate, by the heirs of the deceased.

The case of the mandate is a particular one. The death of the principal and/or the proxy entails, in principle, the caducity of the contract of mandate, by virtue of its intuitu personae character. The rule is not rigid and inflexible. The parties may stipulate the survival of the mandate even in such a case. Similarly, the legislator has provided for certain situations in which the mandate survives post-mortem, even in the absence of a contractual provision, exceptions justified by various practical reasons.

[1] A clarification should however be made. Some authors (e.g. C. Pelletier, La caducité des actes juridiques en droit privé français, L'Harmattan, 2004, p. 194) argue that caducity can be retained in the case of suspensive conditions, but not in the case of the fulfilment of resolutory conditions: „*Caducity (...) concerns only the hypothesis of non-fulfilment of the suspensive condition*". However, the argument invoked by the author is not convincing, and we therefore refuse to accept it. In our view, both types of conditions describe hypotheses of caducity and there is no legal reason to conclude otherwise.

[2] For example, see art. 333 (caducity of the preciput clause), art. 1013 (caducity of the acceptance of a donation), art. 1030 (caducity of donations), art. 1048 (caducity of preferential wills), art. 1071 (caducity of a legacy), art. 1195 (caducity of an offer to contract).

[3] R. Chaaban, La caducité des actes juridiques, Étude de droit civil, Préface de Yves Lequette, LGDJ, 2006, p. 92, the distinguished author noting that „*the disappearance of the partner in an intuitu personae contract entails its caducity because of its non-transferability (...) the caducity highlights the impossibility of performing the obligation provided for*".

[4] F. Moțiu, Contractele speciale. Curs universitar, Ediția a VII-a revăzută și adăugită, Universul Juridic, București, 2017, p. 245.

[5] Ibid.

[6] A. Bénabent, Droit des contrats spéciaux civils et commerciaux, 13e édition, LGDJ, 2019, p. 482, the reputed author pointing out that the extinctive effect of the mandate attached to the death of the principal or the proxy „*results directly from the intuitu personae character of the contract*".

[7] High Court of Cassation and Justice – Panel competent to hear appeals in the interest of the law, Decision No 24/2017, consulted on April 8th, 2023 at the following address: https***://www.iccj.ro/2017/11/06/decizia-nr-24-din-06-noiembrie-2017-2/.***

[8] Fr. Deak, L. Mihai, R. Popescu, Tratat de drept civil. Contracte speciale. Vol. II, Universul Juridic, București, 2021, p. 305-306.

[9] Ibid., p. 305.

[10] Slobozia Court, Judgment no. 1721 of July 17th, 2019, consulted on April 8th, 2023 at www.sintact.ro.

[11] „*The mandate does not cease with the death of the person who gave it, nor does it cease if legal counsel or special guardianship has been instituted in respect of him. The mandate lasts until it is withdrawn by the heirs or, in the case of a person in respect of whom special guardianship has been established, by his legal representative*".

[12] R. Popescu in Fr. Deak, L. Mihai, R. Popescu, op. cit., p. 306, the distinguished author arguing that „*the legal provisions relating to the termination of the mandate by death are not imperative*". The same opinion is also expressed in French law, where it is stated that „*the termination of the mandate is not a matter of public order and the principal may have stipulated otherwise*" (A. Bénabent, op. cit., p. 482).

[13] This legal provision was also transposed in the Old Romanian Civil Code, specifically in art. 1539 para. (2), which stated the following: „*It is also the duty to finish the business started at the death of the principal, if the delay could result in danger*".

[14] C. Pelletier, op. cit.

[15] Ibid, p. 327.

THE PARTITION OF THE ASCENDANT – IN AN ATTEMPT TO REVITALIZE AN ANTIQUATED INSTITUTION –

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Abstract

In theory, the partition of an ascendant is a good example of an act of estate planning, which still has the hope of occupying a privileged place among the legal means made available by the legislator to the author of the succession, who is trying to prevent future misunderstandings regarding the division of his or her inheritance. Regrettably, however, this institution is not sufficiently trusted by the people in question, since, even after almost eighteen decades since the partition of ascendancy saw the light in the Romanian legal landscape, ordinary people still show reluctance in this choice.

At first glance, one might consider that reforming an institution, which is rarely used, even marginalized, would be of no practical benefit under the current socio-legal framework. However, we believe that concrete measures to improve the regulation of the division of inheritance offer real opportunities to revitalise this legal mechanism, which could perhaps become one of the most effective means of achieving a division of inheritance without the heirs having to „come hell or high water" to put an end to the state of indivision.

This article thus proposes coordinated measures anchored in the reality of our society and inspired by the complex provisions of the inter vivos gifts, as they evolved in the French socio-economic framework and which, with certain nuances, can also be embraced in the Romanian legal space.

Keywords*: partition, distribution, donation-sharing, testamentary partition, estate planning, transgenerational partition*

1. Introductory considerations

Succession partition is the last step in the long series of operations that heirs have to go through in order to obtain exclusive ownership of the property acquired by inheritance. As is also recognised in French doctrine, the system of distribution of inheritance has many disadvantages and in the event of disagreement between heirs there is no other way out than judicial partition, which often leaves behind deep scars and lingering resentments. Thus, perhaps one of the most effective means of dealing with these shortcomings is to allow the author of the succession to share the property oneself among the heirs. As the arbiter of one's family, one will use the influence and wisdom to prevent the distribution of the inheritance from undermining the peace of the family.[2]

The legal period of the upward sharing regulated by the French legislature is a remarkable one, the institution being placed under the scrutiny of doctrinaires, jurists and notaries for a long time, in order to achieve what is today called 'liberality-sharing'. Contrary

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[2] Fr. Terré; Y. Lequette; S. Gaudemet, *Les successions. Les libéralités,* 4e édition, Ed. Dalloz, Paris, 2014, p. 1109.

to this development, the partition of ascendancy found in the current Romanian Civil Code has „frozen" to its incipient form, with minor, almost imperceptible changes.

1.1. A brief legislative history

Regulations related to the partitioning of property inherited from one's ancestors in the Civil Code of 1864, which we find in the text of Articles 794-799 and which has been maintained in the new Civil Code without essential changes in Articles 1160-1163, has taken over the archaic regulation of partition by descent in French law prior to the amendment made by the 2006 Law.[3]

For a better understanding of the institution under analysis, we will make a brief review of the changes that have occurred over time in relation to partition of ascendant's estate in French law to become what is known today as *liberalities-sharing (‚liberalités-partages').*

The French Civil Code, in Title II of the immense Book III on „The various ways in which property is acquired", devotes to this institution a sixth chapter entitled: „Partitions made by ascendants", which current parlance has called „partitions by ascendants". In 2006, this chapter became Chapter VII entitled: „Liberalities-sharing", a change in terminology that reflects a considerable evolution whose most visible implication is only the final manifestation of a much deeper historical change.[4]

The partition of ascendant's estate organised by the Napoleonic Code was an original institution and was based above all on considerations of internal peace which the act was intended to promote under the enlightened magistracy of the father of the family. Therefore, all children had to be called, respecting not only the right of reserve of each, but also their equal vocation to inherit, then dominated by the principle of equality in kind. At most it was admitted in extremis that the distributing ascendants could favour one or other by a precipitate, but a special action in abatement was provided for to prevent a precipitate liberality from being able, by combining it with an injury of less than a quarter, to give one of the co-heirs a greater advantage than is allowed. More generally, the usual conditions of gifts and wills had to be respected at the same time as the principles applicable to ordinary shares, to which case law had rigorously ensured their applicability.[5]

Subsequently, the Law of 7 February 1938 and the Decree-Law of 17 June 1938 sought to consolidate the partition of ascendant's estate, in order to prevent the numerous disputes which had been the source of it, profoundly changing its spirit. On the one hand, this legislation has facilitated the testator's predictions, in particular by fixing the valuation of the property distributed on the day of the donation-sharing and by the (clumsy) effort to exempt ancestor shares from the principle of equality in kind. On the other hand, it has limited the criticism of partition, in particular by restricting the nullity for the omission of the child and by reducing the time limits for contesting the distribution made.[6]

Supported by the idea that the person who has recourse to partition of ascendant's estate should have the same freedom as if one were distributing one's assets among the children or descendants by means of the corresponding ordinary gifts, the reform of partition of

[3] M. M. Soreață, *Legislative novelties on succession introduced by the new Civil Code, pub*. Hamangiu, București, 2013, p. 239.

[4] Ph. Malaurie, L. Aynès, *Droit des successions et des libéralités*, 9e édition, LGDJ, Lextenso, Paris, 2020, p. 611.

[5] *Idem.*

[6] Ph. Malaurie, L. Aynès, *op. cit.*, p. 614.

ascendant's estate introduced by the Law of 3 July 1971 simply abolished the penalty of nullity for the omission of a child, rescission for injury and special reduction in favour of a more systematic application of the protection of the reserved portion of the estate.[7]

The Act of January 5, 1988 came up with an even newer view of partition of ascendant's estate, allowing a person to make a donation-sharing for the benefit of persons other than his or her children when „his or her property includes an individual business of an industrial, commercial, handmade, agricultural or liberal nature." (Art. 1075 para. (3) old French Civil Code).[8]

The 2006 law extends the previous reforms presented over and brings an innovation in the field – transgenerational donation-sharing. At the same time, it exceptionally grants the possibility of making liberalities-sharing to third parties by widening the scope of application to the transfer of companies operating in corporate form. It also made it easier to use it for the benefit of children from different marriages (within reconstituted families). Finally, it enlarged the institution's domain by authorizing donations and testamentary partitions in all hereditary relations and not only in the relations between the ascendants and the descendants.[9]

In Romanian law, although with the adoption of the new Civil Code, which entered into force in 2011, the premises of a reform also existed in respect of partition of ascendant's estate, surprisingly, the legislature chose not to intervene in this regard, leaving the existing regulation which it took over almost unscathed.[10]

Thus, at present, the partition of ascendant's estate still remains an act of the ascendant which, in order to avoid the creation of a state of division between its heirs who also have the status of descendants, uses one of the two forms made available by the legislature (donation or will) to share, in the manner which it considers most appropriate, succession property.

1.2. Legal status

It is widely acknowledged that the share of the estate is a mixed legal act, given that it encompasses both rules of division and of donation and will, as appropriate.[11] However, the legal nature of the division of ascendancy needs to be addressed in more depth, in which case the analysis will go beyond the classical classification of legal acts and approach the institution in a syncretic manner.

It is thus considered in French literature that the division of inheritance among ascendants has a triple character, being (i) an act of authority or sovereignty, (ii) a gratuitous act of transfer and (iii) an act of distribution.[12]

First of all, the division of inheritance among ascendants was considered as an act of authority, considering that it was a prerogative attached exclusively to parental authority, the author of the partition (either the father or the mother) being considered the judge and arbiter

[7] *Ibidem.*, p. 615.

[8] The practical interest only really arose when it was a question of transferring a business to a grandchild of the donor whose author was still alive, just as Jean Carbonnier later envisaged in Une offre de loi, *Idem*.

[9] *Idem.*

[10] D. Isache, *Voluntary liquidation of the succession*, Pub. Solomon, 2021, p. 194.

[11] Fr. Deak; R. Popescu, *Succession Law Treaty, Vol. III – Transmission and division of inheritance*, 3rd edition, updated and supplemented, pub. Universul Juridic, București, 2014, p. 218.

[12] Ph. Malaurie, L. Aynès, *op. cit.*, p. 616.

of his/her own inheritance, this act of domestic magistracy having the purpose of ensuring peace in the family.[13]

Given that in the current French legislation, division of inheritance among ascendants has taken on new characteristics, being renamed „liberality-sharing" as a result of the extension of the person of the disposer (previously ascendant) and of the grantee (previously descendant), it follows that it is no longer regarded as an act of an essentially family nature, but rather as a genuine act of ownership, which manifests the sovereignty of the owner over his property..[14]

In the second part, the character of an act of transmission free of charge is based on the two varieties by which that institution takes shape: the donation and the testament shares, which must, where appropriate, comply with the rules governing the provisions of the inter vivos or mortis causa free of charge and, in any event, the inheritance reserve.[15]

Finally, in a last aspect, we point out that the division of inheritance among ascendants, whether in the form of a gift or a will, is not only a liberality, because it is also a partition by inheritance and, as such, cannot exist without an effective distribution of the property transmitted under the authority of the disposer.[16]

In the mid-nineteenth century, several authors and several judgments of the French Court of Cassation suggested that the sharing-donation constituted a „presuccession": the transmission and sharing of the estate would have been anticipated as if it had itself been opened in advance to the extent provided for, which had the effect of establishing a first available quantity during the sharing-donation and then a new one at the time of the opening of the succession.[17] This theory was considered inadmissible: there are no two successions, the succession is open only at death, there is no anticipated opening: *Nulla est viventis hereditas* succession does not open for the living.[18]

The dual nature of donation-sharing is also recognized by the Romanian doctrine, authors established in inheritance law considering this mixed legal act to be not only a simple liberality, but an act of anticipation of the succession, which initially manifests itself as a liberality *inter vivos*, and will produce the essential effects of sharing from the date of opening the inheritance.[19]

As far as the partition-will is concerned, it presents an undeniable advantage for the ascendant who, although he/she wishes to distribute the succession among his/her descendants in the hope of avoiding possible misunderstandings on the occasion of the

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[13] *Idem*. Clearly, in the Romanian legal space, the division of inheritance among ascendants remains a genuine act of sovereignty, the prohibition of the use of this institution outside the direct descending line being a clear expression of the legislator's intention to keep assets within the restricted circle of the family.

[14] Ph. Malaurie, L. Aynès, *op. cit.*, p. 616.

[15] However, the liberality of the transaction is much more marked in the donation-sharing which is based on the common will of the disposer and the gratification, than in the will-sharing which is imposed by the deceased on his/her heirs., *Ibidem.*, p. 617.

[16] *Ibidem*, p. 619.

[17] Ph. Malaurie, L. Aynès, *op. cit.*, p. 619.

[18] „ *If the division of inheritance among ascendants opened the succession, so did death: there were two successions. What, we were impressed, two successions? So there would be two deaths! and two inheritances! The fiction bordered on the absurd. The doctrine of presuccession could not be accepted: a single estate, a single death, a single succession", see also*, A. Pellegrin, *De la nature juridique du partage d ascendant,* th. Grenoble, LGDJ, 1961, préf. P. Hébraud, p. 23 *apud* Ph. Malaurie, L. Aynès, *Ibidem*, p. 620.

[19] D. Chirică, *Civil law treatise. Successions and Liberalities*, 2nd edition, pub. Hamangiu, București, 2017, p. 507.

division, does not intend to obtain the heirs' agreement to this effect. [20] If it is of less interest and attraction to the coparceners than a gift-share, the will-share is a convenient and low-cost means of organising the ascendant's succession, since it does not require any dispossession and can be revoked or modified at any time to take account of changes in property, family or emotional circumstances. At the same time, provided that it does not prejudice the reservation of succession, it is effectively rigorous, since the testamentary partition is imposed on descendants who do not have to consent to it and cannot reject it without renouncing the testator's succession at the same time. It can thus play a decisive role when, during the testator's lifetime, his heirs in interest do not agree and it is impossible or inappropriate to attempt to associate them with the succession settlement.[21]

2. Succinct overview of the varieties of ascendant sharing:

Donation-sharing is by far the most widely practised form of intestacy because it combines the advantages of a consensual distribution of the inheritance, which replaces the division that the heirs would have made after the death of the testator, with that of an anticipated transmission of at least part of the inheritance for their benefit.

A partition will, which takes effect only on the testator's death, does not have the advantage of anticipating the settlement of the succession even before it is opened, its interest being to enable the testator to impose on one’s heirs the partition of the succession which one oneself has decided.

However different they may be, these two variants are nevertheless part of the same institution, namely division of inheritance among ascendants, because they include each of the two constituent elements that make up the unity of the concept: they are both a liberality and a settlement, more specifically a division of all or part of the disposer's estate, carried out by means of liberality.[22]

A donation-sharing consisting of a gratuitous transfer of present property made by way of anticipated partition of the estate, its realisation is subject to the substantive and formal conditions of the gift which constitutes the vector, together with the requirements of a partition made by or under the authority of the party disposing of the property.[23]

A testamentary partition is a unilateral and essentially revocable act by which an ascendant divides all or part of the estate between his/her heirs..[24]

The purpose of the testamentary partition is therefore not to designate legatees, but to share the succession between the heirs. Thus, in the absence of an express reference by the testator to the rules of division of inheritance among ascendants, it is often difficult to distinguish the testamentary partition from the simple bequests left by the testator.[25]

What gives great interest to the qualification, what distinguishes the testamentary partition from the ordinary will containing a series of legacies to the heirs, is the fact that this distribution of the succession is imposed on them: they cannot repudiate their testamentary vocation in order to maintain their legal vocation. However, even more so than for donation-sharing, qualification is often uncertain. In order for a will-share to qualify, the

[20] *Ibidem,* p. 516.
[21] Ph. Malaurie, L. Aynès, *op. cit,* p. 641.
[22] Ph. Malaurie, L. Aynès, *op. cit.*, p. 612.
[23] *Ibidem*, p. 627.
[24] *Ibidem*, p. 1138.
[25] *Idem.*

testator must have divided his estate.[26] Thus, if a testator leaves equivalent legacies to each of his heirs, it is likely to be a testamentary partition[27]; similarly, where provisions addressed to children relate to all or most of the estate, the qualification of a testamentary partition may be favoured; this qualification may also result from harmonisation with gratuitous provisions outside the deed.[28]

3. Conditions

3.1. Subjects of the division of inheritance among ascendants

According to Article 1160 of the Civil Code, the division of inheritance among ascendant can only be made by the father and mother, or more distant ascendants if there is representation, in favour of their descendants, regardless of whether they are of marriage, out of wedlock, or adopted.[29]

As such, the fact that the descendants are legitimate, natural or adopted is irrelevant, the only condition being that they have an effective right of inheritance, including the institution of representation being allowed, in the situation where one of the children of the disposer is predeceased, his/her grandchildren who are to succeed him/her by representation being able to take his/her place.[30]

Along these lines, it follows that in our law the children of the husband cannot be beneficiaries, as the provision made for their benefit cannot be the result of a division of inheritance among ascendants, and they can only be gratified by an ordinary gift or a legacy. Nor is the option of making a donation-sharing provision between spouses or for the benefit of other relatives open; no doubt.[31]

The scope of persons entitled to use this institution is therefore quite limited, being inaccessible to collateral relatives, for example, as it is also forbidden to third persons of inheritance.

The same situation was found in French law prior to the 2006 Law, with the notable exception that division of inheritance among ascendants was allowed, where the assets concerned were individual businesses, to be carried out for the benefit of persons other than the limited circle of children or other descendants of the disposer, and the disposer's business could therefore be taken over by a third party.[32]

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[26] Cass. 1re civ., 5 déc. 1978*, Bull. Civ.* I, nº376: „*there is a testamentary partition only to the extent that the testator himself has assigned lots to his descendants" (today his presumed heirs), see also*, Ph. Malaurie, L. Aynès, *op. cit.*, p. 641.

[27] Cass. 1re civ., 30 mars 1955*, Bull. Civ.* I, nº152: „the exclusion of the qualification of testamentary partition because 'the very idea of equality is not included in the will', see also, *Idem.*

[28] Cass. 1re civ., 5 juill. 1989*, Bull. Civ.* I, nº282: „The will of 17 December 1952 distributed the assets among the testator's sole heirs, and because of its chronological proximity to the donation-sharing of 24 October 1952, almost all of the donor's assets were distributed within a few weeks among her children equally, each of them receiving an apartment and a house in the country. (...) From their reconciliation it emerged that the will of 17 December 1952 set out intentions similar to those which inspired the donation-sharing, being an addition, so that it constituted a testamentary partition", see also, *Idem.*

[29] Fr. Deak; R. Popescu, *op. cit.,* p. 220.

[30] Ph. Malaurie, L. Aynès, *op. cit.*, p. 622.

[31] *Idem.*

[32] *Idem.*

In accordance with Article 1075 para. (1) of the French Civil Code.[33], the testator may make a liberality-sharing for the benefit of his/her presumed heirs, whoever they may be, and is not limited to the direct descending line. In particular, the spouse may be called upon at the same time as the descendants of the testator, since they have concurrent right of succession. In their absence, collaterals may be gratified as coparceners: for example brothers and sisters, nephews and nieces, when they have inheritance rights.[34]

One of the most remarkable innovations of the 2006 Act is the transrational gift-sharing, the organisation of which was borrowed, almost word for word, from Jean Carbonnier and his co-authors' „*Offer in Law".* This donation makes it possible to call upon descendants who are not presumptive heirs because they are not in the degree of successor, in particular grandchildren during the lifetime of the child from whom they are born, which article 1075-1 C. civ. fr. reductively called a donation-share made „*to descendants of different degrees".*[35]

The reason for this novelty, often requested by notaries, is due to the extension of human life. As written in the „Offer of the law": „When (...) the child donee has reached the age of fifty or sixty, it is sometimes more rational to assign the property to the grandchildren, even if only in bare ownership, the child being content with the usufruct". In response to an ageing population, and designed to allow a generational leap in the transmission of inheritance with the advantages of ordinary donation-sharing, transgenerational donation-sharing is, in the order of voluntary devolution, the counterpart of representing the renouncer in an intestate succession.[36]

After all, both institutions are based on the same idea: the power given to a child to retire for the benefit of his or her own children, during the lifetime of the deceased in one case or on his or her death in the other.[37]

Transgenerational donation-sharing requires in all cases, in addition to the consent of the testator and the co-parceners, the consent of the child who agrees to withdraw for the benefit of his or her heirs, since the whole economy of the operation is based on the fact that the grandchild requests the donation-sharing by descent when he or she is not a successor and comes „ in lieu and stead" of the heir presumptive whose child he or she is (Art. 1078-4 para. (1) French Civil Code).[38]

In the context of the donor's succession, the transmission of property received by the grandchildren in place of the child is considered as having been made to the latter and the grandchild's or grandchild's share is imputed to the donor's reserve.[39] At the same time, it

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[33] Art. 1075 C. civ. fr.:"*Toute personne peut faire, entre ses héritiers présomptifs, la distribution et le partage de ses biens et de ses droits. Cet acte peut se faire sous forme de donation-partage ou de testament-partage. Il est soumis aux formalités, conditions et règles prescrites pour les donations entre vifs dans le premier cas et pour les testaments dans le second*."

[34] Ph. Malaurie, L. Aynès, *op. cit.*, p. 622.

[35] *Idem.*

[36] Ph. Malaurie, L. Aynès, *op. cit.*, p. 622.

[37] Fr. Terré; Y. Lequette; S. Gaudemet, *op. cit.*, p. 1116.

[38] Ph. Malaurie, L. Aynès, *op. cit.*, p. 623. The law increases the precautions in this regard because it requires the consent of the child to be given, which is fully or partially erased even in the act of transgenerational donation and recalls the rules of vitiation of consent. In this regard, Art. 1078-5 para. (2).

[39] M. Grimaldi, *L'utilité de la donation-partage transgénérationnelle mise en évidence par les conséquences de n'y avoir point recouru*, în Revue trimestrielle de droit civil, avril-juin 2020, Dalloz, Paris, 2020, p. 443.

should be noted that the reconstitution of the reserve, when it occurs, is done according to the rules of donation-sharing.[40]

Example:

A father shared his property in advance between his two sons, Pierre and Paul. Paul, himself the father of Jean and Jeanne, has agreed to withdraw part of his estate for the benefit of his daughter. Pierre's lot consisted of a property worth €150. Paul's lot consisted of a property worth €50 allocated to him and another property worth €100 allocated to Jeanne.

The donor ascendant dies after establishing a universal legatee. Existing assets are worth €120.

The calculation table is 420 euros, the reserve for each child is 140 euros and the available contribution is 140 euros. The donations made to Jeanne are deducted from Paul's reserved portion, at the same time as the portion he himself benefited from, each of the two lines thus receiving its share of the reserved portion within the anticipated division. The universal legatee will be able to claim the remaining €120.[41]

The grandchild, gratified by a transgenerational donation-share, still has to account for it in the succession of its author. The interest, of course, is to protect grandchildren not awarded by transgenerational donation-sharing from the risks of inequality that may result; by consenting to one of his children being allocated in his place in the anticipated sharing made by the grandfather, a father cannot deprive his other children of the share of the reserve that they are entitled to claim from his estate.[42]

Therefore, according to Art. 1078-9 para. (1) of the French Civil Code: in the succession of a deceased child, the property which the grandchildren have received from the ascending donor is treated as if it had been owned by the direct donor.[43] By exception, however, donations received by grandchildren may be treated in their author's estate as a donation-share made by the author.[44]

We believe that the introduction of this institution in Romanian law could increase the chances of a considerable increase in the number of inheritance planning acts, allowing the conclusion of a donation-sharing with different degree descendants being a coordinated solution in relation to the economic and demographic reality of our country.

3.2. The subject matter of the division of ascendant

The division of ascendant can only relate to the assets belonging to the disposer, with the mention that in the case of a donation-partition, these must be present assets[45] and not

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[40] Fr. Terré; Y. Lequette; S. Gaudemet, *op. cit.,* p. 1136.

[41] *Idem.* Note Article 913 of the French Civil Code, according to which gifts, *whether inter vivos or mortis causa*, may not exceed half of the settlor's estate if the settlor leaves at death a single child; a third if he leaves two children; a quarter if he leaves three or more.

[42] Fr. Terré; Y. Lequette; S. Gaudemet*, op. cit.*, p. 1136.

[43] Tax considerations explain this fiction: the deductions offered for a donation received from grandparents turns out to be less favourable than that applicable when a donation is made to children by parents. From a civil law point of view, this fiction makes it possible to ensure that the reserve of each descendant within the same lineage is respected, see also A. Leborgne, *La réforme des successions et des libéralités et la loi du 23 juin 2006*, Presses Universitaires d'Aix-Marseille, 2008, p. 72

[44] With all the consequences that such a qualification entails: evasion of the report, valuation on the day of the anticipated division for the calculation of the reserve, in this regard, see Fr. Terré; Y. Lequette; S. Gaudemet, *op. cit.*, p. 1137.

[45] D. Guével, *Droit des successions et des libéralités,* 3e édition, LGDJ, Lextenso, Paris, 2014, p. 249.

future assets, the partition of future assets being possible only through the division of inheritance by will.[46]

The prohibition of the inclusion of future assets in the gift-partonage is explained by the principle of irrevocability of the second degree which governs the subject matter of the gift, a contrary solution leaving full freedom to the donor to revoke the gift implicitly by simply not disposing of the assets which constitute its object. [47]

It is not necessary for the partition by descent to include all the property of the testator: it can only be partial as far as the property is concerned, so that property which will fall into co-ownership because it has not been assigned or divided will remain so after the death of the testator, according to the common law of partition.[48] Most often, the testator reserves all or a part of the right of usufruct of the donated property, generally providing for its reversion to the surviving spouse, which the case law analyses as a donation of property with a term.[49]

As has also been noted in French doctrine, the usufruct reserve has the advantages and disadvantages of any family usufruct. It allows the dispositor and the spouse to maintain their standard of living throughout their lives and despite the donation. But the usufruct is a way of managing mediocre heritage, especially with the extension of the duration of human life. However, the reserve in usufruct is more frequent than the provision of a life annuity (due to the limited resources then allocated to the settler) or that of the provision of benefits in kind (a kind of alimony pension), which can cause conflicts between testator and beneficiary.[50]

In view of the fact that one cannot transfer and share property to others, the doctrine has raised a number of issues relating to the subject matter of division of inheritance by ascendants: (i) the possibility of sharing property held in indivision between the disposer and a third party, (ii) the possibility of dividing common goods and (iii) the possibility of sharing property already donated.

(i) Undivided property and cumulative donation-division – the division of ascendant can, in principle, refer only to the property of the testator. When the object of the donation is an undivided property, the gift-sharing is subject to the results of the sharing: if the property is finally assigned to another co-divider, the distribution and distribution carried out are retroactively brought into question.[51]

The principle includes an important provision: when a spouse dies, the surviving spouse who intends to make a donation-partition to the common children can, in order to proceed to a global distribution, add to their own property the property of the deceased spouse, whether

[46] D. Isache, *op. cit.*, p. 202.

[47] D. Chirică, *op. cit*., p. 510.

[48] In practice, the author of a donation-partition always retains full ownership of certain assets, so that they do not remain at the discretion of those they have just gratified. He often provides an annuity for his benefit at the expense of the grantee, or otherwise retains a right of use and occupation of the dwelling he is transferring and usually guarantees his rights by an inalienability clause. In this respect, see also Cass. 1re civ., 10 juill 1990, Bull. civ. I, nº192: *The donors „wishing to arrange their old age, in material and moral peace, under a roof in which they have spent most of their lives, wished, by choosing their son as debtor of their right of use and habitation, which is of a strong intuitu personae character, that the latter should exercise it, free from any disturbance of the use which they are more entitled to expect from a son than from a third party. It (the Court of Appeal) was able to infer that the clause, limited in time, was thus justified by a serious and legitimate interest.",apud*, Ph. Malaurie, L. Aynès, *op. cit.*, pp. 623-624.

[49] Ph. Malaurie, L. Aynès, *op. cit.*, p. 624.

[50] *Idem.*

[51] *Ibidem*, p. 625.

they themselves have indivisible rights over their property (e.g. the property was common) or the indivision exists only among descendants (e.g. the property was the deceased spouse's separate property over which they have no inheritance rights or right of universal usufruct). The property given by the surviving spouse represents only a portion of the shared property, with the other portion already belonging to the heirs: there is a contraction of the donation-partition of the surviving spouse's property and an amicable partition of the deceased's estate.[52]

The act known as cumulative donation-partition has the advantage of allowing for a coherent regulation of the conjugal patrimony, by achieving through the same act both an „*amicable partition of the succession assets and a donation-partition of the surviving parent's assets"*.[53] However, it is necessary for all major and capable heirs to consent to this, and the French Court of Cassation has recognized the validity of this requirement.[54]

(ii) *When it comes to jointly owned property and conjunctive donation-partition* – as the donation-partition can only refer to the assets in which the dispositor holds ownership and free disposition rights, a traditional view has been that conjunctive donation-partition cannot have jointly owned property as its object, just like in the case of testamentary-partition.[55]

Provided that the disposer obtains the spouse's authorisation to dispose of the property in accordance with Article 1422 of the French Civil Code, there is nothing to prevent the joint property from being included in the donation-sharing that a spouse would make.[56] In particular, by virtue of Article 1078-1 of the French Civil Code, one could incorporate into the donation-sharing of hi/hers property an ordinary gift of common property previously made to one of the coparceners by virtue of Article 1422 of the French Civil Code.[57]

However, it has always been accepted that two spouses (who can be unmarried ascendants, or even persons other than ascendants) can agree together on a joint donation-sharing by merging into a single estate to be divided among their descendants the properties given by each, which is called a „conjunctive" donation-sharing (Article 1076 of the French Civil Code refers to it as „common"). They may include, without doubt, common (or undivided) property in the partition they make.[58]

Before the 2006 law, the possibility of using a conjunctive donation-sharing for a child who is not common to both spouses (child from a previous marriage in a reconstituted family) created difficulties. The French Court of Cassation had held that a donation made in this way was void.[59] The judgment had been understood in different ways, its reasoning

[52] D. Chirică, *op. cit*., p. 511.

[53] Fr. Terré; Y. Lequette; S. Gaudemet, *op. cit.*, p. 1116.

[54]Cass. 1re civ., 20 juin 1955*, D.* 1955.737: „If, in principle, the ascendant donor can only include in the anticipated distribution of his estate among his children the only assets that belong to him, and not those that come from the estate of his predeceased spouse, there is no legal impossibility, if the partition is made by inter vivos deed and if all the children of full age and capable of contracting consent thereto, for that ascendant to constitute a joint estate of his estate and that of his predeceased spouse whose children have been included as heirs and to include in the deed of gift-sharing all such property. „ see also, Ph. Malaurie, L. Aynès, *op. cit.*, p. 625.

[55] *Idem.*

[56] Fr. Terré; Y. Lequette; S. Gaudemet, *op. cit.*, p. 1116.

[57] Ph. Malaurie, L. Aynès, *op. cit.*, p. 625.

[58] *Idem.*

[59] Cass. 1re civ., 15 oct. 1981*, dame Carn, Bull. Civ.* I, nº292: „The wife of the third marriage, not being an ascendant of the children of the second marriage, could not include the latter among the beneficiaries of a gift-

being based on two analyzes: either the pure and simple prohibition of involving a child who is not common in a joint donation-sharing, only a normal donation-sharing made by his ascendant, possibly in the same instrument, and the possibility of allocating a lot to him, or the possibility of including it, provided that by that act he is attributed exclusively to goods coming from his ascendant, that is to say, personal property or common property given solely by the consent of the spouse. Such an interpretation was very bold as regards the indivisibility of the conjunctive sharing donation, but it validated an eminently desirable family pact, which explains why it was enshrined by the reform: art. 1076-1 French Civil Code.[60]

Thus, to the question whether a joint donation-sharing could be made in the absence of a common child, a ministerial response not only answered in the negative, but added that it would take at least two common children to make use of it.[61]

As stated in the Romanian doctrine, a joint donation-sharing in favor of children who are not common is allowed, provided that the property attributed to the child belongs exclusively to his/her parent, otherwise this liberality will be qualified as a normal donation.[62]

(iii) *Incorporation of assets already donated* – the donation-sharing may refer only to assets in the hands of the disposer, its nature and function normally exclude the integration of assets that are already out of the hands of its patrimony.

By way of exception, under French inheritance law, a donation may refer to property already given by the donor to a co-shareholder, although the recipient is no longer the owner: such property is then 'incorporated' into the division (Art. 1078-1 para. (2) French Civil Code), which makes it possible to re-establish equality between those who have been gratified, when some have received greater benefits than others or whose value has evolved differently, and to avoid relationships from a regular partition: a kind of „reset of meters to zero." Of course, the consent of the donor is required.[63] It does not matter whether previous donations were disguised or indirect or whether they are manual donations (except for tax consequences).[64]

Incorporations are not regarded as a donation between heirs in title, but as a partition made by the disposer (art. 1078-3 of the French Civil Code), with the consequence of being subject to the rules of partition. They are similar to a degraded *mutuus dissensus*: a kind of revocation of the original donation with immediate reassignment of its object in a donation-parcours which absorbs it and possibly modifies it in another way in favour of additional agreements.[65]

Without being expressly regulated in the Romanian Civil Code, the possibility of incorporating assets that were the subject of previous donations has been recognized by doctrine, with the clarification that there is a distinction in treatment between previous

share, even conjunctive, which refers without distinction to the property of the two spouses.", see also, Ph. Malaurie, L. Aynès, *op. cit.*, p. 625.

[60] *Idem.*

[61] Rép. Min. 11 mars 2008, nº 12920, JCP N 2008, act. 313, see also Fr. Terré; Y. Lequette; S. Gaudemet, *op. cit.,* p. 1121.

[62] D. Chirică, *op. cit*., p. 510.

[63] Fr. Terré; Y. Lequette; S. Gaudemet, *op. cit.,* p. 1117.

[64] Ph. Malaurie, L. Aynès, *op. cit.*, p. 625.

[65] *Ibidem*, p. 626.

reportable donations and those exempt from reporting. Thus, with regard to the donations subject to the report, given that they represent no more than a simple advance on the inheritance, there is nothing to prevent their inclusion in a subsequent gift-share. As regards non-reportable donations, it was assessed that they could also be integrated only with the agreement of all parties, in which case, we will be in the presence of a debt substitution novation.[66]

3.3. Valuation of assets

An essential issue in the implementation of the division of inheritance among ascendants is closely linked to the determination of the value of the assets divided by the ascendant, not in order to attempt an equal distribution (the condition of equality in value of the lots constituted by the ascendant is not mandatory)[67], but in order to analyse the advisability or necessity of formulating an action to reduce the excessive donations.

Bearing in mind that at the time of drawing up a division of inheritance among ascendants, the value of the reserve (in reality, not even the inheritance share) cannot be established with certainty, as it will have to be calculated at the time of the opening of the ascendant's succession, it is not excluded that, following monetary fluctuations, a gratified descendant may invoke a breach of his reserve, given that an early waiver of the action for reduction is expressly prohibited by the Civil Code.[68]

The major difference that now distinguishes donation-sharing from ordinary gift law in French law concerns the date of valuation of gifts in terms of reduction, when donation-sharing infringes the reserve. Common law requires the valuation of donated assets on the day of the opening of the succession (taking into account their condition on the day of the donation) in order to determine the existence and extent of a violation of the inheritance reserve (Art. 992 of the French Civil Code), and this date also applies in principle to the donation-sharing. But in this respect, the donated assets can be valued, by way of exception, on the day of the donation-sharing, when three conditions are met (Article 1078 French Civil Code), the first of which is fundamental: 1) all the reserved heirs (alive or 'represented' at the death of the ascendant) have participated in the sharing and received a lot[69] (possibly through their own descendants in the case of the transgenerational donation-sharing); 2) there is an express acceptance to this effect, which is a condition automatically fulfilled when the donation-sharing is apparent; 3) no reserve in usufructuary form has been provided for t of a sum of money: in this quasi-usufruct situation, the derogation would indeed risk being turned against the co-distributors of the funds, since it would bear the cost of the monetary depreciation (the refund at the end of the usufruct being at the nominal value of the amounts donated (Art. 587 French Civil Code) while the main beneficiaries would profit from inflation.[70]

This derogatory assessment, which is one of the major attractions of donation-sharing and a key issue of its qualification, is thus based on a true family pact: it is the agreement of all presumed reservants that authorizes, with the support of the law, with a view to ensuring the agreed succession settlement, major deviation from the usual principles. When harmony

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[66] D. Chirică, *op. cit*., p. 510. For a contrary opinion, see also, D. Isache, *op. cit*, p. 200.
[67] F. Deak, *op cit.,* p. 224.
[68] Conform 956 C. civ.
[69] Fr. Terré; Y. Lequette; S. Gaudemet, *op. cit.*, p. 1132.
[70] Ph. Malaurie, L. Aynès, *op. cit.*, pp. 637-638.

prevails, a set equality on the day of the act can thus be substituted by the minimum equality of succession vocations on the day of the opening of the succession, normally guaranteed by the reserve, each co-shareholder making his/her own gains or losses in value relating to his/her lot.[71] But the other liberalities are comparatively vulnerable, with the increased risk that the undervalued donation, as in the 1938 system, would not respect the co-sharing reserve rights.[72]

Therefore, if the deed of distribution was initially balanced, any fluctuations affecting the value of the donated assets cannot compromise its stability. Gains or losses in value arising on each lot will belong to its sole holder.[73]

4. Conclusions

The decision to maintain the regulation of the institution of division of inheritance among ascendants as originally envisaged can be explained by the fact that the complex provisions of the liberality-parcenary, as they evolved in the French socio-economic framework, would have lacked practical applicability given that the post-communist Romanian legal framework at the time of the adoption of the law was not (and perhaps is not yet) ready for such a change.

We fully agree with Professor Mircea Dan Bob's opinion[74] regarding the fact that even after almost eighteen decades since the institution of division of inheritance among ascendants saw the light in the Romanian legal landscape, the common man does not trust such an institution which he perceives as being esoteric. More often than not, in an attempt to achieve the same result that the division of inheritance among ascendants, litigants will resort to the familiar family pacts, the agreements at the family table weighing more heavily than the letter of the code.

Given that the omission of one of the descendants from the division of inheritance among ascendants is automatically sanctioned by absolute nullity, it is obvious that a partition in the form of a donation *per saltum*, such as the transgenerational donation-partition provided for in French law, is excluded from the outset. What is more serious, however, is the impossibility of avoiding the nullity of a division of inheritance among ascendants for the omission of a child if there are sufficient assets in the estate to provide the child with a reserve.

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[71] *In the case of a reduction, the allowance must still be reassessed on the day it is paid, which normally takes place at the final settlement*. Cass. 1re civ., 17 déc. 1996, *Bull. Civ.* I, nº462: „The provisions of Article 1078, an exceptional text, concern exclusively the imputation and calculation of the reserve, and not the action for reduction for the exercise of which Article 1077-2 refers to the rules of inter vivos gifts, in particular those provided for in Article 868 (Articles 924-2 and 924-3 of the current French Civil Code)", see also: Ph. Malaurie, L. Aynès, *op. cit.*, p. 638.

[72] *Idem.*

[73] Fr. Terré; Y. Lequette; S. Gaudemet, *op. cit.*, p. 1133.

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VACANT INHERITANCE. COMPARATIVE AND JURISPRUDENTIAL PERSPECTIVES

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Abstract
This article presents the concept of vacant inheritance from three perspectives: legislative, doctrinal and jurisprudential. The first component draws up the main provisions of national, european and comparative law, provisions that are accompanied by interpretations provided by specialized literature, which answer various questions that have been controversial over time, such as the legal nature of the state's right to inheritance or the state's right of seisin. Last but not least, will be made a transition from the theoretical to the practical plan, through brief references to the judicial practice of the national courts that have been invested with the settlement of certain actions on which occasion they have pronounced on the paradigm of vacant inheritance.
Keywords: *vacant inheritance, certificate of vacancy, theory of desheritance, seisin.*

Introduction

An essential principle in the matter of real estate is that there is no patrimony without an owner, even if *de facto* the solution might seem different. Particularizing, in inheritance law, there are situations in which, either voluntarily or involuntarily, the heirs are not those who would normally have collected the inheritance, namely relatives or legatees, but an entity that, at least from the perspective of the preferential legal regime, would seemed superior, namely a legal entity that embodies public power, namely the state or administrative-territorial unit (UAT).

The intrusion or finality of this will of the legislator to assign succession rights to these entities has been reflected a lot in the specialized literature, since, indeed, most of the time it is not according to his will that all his wealth or a part of it to end up in the hands of the public administration, and, definitively, to all the people who live in the respective territorial area, since, if he had wanted it, he would have disposed of it by bequest like this, or from the simple disinheritance, this intention cannot clearly emerge, but the reason for the existence of this institution is to not leave certain assets without an owner, being able to be capitalized in the interest of everyone, and this solution could only be seen as an *ultima ratio*, being subsidiary to the „typical" inheritance, namely the legal or testamentary one.

The cases in which vacant succession occurs fall into two categories, namely total vacancy, when the entire patrimony is passed on to the commune, city or municipality, or partial, when only a portion of the estate is vacant. If in the old regulation this classification was not expressis verbis provided for, but being admitted by judicial practice, nowadays the Romanian legislator recognizes this division.[1] Thus, in the first case we refer to situations in which the decedent has no legal heir or reserve or has only non-reserved heirs whom he has completely disinherited, and in the second case we consider circumstances in which there are no legal heirs, and legacies with universal title or private title were instituted by the will for part of the inheritance, the legal heirs are disinherited, and the testator institutes

legatees regarding part of his assets or the testator disinherits his reserved heirs and does not institute legatees.[2]

Next, we will address the issue of the legal nature of these succession rights, going on to analyze the normative and jurisprudential framework dedicated to the succession vacation.

Legal nature

A controversial aspect in the specialized literature was the qualification of the quality of heir that the UAT has, although the UAT cannot obtain a vacant inheritance, as the county is not included in the limited list of beneficiaries, although, having legal personality, it could acquire in its patrimony such assets.[3]

Thus, a first theory, that of inheritance, took into account the sovereignty that accompanies the public power, so the commune, the city or the municipality, and in certain cases the state, collects the inheritance based on its own aptitude, and not as a legal or testamentary heir.[4] This *jus imperii* was and is still supported by arguments such as the lack of a typical heir certificate, the residual vocation,[5] the lack of a right of option,[6] the impossibility of being removed from the inheritance, this clause being considered unwritten,[7] the non-existence of a reciprocal abstract legal vocation as in the case of legal heirs etc.

The second theory is that of legal inheritance, which had as arguments the express consecration in the old civil code that the state is the legal heir,[8] and in the new regulation the fact that within the title dedicated to legal inheritance the existence of vacant inheritance is mentioned. At the same time, the state bears the inheritance liability within the limits of the asset, just like a legal heir, and the source of this right is the law.[9] On the other hand, it should be noted that the whole state, based on its right to legislate, a component of its sovereignty, issues the normative act that recognizes the vacant inheritance, so this circle would rather be an argument in favor of the theory of disinheritance.

We consider that the first theory is supported by more solid arguments, both from a legislative perspective, since the very art. 963 (3) Civil Code. provides that in the absence of legal or testamentary heirs, the patrimony will be transmitted to the commune, city or municipality, from the literal interpretation it appears that the listed beneficiaries are excluded from the category of legal heirs, as well as from the jurisprudential one, given that the High Court ruled in 2011[1] – an appeal in the interest of the law in the sense that the moment from which the state can be a party in the succession architecture by introducing an action to establish the quality of sole heir against him is the issuance of the certificate of succession vacancy, in the other cases he is not in any way involved in these aspects, as the legal heirs would have been.

Although it would seem like a theoretical problem, this qualification enjoys numerous practical resonances, the interest of the qualification being the solution that could exist in the event of the revocation of the renunciation of the inheritance made by a legal or testamentary heir, since if we admit that it is legal heir, the revocation is ineffective, and if we refer to sovereign law, this revocation is valid[10] and the fate of the assets of the deceased

[1] High Court of Cassation and Justice, Decision no. 2/2011 of 04.04.2011, Official Journal of Romania no. 365 of 25.05.2011.

Romanian abroad, a problem that was solved in the new regulation, which provides that the state will acquire these assets, another argument in favor of the theory of sovereignty.[11]

Vacant inheritance in romanian and european law

The seat of the matter in national law is represented by art. 553 Civil Code, which provides for the existence of a certificate of succession vacancy in the case of vacant inheritances and the fact that the assets that share the inheritance pool will enter the private domain of the commune, city or municipality in whose territorial radius the assets were located on the date of the opening of the inheritance, without registration in the land register, and those abroad belong to the Romanian state. Art. 1135-1140 Civil Code presents the aspect of the provisional administration of assets by a special curator, a misnomer, as it is likely to mislead regarding the notion of a curator, a quality that appears in other situations, namely those provided for in art. 150: conflicting interests arise between the tutor and the minor, which are not among those that must lead to the replacement of the guardian, because of illness or for other reasons the guardian is prevented from performing a certain act on behalf of the minor he represents or whose acts approves them.

Also, a portion of the notarial procedure is regulated, namely the summing up of the successors after 1 year and 6 months, the publication in a publication for 2 months and the determination of the vacant inheritance, if after this total interval of 1 year and 8 months no one does not appear, even if the representative of the commune, city or municipality does not appear. In this sense, a much more beneficial legal treatment can be observed than in the case of legal or testamentary heirs, especially since there is no specific term in which the determination of the succession vacancy is required. Combined with the provisions of Law 36/1995 on public notaries and notarial activity, art. 118, we note that there is also the possibility that the notary does not provide a certificate of succession vacancy, but only notes the extinction of a right of concession or use over the place of death or burial, in the conditions where the entire patrimony consisted only of this right.

The specialized literature has expressed the opinion that there is an obvious inequity between the state and the citizen, reflected by the exclusive right of the representative of the public authority to request the issuance of the succession vacation certificate, and not of the creditors of the inheritance or other persons interested in the liquidation of the deceased's estate. [12]

Effective entry into the detention of the inheritance can be achieved as soon as all the known successors have renounced the inheritance or if no heir is known after the period of 1 year and 8 months has passed. This provision represented an argument in favor of the commune, city or municipality's right of seisin. In any case, the effects of the certificate are produced retroactively, from the date of the opening of the inheritance, being a declarative and not constitutive act, [13] precisely because the heritage cannot remain without an owner.

Last but not least, the existence of the succession vacation certificate does not prevent the filing of a subsequent action in the petition of inheritance or annulment of the certificate and the establishment of succession rights. A peculiarity of these procedures resides in the fact that amicable settlement is not allowed, the exclusive competence belonging to the court of law.[14]

From the perspective of European law, there is Regulation no. 650/2012,[2] which, in 33, recognizes the right of a member state or of an entity designated for this purpose by that state to acquire, under its law, the assets of the estate located on its territory, but to recognize the creditors' right to request the satisfaction of their claims from the estate as a whole. Therefore, it can be observed that the state enjoys a large degree of appreciation in matters of succession, a conclusion that can also be reached by reference to the provisions of art. 3 and 4 of the Treaty on the Functioning of the European Union,[3] which stipulates the areas in which the EU is exclusively competent, respectively the areas of shared competence, a list in which the matter of successions is not found.

Comparative law

In this section we will analyze the main legislative provisions regarding succession leave, in order to compare the respective legal regime with the Romanian one. In this sense, we take as a benchmark the legislation of the following countries: France, Great Britain and Germany, so that there is as much variety as possible of the legislative solutions adopted.

We begin with the French normative framework, represented by art. 809-811 Civil Code.[4] According to these provisions, after the 6-month period in which the heirs have not exercised their express or tacit right of succession option, the inheritance is declared vacant by the court at the request of any creditor, of any person who ensured, on behalf of the deceased person, the administration to all or part of his patrimony, to any other interested person or to the state. We note that the term is much shorter than the one adopted by the Romanian legislator, and the scope of persons who can request the declaration of succession vacation is very extensive.

Also, the provisions of the Civil Code regulate the procedure for appointing the curator and his powers, which results in the direct relationship between the court and the curator, the notarial extrajudicial procedure not being preferred by the French legislator. From the perspective of the documents that the curator can conclude previously, the extinguishment of succession obligations are limited to the costs necessary to preserve the patrimony, funeral expenses, taxes owed by the deceased, as well as rent and other succession debts whose settlement is urgent.

At the same time, it is expressly provided that the state must request the entry into possession of the assets, this cannot be achieved by simply passing the term, and if it wishes to acquire in this way the assets that make up the estate, it must be ensured that the inventory of the assets was carried out by the curator in the forms prescribed by law, and if he did not fulfill the necessary formalities, he will be liable for the damages caused to the interests of the heirs, provided that they present themselves.

We can deduce from these provisions a much more drastic legal regime for the heirs, if they are present, but are not determined to accept the inheritance in the rather short term

[2] Regulation no. 650/2012 of the European Parliament and of the Council of July 4, 2012 regarding jurisdiction, applicable law, recognition and enforcement of court decisions and acceptance and enforcement of authentic documents in matters of inheritance and regarding the creation of a European certificate of heir, Official Journal of the EU no. L 201/107.

[3] The Treaty on the Functioning of the European Union, 26.10.2012, Official Journal of the EU no. C 326/49.

[4] French Civil Code. Accessed on 16.04.2023: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/.

anyway, which reflects an increased importance of this successor institution, by expediting the procedures and ensuring a certainty on the estate, which, due to the passage of time, could suffer major losses, although it could be capitalized in the public interest.

We continue with the English normative framework, namely section no. 46 of the Administration of Estates Act 1925,[5] which provides that if the deceased has no heirs, then the estate will pass as bona vacantia to the Crown or the Duchy of Lancaster or Cornwall, if the deceased was resident there. Therefore, the citizenship of the deceased is not relevant, but the fact that he was resident in this state. These provisions must be interpreted using the systematic method by reference to the provisions of another normative act, namely the Succession Act 1964 of Scotland,[6] which in section no. 7 stipulates that nothing shall affect the right of the Crown to acquire the vacant inheritance in the absence of any heir.

More interesting is the provision that includes in the category of heirs that prevents the state from acquiring the inheritance the civil partner, i.e. not only the surviving spouse, but also the one who has similar relationships, and the probate issue could represent an even more interesting aspect, since there is no number minimum years to be considered civil partners. Also, up to this point we could observe that both the French and the English legislation adhered to the solution that the entire inheritance mass belongs to the state, and not to the local public administration authorities, as is the case in Romania.

Last but not least, the German legislator, in the content of art. 1.936 Civil Code,[7] established that the inheritance should be collected by the lands, and not by the federation, which reflects a greater autonomy of these local authorities, who have the possibility to administer their patrimony which will grow more or less through these legacies. At the same time, it recognized as Great Britain the right of the civil partner to inherit as the spouse, which would influence the right of the lands on the inheritance, with the mention that the phrase used is „life partner."

Judicial practice

In this section, we will provide some jurisprudential interpretations by presenting some case decisions, in which the courts have found the existence or non-existence of vacant successions or have resolved requests to cancel vacation certificates.

Thus, in one case the ex-wife of the deceased asked for the sharing of an apartment purchased together with the latter during the marriage, she having a 90% contribution. Since the decedent had no heir, a notarial certificate of succession vacation was issued in favor of the municipality of Iași. The Municipality of Iași raised the exception of the passive procedural quality, as the share of the apartment for which the succession vacation certificate was issued is not in the property of the Municipality of Iași. The court found that the deceased died in June 2011, therefore, before the entry into force of the New Civil Code, as a consequence, the succession vacation certificate was illegally issued for the benefit of the Municipality of Iași, the Romanian state being the one that should have acquire, or, considering that there is no cause of absolute nullity, the court cannot ex officio invoke the

[5] Administration of Estates Act, 1925. Accessed on 16.04.2023: https://www.legislation.gov.uk/ukpga/Geo5/15-16/23/contents.

[6] Succession (Scotland) Act, 1964. Accessed on 16.04.2023: https://www.legislation.gov.uk/ukpga/1964/41/contents.

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invalidity of the certificate. Therefore, the certificate remains valid, and the exception was rejected, the court also referring to the ÎCCJ decision from 2011 regarding the passive procedural capacity of the state, without relevance that in fact there would be no concrete administration of the assets that would result from the capacity of co-owner.[8]

In another case, the plaintiff, a creditor of the estate, filed an action against the city asking the court to find the succession vacant, since no heir exercised the right of succession option. The defendant invoked the lack of succession vacation in the presence of two heiresses, although their attitude is oscillating regarding the acceptance of the inheritance. The trial court invoked ex officio the exception of the general incompetence of the courts, since according to art. 1137 C.civ, the public notary is the one who ascertains the succession vacancy, not the court. Also, the court found that this procedure is carried out after the summons of all the heirs by the notary, and not only after the 1 year and 6 months period has passed, according to the current regulation. Against the sentence, the plaintiff filed an appeal, requesting the cancellation of the appealed sentence and the referral of the case for retrial at the first instance. In the grounds of the appeal, it was shown that the challenged judgment was pronounced with the wrong application of the rules of substantive law and in violation of the rules of procedure, the court including in its judgment contradictory reasons or extraneous to the nature of the case. The court admitted the appeal, with the reasoning that the provisions of art. 1.136 –1.137 must be interpreted as strictly regulating the notarial procedure of ascertaining a vacant succession, being supplemented in this sense with the provisions of art. 118 of Law 36/1995, and not as establishing a norm of general competence that assigns this type of requests to the exclusive competence of the public notary, without the possibility of direct referral to the court.[9]

In an action to cancel the certificate of succession vacancy, but not for the most often cited reason, namely the existence of heirs, but for defrauding the law, since the property of the deceased no longer contained the right of ownership over the assets provided for in the notarial document. Through the counterclaim, the Romanian state, represented by the Ministry of Public Finance, requested that it be established that the will drawn up by the deceased is invalid, since the legatee died before the opening of the succession, that the document under a private signature entitled donation did not produce legal consequences due to non-compliance the validity requirement, respectively the authentic form and, consequently, the real estate that is the subject of the succession vacation certificate cannot make up the shared table. The summons request was rejected on the grounds that there are no rights belonging to the plaintiff, validly acquired, which were damaged by the issuance of the succession vacation certificate, so that it is necessary to cancel it, and the counterclaim was admitted only in party, with regard to the heads regarding the determination of the invalidity of the will and the absolute nullity for the form of the donation, not the finding that the assets cannot make up the divisible mass, since since the claims raised by the plaintiff are unfounded, therefore the succession vacation certificate is not susceptible to be

[8] Iași Court, first civil section, decision no. 870/2016 of 02.06.2016. http://www.rolii.ro/hotarari/58917380e49009082d0015a5.

[9] Constanța Court, first civil section, decision no. 57/2018 of 24.04.2018. http://www.rolii.ro/hotarari/5b10ae50e490090c0a000048.

annulled, for the reasons cited, it is not necessary to establish the circumstance referred to in the counterclaim.[10]

Conclusions

The concept of succession vacation was thought as a mechanism to avoid procrastination of the succession debate, but, in reality, all the benefits established by the legal provisions, such as the heirs' right of secession, the right of residence of the surviving spouse, the reduced rate of taxation applied to the inheritance after the passage of two years from the death, they have the effect of not stimulating the successors in any way, to which is added the aspect that the representatives of the communes, cities and municipalities do not carry out any concrete steps after the passage of that interval of 1 year and 6 months.

To the question of whether or not the models adopted by foreign legislation should inspire the Romanian legislator, there can be a variety of answers, since, as we observed in the section dedicated to comparative law, the way in which they relate to the institution of succession vacation is from some perspectives completely different from ours, from the capacity of the beneficiary, to the term in which the right of succession option can be exercised, or even the recognition of the cohabitant's capacity as an heir, which would reflect the desirability of respecting the implicit will of the deceased, which, for various reasons, did not made a will to prevent the incidence of the succession vacation provisions in the paradigm of own inheritance.

We consider the issue of this institution topical in the Romanian succession landscape, although the Romanian legislator does not take into account certain aspects that are likely to influence the passivity of the successors, as I mentioned above. Thus, from this regulation it could also emerge the legislator's intention that local public administration authorities should not be regarded as „intruders" in family relationships, which, from one point of view, are also based on assets, given that the reality of society Romanians reflect a difficulty in carrying out these notarial procedures due to financial considerations.

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BRIEF COMPARISON BETWEEN THE SITUATION OF VACANT GOODS IN ROMANIAN CIVIL LAW AND BRITISH COMMON LAW

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Abstract
Regardless of the reason (ab intestat succession, company or partnership dissolution, etc.), goods and chattels may end up as part of a bona vacantia. Despite the fact that the succession has its origin in Roman times, the manner in which goods are distributed differ from one legal system to another. In this paper we will briefly discuss about the resemblances and differences on how vacant goods are treated in the Romanian legal system (civil law), and in the British legal framework (common law).
Keywords: *bona vacantia, ownership of goods, transfer of ownership, succession*

1. Introduction

Since the time of the Romans, it was inconceivable that a good would not have a dominus, an owner. It could even be said that the entire legal institution of succession had as its immediate aim the clarity of the civil circuit, even in the event of the death of the owner.

In the following, we will analyse by comparison the manner in which inheritances resulting from death are transmitted, the situation of vacant assets, by reference to the bona vacantia situation, and the particularities of the two legal systems.

Last but not least, it is necessary to specify the fact that in the United Kingdom of Great Britain and Northern Ireland three legal systems operate: Scottish, Northern Irish and Anglo-Welsh. In the content of this paper, references to British law will refer to the legal system applicable in England and Wales.

2. General rules regarding inheritance

2.1 Romanian law

In Romania, the situation of inheritances is dealt with extensively in Book IV of the Civil Code (Articles 953 through 1163). The general rule is that the deceased's estate is transmitted according to the law – legal inheritance – the transmission of the estate according to the wishes of the deceased – testate inheritance – being the exception. Even at a sociological level, the use of a will is not as common as in other European countries, the general understanding being that they are indicated only in the case of considerable estates. However, it is not mandatory that the estate be transmitted only in one of the two ways, the possibility that only part of it be transmitted according to a will, and the rest of the estate be divided according to the rules provided by the law being available. Such situations are encountered when the deceased either seeks to convey a particular asset to a survivor or seeks to remove a successor from the estate.

According to the rules of legal inheritance, the inheritance belongs to the surviving spouse and relatives of the deceased, namely his descendants, ascendants and collaterals, as

the case may be[1]. Ascendants and descendants can inherit regardless of the degree of kinship with the deceased, while collaterals only up to and including the fourth degree.

The law also provides for a category of persons who cannot be totally removed from the inheritance – reserved heirs. They have the right to half of the „gross" inheritance share, i.e. the value of the inheritance before it is affected by donations (or similar actions) or disinheritance. These are the deceased's surviving spouse, descendants and parents[2].

Finally, it is worth mentioning that both the legal inheritance and testate inheritance simply create a right to inherit and exercising this right is, in the majority of cases[3], at the discretion of the kin.

2.2 British law

As it is well known, the British legal system is largely an uncodified legal system based on customs and judicial precedent, with few written statutes. However, in the case of inheritances, the general rules are contained in the Inheritance Act 1883 and the Administration of Estates Act 1925.

They deal entirely with the situation of intestate inheritances, since the general rule in British law is testate inheritance (or inheritance by will). In the absence of a will, the inheritance is divided among the relatives of the deceased, in a similar way to the division under Romanian law, the particularity being the priority given to the surviving spouse and the unlimited collateral relatives that may inherit.

Unlike Romanian law, British law does not have the institution of residual inheritance, so the deceased may dispose of his estate in an unrestricted way.

Another peculiarity of practice in British law is the possibility of establishying, by will, of a trust for the benefit of living persons (at the time of death). In this way, the property is no longer transferred, avoiding the payment of significant taxes. What is transferred is simply the benefit of the trust.

3. General rules regarding the transmission of goods in case of company dissolution

3.1 Romanian law

Liquidation is a stage preceding the dissolution of a company or association, provided for in Title VII of Law 31/1990 on companies. Only after the liquidation procedure is closed, the company is stricken off the trade register.

The liquidation is coordinated by a liquidator, who, in the case of voluntary dissolution, is appointed by shareholder resolution. He takes over the management of the company's activity and completes all ongoing operations (settlement of disputes, sale of assets from the heritage, etc.). The purpose of the liquidator's activity is that, on the one hand, ensuring that the voluntary liquidation takes place without the company in question having been insolvent or with the aim of defrauding the creditors and, on the other hand, to ensure the pay out of the company's liabilities and oversee the distribution of the assets. Most of the time, the

[1] Art. 963 of the Romanian Civil Code

[2] Art. 1086 – 1088 of the Romanian Civil Code

[3] While Art. 1106 of the Romanian Civil Code clearly states that no one can be forced to accept an inheritance he is entitled to, Art. 1107 paves the way to creditors of accepting part of the inheritance entitled to their debtor, in the limit of their receivable

assets of the company are divided among the shareholders, corresponding to their participation in the share capital of the company. The proposal for the distribution of the company's assets is approved by shareholder resolution, and the activity of the liquidator is recorded in a report that is also submitted to the local trade registry.

Since the distribution of the company's assets takes place before its dissolution from the commercial register, the situation in which a company would be stricken off while still owning assets is rare, but not excluded. For example, if an asset was omitted from the inventory by the liquidator.

3.2. British law

Voluntary dissolution is also provided for in the Companies Law of 2006, in art. 1003-1011. The procedure failsafe provisions for the protection of employees and creditors (the obligation to inform a certain category of persons, publication in the First Gazette, etc.), but it leaves to the director(s) what, under Romanian law, falls under the attributions of the liquidator.

The director(s) must ensure that, prior to the request for dissolution, the company's asset was used to cover its liabilities, that any resulting asset was distributed to the associates and that there are no more assets in the company's patrimony, receivables or the like. Even before applying for voluntary dissolution, the director must take care that all bank accounts of the company are closed, after the striking off there are no means by which the possible sums of money left in such accounts can be recovered.

The intervention of the Companies House is minimal and without any verification on the fulfilment of any substantive legal requirements.

4. Bona vacantia

4.1. Common grounds

Bona vacantia is a Latin motto used to describe any form of abandoned property, without an owner, or inheritance without heirs. Depending on the country and legal system, vacant goods or inheritances end up, after a certain time, in the estate of other people, usually authorities.

4.2. Romanian law

The Romanian Civil Code expressly deals with both the situation when the owner relinquishes, of his own free will, ownership of a freehold, as well as the situation of vacant goods. Also, through the institution of usucaption, the hypotheses of non-use or abandoned of assets are treated implicitly.

In the event that the owner renounces the ownership right, this can only take place through a notarized statement, by which case the administrative-territorial unit, based on the decision of the local council, can request the registration of the ownership right in his favour, if another person does not requested registration under the usucaption[4]. It follows, therefore, that the transfer of freehold to the property of the administrative-territorial unit in case of relinquishing of ownership has a subsidiary character (it can only take place in the

[4] Art. 889 of the Romanian Civil Code

absence of a usufructuary claim from another person) and optional (the administrative-territorial unit is not obliged to request the registration of the property).

Next, in the case of a traditional bona vacantia, the estate becomes the private property of the administrative-territorial unit on whose grounds it was on the date of the opening of the inheritance (date of death of de cuius). Declaring an inheritance as vacant is made by the notary public, ex officio or at the request of the local administration concerned. Thus, if there are indications that the inheritance is to be declared vacant, the public notary normally having jurisdiction will inform the local authorities. If within one year and six months from the date of the opening of the inheritance, no heir has claimed the inheritance, the notary, at the request of any interested party, will subpoena all the possible heirs, through a publication made at the place of the opening of the inheritance, at the place where the estate is situated, as well as in a widely circulated newspaper, at the expense of the estate, to appear at his office within two months at the latest from publication. If no heir appears within the deadline set in the publication, the notary will find that the inheritance is vacant. The administrative-territorial unit enters into the de facto possession of the inheritance as soon as all the known successors have renounced the inheritance or, upon completion of the term provided for in Art. 1137, if no heir is known. The estate is acquired retroactively from the date of its opening[5].

In practice, the actual taking over of assets from a bona vacantia, especially freeholds, also requires an act of acceptance of the inheritance, in the form of a local council bill.

Finally, the ownership of any goods or freehold, unused for a long period of time or left without an owner, can be acquired by usucaption, under the conditions of Art. 928-934 of the Civil Code. This, however, implies, among other things, a high degree of diligence on the part of the person who wants to acquire the property that can be subject to usucaption. Therefore, we cannot speak of a possibility of passing on an asset without an owner, but rather of acquiring such an asset.

4.3. British law

British law treats unclaimed assets following an inheritance and assets abandoned or undistributed prior to the liquidation of a company in the same manner. All are considered vacant property and initially fall under the administration of the Crown[6]. Goods and chattel are sold at public auction, with the proceeds being used to cover the Crown's debts, and real estate (worth over £500) reverts to the Crown. The crown does not refer, in this case, to the sovereign or the royal family, but to the state apparatus of the kingdom. This custom has its origins in two principles: i) private property was originally acquired from a lord who, in turn, had acquired it directly from the monarch. Thus, it is only natural that when a person no longer needs ownership of the property, it reverts to the monarch and ii) the monarch is seen as a pater familias, ultimately being the most distant relative of any British citizen. This latter principle was also theorized by subsequent legal provisions, in which the Crown is mentioned as the last class of heirs.

It should be noted that the purpose of the Crown is not to retain ownership of real estate in the estate. Once transferred to the administration of the Crown, the estate is administered

[5] Art. 1135-1139 of the Romanian Civil Code

[6] Except for estates situated in the counties of Cornwall and Lancaster, which are administered directly by the Duke of Cornwall (the reigning King) and the Duke of Lancaster (the Prince of Wales, the King's eldest son)

by a specialized department within the Treasury Solicitor. This department has two purposes: first, to carry out new steps in an attempt to find living successors or persons[7] to whom the inheritance could be passed on, and second, to liquidate the assets.

Thus, in a first phase, the properties are listed in a special register of vacant inheritances, and any person who claims a connection with the deceased can claim them. As previously stated, legal succession under British law can take place against any relative of the deceased, however distant. Thus, it is possible that, although in the first instance the inheritance appeared to be vacant, there are still successors of the deceased who wish to take over the real estate. This situation has created a real line of business, of the so-called „relative hunters". Thus, companies specialized in several fields (usually legal and genealogical) try to identify distant relatives of people who died without leaving a valid will, but with considerable wealth at the time of death, in order to obtain a commission. During this time, the properties are maintained at a minimal level, but any proceeds (such as rent) remain with the administrator.

If after following these steps, the institution designated by the Crown to administer the estate is not approached by an heir within 10 years or does not pass the estate onto another person, it will proceed to sell the estate by public auction. The proceeds shall be passed on to the Crown.

5. Final conclusions

The two legal systems provide for both legal and testamentary inheritance. While in the Romanian legal system, legal inheritance is the rule, in the British one it is the exception. The Romanian system has the peculiarity of creating a class of reserved heirs, while the British system has the peculiarity of expanding almost unlimited the number of classes of relatives who can inherit.

Both legal systems also accept the existence of vacant estates and provide for ways to transfer ownership of assets from such an estate to the authorities. While the Romanian Civil Code, consistently following the principle of decentralization of authority, pushes these goods towards the local authorities, the British custom takes these goods to the supreme state authority.

If the purpose pursued by the Romanian Civil Code is for the goods from a vacant inheritance to remain in the property of the administrative-territorial unit, and for it to decide on a case-by-case basis how it will dispose of them, in British law, their transmission is pursued for a long time to successors who had not been initially identified, and liquidated only as a last resort by sale at public auction.

Finally, it should also be mentioned that, in British law, there is also a situation in which the goods from an inheritance are not passed on to the heirs in the strict sense of the word, but enter a trust established for their benefit. In this way the payment of considerable taxes is avoided.

[7] In the case of a bona vacantia, the Crown may assign an estate or part of it to persons who were not related to the deceased, such as a person who took care of the deceased during the last period of his life

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Section B

CERTAIN DUTIES OF THE SYNDIC JUDGE IN THE INSOLVENCY PROCEEDINGS REGULATED BY LAW NO. 85/2014

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Abstract

The syndic judge is the person who represents the court, i.e. the court in whose jurisdiction the debtor is based and where the request to open insolvency proceedings was judged, being the one who leads insolvency proceedings.

After 1990, the legislation in the field of insolvency underwent numerous changes, so the role of the syndic judge was adapted to the new needs, the attributions that belonged to him based on Law no. 64/1995, were taken over by the judicial administrator/judicial liquidator, which in turn is under the control of the creditors, organized in the creditors' meeting and the creditors' committee.

Even if currently, the main duties of the syndic judge are regulated by the provisions of Article 45 (1) of Law no. 85/2014, during the trial of an insolvency file, any litigious situation, which is also related to collective proceedings, will fall within the jurisdiction of the syndic judge, thus, its role in insolvency proceedings is difficult to reduce to the provisions regulated by this article.

Keywords: *insolvency, debtor, creditors, syndic judge, creditors' meeting, creditors' committee, judicial administrator, judicial liquidator.*

The first Romanian legislation containing a complete regulation of merchant bankruptcy was the **Commercial Code from 1840**, which, as far as bankruptcy was concerned, focused on: the Court, the judge-commissioner, the syndic, the creditor and the bankrupt.

The Commercial Code from 1840 established that the judge-commissioner and the syndic were appointed by the Court, mainly from among the creditors, and the syndic performed their duties under the supervision of the judge-commissioner, and had the managerial task of liquidating assets and liabilities.

The Romanian Commercial Code of 1887, with subsequent amendments, constituted the main regulation in the matter of bankruptcy until the entry into force of **Law no. 64/1995 on judicial reorganization and bankruptcy proceedings**[1].

In the conception of the **Romanian Commercial Code**, bankruptcy was regulated as a collective forced execution proceeding on the assets of the debtor merchant, who stopped paying commercial debts. The entire bankruptcy proceedings were carried out under the authority of the court, and the judge-commissioner coordinated the operations carried out by the syndic, under the supervision of „*a delegation of creditors*", in fact the Committee of Creditors, from the present. The judge-commissioner was the body that exercised the administration of bankruptcy proceedings in order to preserve the assets of the bankrupt, in

order to cover the creditors' claims. The provisions of Article 726 of the Commercial Code established that the syndic was appointed by the Court.

The commercial code was amended in **1895**, and later in **1902**, so that administrative and jurisdictional attributions were delimited, the syndic judge being the one who acquired administrative attributions, management of proceedings, the one who could formulate actions to annul fraudulent acts, as well as requests to incur liability, and who took over the attributions of the syndic. The duties of the syndic judge of that period were those of the judicial liquidator of today.

The bodies that applied bankruptcy proceedings were the court, the public ministry, the syndic judge and the general assembly of creditors. As a result, the syndic was no longer regulated.

In the period **1948-1989**, the Commercial Code had a limited applicability considering the specifics of the socialist economy, but after 1990, it became again the main regulation of commercial activity, organized on the basis of the principles of private property and free initiative.

Later, **Law no. 64/1995 regarding judicial reorganization and bankruptcy proceedings**, was a much more liberal and debtor-friendly law, so it did not take over the harsh and restrictive measures of the Commercial Code.

The judicial reorganization and bankruptcy proceedings concerned exclusively the debtor's patrimony, and not his person, and the proceedings were conducted under the control and supervision of the judiciary, in which the syndic judge was in a central position. The law established that the bodies applying proceedings were the court, the syndic judge, the liquidator administrator, the creditors' meeting and the creditors' committee. As in the Commercial Code of 1887, the syndic judge was the manager of the proceedings, and the administrator of the proceedings could be appointed on an optional basis by the Creditors' Assembly. The proceedings administrator was tasked with overseeing management operations, assisting the debtor with all acts regarding management, or part of them, managing all or part of the debtor's activity, and could be charged with the execution of the duties delegated by the syndic judge.

By **Law no. 99/1999[2] and Ordinance no. 38/2002**[3], the syndic judge was released from certain tasks such as inventory, sealing of goods, auction sales, these being entrusted to practitioners in reorganization and liquidation, members of the professional body, called U.N.P.R.L., which later became, U.N.P.I.R.

As a result, the insolvency practitioner became the proceedings manager, being able to refer the syndic judge to any issue that required his resolution.

In the vision of **Law no. 64/1995**, the following bodies were established for the enforcement of proceedings: the court-tribunal, the syndic judge, the judicial administrator, the liquidator, the meeting of creditors and the committee of creditors (until 2002), to which was added the general meeting of associates and the committee of associates, which had a broad scope of powers, going as far as managing all or part of the debtor's business.

Following the amendments made to Law no. 64/1995, in the years 1999 and 2002, the duality of the attributions of the syndic judge was eliminated, who previously was called to perform both administrative and jurisdictional attributions, the insolvency practitioner becoming the proceedings manager, who could refer the syndic judge in connection with any issue that required court intervention.

Law no. 85/2006[4] and **Law no. 85/2014**[5], largely kept the changes brought by Law no. 64/1995, modified both with regard to the participants in the proceedings and with regard to the duties shared between the syndic judge and the insolvency practitioner, from the perspective of the specific functions held.

Law no. 85/2006 brought significant changes, in the distribution of roles, attributions and prerogatives between the proceedings bodies, the syndic judge, on the one hand, and insolvency practitioners, on the other.

If the provisions of Article 11 (2) established that the duties of the syndic judge are limited to the judicial control of the activity of the judicial administrator or the liquidator, in the cases and requests of a judicial nature related to insolvency proceedings, the managerial duties fell to the administrator or the judicial liquidator, and in the situation where the debtor's right of administration was not lifted, they fell to the debtor.

These managerial duties were subject to any control from the creditors, who could verify the appropriateness of the measures taken by the liquidator, within the proceedings.

The role of creditors increased in the proceedings, so that they could manage the debtor's assets through the liquidator, decide on their rights regarding the recovery of debts, and appoint the liquidator who was to conduct the insolvency proceedings.

The syndic judge presided over the entire proceedings from the opening to its closing, and pronounced judgments, which marked the stages passed in the proceedings, resolving conflicts, disputes and requests arising from the rights of the participants.

In all these conflicting situations, the syndic judge exercised legality control regarding the measures taken by the insolvency practitioner or resolved appeals and objections of the participants in the insolvency proceedings.

The syndic judge's control could not be exercised over the appropriateness of the insolvency practitioner's managerial measures. The prerogatives of controlling the appropriateness of managerial decisions of the insolvency practitioner were held by the Creditors' Assembly and the Creditors' Committee.

Currently, in order to achieve the stated purpose of the law **(Law no. 85/2014)**, it was considered necessary for collective proceedings to be applied and supervised by certain bodies specially empowered by law, because only through a fast and specialized development, the creditors' interests can be protected, and the debtor's debts paid off.

Therefore, the legislator decided that the application of insolvency proceedings should be entrusted to expressly determined bodies, each of these specialized persons performing certain acts and operations within the proceedings, the syndic judge being assigned specific duties for the position held namely the judicial control of the activity of the judicial administrator and/or the liquidator.

In accordance with the provisions of **Article 40 of Law no. 85/2014**, insolvency proceedings are applied by the bodies authorized by law, namely: the courts, the syndic judge, the judicial administrator and the judicial liquidator.

And according to **Article 40 (2)**, the mentioned bodies are obliged to ensure the speedy performance of the acts and operations provided for by this law, as well as the realization, in accordance with the law, of the rights and obligations of the other participants in these acts and operations.

In addition to these bodies, the following also participate in the proceedings: the debtor, the creditors' meeting and the creditors' committee, the special administrator, as well as

some specialized persons called to help the syndic judge or the administrator/judicial liquidator, in areas where specialized knowledge is required.

During the entire duration of the proceedings, the bodies that apply the proceedings, provided by Article 40 (1), will have to ensure the speedy performance of the acts and operations provided for by law, as well as realizing, in accordance with the law, the rights and obligations of the other participants in these acts and operations.

1. THE COURTS OF LAW

According to **Article 41 (1) of Law no. 85/2014**: „*all the procedures provided for in this chapter, with the exception of the appeal, are under the jurisdiction of the court or, if applicable, the specialized court in whose jurisdiction the debtor had its registered office/business at least 6 months prior to the date of referral to the court. If a special insolvency section has been created within the court, it has the competence to carry out the procedures provided for by this law."*

Next, Article 41 (3) provides that the court, legally vested with a request to open insolvency proceedings according to paragraph (1), remains competent to resolve the case, regardless of subsequent changes of the debtor's headquarters.

All requests, appeals, actions based on the provisions of this chapter are judged according to the provisions of the Code of Civil Proceedings regarding the judgment in the first instance, with the mention that the deadline for filing the objection is a maximum of 15 days from the communication, the answer to the objection is not mandatory, and the syndic judge sets, by resolution, within a maximum of 5 days from the date of submission of the objection, the first court term, which will be no more than 30 days from the date of resolution. Regarding requests to open insolvency proceedings or in other cases where the law provides for special terms, these special terms will be taken into account.

As a result, Law no. 85/2014, compared to Law no. 85/2006, did not change the jurisdiction of the court in whose jurisdiction the debtor has its headquarters, but only came up with an addition, in the sense that it added the condition that the debtor had its main headquarters at least six months before the referral to the court within its jurisdiction of that court.

Therefore, the intervention of the courts is not only necessary to protect the general interests of society, but also indispensable for the resolution of conflicts of interest that inevitably arise between the debtor and his creditors, as well as the other participants in the proceedings.

2. THE SYNDIC JUDGE

The insolvency proceedings, being a collective proceeding aimed at paying the debts of the insolvent debtor towards his creditors, required the appointment of a competent person to supervise the acts and operations established by law, which are carried out at various stages of the proceedings, to give both the creditors and the debtor the guarantee that their rights and interests will be respected.

Both in the view of Law no. 85/2006, as well as Law no. 85/2014, the syndic judge has the main role in applying insolvency proceedings. This results not only from the contents of Article 45 (1) of Law no. 85/2014 [former Article 11 (1) of Law no. 85/2006][6], which provides for his main attributions, but also from the circumstance that the insolvency judge is a magistrate, with all the consequences arising from this legal status.

It can be stated that the syndic judge is the only one among all participants in collective proceedings who is disinterested in this procedure, considering that the other participants may pursue certain personal interests, either to realize their claims against the debtor, or to capitalize on the debtor's assets at the highest possible level, and, thus, to collect as high a success fee as possible, or to acquire at the lowest possible prices certain goods from the debtor's estate.

Thus, it can be stated that the syndic judge exercises a public function, of general interest, in the performance of his duties acting as a magistrate, and not as a representative of the debtor or creditors, which gives its acts binding character for all parties involved in the proceedings.

And, from the analysis of the provisions of Article 45 (2) of Law no. 85/2014[7], it follows that the syndic judge is not the manager of the proceedings, but only its supervisor, from the perspective of legality.

But, from a simple check of the provisions contained in Law no. 85/2014, it can be observed, however, that some of the legal provisions refer the syndic judge to the scope of appropriateness control of the adopted measures.

Thus, by way of example, according to the provisions of Article 49 (3) of Law no. 85/2014: „*If, after the adoption of the decision of the meeting of creditors, it is established, by final decision, that the vote was vitiated by the introduction or elimination of a claim, for which its owner had requested to be entered in the table of claims and if the vote thus flawed could have led to the adoption of another decision, the meeting of creditors is reconvened with the same agenda. If the new decision of the meeting of creditors is different from the initial one, the syndic judge can decide to dissolve in any case the acts or operations concluded pursuant to the initial decision".*

Based on this legal provision, the syndic judge will give a resolution and decide whether or not it is appropriate to dissolve the acts or operations concluded under a judgment proven to be flawed.

And, according to Article 75 (9) of Law no. 85/2014: „*In order to ensure the resources in order to continue the current activity of the debtor during the observation period, the sums of money that are the subject of the preferential cases provided for in this article may be used by the judicial administrator with the consent of the creditor holding the guarantee. In case of refusal of this agreement, the syndic judge can authorize the use of these sums of money, with the granting to the creditor of the guarantee of the appropriate protection, according to the provisions of Article 87 (3) „.*

From the verification of these legal provisions, it can be seen that the syndic judge is called to analyze the appropriateness of using the sums of money existing in the debtor's account, on the date of the opening of the proceedings, and on which there are causes of preference, even without the consent of the creditor, if appropriate protection is granted

IN CONCLUSION

In insolvency proceedings, regulated by Law no. 85/2014, the managerial powers belong to the judicial administrator or the judicial liquidator, and, exceptionally, to the debtor, if he has not been deprived of the right to administer his assets.

The managerial decisions of the judicial administrator, the judicial liquidator or the debtor who has retained the right of administration, can be controlled under the aspect of opportunity by the creditors, through their bodies.

However, it can be noted that, even if provisions (2) of Article 45 of Law no. 85/2014, establish that the duties of the syndic judge are limited to the judicial control of the activity of the judicial administrator and/or the judicial liquidator, there are situations in which, if the creditors adopt a passive attitude, the one who will adopt the necessary measures, including those aimed at the measures of opportunity, is the syndic judge.

As a result, the powers of the syndic judge cannot be limited to those provided by the provisions of Article 45 (1) of Law no. 85/2014, so that, until the time when he will be discharged from any duties or responsibilities regarding the proceedings, the debtor and his assets, creditors, holder of preferential rights, shareholders or associates, by closing the proceedings, according to the provisions of Article 180, any litigious situation, which is related to insolvency proceedings, will come under its competence for resolution.

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[4] Law no. 85/2006 regarding insolvency proceedings, published in the Official Gazette of Romania no. 359 of April 21, 2006, currently repealed.

[5] Law no. 85/2014 regarding insolvency prevention and insolvency procedures, amended, published in the Official Gazette of Romania no. 466 of June 25, 2014.

[6] The provisions of Article 45 (1) of Law no. 85/2014 establish the following:

"(1) The main duties of the syndic judge, within this chapter, are:

a) the reasoned pronouncement of the decision to open insolvency proceedings and, as the case may be, to enter into bankruptcy, both through general proceedings and through simplified proceedings;

b) the adjudication of the debtor's appeal against the creditor's introductory request for the initiation of proceedings;

c) judging the opposition of creditors at the opening of proceedings;

d) the reasoned appointment, after the verification of possible incompatibilities, by the sentence opening proceedings, as the case may be, of the provisional judicial administrator/provisional judicial liquidator, requested by the creditor who submitted the request to open proceedings or by the debtor, if the request belongs to him. In the absence of such a proposal made by the debtor or by any of the creditors, the appointment will be made from among the insolvency practitioners registered in the Table of the National Union of Insolvency Practitioners in Romania, who have submitted their offer to the file. If no offer has been submitted, it will randomly designate any of the insolvency practitioners registered in the National Union of Insolvency Practitioners from Romania. If both the debtor and the creditor have requested the appointment of a judicial administrator/judicial liquidator, the creditor's request will prevail. If the creditors request to be appointed different judicial administrators/judicial liquidators, the syndic judge will appoint one of those proposed by them. The appointment will be made for the administration of the proceedings until it is confirmed in accordance with the law. At the same time, the syndic judge will set the fee in

accordance with the criteria established by the Government's Emergency Ordinance no. 86/2006, republished, with subsequent amendments and additions, as well as his attributions for this period;

e) confirmation, by conclusion, of the judicial administrator or the judicial liquidator appointed by the meeting of creditors or by the creditor who owns more than 50% of the value of the claims. If there are no challenges to the legality of the decision of the meeting of creditors or of the decision of the creditor who owns more than 50% of the value of the claims, the confirmation is made in the council chamber, without summoning the parties, within 5 days of notification to the syndic judge;

f) replacing, for valid reasons, by conclusion, the judicial administrator or the judicial liquidator, according to the provisions of Article 57 (4);

g) judging requests to revoke the debtor's right to continue conducting his activity;

h) adjudicating requests to hold accountable the members of the management bodies who contributed to the debtor becoming insolvent, according to Article 169, or notifying the criminal investigation bodies when there is data regarding the commission of an offense;

i) judging the actions brought by the judicial administrator or the judicial liquidator for the annulment of some fraudulent acts or operations, according to the provisions of Article 117-122 and actions for the nullity of payments or operations carried out by the debtor, without right, after the opening of proceedings;

j) judging the appeals of the debtor, the creditors' committee or any interested person against the measures taken by the judicial administrator or the judicial liquidator;

k) confirmation of the reorganization plan, after its voting by the creditors;

l) resolving the request of the judicial administrator or the creditors to interrupt the judicial reorganization and bankruptcy proceedings;

m) the resolution of challenges to the reports of the judicial administrator or the judicial liquidator;

n) judging the action to annul the decision of the meeting of creditors;

o) judging the requests of the judicial administrator/judicial liquidator in situations where a decision cannot be taken in the meetings of the creditors' committee or the meeting of creditors due to the lack of quorum caused by the non-appearance of legally summoned creditors, at least two of their meetings having the same order of the day;

p) ordering the convening of the meeting of creditors, with a certain order of the day;

q) pronouncing the resolution to close the proceedings;

r) any other attributions provided by law".

The provisions of Article 45 (2) of Law no. 85/2014 establish the following:

"(2) The duties of the syndic judge are limited to the judicial control of the activity of the judicial administrator and/or the judicial liquidator and to the processes and requests of a judicial nature related to insolvency proceedings. The managerial duties belong to the judicial administrator or the judicial liquidator or, exceptionally, to the debtor, if he has not been deprived of the right to administer his assets. The managerial decisions of the judicial administrator, the judicial liquidator or the debtor who has retained the right of administration can be controlled under the aspect of opportunity by the creditors, through their bodies".

TERMINATION OF THE POWER TO REPRESENT AND EXCEPTIO INTRA AMBITUM LEGE DATA: CONTINUATION OF THE MANDATE BY THE HEIRS

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Abstract

Any living being has, in principle, the ability to engage in legal relationships, concluding a multitude of legal acts during life. However, there are also situations that make it almost impossible for you to participate in the hiring of a mandatory report, and this shortcoming is not only one of modern society.

Representation was an institution that developed more difficult because in the Roman era, binding commitments were born directly between parties through rituals and sacramental words, bringing, over time, more and more exceptions to the rules of representation, which over time allowed the recognition to this new legal institution as a complex legal mechanism, a technique or even a legal artifice that gives rise to a series of complex legal relationships based on two wills: the primary will that generates the mandate of representation, combined with the applied will of the representative which is necessary for the execution of the mandate, the role of each of the two wills being essential and precisely for that reason death – the common cause of termination of contracts – knows specific valences in the matter of representation, it being possible to execute the will even after death through the possibility offered by the legislator to continue the mandate by the heirs.

The accuracy in the admissibility of the management of these hybrid mandates, if we can qualify them as mandates, must be maximum, the definition of a legal regime should be clear from the extent of the powers it confers to the determination of the quality in which the heirs act, useful clarifications for the legal institutions related to the institution to print the legal regime of this creation from the perspective of the effects and the incident legal liability.

Keywords: *representation, termination of mandate, death, inheritors, power*

Civil capacity – a sine qua non condition of representation

From the perspective of biological sciences, the human body could be functional for a period of about 120 years, and the life expectancy increases considerably with the improvement of the standard of living of living conditions and hygiene, etc.

However, death is an inevitable more or less distant event in the life of any person and most often an unexpected event that leads to the complete and definitive cessation of life.

Death has been defined and has been the subject of many fields of science, but medical researchers say that death basically corresponds to the cessation of all vital functions and the definitive cessation of all brain activity without going into the details of clinical death, brain death and other types of potentially reversible or irreversible states.

„Death is very likely the single best invention of Life. It is Life's change agent. It clears out the old to make way for the new" said in a farewell speech the co-founder of Apple, Steve Jobs, and even if quantum physics suggests human continuity outside the ephemeral

body, based on the study of the phenomenon of interconnection of particles which, according to researchers, creates a dualism between body and soul and regardless of scientific or religious motivations and beliefs, **we still have to limit ourselves** to what society accepts as an implacable and indisputable destiny: death from the perspective of the regulations, even cumbersome ones, that certify the overcoming of this recognized legal-administrative barrier: the death certificate, the civil status document that proves the status of the deceased person.

„Civil capacity is recognized for **all** persons**"** says Article 28 (1) of the Civil Code continued to show in the next paragraph that „Every person has the capacity to use and, except for the cases provided for by law, the capacity to act".

„No one can be limited in the capacity to use or deprived, in whole or in part, **of the capacity to act,** except in the cases and conditions expressly provided by law", but also „**No one can renounce,** in whole or in part, the capacity of use or capacity to act"[1].

Capacity to use – respectively general and abstract aptitude **to have** civil rights and obligations –, it starts from the birth of a person and ends with his death,[2] and this continues with the ability to ***conclude*** *civil legal documents on their own, which gives the person the* ***capacity to act****.*[3]

As a result, any living being has, in principle, the ability to engage in legal relationships, concluding a multitude of legal acts during life. However, there are also situations that make it almost impossible for you to participate in the engagement of an obligatory relationship, and this shortcoming is not one of modern society, but has been since „the dawn of the earth".

Representation was an institution that developed more difficult, unlike sales contracts, maritime loans, and other similar legal relationships because in Roman Law; based in the beginning on the strictly material connection between the contractual parties who committed themselves obligatorily through rituals and sacramental words that belonged exclusively to the contractual parties, virtually eliminated through ritual the possibility of representing the parties at the conclusion of legal acts. Under the influence of the canonists, Roman law evolved with regard to the mandate towards the notion of representation. It was then held that „there can be no mandate except in so far as there is representation". It proved, over time, that the impossibility of representation represented an obstacle in the rapid evolution of society determined by the development of economic relations; what made, over time, the institutional evolution of this institution know perfectible stages of self-development; bringing to the rule of non-representation in several exceptions that in time allowed representation[4] and definitively led to the recognition of this new legal institution.

Representation today represents a complex legal mechanism, a technique or even a legal artifice that gives rise to a series of complex legal relationships both between the represented and the representative, as well as in their relationships with third parties, especially in relation to the good faith of the latter, and the birth of the representation and the exposure of the power of representation have not only the role of investing the representative with the conclusion of mandated legal acts, but in the doctrine it was

[1] Article 29 of the Civil Code.

[2] Article 34-35 of the Civil Code.

[3] Article 37 of the Civil Code.

[4] Mircea Dan Bob – *Reprezentarea în dreptul roman*, „Revista Română de Drept Privat" Magazine no. 02/2019

appreciated as a genuine offer to contract offer made through the power of representation. Interesting theory, although the risk of the current doctrine and jurisprudence from many perspectives, but also from that of the limits of the power of representation because, is it not so, the offer as a unilateral legal act irrevocably binds the represented (principal) within the limits and exactly of the power of representation concluded; the current foundation and reasoning of the legislator requiring to be changed – an aspect that will be the subject of a future debate.

Returning to the subject, however, according to Article 1.298 of the Civil Code „*In the case of conventional representation, both the represented and the representative must have the capacity to conclude the act for which the representation was given.*" – noting that the requirement of dual capacity, both of the principal and of the representative, is *only in the case of conventional representation* !!!! because only in this hypothesis both must have the capacity to conclude the act for which the representation was given, the capacity to be assessed in relation to the nature of the legal act to be concluded in accordance with the trichotomous division of acts between acts of conservation, administration, disposition.

Therefore, the principal must be able to conclude the act that forms the object of the contract himself, as the sanction for non-compliance with this special rule is *invalidity*, which can be invoked even by the representative; (exception from common law that is conferred on him *in order not to be exposed to* patrimonial *legal liability* towards the third party with whom he contracts by virtue of representation and who would suffer damages following the cancellation of the mandate). Thus, the represented (principal) as well as the representative must fulfill all the conditions of capacity in order for the authorized legal acts to be concluded in the name and on behalf of the former, which are in charge of the obligations assumed by the representative.

It is obvious that in this case it is necessary to meet not only the capacity to use sine qua non, but the capacity to act is put into question in the most sensitive form of its harmonization with the mandated acts and we can encounter many situations that determine the inability to act for the conclusion of a certain act such as: the age, the quality of one of the parties regarding the mandated act (for example a foreigner lacking the specific capacity to acquire extra-urban land), capacities that are assessed in relation to the analyzed legal act, although, separately, regarding the representation, its validity can only be assessed in relation to the date on which the representation took place.

Even if the legislator of the new Civil Code instituted the rule of capacity through the provisions of Article 1298 Civil Code, the doctrinal debate remains regarding the consistency of this capacity, the provisions ranging from the full capacity of use and to act of both the principal and the representative at the conclusion of the mandated acts, up to the condition of capacity required exclusively in the person of the representative (proposal also reinforced by Italian legislation which, by parallelism, only requires the representative to have the ability to understand and assume the content and effects of the legal act). That things in the Romanian legislation have a different turn can also be demonstrated by the *reductio ab absurdum* reasoning exemplifying that we can validly mandate a person today to conclude an assignment of litigious rights, although at the time when the mandated operation is carried out, the representative has acquired the capacity of judge of the court in the district in which the litigious right that is the object of the mandate is judged. And the structure can also be the other way around: as Romanian citizens, we conclude the deed of representation in favor of a Chinese citizen aiming at the purchase of land on Romanian

territory, and it is obvious that the representative's inability to acquire land in Romania does not affect the execution of the mandate, the representative not being a person to whom the law requires a certain capacity to acquire such an asset, but he has full capacity to use and to act, therefore possessing the amount of capacity sufficient for valid representation at the conclusion of the sale deed.

Our support is also strengthened by the provisions of Article 1300 of the Civil Code[5] so that the validity elements of a contract relative to consent will always be assessed in the person of the representative and only by way of exception when they concern certain elements previously established by the representative, the assessment of good or bad faith can also be carried out in relation to his person, and the legislator's conclusion is not always easy to see, because the representative in bad faith will not be able to save the contract by invoking the good faith of his representative, which is quite important in terms of liability for eviction or defects, for example.

The legal problem also arises in the context of a poor jurisprudence determined by the changes of legislative vision in this matter under the empire of the previous civil code, which through the provisions of Article 1538 shows that the representation could also be given to a person lacking capacity, to an incapable person, because the legal theory claimed that concluding the act in the name and on behalf of the principal directly between him and a third party, and the representative being only an intermediary, the validity conditions of the legal act could not be interpreted in the person of the intermediary.

Obviously, the theory does not hold in the modern conception of the new civil code, on the contrary, the legislator, in order to eliminate any analogy with the evaluation judgments of the previous one, emphasized in Article 1.298 of the Civil Code that the verification of consent is usually done in person to the representative, and only by way of exception in the person of that representative according to what is shown. The exercise of this right of representation is done in the name and on behalf of the representative, pursuing his essential interests. In other words, his legal will to be put into practice by the representative. Therefore, without putting into motion his legal will acted upon by the representative's interests, the representation has no meaning, but its finality is ensured by assuming the role of executing the mandate and by proceeding to execution by the representative. As a result, two wills will always co-exist for the benefit of the legal act: the primary will that gave birth to both the instrument of representation and his interest in the legal act that was to be concluded, combined with the applied will of the representative, derived from the priority and primary will of the represented, the will that is necessary to implement the interests of the represented, the role of each of the two wills being essential[6].

Death – the reason for the termination of the mandate contract

In our equation, we must take into account that the new Civil Code additionally regulates the duration of the mandate through the provisions of Article 2015 of the Civil Code, according to which „*If the parties have not stipulated a term, the mandate contract*

[5] Article 1300 of the Civil Code:Good faith „*(1)Apart from the case where they are relevant for the elements established by the principal, good or bad faith, the knowledge or ignorance of a certain circumstance is assessed in the person of the representative. (2) The principal of bad faith can never invoke the good faith of the representative."*

[6] For more details, see Valeriu Stoica *Despre Puterea se Reprezentare*, în „Revista Română De Drept Privat" magazine no. 2/2019

terminates in 3 years from its conclusion". As a result, we do not have a minimum duration of the mandate, which theoretically can be of the order of minutes, although hard to believe in practice, but no maximum duration allowed, as it can extend over several years, however, in the absence of leadership of the parties, the regulator assumes that the duration of the mandate is three years, a term that runs from the date of its conclusion. And here, discussions arise in the doctrine because we must distinguish between the duration of the mandate contract as an instrument that proves the existence and birth of the mandate relationship and the beginning of the mandate relationship, which arises from the date agreed by the parties, the principal and the agent, to start the procedure for concluding the mandated legal acts, a moment which can often differ from the date of conclusion of the mandate contract[7].

Starting from the duration of the representation, not infrequently, in time, – between the ability of the represented to conclude the act of representation, which can be, for example, a capacity specific to the conclusion of administrative acts only and the capacity relative to the conclusion of the legal act that represents the very obligation of the representative, which can be full from the start, *from the moment the representative is identified,* – discrepancies may appear during the execution of the mandate or act of representation and even cause the termination of the representation, having in this case consequences that are sometimes extremely unfavorable to the representative or his heirs.

So our question arises when, although, at the date of the valid conclusion of the act of representation, the capacity of the represented and the representative was full, in the meantime the conditions of capacity are lost and the representation conditions of from Article 1298 of the Civil Code are no longer fulfilled. To be more clear, it is important to remember that this disruptive moment, which changes the course of the representation, can intervene at a moment that is most unfavorable to the interest of the representation, and the sudden termination of a legal situation assumed by the parties can have negative consequences on the assets of the represented – and the death of the represented (the principal), but also the death of the representative (the representative) represent such situations.

The representation, being a genuine contract, is applicable to the general causes of termination of contracts, following the termination under the conditions regulated by the Article. 1321 of the New Civil Code, respectively by execution, expiration of the term, fulfillment or non-fulfillment of the condition, accidental impossibility of execution, but the provisions of Article 1307 also regulate specific causes of termination of the power to represent: „*(1) The power to represent ceases upon the death or incapacity of the representative or the represented, unless the contrary results from the convention or the nature of the business. (2) If the representative or the represented is a legal person, the power to represent ceases on the date on which the legal person ceases to exist",* at the same time showing in paragraph (4) that „ *(4) Termination of the power to represent does not produce effects regarding third parties who, at the time of concluding the contract, did not know and should not have known this circumstance."*

[7] For more details, see Dan Chirică – *Condiţiile de validitate, proba şi durata reprezentării convenţionale, in* „Revista Română de Drept Privat" Magazine

Extending the effects of the mandate – „the post-mortem mandate"

So that, in the event of termination of representation by the death of the principal, the new code[8] contains a new provision that ensures the extension of the effects of the mandate after its natural termination through the loss of the capacity to use it, through death, the representative or his heirs or representatives being obliged by the provisions of Article 2025 Civil Code[9] to continue the execution of the mandate if, due to the delay caused by the interruption of the representation and the need to appoint a new representative, it risks creating substantial damage to the interests of the principal or his heirs.

Death – the cause of legal termination of the powers of representation once again demonstrates the role and functions of each of the competing and congruent wills of the representative and the represented, and apparently also paralyzes the will of the other party, because in the opinion of the legislator, as a rule, the will of one of the parties cannot support the entire contractual arrangement and cannot survive successfully in the context of the uniqueness of the representation.[10]

It should be remembered that, according to the provisions of Article 88 of the Code of Civil Procedure, the mandate does not end with the death of the one who gave it, but lasts until it is withdrawn by the heirs or by the legal representative of the incapacitated person. Thus, especially from the procedural perspective, to see if the mandate is valid, but the legislator does not impose the continuation of the representation against the will of the rightful party of its heirs, but they are expected to assert their option regarding the mandate given by its author[11].

Thus, the provisions of Article 2030 combined with the provisions of Article 2035 of the Romanian Civil Code offer solutions for the continuation of the mandate affected by one of the causes of termination: death[12].

Thus, the provisions of Article 2030 combined with the provisions of Article 2035 of the Romanian Civil Code offer solutions for the continuation of the mandate affected by one of the causes of termination: death.[13], being obliged to continue the execution of the mandate exclusively in the exceptional situation in which the delay in its execution could

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[8]. Of French inspiration Article 2003 of the French Civil Code Le mandat finit: Par la révocation du mandataire, Par la renonciation de celui-ci au mandat, Par la mort, la tutelle des majeurs ou la déconfiture, soit du mandant, soit du mandataire. (varianta anterioara Par la mort naturelle ou civile (1), la tutelle des majeurs ou la déconfiture, soit du mandant, soit du mandataire.)

[9] Article 2035: Death, incapacity or bankruptcy of one of the parties

„(1)In case of death, incapacity or bankruptcy of one of the parties, its heirs or representatives have the obligation to immediately inform the other party. In the case of the protection mandate, the representative immediately informs the guardianship court about the death of the principal. (2) In the case provided for in par. (1), the representative or his heirs or representatives are obliged to continue the execution of the mandate if its delay risks endangering the interests of the principal or his heirs. In the case of the protection mandate, the heirs or representatives of the representative immediately request the guardianship court to take a protective measure regarding the person of the principal."

[10] The previous regulation, contained in the provisions of Article 1552 of the Civil Code from 1864, stipulated that the mandate was extinguished by the death, prohibition, insolvency and bankruptcy of either the principal or the representative.

[11] HCCJ, civ judg. and of int. propr., Dec. no. 5761/2004, in L.C. Stoica, *Mandatul,* p. 205

[12] *Dana-Lucia Tulai, Situatiile de exceptie in care legiuitorul dispune continuarea mandatului dupa survenirea unei cauze de incetare a sa* – Universul Juridic Premium 4 of 2023

[13] In the case of the protection mandate, the representative immediately informs the guardianship court about the death of the principal.

endanger the interests of the principal or his heirs[14] – the non-incidental hypothesis in case several representatives were appointed, because the death of one of them is not sufficient to terminate the mandate, but they could act separately.

From the point of view of the procedure, the legislator establishes a first rule for the institutional activation of this mandate: the principal announces the death of his representative in order to be allowed to replace him and take the other necessary measures, and substantially as a subsidiary obligation, the legislator indirectly insisted on respecting the principal's interests in order not to create prejudices, a too heavy and undefined task, difficult to accept under the conditions of common law.

Although we agree that the heirs must have all the powers and prerogatives of the representatives in order to fulfill the mandate, we cannot ask ourselves what is the capacity in which they act; because it is difficult to apply the cloak of representation to them when their powers are as limited as they are ephemeral, powers that we retain were not conventionally conferred even though we are in a conventional and not legal mandate. Would they be simple business administrators, or business managers?

By corroborating Article 2035 with 2036 of the Civil Code, the legislator protects good faith and shows that the ignorance of death as the cause of termination of the mandate absolves the representative of responsibility and is considered to have been done in the legitimate execution of the mandate, because everything he „*made, on behalf of the principal, before knowing or being able to know the reason for the termination of the mandate is considered validly done in its execution".*[15]

The French Code states similarly in Article 2036 French Civil Code[16] that if the representative is not aware of the death of the principal or of one of the other causes of termination of the mandate, what he did in this ignorance is valid, adding to Article 2009 of the French Civil Code as in case of death of the representative, his heirs must notify the principal and, in the meantime, ensure what the circumstances require in the interest of the principal.

Usually, the *intuitu personae* ties of trust that justified the conclusion of the mandate contract do not necessarily exist regarding the heirs of the deceased, and the contract must, therefore, be extinguished by death, and the representative or the heirs must give an account of the fulfillment of the mandate. Starting from this virtue of the mandate and appreciating the nature of the norm from Article 2025, we appreciate that the rule is mandatory but has a supplementary character, the agreement of the contracting parties to exclude its application through an express clause being possible.

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[14] It is also accepted that a mandate of representation is transmitted to the heirs when it is an accessory to a main synalagmatic contract for which it provides guarantees. The Court of Appeal of Douai decided on December 22, 1848 that „*a mandate given by a lessee to his lessor to sell his crops in default of payment at the end of the term does not terminate with the death of the debtor.* This is expressed particularly clearly in a judgment of the Court of Limoges of February 1, 1935*"A mandate is admitted to extend its effects beyond the death of the principal if its nature or purpose so implies, especially if it is an indivisible mandate linked to another surviving the death of the principal."*

[15] Article 2039 of the Civil Code.

[16] Article 2008 of the French Code– Si le mandataire ignore la mort du mandant ou l'une des autres causes qui font cesser le mandat, ce qu'il a fait dans cette ignorance est valide. The text is clarified by articles 1991 § 2, 2009 and 2010 which, at the same time, bring certain necessary adjustments. These are the only general texts that directly regulate the contract of mandate in case of death.

In addition, the French doctrine has traditionally considered that the mandates concluded in the common interest of the principal and a third party do not expire following the death of the principal, and they will continue to be executed even if there is no imminent danger of worsening the patrimonial situation of the deceased or his heirs.

The death of the principal does not have such viral consequences as those of the representative – due to the predominantly unilateral character in the case of the free mandate contract, but also the fact that naturally the patrimonial obligations are passed on to the heirs in the event of the onerous contract, but he must also honor his obligations stipulated in the mandate contract if his inaction is likely to harm the interests of the principal's heirs.

And yet we wondered if we could still appreciate that death, leading to the *de jure* termination of representation, equates to the lack of representation? the hypothesis in which the act does not produce the specific effects between the representative and the third party, the full potential being the effects of Article 1309 paragraph 1 of the Civil Code, as a result of which the completed deed cannot be executed by the principal, but the good faith third party can claim damages to the representative for inducing the idea of representation and determination at the conclusion of the legal deed, although there is also the theory that he could claim even the execution of the legal act because the best restitution of the damage is in kind, and in this case it is even fully justified by the circumstance of the protection of the third party and the stability of the civil circuit; when it is based on good faith, for the clarity of his rights it would be useful for the legislator to go back and share a right of option between the right to interest damages or the right to execution in kind at the disposal of the third party who has become a contractor in good faith[17].

Instead of conclusions – a window to meditation

In conclusion, as a rule, the mandate cannot be honored in the event of the death of the principal, and the mandated legal act cannot be concluded validly on the basis of that mandate of representation.

Only exceptionally the heirs, third parties to the contract of mandate, are required to act in execution of the mandate and only limited and ephemeral in order not to endanger the interests of the parties.

The legislator's solution is saving, but it represents a profound change that the mandate contract has undergone during its history, and which began even in Roman law from the pronounced *intuituu personae* character that its conclusion implied, therefore initially it was free, revocable *ad nutum* and non-transmissible to heirs, ceasing by law upon the death of one of the contracting parties.

This principle is reflected in the norm provided for in article 2030: the mandate ends with death, although this norm seems to be annihilated (in fact it is only delayed) by articles 2035-2026 of the Civil Code, by virtue of which, exceptionally, the power of representation can survive for a short period of time, with all the preserved attributes of representation but also with executive power because through this artifice of the ultra-activity of the

[17] For details see Ionuț Florin Popa– *Limitele reprezentării voluntare și opozabilitatea*, in „Revista Română de Drept Privat" magazine, no. 02/2018

personality, the deceased is presumed to be alive extending the effects of his ability to use and to act so that we can even speak of a post-mortem mandate.

Prudence in the admissibility of managing these hybrid mandates, if we can qualify them as mandates, must be maximum, the definition of a legal regime should be clearer because the extent of the powers it confers is very controversial; and the capacity in which the unknown acts, useful clarifications for the related legal institutions to print the legal regime of the institution from the perspective of the effects and the legal liability incident to it.

THE RETURN OF PRIVATELY OWNED REAL ESTATE, TAKEN ABUSIVELY DURING THE COMMUNIST REGIME, AT THE REQUEST OF THE HEIRS. JURISPRUDENTIAL SOLUTION COMMENTED

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Abstract

The article is intended to be a criticism of a jurisprudential solution in which the court rejected the request for reparative measures of the plaintiff, the heir of the former owner, in the context in which he appeared in the decree of abusive taking, noting that there was no proof of transmission succession through a certificate of heir and/or capacity of heir of the notifier as a result of the death of his father.

The study deals with issues related to the right to legal increase established by Law 10/2001, in the sense that the shares of the legal or testamentary heirs who did not follow the restitution procedure are benefited by the other heirs of the entitled person who submitted the restitution request within the deadline.

It is also seen that Law no. 10/2001 envisages the restitution of the immovables taken over abusively by the former owners, regulating a return of the parties to the situation prior to the act of abusive taking, a fact that justifies and argues for the insertion in its content of provisions derogating from the proof of ownership under common law, provisions according to which, if it was taken over from a person listed in the Expropriation Decree, the reparative measures operate by restoring the same person to their previous situation.

Keyword: *right of addition, heir, certificate of heir, expropriation, wrongful taking.*

1. Introductory considerations

The starting point of this article was a solution of the Bucharest Court in a dispute promoted by the IS plaintiff in conflict with the Bucharest City Hall, by which it was requested to compel it to grant remedial measures based on Law no. 165/2013 on the land building with an area of 666 s.m., located in Bucharest.

From the documents submitted to the file, it appears that the plaintiff notified the City Hall through the bailiff, as based on Law no. 10/2001 to grant compensation for the specified building.

The immovable land object of the notification formulated pursuant to Law no. 10/2011, was acquired by the authors of the notifier, respectively the spouses I.V. and I.E. in full ownership according to the property title (deed of sale and purchase from 1922), in the share of ½, each.

I.V., the plaintiff's father, died in 1943, according to the death certificate. According to the 2009 certificate issued by the Chamber of Public Notaries, the succession procedure concerning the author of the notifier, respectively the I.V., was not registered on the role of the former State Notary or any Public Notary Office.

From the evidence held by the defendant PMB, the mentioned building was the subject of the Decision from 1973 issued by the People's Council of the Municipality of Bucharest,

and based on table no. 21 annex to the Decree, position 24, lists the plaintiff with expropriated land with an area of 666m.p. Considering that until the date of the action (2017) the defendant PMB had not resolved the administrative file, the deadline being 1.01.2027, the plaintiff considers that he is entitled for the court to rule on the existence and extent of the right of ownership and to order the granting of reparative measures based on Law no. 10/2001, respectively Law no. 165/2013.

By Civil Judgment no. 1931/2018 of the Bucharest Court, Civil Section III, the court admitted as well-founded, in part, the summons request and found that the plaintiff has the capacity of a person entitled to compensatory measures through points that will be established under the terms of Law no. 165/2013 for the property share inherited from his mother, I.E., respectively for the land property with an area of 331 s.m. To decide in this way, the court held that regarding the ½ share held by author I.V., there was no evidence of succession through a certificate of heir and/or heirship of the notifier as a result of the death of his father. At the same time, the court held that, in the content of the deed of division of the ascendant from 1943, drawn up after the death of author I.V., it was decided in favor of the notifier – claimant only on her exclusive share of ½ of the entire building that was entirely owned by him, however, and that heir of the deceased I.V.

2. **Proof of ownership in the case of actions for the retrocession of immovable property taken over abusively**.

Proof of ownership in the case of actions based on the provisions of Law no. 10/2001 is different from the proof of ownership in common law cases [1], because Law no. 10/2001 establishes an easier evidentiary regime, allowing the proof of ownership through documents other than the ownership transfer act. In this sense, by proof of ownership is meant, in accordance with art. 23 point 1 of the Methodological Norms for the application of Law no. 10/2001: a) any transferable legal documents of ownership, which certify the ownership of the property by the natural person or legal person (deed of sale, purchase, transaction, donation, book extract land (...), b) legal documents certifying the quality of heir (certificate of heir or of the quality of heir (...) c) **in the case of expropriation provided for by art. 11 of the law, it is sufficient to present the act of expropriation and, as the case may be, the presentation of the minutes concluded on this occasion or the expropriation agreement".**

At the same time, according to art. 24 of Law no. 10/2001 [2], „(1) In the absence of evidence to the contrary, the existence and, as the case may be, the extent of the right of ownership, is presumed to be the one recognized in the normative or authoritative act by which the measure of abusive takeover was ordered or the takeover measure was implemented abusive. (2) In the application of the provisions of paragraph 1 and in the absence of evidence to the contrary, the person identified in the normative act or authority by which the measure of abusive takeover was ordered or, as the case may be, put into execution, is presumed to own the property under the name of the owner".

Through the rules specified above, the legislator regulated a relative presumption regarding the existence and extent of the right of priority, which can be overturned by

[1] [1] For details on proof of ownership, see P.E.Ispas, Civil law, Main real rights. Synthesis. Jurisprudence. Grids. Ed. Hamangiu, Bucharest, 2022.

[2] [2]Law no. 10/2001 regarding the legal regime of some immovables taken over abusively between March 6, 1945 – December 22, 1989, republished in M of. no. 798 of September 2, 2005.

contrary evidence. By contrary evidence is meant any document that reveals a contrary legal situation of the right of priority over the immovable in relation to the one indicated by the act of taking over. More precisely, the contrary evidence to overturn the presumption of ownership, established by art. 24 of the law, signifies the proof of the fact that, despite the act of taking over the building by the state, which indicates as the owner, it was not the person indicated in the act of taking over.

We believe that this presumption is applicable in the present case, considering the mentions in the expropriation act. Thus, as in the Expropriation Decree, the annex includes the applicant IS, with expropriated land of 666 square meters, which is why the court's decision is unfounded, the applicant being the person entitled to compensatory measures consisting of points that should be established under the terms of the Law no. 165/2013 [3]for the entire land area, and not in relation to the ½ share received from the notifier's mother.

According to art. 26 of Law no. 10/2001 „If restitution in kind is not possible, the owner of the building, or as the case may be, the entity invested according to this law with the resolution of the notification is obliged to, by decision or, as the case may be, by reasoned disposition, grant the person entitled to compensation for other goods or services or to propose the granting of compensation under the conditions of the special law on the regime for establishing and paying compensation related to immovable property taken over abusively (...)". These provisions were supplemented by the provisions of art. 33 and 35 of Law no. 165/2013 which stipulates that, after analyzing the merits of the notification regarding the abusive takeover, upon ascertaining the quality of the entitled person and upon the possibility of restitution in kind or the granting of equivalent measures, the Municipality of Bucharest through The Mayor General must issue a provision to propose the granting of compensatory measures consisting of points under the terms of Law no. 165/2013 for the mentioned building. The establishment of this obligation in the charge of the holding unit is the consequence of the substantive resolution of the notification and represents the initiation of the enforcement procedure.

3. The situation of the successor who did not accept the inheritance on the date of the abusive takeover. The right to increase in the context where the heirs did not follow the restitution procedure.

According to art. 4 of Law no. 10/2001, para. 1-4: „ If the restitution is requested by several entitled co-owners of the requested immovable property, the right of ownership is determined or established in ideal shares, according to common law. The legal or testamentary heirs of the entitled natural persons also benefit from the provisions of this law. The inheritors who, after March 6, 1945, did not accept the inheritance are reinstated by law within the term of acceptance of the inheritance for the goods that are the subject of this law. The request for restitution has the value of accepting the succession for the goods whose restitution is requested under this law. Of the shares of the legal or testamentary heirs who did not follow the procedure provided for in chapter. III (the restitution procedure) benefits the other heirs of the entitled person who submitted the restitution request within the deadline".

[3]Law no. 165 of May 16, 2013 regarding the measures to complete the restitution process, in kind or by equivalent, of the buildings taken over abusively during the communist regime in Romania, published in M.Of. no. 278 of May 17, 2013

Referring to these provisions, the court correctly recognized the claimant's status as an heir after his mother, but wrongly assessed that the claimant's status as an heir after his father was not proven.

Art. 4 para. 4 establishes the right to increase or grant a quota, stating that the quotas of the heirs who did not follow the restitution procedure benefit from the other heirs of the entitled person who submitted a request for restitution.

In the application of this text, an important role is played by the time of the death of the former owner relative to the date of the transfer of the building into state ownership. Thus, the date of the owner's death, depending on the moment of expropriation, determines the application of the right to increase or the granting of a quota. If the death occurs before the expropriation, the provisions of art. 4 paragraph 1, the takeover being done in fact from the heirs, according to the quotas that belong to each individual. In the event that the death occurs after the property has been taken over by the state, then the law can be applied art. 4 para. 4, the right to increase.

Related to the aforementioned, the provisions of art. 4 para. 1 of the Law, in the sense that the plaintiff collects his own share, as co-owner, but also his mother's share, as successor. At the date of the takeover, the plaintiff was the son of the deceased I.V., who died in 1943, thus acquiring through succession, before the expropriation, the ownership right over his father's share. Thus, in 1973, the date of the expropriation, he was co-owner with his mother on the notified building, a fact that also results from the assessment report for the disputed building, in which the plaintiff and his mother appeared. In application of art. 4 para. 1 of the Law, the methodological norms for the application of Law no. 10/2001, details in the sense that if the restitution of the same building is requested by several entitled persons, who invoke a property title attesting the existence of co-ownership at the date of the abusive takeover, a restitution decision will be issued in which record the ideal quotas provided in the invoked property title.

The notion of the „right to increase" [4], specific to conjunctive legates with private title, is also used in the case of universal inheritance or with universal title, to explain the increase of the share due to the co-heirs in the event that one/some of them cannot/can't or doesn't want to / want to come to the inheritance. By virtue of this right, the universal successor or with universal title collects the share of the co-heir who does not want or cannot come to the inheritance. In the event that not all the persons who have the capacity of heir of the entitled natural person have requested the restitution of the immovable taken over abusively, the shares due to those who did not submit notifications will benefit the other heirs who submitted a request for restitution within the deadline. The solution provided for in art. 4 para. (4) of the law is in accordance with the legal provisions applicable in the matter of successions (the right of addition regulated by art. 697 of the previous Civil Code, according to which „The part of the renouncer benefits his heirs"...). Therefore, the co-heir who requested restitution in kind of the building based on Law no. 10/2001 (considered accepting heir) also collects the share of the co-heir who did not accept the succession within the legal term (who did not submit the notification until February 14, 2002 and who thus became a stranger to the succession by non-acceptance). If, after the adoption of the settlement decision/disposition and until its tabulation, other persons with a succession vocation appear who have submitted a request for restitution within the deadline, the revocation of the

[44]Fr. Deak, R. Popescu, Succession Law Treaty, vol II, Ed. Universul Juridic 2019, pg. 191.

administrative act will be ordered and the issuance of a decision/disposition in accordance with the law.

4. Conclusions

Law no. 10/2001 envisages the restitution of the immovables taken over abusively by the former owners, regulating a return of the parties to the situation prior to the act of abusive taking over. This reason also justifies the insertion in its content of the provisions derogating from the evidentiary regime of common law in the matter of property (contained in art. 24), provisions in the light of which, if proof of taking over from a certain person was made (in this case from the heirs, even in the absence of acceptance of the succession and an heir certificate[5]) the reparative measures operate properly, by restoring the same person to the situation they had before the act of abusive taking.

[5]Regarding the procedural aspects of the retrocession action, see M. Dinu, Civil procedural law – The principles of the civil process. Civil action. Participants in the civil process. Jurisdiction of the courts. Procedural documents and procedural deadlines. The judgment in the first instance, Ed. Hamangiu, 2020; N. M. Carolina, Legal sequestration of the property belonging to third parties and their damage, through final decision, in ensuring measure of special seizure from defendant, in the volume of the International Conference on Law, European Studies and International Relations, Third Edition, Titu Maiorescu University, Faculty of Law, Ed Hamangiu, 2026, pp. 333-338.

PRACTICAL IMPLICATIONS IN THE CASE OF THE DEBTOR'S DEATH DURING THE ENFORCEMENT PHASE. THE SITUATION OF THE DEBTOR'S HEIRS

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Abstract

Forced enforcement as a phase of the civil process represents for the debtor the phase in which he sees his subjective civil right against the debtor asserted, as a subjective civil right ascertained by a court decision or by another enforceable title to which the legislator gives enforceable power.

However, given that death is a natural phenomenon, undesirable situations arise in which the debtor's death occurs during the foreclosure phase, in which context the natural questions arise: against whom will the foreclosure be directed? Under what conditions can it be directed against the heirs? What are the limits within which they will respond? What is the procedure to follow?

Keywords: *debtor, trustee, succession, creditor, bailiff*

1. General aspects regarding forced execution against heirs

The forced execution against heirs is regulated in the Code of Civil Procedure under Article 687 to Article 689 [1]. According to the provisions of Article 687 of the Civil Procedure Code, „*if the debtor dies before the judicial executor is notified, no forced execution can be initiated, and if the debtor dies after it has been initiated, it cannot be continued as long as the inheritance has not been accepted by those called to inherit or, in their absence, until a succession curator has been appointed, or, as the case may be, a special curator for execution, under the conditions of Article 58. In the event that the creditor or judicial executor becomes aware, in any way, that the debtor has deceased, he is obliged to immediately request the notaries' chamber in whose jurisdiction the deceased had the last domicile to make a note in the special register provided by law about the commencement of forced execution and to issue a certificate indicating whether the debtor's inheritance has been discussed or not, and if so, who the heirs are, as well as whether a curator has been appointed until the inheritance is accepted by at least one of the successors. In the event that it is found that the inheritance has not been discussed or, as the case may be, accepted, the creditor or judicial executor may request the notaries' chamber in whose jurisdiction the deceased had the last domicile or, as the case may be, the already notified notary, to prepare an inventory of the succession or appoint a person for this purpose.*"

From the analysis of the text of Article 687(1) CPC, it follows that the initiation of forced execution is prohibited when the debtor's death has occurred. Furthermore, if the debtor's death occurs during forced execution, it cannot be continued until the succession is accepted by the heirs, or, in the absence of legal and testamentary heirs, until the appointment of a succession curator, or, as the case may be, a special curator for execution,

under the conditions provided by Article 58 CPC. The use of the disjunctive conjunction „or" must be interpreted to mean that either the expiration of the term for accepting the succession is awaited to allow the initiation of execution, or the appointment of a special curator is requested if there are no accepting heirs until that moment [2].

Therefore, if the enforcement was not authorized at the time of the debtor's death, this constitutes a legal impediment to execution, so authorization cannot be granted. If, however, it is still admitted, the enforcement court's decision can be annulled through an objection to execution.

If the debtor's death occurs after the authorization of enforcement, the procedure can only continue after the acceptance of the succession by the heirs or after the appointment of a curator. In this situation, a case of automatic suspension of forced execution arises [3]. In this regard, judicial practice has established that „Articles 687-689 of the Civil Procedure Code regulate the situation in which the debtor's death occurs and distinguishes whether this event occurred before or after the judicial executor was notified: if the debtor dies before this moment, the initiation of forced execution is prohibited, as provided by Article 687(1) of the Civil Procedure Code ('If the debtor dies before the judicial executor is notified, no forced execution can be initiated'), in this case, the execution must be initiated directly against the heirs, respecting the conditions provided by legal norms. Only in the case where the debtor's death occurs after the initiation of forced execution, it continues against the heirs, respecting the provisions of Article 689 of the Civil Procedure Code. In this case, the debtor had been deceased since 2012, so the initiation of forced execution against him was expressly prohibited by law, and the enforcement acts were null and void. This enforcement cannot be continued against the heirs for the recovery of enforcement costs, as ordered by the decision of April 13, 2017. For these enforcement costs to be recoverable from the heirs, it was necessary for the initiation of forced execution to take place against them, not the deceased. However, there is no enforcement act that has been carried out against the objectors, including the approval by the enforcement court of forced execution against them" (*Trib. Brașov, s. I civ., dec. civ. no. 623/Ap of April 20, 2018)*

However, these provisions must be correlated with those contained in the Civil Code. According to Article 1103(1) of the Civil Code, the right to inherit must be exercised within one year from the date of the opening of the inheritance. According to the provisions of paragraph (2) of this article, the deadline for exercising the right of inheritance runs:

a) from the date of the birth of the heir if the birth occurs after the opening of the inheritance;

b) from the date of death registration in the civil status register if the registration is made based on a court decision declaring the death of the person leaving the inheritance unless the heir knew about the death or the decision to declare death at an earlier date, in which case the term runs from that later date;

c) from the date the legatee knew or should have known about the legacy if the will containing this legacy is discovered after the opening of the inheritance;

d) from the date the heir knew or should have known about the relationship on which his/her inheritance right is based, if this date is after the opening of the inheritance.

Given the above, on the one hand, it should be noted that the moment when the one-year term begins to run differs depending on various aspects, which can significantly extend the expiration of the term. On the other hand, the right of inheritance is essentially personal,

and according to Article 1106 of the Civil Code, no one can be forced to accept an inheritance that belongs to them.

In reality, the creditor can avoid the effects of these legal provisions by requesting the appointment of a special curator for execution (because, in this hypothesis, the execution has been initiated), and then can use the provisions of Article 1113 of the Civil Code, which state that, for good reasons, at the request of any interested person, a successor can be obliged, following the procedure provided by law for the presidential ordinance, to exercise their right of inheritance within a shorter period than that provided for in Article 1103 of the same code.

2. Rights and obligations of the creditor and judicial executor in the event of the debtor‘s death. Implications of the succession option in the enforcement plan.

In accordance with the provisions of Article 687(2) of the Civil Procedure Code (CPC), in the event of the debtor's death, the creditor and judicial executor have a series of rights and obligations:

a) The creditor and judicial executor have the obligation, as soon as they learn about the debtor's death, to inform the chamber of notaries public in whose jurisdiction the deceased had the last domicile about the initiation of forced execution against the debtor. This information should be recorded in the special register provided by law.

b) Another obligation instituted by Article 687(2) of the CPC for the creditor or judicial executor is to request the chamber of notaries public to issue a certificate indicating whether the debtor's inheritance has been discussed. If the deceased debtor's inheritance has been discussed, the certificate must include the identification details of the persons who are heirs. The certificate must also indicate whether a curator has been appointed until the acceptance of the succession by at least one of the heirs. If a curator has been appointed, the certificate must include the identification details of the curator. If no curator has been appointed, at the request of the creditor or judicial executor, the enforcement court will immediately appoint a special curator until a curator of the succession is appointed under the conditions of the law.

c) If Article 687(1) and (2) of the CPC establish the obligations of the creditor and judicial executor in the event of the debtor's death, paragraph (3) of the same article provides the possibility for them, in the case where the inheritance has not been discussed or, as the case may be, accepted, to request either the chamber of notaries public or the notary public on whose register the succession file was recorded to conduct an inventory or appoint a person for this purpose.

Given that the first scenario provided in Article 687 of the CPC concerns the situation of the debtor's death before the initiation of forced execution against him, his heirs have no obligation to inform the judicial executor about this aspect. They could not take such action since the judicial executor is chosen by the creditor at the time of filing the application for forced execution [4]

Regarding the term for the succession option, we emphasize that the application of paragraph (3) of Article 687 of the CPC does not presuppose the expiration of the term for exercising the succession vocation through the acceptance of the succession. The premature rejection of the request for the appointment of a special curator, on the grounds that this term has not expired, even though the creditor proves the absence of any acceptance declaration or succession procedure in progress, is therefore contrary to the spirit of this regulation. Articles 687 and following are included in the Civil Procedure Code precisely to help the

creditor quickly overcome this period after the debtor's death and to continue the execution while respecting the rights of the heirs, whose interests are protected by the curator.

In other words, as correctly stated by judicial practice, the purpose of the rules contained in Article 687 and following of the CPC has two valences: to protect the deceased debtor's assets from potential abusive execution and to prevent the enforcement from being blocked by providing the possibility of appointing a special curator (*Bucharest Tribunal, 4th Civil Section, Civil Decision No. 512/A dated January 10, 2017, in R.R.E.S. No. 1/2017, p. 182).*

3. Commencement of forced execution after the debtor"s death, in the absence of heirs. Appointment of a special curator

If forced execution has not been initiated during the debtor's lifetime, after the debtor's death, execution, as a rule, will continue against the accepting heirs of the succession, in accordance with the provisions of Article 688 of the Civil Procedure Code (CPC).

However, there is a possibility that the succession has no accepting heirs, in which case the appointment of a curator of the succession is necessary. Until such an appointment, upon the request of the creditor or judicial executor, the enforcement court will immediately appoint a special curator, who has all the rights and obligations provided by law for the legal representative. The special curator's role ceases when a curator of the succession is appointed. Therefore, the active procedural status regarding the request for the appointment of the special curator belongs to the creditor or judicial executor, and the applicable provisions are those of Article 58 of the CPC. The curator's appointment procedure will be conducted urgently, and the curator will be chosen from the lawyers specifically designated for this purpose by the bar association for each court. The provisional remuneration of the appointed curator is determined by the court through a ruling, also specifying the payment method. The enforcement court will issue a ruling subject to appeal within 10 days of notification.

In the same vein, judicial practice has ruled through decisions that, „according to Article 688 of the CPC, if the debtor dies before the initiation of forced execution, and it is found that there are no accepting heirs and no curator of the succession has been appointed, upon the request of the creditor or judicial executor, the enforcement court will immediately appoint a special curator. The provisions of Article 58 of the CPC apply accordingly. The conditions of the mentioned legal text are met if the documents in the file show that the debtor died before the initiation of forced execution, and the examination of the Notarial Registry of Succession Options (R.N.N.E.O.S.) revealed that no declarations regarding the right of succession option have been registered. Thus, in accordance with Article 687, related to Article 58 of the CPC, the court will randomly appoint a special curator from the lists of lawyers designated for this purpose by the bar association, until the appointment of the curator of the deceased's succession. The court will also establish the remuneration for the special curator, borne by the creditor" [5]

The request for the appointment of the special curator is judged according to the rules of non-contentious procedure, with only the creditor being summoned (the debtor cannot be summoned as he is deceased).

Regarding the possibility of the lawyer curator being replaced, in relation to the provisions of Article 234(2) of the Statute of the Legal Profession, which stipulate that if a lawyer is prevented from performing professional service, they will ensure their

replacement, including by a lawyer practicing in another form of professional practice, if they obtain the client's prior consent, we believe that such a replacement cannot occur, as one of the necessary conditions, namely obtaining the client's consent, is not fulfilled. Moreover, the institution of the special curator does not regulate such a possibility for them. Indeed, the special curator has the possibility to request the court to be replaced when, for objective reasons, they cannot fulfill their mandate. However, with the replacement, their status ceases, and the institution of substitution is not applicable but rather a form of termination of the mandate*)* [6].

4. Commencement of forced execution after the debtor's death against adult heirs. Procedure for notifying them of the commencement of forced execution against them

In the scenario where the inheritance has been accepted by heirs, and among them are only adults, the general rule is that forced execution will be initiated against all of them, except in cases where only some of them, by law or according to the deceased's will, are liable for specific debts of the deceased.

Regarding the method of informing heirs that forced execution will commence against them, if it applies to all, they will be collectively summoned by notice at the place where the inheritance was opened, addressed to the estate. However, if heirs, during inheritance proceedings or later, have chosen a different residence for the summons or designated a representative, the summons will be served at the indicated or chosen location.

As the provisions of Article 688(2) CPC do not contain specific rules regarding summons concerning the sole accepting heir of the succession, it is deemed that they should be summoned according to common law provisions, specifically to the domicile or chosen place for procedural communication. The legal consequence of non-compliance with the summons procedure will result in the nullity of the procedural acts performed in this way, under Article 175(1) CPC (nullity conditioned by the existence of harm). ((*Bucharest Tribunal, Fourth Civil Section, Civil Decision No. 5027 of December 16, 2016, in M. IONAȘ, op. cit..,p. 46)*

5. Commencement of forced execution after the debtor"s death against minor heirs or persons under judicial guardianship or special guardianship

Article 688(3) CPC prohibits the commencement of forced execution when among the accepting heirs there are minors or persons under judicial guardianship or special guardianship until the appointment of representatives or legal guardians for these individuals. Generally, the appointment of a representative or legal guardian must occur within one month from the debtor's death or from being placed under judicial guardianship or special guardianship. Otherwise, the creditor or judicial executor has the possibility to request the execution court to appoint a special curator, under the conditions of Article 58 CPC.

6. Continuation of execution against heirs

If the debtor dies during forced execution, the execution will be suspended and will be resumed against accepting heirs after a period of 10 days from the date they were informed about the continuation of forced execution against them. In this case, the aspects outlined in Article 687 CPC regarding how the creditor can prompt the exercise of the right of inheritance choice will apply.

Concerning the procedure for informing heirs about the existence of execution and its continuation against them, especially when among the accepting heirs there are minors or individuals under judicial guardianship or special guardianship, the provisions of Article 688 CPC apply accordingly.

Instead of conclusion

The undesired but unfortunately existing event of the debtor's death during forced execution complicates the enforcement against heirs, prolonging the timeframe for the creditor to realize their right established by the enforceable title. Furthermore, the debtor's death can be considered an obstacle to forced execution, as no forced execution can be initiated if the debtor dies before its commencement, and if the debtor dies after its initiation, it cannot be continued until the inheritance is accepted by those called to inherit or, in their absence, until a curator of the succession is appointed according to the law, or, as the case may be, a special curator for execution. If execution had commenced at the debtor's death, it is suspended and will only be resumed against accepting successors after 10 days from the date they were notified of the continuation of forced execution.

References

[1] for details see, M.Dinu, R.Stanciu, Enforcement in the civil procedure code, 2nd Ed., Ed. Hamangiu, 2019, p. 256-268

[2]idem, p. 258

[3]Niță Maria Carolina, 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).

[4] Bucharest Tribunal, 6th Civil Section, Civil Decision No. 2465 dated June 29, 2016, in M. IONAȘ, Aspects Regarding Forced Execution Against Heirs, in R.R.E.S. No. 1/2018, p. 42

[5] District Court 6 Bucharest, closed on October 27, 2014, in M. Dinu, R. Stanciu, op. cit., p. 133).

[6] M. Dinu, Theoretical and Practical Aspects Regarding Special Curatorship as a Form of Representation in Civil Proceedings, in P.R. No. 5/2018, p. 57-64

THE RESTITUTION OF LANDS TO SUCCESSORS. ANALYSIS OF LEGAL PRACTICE AND INCIDENTAL LEGAL PROVISIONS

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Abstract

The abusive takeover of real estate during the communist period opened, post-communism, the possibility for the former owners to request the restitution of these properties which, mainly, had been taken over by the state without a valid title and without meeting the legal conditions in force at the time of the takeover. In this article we will analyze the provisions of some laws that regulated the conditions of restitution and we will also analyze the situation of the successors of the former owners through the lens of the incidental legal provisions and through the lens of the jurisprudential solutions adopted by the national courts and also by the European Court of Human Rights.

Keywords: *abusive takeover, restitution, the situation of the successors of the former owners.*

INTRODUCTORY CONSIDERATIONS

Between March 6, 1945 and December 22, 1989, the state took over buildings under private ownership. These takeovers were made by the communist regime, most of the time, without a valid title. The provisions of Law no. 10/2001, to which we will mainly refer in the following, detailed and defined both the procedure for the restitution of the goods taken over and the goods that could be the object of the restitution.

Thus, according to Article 1 of Law no. 10/2001 regarding the legal regime of certain real estate taken over abusively between March 6, 1945-December 22, 1989, republished[1], are subject to restitution „*Immovable assets improperly taken over by the state, cooperative organizations or any other legal persons between March 6, 1945 and December 22, 1989, as well as those taken by the state on the basis of Law no. 139/1940 on requisitions and unreturned shall be returned in kind or in equivalent, when restitution in kind is no longer possible, under the conditions of this law".*

At the same time, by the provisions of Article 2 of the same law, the immovables taken over abusively were defined, these being categorized by the legislator in several forms, respectively: a) nationalised buildings by Decree no. 92/1950 for the nationalization of some buildings, with subsequent amendments and completions, by Law no. 119/1948 for the nationalisation of industrial, banking, insurance, mining and transport undertakings, as well as other normative acts of nationalisation; b) the buildings taken over by confiscation of wealth, as a result of a judicial decision of conviction for crimes of a political nature, provided by the criminal legislation, committed as a manifestation of the opposition to the totalitarian communist system; c) buildings donated to the state or other legal entities on the basis Decree no. 410/1948 on the donation of some graphic arts enterprises, Decree no.

[1] Republished in the Official Gazette of Romania no. 798 of 02.09.2005.

478/1954 on donations made to the state and the like, not concluded in authentic form, as well as buildings donated to the state or other legal entities, concluded in the authentic form provided by art. 813 of the Civil Code, in the latter case if the action was admitted for annulment or in finding the nullity of the donation by a final and irrevocable court decision; d) the buildings taken by the state for non-payment of taxes as a result of abusive measures imposed by the state, whereby the rights of the owner could not be exercised; e) the buildings deemed to have been abandoned, on the basis of an administrative provision or a judicial decision rendered pursuant to Decree no. 111/1951 on the regulation of the situation of goods of any kind subject to confiscation, confiscated, without heirs or without a master, as well as goods that no longer use the budgetary institutions, from 6 March 1945 to 22 December 1989; f) the buildings taken by the state on the basis of laws or other unpublished normative acts, at the date of takeover, in the Official Gazette of Romania, Part I, or in the Official Bulletin; g) buildings taken by the state on the basis Law no. 139/1940 on requisitions and which have not been returned or for which the owners have not received fair compensation; h) any other real estate taken over by the State with valid title, as defined in art. 6 6 para. ((1) of Law no. 213/1998 on public property and its legal regime, as amended and supplemented; i) any other buildings taken without a valid title or without complying with the legal provisions in force at the time of takeover, as well as those taken without legal basis by acts of provision of the local bodies of power or state administration.

Nor should we overlook the provisions of Law no. 165/2013[2] regarding the measures to complete the restitution process, in kind or by equivalent, of the buildings taken over abusively during the communist regime in Romania. The basic principle established by this law is represented by the restitution in kind of real estate taken over abusively during the communist regime. There are exceptions to this rule, however, as we will show within this paper. For example, according to Article 1 (2) of Law no. 165/2013, „*If the restitution in kind of buildings improperly taken over during the period of the communist regime is no longer possible, the only equivalent remedial measure that is granted is the compensation by points".*

Law 165/2013 was adopted by the Romanian legislator following the pronouncement by the European Court of Human Rights of the Pilot Judgment of October 12, 2010, in the case of Maria Atanasiu and others against Romania[3]. Through this ruling, the ECHR held Romania responsible for the application of effective means and the adoption of simplified rules of procedure, in order to give the compensation system greater predictability. Consequently, the adoption of this law was made so that the Romanian State could fulfill its obligations imposed by the ECHR regarding the process of restitution of properties taken abusively during the communist regime. Through the cited Pilot Judgment, the ECHR ruled that „*Restitution legislation of wide sweep, in particular if it implements a programme of social and economic reform, is hardly capable of doing entire justice in the diverse circumstances of the very large number of different individuals concerned. It is in the first place for the domestic authorities, and in particular Parliament, to assess the advantages*

[2] Published in the Official Monitor of Romania no. 278 of May 17, 2013.

[3] In this sense, see Irina Gulie, Law no. 165/2013 regarding the measures to complete the restitution process, in kind or by equivalent, of the buildings taken over abusively during the communist regime in Romania – benchmarks of the jurisprudence of the Constitutional Court, available at the web address https://www.ccr.ro/wp-content/uploads/2020/05/Irina-Gulie-studiu.pdf.

and disadvantages involved in the various legislative alternatives available, bearing in mind that this is a policy decision"[4].

In this context, it is obvious that according to the jurisprudence of the ECHR, the laws adopted for the restitution of property taken abusively during the communist regime had not achieved their goal, which is why Law no. 165/2013, a normative act that generated an extensive jurisprudence of the Constitutional Court of Romania.

THE ISSUE OF SUCCESSORS

Since the entry into force of Law no. 10/2001, the rights of the successors of the former owners were regulated, the rights of the legal or testamentary heirs of the entitled natural persons being fully recognized. Thus, according to Article 4 of Law no. 10/2001, „*The provisions of this law also benefit the legal or testamentary heirs of entitled individuals"*. By Law no. 165/2013 it was regulated, as the scope of the law, that the provisions of the mentioned normative act apply to the requests made and submitted, within the legal term, to the entities invested by the law, not resolved until the date of entry into force of this law, to the cases in the matter of restitution of the buildings subject to abusive takeovers on the role of the courts as well as the cases before the European Court of Human Rights suspended under the pilot judgment of 12 October 2010, delivered in Case Maria Atanasiu and Others v. Romania, on the date of entry into force of the this law, as stipulated in Article 4 of the Law.

Also by Law no. 165/2013, a provision was introduced that had not been contained in another normative act, this being of particular importance regarding the successors in view of the possibilities that the assignees of the litigious rights, successors of the parties, have in order to capitalize on the assigned claims. Thus, according to Article 1 (3) of Law no. 165/2013, „*If the holder has alienated the rights due to him according to the laws of restitution of the property, the only remedy that is granted is the compensation by points according to Article 24 24 para. ((2), (3) and (4).*

(4)". This article was the subject of the constitutionality check, the Constitutional Court of Romania ruled by Decision no. 179 of April 1, 2014[5] in the sense of rejecting the objection of unconstitutionality, with the following reasoning: „the criticized legal provisions regulate rectification procedures, namely the policies of restitution in kind or through compensations of immovable property taken over abusively and reflect the will of the new democratic state. The Court observed that, viewed from an overall perspective, restitution policies combine two components: a reparatory/moral component and a patrimonial one regarding property rights. The two aspects of the restitution policy are closely related to each other and, in reality, concern only the original owners of the property right, former owners, and their legal or testamentary heirs. That is precisely why, starting from these aspects, the legislator established that one of the principles underlying the granting of remedies provided for by Law no. 165/2013 is that of the prevalence of restitution in kind, and as regards the points established by the compensation decision issued in the name of the owner of the property right, former owner, or of his legal or testamentary heirs, it establishes that they cannot be affected by capping measures. Another is the legislative solution from Law no. 165/2013 in the situation where the persons who

[4] Judgment Maria Atanasiu and others v. Romania, paragraph 170.

[5] Published in the Official Gazette of Romania No. 409 of June 3, 2014.

considered themselves entitled and who submitted notifications according to Law no. 10/2001 have assigned the right of claim on the Romanian state to third parties, signing assignment contracts on these occasions. In these situations, the law has capped the reparative measures that can be granted to the assignee, a fact that generated the present criticism of unconstitutionality".

Continuing the reasoning that led to the rejection of the exception of unconstitutionality, the CCR also noted, when analyzing the legal nature of the contracts for the assignment of litigious rights, that these legal acts „are random contracts and that, by definition, these alienations could only take place between the time of submitting the notification and the time of issuing the compensation title, considering the provisions of Article 5 (1) a) of title VII of Law no. 247/2005 regarding the reform in the fields of property and justice, as well as some adjacent measures according to which „the rights established by the compensation titles cannot be sold, bought, given as a guarantee or transferred in any other way, for a fee or for free, with the exception of their acquisition as a result of the succession; the acts of alienation of these rights, except for the transmission as a result of the succession, are struck by absolute nullity". However, as noted in the specialized literature, random contracts are onerous contracts in which the extent or even the existence of the obligation for one of the parties or for both contracting parties is not known at the time of the conclusion of the contract; because it depends on a future and uncertain event, in this case the establishment of the assignor's ownership right. Therefore, at the conclusion of the contract, neither the assignor – the person who considers himself entitled to restitution –, nor the assignee – the third party in the relationship between the state and the person who considers himself entitled – cannot establish with certainty the existence of a property right of the former, which would determine a right to compensation of the second, so that the amount of the gain or the loss, or their existence, cannot be quantified. It is obvious that both the persons who consider themselves entitled to the remedies, as well as the assignees of the claim rights stemming from the restitution laws, have only acquired the vocation of obtaining remedies, the capacity of owner of the right of ownership over the property taken abusively following to be established after the exhaustion of the procedures provided for by the restitution laws".

Although apparently the successor assignees of the persons entitled have a less privileged position compared to the assignors, the solution adopted by the CCR must still be supported, namely that the legislator's intention was to limit speculative operations with litigious rights by capping payments to the assignee. At the same time, the Constitutional Court held that the purpose of the remedies adopted by Law no. 165/2013 was to mitigate the consequences of the massive violation of property rights in the communist regime, not the creation of new rights or sources of income for third parties, so that capping the amount of compensation granted to assignees appears to be consistent with both the Romanian Constitution and ECHR jurisprudence.

PROOF OF TITLE OF OWNERSHIP. THE PRACTICE OF COURTS

In the analyzed matter, the proof of ownership title had to be made to give effectiveness to the right to restitution, a right enshrined in the laws to which I referred in this article. Although we will not analyze the provisions of all laws passed in the matter of property restitution, it is worth noting that the proof of ownership title is done in a similar manner.

Regarding the provisions of Law no. 10/2001, the legislator regulated a simple presumption of the existence of the ownership title in Article 24 according to which „*(1) In*

the absence of evidence to the contrary, the existence and, as the case may be, the extent of the ownership, shall be presumed to be the one recognized in the normative act or by the authority ordering the measure of abusive takeover or the measure of taking over abusive. (2) In application of the provisions (1) and in the absence of evidence to the contrary, the person individualized in the normative act or by the authority by which he was ordered or, as the case may be, has been executed the measure of abusive takeover is presumed to hold the property under the name of owner.". As a consequence of this regulation, in the practice of the courts, the issue of proving the property title by the successors was raised [1], bearing in mind that regarding the right to increase regulated by Law no. 10/2001 in favor of the heirs who submit the notification to the detriment of those who do not, as well as the loss of any right to act beyond the deadline set for submitting notifications revealed the legislator's interest in outlining another regime of rights due to those who consider themselves entitled to measures according to law 10/2001 derogating from the common law and different from that provided by the usual inheritance procedures. As an effect of this legal dichotomy transposed on the notion of „legal successor in rights", the provisions of Law no. 10/2001 regarding the legal regime of some immovable property taken over in an abusive manner do not take from the common law only the elements necessary to define the notifiers as successors with a private title or with a universal title of the rights held by those allegedly dispossessed of the immovable property, but without thereby indisputably proving the other benchmarks to which the special law refers (the nature of the abusive takeover and the quality of ownership during the reference period). The notifier will, consequently, always have the obligation to prove these elements, not being sufficient to invoke the quality of legal successor of the alleged wrongfully dispossessed.

Continuing this reasoning, it should be noted that Law no. 10/2001 on the legal regime of some properties taken over abusively does not consider it sufficient – for the purpose of classifying the act of takeover as abusive – proof of ownership of the immovable property by the notifier's predecessor, from the time of its acquisition into the heritage[2]. Based on this reasoning, the court held that in the case brought to trial, it cannot be held that the takeover was abusive because there is no act that indicates this takeover so that the judges can give effect to the right claimed by the dispossessed. The court also held that as long as there is no mention in the tax records or in the property register that, after March 6, 1945, reveals the person who considers himself entitled as the owner of the ownership title, it cannot be appreciated that the court found that the real estate was taken over abusively.

In this context, from our point of view it must be established, in relation to the special provisions contained in Law no. 10/2001, to what extent the presumption established in Article 24 produces or does not produce the legal effects established by law. To the extent that there is data or evidence that renders the presumption void, then it must be fully applicable. Conversely, if there is evidence contrary to the application of the presumption of ownership, then the solution can only be one: the impossibility of applying the presumption which was previously referenced. So, from our point of view, the reasoning and arguments brought by the court are valid, solid and in full accordance with the spirit and letter of the law.

Also in the practice of the courts [3], establishing that the plaintiff together with his wife appeared in the tax records of Bârlad City Hall with a plot of land and a building, starting from 1960 until 1978, when they were demolished, the court drew the erroneous conclusion, contradictory to the observed factual situation, that there was no proof of the

abusive takeover of the construction (respectively, no evidence was produced to show who demolished the construction). However, from the content of the two addresses issued by the public authority, it is evident that the loss of ownership of the construction was made as a result of the fact that they were demolished. Therefore, it could not be a question of a manifestation of the will of the former owners to have their building demolished, the exit of the asset from their patrimony being the result of an abusive act (demolition of the building).

Another situation with which the courts were invested was represented by the issue of lands taken over abusively, on these lands there is a right of use and not a right of ownership. Thus, the formulation of a summons based on the provisions of Law no. 10/2001 can be admitted by the court only to the extent that the person who considers himself entitled had the capacity of owner of the immovable taken over abusively, it is not enough that the plaintiff had a simple right of use over the immovable taken over abusively, in order to attract the applicability Law no. 10/2001. In this sense, the High Court of Cassation and Justice held that despite the claim of the appellants, both from the contents of the sale-purchase agreement authenticated under no. 1098 of September 18, 1979, as well as from the provisions of Article 30 of Law no. 58/1974 to which the sales contract refers, it follows with certainty, indisputably, that they acquired as buyers only the right of ownership over the construction, the related land becoming the property of the state from the sellers' patrimony. In this context, Law no. 10/2001 is not applicable, for the simple reason that, according to the provisions of Article 4 (1) and the provisions of Article 4 (2) of the normative act, within the meaning of the special reparation law, only the owners of the property right at the time of the abusive takeover of the real estate or their heirs are entitled persons. According to the provisions of Article 30 of Law no. 58/1974, the buyers of the construction acquired the right of use over the related land, for the duration of the existence of the construction. Regardless of the fact that the state takeover of the land based on Law no. 58/1974 can be considered abusive, in the sense of Article 2 of Law no. 10/2001, the abusive takeover does not entitle the granting of remedies to the persons who owned the buildings at the time of the takeover[4].

As it follows from the previously mentioned jurisprudential solutions, the practice generated by Law no. 10/2001 was a varied one, the situations brought to the judgment being far from being similar or identical. At the same time, it should be specified that the situation of the successors is a special one because, as I have shown previously, the presumption of abusive takeover established by law is not sufficient. As long as this presumption has a relative nature, any contrary evidence that can be brought before the court of law is likely to overturn the presumption with the consequence of the impossibility of proving what is claimed before the court of law.

CONCLUSION

The laws adopted by the legislator in the matter of restitution of property taken over abusively during the communist regime were aimed at restoring the rights of people who, in the previous political regime, were deprived of the property rights acquired under the terms of the law.

It is true that the legal provisions have not always been properly applied, which is the reason why the ECHR issued the Pilot Judgment in the case of Maria Atanasiu and others against Romania, a decision that led to the adoption of Law no. 165/2013.

Beyond the fact that we appreciate that even this last law is far from being an ideal law, nevertheless the persons subject to the abusive takeover and their successors had the opportunity to obtain the remedies requested to counterbalance the losses suffered during the communist regime.

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MEDICAL PRACTICE. SUCCESSIONAL TRANSMISSION. FISCAL IMPLICATIONS

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Abstract

In the matter of successional transmission of the medical practice of a family doctor, we refer to the special provisions provided in Law no. 95/2006 and in the Order of the Minister of Health no. 1322/2006. The concept of family medicine practice implies reference to 3 elements, namely: professional heritage, office infrastructure and clientele. Does the transmission of the right of ownership over the professional heritage through legal inheritance has fiscal implications in relation to the provisions of art 42 letter j. of the Fiscal code, according to which the amounts or goods received as inheritance or donated represent non-taxable income? Or will the provisions of art 48 para. 2 letter c. of the Fiscal Code be applied in order to calculate the additional income tax and the ancillary obligations?

Keywords: *medical practice, family medicine, successions, income taxation, deductible expenses.*

The concept of family medicine practice implies bringing together the professional heritage, the office infrastructure and the clientele of a family doctor.

Can the practice of a family physician be passed on through succession?

Order no. 1322/2006 on the approval of the rules for establishing the criteria and methodology for taking over the activity of an existing medical office notes that „The practice of family medicine, hereinafter referred to as the practice, brings together the professional heritage, the infrastructure of the office and the clientele represented by patients and other beneficiaries of the services provided by the medical office". The provisions of art. 31 para. 3 and art. 33 of the Civil Code stipulate that „(3) Special-purpose assets are fiduciary assets, established according to the provisions of Title IV of Book III, those affected by the exercise of an authorized profession, as well as other assets determined according to the law", namely that „(1) The constitution of the estate affected by the individual exercise of an authorized profession is established by the deed concluded by the holder, in compliance with the form and publicity conditions provided by the law. (2) The provisions of para. (1) apply accordingly in case of increase or decrease of the individual professional patrimony. (3) The liquidation of the individual professional patrimony is carried out in accordance with the provisions of art. 1.941 – 1.948, unless the law provides otherwise."

In accordance with the provisions of the Civil Code, *inheritance is the transmission of the patrimony of a deceased natural person to one or more living persons*. According to the provisions of art 954 of the Civil Code, the opening of the succession coincides with the moment of the death of the natural person, and the opening of the succession procedure represents a moment subsequent to the death of the natural person, and can be done by any

person who has a succession vocation either under the conditions of law 36/1995, respectively the notification of the notary public, or by initiating a legal action.

The notarial succession procedure is initiated on the request of any concerned person by means of a request in which the civil status data of the deceased, the home address of the heirs and the bequest are mentioned. On the request of the concerned persons, the inventory of the inherited assets will be carried out in accordance with the provisions of art 105 et seq. from Law 36/1995.

In the event of transmission by succession of the medical practice, we have a special situation, and takeover is carried out not in accordance with the provisions of the common law in the matter, but in reference to the provisions of the special Law 96.2006, OMS (Order of the Minister of Health)1322/2006.

Thus, according to article 17 of OMS 1322/2006, in the event of the death of the owner of the office with only one doctor, the activity is taken over in a differentiated way according to whether or not the legal heirs meet the conditions demanded by the law.

If the legal heirs fulfill the provisions of the special law, in the sense of art. 6 of OMS 1322/2006, the takeover can be carried out by a family medicine specialist, a natural person or a health unit with a family medicine profile, in the organizational forms provided by the law.[1] Individual doctors (natural persons) will prove their right to exercise their profession by registering in the Unique Register of medical offices, under the conditions of the law.

As the practice of family medicine represents professional heritage that can only be owned by certain persons – namely, doctors certified by the National Health Center to practice family medicine and have a collaboration contract concluded with it – the acquisition, preservation and alienation of family medicine practice is subject to the special law.[2]

If the legal heirs do not meet the conditions stipulated by OMS 1322/2006, then they will decide on the method to take over the activity by a family doctor who meets the conditions of the law or they will be able to decide on the employment, for a limited period of time, of a substitute family doctor.

The maximum term to complete the takeover of the office's activity by a new doctor is of one year after the death of the former holder. If, during this period, the situation is not regulated, the local authorities, in cooperation with the public health authorities where the office is registered, will undertake all the steps provided by the law regarding the establishment of a new family medicine office by a new owner.

The case-law in the matter considers that these restrictive provisions highlight the fact that the practice of family medicine is closely related to the person of its holder, because its extent depends on the professional qualities of the holder and not only – first of all the competence, but also the compliance with the working schedule, the availability to work overtime or to visit the patients' homes, to listen to the patients and empathize with them, to participate in the prevention and information campaigns, to equip the office, the quality of the auxiliary staff, etc. In other words, family doctors are authorized natural persons operating in a competitive environment, so their income depends on how much they get involved in the activity they carry out.

The mentioned provisions also emphasize the fact that family medicine is a very important public service for society, which is why the owner's right to the practice is not absolute, since he cannot pass it on in this form to the heirs who, in order to benefit from the work of their author, only have one year to capitalize on their inheritance.[3]

According to the provisions of art. 5 of OMS 1322/2006, *the object of taking over the activity* of a practice is the professional heritage. Law 95/2006 stipulates that *the takeover of the activity of an existing practice by another family doctor, provided that the activity of the owner doctor has ceased, is carried out by transferring the owned professional heritage to the doctor who takes over the practice.[4]*

The methods of taking over the activity, stipulated in the provisions of art. 5 of OMS 1322/2006, refer to the *mortis causa* takeover procedure, even the provisions of art. 17 of OMS 1322/2006 making a reference in this regard. [5] The methods of taking over the practice can consist in the sale under the terms of Law 95/2006, the exchange, donation, legacy made under the terms of the Civil Code, the lease, free loan, usufruct, contribution to the share capital.

From the corroborated interpretation of these legal provisions, it results that, in the event of the death of a doctor practicing independently in a practice, his activity ceases. However, it can be taken over by another person through sale, exchange, donation, lease, contribution to the share capital, but the object of taking over the activity of a practice represents the professional heritage, and not the infrastructure of the office, which represents the second element of family practice.

The transmission of the infrastructure of the office, which is used by the doctor who ceases his activity, takes place only if a clause to this effect is provided in the contract based on which this use is held, as expressly stipulated in art. 8 letter b). Therefore, there can be no confusion between the transmission of the use of the office's infrastructure and the take-over of the office's activity, because they have a different object, the first regarding the components or basic elements necessary in this field of activity, and the second, the professional heritage, which represents the totality of all the assets, rights and obligations affected by the purpose of exercising this activity.[6]

The practice of family medicine brings together the 3 elements: the professional inheritance, the infrastructure of the office and the clientele. As regards the infrastructure, depending on the method of ownership and use of the infrastructure, the situation is distinguished in which the infrastructure is in the private property of the health unit organized by the doctor and which can be transmitted in one of the forms of transmission provided by the law. And the situation in which the infrastructure is in use by the doctor who ceases his activity, and if such a clause is provided in the contract based on which it is held, the use of the infrastructure may be transferred.[7] In this regard, the case-law in the matter assesses that, if the contract under which the infrastructure is owned does not include a clause in the sense of art. 8 para. 1 letter b. from OMS 1322/2006, the use of the infrastructure will not be able to be transferred, as the provisions of art 1822 of the Civil Code are not applicable. Since the method of taking over the practice is regulated by special rules, each element of the component is subject to distinct specific provisions and the general rules of the Civil Code that regulate the non-termination of the lease in case of the tenant’s death are not applicable in the case of transmission of the medical practice by succession.

As regards the clientele, as concisely defined by art. 1 of Order no. 1322/2006, this is represented by patients and other beneficiaries of the services provided by the office. Family doctors offer an *intuitu personae* service. The patrimonial aspect of the number and composition of the clientele is important, because the impact of the clientele on the doctor's income is significant. Family doctors are remunerated based on the contracts concluded with

the insurance company, and their remuneration is directly proportional to the number of clients: both the payment *per capita* (rate for the insured person listed as registered on the doctor's list), and the payment for the services provided to execute certain categories of services, such as: consultations, vaccinations of children, national programs for monitoring the health status of the population, etc. According to art. 60 letter (i) of Law no. 95/2006, the practice of family medicine brings together the professional heritage, the infrastructure of the office owned or used by the doctor. The transmission takes place by inheritance from the owner of the ownership right over the clientele and over the goods that make up the infrastructure of the office. The situation is important to the extent that, during the succession debate, there is an heir who does not satisfy the conditions of the law to take over the medical practice; there is also the matter concerning the amount of indemnities in case of continuation of the contract for the provision of medical services of primary medical care.[8]

If there are no legal heirs, the legal authorities will take all the steps to establish a new family medicine practice with a new owner and for a maximum period of one year, the activity can be taken over by a substitute family doctor.[9]

The transmission of the right of ownership over the professional heritage through legal inheritance has fiscal implications in reference to the provisions of art 42 letter j. of the Fiscal code, according to which the amounts or goods received as inheritance or donated represent non-taxable income or will the provisions of art 48 para. 2 letter c. of the Fiscal Code be applied in order to calculate the additional income tax and ancillary obligations?

A component of the gross income based on which, by subtracting the expenses incurred in order to achieve deductible income, the net income resulting from independent activities such as the case of medical professions is determined, is constituted *by the earnings from the transfer of assets from the business patrimony, used in an independent activity, including the equivalent value of the assets remaining after the final cessation of activity.[10]*

Related to the concept of family medicine practice as defined in OMS 1322/2006 and in Law 95/2006, it brings together the three components: the professional heritage, the office infrastructure and the clientele, and *the object of taking over the activity of a practice is represented by professional heritage.*

Following the death of the owner doctor of the family medicine practice, with regard to the professional heritage making the object of the takeover of the medical practice, a transmission operates under the conditions of the special law which, depending on the situation, can be carried out in one stage or in two, namely, the temporary employment of a family doctor and subsequently the sale of the activity of the practice. In a decision made in such a case, the court assessed that, *in such a regulatory context, the price obtained from the transfer by sale, after the cessation of the independent activity, has the character of gross income of the medical office. This operation, which materializes the fact of taking over, cannot be qualified as a transfer of amounts or assets as inheritance or donation and therefore cannot constitute non-taxable income in the sense of art 42 letter j. of the Fiscal Code. It will be taxed according to the category to which it belongs, namely as income subject to income tax in accordance with the provisions of art 41 letter a. of the Fiscal Code.*[11]

In the situation of sale of the family medicine practice, we are not in the case of income earned by the family doctor from the activity that he has carried out, but we are talking about the sale of the practice under the conditions of art. 5 of OMS 1322/2006. Technically, income is generated from the transfer of assets from the business patrimony used in an

independent activity, and this operation will be taxed as such. The component elements of the medical practice do not belong to the estate of the natural person, and the price obtained from the sale after the cessation of activity is subject to tax in the context of special regulations.

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CONTROVERSIAL ASPECTS CONCERNING THE REGULATION OF SUCCESSIONAL INDIGNITY IN THE NEW CIVIL CODE

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Abstract

The regulation of successional indignity in the new civil code has entailed a laborious process of interweaving the elements of permanence, which were preserved from the old regulation, with elements of novelty, which reflect the vision of the legislator and their legislative policy. Thus, a legislative element of absolute novelty in this matter consists in the regulation of judicial indignity, as one of the forms of successional indignity, along with indignity by law. Subject to the same logic of the legislative renewal are the regulation of new cases of indignity by law, as well as the regulation of acknowledging indignity by a final civil judgment for the hypothesis in which the ruling of a final criminal judgment of conviction would be prevented by the death of the perpetrator, by amnesty or by the time-barring of criminal liability.

Keywords: *acknowledgment; judicial; inheritance; indignity; successor; heir.*

I. Preliminary considerations

Far from being an unknown quantity, successional indignity is an institution already classicized in the domestic successional legal landscape, which has preserved its legal nature and its specific legal features, even if it has undergone, over time, changes in its content.

Any analysis of successional indignity can only start from its correct identification as an institution that materializes one of the negative conditions for inheriting, and it cannot cast aside its legal nature of civil penalty either, which applies only if deeds expressly provided for and limited by the law are committed.

Thus, as is known, in order for a person to inherit, apart from the positive conditions of successional capacity and vocation, two negative conditions are also required, namely the condition that successional capacity is not undignified to the person whose inheritance he/she may claim, and the condition that he/she was not disinherited by the latter. The negative condition of the non-existence of successional indignity is required both in the case of legal inheritance, and in the case of testamentary inheritance, and its non-fulfillment renders such a potential inheritance ineffective.

As regards the legal nature of successional indignity, it results directly and unequivocally from its very identity of legal or judicial depriving of a legal heir of the right to collect a determined inheritance, as a consequence of the culpable commission of a serious act, stipulated by the law, against the bequeather or against certain nominated heirs.

For a good classification and for an easy understanding of the present analysis, we find it necessary not only to shed light on the current regulation, but also to provide a short diachronic perspective of the institution of successional indignity. From this point of view, we remind that, under the rule of the Civil Code of 1864, only cases of indignity by law were recognized, these being the following: a) conviction for murder or attempted murder of

the bequeather; b) the capital charge declared slanderous against the bequeather; c) failure by the heir to report the murder of the bequeather [1].

The novelties introduced by the New Civil Code consisted, on the one hand, in reforming cases of indignity by law and the ways of acknowledging them, and, on the other hand, in the recognition and regulation, as an element of absolute novelty, of the institution of judicial indignity, as form of successional indignity with its own identity, distinct from indignity by law.

As regards indignity by law, the new elements consist in the elimination of two of the factual and legal situations representing cases of indignity under the rule of the old civil code, the adaptation of the third one and the introduction of a new case of indignity. More precisely, in the view of the New Civil Code, legal indignity is circumscribed to the idea of conviction for committing the crime of murder or the attempt to commit this crime, in two versions, regulated by art. 958 para. 1: a) against the bequeather; b) against another heir who, if the inheritance had been open at the time when the deed was committed, would have removed or restricted the doer's vocation to inherit [2].

As for judicial indignity, unlike that of law, it is not acknowledged, but can only be declared by the court, and, according to art. 959 para. (1) of the New Civil Code, it may be declared unworthy to inherit:

a) the person criminally convicted for committing, with intent, serious acts of violence, physical or moral, against the bequeather, 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 forged the will of the deceased.

c) the person who, through fraud or violence, prevented the bequeather from drawing up, modifying or revoking the will.

II. Inadvertences and ambiguities regarding the regulation of successional indignity in the New Civil Code

2. 1. Regulatory context

Following Romania's accession to the European Union, beginning with 2004, the draft of a new civil code was initiated, that should reflect the current stage of social and institutional evolution in Romania, and that should include the modern social and legal requirements and changes in legislation at European and international level.

The current civil code entered into force on October 1, 2011, replacing the old civil code enforced on December 1, 1865. The normative act regulates patrimonial and non-patrimonial relations between persons, as subjects of civil law [3].

In this context, some pressure was created in the sense of programmatic attempts at legal innovation, attempts, perhaps excessive, with certainty and with positive effects, but which created in the matter of successional indignity many conceptual ambiguities and problems of interpretation as well, which this analysis intends to study in depth.

2.2. The situation of ex officio claiming of successional indignity by law by the notary public

Given the seriousness of the deeds committed by the undignified person, the legislator appreciated that successional indignity by law can be acknowledged at any time, once it

exists, from the moment when the criminal judgment of conviction remains final; the entity with competence to acknowledge it is either the court of law or the notary public, based on the judgment indicating such indignity [4].

Therefore, although they are vested with civil cases, both the courts of law, and the notaries public, exceeding the principle of availability, can invoke ex officio the existence of a case of successional indignity by law, in order to acknowledge indignity, provided that they hold a criminal judgment for conviction showing that an heir is undignified.

Or, if the court, being part of the judicial system, has at its disposal specific means of accessing judicial information, including as regards the criminal conviction of heirs involved in a specific succession case, the question arises how the notary public vested with a succession case can find out whether the potential heirs have been criminally convicted, which would trigger their successional indignity by law?

Because, in the absence of a coherent mechanism that the notary public could use in order to take note of, and to permanently have at his/her service, the state of fact and the judicial history of the persons involved in the successional cases that he/she manages, the ex officio claiming of successional indignity by law by the notary public remains a mere formal procedural way, without practical finality.

In these conditions, it should also be taken into account the fact that the mere access to the information concerning the criminal record of the involved persons is not enough; the intervention of the rehabilitation of the undignified person removes the criminal effects of the criminal conviction, leading to a „*clearing"* of the criminal record of the convicted person; however, it does not remove the civil effect of the same conviction, which consists in the successional indignity by law of the convicted person [5]. Consequently, the notary public requires a deeper level of access or, at any rate, the access to a more extended database than the simple „*criminal record*", even if only sequentially from the material point of view, since it concerns only the offences of murder and attempted murder.

A possible solution could consist in creating, at the level of the National Union of Notaries Public of Romania, a database that would include all the persons criminally convicted by final judgments for committing crimes of murder and attempted murder. Such a database would be extremely useful especially in those situations where quite a long time has passed since the act was committed, which means that, in the collective mind, the memory of the deeds has faded and is no longer current.

2.3. The situation of acknowledging indignity by a final civil judgment

Under the old civil code, indignity (exclusively by law) operated and could only be claimed under the conditions of the pre-existence of a final criminal judgment of conviction for the expressly provided facts; the civil judge only acknowledged the ope legis intervention of indignity. As such, in the situation where the ruling of a final criminal judgment of conviction was prevented by the death of the perpetrator, by amnesty or by the time-barring of criminal liability, the indignity did not operate and could not be acknowledged by the civil judge [6].

This situation represented one of the legislative gaps whose coverage was intended and sought to be achieved through the provisions of the New Civil Code. The specific legislative manner to achieve this desideratum was to introduce, by art. 958 para. (2) of the New Civil Code [7], a way to have indignity acknowledged by the civil court, even in the absence of a final criminal judgment of conviction, which would „generate" ope legis the state of

indignity. Mutatis mutandis, the same was pursued by regulating, by art. 959 para. (4) of the New Civil Code [8], the acknowledgement of indignity through a final civil judgment, for the hypothesis that the conviction for the facts mentioned in para. (1) letter a) of the same article would be prevented by the death of the perpetrator, by amnesty or by the time-barring of criminal liability.

Now, although the legislator's intention was undoubtedly a commendable one, its materialization leaves room for equivocation and ambiguity.

Thus, first of all, it should be noted that both the provisions of art. 958 para. (2), as well as those of art. 959 para. (4) of the Civil Code speak about the acknowledgement of certain facts, using the same wording: „*... if those facts have been acknowledged by a final civil judgment.*"

However, as a legal constant, Romanian civil procedural legislation, theory and case law do not know and do not recognize the action in acknowledging facts, but only in acknowledging the existence or non-existence of a right [9].

Therefore, although the civil law creates a legal instrument to settle the mentioned situation, which is not in accordance with the civil procedural legal framework, the procedural means of capitalizing on this instrument is missing, so that serious doubts and questions arise regarding the specific way of claiming indignity in cases when the ruling of a final criminal judgment of conviction is prevented by the death of the perpetrator, by amnesty or by the time-barring of criminal liability.

Of course, there are also opinions in the sense that such an acknowledgement action is procedurally viable and that indignity could be claimed, in all cases, only based on the civil judgment that ends it, even in the case of judicial indignity, in which case, in accordance with the provisions of art. 959 para. (4) of the NCC, the civil court only acknowledges the indignity, but it does not declare it [10].

Without dismissing such an opinion, we cannot fully agree with it either, given that, from a civil procedural perspective, acknowledgement concerns, as we have shown, the existence or non-existence of rights, and not of facts.

On the other hand, the ambiguity of the law inevitably leads to a doubtful perspective regarding the legal significance of the judgment of „acknowledging the facts", ruled pursuant to art. 958 para. (2) and art. 959 para. (4) NCC. More precisely, the legitimate question arises as to whether this judgment is sufficient for the existence of the state of indignity or is only a prerequisite, as a new judgment is necessary, in order to acknowledge and, respectively, declare the indignity.

Without going into details, for reasons related to a vision and systematic interpretation of the law, we lean towards the second option, but only the case law, in the process of being established, will give a consistent and final answer to this question.

2.3. The situation of the inheritance left to the undignified person after committing the deed that triggers his/her indignity.

Finally, another controversial issue consists in the legal significance and especially the effect of a testamentary bequest drawn up by the de cujus in favor of the undignified person after committing the deed that triggers his/her indignity.

Thus, the civil law, after establishing, through the first sentence of art. 961 para. (1) NCC, two alternative ways of removing the effects of legal or judicial indignity: express testamentary provision or express provision contained in an authentic notarial act [11], in the

second sentence of the same article, establishes, through a negative wording interpretable per a contrario, an assimilated variant, namely the situation of the inheritance left to the undignified person after committing the deed that triggers his/her indignity, and which also includes an express mention of pardon of the undignified [12].

In relation to this assimilated manner of removing the effects of indignity, there is the matter of defining the notion of „*express declaration*", which should include the inheritance left to the undignified in order to remove the effects of indignity. More specifically, the question arises whether this phrase must be given a purely formal meaning of expression in a wording that should include expresis verbis the idea of pardon or of removal of the effects of indignity, or whether a wording that unequivocally expresses this idea is is enough.

We favor the version of the broader, non-formal interpretation, as we appreciate that the will of the legislator was to avoid any misunderstanding through the way of formulating the binding clause, and not to establish a sacramental formula, an idea that would lead to the first version of interpretation; in this case as well, only the case law will provide a final answer to this question.

III. Final considerations

The regulation of successional indignity in the New Civil Code pursued a series of objectives, including the updating of the specific legal lexicon, the modernization of some legal institutions and the supplementation of the legal framework with new legal institutions, objectives imposed by the general evolution of society, but also by the evolution of the internal and international legal framework, from a doctrinal, jurisprudential and legislative point of view.

The objectives contemplated by the legislator were, for the most part, achieved, as previously shown, in particular by the regulation of judicial indignity, the regulation of new cases of indignity by law, as well as the regulation of acknowledging indignity by a final civil judgment for the hypothesis in which the ruling of a final criminal judgment of conviction would be prevented by the death of the perpetrator, by amnesty or by the time-barring of criminal liability.

Without going into the analysis of causality, what is obvious is that the process of regulating successional indignity in the New Civil Code was, in a euphemistic expression, far from perfect, creating, as already shown, many conceptual ambiguities and problems of interpretation.

However, this analysis sought precisely to deepen and „dissect" these legislative inadvertences, without the intention of providing solutions, but rather of bringing them into discussion and of opening a future field of debate.

NOTES AND BIBLIOGRAPHICAL REFERENCES

[1]. Art. 655 of the Civil Code of 1864: „*The following persons are undignified to inherit and are therefore excluded from inheritance: 1. The person convicted for murdering or attempting to murder the deceased. 2. The person who made a capital accusation against the deceased, declared by the court as slanderous. 3. The major heir who, having knowledge of the deceased's murder, did not report it to justice."*

[2]. Art. 958 para. (1) the New Civil Code: „ *It is undignified to inherit by law: a) the person criminally convicted for committing a crime with the intention of murdering the bequeather; b) the person criminally convicted for committing, before the opening of the*

inheritance, a crime with the intention of killing another heir who, if the inheritance had been opened on the date of the deed, would have removed or would have restricted the vocation to inheritance of the perpetrator".

[3]. The normative act was adopted by undertaking the government's responsibility by the Romanian Parliament through Law no. 287 of July 17, 2009, republished with amendments on July 15, 2011 in the Official Journal Part I no. 505-2011.

[4]. According to art. 958 para. (3) Civil Code, „*Indignity by law can be acknowledged at any time, on the request of any concerned person, either ex officio, by the trial court, or by the notary public, based on the judgment indicating the indignity".*

[5]. According to art. 961 para. (2) Civil Code, „*The effects of indignity cannot be removed by rehabilitation of the undignified person, by amnesty passed after the conviction, by pardon or by the time-barring of the execution of criminal penalty".*

[6]. Francisc Deak, Treaty of Succession Law, ACTAMI Publishing House, Bucharest, 1999, page 69.

[7]. According to art. 958 para. (2) Civil Code, *„If the conviction for the deeds mentioned in para. (1) is prevented by the death of the perpetrator, by amnesty or by the time-barring of criminal liability, the indignity operates if those deeds were acknowledged by a final civil judgment."*

[8]. According to art. 959 para. (4) Civil Code, „*When the conviction for the deeds mentioned in para. (1) letter a) is prevented by the death of the perpetrator, by amnesty or by the time-barring of criminal liability, indignity can be declared if those facts were acknowledged by a final civil judgment. In this case, the term of one year runs from the occurrence of the cause preventing the conviction, if it occurred after the opening of the inheritance."*

[9]. According to art. 35 Civil Procedure Code, *„The concerned person can request the acknowledgement of the existence or non-existence of a right. The request cannot be received if the party can request the execution of the right by any other means provided by the law."*

[10]. Chirică Dan, Treaty of Civil Law: Successions and Liberties, C. H. Beck Publishing House, Bucharest, 2014, p. 23-31.

[11]. According to art. 961 para. (1), sentence I of the Civil Code, „*The effects of indignity by law or of judicial indignity can be expressly removed by will or by an authentic notarial act by the bequeather."*

[12]. According to art. 961 para. (1), sentence II of the Civil Code, „*Without an express statement, the inheritance left to the undignified person after committing the deed that triggers the indignity does not represent a removal of the effects of indignity."*

CONFLUENCE OF SUCCESSION LAW WITH COMPANY LAW. ISSUES REGARDING THE CONTINUATION OF THE ACTIVITY OF THE LIMITED LIABILITY COMPANY BY THE HEIRS OF THE DECEASED MEMBER

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Abstract

The present study aims to highlight the consequences of one of the amendments made to Law no. 31/1990 on companies, through the new Trade Register Law no. 265/2022, in the plan of the (re)interpretation of the legal provisions regulating the transmission of social shares through succession. In this new context, the issue, not lacking in controversies, of continuing the activity with the heirs of the deceased LLC member is presented and analyzed.

Keywords*: continuation of the company's activity with the heirs, limited liability company, social shares, inheritance, intuitu personae nature, affectio societatis.*

1. **Preliminaries**

The present approach complements a previous study[1]dedicated to a similar issue, in the context of the amendments made to Law no. 31/1990 of companies through the new law of the Trade Register, Law no. 265/2022, more precisely the amendment brought to Article 230 of the Companies Law, by including the limited liability company in the scope of the mentioned article. It is necessary, *ab initio*, to emphasize the distinction that must be made between the issue of the transmission of the membership interest through succession and that of the transmission of the member status/acquiring the member status by the heirs of the deceased member.

The possibility of the inheritance of membership interest, through legal or testamentary inheritance, is a matter that is resolved in the realm of succession law, by applying, therefore, the legal rules that regulate the transmission and division of the inheritance, the members not being able to censure in any way, by their will transposed by an express clause or materialized by adopting a decision of the assembly of members, the transmission of the membership interest to the heirs of the deceased member. The membership interest of the deceased partner are part of the inheritance, so their transmission to the heirs takes place by law from the moment the inheritance is opened, provided that the heirs exercise their right of succession option in the sense of accepting the inheritance.[2] The associates cannot prohibit

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[1] M. Iliescu, *Implicaţii ale inserării clauzei privind continuarea activităţii cu moştenitorii membruului decedat în actul constitutiv al societăţii cu răspundere limitată, article published in the Conference volume „*PROCEEDINGS OF THE INTERNATIONAL CONFERENCE OF LAW, EUROPEAN STUDIES AND INTERNATIONALS RELATIONS", 10 th edition, Bucharest, may, 12-13 2022, THE PATENT UNIVERSALITY OF INHERITANCE LAW. LEX SUCCESIONIS BETWEEN LEGISLATIVE TRADITION AND MODERN VALUES, Universul Juridic Publishing House, Bucharest 2022.

[2]Article 1100 (1) Civil Code: *The person called to inherit under the law or the will of the deceased can accept the inheritance or renounce it.* Article 1106 Civil Code: *No one can be forced to accept an inheritance due to him.* Article 1114 paragraph 1 Civil Code: *Acceptance consolidates the transmission of the inheritance made by full right on the date of death.*

the transfer of the membership interest to the heirs by way of succession, legal or testamentary, through a clause inserted in the constitutive act. If he accepts the inheritance, the successors of the deceased member will acquire the membership interest retroactively, from the moment of the opening of the succession, that is, from the date of the death of the *de cujus*. What the members can do, either through an express clause inserted in the constitutive act or through a decision of the general assembly of members, is to prohibit the continuation of the activity with the heirs of the deceased member, in other words, prohibiting the transmission of the member status through legal or testamentary succession.[3] **In a case decision, the court erroneously considered that the mention in the constitutive act according to which in the event of the death of a member all the membership interest he owns in the company will revert by right to the other member has the value of a legacy. We appreciate, in the light of what was presented previously, that the said mention can be qualified as a clause prohibiting the continuation of the activity with the heirs.**[4]

In the doctrine, a distinction is made between the notion of successor and that of heir, the term successor denoting the person who meets the conditions provided by law to be able to inherit, but who has not yet exercised the right of succession option. After exercising this right, the successor either consolidates his quality of heir if he accepts the inheritance, or renounces the inheritance by becoming a person removed from the inheritance.[5]

Therefore, the issue of the transmission of membership interest will not arise in the event that the successor has renounced the inheritance, nor in the case of the ex-inheritance of the heirs by the deceased member or of the disinheritance of the heirs of the deceased member.

On the other hand, the acquisition of membership by the heirs in the event of the death of a member means, in fact, the continuation of the company's activity with the heirs of the deceased member and represents a matter of company law, which must be resolved, therefore, by applying special legal rules, contained mainly in the Companies Law. As is known, the *intuitu personae* character of the limited liability company entails the characteristic of non-negotiable and transmissible titles restricting the membership interest. Therefore, the possibility of acquiring membership by the heirs in the event of the death of a member is, *de plano*, restricted by the *intuitu personae* character of the limited liability company.[6] The entry into the society of new members, persons foreign to the association, is

[3] **In a case decision, the court erroneously considered that the mention in the constitutive act according to which in the event of the death of a member all the social shares he owns in the company will revert by right to the other member has the value of a legacy. We appreciate, in the light of what was presented previously, that the said mention can be qualified as a clause prohibiting the continuation of the activity with the heirs.**

[4] Decision no. 761/R/5, Bucharest Court of Appeal, 4th civil section.

[5] See F. Deak, R. Popescu, *Tratat de drept succesoral*, vol. III *Transmisiunea şi partajul moştenirii*, 4th Ed., Universul Juridic Publishing House, Bucharest, 2019.

[6] Among the specific features of the limited liability company, the intuitu personae character is highlighted in the doctrine, the association being realized, therefore, on the basis of the trust between the members, of their personal qualities, a feature borrowed, obviously, from the companies of individuals. The direct consequences of this character are, on the one hand, the membership interest characteristics of being non-negotiable and transferable securities only under restrictive conditions, and, on the other hand, the small number of members, Companies Law no. 31/1990, republished, containing the express provision limiting the number of members to a maximum of 50.

equivalent to the violation of personal character; consequently, the case of the heirs acquiring membership is subject to the will of the members.

On the other hand, the transmission by succession of membership also requires the consent of the heirs in this regard. Even in the situation where they have accepted the inheritance, the heirs will not automatically acquire membership with the acquisition of membership interest. The acceptance of the inheritance by the successors does not result in the obligation to accept the membership; like any contract, the company contract must meet the general conditions of validity provided for in Article 1179 of the Civil Code; in addition, the company contract also requires the fulfillment of special validity conditions, among which is the subjective element, *affectio societatis*, which constitutes the foundation of any company contract, in other words, the consent of the heirs is necessary in order to become members. If the heirs do not want to become members, they can opt to ask for the value of the membership interest inherited from the deceased member.

The confusion between the issue of the transmission of membership interest and that of the continuation of the company's activity with the heirs of the deceased member (transmission by way of succession of membership) also generated the formulation of an exception of unconstitutionality, the relevant legal text being Article 229 (2) of the Companies Law; the second thesis, regarding the continuation of the company with only one member, as a result of the death of the other, was considered unconstitutional by the authors of the exception, considering, in particular, the violation of the right to inherit, provided for in Article 46 of the Romanian Constitution.[7] The main objection brought by the authors was that, due to the criticized regulation, the inheritors, who, according to the authors of the exception, became members by right, are removed from the structure of the company. Rejecting the exception, the Constitutional Court clarified this issue by ruling that ***the criticized legal text actually refers not to the transmission of membership interest, but to the continuation of the company's existence with the heirs of the deceased member and does not contravene the right to inheritance. Such a stipulation in the constitutive act of the company is allowed by the legislator, with the aim of protecting the intuitu personae character of the company, the criticized text applying equally to all those in the hypothesis regulated by the legal norm.***

2. **Practical situations that can lead to the continuation of the activity with the heirs of the deceased member**

In the following we will highlight the cases that lead to the continuation of the activity of the limited liability company with the heirs in the event of the death of a member. We will take the following three situations as working hypotheses:

a) the constitutive act prohibits the continuation of the company's activity with the heirs (insertion of the clause prohibiting the continuation of the company's activity with the heirs);

b) the constitutive act allows the continuation of the company's activity with the heirs of the deceased member (insertion of the clause regarding the continuation of the company's activity with the heirs);

[7] CCR decision no. 387 of May 9, 2006, regarding the exception of unconstitutionality of the provisions of Article 229 (2) from Law no. 31/1990 regarding commercial companies.

c) the constitutive act neither allows nor expressly prohibits the continuation of the company's activity with the heirs (it does not include a clause regarding the possibility of continuing the activity with the heirs, nor a clause prohibiting the continuation of the company's activity with the heirs in the event of the death of a member).

a) Obviously, in the first hypothesis, the insertion of a clause prohibiting the continuation of the company's activity with the heirs cannot, in principle, lead to the possibility of the heirs becoming members continuing the company's activity in this capacity, in this case the legislator establishing the obligation for the company to pay the heirs the value of membership interest according to the last approved accounting balance sheet.

b) The second hypothesis, which assumes that the constitutive act contains the clause regarding the continuation of the company's activity with the heirs of the deceased member, has, in principle, as a result, the continuation of the company's activity with the heirs. The insertion of the clause regarding the continuation/prohibition of the continuation of the company's activity with the heirs of the deceased member represents the desirable solution to be adopted in practice by the members. This clause represents one of the specific clauses that the members of a limited liability company can insert in the constitutive act based on the autonomy of contractual will, but above all it constitutes the concrete expression of the *intuitu personae* character of the limited liability company. By inserting such a clause in the constitutive act, the members can condition the continuation of the company's activity with the heirs of the need for the consent of the members, consent given under the conditions established in the respective clause – *Exempli gratia*: *in case of the death of one of the members, the company can continue its activity with the heirs of the deceased member; the entry of the heirs into the company will be subject to the agreement of the members representing ¾ of the company's share capital/unanimous agreement of the members.* The possibility of the deceased member's heirs taking his place, becoming members, can seriously affect the personal character of the company, which is the essence of this type of company. Therefore, the members are entitled to decide in this regard from the moment of the company's establishment by stipulating such a clause in the company's articles of organization However, even in this situation it is possible that, despite the insertion of the clause regarding the continuation of the activity of the company with the heirs, the activity of the limited liability company cannot continue with the heirs who are not known[8] or who, although they have accepted the inheritance, thus acquired the social shares through legal or testamentary succession, do not wish to continue the activity of the society, i.e. do not wish to become members. In other words, even if the successors have accepted the inheritance, they cannot be obliged to continue the activity of the company as members, even if the constitutive act contains the clause regarding the continuation of the activity of the company with the heirs of the deceased member. As stated in the doctrine, this clause produces its effects only between the members, thus obliging the remaining members to allow the entry of the heirs into the company. However, the latter must consent to the continuation of the

[8] See Sentence no. 1/2022 of the Giurgiu Court. In this case, in a limited liability company with 2 members, the constitutive act contained the clause for the continuation of the company's activity with the heirs, but the heirs are not known, and the remaining member after the death of the other member did not express his will for the continuation of the company in the form of LLC with a single member. In this situation, the court decided to dissolve the company, based on Article 229 of the Companies Law.

company's activity, therefore, to the acquisition of membership through succession – this consent of the heirs is equivalent to the existence of the *affectio societatis element.*

Therefore, not always the hypothesis in which the constitutive act contains the clause allowing the continuation of the company's activity with the heirs automatically leads to the continuation of the company's activity with the heirs, therefore, to the transmission of membership through succession.

It is also worth mentioning here the situation often encountered in practice where, in the context of the existence of a clause for the continuation of the company's activity with the heirs, the remaining members – who do not want the continuation of the activity with the heirs of the deceased member – indirectly „boycott" the respective clause, after the amendment of the constitutive act in the sense of including the heirs as members of the company, through the request addressed to the court for the dissolution of the company on the grounds of the existence of serious misunderstandings between the members.

3. Controversies regarding the transmission of membership through succession

c) The hypothesis in which **the constitutive act does not contain either the clause regarding allowing the continuation of the company's activity with the heirs, nor the clause prohibiting the continuation of the company's activity with the heirs,** in case of the death of a member, it creates difficulties in practice. In principle, in this hypothesis we will apply the provisions of Law no. 31/1990 regarding the continuation of the company's activity with the heirs, respectively the text of Article 202, Article 229 and Article 230. Given that there are, therefore, legal provisions regarding the continuation of the company's activity with the heirs of the deceased member, *prima facio*, there should be no difficulties in finding a solution. However, the context is, unfortunately, unfavorable to finding a clear solution.

First of all, due to the fact that it is conceived in an ambiguous, unclear way, the text of art. 202 of the Companies Law, regarding the conditions for the transmission of membership interest through succession, has generated divergent interpretations both in doctrine and in practice[9], leading to non-unitary solutions.

Secondly, the text of Article 230 of the companies law, as amended by Law no. 265/2022 regarding the Trade Register, contradicts the text of Article 202; because of this, finding a solution becomes a more complicated problem.

We reproduce the normative content of Article 202 of the Companies Law:

(1)*Membership interest can be transferred between members.*

(2)*If the constitutive act does not provide otherwise, transmission to persons outside the company is allowed only if it was approved by the members representing at least three quarters of the interest capital.*

(3)In the case of the acquisition of a membership interest by succession, the provisions of section (2) are not applicable if the constitutive act does not provide otherwise; in the latter case, the company is obliged to pay the interest to the successors, according to the last approved accounting balance sheet.

[9] For jurisprudential solutions, see: C.S.J., s. com., dec. no. 2737/1997; Craiova Court of Appeal, decision no. 444/03.04.2013 – 2nd civil section; Pitesti Court of Appeal, commercial and tax litigation 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/ 03.04.2010; Cluj Court of Appeal, decision no. 1771 of 10.10.2007.

As I have shown, the interpretation of the provisions of Article 202 paragraph (3) of the Companies Law is not without controversy, two opinions are expressed in the doctrine: i) the authors who consider that the legal provision must be interpreted in the sense that, in the case of acquiring membership interest through succession is not allowed to pass on membership, unless the company's constitutive act contains an express clause regarding allowing the continuation of the company's activity with the heirs of the deceased member;[10]ii) the authors who believe that the interpretation of the legal provision is in the sense that, in the case of the acquisition of membership interest through succession, the activity of the society will continue with the heirs of the deceased member, even in the absence of the clause of continuation of the company's activity with the heirs, without the necessary consent of the members taken with a qualified majority, of at least ¾ of the share capital.[11]

I appreciated in the previous study that the interpretation to be given to paragraph (3) of Article 202 is in the sense that, in the case of the transmission of membership interest through succession, the rule is that the consent of the members is no longer necessary, the social shares being transmitted without the restrictions established for the transmission of membership interest to third parties in paragraph 2 of article 202, in the absence of a clause prohibiting the continuation of the activity with the heirs of the deceased member**.** Only in this way can the phrase be interpreted *if the constitutive act does not provide otherwise,* that is, by an express clause in the constitutive act the members have forbidden the continuation of the activity with the heirs of the deceased member, considering the second sentence of paragraph (3) of Article 202, in which the legislator establishes that *in the latter case, the company is obliged to pay the membership interest to the successors, according to the last approved accounting balance sheet.* In other words, only if the members have inserted a clause prohibiting the continuation of the activity with the deceased member's heirs, the company will be obliged to pay them the membership interest value; in this hypothesis, the heirs of the deceased member do not, therefore, acquire membership by inheriting the membership interest, but will only have a claim on the value of the membership interest. In addition, it would be unfair and illogical for the legislator to apply a harsher treatment to the heirs, prohibiting the transfer of membership through succession in the absence of the clause of continuation of the company's activity with the heirs, i.e. prohibiting their entry into the company as members, compared with the treatment applicable to third parties who are allowed to enter the company, is true under restrictive conditions, legislative solution enshrined in paragraph 2 of article 202 of the Companies Law.

We believe that the amendment brought to the text of Article 230 by Law no. 265/2022 necessarily requires the review of the solution, however controversial, in the matter of the continuation of the company's activity with the heirs of the deceased member, in the absence of an express clause in a permissive sense.

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[10] See St. D. Cărpenaru, Tratat de Drept comercial Român, Universul Juridic Publishing House, Bucharest, 2012, pp. 376-379, S. Angheni, Drept comercial, Tratat, C. H. Beck Publishing House, Bucharest, 2022, V. Stoica, *Consecinţe ale aplicării Legii nr. 31/1990 a societăţilor comerciale în dreptul succesoral,* in „Revista de Drept comercial", no. 3/1999, pp. 54.

[11] GH. Piperea, *Drept comercial român. Teoria generală, întreprinderea şi insolvenţa*, C. H. Beck Publishing House, Bucharest, 2020,, p. 433, St. D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *Legea societăţilor comerciale. Comentarii pe articole*, C.H. Beck Publishing House Bucharest, 2006, p. 398, D. Trăilă, *Soluţionarea cererii de partaj judiciar*, *in „Curierul judiciar" no. 1/2016,p. 20 şi urm.*

If the provisions of Article 230 were incident only to partnerships, through the recent amendment to the Companies Law, these legal texts also apply to limited liability companies. Thus, in the new form of Article 230 paragraph 1, the legislator orders: *In general partnerships, limited liability companies, if a member dies and if there is no agreement to the contrary, the company must pay the share due to the heirs, according to the last approved balance sheet, within 3 months of notification of the death of the member, if the remaining members do not prefer to continue the partnership with the heirs who consent to it.*

We are in the presence of a special provision regarding the continuation of the company's activity with the heirs of the deceased member, the premise being the death of the member. In consideration of the intuitu personae character, the rule established in the case of the death of one of the members is the censure of the heirs entering the society with the consent of the members. Therefore, from the interpretation of the provisions of Article 230, it follows without doubt that the legal or testamentary heirs will be able to become members, if the constitutive act contains a clause to continue the activity with the heirs, or if the remaining members wish to continue the activity of the company with the heirs who also consent to become members (of course, in the latter situation, only if a clause prohibiting activity with heirs is not inserted in the constitutive act).

If the constitutive act does not contain a continuation clause and the remaining members do not want the continuation of the company's activity with the heirs, as well as if the constitutive act contains a clause prohibiting the continuation of the company's activity with the heirs, or if the heirs do not consent to become members, the heirs will only have a right of claim against the company, it will be obliged to pay the heirs the due part, i.e. the equivalent of the value of membership interest, according to the last approved accounting balance, within 3 months from the notification of the death of the member.

Therefore, the conclusion that emerges from the interpretation of Article 230, modified, is that, in the absence of the clause allowing the continuation of the company's activity with the heirs (our working hypothesis), it is possible to continue the company's activity with the heirs, the remaining members being those who will decides the entry into the society of the heirs, if they also agree to become members. The provisions of Article 230 in the new form contradict the provisions of Article 202 paragraph 3 of the companies law, regardless of the interpretation of the latter article of law, being absolutely incompatible with the interpretation according to which, in the absence of the clause of continuation with the heirs, they cannot under no way to „enter" the company as members, the will of the remaining members being, therefore, irrelevant in this regard.

We appreciate that the amendment brought to Article 230 is welcome, the solution chosen by the legislator being in full agreement with the spirit of *intuitu personae* that also leaves its mark on limited liability companies. This character logically imposes, as an effect, the solution that the will of the members, expressed, either initially in the constitutive act or later, through a decision of the general assembly, is paramount in the matter of new members entering the company, and the legislator through the change made gives efficiency to this solution. [12]

[12] The commercial company is the result of the will of the members, but the company is not only a contract, but also a legal entity, so that the will of the members, which represents the foundation of the establishment and operation of the company, is manifested not only at the time of the establishment of the company, but also afterwards, throughout its existence.

We must also note that this amendment also has an impact on Article 229 (2) of the company law, which provides for the solution of not dissolving the company if there is a clause for the continuation of the company's activity with the heirs, in the event that, following the death of a member, only one member remains. In the interpretation of the provisions of Article 229 (2), the majority has rightly appreciated, in doctrine and in practice, that the text of the law exempts from the solution the dissolution of the company, exclusively the situation where the constitutive act contains the clause of continuation of the activity with the heirs of the deceased member, considering that the legislator assimilated the non-existence of this clause with a cause of dissolution, the will of the remaining member or the will of the heirs having no relevance.[13] Currently, this solution must be adapted considering the new form of Article 230; we believe that the corroborated interpretation of the two legal texts leads to the conclusion that, even if the constitutive act does not contain a clause for the continuation of the activity, the limited liability company will not dissolve, if the remaining member decides to continue the activity with the heirs, who consent to become members. The remaining members will decide on the continuation or not of the company's activity with the heirs by adopting a decision in the general meeting, by the vote representing the absolute majority of the members and membership interest, except when the constitutive act provides otherwise.

A particular situation is the death of the sole member of the limited liability company with one member, if the constitutive act does not stipulate the possibility of continuing the company's activity with the sole member's heirs. In this situation, in the impossibility of applying the provisions of Article 230, we will apply Article 202 (3), according to which, in the absence of the clause of continuation of the company's activity with the heirs, the continuation of the activity can be achieved with the successors who accept the inheritance and who consent to become members, without restrictions, so without requiring the consent of the members (of course, only if the continuation of the company's activity with the heirs of the deceased member has not been forbidden by the members through an express clause of the constitutive act). This solution is one that gives efficiency, on the one hand, to the principle of safeguarding the company, because it results in the non-dissolution of the company, and on the other hand, to the principle of security[14] and the stability of legal relations. In practice, there are jurisprudential solutions in the sense of non-dissolution of the limited liability company with a single member and the continuation of the activity of the company with the heirs, even in the absence of the express clause of continuation of the activity of the company with the heirs. *The death of the sole member does not lead to the dissolution of the company, except for a contrary clause in the statute, the company continuing with the heirs, even in the absence of a clause of continuation of the company by them, such a constructive solution being preferable to the destructive one that would lead to the dissolution of the company and, in the last instance, upon the disappearance of the legal entity, the interpretation being fully justified by* ***the need to protect the interests of third parties*** *who have entered into legal relations with the company and being a natural consequence of its existence as a separate subject of law,* ***incident being the principle of security and stability of legal relations****. Thus, third parties who were not notified of the*

[13] L. Săuleanu, *Societatea cu răspundere limitată cu membru unic,* in „Revista Româna de Drept al Afacerilor" no.1/ 2011.

[14] L. Săuleanu, Principiile dreptului societăţilor comerciale, in „Legea şi Viaţa" Journal., no. 11(311)/2017, pp. 9-16.

dissolution of the company upon the death of the sole member, through the existence of a statutory clause in this sense, have the right to have their rights and legitimate interests protected as a result of the legal relations they entered into with the company.[15]

Also within the limited liability company with a single member, doctrine and jurisprudence have signaled a particular situation related to the continuation of the company's activity with the heirs, a situation that creates some legal difficulties. Thus, according to the law, if the legal maximum number of members of the limited liability company is exceeded due to the number of heirs, they will be obliged to designate a number of holders that will not exceed the legal maximum. Therefore, in the case of the limited liability company with a single member, if there are several heirs of the deceased single member, they must designate one of them as the sole member. The designation of one of the heirs as the holder (sole member) cannot be done, however, until after the inheritance is divided, so until that moment the social parts belong to several people, and the society continues to exist „paradoxically" under single member LLC form.[16]

Conclusion

The amendment made to Article 230 of the Companies Law by Law no. 265/2022 shows a change of vision of the Romanian legislator on the legal regime of srl, bringing it closer, at least from the perspective of the conditions in which the continuation of the company's activity with the heirs can be achieved, by the legal regime of partnerships. Therefore, **the conclusion that emerges from the interpretation of Article 230, as amended, is that, in the absence of the clause allowing the continuation of the company's activity with the heirs, it is possible to continue the company's activity with the heirs; the remaining members being the ones who will decide the entry of the heirs into the company, if they also agree to become members.** By adopting this solution, the legislator gave equal effectiveness to the *intuitu personae* element that characterizes the limited liability company, and to the imperative necessity of the existence of the *affectio societatis* element, a special condition for the validity of the company contract.

We consider that, at least in practical terms, in the last resort, the will of the remaining members is decisive in the matter of continuing the company's activity with the heirs, because, even in the situation where the clause regarding the continuation of the company's activity with the heirs of the deceased member was inserted in the constitutive act, it becomes ineffective if the remaining members do not want to continue the company with the heirs. Despite the fact that the *pacta sunt servanda* principle obliges them to comply with the clauses of the constitutive act, in practice, the remaining members, who do not want to continue the activity with the heirs, resort to the extreme solution of dissolving the company (which continued with the heirs under the continuation clause), citing the reason for the serious misunderstandings between the members, therefore, the lack of the *affectio societatis* element. *Also, in the situation where the constitutive act contains a clause prohibiting the continuation of the activity with the heirs, if the remaining members want to continue the activity with the heirs, the solution should be in the sense of allowing the continuation of the activity, based on the principle of safeguarding the company.*

[15] Cluj Court of Appeal, Decision no. 1771 of October 10, 2007.

[16] For details see GH. Piperea, *Drept comercial român. Teoria generală, întreprinderea şi insolvenţa*, C.H.Beck Publishing House, Bucharest, 2020, pp. 244-245.

TESTAMENTARY INHERITANCE, A LEGATEE'S RISK?

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Abstract

Since ancient times, the right to dispose of rights, property and obligations after the death of a natural person has been a subject of interest for people. This Herculanean concept was debated in Ancient Egypt, in Israel at the time of Moses, in Sparta and in Athens, where the notion of will was introduced in the time of Solon. The community's conception of the devolution of inheritance has undergone a phenomenon of reverse polarisation, in that in ancient Rome it was considered a dishonour to die without leaving a will, the testator being compared to a king who renounces, whereas today the rule is the manifestation of legal inheritance, the community often considering the will as an act of ex inheritance.

Inheritance is now regulated at constitutional level and is being brought up to date with social conditions through the adoption of the Civil Code, in which important sections are devoted to legislation on the conditions for the validity and effectiveness of wills.

It is important to note that a will is a legal act whose effectiveness depends both on an uncertain term, the death of the testator, and on an implicit condition, that it not be revoked, so that until the testator's actual death the risk of benefiting from the effectiveness of the will falls exclusively on the legatee who is subject to the uncertainty of testamentary revocation.

Keywords: *will; testamentary legacy, heir; property right; risk*

1. Origin and evolution of the concept of testamentary succession

The right to dispose of the rights, obligations and property of an individual after his death has been a common subject since the mists of time. This right to dispose of a natural person's estate after the end of his or her life, manifested under the umbrella of a will, is an old legal concept, strengthened over time, which has gradually evolved and has changed in the course of time, and the reasons for its adoption have changed. It is a concept closely linked to private property in general, the foundation of civil law; civil law encompasses the whole of human life in its dense network of rules. It begins with the cradle of the child, penetrating even into the mysteries of conception, deals with betrothal, organises marriage, and ends with death and the consequences for property, i.e. succession, also known as inheritance [1].

We find original forms of testamentary devolution as far back as Ancient Egypt, in Israel in the time of Moses, in Sparta and in Athens, where the will was introduced in the time of Solon. [2] At that time, however, the right of disposal was not absolutely free and discretionary in Greece, and a person could only dispose of his estate by will if he had no legitimate children. Moreover, the right to make a will was recognised only for Greek citizens born in Athens. [3]

Montesquieu considered that the first form of organisation of inheritance in laws is to be found in the first Roman laws and information about the first wills is provided by Gaius who tells of the two types of primitive wills – one which the Romans drew up on the

occasion of the convocation of councils, i.e. in times of peace, and which was reserved for the families of wealthy patricians, and one which they drew up in procinctu, i.e. in times of war. Later, because of the many inconveniences, the third type of will was added, which was drawn up by means of brass and scales. [4]

In the national space, after the formation of the Romanian states, the first ecclesiastical pravile appeared, containing both ecclesiastical and legal provisions. In the middle of the 17th century, the two most important feudal pravils were adopted – the Romanian Book of Teaching of 1646 [5] and the Law of the Great Pravila of 1652 [6]. Their provisions were in principle similar and stipulated, in matters of succession, that inheritance could be transmitted either by will, written (zapis) or oral (with the language of death), or without a will. [7].

The unification and clarification of the legislation in the national space has known a wide development through the adoption of the Civil Code of 1865, after the Union of 1859, achieved by the double election of Alexandru Ioan Cuza in Wallachia and Moldova.

The Romanian community experienced socio-political changes at national and international level and the Civil Code adopted during the reign of Al.I Cuza no longer responded to the new realities and the understanding of its texts became cumbersome, which is why the Civil Code [8] was adopted and entered into force on 1 October 2011. It is largely a revision of the old Romanian Civil Code, updated with the contributions of doctrine and case law, and is intended to be a happy combination of the French, Italian, Swiss, German and Romanian codes of 1864 [9]. The legislation in force pays greater attention to the institution of the will, which it regulates in detail, thus responding to the criticisms and suggestions constantly made in doctrine and case law over time.

It should be noted that testamentary devolution has changed its nature in the Community conception; thus, in ancient Rome it was considered to be a dishonour without a will, the testator being compared to a king who renounces: dicat testator et erit lex voluntas ejus [10], whereas today this view has been slightly maintained in the Anglo-Saxon area and, as far as the national area is concerned, the majority view is that it is the law that must decide the fate of the deceased's estate, the will being considered a means of ex inheritance.

2. Wills in current national legislation

Article 42 of the Romanian Constitution explicitly states that the right to inheritance is guaranteed and the constitutional enshrinement of this right was necessary because in the legislative system of the former socialist countries the right to inheritance was constantly subject to essential restrictions, the purpose of which was to ensure that the right to inheritance would ultimately revert to the State.

Article 1034 of the Civil Code states that a will is a unilateral, personal and revocable act by which a person, called a testator, makes provision, in one of the forms required by law, for the time when he is no longer alive. It is essential that the legislature does not impose a limitation on the provisions contained in the will, since the basket may contain both provisions of a property nature (related) and only provisions of a non-property nature, without excluding the possibility of the concurrent existence of property and non-property provisions. Although most wills contain only bequests, which is only a statistical fact and not a legal one, it cannot be concluded from this that a will should be identified with a legacy, since in addition to bequests and non-patrimonial provisions, a will may also contain

other provisions which could be described as mixed in so far as they only indirectly involve measures of a patrimonial nature [11].

Also of interest are the provisions of Article 1051 of the Civil Code, which provide that a will may be revoked by a notarial deed or by a subsequent will and that this revocation may be withdrawn in the same way under Article 1053.

The corollary of these legal rules leads us to the idea that a will is a legal act whose effectiveness depends both on an uncertain term, the death of the testator, and on an implied condition, that it may not be revoked.

3. Case study on the risk of testamentary revocation

In order to demonstrate the retractable character and the effects that a testamentary revocation and a retraction of the revocation can produce, we intend to present a factual situation that is less common in judicial practice but which raises problems related to the interpretation of the testator's last will, as follows:

In fact, the deceased in 2009 proceeded to draw up an authentic will in favour of the co-owner of apartment X, establishing him as universal legatee, by the will he ordered that „he leaves all movable and immovable property that will be in his estate at the date of death". Subsequently, in 2014, the deceased drew up another authenticated will containing the provision „I leave ½ share of apartment X" in favour of the same person, establishing her as legatee by particular title. In 2016, the deceased draws up an authenticated declaration stating that she „expressly revokes in its entirety the will authenticated in 2014". In 2018 the testator dies. It should be noted that the legatee is a person domiciled abroad but who has carried out acts of tacit acceptance of the possible inheritance by carrying out unequivocal acts of disposition and conservation of the apartment which was the subject of the will authenticated in 2014. During the period for the expression of the inheritance option, an ordinary collateral approached the notary public where he gave a declaration of inheritance from the deceased's estate and, after the expiry of the period for the inheritance option, he debated the inheritance, without the presence of the legatee, and obtained the right of ownership of the ½ share of the apartment mentioned, although the will of 2009 appeared in the national notarial registers as active. The legatee brings an action for annulment of all the acts on the basis of which the title deed was issued, since the will authenticated in 2009 has not been revoked and is legally effective. The court dismissed the action on the grounds that the drawing up of the private will in 2014 was a partial revocation of the universal will of 2009 which had not been revoked by the declaration of revocation of the will authenticated in 2014.

In our opinion the solution is erroneous and does not reflect the will of the testator. The second will, by particular title, cannot constitute a basis for implicit revocation of the 2009 will as long as it did not revoke a previous will but strengthened its subject matter, practically individualizing the real estate. The express revocation of a will by particular title cannot have any effect in relation to a will by universal title since it is marginal to its effects. The consequence of the revocation of a private will can only be that it is deprived of all its effects, including the alleged 'partial revocation' which the court wrongly held.

If we were to accept the court's reasoning regarding a possible partial revocation of the 2009 will, Article 921 of the Old Civil Code, the provision applicable in this case given the date of the will's drafting, provides that „a subsequent will which does not specifically revoke the previous will, shall only revoke those provisions which are inconsistent or

contrary to those of the subsequent will." A similar legal provision is also found in Art. 1052 para. 3, first sentence, of the Civil Code, which provides that a subsequent will revokes the previous will only to the extent that it contains contrary or incompatible provisions. However, between the two wills governed by different laws, it is clear that there is no incompatibility and no unequivocal provision to the contrary that is evident from the dynamics of these acts of will. The court did not clearly identify any incompatibility or contrary provision denoting revocation. The situation is similar to a situation where the deceased had left a will in a private capacity in respect of an asset and subsequently, after a period of time, left the same asset to the same person by will. However, a tacit revocation cannot be in doubt, as is clear from the court's interpretation and solution. In the revocation declaration of 2016, the deceased states that „I declare that I revoke expressly and in its entirety the will authenticated in 2014". It is clear that the deceased's intention was to maintain in full the effects of the previous will with universal title, revoking the will with private title..

Thus, the practical case presented reveals the importance and the dual nature of testamentary provisions which can have both a patrimonial and a non-patrimonial nature.

A will is a legal act whose effectiveness depends both on an uncertain term, the testator's death, and on an implicit condition, that it not be revoked, so that until the testator's actual death the risk of benefiting from the effectiveness of the will falls exclusively on the legatee, who is subject to the uncertainty of testamentary revocation.

4. Conclusions

Testamentary inheritance has undergone a perpetual change in the collective mentality, in ancient times the drawing up of a will being a noble duty that made you similar to the leader of the state organisation, whereas nowadays the drawing up of a will is more a means of at least partial inheritance of heirs and a means of arranging the distribution of the estate after death.

Contrary to this situation, there has been a marked tendency in case law to give importance to the testator's real will, to the detriment of the declared will and the literal meaning of the terms, reaffirming once again the principle of real will, enshrined in liberal law [12]. On the basis of this principle, judges seek to interpret wills in such a way as to give them a reasonable meaning, and in this operation their power is sovereign [13]. As a conclusion drawn from the practice of the courts, we consider that they tend to validate a will rather than annul it, relying in their interpretation not only on intrinsic elements but also on external elements, extrinsic to the act, but from which the will of the author is unquestionably apparent, without substituting their arbitrary will for the real will of the testator.

The will to be sought is that of the date of the will and not that of the moment of death [14], but the will remains a legal act whose effectiveness is subject to the risk of revocation until the testator's death, the legatee being the one who bears the uncertainty of the existence of his possible rights and obligations.

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[6] The full title of the legislation is „Îndireptarea legiei cu Dumnezeu care are toată judecata arhierésca şi împăratésca de tóte vinele preoţeşti şi mireneşti"

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[10] D. FLORESCU, *op. cit.*, p. 64..

[11] B. DAUCHEZ, „*La propriété littéraire et artistique et les successions testamentaires"*, Ed. Defrénois, 2001, p. 1159

[12] Discrepancies between the internal, real will and the externalised will do not prevent the valid formation of the legal act. However, it is only the declared intention which has effect and which is binding on third parties. With regard to the hypothesis of real will versus declared will, two trends have emerged in doctrine: one which tends to give validity to the real will in order to ensure the security of the civil circuit, and one which tends to give validity to the declared will in order to ensure the dynamic security of contractual relations – see in this respect GHE. BELEIU*,"Drept civil român"*, Ed. Universul Juridic, Bucureşti, 2004, p. 148. The majority Romanian doctrine is of the opinion that through the new legal provisions, the legislator has adopted the subjective concept of will. For the view that the Civil Code combines the two conceptions, subjective and objective, see I. REGHINI, S. DIACONESCU, P. VASILESCU*,"Introducere in dreptul civil"*, Ed. Hamangiu, Bucureşti, 2013, pp. 485-486

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Section C

THE IMPOSSIBILITY OF BEING CONSTITUTED AS A CIVIL PARTY IN THE CASE OF THE CRIME OF „LEAVING THE SCENE OF THE ACCIDENT OR MODIFYING OR ERASING ITS TRACES”

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Abstract

The exercise of the civil action in the criminal process is a benefit granted to the injured person to recover the damage suffered as a result of the commission of the crime by the defendant. The criminal court can rule on civil legal relations when they arise from the commission of the crime, at the request of the injured person, through the request for incorporation as a civil party, under the conditions provided by law.

However, there are situations in which, although the damage exists, the application for incorporation as a civil party is rejected as inadmissible, and here we refer to the crime of „Leaving the scene of the accident or modifying or erasing its traces”, provided by art. 338 of the Criminal Code, which is why we will analyze the appropriateness and resolution of the request for incorporation as a civil party in the case of the above-mentioned crime.

From the point of view of succession relations, the rejection as inadmissible of the request for incorporation as a civil party produces significant legal effects, we discuss, on the one hand, the impossibility of the injured person to request civil compensation in the criminal process and, on the other hand, about preventing the heirs of the civil party from continuing the action, in case of its death.

The study aims to carry out a detailed analysis, both from a theoretical and a practical point of view, of the admissibility of the request for incorporation as a civil party in the case of dangerous crimes, respectively, in the case of the crime of „Leaving the scene of the accident or modifying or erasing its traces”. (art. 338 Criminal Code)

Keywords: *civil action, heirs, crime, leaving the scene of the accident, civil party, damage, compensation, succession*

1. Theoretical notions regarding the crime of „Leaving the scene of the accident or modifying or erasing its traces”

The crime of „Leaving the scene of the accident or modifying or erasing its traces” is provided by art. 338 paragraph (1) of the Criminal Code and implies: „leaving the scene of the accident, without the consent of the police or the prosecutor who is investigating the crime scene, by the driver of his vehicle by the driving instructor, who is in the process of training, or by the examiner of the competent authority, found during the practical tests of the exam for obtaining the driver's license, involved in a traffic accident”.

At the same time, the article also provides an equivalent version in paragraph (2), respectively: „the act of any person to change the state of the place or to erase the traces of the traffic accident that resulted in the killing or injury to the bodily integrity or health of one or more persons, without the consent of the on-site research team”.

Regarding the premise of the crime, according to art. 75 of the O.U.G. no. 195/2002, republished, provides that „traffic accident is the event that cumulatively meets the following conditions: it occurred on a road open to public traffic or had its origin in such a place, resulted in the death, injury of one or more several people or damage to at least one vehicle or other material damage and in which at least one moving vehicle was involved".

Therefore, if these elements are not met, the perpetrator cannot be held criminally liable, considering that the deed does not exist, for which reason, a request for incorporation as a civil party on the part of the victim is to be rejected.

Thus, the crime provided by art. 338 of the Criminal Code („Leaving the scene of the accident or modifying or erasing its traces") is considered to be a crime of danger, directed against the state and which results in the production of a state of danger, not the production of a result, as in the case of „Injury corporal damages due to fault", provided by art. 196 of the Criminal Code, which is why the victim's request to be a civil party is not admissible.

Regarding the admissibility of the application for incorporation as a civil party, art. 20 paragraph (1) of the Code of Criminal Procedure stipulates the term in which the request can be made, as follows: „The establishment as a civil party can be done until the beginning of the judicial investigation. The judicial bodies have the obligation to inform the injured person of this right".

Regarding the form of the request, art. 20 paragraph (2) Criminal Procedure Code provides: „The formation as a civil party is done in writing or orally, with the indication of the nature and extent of the claims, the reasons and the evidence on which they are based". These conditions must be met cumulatively.

Regarding the term in which changes may occur, art. 20 paragraph (5) Criminal Procedure Code provides: „Until the end of the judicial investigation, the civil party may:

A) correct the material errors in the content of the application for incorporation as a civil party;

B) increase or decrease the extent of claims;

C) requests the reparation of the material damage by paying a monetary compensation, if reparation in kind is no longer possible".

If the above-mentioned conditions are not met, namely the term in which the request can be made and its form, the injured person or his successors can no longer be a civil party in the criminal process, and the request will be submitted to the civil court, in which case it is exempt from stamp duty.

1.1. The main legal object of the crime of „Leaving the scene of the accident or modifying or erasing its traces"

By Decision no. 5/2018 of the High Court of Cassation and Justice – the panel for resolving some legal issues in criminal matters, published in the Official Gazette no. 355/24.04.2018 it was established that the main legal object of the crime is represented by social relations regarding the safety of traffic on public roads, which presuppose the presence on the spot of the person involved in the road accident and, in the alternative, social relations regarding the commission of justice, as leaving the scene of the accident can affect the establishment of the manner in which the accident occurred, but also the prosecution of the guilty persons.

Considering the immediate aftermath of the crime, we appreciate that the moment when the crime is consummated is when leaving the accident, and not the moment of the traffic

accident or the moment of injury to a person, in which case, in the situation where the victim requests possible damages through formulation of the civil action, they cannot be admissible in the criminal process.

1.2. The passive subject of the crime of „Leaving the scene of the accident or modifying or erasing its traces"

The main passive subject of the crime of „Leaving the scene of the accident or modifying or erasing its traces" (art. 338 of the Criminal Code) is the state.

In this sense, in consideration of Decision no. 9 of June 2, 2008 and Decision no. 43 of October 13, 2008, pronounced by the High Court of Cassation and Justice – United Sections, it is found that the purpose of this incrimination is to determine the presence at the scene of the person who caused a road accident for the correct administration of justice and not to cover any damages to the person who was the victim of the accident.

Therefore, taking into account the Decisions issued by the High Court of Cassation and Justice in the matter, we appreciate that, in relation to the passive subject, a person who was materially harmed by committing the act provided for by art. 338 of the Penal Code, a civil party cannot be constituted in the criminal process with the object of this crime. However, his right to address the civil courts by formulating a summons request regarding the damage suffered is not removed.

1.3. Immediate follow-up of the crime of „Leaving the scene of the accident or modifying or erasing its traces"

The immediate aftermath of the crime of „Leaving the scene of the accident or modifying or erasing its traces" consists in a state of danger for social relations protected by the criminal law, respectively, social relations regarding the safety of traffic on public roads, as well as social relations regarding the administration of justice.

In other words, the crime of „Leaving the scene of the accident or altering or erasing its traces" does not produce a material result, which is why the victim cannot be a civil party in the criminal process regarding it, but has the possibility of filing a preliminary complaint if the other conditions provided by art. 196 of the Penal Code („Bodily injury due to negligence") or can file a summons request, through a civil process.

Taking into account the considerations presented, from the point of view of succession, in the event of the death of the victim, even his heirs do not have the possibility to become a civil party in the criminal process, having as its object the prosecution of the perpetrator accused of committing the crime of „Leaving the scene of the accident" or modifying or erasing its traces".

2. Procedural aspects – Inadmissibility of the request to be incorporated as a civil party in the criminal process in the case of the crime of „Leaving the scene of the accident or modifying or erasing its traces"

The pending trial of the criminal case regarding the defendant I.M., sent to court for the crime of „Leaving the scene of the accident or altering or erasing its traces" (art. 33 of the notification, in fact it was noted that, on 09.11.2021, around at 8:05 p.m., the defendant I.M. drove the VW G car with registration number XYZ on Calea Văcărești, and when she arrived near the building with no. 123, she injured T.O., who was crossing the street, she

suffering traumatic injuries for which he required 14-16 days of medical care, and then he left the scene of the accident without the consent of the police or the prosecutor.

By the conclusion of 05.01.2023, definitive by the expiration of the appeal term, the judge of the preliminary chamber found the legality of the notification to the court with the indictment no. –-/P/2021 of the Public Prosecutor's Office attached to the X District Court, of the administration of evidence and the execution of the criminal investigation documents, which fulfilled the object of the criminal investigation and ordered the start of the trial against the defendant I.M.

In the public meeting of 13.02.2023, in accordance with the provisions of art. 375 of the Code of Criminal Procedure, the defendant declared that she recognized the commission of the act, as it was retained in the act of referral to the court and requested the resolution of the case based on the evidence that was administered during the criminal investigation phase.

Thus, analyzing the evidence administered during the criminal investigation, taking into account the resolution of the case through the admission of guilt procedure, the court considers that the factual situation described in the reporting document fully corresponds to the truth, from the corroboration of the statements of the defendant, who constantly acknowledged the commission of the act, both during the criminal investigation, as well as in the trial phase, with the other evidence administered during the criminal investigation phase resulting, beyond any reasonable doubt, that the act accused of the defendant exists, constitutes a crime and was committed by the defendant in the form described in the indictment.

The court considers that the said T.O., through the chosen defender, made three requests: a request to be incorporated as a civil party in the criminal process, a request to change the legal classification from art. 338 para. 1 Criminal Code („Leaving the scene of the accident or modifying or erasing its traces") in art. 338 para. (1) Penal Code („Leaving the scene of the accident or modifying or erasing its traces") in conjunction with the offense provided for by art. 196 para. (3) Criminal Code („Bodily injury due to negligence") and a request to join the present case (art. 43 Code of Criminal Procedure) to the one aimed at resolving a complaint against the classification solution (art. 340 Code of Criminal Procedure) which was ordered by indictment, classification solution ordered against the defendant I.M regarding the offense provided for by art. 196 Penal Code („Bodily injury due to negligence").

Next, the court questions the admissibility of the requests made by the said T.O, through the chosen defender.

The representative of the Public Ministry emphasizes the fact that the stage of the preliminary chamber has been completed, and the court has ascertained the legality and validity of the referral act and is bound by this limit of the judgment in relation to the object of the criminal charge.

Thus, the application for incorporation as a civil party strictly related to the object of the case, respectively the offense provided for by art. 338 para. (1) Penal Code, is not admissible on the grounds that such offenses which were in the past regulated by the Highway Code, are dangerous offences, not producing material consequences, the passive subject being the state, the interest being a general one, to be ascertained in time of such behaviors that do not comply with traffic rules.

Regarding the request to change the legal classification (art. 386 Code of Criminal Procedure), considering the classification solution that was ordered in the case against the

defendant I.M. regarding the offense provided for by art. 196 of the Criminal Code („Bodily injury due to negligence") and the document attached to the case file certifying the number of days of medical care, from this perspective, the court considers that this request is not admissible.

Regarding the request to join the present case with the one aimed at the resolution of a complaint against the classification solution, it considers that this is not admissible because they are cases with a different framework, which follow different procedures and the provisions regarding the joining are not incidental. (art. 43 Criminal Procedure Code)

The chosen lawyer of the said T.O. assesses that the request for incorporation as a civil party is admissible, considering that there is identity of parties, object and cause. It also shows that the incident produced was recognized by all parties involved and appreciates that it cannot be said that the defendant cannot be accused of the crime of „Hitting or other violence" provided for by the change in legal classification, which is why he requests the extension of the discussion of the admissibility of the two requests after finding out the ranking solution that he appealed and granting a new trial term.

Finally, regarding the request to join the cases, the chosen defender of the said T.O appreciates that after the pronouncement of the solution in the file aimed at solving the complaint against the classification solution, it will be possible to say whether or not it has quality in the file.

The lawyer of the defendant I.M. requests the rejection of the request for incorporation as a civil party, considering that the crime brought to trial is a dangerous crime. Regarding the request to join the cases, the defendant's defense attorney considers that this is not admissible, and regarding the request to change the legal classification, he requests the rejection of this request, since the conditions for retaining the crime of „Bodily injury" are not met out of fault" (art. 196 Penal Code) and there was no question of intent to apprehend the crime of „Strikes or other violent acts" (art. 193 Penal Code).

The court rejects as inadmissible the request for incorporation as a civil party filed by the said T.O., rejects as inadmissible the request to join the present case to the request involving the resolution of the complaint formulated against the classification solution ordered by indictment no. –--/P/2021 of the Prosecutor's Office attached to the X District Court and rejects as inadmissible the request to change the legal classification from art. 338 para. (1) Criminal Code in art. 338 para. (1) Criminal Code and art. 196 para. (3) Penal Code.

Regarding the requests made by the said T.O, through the chosen lawyer, the dispositions of the court are represented by the following arguments:

First of all, the court sees the fact that judgment is limited only to the crime of „Leaving the scene of the accident or modifying or erasing its traces" provided by art. 338 para. (1) Penal Code because regarding the crime of culpable bodily harm (art. 196 paragraph (2) and paragraph (3) of the Criminal Code), the prosecutor ordered the case to be dismissed.

With regard to the crime of „Leaving the scene of the accident or modifying or erasing its traces" (art. 338 Penal Code), the court notes that by Decision no. 5/2018 of the High Court of Cassation and Justice – the panel for solving some legal issues in criminal matters – it was established that the main legal object of the crime is represented by social relations regarding the safety of traffic on public roads, which presuppose the presence on the spot of

the person involved in the road accident and, in the alternative, the social relations regarding the administration of justice are also protected, since leaving the scene of the accident can affect the establishment of the manner in which the accident occurred, but also the prosecution of the guilty persons.

Thus, the immediate consequence consists in creating a state of danger for social relations regarding the safety of traffic on public roads, but also for social relations regarding the administration of justice.

With regard to the crimes the result of which is the occurrence of a state of danger, the court, in consideration of Decision no. 9 of June 2, 2008 and Decision no. 43 of October 13, 2008, pronounced by the High Court of Cassation and Justice – United Sections, states that the purpose of this criminalization is to determine the presence on the scene of the one who caused a road accident for the correct administration of justice and not to cover any damage the person who was the victim of the accident. In the context in which the court was notified only with regard to the offense provided for by art. 338 para. (1) Criminal Code, the court finds that the quality of the injured person of the named T.O. cannot be retained in this case.

For these reasons, the procedural framework will be configured by making the appropriate entries in the ECRIS computer system in the sense that the said T.O. meets the quality of procedural subject – witness.

Considering the configuration of the procedural framework achieved in the sense that the said T.O. meets the quality of a witness and not the quality of an injured person, correlative to the crime that is the subject of the judgment, in consideration of art. 19 para. (1) and paragraph (2) of the Code of Criminal Procedure, the rejection as inadmissible of the request for incorporation as a civil party is justified.

Related to the admissibility of the request to join the present case to the one involving the resolution of the complaint against the classification solution ordered by indictment no. –--/P/2021 of the Prosecutor's Office attached to the Legal Court from art. 338 para. (1) Criminal Code („Leaving the scene of the accident or modifying or erasing its traces") in art. 338 para. (1) Criminal Code („Leaving the scene of the accident or modifying or erasing its traces") and art. 196 paragraph (3) of the Criminal Code („Bodily injury caused by fault") the rejection of the request as inadmissible is justified in the context in which the legislator did not establish the right of the subject of the proceedings to exercise such a procedural right, and on the other hand, through this procedure the limits of the judgment cannot be extended with respect to facts other than those shown in the act of referral to the court as is, in fact, requested by the witness T.O.

In conclusion, starting from the idea: „we do not inherit the land from our ancestors, but simply borrow it from our children", we appreciate that the aspects related to the constitution as a civil party in the criminal process have a major relevance in the case of the succession debate, the conditions of admissibility being in the first place when analyzing such a request, which is why I analyzed the present theme.

Therefore, examining the conditions that the injured person or his successors must meet when formulating the request to be incorporated as a civil party in the criminal process, we note that they are, on the one hand, procedural (being provided, mainly, by art. 20 Code of Criminal Procedure) and, on the other hand, substantial (being analyzed in concreto, as they were debated in the present practical case).

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CRIME PREVENTION – A MUST FOR ANY SOCIETY!

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Abstract

The level, structure and dynamics of crime decisively influence the legal order and the quality of life in society, a fact that causes states to carry out extensive crime prevention actions. However, crime prevention is an extremely complex activity that involves both state bodies with specific powers as well as state bodies without specific powers, governments and commercial companies and, finally, any person.

With such a wide range of activities and participants, there are of course controversies. These controversies refer to the notion of crime prevention, the diversity of preventive activities carried out by the authorities in particular and by society in general, the principles that govern crime prevention and the directions in which preventive activities must act.

All these, which differ from one country to another, are analyzed in the form of a scientific concept to provide both criminologists and authorities, interested in improving preventive activities, a correct and up-to-date conceptual basis.

Keywords: *crime prevention, criminal policy, criminal phenomenon, crime dynamics.*

1. Notion

There was no special concern for the elaboration of the concept of crime prevention. The few definitions appearing in textbooks or in criminology dictionaries conjecturally substantiate various positions expressed by the authors. Thus, a dictionary of criminology defines crime prevention as „*permanent socio-legal action that involves the application of a set of measures with a social, cultural, economic and political, administrative and legal character by state bodies, public and special organizations, intended to prevent committing antisocial acts, by identifying, neutralizing and removing the causes of the criminal phenomenon and the conditions that favor their occurrence."*

Another dictionary generically defines crime prevention as an activity carried out in order to prevent and avoid the commission of crimes.

Professor R. Gassin analyzes the definition of crime prevention from a double perspective: extensive and limiting.

From the extensive perspective, prevention is any program or any practice that leads to a decrease in the number of crimes that would not have occurred without this program or this practice. This definition also includes criminal sanctions in the general notion of prevention.

In a limiting conception, prevention can be defined as a tool used by the state to better control crime by eliminating or limiting criminogenic factors and by adequately managing the factors in the physical and social environment that create favorable opportunities to commit crimes.

This limiting conception that excludes criminal sanctions from the notion of prevention is also promoted by the Council of Europe through recommendation R (83) 7 of the Committee of Ministers of the member states.

In an attempt to summarize, we could say that crime prevention is a set of activities carried out by the central and local bodies of the public administration, by civil society, as well as by citizens organized in order to prevent the commission of crimes

2. Action directions of crime prevention.

Regarding the action **directions of crime prevention**, most criminologists are of the opinion that they would be the following:

a) The prevention of crime through social development includes a series of social, educational, health, training programs, such as those regarding high-risk families and children.

b) Community or local prevention aimed at risk areas, such as very disadvantaged areas in terms of infrastructure, services, standard of living, where there is a lack of cohesion between health members. These programs tend to strengthen the sense of security of the residents of certain neighborhoods, to mobilize the authorities to reduce delinquency, to improve services within the community. Community crime prevention programs are based on an active participation of residents and civil organizations in neighborhoods, establishing a list of priorities and social interventions.

c) The prevention of criminogenic situations aims to limit the possibilities of committing crimes, to reduce the risks for potential victims and to reduce the advantages that would arise for criminals from committing crimes.

d) Reintegration programs consider working with children, young people, adults who already have problems with the judicial system, those in detention and those released.

3. Typology of crime prevention.

Depending on the directions of action, several crime prevention actions can be distinguished:

a) The first distinction is between adult crime and juvenile crime (juvenile delinquency). Crime, in general, is a complex social, legal, economic, psychological and cultural phenomenon, which requires specific approaches on multiple levels.

Within the framework of general crime, a special place is occupied by juvenile delinquency, which, in one approach, means the set of facts that violate the criminal law, in another, more extensive approach, it also refers to misdemeanors, as well as to civil, disciplinary, etc.

Obviously, prevention programs for adults must be different from those for minors, taking into account the fact that the latter are personalities in training, sensitive to the instructive-educational process, with multiple possibilities of social reinsertion.

b) General prevention and special prevention.

The general prevention is carried out as a result of the criminalization of the act by the criminal law, by making society members aware of the prohibition under criminal sanction of committing the act.

Special prevention aims to prevent the convicted person from committing new crimes and constitutes the direct purpose of the punishment applied.

The Italian doctrine makes a distinction between negative general prevention and positive general prevention.

In the first case, the efficiency results from the dissuasive message that the criminal law norm sends to each person.

In the second case, the prevention is not based on the intimidating effect of the criminal law, but on raising the level of awareness of the citizens regarding the defense of the values protected by the legal order.

Special negative prevention aims to stop the dangerousness of the criminal by imposing an obstacle between him and society: the state of detention.

The special positive prevention aims to create positive transformations in the personality of the convict, so as to obtain his full recovery for society.

c) Defensive prevention and emancipatory prevention. Defensive prevention aims at the defense of social values protected by the criminal law, it is focused on fear and exclusion, while emancipatory prevention has faith in the moral resources of the population, in its ability to adapt to new demands, to build itself ethically, has considering the values of inclusion and integration.

In a contemporary approach, the person guilty of committing a crime can no longer be isolated from society but allowed, helped, encouraged to be the subject of the transformation exerted on him by the collective in which he works or studies, the social universe in which he carries out his existenceexistenţa.

d) Social prevention and situational prevention. Social prevention aims at the active participation of civil society, socialization and social control institutions in actions to identify and combat potential sources of criminological risk, to reduce the effects of crime, to create a current of opinion unfavorable to them, to restore social order.

Situational prevention aims at reducing or eliminating pre-criminal situations, neutralizing potential delinquents by bringing them to the attention of the community, by involving them in formative-educational actions, by informing the public about criminogenic situations etc.

4. Generalization of knowledge of crime prevention.

Making progress in the field of crime prevention requires overcoming the concepts of particular and local to access the general and universal. One way to move from the first stage to the second is to multiply assessments and to make systematic assessments and assessments. Human, material and moral resources should not be used only for particular situations, but should lead to the prevention of crime in general.

But, to overcome this stage of the particular case, it is not enough to carry out a chain of evaluations. We must have a conception that will lead to a series of forms of preventive intervention, which will contain hypotheses on the relationships that must be established between an intervention and the criminal manifestation on which we have proposed to act.

Such concepts allow conclusions of general use and will help those who intervene to understand the logic of preventive action, to know why they can expect a certain result from a certain measure.

The generalization of good practices is a method that has imposed itself, many countries building their national strategies on the basis of international standards and especially the guiding principles of the United Nations.

The coordination of crime prevention activities is also ensured most of the time by the competent ministry, i.e. the Ministry of the Interior. Many states have established some kind of „national coordinating court": Canada (National Crime Prevention Centre); Norway (Norwegian Center for Crime Prevention); France (National Committee for the Prevention

of Delinquency, chaired by the Prime Minister); Chile (National Public Security Council), Hungary (National Crime Prevention Council), etc.

Numerous strategies and action plans call for greater involvement of the private sector including civil society bodies and commercial companies.

Quebec's crime prevention policy envisages a specific partnership between private agencies and the Ministry of Public Security, giving rise to a permanent consultation mechanism between private and public bodies.

Although state governments constantly display the importance they attach to crime prevention, they are nevertheless forced to recognize the insufficiency of the resources and means at their disposal. Moreover, the national courts that should implement these strategies only have a limited autonomy.

The problem of financing prevention policies is on a global scale. Only a few countries managed to create and feed a special fund dedicated to the implementation of the national prevention policy (Australia, France, Canada).

5. Crime prevention in international documents.

Since June 21, 1946, when the Economic and Social Council tasked the Commission on Social Problems to initiate effective mechanisms that could be adopted in the field of crime prevention and the treatment of delinquents, crime prevention has been a permanent issue on the UN agenda.

One of the most relevant documents is General Assembly Resolution 46/152 of December 19, 1991, which delegated the Economic and Social Council to approve the role and functions of the United Nations Congress for the prevention of crime and the treatment of offenders.

In accordance with the recommendations stated in the declaration of principles and the action program.

The action program established the following general objectives:

a) crime prevention within the states and between them;

b) the fight against crime both at the national and international level;

c) strengthening regional and international cooperation;

d) integration and consolidation of member states' efforts aimed at preventing and combating transnational crime;

e) more effective and efficient administration of justice.

On the continental level, the Council of Europe adopted several recommendations, the most relevant of which is Recommendation (1987)19 of the Committee of Ministers of the Council of Europe, which outlines the following directions of action:

a) member states to include prevention as a permanent mission in their government programs.

b) member states to create, encourage and maintain crime prevention bodies at national, regional and local level.

c) to establish and promote crime prevention programs.

d) to promote and encourage research for international cooperation in the field of crime prevention.

These documents underline, if it were still necessary, the importance of preventing crime and carrying out a continuous and institutionalized activity, controlled and encouraged at the state level in this regard.

6. The situation of crime prevention in Romania.

In our country, at this moment, there is no body that studies the state, structure, dynamics and etiology of the criminal phenomenon and proposes appropriate measures annually or whenever necessary.

In 2003, the National Institute of Criminology was established, abolished by the then Minister of Justice, Monica Macovei, in 2006. The Institute was re-established in 2017 and abolished in the same year by Minister Tudorel Toader.

Currently there are agencies and offices dealing with certain crimes, such as the National Anti-Drug Agency or the Office for the Prevention and Combating of Money Laundering, as well as other bodies dedicated to domestic violence and juvenile delinquency.

Within the Romanian Police, since 1998, the Institute for Research and Prevention of Crime has been operating, with the rank of director, which elaborates and implements crime prevention programs/projects/campaigns that deal with various types of crimes.

By Decision of the Government of Romania no. 763 of July 26, 2001, the National Crime Prevention Committee was established as an international body without legal personality, under the authority of the Prime Minister and under the coordination of the Minister of Justice, made up of state secretaries appointed by each ministry, and delegates of the Child Protection Agency and of the Foreign Intelligence Service.

(It was repealed by Decision No. 233 of March 30, 2005 regarding the establishment, organization and functioning of the Council for coordinating the implementation of the National Anti-corruption Strategy for the period 2005 – 2007), government act whose validity has been extended several times. The committee met monthly with the role of elaborating, integrating, correlating and monitoring the Government's crime prevention policy at the national level.

Unfortunately, as in the case of the body established within the Romanian Police, this body was an internal one, without legal personality, without a budget, without transparency, which never published activity reports, did not propose measures, even in difficult criminological situations.

Romania does not need this type of body, but a body with permanent activity that analyzes the criminal status, the typology of delinquents and proposes appropriate measures, the application of which is tracked, analyzed and correlated, permanently informing society about the measures taken.

It is a positive fact that this body had a governmental character because it had the possibility to propose measures to the Government, both for solving some problems of a general nature, because this type of problems can be discussed at the governmental level, as well as by taking some social measures.

Measures of a social nature (establishing jobs, organizing initiation or professional training missions, improving living conditions for young people, offering promising prospects for young graduates of pre-university studies and more) can only be taken at the governmental level.

Therefore, even if the bodies with prevention tasks must include specialists in criminal law, criminology, penology, criminal prevention, psychology, sociology, their studies must be subject to the approval of the Government in order to transform them into instruments of positive change in society.

7. Conclusions

The crime prevention activity is a complex activity that requires in-depth criminological studies in groups of specialists from multiple fields to be followed and adapted in social practice. Romania must follow the examples of France, Canada, Australia and other states that have such institutionalized bodies and that give good results. The fact that, today, the evolution of crime is not part of the first ten serious problems facing Romanian society should not lead us to remain passive, but, on the contrary, mobilize us to carefully build a safer society for the day tomorrow. Measures to ensure public order and security can lead to a decrease by a number of percentages of the criminal state.

But the most important crime prevention measures are those of a social nature, which are special economic programs for disadvantaged areas, qualification and retraining courses for young people, economic investments that lead to a decrease in unemployment, etc.

Romania has a rich experience, perhaps the richest in Europe, in terms of the positive role exercised by work groups on young people inclined to commit antisocial acts. Even if we are witnessing major socio-economic changes in this century compared to the last part of the last century, these experiences must and can be capitalized on, as they can play a predominant role in what we can rightly call must be the primary task of any government: ensuring social welfare and preventing crime.

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CJEU JURISPRUDENCE REGARDING THE PREFERENTIAL INHERITANCE TAX RATE

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Abstract
Adopting and maintaining in force legislation that provides for a preferential inheritance tax rate for bequests made in favor of non-profit organizations that are established in other member states of the European Union or the European Economic Area (EEA) subject to reciprocity is, in principle, contrary to EU law.
Keywords: *inheritance tax, legacy, unequal treatment between residents and non-residents, free movement of capital guaranteed by the EU Treaty.*

Succession; capital circulation

It emerges from the constant jurisprudence of the CJEU that successions, as they consist in the transmission to one or more persons of the patrimony left by a deceased person, fall within the notion of capital circulation within the meaning of art. 63 TFEU, except in cases where their constituent elements are limited to the interior of a single member state.

The national provisions that establish the value of an immovable property in order to calculate the amount of tax due in the case of acquisition by inheritance may not only discourage the purchase of immovable property located in the respective Member State, but may also have the effect of reducing the value of the inheritance of a resident of to a Member State other than the one in which the said goods are located.

According to art. 63 para. (1) TFEU, „... any restrictions on the movement of capital between member states, as well as between member states and third countries" are prohibited, and pursuant to para. (2) of the same article, „.... any restrictions on payments between Member States as well as between Member States and third countries are prohibited".

In the case of succession, the measures prohibited by art. 63 para. (1) TFEU, as restrictions on the free movement of capital, also includes measures that have the effect of reducing the value of the patrimony of a resident of a member state, other than the one on whose territory the goods in question are located and that require their transmission by means of inheritance. [1]

The application of a higher tax burden to non-residents compared to residents constitutes a restriction on the free movement of capital. Thus, the application of tax rates depending on the place of residence of the deceased or the heir is against EU law [2], the

national law must not constitute a means of arbitrary discrimination nor a disguised restriction of the free movement of capital and payments. [3]

Of course, the need to defend the coherence of the tax system may justify a restriction on the exercise of the fundamental freedoms guaranteed by the treaty. However, in order for such a justification to be admitted, it is necessary to establish the existence of a direct link between the granting of the tax advantage in question and the compensation of this advantage through a determined tax levy.[4]

At the same time, it must be borne in mind that a restrictive measure, in order to be justified, must respect the principle of proportionality, in the sense that it must be adequate to guarantee the achievement of the objective it pursues and must not exceed what is necessary to achieve this goal

The Member State in which the immovable property that is the subject of the succession is located cannot, in order to justify a restriction on the free movement of capital resulting from its regulation, rely on the existence of a possibility, independent of its will, to grant a tax credit by another member state, such as the member state in which the person whose succession is opened had his residence at the time of his death, which could compensate, in whole or in part, the damage suffered by his heirs as a result of the non-deductibility, in the state member in which the bequeathed immovable property is located, when calculating taxes on the transfer of real estate properties, of the debts encumbering the said immovable property.[5]

Granting tax benefits

In the jurisprudence on the free movement of capital and inheritance tax, the Court has already emphasized that a national of a Member State cannot be deprived of the possibility of availing himself of the provisions of the treaty for the reason that he takes advantage of the tax advantages legally offered by the rules in force in another member state than the one in which he resides.[6]

In the jurisprudence of the CJEU, there are numerous cases regarding the granting of certain tax advantages by the member states, the Court's decisions being in the sense that we must distinguish between the different treatments allowed under art. 65 para. (1) letter (a) TFEU and arbitrary discriminations prohibited under para. (3) of the same article.

Because a national tax regulation, which, in order to calculate the inheritance tax, makes a distinction in terms of the amount of the reduction applicable to the taxable base of an immovable asset located in the Member State, according to whether the deceased or the heir resides in this Member State or after as they both reside in another member state, can be considered compatible with the provisions of the treaty regarding the free movement of capital, it is necessary that the difference in treatment concerns situations that are not objectively comparable or be justified by an imperative reason of interest general. In addition, to be justified, the difference in treatment must not exceed what is necessary for the objective pursued by the regulation in question to be achieved.[7]

As an example, we show the judgment pronounced in case C-98/16 Commission / Greece, the legal issue raised being that the tax treatment of legacies made in favor of certain non-profit legal persons established in Greece is more favorable than that of legacies in favor of entities similar established in other member states of the Union or the EEA. In this case, a preferential rate of 0.5% was automatically applied to non-profit legal entities existing or legally established in Greece, while the same rate could be applied to legal

entities established in other EU or EEA member states only if the condition of reciprocity was met. If this reciprocity condition was not met, the applicable rate varied from 20% to 40%, depending on the value of the taxable property.

In this regard, it must be pointed out that, in accordance with art. 65 para. (1) letter (a) TFEU, „art. 63 [TFEU] does not affect the law of the member states [...]. to apply the relevant provisions of their tax legislation which distinguish between taxpayers who are not in the same situation as regards their residence or the place where their capital is invested". The derogation provided for in art. 65 para. (1) letter (a) TFEU is, however, regulated by art. 65 para. (3) TFEU, which provides that national provisions must not constitute a means of arbitrary discrimination or a masked restriction of the free movement of capital and payments, as defined in art. 63 of the TFEU.

The Court has already ruled[8] that although it is legitimate for a Member State to require, in order to grant certain tax advantages, the existence of a sufficiently close link between the bodies pursuing some of its general interest objectives and the activities they carry out, the latter cannot, however, reserve the benefit of these advantages only to organizations established in its territory and whose activities are likely to exempt it from some of its responsibilities.

The possibility for a Member State to be relieved of some of its responsibilities is not sufficient, in itself, to allow it to introduce a difference in treatment between national bodies recognized as being of general interest and those established in another Member State.[9]

A regulation that makes the application of a reduction on the taxable base of the respective immovable asset dependent on the place of residence of the deceased and the heir at the time of death leads to the application, in the case of successions between non-residents that include such an asset, of a tax burden superior to the case of successions involving at least one resident and, therefore, has the effect of diminishing the value of the respective succession.[10]

Consequently, such a national regulation constitutes an obstacle to the free movement of capital, in the sense of art. 63 of the TFEU.

In case C-25/10 Missionswerk Werner Heukelbach eV v. The Belgian State, the Court pointed out that, although it is legitimate for a Member State to require, in order to grant certain tax advantages, the existence of a sufficiently close link between bodies which it recognizes as pursuing some of its objectives of general interest and the activities it carries out [11], however it cannot grant such advantages only to bodies established in its territory and whose activities may relieve it of some of its responsibilities. [12]

The possibility that a Member State may be relieved of some of its responsibilities does not allow it to establish a difference in treatment between national bodies recognized as being of general interest and those established in another Member State on the grounds that donations made for the benefit of the latter bodies, although their activities fall within the objectives of the regulation of the first member state, they cannot lead to such budgetary compensation.

As I have shown above, the need to prevent the reduction of tax revenues is not even among the objectives provided for in art. 65 TFEU, nor among the imperative reasons of general interest likely to justify a restriction of a freedom established by the FEU Treaty.[13]

The Court also decided that when a body recognized as being of general interest in a member state fulfills the conditions imposed for this purpose by the legislation of another

member state and has as its objective the promotion of identical interests of the collectivity, so that it could be recognized as being of general interest in the latter member state, the authorities cannot deny the respective body the right to equal treatment for the simple reason that it is not established on the territory of the said member state.[14]

In Case C 510/08 Vera Mattner v. Finanzamt Velbert, Germany, the German government invoked the need to defend the coherence of the German tax system, showing in this regard that it would be logical for the tax advantage resulting from the application of the full rate reduction to the taxable base to be reserved only for taxable persons subject to an unlimited tax liability in the Member State in whose territory the asset is situated, as long as this regime, in so far as it involves the taxation of the taxable person's worldwide patrimony, is overall less advantageous than that applicable to the taxable person subject a limited tax liability in the same state.

In this regard, the Court emphasized that the need to defend the coherence of the tax system can justify a restriction on the exercise of the fundamental freedoms guaranteed by the treaty. However, in order for such a justification to be admitted, it is necessary to establish the existence of a direct link between the granting of the tax advantage in question and the compensation of this advantage through a determined tax levy.

However, it is sufficient to state that the tax advantage resulting, in the member state on whose territory the real estate is located, from the application of a full rate reduction on the taxable base if this donation involves at least one resident of this state is not offset in that state by any tax levy determined under the gift tax. It is necessary to specify that although the case presented concerned the situation of taxation of donations, the solution offered by the Court also applies to tax advantages on inheritances, and the conclusion offered by the CJEU, in the sense that the measure cannot be justified by the need to maintain the coherence of the German tax system, is, in principle, applicable to inheritance taxation.

With regard to safeguarding the interest of the national economy, in the Judgment Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis, Greece, the Court reiterated the fact that reasons of a purely economic nature, such as among others the promotion of the national economy or its proper functioning, cannot serve as a justification for obstacles prohibited by the treaty.

In case C-318/07, Hein Persche v. Finanzamt Lüdenscheid, the Court showed that it is up to each Member State to determine whether, in order to encourage certain activities recognized as being of general interest, it provides tax advantages both in favor of private bodies or public that deal with the respective activities, as well as taxable persons who make donations in their favor

Although it is legitimate for a Member State to reserve the granting of tax advantages to bodies pursuing some of its general interest objectives, a Member State may not reserve the benefit of such advantages only to bodies established on its territory and whose activities may therefore to relieve him of some of his responsibilities.

However, it does not follow from this that a member state can establish a difference in treatment, in the field of tax deductibility, between national bodies recognized as being of general interest and those established in another member state for the reason that donations

made for the benefit of the latter, even if their activity falls within the objectives of the regulation of the first member state, they cannot lead to such budgetary compensation.

Although the need to prevent the reduction of tax revenues is neither among the objectives set out in the TFEU nor among the imperative reasons of general interest likely to justify a restriction of a freedom established by the treaty, a Member State may apply a difference in treatment between recognized national bodies as being of general interest and those established in other member states when the latter pursue other objectives than those provided for by their own legislation.

Community law does not require Member States to ensure that foreign bodies recognized as being of general interest in their home Member State automatically benefit from the same recognition on their territory. In this regard, Member States have a discretion which they must exercise in accordance with Community law. Under these conditions, member states are free to define the interests of the community that they want to promote by granting advantages to associations and bodies that disinterestedly pursue objectives related to those interests and respect the requirements related to the implementation of those objectives.

It is no less true that when a body recognized as being of general interest in a Member State fulfills the conditions imposed for this purpose by the legislation of another Member State and has as its objective the promotion of identical interests of the collectivity, so that it could be recognized as being of general interest in the latter member state, the authorities of this member state cannot deny the respective body the right to equal treatment for the simple reason that it is not established in their territory.

Conclusions

In the defenses formulated, the Member States have shown that the loss of public revenue resulting from the preferential tax treatment reserved for non-profit organizations established in that State is fully compensated by the role played by these organizations in society. Greece has shown that if preferential tax treatment were to be extended to non-profit legal entities established in EU or EEA Member States that do not grant similar tax treatment to Greek legal entities, this would unduly reduce the revenues of the state budget. Therefore, the Hellenic Republic opined that the maintenance of the reciprocity clause is justified by the need to prevent a reduction of tax revenues, the thesis that was not accepted by the Court, since the need to prevent the reduction of tax revenues is not even among the objectives provided for in Art. 65 TFEU, nor among the imperative reasons of general interest that justify a freedom of restriction established by the treaty.[15] The same is true, moreover, with regard to protecting the interests of the national economy.[16]

It follows that art. 63 TFEU opposes the legislation of a member state that provides for the possibility of benefiting from the reduced rate of taxes on the succession of non-profit organizations that have their headquarters in this member state or in the member state where the decedent actually resided or had his seat of work at the time of death or where he previously actually had his residence or place of work.

If a national regulation puts the heirs of a person who, on the date of his death, has the status of resident and those of a person who, on the same date, has the quality of non-resident, it cannot, without causing discrimination, treat these heirs differently, within the same taxation, with regard to the deductibility of the charges encumbering this immovable asset. Treating identically, with the exception of the deduction of debts, the successions of

these two categories of persons, in order to tax the successions, between the latter there is, in terms of the modalities and conditions of this taxation, no difference of objective situation that can justify a difference of treatment.

The unequal treatment of residents and non-residents in the payment of inheritance tax violates the free movement of capital guaranteed by the FEU Treaty.

Referinţe

[1] Court Decision Mattner, C-510/08, pct. 26; Commision /Greece, C-244/15, point 28.

[2] Court Decision Welte, C-181/12, point 25 și 26; Commision/Spain, C-127/12, unpublished, point 58; Commision/Greece, C-244/15, point 29.

[3] Court Decision Jäger, point 41, Eckelkamp and others, point 58, Arens-Sikken, point 52, and Mattner, point 33.

[4] Court Decision Manninen, point 42, and Court Decision din 17 septembrie 2009, Glaxo Wellcome, point 77 și 78.

[5] Court Decision Arens-Sikken, point 65.

[6] Court Decision Barbier, C 364/01, point 71, and Court Decision Eckelkamp și alții, point 66.

[7] Court Decision Manninen, point 29, and Court Decission Eckelkamp și alții, point 58 și 59, Arens-Sikken, point 52 și 53, și Mattner, point 34.

[8] Court Decission Persche, C 318/07, point 44, Missionswerk Werner Heukelbach, C 25/10, point 30.

[9] Court Decission Persche, C-318/07, point 46, Missionswerk Werner Heukelbach, C-25/10, point 31.

[10] Court Decission Eckelkamp and others, point 45 și 46, Mattner, point 27 și 28, and Missionswerk Werner Heukelbach, point 24.

[11] Court Decision Centro di Musicologia Walter Stauffer, point 37.

[12] Court Decision Persche, point 44.

[13] Court Decision Persche, point 46.

[14] Court Decision Persche, point 49.

[15] Court Decission Manninen, C 319/02, point 49; Persche, C 318/07, point 46 și Court Decision Missionswerk Werner Heukelbach, C 25/10, point 31.

[16] Court Decision AGET Iraklis, C 201/15, point 72.

CONSIDERATIONS REGARDING THE REGULATION OF THE OFFENCE OF PERJURY IN THE ROMANIAN CRIMINAL CODE[1]

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Abstract

One of the fundamental principles of the criminal process is the principle of finding out the truth, and the purpose of the criminal process is to bring the person guilty of committing a crime to criminal responsibility. In order for a person to be held criminally liable, it is necessary to know exactly and completely the facts committed, the way in which they happened, as well as their author. For this purpose, witness statements are also necessary, which represent important evidence in the criminal process. However, if the suspect and the accused benefit from the right to remain silent, the situation of the person heard as a witness is totally different, since, at least in the first phase of the criminal process, he is in a quite vulnerable position, he is in a rather vulnerable position, determined by the legal obligation he has to make known all the information he possesses. Otherwise, the witness himself will be held criminally liable. In the context of the regulations in force, a problem that gave rise to many controversies both in doctrine and in practice, with the courts giving non-unitary solutions, was also that of establishing the legal classification in the crime of perjury or in that of favoring the perpetrator of the deed of a person who, having the capacity of a witness, makes petty statements during the hearing or does not say everything he knows in order to prevent or hinder the investigations in a criminal case, to bring him to criminal liability or to execute a punishment or custodial measures.

Keywords: *perjury, favoring the perpetrator, crime, witness, Criminal Code, qualifications contest, crime contest*

1. The crime of perjury between the previous and the current regulation

The offence of perjury was regulated in the previous Criminal Code under article 260, having the following contents: „The act of the witness who, in a criminal, civil, disciplinary case or in any other case in which witnesses are heard, makes false statements, or does not say everything he knows about the essential circumstances about which he was asked, is punishable by imprisonment from one to 5 years. The act provided for in the previous paragraph is not punishable if, in criminal cases before the defendant is arrested, or in all cases before a decision has been pronounced or another solution has been given as a result of the false testimony, the witness withdraws his testimony. If the withdrawal of testimony occurred in criminal cases after the arrest of the defendant or in all cases after a decision was pronounced or after another solution was given as a result of the false testimony, the court

[1] I wrote this study with pride and respect, in honor of my teachers Mr. Alexandru Boroi (on the occasion of the 40th anniversary of his career in university education) and Mr. Tudor Amza (on the occasion of the 50th anniversary of his career in the field of legal sciences).

will reduce the penalty according to article 76. The provisions of para. 1 – 3 shall also apply accordingly to the expert or the interpreter".

The current Criminal Code criminalizes this act in article 273, which can be found in Title IV of the Special Part of the Criminal Code, entitled „Crimes against the administration of justice", as it follows: „(1) The act of the witness who, in a criminal, civil case or in any other procedure in which witnesses are heard, makes false statements or does not say everything he knows about the essential facts or circumstances about which he is questioned, shall be punished with imprisonment from 6 months to 3 years or with a fine. (2) Perjury committed: a) by a witness with protected identity or being in the witness protection program; b) by an undercover investigator; c) by a person who prepares an expert report or by an interpreter; d) in relation to a deed for which the law provides the punishment of life imprisonment or imprisonment of 10 years or more, shall be punished with imprisonment from one to 5 years. (3) The author is not punished if he withdraws his testimony, in criminal cases before apprehension, arrest or initiation of the criminal action or in other cases before a decision has been pronounced or another solution has been given, as a result of perjury".

The modification of the incrimination text was determined, among other things, by the evolution of socio-economic realities and by the evolution of doctrine and jurisprudence in the matter. In an opinion[2], it was appreciated that „the reason for the changes lies in the need to adapt criminal legislation to the current realities of a democratic society, to the provisions of European norms, as well as to the requirements established by doctrine and jurisprudence." It was also argued that, considering „the number of people who make false statements, who try to induce false testimony or who file criminal complaints to prevent a civil process from proceeding, the question arises whether this state of fact is also reflected in the convictions for these acts. The answer is obviously negative, as there are few cases of convictions for perjury, although perjury exists in the Romanian judicial system."[3]

Comparatively examining the two types of incrimination, we notice that in the first paragraph the legislator expanded, on the one hand, the scope of committing the act from „criminal, civil, disciplinary case or in any other case" to „criminal, civil case or in any other „procedure", and on the other hand, the object of the deposition. Therefore, the witness will be sanctioned not only for making false statements, or not saying everything he knows about the essential circumstances about which he was asked, but also for what he did or did not say in relation to the facts. At the same time, unlike the old Penal Code, the sanctioning regime provides for a fine as an alternative to imprisonment, the limits of which are reduced between 6 months and 3 years. For the aggravated form regulated in the second paragraph, the legislator increased the punishment limits, providing for the prison sentence from one to 5 years, when the active subject is either qualified (witness with protected identity or being in the Witness Protection Program, investigator under cover, expert or interpreter), or a person who makes false statements in connection with an act for which the law provides for the penalty of life imprisonment or imprisonment of 10 years or more. Also, the cause that previously provided for the reduction of the penalty was excluded in the new incrimination

A. M. Pop (2012). Influențarea declarațiilor în lumina prevederilor noului Cod penal, in „Caiete de Drept penal" no. 3/2012, p. 12.

S. Bogdan (2007). Scurte considerații privind unele infracțiuni în legătură cu înfăptuirea justiției, in „Studia Universitatis Babeș-Bolyai, Series Jurisprudentia" no. 2/2007, available on: http://studia.law.ubbcluj.ro/articol.php?srticolId=264.

formula of this offence, including the third paragraph of article 260 of the old Criminal Code. We note that the legislator reformulated in the third paragraph the cause of non-punishment provided for in article 260 para. (2) from the previous Criminal Code, currently the author is exonerated from liability if he withdraws his testimony, in criminal cases before apprehension, arrest or the initiation of the criminal action or in other cases before a decision has been pronounced or another solution would have been given, as a result of the false testimony.

2. **Aspects regarding the quality of witness**

„The offence of perjury can only be committed by a witness, expert or interpreter. The person who is not in a specific legal relationship with the judicial body, respectively does not have the procedural quality of a witness, expert or interpreter, cannot be the subject of the offence of perjury. In other words, the person who has the status of a party in the process cannot have the quality of witness and cannot commit the crime of perjury"[4].

In the view of the constitutional court, the witness „is the natural person, other than the suspect, the injured person and the parties in the criminal process, who has knowledge of facts and factual circumstances that serve to establish the existence or non-existence of a crime, to identify the person who committed and to the knowledge of the circumstances necessary for the fair resolution of the case and finding out the truth in the criminal process. The statements of the witness constitute means of proof, and they consist of the report made by the witness to the criminal judicial body in the criminal process, through which he reproduces his knowledge of the facts or factual circumstances necessary for the fair resolution of the case. The sphere of the persons that might have the quality of witnesses in the criminal process is defined by the provisions of article 114 and article 115 of the Code of Criminal Procedure. The quality of witness may have „any person who has knowledge of facts or factual circumstances that constitute evidence in the criminal case" and who, at the same time, does not have the procedural status of suspect, injured person, defendant, civil party or civilly responsible party. Therefore, in the case of persons who have the quality of party or main procedural subject, there is a relative presumption of partiality – no person can be a witness in his own case (nemo testis idoneus in re sua) – it being appreciated that they, having a substantial interest in the way of solving the case, they cannot be considered impartial observers of the facts brought to the judgment"[5].

The false statement can be made with regard to the context and circumstances of the deed (for example, by misrepresentation), with regard to certain data relating to the person of the perpetrator or of the other parties in the criminal process, with regard to the relations between the witness and the perpetrator, with regard to guilt, consequences etc.

Considering the fact that witness statements are means of evidence, contributing to finding out the truth, the role of witnesses, experts, interpreters in the administration of justice should not be minimized. Along with the fundamental evidence administered, the witnesses, experts and interpreters, who also have the role of clarifying certain aspects regarding the respective evidence, contribute essentially to the elucidation of the case. Knowing and testifying to the truth, witnesses can relate details of the commission of the

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Boroi Alexandru (2008). Drept penal. Partea specială. The 2nd Edition, Bucharest: C. H. Beck Publishing House, p. 397.

Constitutional Court of Romania, Decision no. 562 from the 19th of September 2017, published in Official Monitor of Romania, Part I no. 837 from the 23rd of October 2017, paragraph 14.

facts exactly as they unfolded. This is the reasoning that underlies the duty of the witness to give true statements, in accordance with reality, statements in which he gives everything he knows about the circumstances of the case about which he is questioned. The same duties are incumbent on experts or interpreters. Although it starts from the premise that the statements of witnesses, experts, interpreters are in good faith, the violation of their duties can lead to the delay in finding out the truth or even the taking of wrongly pronounced convictions[6].

Without the witness being in bad faith, however, witness evidence is seen only in appearance as simple to administer and evaluate, as practice has shown that witness statements, being made through the filter of one's own perception, can be characterized by relativism and, as such, having random value[7]. In the statements of witnesses, experts, interpreters, there could be inconsistencies due to erroneous perceptions of reality or even memory loss, aspects that do not attract criminal liability for the crime of perjury[8]. In order to establish the sincerity of the witness and to determine the veracity of the testimony, it is imperative to know and master all the forensic tactical rules of hearing, as well as to adapt them to the subject being listened to, so that his testimony is as true as possible[9]. Despite all these shortcomings and even if there is sufficient material evidence in the case file, the importance of the statements is still preserved.

In accordance with the provisions of article 117 para. 1 lit. a) and b) of the Code of Criminal Procedure, the following categories of persons may refuse to be heard as witnesses: the spouse or ex-spouse, ascendants and descendants in direct line, brothers and sisters of the suspect or defendant. Also, according to article 117 para. (3), in the event that they accept to be heard as witnesses, in this case the legal provisions regarding the rights and obligations of witnesses will be applicable. If such categories of witnesses will make statements (including false self-incrimination) in order to prevent or hinder the criminal investigation or the criminal prosecution of the perpetrator, although such acts constitute acts favoring the perpetrator, being a family member, it will become incident the cause of non-punishment provided by article 269 para. (3), which states that „the favoritism committed by a family member is not punishable". In such cases, the legislator did not sanction the family member for committing the crime of favoring the perpetrator, but for statements lacking a real correspondent, they could be criminally liable for committing the crime of perjury. We consider the legislator's position to be fair, not to leave out of criminal liability the one who, although he has the right to remain silent, in full knowledge of the case gives up by making false statements and, by doing so, committing a crime against justice. Going by the reasoning set out above, we express our opinion that when, falsely, a family member takes the blame for committing a crime, it would be appropriate to be held criminally liable for misleading the judicial authorities.

To see Dungan Petre, Medeanu Tiberiu, Paşca Viorel (2011). Manual de drept penal. Partea specială. Vol. II, Bucharest: Universul Juridic Publishing House, p. 89.

To see Ciopraga Aurel (1979). Evaluarea probei testimoniale în procesul penal, Iasi: Junimea Publishing House, p. 10.

Dobrinoiu Vasile, Dima Traian (2007). Drept penal. Curs selectiv pentru licenţă. Partea generală şi partea specială, Bucharest: Hamangiu Publishing House, p. 541.

Stancu Emilian (2007). Tratat de criminalistică. The 4th Edititon, Bucharest: Universul Juridic Publishing House, p. 376.

At the same time, we also emphasize the fact that „the participant in the commission of a crime who was tried separately from the other participants and later heard as a witness, in the separate case, cannot have the status of active subject of the crime of perjury provided by article 273 of the Criminal Code"[10]. „The Supreme Court held that, from a formal procedural point of view, even a participant or a former participant in the commission of a crime can be heard as a witness. In this case, however, the witness cannot be compelled, under penalty of liability for committing the crime of perjury, to declare the truth, if this honest declaration could lead to self-incrimination. Perjury cannot be retained even when the statement requested of the witness could lead to his conviction, even in a different judicial procedure than the one in which he is heard. In a separate case, the definitively convicted participant will be able to be heard as a witness in the cases of the other participants in the same act, but his new statement continues to keep the „original" traces of a suspect or defendant statement, even if, formally, the person has the new procedural framework, the capacity of a witness"[11].

„The reporting witness who benefits from the cause of non-punishment provided for in article 290 para. (3) of the Criminal Code can be the active subject of the crime of perjury, provided by article 273 para. (1) of the Criminal Code", and not of the favoring of the perpetrator, regulated in the content of article 269 of the Criminal Code.[12] By referring to the system of the Convention for the protection of human rights and fundamental freedoms, the European Court established that the notion of „witness" has an autonomous meaning, independent of its qualification in the national norm[13]. Also, the statement of a witness or another person capable of substantially substantiating the conviction of a person sent to court constitutes a „testimony in the prosecution", being incidents the provisions of article 6 paragraphs 1 and 3 letter d) from the Convention[14], the denouncer acquiring as a consequence the status of a witness. Moreover, in most of the member states of the Council of Europe[15], the person who makes a complaint can be heard as a witness[16].

We consider it necessary to bring into discussion the hypothesis in which a person is summoned for hearing as a witness in a criminal case or is called by the judicial bodies to give a statement, and he refuses. Although the witness can be brought before the judicial bodies on the basis of a warrant to bring, however, according to article 283 para. (2) of the Criminal Procedure Code, his refusal to give statements can only be sanctioned as a judicial

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To see in this regard, High Court of Cassation and Justice se vedea în acest sens, I.C.C.J., The panel for resolving some legal issues, Decision no. 10 from the 17th of April 2019, pronounced in the File no. 377/1/2019, published in Official Monitor, Part I no. 416 from 28/05/2019.

Constitutional Court of Romania, Decision no. 236 from the 2nd of June 2020, published in Official Monitor of Romania, Part I no. 597 from the 8th of July 2020.

To see in this regard, High Court of Cassation and Justice, Decision no. 1 from the 16th of January 2020, pronounced in the File no. 2721/1/2019, published in Official Monitor of Romania, Part I no. 173 from 03/03/2020.

To see in this regard, Decision from the 24 th of April 2012, pronounced in Cause Damir Sibgatullin against Russia, paragraph 45.

To see in this regard: Decision from the 9th of November 2006, pronounced in Cause Kaste and Mathisen against Norway, paragraph 53; Decision from the 27th of February 2001, pronounced in Cause Luca against Italy, paragraph 41.

We suggest, for example, Poland, The Czech Republic, Slovakia, Norway.

We specify that Romania and Norway introduce an exception, which concerns the family of the accused, as well as certain categories of people who have the obligation to maintain professional secrecy.

misconduct. As a consequence, we express our opinion that the intervention of the legislator is necessary in order to cover this legislative loophole, since there are not a few cases when witnesses have extremely important information for the elucidation of the case. In this circumstance, we consider that the unjustified refusal of a person to make statements is as serious deed as when the witness makes false statements and, as the administration of justice itself may be endangered, the act should be criminalized as a crime. In support of the above, we mention the fact that such situations are incriminated in the criminal legislation of other states. In France, for example, article 434-15-1 sanctions „non-appearance, non-taking of oath or deposition, without excuse or justification, before the investigating judge or before an official of the judicial police acting on the rogatory commission by a person who has been summoned by it for hearing as a witness." In Spain, article 463 para. (1) of the Criminal Code incriminates as a crime the act of a person who, „legally summoned, voluntarily does not appear, without a true motivation, at a court or a tribunal in a criminal trial with the defendant in preventive detention, causing suspension of the oral debates", providing for this the penalty of imprisonment alternatively with a fine.

In our opinion, it is also necessary to underline the fact that „(...) in national doctrine and jurisprudence, it has been constantly supported, with principle value, the opinion according to which if the witness, in order not to accuse himself of committing a crime, makes false statements or intentionally omits certain essential circumstances about which he was asked, he would not commit the crime of perjury. In reality, such a person is no longer a „witness", since he can no longer appear in this quality in relation to a possible indictment of himself, since the questions addressed to him would lead, if he answered honestly, to the involvement in a criminal trial. In such a situation, the witness can no longer be asked to be objective, at the same time when the criminal sanction is looming over him"[17]. „Although finding out the truth must prevail, the prosecutor cannot attribute the quality of a witness to a person he knows is involved in committing a criminal act, just so that, using the described mechanism, he can arrive at the formulation of a criminal charge"[18].

3. **Controversial aspects regarding the relationship between the crime of perjury and that of favoring the perpetrator**

In the opinion of Vintilă Dongoroz[19], the problem of competition of criminal laws arises when two or more laws contain rules that simultaneously regulate the same matter, but one of them contains a general criminal discipline, and the other a special criminal discipline. Although foreign criminal doctrine and jurisprudence relate both to the principle of specialty and to the principles of subsidiarity, alternativeness and absorption for the purpose of solving a competition of qualifications, the national criminal doctrine[20], appropriating the

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High Court of Cassation and Justice – Criminal Section, Criminal Decision no. 231/A/9 June 2015.

High Court of Cassation and Justice – Criminal Section, Criminal Decision no. 40/A/2018.

To see V. Dongoroz (2000). Criminal Law (reprint of the 1939 edition), Bucharest: Tempus Society Publishing House and the Romanian Association of Criminal Sciences, p. 101.

Al. Boroi, M. Gorunescu, M. Popescu (2004). Dicţionar de drept penal, Bucharest: All Beck Publishing House, p. 71; M. Basarab (coord.), V. Paşca, Gh. Mateuţ, C. Butiuc (2007). Codul penal comentat. Partea generală, vol. I, Bucharest: Hamangiu Publishing House, p. 42; I. Pascu, V. Dobrinoiu, T. Dima, M.A. Hotca, C. Păun, I. Chiş, M. Gorunescu, M. Dobrinoiu (2012). Noul Cod penal comentat. Partea generală, vol. I, Bucharest: Universul Juridic Publishing House, p. 33; C-tin. Mitrache, Cr. Mitrache (2014). Drept penal român. Partea generală, Bucharest: Universul Juridic Publishing House, p. 79; L.V. Lefterache (2016). Drept penal. Partea generală, Bucharest: Hamangiu Publishing House, p. 76; I. Pascu, A.S. Uzlău, Gh. Muscalu (2016). Drept penal.

opinion of Professor Dongoroz, ignores these latter principles and, at the risk of solving of the qualifications competition in erroneous way, shows a predilection for the application of the specialty principle. Frequently applied in national and international judicial practice in order to resolve the competition of qualifications in criminal matters, especially when the conflicting regulations contain elements of specialization in relation to each other, the principle of specialty was taken into account by the supreme court including when it established that the crimes of perjury and favoring the perpetrator are in a specialized relationship.

In the context of the regulations in force, a problem that gave rise to numerous controversies both in doctrine and in practice, with the courts pronouncing non-unitary solutions, was also that of establishing the legal framework of the deed of a person who, having the capacity of a witness, during the hearing, makes false statements or does not say everything he knows in order to prevent or hinder investigations in a criminal case, to bring him to criminal liability or to execute a sentence or custodial measures. The problem was generated by the regulations provided in article 269 of the Criminal Code (favoring the perpetrator) and in article 273 of the same code (perjury), both in the hypothesis of the existence of a contest of qualifications, and in that of a contest of crimes. In order to solve this problem, it was necessary the intervention of the High Court of Cassation and Justice, which, following the formulation of an appeal in the interest of the law, issued a decision[21] calling for the application of the principle of specialty.

Analyzing the decision[22] of the High Court, we note that it appreciated the character of the crime of perjury of a special norm in relation to the crime of favoring the perpetrator considering the following aspects: the fact that both regulations have the same generic legal object, the fact that the active subject of the crime of perjury is qualified, unlike that of the crime of favoring the perpetrator, which is general, the fact that the material element of the objective side of the crime of perjury is represented by actions or inactions materialized in the form of special help (not in any form of help) granted by the active subject either by the false statements made or by the omission to say all that he knows. It is very true that a norm of incrimination with a qualified active subject becomes the special norm in relation to that which has a general active subject, and, by way of consequence, perjury constitutes the special incrimination in relation to favoring the perpetrator. At the same time, regarding the subjective side, we find that the form of guilt is not the intention characterized by purpose, but the simple intention. Moreover, as we mentioned before, the active subject can make false statements or omit to say everything he knows with the aim of unfairly blaming the perpetrator, not just favoring him. Returning to the crime of favoring the perpetrator, we find that the intention with which this act is committed is qualified by purpose, since the help is given for the purpose of preventing or hindering investigations in a criminal case, bringing criminal liability, executing a punishment or measures deprived of liberty. From this

Partea generală, Bucharest: Hamangiu Publishing House, p. 55; M.A. Hotca (2017). Manual de drept penal. Partea generală, the 4th Edititon, Bucharest: Universul Juridic Publishing House, p. 91; M. Udroiu (2018). Drept penal. Partea generală, the 5th Edition, Bucharest: C.H. Beck Publishing House, p. 13.

We refer to High Court of Cassation and Justice, Decision no. 1 of January 14, 2019, pronounced in File no. 2691/1/2018, published in the Official Monitor of Romania, Part I no. 187 of 08/03/2019.

High Court of Cassation and Justice, Decision no. 1 of January 14, 2019, pronounced in File no. 2691/1/2018, published in the Official Monitor of Romania, Part I no. 187 of 08/03/2019.

perspective, we can't help but wonder if the crime of favoring the perpetrator would also have a special character compared to that of perjury? And if so, then can we still apply the specialty principle? And again, we come to the question: competition of qualifications or competition of crimes in the case of the two incriminations? Because, more than what we have shown, not every false statement meets the elements of the crime of favoring the perpetrator, just as not in all cases the aid given for the purpose of favoring the perpetrator takes the form of the crime of perjury. Carefully analyzing the wording of the two incriminating texts, we find that each of them contains at least one element that is not found in the other (in the case of the crime of favoring the perpetrator, the active subject can be any person, not just the witness, and in the case of the crime of perjury, the purpose is not just to favor the perpetrator). Following this reasoning, we could state that the application of the specialty principle in order to establish the special character of the crime of perjury in relation to that of favoring the perpetrator, could really be used only and only if the active subject of the crime of perjury committed the act with the same purpose as that provided by the legislator in the case of the crime of favoring the perpetrator. But in this way, the false statement or the omission to say everything he knows for the purpose of unjustly blaming the perpetrator would remain outside the scope of criminalization, which is unacceptable, especially since the legislator's intention was to increase the sphere of incidence of this regulation. Moreover, it must also be borne in mind that the false statement or the omission to tell everything that he knows should not be restricted to favoring or blaming the perpetrator, since such purposes may be absent or may be the subject of various other reasons. But even in the hypothesis in which the principle of specialty could not be applied, this should not be interpreted in the sense of retaining the two crimes in competition, since, as we have shown previously, their retention in competition would be excessive.

In the judicial practice at the national level, it was found that the legal classification of the act of a person heard as a witness to make false statements or not to say everything he knows in relation to the essential facts or circumstances about which he was asked was made either in the provisions of article 273 para. (1) of the Criminal Code regarding the crime of perjury, or in the provisions of art. 273 para. (1) of the Criminal Code in formal competition with article 269 para. (1) of the Criminal Code regarding the crime of favoring the perpetrator[23], with the application of article 38 para. (2) from the same code[24], or only in the provisions of article 269 para. (1). The courts that framed the act in the provisions of article 273 para. (1) of the Criminal Code took into account the fact that „the crime of favoring the perpetrator has the character of a general, but subsidiary criminalization, the

Article 269 of the Criminal Code – Favoring the perpetrator: (1) Help given to the perpetrator in order to prevent or hinder the investigation in a criminal case, the prosecution, the execution of a sentence or custodial measures is punishable by imprisonment from one to 5 years or a fine. (2) The penalty applied to the favorer cannot be greater than the penalty provided by law for the act committed by the perpetrator. (3) Favoritism by a family member is not punishable.

Article 38 of the Criminal Code – Contest of crimes: (1) There is real contest of crimes when two or more offences were committed by the same person, through distinct actions or inactions, before being definitively convicted for any of them. There is a real contest of crimes when one of the crimes was committed for the committing or concealment of another crime. (2) There is formal contest of crimes when an action or an inaction committed by a person, due to the circumstances in which it took place or the consequences it produced, realizes the content of several crimes.

help given to a perpetrator receiving this qualification only when other provisions do not criminalize special cases of favoring"[25]. Therefore, they appreciated that „when it is committed by making false statements or failing to disclose what is known about the essential facts or circumstances of the case by a person heard as a witness, if the purpose is the same, consisting in the help given to the perpetrator for preventing or making it difficult to bring criminal liability, the priority norm is the one provided by article 273 para. (1) of the Criminal Code"[26].

Also, sharing the view of the supreme court, these courts also appreciated that the crimes of perjury and favoring the perpetrator can coexist only if the objective side consists of different material acts, noting that, in the absence of concrete acts of favoring, the statements of the witness in violation of the obligation to tell the truth regarding the aspects that constitute the subject of the hearing meet only the constitutive content of the offence provided for by article 273 para. (1) of the Criminal Code, regardless of whether the act is committed with direct intent (that is, with the express aim of favoring the perpetrator) or with indirect intent. These courts have also shown that the same deed cannot constitute the material elements of two different crimes, noting that „the crime of perjury is a special variant of favoring a perpetrator, since by perjury, in criminal cases, it can be also done implicitly and a favoring of the perpetrator"[27]. We underline the fact that, based on the principle of specialty, the majority position of the doctrine[28] was in the sense of the legal framing of the act in the provisions of article 273 of the Criminal Code, considering to be excessive the retention of two crimes for the commission of the same material act.

The courts that included the act in the provisions of the article 273 para. (1) of the Criminal Code in formal competition with article 269 para. (1) of the Criminal Code regarding the crime of favoring the perpetrator, with the application of article 38 para. (2) of the same code, established that the aid that represents the material object of the crime of favoring the perpetrator constitutes at the same time an action that carries out the content of the crime of perjury, emphasizing the fact that as a result of false statements, on the one hand, the perpetrator is favored and, on the other hand, finding out the truth is affected. These courts have also shown that the two crimes have a similar, not identical, special legal object, even if the generic legal object is the same, and the sanctioning regime being greater in the case of the crime of favoring the perpetrator than in the case of the crime of perjury, the hypothesis the subsidiarity of the offence provided for by article 269 art. (1) in relation to that provided by article 273 para. (1) of the Criminal Code cannot be discussed. We consider it necessary to specify that also in the doctrine[29], it was expressed the opinion according to which, in the circumstance in which the false testimony would represent a way

To see in this regard, High Court of Cassation and Justice, Decision no. 1 of January 14, 2019, pronounced in File no. 2691/1/2018, published in the Official Monitor of Romania, Part I no. 187 of 08/03/2019.

To see in this regard, High Court of Cassation and Justice, Decision no. 1 of January 14, 2019, pronounced in File no. 2691/1/2018, published in the Official Monitor of Romania, Part I no. 187 of 08/03/2019.

To see in this regard, High Court of Cassation and Justice, Decision no. 1 of January 14, 2019, pronounced in File no. 2691/1/2018, published in the Official Monitor of Romania, Part I no. 187 of 08/03/2019.

S. Bogdan, D.A. Şerban (2017). Drept penal. Partea specială. Infracţiuni contra persoanei şi contra înfăptuirii justiţiei, Bucharest: Universul Juridic Publishing House, p. 321.

Gh. Nistoreanu, V. Dobrinoiu, I. Molnar, I. Pascu, A. Boroi, V. Lazăr (1995). Drept penal. Partea specială, Bucharest: Continent XXI Publishing House, pp. 366-367.

to favor a person so that she would not be held criminally liable, it is necessary to retain the two crimes concurrently.

As I said before, there is another category of courts that have framed the act of the witness who, under oath, makes false statements or does not tell everything he knows, in the provisions of article 269. para. (1), appreciating that „the help granted to the perpetrator by the person who appears, on his own initiative, before the judicial body, requests to be heard and gives, as a witness, false statements, affirming that he is the author of an act that he did not had committed it, with the obvious purpose of preventing or hindering the investigations regarding the person of the perpetrator, constitutes the crime of favoring the perpetrator"[30]. It was considered that „unlike the old incrimination, considering the inversion of the topic of the normative texts within Title IV and the upper limits of punishment, the Criminal Code of 2009 does not attribute a general subsidiary character to the offence provided for in article 269 para. (1) of the Criminal Code in relation to that provided by article 273 para. (1) of the Criminal Code"[31].

Therefore, it was necessary the intervention of the High Court of Cassation and Justice in order to establish whether in the case of the act of a person heard as a witness of giving false statements or of not saying everything he knows in relation to the essential facts or circumstances regarding which she was asked, are we in the presence of an ideal contest of crimes (and both provisions provided for in the Criminal Code will be incident) or are we in the presence of a contest of qualifications (and only one deed will be retained).

The doctrine[32] defines the contest of qualifications as „the situation in which two or more legal provisions are likely to be applied to sanction the action committed by the perpetrator, although in reality there is only one crime. What is common to the ideal competition and the qualification competition is the plurality of applicable legal texts regarding the author's action, and the element that differentiates them is the existence of the real plurality of crimes in the case of the ideal competition, while in the hypothesis of the qualification competition the criminal plurality is only apparent, being in fact in the presence of a single crime". „We are in the presence of alternative qualifications in the situation where there is an essential opposition between the legal contents of the offences susceptible to be retained, so that the choice of one qualification necessarily excludes the other, and this delimitation requires a careful analysis of the legal norms in contest to be able to determine whether they are excluded or not."[33]

At the same time, when a special qualification includes all the elements of a general one, but also others that are not found in the text of the general qualification, we will be in the presence of a competition of qualifications. On the other hand, if one of the qualifications includes additional elements compared to the other, but the elements contained in the latter are not fully found in the first, then we will find ourselves in the

To see in this regard, High Court of Cassation and Justice, Decision no. 1 of January 14, 2019, pronounced in File no. 2691/1/2018, published in the Official Monitor of Romania, Part I no. 187 of 08/03/2019.

High Court of Cassation and Justice, Decision no. 1 of January 14, 2019, pronounced in File no. 2691/1/2018, published in the Official Monitor of Romania, Part I no. 187 of 08/03/2019.

Florin Streteanu (1999). Concursul de infracţiuni, Bucharest: Lumina Lex Publishing House, p. 142.

Florin Streteanu (1999). Concursul de infracţiuni, Bucharest: Lumina Lex Publishing House, p. 144.

presence of a contest of crimes, the reasoning being that the perpetrator must be drawn criminally liable for the act committed in all its aspects[34].

From this perspective, in order to determine whether it is about of a qualification contest or an ideal, formal contest in the case of perjury crimes provided for by article 273 para. (1) of the Criminal Code and favoring the perpetrator provided by article 269 para. (1) of the same code, a comparative study of the two legal texts is required.

Both crimes, being included in Title IV of the Special Part of the Criminal Code – Offences against the administration of justice, have a common legal object, namely the protection of social relations regarding ensuring the impartiality, independence, legality and firmness of the administration of justice. Regarding the special legal object, we note that it is similar, but not identical regarding the two crimes under analysis, an aspect also emphasized by the constitutional review court. In a decision[35], the Constitutional Court of Romania established that the special legal object of the crime of perjury consists in „the activity of carrying out justice in terms of the administration of evidence, in order to establish the legal truth, which implies a fair and loyal participation in this process of those who have information that can lead to unraveling the cause or establishing the guilt or the innocence of a person". Regarding the special legal object of the crime of favoring the perpetrator, the Constitutional Court emphasized in another decision[36] that it is represented by „the social relations regarding the administration of justice, for the unhindered resolution of which the perpetrators must not be helped to evade the penal legal report or the legal report of the execution of the sentence or to benefit from certain results of the crime". Or, in other words, „(...) the special legal object of the offence of favoring the perpetrator is represented by the social relations related to the administration of criminal justice by ensuring the discovery, investigation and judgment of those who have committed acts provided for by the criminal law and the execution of the applied criminal sanctions, if these facts constitute crimes"[37]. The High Court of Cassation and Justice established that the special legal object of the crime of favoring the perpetrator „is constituted by the social relations whose existence is protected against actions of interference by third parties in the act of criminal justice or in the exercise to the end of the right of the state to punish"[38].

Regarding the active subject of the crime of favoring the perpetrator, we note that the legislator has not established any special condition, it can be any natural person or any legal person that meets the conditions of criminal liability, as it is provided by the law, of course, with the exception of authors or participants in the committing of the crime, as the legislation does not criminalize self-favoring. The situation is not the same in the case of the crime of perjury.

To see in this regard, Florin Streteanu (1999). Concursul de infracţiuni, Bucharest: Lumina Lex Publishing House, p. 153.

Decision of the Constitutional Court no. 97 of March 1, 2018, published in the Official Monitor of Romania, Part I, no. 540 of June 29, 2018 (paragraph 36).

Judge Doina Livia Stanciu, separate opinion (point III.2) regarding the Decision of the Constitutional Court no. 64 of February 9, 2017, published in the Official Monitor of Romania, Part I, no. 145 of February 27, 2017.

Decision of the Constitutional Court no. 810 of December 7, 2017, published in the Official Monitor of Romania, Part I, no. 203 of March 6, 2018 (paragraph 36).

High Court of Cassation and Justice, Decision no. 1 of January 14, 2019, pronounced in File no. 2691/1/2018, published in the Official Monitor of Romania, Part I no. 187 of 08/03/2019.

In a doctrinal opinion[39] it was emphasized that „in order to commit the crime of perjury, a person's witness quality must be legally assigned at the time of his hearing. Therefore, persons who cannot be heard as witnesses, for any reason, cannot be direct active subjects of the crime of perjury". We also underline the fact that „false statements made by a person who does not have the status of a witness (...) do not meet the conditions of typicality"[40]. Therefore, „only the persons who have a judicial task (...) that derives from the existence of a special relationship in which these persons find themselves with the judicial body"[41] can be witnesses. Therefore, according to article 273 para. (1) of the Criminal Code, related to article 114 of the Code of Criminal Procedure[42], due to its procedural quality, the active subject of the crime of perjury committed in the standard version is qualified, being able to be only the witness.

Regarding the material element of the crime of perjury, the legislator provided for the committing of the deed by an action (the action of the active subject to make false statements) or by an inaction (the omission of the active subject to say everything he knows), both concerning „facts or essential circumstances". The phrase „essential circumstances" designates the main facts of the case, the circumstances of committing the acts, as well as any other information relevant to the resolution of the case[43]. The purpose and motive of committing the deed will be taken into account when individualizing the punishment[44], but it does not influence the existence of the crime. In the case of the offence of favoring the perpetrator (article 269 para. (1) of the Criminal Code), the material element is represented by the help given to the perpetrator through an action or an inaction (omission). Therefore, „a certain person, to whom the aid is granted, is in the phase of investigations in a criminal case, the execution of a sentence or custodial measures. The aid must be granted for the purpose of preventing or hindering investigations in a criminal case, prosecution, execution of a sentence or custodial measures. This requirement of the law refers to the objective side of the crime, because it indicates the objective destination of the act of favoring, and not the subjective finality of this act. The endangered judicial activity is precisely that of the competent bodies during the criminal process, starting with the criminal prosecution acts and ending with the execution ones"[45].

The Constitutional Court established that „according to the provisions of article 269 of the Criminal Code, the crime of favoring the perpetrator is the committing of the facts materialized in the aid given to the perpetrator, under the aspect of the subjective side

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V. Dongoroz, S. Kahane, I. Oancea, N. Iliescu and others (2003). Explicaţii teoretice ale Codului penal român, Partea specială, vol. IV, the 2nd Editition, Bucharest: Romanian Academy Publishing House, All Beck Publishing House, p. 157.

Sergiu Bogdan, Doris Alina Şerban (2017). Drept penal. Partea specială. Infracţiuni contra persoanei şi contra înfăptuirii justiţiei, Bucharest: Universul Juridic, Publishing House, p. 339.

Vintilă Dongoroz (2003). Explicaţii teoretice ale Codului penal român. Partea specială. vol. IV, the 2nd Edition, Bucharest: Romanian Academy Publishing House, All Beck Publishing House, p. 157.

According to this legal text, „any person who has knowledge of facts or factual circumstances that constitute evidence in the criminal case can be heard as a witness".

To see in this regard, O. Loghin, A. Filipaş (1992). Drept penal român, Partea specială, Revised Edition, Bucharest: „Şansa" Publishing House and Press S.R.L., p. 208.

To see in this regard, Dongoroz, S. Kahane, I. Oancea, N. Iliescu and others (2003). Explicaţii teoretice ale Codului penal român, Partea specială, vol. IV, Bucharest: Romanian Academy Publishing House, All Beck Publishing House, p. 161.

Judge Doina Livia Stanciu, separate opinion (point III.2) regarding the Decision of the Constitutional Court no. 64 of February 9, 2017, published in Official Monitor of Romania, Part I, no. 145 of February 27,2017.

involving the direct intention qualified by purpose, namely for the purpose of preventing or hindering investigations in a criminal case, bringing criminal responsibility, execution a punishment or custodial measure. Considering this aspect, the Court finds that not every deed that results in an aid given to the perpetrator meets the constitutive elements of the crime of favoring the perpetrator. Thus, only if it is found that the purpose provided by the law – preventing or hindering investigations in a criminal case, bringing criminal liability, executing a punishment or custodial measures – was pursued by carrying out the deed, it will be retained the committing of the offence of favoring the perpetrator. In the realization of the material element of the crime of favoring the perpetrator, the author will have foreseen the effect that its realization will have on the perpetrator of an act provided by the criminal law. Thus, the favorer will have a real representation of the activity carried out by the favored one, otherwise the activity would not be realized conceptually in the form of the help given to the perpetrator"[46].

In the doctrine[47], it was argued that insincere, false statements do not constitute actions or inactions capable of realizing the material element of the crime of favoring the perpetrator, since, although they could represent means or actions of hiding or altering the truth, this does not necessarily mean that will also hinder or frustrate the prosecution, trial or execution of the sentence. Furthermore, insincere or false statements of a witness may be done to the detriment of the perpetrator, not necessarily to help him.

We believe that the legislator sought to sanction perjury through the regulation contained in the text of article 273 para. (1) and, by no means, the concurrent retention of two crimes in the event of committing an action causing damage to a single legal object[48]. Not by chance, according to article 120 para. (2) letter d) from the Criminal Procedure Code, before giving statements, it is reminded to the witness that perjury is punishable as a crime.

We underline the fact that favoring the perpetrator has the character of a general but subsidiary criminal norm, the help representing favoring within the meaning of article 269 of the Criminal Code only in the absence of another legal text criminalizing special cases of favoring[49]. Therefore, „the crime of perjury, when the untruthful statements or the omission of the statement are intended to help, prevent or hinder the carrying out of investigations in a case and the prosecution, has a special character in relation to the crime provided for by article 273 para. (1) of the Criminal Code"[50]. Therefore, the crime of favoring the perpetrator and that of perjury are in a subsidiarity relationship of the general crime-special

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Decision of the Constitutional Court no. 249 of April 25, 2017, published in the Official Monitor of Romania, Part I, no. 768 of September 27, 2017 (paragraph 21); Decision of the Constitutional Court no. 810 of December 7, 2017, published in the Official Monitor of Romania, Part I, no. 203 of March 6, 2018 (paragraph 34).

To see in this regard, Horia Diaconescu (2001). Posibilitatea comiterii infracţiunii de favorizare a infractorului de către persoana vătămată prin infracţiune, „Dreptul" no. 5/2001, p. 181.

In support of our opinion, to see Sergiu Bogdan –coordonator – Doris Alina Şerban, George Zlati (2014). Noul Cod penal, Partea specială, Analize, Explicaţii, Comentarii, Bucharest: Universul Juridic Publishing House, p. 338; G. Bodoroncea, V. Cioclei, I. Kuglay and others (2016). Codul penal, Comentariu pe articole, the 2nd Edition, Bucharest: C H. Beck Publishing House, p. 273-274; Mihail Udroiu (2016). Drept penal, Partea specială, the 3rd Edition, Bucharest: C. H. Beck Publishing House, p. 347; Măria Oprea (2015). Infracţiuni contra înfăptuirii justiţiei, Bucharest: Universul Juridic Publishing House, p. 310.

To see in this regard, Vintilă Dongoroz (1972). Explicaţii teoretice ale Codului penal român, Partea specială, vol. IV, Bucharest: Romanian Academy Publising House, p. 214, the last paragraph.

High Court of Cassation and Justice, Decision no. 1 of January 14, 2019, pronounced in File no. 2691/1/2018, published in the Official Monitor of Romania, Part I no. 187 of 08/03/2019.

crime type, which is why „in the examined hypothesis, it is a contest of qualifications, and not an ideal, formally contest"[51]. In the doctrine[52], it was appreciated that as the crime of non-reporting, provided for in the article 266 of the Criminal Code, is in a specialized relationship with the crime of favoring the perpetrator, provided for in the article 269 of the Criminal Code, the same situation is valid for the crimes of favoring the perpetrator and perjury.

Moreover, the High Court of Cassation and Justice ruled that „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 he was asked meets only the elements of typicality of the crime of perjury, provided by article 273 para. (1) of the Criminal Code"[53]. From this we must not understand, however, that the crime of favoring the perpetrator represents a general criminal norm in relation to any criminalization norm provided either in the Criminal Code or in the special criminal legislation. By way of consequence, if a deed fulfills the constitutive content of a crime, such as an official service offence or a corruption offence, then we can talk about the possibility of the existence of a contest between this offence and the offence provided for in the article 269 of the Criminal Code, respectively favoring the perpetrator.

4. Conclusions

Practice has shown that among the large number of people who violate the provisions of the article 273 of the Criminal Code and the convictions for committing this act there is an inverse proportional report, which creates the risk of affecting the credibility of the evidence with witnesses. However, we must also take into account the fact that there are not a few situations in which the person heard as a witness makes statements that do not correspond to reality, for example, due to errors of perception, but without having the intention to hide or distort the truth. But, of course, in such situations, there is no question of a conviction for committing the crime of perjury.

Also, another hypothesis in which the veracity and compliance of the witness's statements with reality can be called into question would be that in which the informant acquires the status of a witness and, at the same time, also has a legitimate interest, an interest what even concerns his criminal responsibility. In our opinion, even when social relations regarding the administration of justice are affected by the statements made during a judicial procedure, but from the evidence administered in the file the court succeeds in establishing the factual situation correctly, it must be determined whether the damage to the value protected by the norm of criminalization has or not has only a minimal degree of danger. It is true that the court will pronounce a judgment of conviction, but it will do so only when the charge has been proven beyond a reasonable doubt. And precisely for this purpose, the court has the right to freely assess the credibility and value of each piece of

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High Court of Cassation and Justice, Decision no. 1 of January 14, 2019, pronounced in File no. 2691/1/2018, published in the Official Monitor of Romania, Part I no. 187 of 08/03/2019.

To see in this regard, Gh. Ivan (2019). Favorizarea făptuitorului – incriminare generală. Mărturia mincinoasă – incriminare specială. Nereţinere în concurs formal. Admisibilitate, in „Pro Lege" no. 2-3/2019, p. 276.

High Court of Cassation and Justice, Decision no. 1 of January 14, 2019, pronounced in File no. 2691/1/2018, published in the Official Monitor of Romania, Part I no. 187 of 08/03/2019.

evidence administered in a case brought to trial, their probative force not being conditioned by any predetermined order.

We must not ignore the existence in practice of some situations in which the person who agreed to make statements during the criminal investigation phase, later refuses to repeat them, due to possible negative consequences on personal safety. In such a hypothesis, we consider it extremely important that a person questioned as a witness is recognized the legal right to consult a lawyer before the first hearing, especially in cases where there is suspicion of his involvement in the committing of the crime.

Since there are not a few cases where witnesses have extremely important information for the elucidation of a case, we appreciate that the unjustified refusal of a person to give statements is as serious as when the witness makes false statements. Considering that the administration of justice itself can be jeopardized in this way, we express ourselves in the sense that such an act should be criminalized as a crime.

In our opinion, with all its shortcomings, and although sometimes through their lack of truthfulness, the statements of witnesses can make this evidence useless for the purpose of solving a case, yet the importance of the administration of witness evidence remains. Therefore, the regulation of the crime of perjury constitutes one of the necessary and reference means in order to ensure the criminal protection of the administration of justice.

FALSE TESTIMONY IN NOTARIAL SUCCESSION PROCEEDINGS

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Abstract

The provisions of Article 108 of the Law of Notaries Public and Notarial Activity no. 36/1995 stipulates that in the notarial succession procedure, the capacity of 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 with witnesses, and the goods that make up the estate are proven by the agreement of the heirs or by any means of proof. At the same time, from the analysis of the provisions of Article 113 (2) i) of Law no. 36/1995, it follows that the final conclusion of the succession procedure must also include the testimonyof those present regarding the number and quality of the heirs, corroborated with the testimonyof the witnesses.

Therefore, it is obvious that in the notarial succession procedure the test with witnesses is also administered and when closing the notarial succession procedure the notary must also take into account the testimonyof the witnesses.

Considering the importance of proof by witnesses in the notarial succession procedure, in this paper we aimed to highlight the particularities of the crime of false testimony in the case of this procedure, as well as the relationship between this offense and the offense of influencing testimonies, while also analyzing the opinions expressed in the specialized literature regarding this offense as well as the relevant jurisprudence in the field.

Keywords: *false testimony, notarial succession procedure, influencing testimonies, false testimonies, witness*

1 INTRODUCTORY CONSIDERATIONS REGARDING THE NOTARIAL SUCCESSION PROCEDURE AND THE ROLE OF WITNESS EVIDENCE IN THIS PROCEDURE

According to *Article 954 (1) of the Civil Code* a person's inheritance procedure opens at the time of their death and *Article 953 of the Civil Code* defines inheritance as the transmission of the patrimony of a deceased natural person to one or more living persons. At the same time, from the analysis of the provisions of *Article 963 (1) of the Civil Code* it follows that the inheritance goes, according to the order and rules of the Civil Code, to the surviving spouse and relatives of the deceased. The relatives of the deceased are his descendants, ascendants and collaterals, as the case may be.

The question is what is the procedural way in which this transmission of the patrimony from the deceased person to the heirs takes place. According to *Article 233 from the Regulation on the application of the Law on Notaries Public and notarial activity no. 36/1995*[1], the succession procedure is the competence of the court or the notary public, depending on its litigious or non-litigious nature. According to *Article 954 (2) of the Civil Code*, the competence to open the inheritance is established according to the last domicile of the deceased. The proof of the last domicile is made with the death certificate or, as the case

may be, with the final court decision declaring the death. If the last domicile of the deceased is not known or is not located on the territory of Romania, the competence belongs to the first notified notary, provided that there is at least one immovable property in his constituency, or at least one movable property, if there are no immovable properties. In the event that no goods are found in the deceased's patrimony on the territory of Romania, but his last domicile was on the territory of Romania, the competence belongs to the first notified notary public.

The notarial succession procedure can be opened by the notary public at the request of the heirs or other persons justifying an interest, as well as at the request of the secretary of the local council of the locality within which the assets of the deceased were located on the date of the opening of the inheritance. After being notified of the opening of the succession procedure, the notary public is obliged to check his territorial competence, and if he finds that he is not competent, he withdraws and informs the applicant about the notary competent to carry out the succession procedure [*Article 103 (2) of Law no. 36/1995*]. If he finds that he is competent, the notary must check the register of successions to be sure that the succession procedure has not previously been opened with another notary public in the jurisdiction of the same judge. After establishing that he is legally notified, the notary public must order the summoning of the persons who have a vocation to the inheritance and also the legatees and the executor of the will, if there is a will.

At the request of the interested persons, the inventory of the inherited assets will also be carried out, specifying that the inventory request is also a request to open the succession procedure, if there is no previous request in this regard [*Article 105 (1) of Law no. 36/1995*].

In *Article 105 (5) of Law no. 36/1995* it is stated that the successors or, as the case may be, the executor, creditors and two witnesses may participate in the preparation of the inventory, and if the executor or creditors refuse to sign the minutes, the signature of the witnesses is sufficient to complete the procedure.

In the succession procedure, the notary public establishes the quality of the heirs and legatees, the extent of their rights, as well as the composition of the estate [*Article 107 (1) of Law no. 36/1995*]. On the basis of the declaration or on the basis of other evidence administered in the case, the notary will establish whether the heirs have accepted the succession within the legal deadline [*Article 107 (1) of Law no. 36/1995*].

Article 108 of Law no. 36/1995 shows that both the capacity of 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 with witnesses. At the same time, the goods that make up the estate are proven by documents or by any other means of evidence allowed by law, so including the proof by witnesses.

During the succession debates, at each term the notary public prepares a conclusion that must include mentions regarding the course of the procedure, the testimonies of the parties, the presence of witnesses and the measures ordered. Therefore, it is obvious that most of the time in the notarial succession procedure, proof by witnesses is also administered.

As for the solutions that can be given in the notarial succession procedure, they depend on the outcome of the succession debate. If it is found that there are no assets in the estate, the notary public closes the succession procedure with a conclusion and classifies the case as having no object. In the situation where there are assets in the estate, the agreement between the heirs is reached and sufficient evidence has been administered to clarify the case, the notary public will draw up the final conclusion of the succession procedure. From the

analysis of the provisions *Article 113 (2) lit. i) of Law no. 36/1995*, it follows without a doubt that when closing the notarial succession procedure, the notary must also take into account the testimonyof the witnesses. Thus, this legal text shows that the final conclusion of the succession procedure must also include the testimonyof those present regarding the number and quality of the heirs, corroborated with the testimonyof the witnesses.

At the same time, based on the declarations of the heirs, but also on all the evidence administered in the case, so including the proof by witnesses, the notary public will ascertain the composition of the estate, the value of the assets or, as the case may be, the value of the calculated assets, as well as the value of the liabilities and the net assets.

Under these conditions, we cannot fail to notice that even in the notarial succession procedure, the false testimony of the witness can affect the social relations regarding the good administration of justice, relations that presuppose finding out the truth in cases where witnesses are heard for the correct establishment of the inheritance mass, the number and the quality of the heirs. In fact, the notarial succession procedure is one of the procedures in which proof by witnesses can essentially contribute to the fair resolution of the case. Therefore, if a witness heard in these proceedings makes false testimonies or does not tell all he knows about the essential facts or circumstances about which he is questioned, depending on the concrete circumstances of the case and depending on the form of guilt of the author, the crime of false testimony can be ascertained. We will further analyze the particularities of the crime of false testimony in the notarial succession procedure.

2 THE PARTICULARITIES OF THE CRIME OF FALSE TESTIMONY IN THE NOTARIAL SUCCESSION PROCEDURE

From the analysis of the criminalization norm from *Article 273 (1) Cod penal* it follows that in the notarial succession procedure the crime of false testimony consists in the act of the witness who, in such a procedure, makes false testimonies or does not say everything he knows in relation to the essential facts or circumstances about which he is asked by the notary public.

As regards the cause of non-punishment provided by *Article 273 (3) Cod penal*, the author of this offense is not punished if he withdraws his false testimony before a solution has been given by the notary in the notarial succession procedure, as a result of the false testimony.

The special legal object of this crime consists in the social relations regarding the administration of justice, relations which presuppose, among other things, finding out the truth in the notarial succession procedure in which witnesses are heard to establish the inheritance mass, the number and quality of the heirs. In the specialized literature, it has been shown that the reason for this norm of incrimination results, among other things, from the special importance that the legislator gives in the process of administering justice to proof by witnesses. This is because people who participate as witnesses in any kind of cases or other proceedings in which witnesses are heard enjoy credibility and can essentially contribute to finding out the truth [2]. If it is committed within the notarial succession procedure, the crime has as *adjacent legal objec*t the social relations regarding the patrimony of a natural or legal person, because such an act damages or endangers the patrimony of the heirs of the deceased.

The crime does not have *a material object*, considering that the action specific to the material element is not directed directly at a material entity [3] in which the social value

protected by the criminalization rule can be found, and the document in which the false testimony is recorded represents the means by which the crime is committed [4].

In the notarial succession procedure, the *active subject* of this offense is of course qualified, being only a person who has the capacity of a witness. Considering the specifics of this procedure, which involves the hearing of only natural persons as witnesses, the necessary conclusion is that the legal person cannot be an active subject of this crime. The heir who declared before the notary that she is the sole heir of the deceased does not fulfill the capacity of a witness in the notarial succession procedure and therefore cannot be an active subject of the crime of false testimony, although he knew that the deceased still had an heir, in her charge the crime of forgery in declarations could be retained [5].

As it was shown in the specialized literature[6], the crime of false testimony, by its nature, excludes criminal participation in the form of co-authorship, because we are in the presence of an „*in persona propria"* crime, in which case the material element of the objective side involves breach of a strictly personal obligation[7].

Criminal participation, however, is possible in the form of instigation and complicity, for the instigator and accomplice not being provided for any special quality in the incrimination norm. Regarding the instigation, we show that if the instigation to false testimony is carried out by corruption, by coercion or by another act with an obvious intimidating effect committed on the witness or on a family member of the witness, then the offense of influencing testimonies provided by Article 272 of the Criminal Code will be held, and not the instigation of false testimony.

The main passive subject it is the state, as the owner of the social value protected by the criminalization norm. As for the *secondary passive subject*, this is the person whose rights are harmed or endangered by the commission of the crime[8]. The question arises whether, regarding the notarial succession procedure, the secondary passive subject can only be the natural person, or in certain cases we could also have a legal person as the secondary passive subject of this crime. As is known, the inheritance is of two kinds: legal and testamentary, they can coexist, as also results from the provisions of *Article 955 of the Civil Code*. At the same time, according to *Article 962 of the Civil Code*, in order to inherit, a person must have the capacity required by law or have been designated by the deceased in a will.

According to *Article 963 (1) of the Civil Code*, the legal inheritance belongs, in a certain order and according to certain rules, to the surviving spouse and relatives of the deceased. The relatives of the deceased are the descendants, ascendants and collaterals. Therefore, if the deceased has legal heirs and did not leave a will, the *secondary active subject* of the crime of false testimony can only be the natural person, considering that the deceased cannot have legal heirs, legal entities, whose rights may be harmed or put in danger. *Article 963 (3) of the Civil Code* however, tells us that in the absence of legal or testamentary heirs, the deceased's patrimony is transmitted to the commune, city or, as the case may be, the municipality in whose territorial radius the goods were located at the time of the opening of the inheritance. We conclude that if the deceased has no legal or testamentary heirs, the passive secondary subject of the false testimony is the commune, city or municipality in whose radius the goods were located at the time of the opening of the inheritance.

As for testamentary inheritance, we remind that *Article 208 of the Civil Code* It allows legal entities to receive liberalities under the conditions of common law, even if liberalities are not necessary for the legal person to be legally established. However, according to *Article 984 (2) of the Civil Code*, liberalities can only be made by donation (*inter vivos*) or

by bequest included in the will (*mortis causa*), the legacy being defined by Article 986 of the Civil Code as that testamentary disposition by which the testator stipulates that, upon his death, one or more legatees will acquire his entire estate, a fraction of it or certain determined assets. Also taking into *Article 987 (1) of the Civil Code consideration*, according to which any person can receive liberalities, the conclusion is that in the case of testamentary inheritance the legal person (including the association or foundation) can be a *secondary passive subject* of the crime of false testimony. We also show that according to *Article 863 c) of the Civil Code*, the right of public property can be acquired by bequest, accepted under the conditions of the law, and from the analysis of *Article 291 from the Administrative Code approved by GEO no. 57/2019*, legacies must be accepted by the state or territorial administrative units. Therefore, in the case of testamentary inheritance, the state or territorial administrative unit may be a *secondary passive subject* of the crime of false testimony.

The crime of false testimony has a premise situation, which in the analyzed case consists in the opening of a notarial succession procedure in which witnesses are to be heard. The crime of false testimony has a premise situation, which in the analyzed case consists in the opening of a notarial succession procedure in which witnesses are to be heard[9].

The objective side. The material element can be achieved through two alternative normative ways. Thus, it can consist of either *the witness's act of making false testimonies,* or *in the witness's failure to tell all he knows.*

Making false testimonies involves an action by the witness to make disingenuous accounts that do not correspond to what he knows in relation to the facts or circumstances about which he is questioned[10]. We are not in the presence of this offense if the witness correctly renders the circumstances or facts about which he is questioned, but only if he gives his own erroneous interpretation in bad faith, because the role of the witness is not to give an interpretation to the facts or circumstances, but only to relate them. The assessment of the facts and circumstances related by the witness will be done only by the notary public, who must subject the administered evidence to an external control[11].

Not telling everything that he knows implies an omission of the witness that manifests itself as a result of his reluctance to state what he knows, that goes under silence or hides all or part of what he knows, although he is expressly asked. For this offense to be sustained, the witness's silence must relate to something the witness knew, not something the witness could have known[12].

In case of omission, this offense cannot be held if the witness invokes the right to remain silent and the right not to incriminate himself. We agree with the views expressed in the doctrine that this offense cannot be held where the witness expressly refuses to answer questions[13]. Thus, the silence of the witness does not attract the commission of the crime of false testimony, if it represents an express refusal to answer[14]. Therefore, only that omission that is likely to mislead the notary public in the notarial succession procedure is of criminal relevance. In *Article 317 of the Civil Procedure Code* the persons who are exempted from being witnesses in civil cases are mentioned, therefore including in the notarial succession procedure.

The essential requirement attached to the material element of this offense is that the action of the perpetrator to make false testimonies or his omission to say everything he knows, *is related to the essential facts or circumstances about which he is asked by the*

notary public [15]. Therefore, in order to be able to retain this crime in the normative way of omission, it is mandatory that the witness has been expressly asked previously by the notary public regarding essential facts or circumstances and that he chooses not to say everything he knows in connection with these[16]. At the same time, not every false testimony of the witness meets the conditions of this crime, but only those false testimonies that are made in relation to the essential facts or circumstances about which he is asked in the notarial succession procedure.

Only those facts or circumstances related to the notarial succession procedure and which are important from an evidentiary point of view for the notary public in making a decision at the end of the procedure carried out by him *are considered essential*[17]. As shown in jurisprudence and doctrine[18], the essential character of the facts or circumstances is determined according to the object of the evidence in the notarial succession procedure, in the sense that the respective evidence is necessary in the procedure, and not depending on the decision adopted by the notary public in the respective procedure[19]. For the retention of this crime, it is not necessary that the notary made a decision based on the false testimony, it being sufficient that the false testimony was capable of leading to an erroneous decision of the notary in the notarial succession procedure.

If the act is committed both by false testimonies and by the omission of the witness to say everything he knows, the unitary character of the crime is preserved, considering that the testimonies and omissions represent alternative normative ways of committing this crime[20].

By Decision no. 1/2019 pronounced by the HCCJ – The panel competent to judge the appeal in the interest of the law, it has been established that the act of a person heard as a witness making false testimonies or not telling all he knows about the essential facts or circumstances about which he has been questioned meets the typical elements only of the crime of false testimony, not of the crime of favoring the perpetrator. In the considerations of the decision, it was shown that favoring the perpetrator has the character of a general, but subsidiary crime, between the crimes of favoring the perpetrator and that of false testimony, there being a subsidiarity relationship of the general crime type – special crime, which makes the crime of favoring the perpetrator only holdable when there are no other specific crimes of favoring, such as the crime of false testimony.

The immediate consequence is a state of danger for the proper administration of justice[21], state of danger that is capable of leading to an unfair settlement of the notarial succession procedure[22], but without having to produce a concrete result consisting in the adoption by the notary public of a wrong solution of the notarial succession procedure[23]. Therefore, the act can constitute the crime of false testimony even if the solution given in the case in which the false testimony was given was fair[24].

The causal link between the material element and the immediate consequence results from the materiality of the fact, without the need to prove it.

Regarding the *subjective side*, the crime is committed with *direct* or *indirect intent*. If the witness makes false testimonies without being in bad faith, having a wrong perception of reality, the subjective side of the crime is not realized[25]. Thus, in the case of this crime, the court must carefully check whether the witness made the false testimonies or did not say everything he knows with the intention of misleading the notary public, thereby affecting the

proper settlement of the notarial succession procedure, or made the respective testimonies without pursuing or accepting this finality[26]. If the act is committed by omission, if the witness is asked about an act or circumstance and his attention is drawn to its essential character, thereby the witness realizing that if he does not tell the whole truth, he creates a state of danger for the administration of justice, a result that he can pursue or just accept [27], therefore the direct or indirect intention will be retained, as a form of guilt.

Forms of the crime. Acts of preparation and attempt in the modality of the action are possible but not punishable. *The attempt by the mode of inaction* is not possible.

The deed is *consummated* at the moment of the realization of the material element of the objective side. In the case of the notarial succession procedure, the consummation of the deed occurs when the witness signs the testimony[28], regardless of whether this testimonywas taken into account by the notary public or not[29].

The continued form of this crime in the notarial succession procedure is possible when, being heard several times at different time intervals in the same succession procedure, the witness makes several false testimonies based on the same criminal resolution.

Cause of impunity. The legislator provided a cause of non-punishment of the crime of false testimony, which becomes applicable in the notarial succession procedure if the perpetrator withdraws his testimonybefore the notary public has adopted a final decision as a result of the false testimony. The rationale behind this impunity is to allow the perpetrator to recover from the false testimony before an unjust remedy is given as a result of the false testimony.

As noted, the time limit to which the false testimony can be retracted to become incident of non-punishment is when a remedy is given as a result of the false testimony. The expression „*as a result of false testimony*" only considers the hypothesis of apprehension, arrest or initiation of criminal proceedings in criminal cases, because the pronouncement of a decision or the taking of another solution in which witnesses are heard, as is the case with the notarial succession procedure, it will always take into account the false testimony that was given in that case. This time limit up to which the false testimony can be retracted must be respected regardless of who is making the false testimony that is being retracted.

As for the solutions that can be given in notarial succession proceedings where witnesses are heard, we have seen that 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 classifies the case as having no object. If there are assets and an agreement has been reached between the heirs and sufficient evidence has been provided, the notary public draws up the final conclusion of the succession procedure.

From the analysis of the provisions of Article 113 (2) i) of Law no. 36/1995, it follows that the final conclusion of the succession procedure must also include the testimonyof those present regarding the number and quality of the heirs, corroborated with the testimonyof the witnesses. Therefore, if a witness heard in the succession proceedings makes false testimonies or does not say everything he knows in relation to the essential facts about which he is questioned, in order to benefit from the cause of non-punishment provided by Article 273 (3) of Penal Code, the witness must withdraw his testimonyno later than when the notary public closes the procedure or until the date when the notary public prepares the final conclusion of the succession procedure, regardless of in whose favor the testimonyis made.

3 CONCLUSION

As is known, the criminal law criminalizes in Article 269 of the Criminal Code the assistance given to persons who have committed acts provided for by the criminal law, in order to hinder or prevent investigations in a criminal case, criminal prosecution or execution of a sentence or custodial measures. This is because through such „help" the proper administration of justice in criminal cases is affected. However, the act of justice can also be affected in cases other than criminal ones. Thus, one of the more concrete ways in which a person can be „helped" in the process of administering justice, in the sense of misleading the bodies that try to find out the truth in the process of administering justice, is represented by false testimonies, made by persons who have the capacity of witness in a trial.

That is why the norm of incrimination from Article 273 of the Criminal Code prohibits first of all that help which is given to the perpetrator by persons called in a trial in a certain special capacity, to help in the just resolution of the respective case[30]. In this sense, we remind you that the social value protected by the crime of false testimony consists in the proper administration of justice, which requires finding out the truth in cases where witnesses are heard, expertise is ordered or experts or undercover investigators are used.

At the same time, however, the criminal law also considers situations in which a person is heard as a witness in cases other than civil or criminal trials, if his testimonycould negatively influence the fair resolution of the respective case. This is because any procedure in which witnesses are heard helps the proper administration of justice, listening to a witness represents a means of obtaining the evidence necessary to solve any case. This is the reason why the incrimination rule of Article 273 Criminal Code also protects situations where certain persons are heard as witnesses in proceedings other than criminal or civil cases. As we have seen, one such procedure in which witnesses are heard is the notarial succession procedure.

This is the reason why the incrimination rule of Article 273 Criminal Code also protects situations where certain persons are heard as witnesses in proceedings other than criminal or civil cases. As we have seen, one such procedure in which witnesses are heard is the notarial succession procedure.

Moreover, as we have seen, the notarial succession procedure can raise numerous problems regarding the cases in which the crime of false testimony can be held, problems that are generated by the specifics of this notarial procedure.

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THE RESPECT DUE TO THE DECEASED PERSON. JUDICIAL PRACTICE CONTROVERSIES REGARDING THE OFFENSE OF DESECRATION OF CORPSES OR GRAVES, PROVIDED FOR BY ART. 383 PARA. (1) OF THE CRIMINAL CODE

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Abstract
The respect owed to deceased persons is a deeply human feeling, of high moral standing, which society promotes and protects, including through criminal law. It is part of the special legal object of the crime of desecration of corpses or graves. Although the provisions of art. 383 para. (1) of the Criminal Code do not seem to raise problems of interpretation, the multitude and diversity of the solutions adopted in judicial practice reveal the need to know in depth both the purpose of the regulation and the constitutive elements of the crime in order to achieve a correct legal framework.
Keywords: *respect due to the deceased persons, desecration of corpses or graves, guilt.*

1. Considerations regarding the regulation of the respect due to the deceased person

Man's life does not end with the death of the body. One of the fundamental rights of the individual, during life, is human dignity, which can be conceived as a supreme principle of law, a primordial value or a constitutional principle in the establishment of values, a substantial norm with supreme rank in the legal system, source of all fundamental rights, or simply right, taboo of the modern liberal/globalist society[1].

We would not have made this short peritextual journey if today we were not witnessing an increasingly powerful attack on the idea of the absolute and intangible character of human dignity.

Returning to the topic of the debate, we note that with the inevitable death of a person, their legal personality also ceases, the rights of the personality extinguishing in turn, however, in consideration of what they represented during lifetime, the deceased person is owed respect.

By respect we understand the deference that fellows must show, dictated by esteem, honor and mutual appreciation, an attitude with religious, moral and customary dimensions[2].

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[1] M. Bălan,,, The constitutional values of human dignity", Law Review, no. 2/2021.

[2] P. Perju,,,The respect due to the person even after their death in the existing regulations in the legal order of some European and North American states as well as in the new Romanian Civil Code", Law Review, no.1/2016.

From a religious perspective, we all bear the image of God, being created in his image and likeness [3]. Morally and ethically, the body of the deceased person cannot simply be thrown away or abandoned, like a carcass, at the same time custom dictates following the funeral traditions and customs specific to the age, social class and religion of the deceased.

The regulation of the respect owed to the deceased person has an international/unional but also a national character.

Among the first regulations can be listed: The Universal Declaration of Human Rights; Convention for the Protection of Human Rights and Fundamental Freedoms; Charter of Fundamental Rights of the European Union; The European Social Charter. To these are added: the Covenant on Human Rights, the Oviedo Convention and the Additional Protocol signed in Paris on January 12, 1998, which regulates the protection of human rights and the dignity of the human being with respect to the applications of biology and medicine, Directive 2004/23/ EC, Directive 2006/17/EC and Directive 2006/86/EC.

At national level, the issue addressed was materialized through various provisions of special laws, such as Law no. 104/2003 regarding the handling of human corpses and the sampling of organs and tissues from corpses for transplantation, title VI of Law no. 95/2006 regarding health reform, Law no. 102/2014 regarding cemeteries, human crematoria and funeral services and, with the entry into force of the new Civil Code, the legislative consecration of the notion acquired clarity and firmness[4].

According to the provisions of art. 78 of the current Civil Code, the respect due to the deceased regards two major aspects, the memory and the body [5].

The memory of the deceased person is the memory that those who remain alive keep [6], art. 79 of the Civil Code referring to the legal norms devoted to the right to the image, art. 73 of the same code, and the right to reputation, art. 72 para. (2) Civil Code, of the living person, which applies accordingly.

The inanimate body, although no longer a person, is „imbued with the personality of the one who was”[7], as a consequence, the respect for it manifesting itself on several levels: the organization of funerals; decent behavior towards him and his funeral; carrying out the

[3] S. Morar, D. Perju-Dumbravă, A. Cristian,„ Ethical and humane aspects of the use of human cadaver for teaching and scientific purposes”, Romanian journal of bioethics, vol.6, no.4, October to December 2008, p. 67, 68.

[4] D.D. Dănișor, S. Cercel,„Death seen from the judicial perspective of the new romanian Civil code: the respect owed to a deceased person”, Globalization and Intercultural Dialogue.Multidisciplinary Perspectives. Section:Law, Târgu-Mureș, Arhipelag XXI, 2014, p. 62, old.upm.ro/gidni/GIDNI-01/GIDNI%2001%20-%20Law.pdf.

[5] The new Civil Code regulated the person's right to dispose of their body after death in the context of the framework provided by art. 26 para. (2) of the Constitution which stipulates the right of the person to dispose of themselves, also known as the right of the person to dispose of their body or bodily freedom. Regarding the creation and development of legal principles through the interpretation of the constitutional norm, see A.D. Bobaru,„Relevant aspects regarding the interpretation of the norm in the jurisprudence of the Constitutional Court of Romania, study published in the volume of the scientific conference Legal order and justice in the European space organized by the Legal Research Center „Grigore Iunian” within the Faculty of Education Sciences, Law and Public Administration of the „Constantin Brâncusi” University from Târgu-Jiu in partnership with the Legal and Administrative Sciences Research Center within the Scientific and Multidisciplinary Research Institute of the „Valahia” University from Târgoviște, 31st of May 2022, Sitech Publishing House, Craiova, 2022, p. 129-138.

[6] Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei,„ The new Civil Code. Commentary on articles”, Publishing House C.H. Beck, Bucharest 2014.

[7] O. Ungureanu, C. Jugastru,„ Civil law. Persons”, 2nd edition, revised, Hamangiu Publishing House, Bucharest, 2007.

sampling of human organs, tissues and cells for therapeutic or scientific purposes only under the conditions provided by law.

In turn, the criminal law criminalizes the most serious touches that can be brought to the body of the deceased person. The desecration of a grave, a monument, a funeral urn or a corpse meet the constitutive elements of the crime of desecration of corpses or graves. Also, the handling of corpses, as well as the taking of tissues or organs from corpses, in violation of the provisions of the law, constitutes the crime provided for by art. 27 of Law no. 104/2003.

Although the criminalization of desecration of corpses or graves seems to be unequivocal, the issue of the incidence of the provisions of art. 383 para. (1) of the Criminal Code, in certain cases, created controversies in judicial doctrine and practice, including the pronouncement by the High Court of Cassation and Justice of Decision no. 35/2008, in the resolution of an appeal in the interest of the law, regarding the legal classification of the act of murder followed by the dismemberment or burning of the corpse in order to conceal the murder[8].

We will present our own reflections after outlining some considerations regarding the crime of desecration of corpses or graves, with emphasize on the reason for the incrimination, the material element and the form of guilt with which the crime is committed, elements without which we believe that a judicious opinion cannot be formulated on the problem under discussion.

2. The crime of desecration of corpses or graves, provided by art. 383 para. (1) of the Criminal Code

The provisions of art. 383 Criminal Code criminalize the desecration of corpses or graves and has a counterpart in art. 319 Criminal Code previously related to the desecration of graves, the legislator of the new Criminal Code completing the marginal name to bring it into agreement with the content of the criminalization norm[9].

Unlike the previous Criminal Code, the current Criminal Code criminalizes the desecration of corpses and the desecration of graves in separate paragraphs of art. 383, differentiating them under the sanctioning aspect.

We will move on to the provisions of art. 383 para. (1) Criminal Code, regarding the desecration of corpses, which have raised discussions in judicial doctrine and practice, criminalizing the theft, destruction or desecration of a corpse or the ashes resulting from its cremation. While the previous Criminal Code mentioned the desecration of a corpse by any means, the current Criminal Code distinguishes as methods the theft, destruction or desecration of a corpse, as well as the theft, destruction or desecration of the ashes resulting from its cremation.

The reason for the criminalization finds its justification in the need to protect the rules of social coexistence that involve respect for the inanimate remains of the disappeared and for the material objects that symbolize their memory, respect that corresponds to a deep human feeling, characteristic of all human collectivities. An act of contempt, mockery of the

[8] https://www.iccj.ro/2008/09/22/decizia-nr-35-din-22-septembrie-2008-cu-privire-la-incadrarea-juridica-a-faptei-de-omor-urmate-de-dezmembrarea-ori-incendierea-cadavrului-in-scopul-ascunderii-omorului/.

[9] N. Grofu,,Desecration of corpses or graves in the conception of the new Criminal Code", Journal of Criminal Law, no. 3-4/2015, p. 67-73.

disappeared and their memory has always provoked the collective reaction, being repressed in all criminal laws[10].

The special legal object of this crime is, therefore, constituted by social relations, whose normal development is conditioned by the cultivation and preservation of the collective feeling of respect towards human corpses and the ashes resulting from their cremation, piety towards the deceased being the expression to the oldest and deepest religious and moral values[11].

The material object of the crime can be a human corpse, respectively the remains of the deceased person in any form [12], as well as the ash resulting from its incineration.

The material element of the objective side is provided alternatively, which may consist of evasion, destruction or desecration.

Theft involves taking and moving the corpse or the ashes resulting from its cremation from the place where it is located to another place, without the consent of the persons entitled to arrange or perform the funeral ritual[13], and the destruction implies the destruction, total or partial abolition of the corpse or the ashes resulting from its cremation.

By profanation we mean the treatment without due respect of things considered holy, their mockery, defilement, the action generally involving the idea of violence committed on the material object of the crime, which is altered, soiled. The desecration of the corpse can take place by hitting, mutilating, changing the position, digging up, stripping, throwing bones or remains, defiling, practicing an act of sexual perversion on it, in general it can be committed by any means and in any way. However, the doctrine emphasized that the act must be physical, material, which involves touching the material object and changing its substance or at least its appearance or position, likely to affect the feeling of piety and respect for the dead and their remembrance[14].

In judicial practice, the following were considered as representing a material element of the crime: stabbing, repeatedly, of the deceased in the middle 1/3 of the chest, causing a cut wound, oriented transversely, with a length of about 15 cm, with the involvement of the heart of the corpse, in an advanced state of putrefaction (court ruling no. 146/2020 Brezoi Court, ROLLI); putting the body of the stillborn child in a bag, hidden under the bed in the bedroom and later, after a month, throwing it in the dumpster next to the block (court ruling no. 22/2015 Filiași Court, ROLLI); undressing the corpse, bending the legs and having sexual relations with it (court ruling no. 1247/2017 Alba Court of Appeal, ROLLI); hiding the body of the victim, who died on 25.02.2014, in a plastic sheet and then in the victim's cart, covering it with sheaves of corn cobs, the body being discovered by the police on 02.04.2014 in an advanced state of putrefaction (court ruling no. 1958 Focșani Court,

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[10] Dongoroz V., Kahane S., Oancea I, Fodor F., Iliescu N., Bulai C., Stănoiu R., Roșca V., „Theoretical Explanations of the Romanian Penal Code", Vol. IV, Special Part, Academy Publishing House Socialist Republic of Romania, Bucharest 1972, p. 657.

[11] Tr. Pop,,, Offenses against respect due to the dead. Art. 313", „Charles II annotated criminal code. The special part", vol. II, C. Rătescu et al., Publishing House Socec S.A. Bucharest 1937,, p. 264.

[12] N. Grofu, *prev.cit*.,,,For example, both the inanimate body as it is found after death, before it enters putrefaction, and the forms it may take later, by decomposition, when the organs are dislocated, the putrefaction completes its action, and the bones of the skeleton are the only remains of the person deceased.".

[13] V. Dobrinoiu, M.A. Hotca, M. Gorunescu, M. Dobrinoiu, I. Pascu, I. Chiș, C. Păun, N. Neagu, M.C. Sinescu, The New Criminal Code commented. The special part", 3rd edition, revised and added, Universul Juridic Publishing House, Bucharest, 2016.

[14] Dongoroz V., *prev.cit*.p. 659.

ROLLI); bumping the corpse placed in the coffin, repeatedly, grabbing the hands, lifting it to a sitting position, pushing it back, changing its initial position, while the defendant used vulgar words and expressions (Lehliu Gară Court[15]); keeping the body for a year in the home, followed by its abandonment at the edge of a forest where it was torn up by animals (Lugoj Court [16]); cutting the corpse, in the coffin, at the level of the face with a penknife (court ruling no. 59/2009, Buhuși Court, ROLLI); maintaining anal sexual relations with the corpse of a male person, who had just died due to acute cardio-respiratory insufficiency (Alba-Iulia Court[17]); placing the body in a cistern (court ruling no. 907/2003 Supreme Court of Justice [18]).

The form of guilt with which the crime is committed is the intention, both direct and indirect, the culpable commission not being criminalized. There is indirect intent when the perpetrator foresaw the material consequence on the object of the desecration and therefore the creation of a state of danger for the relations of social coexistence and, without wanting this result, nevertheless accepted the eventuality of its occurrence.

For the existence of the intention, neither the motive nor the purpose of the act is of interest, these will be considered in the judicial individualization of the punishment. The motive may be hatred, revenge, the desire for profit, hooliganism or it may not have a vile character, for example the desire is to rebury the corpse without complying with the legal conditions[19].

3. Aspects of judicial practice

In judicial practice, there was no unified point of view regarding the legal classification of the act of murder followed by the dismemberment or burning of the corpse in order to conceal the murder, some courts considering that, in such a case, there is no crime of desecration of corpses, because the defendant, by dismembering or burning the corpse, does not seek to harm or alter the feeling of respect for the dead, but only to conceal the commission of the crime of murder

Thus, it was pointed out that in the situation where the victim's corpse is set on fire for the purpose of erasing the traces of a murder, the constitutive elements of the crime of desecration of graves are not met, lacking the specific intention of the subjective side that characterizes this crime, that of harming the feeling of respect due to the dead and their memory. In this case, it was considered that only the commission of the crime of murder should be held in charge of the perpetrator of the murder (High Court of Cassation and Justice, court decision no. 907/2003, in Law no. 7/2004, p. 266, and Supreme Tribunal, court decision no. 192/1980, în Law Romanian Review no. 9/1980 [20]).

Other courts, on the contrary, have ruled that, in such cases, two crimes are committed, namely murder and desecration of graves.

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[15] https://www.ziuaconstanta.ro/stiri/justitie/sentinta-definitiva-pentru-profanarea-de-cadavre-sau-morminte-800821.html.

[16] https://ziarulactualitatea.ro/o-femeie-condamnata-pentru-profanare-de-cadavre-a-fost-ridicata-de-politisti/.

[17] https://alba24.ro/necrofil-condamnat-la-judecatoria-alba-iulia-a-facut-sex-cu-un-cadavru-in-gara-cfr-din-vintu-de-jos-ce-pedeapsa-a-primit-947314.html.

[18] https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=84580#highlight=##

[19] Dongoroz V., *prev.cit.cit*., p. 659-660.

[20] A. Boroi, I.Rusu, A.D. Chirilă, G.L. Goga, A.I. Dumitrache, M.I. Bălan Rusu,,, Judicial practice in criminal matters. Criminal law. The special part", Universul Juridic Publishing House, Bucharest 2014.

The High Court of Cassation and Justice, by decision no. 35/22.09.2008, admitted the appeal in the interest of the law and established that, in the hypothesis in which the material object of the crime is a corpse, and the defendant, by dismembering or burning the corpse, pursues concealment of the previously committed murder, the crime of murder and the crime of desecration of graves will coexist, the latter crime can also be committed with indirect intent, when the author does not pursue and does not want to harm the sense of respect due the dead, but merely accepts the occurrence of such a consequence as an effect of his act of concealing the murder by subjecting the corpse to the act of destruction.

Even after the pronouncement of this decision, there were still isolated solutions, of retaining only the crime of murder. Thus, by criminal decision no. 1007/2010, High Court of Cassation and Justice – The criminal section rejected as unfounded the appeals declared by the defendants S.C. and B.Ş. against criminal decision no. 104/A/2009 of the Oradea Court of Appeal, decision by which the defendants were sentenced to 25 years each for committing the crime of murder provided for in art. 174-176 para. (1) lit. c) and d) Criminal Code, with the application of art. 37 lit. a) Criminal Code, establishing that, on August 9, 2004, the two defendants asked the victim S.K.R., a taxi driver, to transport them from Marghita to Carei, but on the way they killed him by applying of blows to the head, chest and other parts of the body, then they dragged the car into a field of sunflowers, where they set it on fire, burning the victim's body to a large extent[21].

The doctrine states that in the situation of committing murder, through the killing activity, the defendants, from a subjective aspect, show contempt, hatred, towards the victim, for their life and in no way pursue, directly or indirectly, the violation of respect that must be owed to the dead, the two specific intentions, on the one hand, to murder, on the other hand, to the desecration of corpses, being incompatible. Therefore, only one crime is committed[22].

Even if criminal decision no. 1007/2010 concerned the interpretation of the provisions of art. 319 of the previous Criminal Code, its effects continue to occur in the context of the new regulation [23], which means that, at least in the event that the act of killing is followed by a second act, of desecration of the corpse, the two distinct, successive acts must „receive the natural legal clothing of each, corresponding to the crime of murder in the form in which it was committed, as well as the crime of desecration of graves „, as shown by the High Court.

In cases when the crime of murder is committed through actions that could constitute at the same time a material element of the crime of desecration of graves, the legal framework will depend on the possibility of the judicial bodies to establish whether the actions of destruction, damage to the victim's body took place perimortem or postmortem.

Thus, if the dissection, burning or other actions that also damage the corpse constitute the very material element of the crime of murder, in judicial practice only the commission of the latter crime was retained, usually in a qualified form attracted by the cruelties exercised on the victim: the act throwing a flammable projectile through the window of a building, causing burns to the person in the building, meets the constituent elements of attempted murder, he circumstantial element of aggravation relating to murder committed by cruelty being applicable; the act of the defendant who gave birth to the victim A.A., alive and

[21] R. Bodea, B. Bodea,„ Controversies regarding the constitutive content of the crime of desecration of graves", Law Review, no. 8/2013.

[22] R. Bodea, B. Bodea, prev.cit.

[23] http://www.mpublic.ro/sites/default/files/PDF/analiza_ril.pdf.

viable, whom she wrapped in a diaper, a bag, a satchel and a polyethylene bag into which she inserted a brick, after which she threw the body into a latrine[24].

Sometimes, due to the manner of committing the crime of murder, through violent actions of a particular intensity, extended over time, establishing the moment when the death occurred can be extremely difficult. In such situations, the courts have pronounced either sentencing solutions for both crimes: the defendant applied several blows to the victim in the thoracic-abdominal area, with a pocketknife, then pulled the victim out into the yard of the house and, with the edge of an ax, hit her in the head, in the forehead area, after which, with the same ax, he cut her body into 12 fragments (head, torso with right thigh, fragment of right arm, fragment of right forearm with hand, fragment of left arm, fragment of forearm with left elbow, fragment of left forearm with hand, fragment of right calf, fragment of right calf and foot, fragment of left thigh, fragment of left calf and fragment of calf with left foot)[25]; the defendant stabbed the victim 64 times in vital areas, namely the chest and abdomen, after which he amputated his right arm by repeatedly hitting him with an ax [26], or only for the crime of murder: the defendants' act of having inflicted several blows on the victim's head and chest with fists, with a wooden chair or stool and with an axe, causing multiple traumatic injuries, followed by burying the victim, without being able to establish whether he had already died[27], appreciating that there is a doubt about the existence or not of the material object of the crime, the victim's corpse, the latter being still alive at the time of the burial by the defendants, a doubt that benefits them.

According to judicial practice, it is possible to commit the crime of desecration of corpses, contrary to the opinion expressed in the doctrine, also through inaction, through a passive attitude of the perpetrator who having acknowledged the death, leaves the corpse to decompose: the actions of the defendant who, between January 2013 and February 2014, kept his father's dead body in the house, until it decomposed, due to the lack of muscle and fat tissue, and at the level of the head, the lack of eyes and several holes at the level of the cheeks, and collected, without right, the pension due to his father, meets the constitutive elements of both the crimes of desecration of corpses or graves and fraud in continued form[28].

The question arises whether the crime of desecration of graves is committed in the situation where, after having murdered the victim, the perpetrator no longer undertakes any action on the victim's corpse, but since it is not discovered by the judicial bodies, it degrades naturally, by decomposition, or devouring by animals.

In judicial practice, it has been assessed that the crime under of art. 383 para. (1) Criminal Code was committed since, after the defendant and the victim left the marital residence together, the destination not being known, the defendant killed the victim, the body not being found despite extensive search activities. So, the lack of a grave and the omission of going through the specific burial ritual, in the presence of those close to the

[24] Galați Court of Appeal, criminal decision no.524/10.05.2017, available on www.Lege5.ro.

[25] Oradea Court of Appeal, criminal decision no.465/26.09.2019, available on www.Lege5.ro. According to the forensic report – autopsy no. 1700/111/327 of 27.11.2013, „the rest of the traumatic injuries could have occurred peri/post-mortem (in agony) – by repeated hitting with a cutting-splitting object with a large mass (possibly a hatchet) causing cranial trauma– open brain, decapitation and dismemberment of the body".

[26] Brașov Court of Appeal, criminal decision no.717/09.12.2020, available on www.Lege5.ro.

[27] Tg.-Mureș Court of Appeal, criminal decision no.359/28.07.2021, available on www.Lege5.ro.

[28] Ploiești Court of Appeal, criminal decision no.511/21.04.2017, available on www.Lege5.ro.

victim, was considered to prove that the body was hidden[29]. Same charges were brought in the case of the defendant in whose car the victim was seen for the last hour alive, holding that the hiding of the victim's remains results from the fact that they were no longer found, without having a grave and without being able to carry out the specific burial ritual, in the presence of the close ones[30].

On the other hand, it was assessed that the act of the defendant, who grabbed the victim's clothing with his left hand, hit him once with the knife in the neck area, with the consequence of severing the large blood vessels, causing the victim to fall into a bush, where he remained until the morning, when he was found dead and with the absence of soft parts from the cephalic extremity and neck, neck organs, trachea, right bronchus, absence of bone substance from the neuro and cranium, mandible, cervical spine, thoracic vertebrae and right clavicle, absence determined postmortem by the action of necrophagous animals, meets the constitutive elements only of the crime of simple murder[31].

4. Discussions

At first glance or, better said, when reading from a strictly theoretical perspective, the text of the incrimination contained in the provisions of art. 383 para. (1) Criminal Code seems to have an unambiguous wording, which cannot raise particular problems of interpretation and application in judicial practice.

However, as previously shown, the analysis of the solutions handed down by the courts reveals several aspects worthy of emphasis.

There have been non-unitary solutions in cases where, after completing the act of killing the victim, the perpetrator destroyed the body in an attempt to hide the commission of the crime, the older practice, including that of the Supreme Court, being in the sense of retaining exclusively the existence of a crime against life. With the pronouncement of decision no. 35/22.09.2008, in the resolution of an appeal in the interest of the law, the courts will have to ascertain the both the crime against life and the crime provided for by art. 383 para. (1) Criminal Code, whenever, after the act of killing, a second act follows, of desecration of the corpse, even if the perpetrator does not pursue and does not wish to harm the feeling of respect owed to the dead, but only accepts the occurrence of such result.

However, there are cases in which the crime of murder is committed through activities of particular violence, by setting the victim on fire or by cutting them with multiple blows of an axe/axe/chainsaw, with the consequence of dismembering the body. In such situations, when the destruction/annihilation of the body is the very way of committing the murder or it is impossible to establish the exact moment of death in the chronology of the violent activities, we consider that the crime of murder by cruelty will be retained exclusively. The two crimes cannot be committed in the form of formal multiple violations because they have diametrically opposite premise situations, a person alive in the case of the crime of murder, respectively the existence of a corpse in the case of the previous crime. of art. 383 para. (1) Criminal Code.

At the same time, judicial practice admitted, contrary to the opinions expressed in the doctrine related to the previous Criminal Code, the possibility of committing the crime of

[29] Suceava Court of Appeal, criminal decision no.143/28.07.2021, available on www.Lege5.ro.
[30] Gorj County Court, criminal ruling no.194/24.10.2018 available on www.Lege5.ro.
[31] Olt County Court, criminal ruling no.92/04.07.2018 available on www.Lege5.ro.

desecration of corpses or graves also through inaction, when the perpetrator only acknowledged the death, caused by causes independent of him, and did not undertake the steps for the deceased to benefit from the funeral ritual. The form of the improper omission crime would be retained when the requirements of art. 17 Criminal Code, respectively the author has the position of guarantor, having the obligation to prevent the destruction.

On the other hand, the inaction of the perpetrator, if he caused the death of the victim, practically abandoning the body at the place of the act, was deemed not to meet the constitutive elements of the crime of desecration of corpses or graves. We believe that this orientation of the practice is correct as long as, after the death, the perpetrator did not take any further action on the corpse. By incurring his liability for the crime of desecration of corpses or graves, the provisions of art. 266 of the Criminal Code, which criminalize non-denunciation, would be evaded. Although the author of a criminal act against life or which resulted in the death of a person cannot be the active subject of this crime, he would be criminally liable for committing the crime under of art. 383 Criminal Code because, concretely, he did not report himself, not bringing the fact to the attention of the authorities.

In situations where the efforts of the judicial bodies to find the victim's body remain fruitless, in judicial practice it has been assessed that the crime of desecration of corpses or graves has been committed, the absence of the corpse proving the actions of its destruction and concealment.

Although the provisions of art. 383 para. (1) Criminal Code seem easy to interpret, the multitude and diversity of solutions adopted in judicial practice prove that, in order to achieve a correct legal framework, it is necessary to understand the rationale of this criminalization as well as to know the constitutive elements of the offense provided for by desecrating corpses or graves, especially the material element, the object material and form of guilt.

Moving towards the end of the paper, we can say that the legal framework, described since the beginning, scientifically substantiates the social necessity of legislating the respect due to the person, after their death. In our opinion, the innovation trends of legislative solutions consider the memory, the will and the body of the deceased, viewed as a unitary, multidimensional construct. The normative propositions regarding these values, in the regulation offered by the national positive law, are obviously governed by the priority of the international normative acts regarding human rights that Romania has ratified. The regulation of the „ultima ratio" by criminal law norms of the addressed issue only strengthens the legal framework in the matter.

From the various practical situations presented, the idea emerges that, at the praetorian level, although the provisions of art. 381 para. (1) of the Criminal Code, do not seem to raise problems of interpretation[32], in reality, the multiplicity and diversity of the solutions adopted by the courts undeniably reveal the need for thorough knowledge, first of all, of the purpose of the regulation.

Given the argumentative line, we can conclude that international and national regulations firmly converge towards the conclusion that the rights of the human being universally incorporate the respect due to the memory, will and body of the person after his

[32] R. Bodea, B. Bodea, „Controversies regarding the constitutive content of the crime of desecration of graves", Law Review, no. 8/2013, p. 186.

death. We say this bluntly today as we live in a new age with real tendencies to objectify the person.

Axiomatically, death extinguishes only the legal personality, not the human personality, which must continue to enjoy respect, with religious, moral, customary dimensions and imposed, lastly, by means of criminal law.

In conclusion, our scientific approach sought to gather all the information useful for the analysis of this crime, to interpret where there was no interpretation. If to this end the written pages will contribute a base of information and political-legal and legislative orientation, their purpose and the passion from which they arose will both find their fulfillment and justification.

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[8] N. Grofu,,,Desecration of corpses or graves in the conception of the new Criminal Code", Journal of Criminal Law, no. 3-4/2015.

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[10] Tr. Pop,,, Offenses against respect due to the dead. Art. 313", „Charles II annotated criminal code. The special part", vol. II, C. Rătescu et al., Publishing House Socec S.A. Bucharest 1937.

[11] V. Dobrinoiu, M.A. Hotca, M. Gorunescu, M. Dobrinoiu, I. Pascu, I. Chiș, C. Păun, N. Neagu, M.C. Sinescu, The New Criminal Code commented. The special part", 3rd edition, revised and added, Universul Juridic Publishing House, Bucharest, 2016.

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[13] R. Bodea, B. Bodea, „Controversies regarding the constitutive content of the crime of desecration of graves", Law Review, no. 8/2013.

THE EPHEMERAL RIGHT OF RESIDENCE FOR THE SURVIVING SPOUSE – EVIDENCE OF FAMILY SOLIDARITY IN THE SUCCESSION'S SPHERE?

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Abstract

The solidarity function of a family is carried out between all its members, during the whole life. Through it, the unity, the protection, the intimacy and the cohesion of a family group, manifested from the very beginning of a family life, is guaranteed. In which context can we discuss about family solidarity after the death of one's spouse? Is the right of residence for the surviving spouse-recognized by the legislator-a panacea for solidarity in the sphere of succession law? This work contains a detailed analysis of the current legislation, in the field of the surviving spouse's right of residence, but also contains the ways in which the latter can be considered a proof of the family solidarity principle, manifested postmortem. The present research comprises an unique structure, so that the entire area of the indispensable premises to the comparative analysis, which concerns the right of the surviving spouse for residence, can be exposed.

Keywords: *right of residence, surviving spouse, home, temporary, family solidarity.*

1. Introductory notes regarding the family solidarity

From a legal and sociological point of view, the current era we are going through is subject to uncertainties and questioning of human values. In this sense, we can affirm that today the institution of the family is presented to us in an innovative perspective, both in doctrine and in the European jurisprudence. However, law, as a science, is based on the field of morality[1]. Therefore, assigning the institution of the family to this domain is a natural move, which does not exclude the possibility of issuing specific legislation.

Closely related to the institution of the family, the principle of family solidarity represents a „hinge" of it because, without the existence of a mutual support between the members of the family, the institution would remain like a shell, devoid of soul and the only existing links between the people who make it up would be only of a biological nature. Or, the family represents precisely affection, compassion and unity, and the mutual support that parents, spouses and children give each other, of course selflessly, represents the expression of family solidarity. The function of solidarity is thus carried out between all members of a family, throughout life. Through it, the unity, the protection, the intimacy and the cohesion of a family group, manifested from the very beginning of family life, is guaranteed. At the same time, the existing solidarity in the spouses' family of origin will certainly influence the new union they will be part of, due to their education and the way they were prepared to live together. Just as art requires sacrifices, it is assumed that the ideal family also requires

[1] Goldan, A.M. (2022). Raporturile maritale și de filiație în dreptul privat comparat. Editura Universul Juridic, București, p. 7.

certain sacrifices, manifested through the concept of family solidarity, following mutual concessions by the spouses[2].

The principle of family solidarity is provided by the Romanian legislator, within the framework of art. 309, from the Romanian Civil Code. According to this article, spouses have a duty to provide each other with „respect, fidelity and moral support"[3]. Another norm, which suggests compliance with this principle, is represented by the art. 325[4] of the Romanian Civil Code, the legislator referring, this time, to mutual material support. Finally, also in the Romanian Civil Code we also find the art. 516 para. (1)[5], through which is established the existence of a maintenance obligation between spouses, between parents and children, but also between other persons provided by the legislator. The maintenance obligation between spouses was considered in extenso by the Romanian and European legislator, as the opportunity was provided by legal norms to request maintenance even after the dissolution of the marriage[6]. Therefore, the maintenance obligation between spouses exceeds the duration of the marriage, turning it into an obligation between former spouses. Can we consider, applying the principle of analogy, that the right of residence recognized by the legislator to the surviving spouse is an extension of family solidarity, in case of marriage dissolution? We will discuss all these aspects in the following sections.

2. Widowhood year: temporary right of residence

The death of a family member brings with it suffering and imbalance. For these reasons, it was unanimously recognized in the popular consciousness that there is a period of mourning that lasts one year after the death[7]. Grieving is the period of time needed to overcome the pain and return to life before the loss of the loved one. In literature it has been even discussed about anticipatory mourning, which involves going through a process of preparation for the death of a loved one, due to which the other gradually gets used to new perspectives of separation and irreparable loss[8]. According to the current legislator, after the marriage dissolution by death, the surviving spouse has a special right to the family home, which allows him to remain there and thus preserve his living environment for a short period of one year. Establishing a widowhood period of one year represents an application of the

[2] Druță, F. (1998). Psihosociologia familiei. Editura Didactică și Pedagogică, București, p. 55.

[3] Codul civil român, art. 309: „ (1) Soții își datorează reciproc respect, fidelitate și sprijin moral. (2) Ei au îndatorirea de a locui împreună. Pentru motive temeinice, ei pot hotărî să locuiască separat".

[4] Codul civil român, art. 325: „(1) Soții sunt obligați să își acorde sprijin material reciproc. (2) Ei sunt obligați să contribuie, în raport cu mijloacele fiecăruia, la cheltuielile căsătoriei, dacă prin convenție matrimonială nu s-a prevăzut altfel. (3) Orice convenție care prevede că suportarea cheltuielilor căsătoriei revine doar unuia dintre soți este considerată nescrisă".

[5] Codul civil român,art. 516 alin. (1): „Obligația de întreținere există între soț și soție, rudele în linie dreaptă, între frați și surori, precum și între celelalte persoane anume prevăzute de lege".

[6] Codul civil român, art. 389: „(1) Prin desfacerea căsătoriei, obligația de întreținere între soți încetează. (2) Soțul divorțat are dreptul la întreținere, dacă se află în nevoie din pricina unei incapacități de muncă survenite înainte de căsătorie ori în timpul căsătoriei. El are drept la întreținere și atunci când incapacitatea se ivește în decurs de un an de la desfacerea căsătoriei, însă numai dacă incapacitatea este cauzată de o împrejurare în legătură cu căsătoria."

[7] Mihăieș, M. (2009). DESPRE doliu. Un an din viața lui leon w.. Editura Polirom, București; Rovere, A. (2012). And still they bloom. A family's journey of loss and healing. Editura American Cancer Society, Atlanta, Georgia.

[8] Fasse L., Sultan S., Flahault C., (2013). Anticipatory grief experience before the death of a spouse: An interpretative phenomenological analysis. Psychologie française, 58, pp. 177-194.

Roman law in the present day, as they had provided in the Law of the XII Tables a prohibition on the widow' s remarriage, for a period of one year from the death of the husband[9]. We observe, thus, the same one-year period of time that testifies, in actuality, the surviving spouse's need to adapt to the new social status.

The diachronic analysis of the surviving spouse's right of residence reveals a number of interesting issues, such as the obligation of spouses to live together during the marriage, as well as the special protection for the family home[10]. It should be remembered, in this sense, that before the adoption of the Romanian Family Code in 1954, it was applying the provisions of art. 1279 from the Civil Code 1864, through which the surviving wife was granted the right to request, during the year dedicated to mourning, the procurement of housing and mourning clothes, from the estate of the deceased[11]. From this we can derive the need to provide legislative protection to the surviving spouse, but also to the family home, so that the imbalance caused by the death can be removed. Starting with 1954, respectively with the adoption of the Family Code, the legislator no longer expressly specified the obligation of cohabitation of spouses, nor the right of temporary residence. The jurists, however, had the provisions of Law no. 319 of 1944, which concerned the right of inheritance of the surviving spouse. According to art. 4 of this law, „the surviving spouse who does not have another home of his own, will have until the execution of the exit from the indivision and in any case, at least for one year after the death of his spouse, in addition to the right of inheritance according to the provisions above, a right of residence on the house in which he lived, if it is part of the succession"[12]. Currently, we say about the right of residence of the surviving spouse that it has returned to the mother law, as it is provided again by the Romanian legislator in the framework of art. 973 from the Civil Code[13]. The current text gives the surviving spouse the free enjoyment of remaining in the family home for the twelve months following death, including until the division of the inheritance. The right, although temporary, is of public order, as the surviving spouse cannot be deprived of it. Also, the establishment of the right for residence is automatic, in the sense that the spouse does not have to request permission to exercise it. We consider that the temporary right granted to the surviving spouse is a direct effect of the marriage and does not qualify as a right of inheritance. Consequently, the surviving spouse benefits from this right, even if he does not participate in the division of the inheritance. Similarly, making use of the

[9] Ciucă, Valerius M. (2014). Drept roman. Lecțiuni. Editura Universității „Alexandru Ioan Cuza", Iași, p. 306.

[10] Calmuschi, O. (1977). Unele probleme actuale în legătură cu domiciliul soților. Studii și cercetări juridice 3, pp. 329-330.

[11] Codul civil român din anul 1864, art. 1279: „Dacă căsătoria se desface prin moartea bărbatului, femeia are alegerea de a cere, pentru cursul anului de doliu, sau dobânzile ori fructele dotei sale, sau alimente din succesiunea bărbatului său. În toate cazurile, abitaţiunea în cursul acelui an şi veşmintele de doliu trebuiesc a se procura femeii din succesiunea bărbatului".

[12] For details, following this site: https://legislatie.just.ro/Public/DetaliiDocumentAfis/32.

[13] Codul civil român, art. 973: „(1) Soțul supraviețuitor care nu este titular al niciunui drept real de a folosi o altă locuință corespunzătoare nevoilor sale beneficiază de un drept de abitație asupra casei în care a locuit până la data deschiderii moștenirii, dacă această casă face parte din bunurile moștenirii. (2) Dreptul de abitație este gratuit, inalienabil și insesizabil. (3) Oricare dintre moștenitori poate cere fie restrângerea dreptului de abitație, dacă locuinţa nu este necesară în întregime soţului supravieţuitor, fie schimbarea obiectului abitaţiei, dacă pune la dispoziţia soţului supravieţuitor o altă locuinţă corespunzătoare. (4) Dreptul de abitaţie se stinge la partaj, dar nu mai devreme de un an de la data deschiderii moştenirii. Acest drept încetează, chiar înainte de împlinirea termenului de un an, în caz de recăsătorire a soţului supravieţuitor".

temporary right of residence does not imply tacit acceptance of the succession. Finally, the value of the right is not deducted from his inheritance share. As such, the spouse does not owe any compensation to the other heirs as a remedy for the use of the home.

In the following lines, we will analyze the art. 973 from the Romanian Civil Code, to illustrate the characteristics of the right of habitation, reserved for the surviving spouse. According to paragraph (1), „the surviving spouse who is not the holder of any real right to use another home corresponding to his needs benefits from a right of residence over the house in which he lived until the date of the inheritance opening, if this house is part of the assets of the inheritance „. From this we can deduce the idea that the main residence from the date of death will be taken into account. At the same time, the right of residence is not subject to a condition of cohabitation of the spouses at the time of death. Therefore, the occupancy status of the home is assessed only in relation to the surviving spouse. We go further with the analysis of the text proposed by the Romanian legislator and note the fact that it is imposed as a condition the non-existence of any real right to use another suitable home, at the date of the inheritance opening. The notion of proper residence is open to interpretation, as it is necessary to determine the actual situation of the surviving spouse after the death. Here we mean preserving, as far as possible, the conditions of life that existed before death. In practice, we can distinguish different mechanisms that have an effect on the housing desired by the surviving spouse. For example, it could happen that after the death of the husband, the wife is the sole breadwinner and bears the total costs, as she no longer shares expenses with her husband. Basically, after death, the cost of housing per capita is multiplied by two. Then, the widow may wish to reduce these costs by choosing, for example, a smaller home. In this way, the woman will have a choice between using the same home and moving to support herself. However, moving to a new home involves costs, not only financial but also indirect, such as the loss of the material habits, knowledge of the local environment or the emotional cost of leaving neighbors and friends[14]. The intervention of the Romanian legislator temporarily reconciles the two directions, as the surviving spouse will have time to think at his disposal, to figure out whether the family home is still profitable or not, respectively he will not feel abandoned, but will continue to live there to easily bear the financial and emotional imbalance. In relation to the ideas presented above, according to the current Civil Code, any of the deceased's heirs has the right to request from the court either the restriction of the residence right, if it is found that the home is not entirely necessary for the surviving spouse, either the change of the home, offering the spouse a suitable new one. From here we can understand the idea that the initiative to change the home will belong to the heirs, not to the surviving spouse, a context that can generate multiple conflicts.

The following condition present in Romanian legislation assumes that the home is part of the inheritance, in whole or in part. From this we can deduce that the temporary right of residence is applied, either in the situation where the house belongs to the spouses, united by a matrimonial regime of the community, without distinguishing the shares held, or in the situation where the spouses are united by a regime of separation of assets, either in the hypothesis where the home is the exclusive property of the deceased. The temporary right of residence could thus also apply when the deceased was a co-owner with a third party. For

[14] Bonnet C., Gobillon L., Laferrère A. (2007). Un changement de logement suite au décès du conjoint?. Gérontologie et société. 30(121), pp. 195-210.

example, the home may belong one-third to the deceased and two-thirds to his siblings, or half to their spouses and half to their children. In this case, the husband can benefit from the right of residence until the end of the one-year term, or until the division of the inheritance.

If the home that is the subject of the residence right is rented, then it will apply the provisions of art. 323, para. (1) of the Civil Code, where it is specified that each spouse has his own right of occupancy, even if only one of them is the owner of the contract or the contract is concluded before the marriage. In the event of the death of one spouse, the surviving one will continue to exercise his right of occupancy, if he does not expressly renounce on it within 30 days from the date of registration of his spouse's death[15].

The right of residence is exercised „reasonably", under the conditions provided by the current Civil Code. This means that the surviving spouse can neither assign nor rent his rights to another person. However, the question arises as to whether the surviving spouse could rent the property for residential or professional use in order to obtain the resources necessary for living. Indeed, the husband is, in principle, the only captain on board who defines his needs, but the court can be referred in case of disagreement between the heirs on the assessment of the state of need. Therefore, the court could grant such an exception, if it finds that the rental allows the surviving spouse to support himself or to obtain a new home. This thesis could be contradicted by some practitioners in the country, as they define the right to housing as personal, therefore inalienable and untraceable.

The next condition indicated by the legislator assumes that the surviving spouse does not remarry within the term of widowhood, in order not to lose the right of residence. This negative obligation can reveal moral aspects such as respect for the deceased, or material aspects as the remarried surviving spouse will acquire a new family home. The same does not happen if the surviving spouse chooses cohabitation over a new marriage. Obviously, even in this situation, the heirs can ask the court to restrict the right of residence or offer a new home, until the inheritance is shared.

Finally, the surviving spouse is responsible for maintenance repairs and paying contributions as an usufructuary. Since the right of residence is free of charge, the spouse will not pay rent for the use of the building, and if he also has the capacity of heir, the free will benefit him both retroactively and in the future, for the share corresponding to the inheritance rights. We can consider that the spouse has the quality of a borrower with the obligation to return the good, in his individuality. If the real estate will be assigned by the court to the surviving spouse, then he will become the real owner from the borrower, with all the related rights and obligations.

Unlike our legal system, in France, the legislator offers greater protection to the surviving spouse in the sense that he is granted the right of residence for the twelve months from the date of death, but also a right to use the related furniture[16]. In Romania, we distinguish between the right of residence and the special right to inherit furniture and household items. At the same time, the temporary right in France can become permanent, in the sense that, at the time of assigning the assets that are part of the inheritance, priority will

[15] Codul civil român, art. 1834, alin. (2): „Descendenţii şi ascendenţii chiriaşului au dreptul, în termenul prevăzut la alin. (1), să opteze pentru continuarea contractului de închiriere până la expirarea duratei acestuia, dacă sunt menţionaţi în contract şi dacă au locuit împreună cu chiriaşul. Dispoziţiile art. 323 alin. (3) sunt aplicabile în privinţa soţului supravieţuitor."

[16] Gaudemet, S.,(2018). Quelle protection pour le conjoint survivant en France? Régimes matrimoniaux, successions, libéralités. Revue internationale de droit comparé 70(2), pp. 249-260.

be given to the surviving spouse in keeping the family home. Consequently, in the presence of several requests regarding the same home, the judge will have to rule in favor of the husband. Also in France, the spouse and the other heirs of the deceased can enter into an agreement to transform the right of residence and use into a life annuity or in the offering of a total amount. Conversion requires an agreement, so it cannot be imposed on the surviving spouse. If a minor child or protected adult is among the heirs, the agreement must be authorized by the court[17]. Conversely, the temporary right of residence does not apply in France in two situations that refer to the condition of ownership. The first restriction refers to the home of the deceased usufructuary, and the second restriction refers to homes that are owned by a legal entity (a company for example), even if the spouses are the only partners/associates[18].

We conclude this section by recalling a particularly interesting aspect existing in French regulation, namely the possibility of obtaining family solidarity leave. According to art. L. 3142-6 of the *Code du Travail*[19], if a parent, a child, a brother, a sister or a person who lives with an employee of an enterprise suffers from a pathology that puts his life at risk, or is in the phase advanced or terminal of a serious and incurable condition, then the employee will be entitled to family solidarity leave. The employee who has been designated a confidential person will also benefit from this right, in accordance with art. L. 1111-6, from the *Code de la santé publique*. Perhaps such a legislative intervention would be welcome in our country as well, as it reflects one of the most important functions of the family, that of support, unity and compassion, or called in legal terms the function of solidarity between the members of a family.

3. Final considerations regarding the ephemerality of the right of residence, in the context of fulfilling family solidarity

We can say about the family, without fear of making a mistake, that it is a term characterized by an impressive polysemy, an aspect that undoubtedly proves the multiple historical variations of the institution[20]. Nowadays, in a broad sense, the term family designates „the ensemble of persons who are united by marriage, adoption, filiation and by kinship resulting from a descent with a common author”[21]. The preservation of assets from the family of origin, as an ancestral practice, gives way today to the desire to ensure the rights of the surviving spouse. We state this because today wealth is more easily acquired by husbands than by parents, being often divided, unlike the hereditas of the Romans.

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[17] Morin, Ch. (2002). Les droits patrimoniaux du conjoint survivant résultant de la dissolution du mariage. Revue du notariat, *104*(3), pp. 349–453.

[18] Bonnet C., Hourriez, J. (2008). Veuvage, pension de réversion et maintien du niveau de vie suite au décès du conjoint: une analyse sur cas types. Retraite et société, 56, pp. 71-103.

[19]Code du Travail, art. L. 3142-6: „Le salarié dont un ascendant, un descendant, un frère, une soeur ou une personne partageant le même domicile souffre d'une pathologie mettant en jeu le pronostic vital ou est en phase avancée ou terminale d'une affection grave et incurable a droit à un congé de solidarité familiale. Ce droit bénéficie, dans les mêmes conditions, au salarié ayant été désigné comme personne de confiance, au sens de l'article L. 1111-6 du code de la santé publique”.

[20] Bărbulescu, C. (2000). Universul înrudirii. Între istorie și antropologie. Caiet de seminar pentru uz intern. Editura Universității Babes-Bolyai, Cluj-Napoca, Facultatea de Istorie și Filosofie, p. 17.

[21] Carbonnier, J. (2002). Droit civil. La famille-L‘enfant, le couple. Presses Universitaires de France, Paris, p. 3.

According to French legal doctrine, a person's patrimony fulfills two functions, namely the function of responsibility and the function of transmission. The importance of the accountability function has a strong ideological foundation. We must realize, in fact, that this association of heritage and the person reflects a moral conception of the responsibility of persons in their social relations. Binding a person to an inheritance, i.e. to a financial guarantee, makes it possible to be legally responsible for his actions. This is because the legacy conceived in this way concentrates a moral dimension. This moral dimension justifies the principle of the unity of the patrimony but also its importance: the burden of responsibility would be reduced if the scope of the financial guarantee were reduced, by dividing the patrimony into several segments[22]. Finally, heritage theory also fulfills a transmission function. This function is of interest, first of all, to the patrimony of natural persons, since there, effectively, a succession takes place. The identification of the patrimony with the person would normally assume that, upon the latter's death, the patrimony disappears. But, in the name of family solidarity, the law establishes the principle according to which the heirs collect the patrimony of the deceased[23]. Thus, the legislator invented the fiction of extending the personality of de cujus: the heirs succeed him and acquire all his goods and debts[24].

The surviving spouse's right of residence is part of the category of rights that reflect family solidarity, manifested post-mortem as it offers relative protection to the survivor, in order to regain financial and emotional balance. Although, from a legal point of view, the right of residence is a temporary one, the Romanian legislator offers a better option for protecting the surviving spouse, materialized in a matrimonial agreement. This indirect variant, which offers greater protection than the right of residence per se, is called the precipitus clause and is regulated in the current Civil Code, under art. 333[25]. According to Romanian legal doctrine, „the purpose of the precipitus clause is to establish a method of partial liquidation (partition) of the matrimonial regime"[26]. Of course, unlike the right of residence which can also refer to an asset owned by the deceased, in the case of the insertion of a fee clause, only a common asset, owned in co-ownership, with the deceased spouse can be taken into account. Moreover, the insertion of such a clause is only compatible with the conventional community regime, respectively with the property separation regime, since the legal community regime does not require a matrimonial agreement.

In conclusion, we say about the family home that it implies stability, in the sense that the legislator will protect it from transmission or sudden changes such as the death of one of the spouses. Or, precisely the two notions are by definition antagonistic, because the transmission of mortis causa implies instability, in the sense that, until the quotas are established, there will be some uncertainty[27]. At the same time, after the expiration of the one-year term, it could happen that the surviving spouse has to look for a new home, an

[22] Rochfeld, J. (2011). Les grands notions du droit privé. Presses Universitaires de France, Paris, p. 352.

[23] Grimaldi, M. (2001). Droit civil. Succesions. Editura Litec, Paris, p. 548.

[24] Xifaras, M. (2004). La propriete: étude de philosophie du droit. Presses Universitaires de France, Paris, pp. 276-277.

[25] Codul civil român, art. 333: „(1) Prin convenţie matrimonială se poate stipula ca soţul supravieţuitor să preia fără plată, înainte de partajul moştenirii, unul sau mai multe dintre bunurile comune, deţinute în devălmăşie sau în coproprietate. Clauza de preciput poate fi stipulată în beneficiul fiecăruia dintre soţi sau numai în favoarea unuia dintre ei".

[26] Banc, D. (2016). Clauza de preciput– o controversă nestinsă. SUBB Iurisprudentia 3, pp. 73-80.

[27] Murat, P. (2005). Logement et famille: des droits en question. Editura. Dalloz, Paris, p. 44.

aspect that will make it difficult for him to adapt to the new social status, especially after a marriage that lasted for decades. Although the legislator wanted to curb these controversies, by introducing the rules regarding the right of residence of the surviving spouse, the effect was not the desired one[28]. As such, we still find an acute need for protection of the home and the surviving spouse in the event of the death of one spouse. In other words, we remember that the death of the spouses will result in the termination of the matrimonial regime, so that the protection of the family home will no longer be ensured on its basis. Finally, the granting of an ephemeral right of residence, excluding the possibility of making it permanent, in the absence of descendants, as well as the refusal to expressly grant the surviving spouse some preference in assigning the home, presuppose a half-successful approach by the Romanian legislator. Obviously, we must not forget the fact that, in Romania, frequently the surviving spouse ends up living in his own house until his own death, being considered a natural thing by society. The children do not come to disturb his peace and on the contrary, they take care of the well-being of the surviving parent. But, if the family is torn apart, it is important that the Romanian legislator makes it possible to protect the husband, offering him some peace of mind and maintaining a standard of living either for a period or for the whole life.

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[28] Murat, P. (2010). Rapport français, Les successions – Journées internationales. Travaux de l'Association Henri Capitant, p. 10.

INHERITANCE TAX. NEGATIVE ASPECTS

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Abstract

This study aims to analyse the extent to which the tax legislator respects the constitutional guarantees of the right to inheritance by imposing a 1% inheritance tax if the partition of the estate is not completed within 2 years of the de cuius' death. We believe that we are in the presence of a phenomenon of erosion of the right to inheritance and implicitly of property, by „excessive" taxation of property, an aspect that cannot be ignored. In this context, this paper highlights the negative aspects of this type of taxation introduced by the tax legislator.

Keywords: *inheritance law; taxation; property law; tax regime, guarantee and protection.*

The establishment at constitutional level of the general obligation to contribute to public expenditure through the payment of taxes and duties has its roots in the Enlightenment conception, sublimated in France in the Déclaration des Droits de l'Homme et du Citoyen (trd. Declaration of the Rights of Man and of the Citizen of 1789) according to which man, as a rational being, accepts the need for constant compulsory levies by the public authorities in order to provide funds from which the necessary expenditure for the functioning of the State can be made[1]. Thus, Article 56 para. (1) of the Constitution[2] enshrines the obligation to contribute to public expenditure, establishing what the specialist doctrine calls the principle of contributivity[3], legitimately derived from the principle of the necessity of compulsory levies and based on the principle of legality of fiscal obligations enshrined in Article 139 of the Constitution[4].

One category of tax obligation established by the tax legislator and „assumed" by taxpayers is that of Article 111 para. (3) of the Tax Code[5], which provides for the obligation of the heirs of *de cuius*, who have not completed the inheritance procedure within 2 years from the date of death of the author, to pay a tax in the amount of 1% of the value of the estate[6]. This type of taxation is not a contemporary innovation; the inheritance tax was

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[1] Collet, M. (2017), Droit fiscal, Editeur Presses Universitaire de France, pp. 2-4.

[2] Romanian Constitution, art. 56:" (1) Citizens have the obligation to contribute, through taxes and duties, to public expenditure".

[3] Muraru, I.,Tănăsescu, S.M. (2022), Constituția României. Comentariu pe articole, Editura C.H. Beck, București, pp. 481-482.

[4] Romanian Constitution, Art. 139: „(1) Taxes, duties and any other revenues of the state budget and the state social security budget shall be established only by law. (2) Local taxes and duties shall be determined by local or county councils, within the limits and under the conditions of the law. (3) Sums representing contributions to the establishment of funds shall be used, under the conditions of the law, only in accordance with their purpose."

[5] Law no. 227/ 2015, published in M. Of. no. 688 from September 10, 2015.

[6] For more details, see Ducă, E. (2022), Codul fiscal comentat și adnotat, Editura Universul Juridic, București, p. 286 și următoarele.

introduced by the ruler Alexandru Ioan Cuza, replacing the old professional taxes[7]. However, at that time, the state was confused with the lord/ruler, the tax being a subjective decision-making formula at the lord/ruler's disposal[8]. As Dimitrie Cantemir said, „...the lord's will and natural right had the power of written law"[9]. In this context, the transfer of taxation from the hands of the ruler to those of the state led to the transformation of the whole phenomenon of taxation, giving it an objective nature and a modern mantle[10].

It has been said about the basis of inheritance that this institution is a necessary corollary of the right of ownership[11]. The institution of inheritance is intimately linked to that of private property because it emerged and was consolidated (explanation proposed by some authors) in the process of defending the means of production and products by the dominant minority, constituting the main legal instrument through which the perpetuation of slave exploitation was ensured[12]. Moreover, the close link between property and inheritance represents *de lege lata*, and a way of acquiring the right of ownership, in accordance with the provisions of articles 644-645 of the Civil Code[13].

If the right to property, even in its absolute form, is guaranteed since Carol's Constitution of 1866[14], the right to inheritance is only regulated in the Constitution of 1948 in art. 8, being joined to the right to property „Property and the right to inheritance shall be recognised and guaranteed by law", and finally, the 1991 Constitution grants them a regulation *ut singuli*, in Article 44[15], the right to private property being „guaranteed and protected", respectively in Article 46[16] which provides for the guarantee of the right to inheritance.

The present study is based on a series of pressing questions, such as: what is meant by this guarantee of the right of inheritance and why is the „protection", which is enshrined in the defence of property rights at the constitutional level, lacking? Is this guarantee of the right to inheritance maintained in the context of the taxation of the transfer of property rights

[7] Bistriceanu, G.D. (2010), Sistemul fiscal al României, Editura Universitaria, București, p. 15.

[8] For more details, see Iorga, N.(1926), Istoria Românilor, vol. I, Ed. Socec, București, p. 68.

[9] For more details, see Cernea, E., Molcuț, E. (2011), Istoria statului și dreptului românesc, Editura Universul Juridic, București, p. 94.

[10] *Ibidem*.

[11] Molcuț, E. (2011), Drept privat roman, Editura Universul Juridic, București, 2011, p. 15.

[12] Bob M.D. (2016), Manual elementar de drept privat roman Drept roman, Editura Universul Juridic, București, p. 148.

[13] Law no. 287/2009, published in M. Of. no. 505 from july 15, 2011.

[14] Romanian Constitution (1866), art. 19: „Property of any kind, as well as all claims on the State, are sacred and inviolable. No one may be dispossessed of property for a legally established cause of public utility and after a just and prior compensation. By cause of public utility is to be understood only communication and public sanitation, as well as land reclamation works. The existing laws concerning the alignment and widening of streets in the communes, as well as the banks of the waters flowing through or along them, remain in force. Special laws will regulate the procedure and manner of expropriation. The free and unimpeded use of navigable and floating rivers, roads and other communication routes is of public domain."

[15] Romanian Constitution, Art. 44:" (1) The right of ownership, as well as claims against the State, are guaranteed. The content and limits of these rights shall be established by law.(2) Private property shall be guaranteed and protected equally by law, regardless of the owner. Foreign citizens and stateless persons may acquire the right of private ownership of land only under the conditions resulting from Romania's accession to the European Union and from other international treaties to which Romania is a party, on the basis of reciprocity, under the conditions laid down by organic law, as well as by legal inheritance.(3) No one may be expropriated except for a cause of public utility, established by law, with just and prior compensation..."

[16] Constituția României, art. 44: „Dreptul la moștenire este garantat".

by *inter vivos* deeds? Are we witnessing a phenomenon of erosion of the right to property through this taxation of inheritances instituted by the tax legislator?...

In an attempt to outline some answers, it is necessary to make *a priori*, certain terminological clarifications, of course with reverberations for our study. The two concepts, *i.e.,* „guarantee" and „protection", cannot be equated, a conclusion reached by the doctrine after much debate[17] and to which we agree. Thus, the legal protection of a right is aimed at adopting the necessary measures to protect it against infringements by other subjects of law who are on an equal legal footing with the holder of the right, whereas the guarantee requires the regulation of the measures necessary to protect the holder of the right against infringements that may even emanate from the State or administrative units.

In our opinion, we believe that it is „sufficient" for the constituent to take care of the patrimony of a person transmitted by inheritance by guaranteeing this right, since there are effective remedies in civil law (what in Roman law was called *hereditas petitio*[18]) for infringements of this right by private individuals, even if this „protection" is regulated by an ordinary law.

We understand, therefore, that the guarantee of the right to inheritance by the constituent legislator, like the right to property, aims to protect the very existence of the right to inheritance, its being, against any attack that the State or public authorities may bring to it, including or especially, by the adoption of normative acts that remove it from the legal landscape, so that „private estates are levelled, if not destroyed in this way"[19]. However, by adopting the provisions of Article 111 para. (3) of the Tax Code[20] and establishing a form of inheritance tax, does the tax legislator not violate this „guarantee" of inheritance?

The fact that the tax is only levied if the inheritance has not been opened for two years after the death of the author leads to the qualification of this type of tax as a „penalty" in tax terms, due to the passivity of the heirs, which is not exactly fair. We believe that it is the task of the civil legislator to impose such penalties, such as that in Article 1.112 of the Civil Code with the marginal note „*Presumption of waiver"*[21]. Furthermore, we consider that taxation in any case ends up „parasitising" the object of the inheritance, the assets that form part of the estate, if we consider the hypothesis of tacit acceptance in art. 1.110 para. (1) letter a)[22], when the successor, by disposing of his rights, usually those relating to

[17] Muraru, I., Tănăsescu, E.S., *op. cit*., p. 429 și următoarele.

[18] Molcuț, E., *op. cit*. p. 160.

[19] Muraru, I., Tănăsescu, E.S.,*op. cit*., p. 468.

[20] Tax Code (Law 227/2015), art. 111: „(3) The tax referred to in para. (1), if the succession is debated and finalized within 2 years from the date of death of the author of the succession. If the inheritance procedure is not completed within the period referred to above, the heirs shall owe a tax of 1% calculated on the value of the estate".

[21] Romanian Civil Code, art. 1.112: „(1) It is presumed, until proven otherwise, that the successor has renounced the inheritance who, although aware of the opening of the inheritance and his capacity as successor, following his summons under the law, does not accept the inheritance within 1 year (sic!). The summons must contain, on pain of nullity, in addition to the elements provided for in the Code of Civil Procedure, a statement to the effect that if the successor does not exercise his right to accept the inheritance within the one-year period (sic!), he will be presumed to have renounced the inheritance. (2) The presumption of waiver applies only if the summons was served on the successor at least 30 days before the expiry of the period for the option to inherit."

[22] Romanian Civil Code, art. 1.110: (1) Acts of legal disposition concerning part or all of the rights over the inheritance shall entail tacit acceptance thereof. Such acts are: a) the alienation, free of charge or for consideration, by the successor of the rights over the inheritance..."

immovable property (since they are of interest), will owe a tax of 3% in accordance with Art. 111 para. (1) (a)[23].

Being aware that the estate includes immovable property – land or buildings – and other movable property, even in the form of motor vehicles, we believe that we are in the presence of double taxation. We are considering the hypothesis that the heirs did not share the inheritance for two years, thus creating an obligation to pay a tax debt of 1% of the value of those assets (inheritance tax), so that later, when they become the full owners of these assets of the estate, they are obliged to pay another tax to the local budgets for the same real estate and movable property and vehicles (even for the simple ownership). Furthermore, in the event that the latter accumulate principal and accessory debts towards the local budgets, this could even result in the execution of the inherited assets, which reinforces our belief that we are in the presence of a phenomenon of erosion of the right to inheritance and implicitly of property[24].

Instead of conclusions...

We do not deny that taxation is the prerogative of the modern state, being a conscious and voluntary instrument of the state to satisfy public needs, to ensure social equity through income redistribution and at the same time for social cohesion[25], but does not this common good that is intended to be achieved produce an adverse effect by affecting individual rights and interests?

We do not deny „consent to imposition" either, society and the state being conscious creations of man, resulting from the fact of a social contract, and therefore from a bilateral act, which implies that individuals, in exchange for a certain protection, give up part of their freedom. But we believe that this surrender must be limited and that governments must not act without limits. Thus, the individual must be able to oppose overly strong action by the state, to have a freedom of opposition[26].

This freedom-opposition may seem to be a matter related only to a moral and philosophical requirement, but it must still materialize in rights, a right to disobedience, and this is because this right to disobedience works and has worked whenever the lack of respect for the fundamental rights of the person was pushed to unbearable limits.

[23] Tax Code (Law 227/2015), art. 111: (1) On the transfer of the right of ownership and its dismemberments, by inter vivos legal acts on buildings of any kind and land related to them, as well as on land of any kind without buildings, taxpayers owe a tax which is calculated on the value of the transaction by applying the following rates: a) 3% for buildings of any kind and land related to them, as well as on land of any kind without buildings, held for a period of up to 3 years inclusive;..."

[24] Costea, I.M. (2020), Premisele bugetare ale autonomiei locale şi ale descentralizării, în Analele Ştiinţifice ale Universităţii „Alexandru Ioan Cuza" din Iaşi, TOMUL LXVI/I, ŞTIINŢE JURIDICE, disponibil online la http://pub.law.uaic.ro/ro/volume-publicate/2020/anale-uaic-tomul-lxvi-stiine-juridice-2020-nr.-i/drept-public/ioana-maria-costea, p. 328 și următoarele.

[25] For more details, see Niculeasa, M.I.(2011), Summa fiscalis, Editura Universul Juridic, București, p. 130.

[26] Dănișor, D.C. (2007), Drept instituțional și instituții politice, Editura C. H. Beck, București, p. 550 și următoarele.

THE RIGHT TO INHERIT A HEALTHY AND ECOLOGICALLY BALANCED ENVIRONMENT

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Abstract

The human right to use all that nature has given him during his existence, what previous generations have created in the course of evolution, seemed, until recently, a full right, unaffected by other limitations or conditionings than those of material, physical and geographical nature. However, the industrial evolution and the accelerated development of science and technology over the last century, against the backdrop of man's desire to benefit from more and more facilities and material abundance, have led to imbalances in the environment.

The disruption of the environment through unconscious human action first occurred in isolated ways, punctually, locally, and then, over time, increased in regional and even global, planetary manifestations. Thus, the desertification of large areas, prolonged drought, extreme weather phenomena manifested by increasingly high annual temperatures, devastating storms, large-scale fires which regularly destroy thousands of hectares of forest, floods caused by rivers bursting their banks and landslides, the destruction of human settlements, the infestation of waters with physical or chemical pathogens, and the disappearance of hundreds of species of terrestrial and marine plants and animals are realities which we can no longer ignore.

The major changes in the environment, caused by what is generically called pollution, oblige states and regional and international organisations, united by the need to manage the new realities, to act effectively by adopting policies and measures to protect, preserve and regenerate the environment to achieve the development of today's society while respecting the right of future generations to inherit a healthy and balanced environment from all points of view.

The only way to give future generations a real right to life is to protect nature now, otherwise, we will not only make our living conditions worse, but we will pass on to our descendants a toxic legacy, a ruin, which they will not be able to refuse or demand the liquidation of unwanted debts.

Keywords: *environment, circumambience, pollution, right to a healthy environment, environmental protection, the objective of major public interest, sustainable development.*

1. INTERNATIONAL ASSERTION OF THE FUNDAMENTAL RIGHT TO A HEALTHY ENVIRONMENT

As economic, social, intellectual and conscious development has proceeded, human society has felt the need to express, define, in legal and non-legal terms, and recognise the rights and freedoms of its members and their correlative obligations, established for the protection and observance of rights and freedoms using the state authority, which has been given the power of government for good coexistence.

Human rights have gradually crystallised following the nature of acceptable socio-human needs and aspirations, and have gradually undergone changes, updates and restrictions imposed for the maintenance of social order.

The expression of a right to a healthy environment has not been a primary human concern, being a recent right, which has been realised against a background of increasing environmental problems, as man understands that he cannot function and exist outside the environment, so that, to protect his species, it is necessary to protect the environment in which he lives.

Legal doctrine on human rights [1] has categorised rights according to the stage of their emergence, thus speaking of first-generation rights (civil and political rights – which emerged against the bourgeois revolutions in Europe), second-generation rights (social, economic and cultural rights – expressed after the adoption of the Universal Declaration of Human Rights) and third-generation rights (associated with the notions of „solidarity" and „shared responsibility").

This latest generation of rights includes the right to a healthy and ecologically balanced environment, together with „the right to peace, the right to development, the right to communication, the right to a common heritage". The rights of the third generation had as their „starting point the idea of the promotion of human personality, (...), they have become a necessity for cooperation between states and can only be achieved through the cooperation of states and not individually by each of them" [2]. These rights are fundamental, „inherent in human nature, and the deprivation of them makes man cease to live as a human being" [3].

The right to a healthy environment was first enshrined, albeit not *expressis verbis*, in the Declaration of the United Nations Conference on the Human Environment/Environment in Stockholm, in 1972. The Stockholm Declaration sets out 26 common principles, after setting out the issues that led the world's states to issue this joint declaration in the 7 points of the Preamble, based on the premise that „man is both creator and the moulder of his environment". The first principles are, in our view, an expression of the fundamental right to a healthy environment and, at the same time, a detailing of the content of this right, which cannot be enjoyed without the obligations incumbent on its beneficiaries – people:

"Principle 1. Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Principle 2. The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Principle 3. The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved.

Principle 4. Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development.

Principle 5. The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.

Principle 6. The discharge of toxic substances or other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the people of all countries against pollution should be supported.

Principle 7. States shall take all possible steps to prevent the pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea". [4].

The right to the environment was expressly set out in Article 24 of the African Charter on Human and Peoples' Rights, which was adopted on 27 June 1981 in Nairobi and entered into force on 21 October 1986, a document of regional importance. According to Article 24 of the Charter, „all peoples shall have the right to a general satisfactory environment favourable to their development".

Subsequently, the Declaration on Environment and Development (adopted in June 1992 in Rio de Janeiro) proclaims, as its first principle, that „human beings... have the right to a healthy and productive life in harmony with nature". This right is inextricably linked to the duty of the parties to protect the climate system in the interest of *present* and *future* generations, based on equity and following their common but differentiated responsibilities and capabilities, as set out in Article 3 of the United Nations Framework Convention on Climate Change, signed in Rio de Janeiro on 5 June 1992, ratified by the Romanian Parliament by Law no. 24/1994 [5].

Even though the relevant international documents and events of the last two decades, namely the Millennium Declaration (UN General Assembly Resolution 55/2 of 08.09.2000, New York) and the United Nations Conference on Sustainable Development (June 2012, Rio de Janeiro) did not expressly enshrine and define this human right to a healthy environment, its unquestionable existence and its content are evident throughout them, so that we can speak without hesitation about the existence and international enshrinement of a fundamental human right to a healthy and ecologically balanced environment in the third millennium.

2. NATIONAL REGULATION OF THE RIGHT TO A HEALTHY AND ECOLOGICALLY BALANCED ENVIRONMENT

The existence and regulation of the right to a healthy environment must be analysed simultaneously with the analysis of the notions of „environment", „ecological balance" and „environmental pollution", the very content of the right being conditioned by the content of the term „environment" and those adjacent to it. The terminology used to highlight the right to a healthy environment has changed over time and was not uniformly expressed worldwide either a few decades ago or today. Various expressions have been and are used to express the very concept of the environment.

In the context of global events on environmental issues, the need to define the key notion – the environment – naturally arose. Thus, the French-language Commission of the International Colloquium „Enseignement et Environnement", held in Aix en Provence in 1972, defined the environment as: „the totality, at a given time, of physical, chemical,

biological and social aspects likely to have a direct or indirect, immediate or delayed effect on living beings, man and human activities". At the same time, the English-language Commission at the same conference issued another definition, reflecting man's closer dependence: „the totality of all the beings and things that make up man's immediate and distant environment, that can determine or change his existence and that can influence all or part of his way of life" [6].

With the United Nations Conference in Stockholm in 1972, the term „human environment" was widely used, originally meaning „those terrestrial spaces in which the natural environment has been transformed by technological interventions into a structured network of buildings and developments inhabited over-intensively". After the Stockholm Conference, the terms „environment" and „human environment" were considered synonymous, with the latter being broadened in scope.

In the Romanian legal system, the terms „natural environment", „environment", „circumambience" and „geographical environment" have been used in recent decades. The first legislative regulation that expressly provided for the terms „environment", but also „ecological balance" and „pollution" was Law no. 9/1973 [7].

After stating in Article 1 that „the protection of the environment is a *matter of national interest*", this law defined in Article 3 the environment as „the totality of natural factors and those created by human activities which, in close interaction, influence the ecological balance, determine the living conditions for man and the development of society". Further, in the same Article 3, Law no. 9/1973 stated that the ecological balance was „the relatively stable relationship created over time between the various groups of plants, animals and micro-organisms and their interaction with the conditions of the environment in which they live".

In the view of the legislator at the time of the adoption of Law no. 9/1973, environmental pollution was recognized as „those actions that may cause the disruption of the ecological balance or damage the health, peace and comfort of people or cause national economic damage, by altering the quality of natural factors or those created by human activities".

Romania's 1991 Constitution [8] did not expressly enshrine a fundamental right to a healthy and ecologically balanced environment, but an implicit recognition of this right could be outlined through the provisions of Article 134(2), which established the state's obligations to ensure: „d) the exploitation of natural resources following the national interest; e) the restoration and protection of the environment, as well as the maintenance of ecological balance; f) the creation of the conditions necessary to increase the quality of life".

The old Law no. 9/1973 also produced effects in the post-communist period and even after the adoption of the new Constitution, being repealed and replaced by the Environmental Protection Law no. 137/1995 [9]. Both the original and the republished versions of this law primarily stated its subject matter – that of „regulating environmental protection, an objective of *major public interest* based on principles and strategic elements leading to the sustainable development of society". The notion of „environment" was defined in Annex no. I to the Law as „the whole set of conditions and natural elements of the Earth: air, water, soil, subsoil, characteristic aspects of the landscape, all atmospheric layers, all organic and inorganic matter, as well as living beings, interacting natural systems, comprising the elements listed above, including material and spiritual values, quality of life and conditions that can influence human well-being and health".

However, it is noteworthy that Article 5 expressly enshrines the recognition by the state of „the right of everyone to a healthy environment", establishing guarantees to this end. Thus, in addition to the express stipulation of the right to a healthy environment, the forms of manifestation and recognition of this right in law are also listed.

The doctrine has considered that „implicit constitutional recognition is not equivalent to the recognition of a fundamental right, which is always express, but of a subjective right, without access to the procedures laid down for fundamental rights or by international instruments relating to their protection" [10].

However, the fundamental right to a healthy environment was enshrined in the revised Constitution in 2003 [11]. Today, this right is guaranteed by Article 35 of the Constitution, entitled „the right to a healthy environment". This article states that:

(1) The State recognises the right of every person to a healthy and ecologically balanced environment.

(2) The State shall provide the legislative framework for the exercise of this right.

(3) Individuals and legal entities must protect and improve the environment.

The previous content of Article 134(2)(d), (e) and (f) of the 1991 Constitution on the obligations of the state in the field of environmental protection is fully preserved in Article 135.

Constitutional regulation of the right to a healthy environment has been viewed with scepticism or even criticism by the doctrine. It was considered that it would have been desirable to create the economic conditions for the recognition of this right in advance, considering that the legislator was in a hurry, the amendment being made against the background of the need to bring national regulations into line with community regulations given Romania's accession to the European Union and not taking into account possible situations arising from possible disputes that could not be resolved by the national courts, which would then lead to the triggering of procedures provided for by international instruments to protect a fundamental right that is recognised and not respected.

The need to fulfil the commitments undertaken by our country in the process of European integration led to the adoption, as a matter of urgency, of Government Emergency Ordinance no. 195/2005 on environmental protection [12], based on which subsequent legislation in the field of environmental protection could be adopted, as stated in the very preamble of this regulatory document. The current environmental framework law in force is also Government Emergency Ordinance no. 195/2005. Compared to the previous law, there are no notable changes or paradigm shifts. Article 1 retains the wording of the subject matter of the ordinance, as laid down in Law no. 137/1995, and only the reference to „society" concerning „sustainable development" has been removed. The term „environment" is defined in Article 1(2) itself, almost identically to the previous regulation, but with a clarification to the effect that „some" material and spiritual values are concerned, without expressly stating which ones.

In addition to the constitutional enshrinement of the right to the environment and the framework regulation provided by Government Emergency Ordinance no. 195/2002, the right to a healthy and ecologically balanced environment is expressed through special regulations for different sectors of activity and covering multiple areas of environmental protection. By way of example, we mention: Law no. 46/2008 (R) on the Forestry Code [13]; Law no. 18/1991 (R) on the land fund [14]; Law no. 82/1993 on the establishment of the „Danube Delta" Biosphere Reserve [15]; Law no. 407/2006 on hunting and the

protection of the game fund [16]; Water Law no. 107/1996[17]; Law no. 111/1996 on the safe conduct of nuclear activities [18]; Law no. 104/2011 on ambient air quality [19]; Law no. 211/2011 on the waste regime [20]; Law no. 278/2013 on industrial emissions [21].

To these laws must be added the regulations given by multiple Ordinances and Government Decisions, as well as international treaties which, through ratification by the Romanian Parliament, become part of domestic law, as provided for in Article 11(1) of the Constitution. We indicate the following, by way of example, in this respect:

– Convention on Long-Range Transboundary Air Pollution (Geneva, 1979) – to which Romania acceded by Law no. 8/1991;

– United Nations Convention on the Law of the Sea (Montego Bay, 1980) – ratified by Law no. 110/1996;

– Vienna Convention for the Protection of the Ozone Layer (Vienna, 1985) – to which Romania acceded by Law no. 84/1993;

– Convention on the Protection of the Black Sea against Pollution (Bucharest, 1992) – ratified by Law no. 98/1992;

– Convention on Biological Diversity (Rio de Janeiro, 1992) – ratified by Law no. 58/1994;

– United Nations Framework Convention on Climate Change (Rio de Janeiro, 1992) – ratified by Law no. 24/1994;

– Convention on Nuclear Safety (Vienna, 1994) – ratified by Law no. 43/1995.

Even if the existence of the right to a healthy environment cannot be contested, without its recognition and regulation at the level of international and constitutional, national law, this right would risk remaining a mere theory easily ignored and violated. As the major powers of the planet themselves have initiated and signed numerous conventions with the general aim of protecting the environment and thus recognising and respecting, directly or implicitly, the human right to a healthy and ecologically balanced environment, the universal dimension of this right has become unquestionable.

3. LEGAL NATURE AND CONTENT OF THE RIGHT TO A HEALTHY AND ECOLOGICALLY BALANCED ENVIRONMENT

From the point of view of its legal nature, the doctrine has considered that the right to a healthy and ecologically balanced environment is, „like any fundamental right, a subjective right which, together with the other constitutionally and legally regulated rights and obligations, forms part of the legal status of the citizen" [22]. In our opinion, the right to a healthy environment in contemporary times is inextricably linked to the right to life and the right to health, and we, therefore, support its nature as a fundamental and natural human right. The human being cannot exist outside of a healthy and ecologically balanced environment, and the need for legal recognition of this indissoluble human right does not cancel out its value as a natural right but gives it the necessary tools to defend it in the fierce struggle for resources that has become increasingly intense in recent decades.

On the content of this right, it has been argued that „there are two dimensions: the human (individual) dimension, which involves ensuring the integrity, well-being and material and spiritual prosperity of the human being in a healthy and ecologically balanced environment that does not endanger his or her life, health and development, and the natural (collective) dimension, which involves protecting the environment, ensuring a natural

environment that favours the quality of life in general, not only of the human being" [23], considered individually.

Concerning the individual dimension of the right, it has been concluded that „it implies the right of every individual to: a) prevention of pollution; b) cessation of the activity which has the effect of causing harmful pollution; c) compensation for the damage suffered as a result of such pollution". The collective dimension implies „the obligation of peoples and states to cooperate in preventing and combating pollution and in protecting the environment at a regional and international level, just as they must take appropriate measures at a national level" [24].

As we pointed out at the beginning of the analysis of point 2 above, the existence and exercise of the fundamental right to a healthy and ecologically balanced environment are conditioned by the content of the concept to which the right refers, namely that of „environment". In this regard, it should be stressed that the constitutional right to a healthy and ecologically balanced environment has been enshrined in the framework regulation in this field, namely the Government Emergency Ordinance no. 195/2005 on environmental protection, as approved, with amendments and additions, by Law no. 265/2006 [25].

Under Article 5 of Government Emergency Ordinance no. 195/2005, „the state recognizes the right of every person to a healthy and ecologically balanced environment, guaranteeing to this end:

(a) access to environmental information, subject to the conditions of confidentiality laid down by the legislation in force;

b) the right of association in organisations for the protection of the environment;

c) the right to be consulted in the decision-making process concerning the development of environmental policy and legislation, the issuing of regulatory documents in the field, and the drawing up of plans and programmes;

d) the right to apply, directly or through environmental organisations, to administrative and/or judicial authorities, as appropriate, in environmental matters, whether or not damage has occurred;

e) the right to compensation for damage suffered".

It is noteworthy that the content of Article 6 of the same regulatory document shows the *public interest* nature of this right, environmental protection being „the obligation and responsibility of central and local public administration authorities, as well as of all natural and legal persons. The central and local public administration authorities provide in their budgets for funds for the fulfilment of obligations resulting from the implementation of community environmental legislation and for environmental protection programmes and collaborate with the central and territorial public authorities for the protection of the environment with a view to their implementation".

4. LEGAL LIABILITY IN THE FIELD OF ENVIRONMENTAL PROTECTION

Since, as Sophocles said more than 2500 years ago, „Laws will never be respected in a state where there is no fear of punishment", the effective way to achieve the protection of human rights and freedoms was and is the law, particularly through its sanctions.

The legal rules governing rights and obligations at the individual or collective level are addressed to legal subjects who are, at a given moment, in a legal relationship based on environmental law. To give the necessary effect to the legal provisions governing these legal relationships, the relevant legal rules contain clear provisions which make those who fail to

comply with their legal obligations in bad faith, negligently or even without fault legally liable.

Sanctioning provisions can be found both in the framework regulation given by Government Emergency Ordinance no. 195/2005 and in special legislation on the legal protection of certain components of the natural or man-made environment. On the other hand, environmental damage may occur not only as a result of a breach of a legal text but also through the simple performance of human activity which, over time, generates environmental degradation, without this being a breach of any legal rule. In this context, it has been stated in the doctrine that liability is objective and independent of fault [26].

The main forms of legal liability that can be incurred in the field of legal protection of the environment are criminal liability, contraventional liability and civil liability.

Given the nature of the obligations breached, civil liability in this matter is a tort, and its objective nature is enshrined in law, in the provisions of Article 95 of Government Emergency Ordinance no. 195/2005, according to which:

„(1) Liability for environmental damage is objective, independent of fault. In the case of multiple perpetrators, liability is joint and several. (2) Exceptionally, liability may also be subjective for damage caused to protected species and natural habitats, under specific regulations".

Contraventional liability is regulated by Articles 96 and 97 of Government Emergency Ordinance no. 195/2005, which provides for financial penalties (fines) for a wide variety of anti-social acts, the amount of which can range, for the most serious contraventions, from 7.500 lei to 15.000 lei for individuals and from 50.000 lei to 100.000 lei for legal entities.

Criminal liability is provided for in the same framework regulation in Articles 98 and 99, the lighter offences being punishable by imprisonment from 3 months to one year or a fine (for example: burning of stubble, reeds, bushes and grassy vegetation in protected areas and on land subject to ecological restoration), with the specification that these acts must have been such as to endanger human, animal or plant life or health (paragraph 1 of the Article 98 of Government Emergency Ordinance no. 195/2005). The most serious offences provided for in paragraph 5 of the art. 98 of Government Emergency Ordinance no. 195/2005 are punishable by imprisonment from 2 to 7 years and „consist of:

a) continuation of the activity that caused the pollution after the cessation of this activity has been ordered;

b) failure to take measures for the total elimination of dangerous substances and preparations which have become waste;

c) refusal to take action in the event of accidental pollution of waters and coastal areas;

d) refusal to control the introduction and removal from the country of dangerous substances and preparations or the introduction into the country of cultures of micro-organisms, plants and live animals of wild flora and fauna, without the consent issued by the central public authority for environmental protection".

According to Article 99 of the same regulatory document, „the detection and investigation of offences shall be carried out ex officio by the criminal prosecution authorities, under their legal powers, and the discovery and establishment of the commission of any of the offences referred to in Article 98 by the commissioners of the National Environmental Guard, the National Commission for the Control of Nuclear Activities, gendarmes and authorised personnel of the Ministry of National Defence, in the exercise of

their duties provided for by law, shall immediately be brought to the attention of the competent prosecution authority under the criminal procedure law".

5. CONCLUSIONS

Beyond the obligations of states, or rather simultaneously with the implementation of national, regional and global environmental policies that ultimately address people, each of us must act at every level of our lives in compliance with the principle of respect for nature, and for the environment.

We are at a time when we can no longer afford to act destructively and recklessly on biotic and abiotic factors in the environment. Paraphrasing Stephen the Great, in the vision of Barbu Ștefănescu Delavrancea („Sunset"), the Planet did not belong to our ancestors, was not and is not ours, but belongs to the descendants of our descendants in the ages to come. As such, we must continue our existence with respect for nature, for the environment and respect the laws that have been enacted and updated more and more frequently given the real evolution/involution of environmental factors, to fulfil our obligation to pass on to future generations a planet at least as good as the one we inherited from our predecessors, to guarantee our descendants an effective right to a healthy environment, capable of satisfying material, social, cultural and moral needs, in short – to guarantee a right to a healthy life in a healthy and ecologically balanced environment. Since life cannot exist outside a suitable environment, man affects or even negates life itself on this planet by altering the environment.

We must not allow ourselves to be deceived by the „often discreet nature of changes in environmental quality" [26], nor must we allow ignorance to continue to govern our present actions because the future is being written now. We must act continuously to protect the environment before it is too late, remembering the words of UN Secretary-General Bam Ki-Moon in the September 2015 deliberative process of the 193 member states, concluded with UN Resolution A/RES/70/1 of 25 September 2015:... „There can be no Plan B because there is no Planet B" [27].

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Section D

WHAT LEGACY DO WE LEAVE TO FUTURE GENERATIONS? REFLECTIONS ON THE CONSTITUTION AS A COMMITMENT BETWEEN GENERATIONS

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Abstract

In the context of recurrent debates regarding the revision of the Constitution, the study deals with a dimension of the fundamental law that is less discussed at the national level, namely that of commitment between generations. In this light, an invitation is issued to reflect on the values that constitute the hard core of the Constitution, with their meaning and the legal consequences attached to this meaning, as well as on the catalog of fundamental rights contained in the Constitution, with special reference to the protection of the natural environment and the cultural-identity elements, vital for the development of future generations. The conclusion of the study is that the revision of the Constitution involves an extended dialogue at the level of Romanian society, a dialogue that should be placed in the paradigm of the question: what legacy do we leave to future generations?

Keywords: *revision of the Constitution, intergenerational solidarity, constitutional identity, right to a healthy environment, access to culture*

I. Introduction

The anniversary in 2023 of the centenary of unified Romania [1] and the broad view of analysis of the evolution of Romanian constitutionalism that it opens up give us the opportunity to continue the study of the issue that we approached at the celebration of three decades of the Romanian Constitution [2], focused this time on a dimension of the fundamental law less addressed in national debates, namely that of commitment between generations.

Perhaps this dimension is less debated since it is obvious that, by their very nature, Constitutions are documents that address several generations [3] so that it seems understood that on the shoulders of the framer rests not only the responsibility of the present, but also of the future, of the generations to come. However, we consider that an awareness of the deep meaning of this responsibility is needed, so that any discussion regarding the amendment of the fundamental law is evaluated in the light of the Constitution as a partnership between generations, and is built around the concept of intergenerational solidarity. In this way, we can more easily discern between momentary passions and really necessary changes, likely to strengthen the country's constitutional foundation.

In this respect, in this study we will launch an invitation to reflect on the values that constitute the hard core of the Constitution with their meaning and the legal consequences attached to this meaning, as well as the catalog of fundamental rights set forth in the Constitution, with special reference to the protection of the natural environment and of cultural-identity elements, vital for the development of future generations.

2. The hard core of the Constitution. The constitutional identity of Romania.

Usually, the revision of the Constitution is a complex act, which involves several stages and the involvement, as a rule, of several institutional actors [4]. Some constitutions provide a more flexible revision procedure, others, such as Romania's, a more rigid one. And in this regard, the right balance is necessary between the need for stability and the need for change, between avoiding abuse and freezing in time.

In this regard, the Romanian Constitution regulates, in detail, the revision procedure, in Articles 150-152 of the Constitution. In view of the present study, the limits of the revision, expressly regulated by Article 152, are relevant, more specifically the material limits provided by paragraph (1), namely those values considered intangible by the constituent power (none of the provisions with regard to „*the national character, independent, unitary and indivisible of the state, the republican form of government, the integrity of the territory, the independence of justice, political pluralism and the official language*" shall not be subject to revision) and those enshrined in paragraph (2), according to which no revision shall be made if it results in „*the suppression of citizens' fundamental rights and freedoms of or the safeguards thereof*". [5]

These values establish, according to the case-law of the CCR, the core of **Romania's constitutional identity**. Thus, in Decision No 390/2021 [6], the CCR noted the following: „*81. A special regulation in the Romanian Constitution refers to the relationship between national law and European law, which is established in Article 148 (2) and (4), according to which: „(2) Following accession, the provisions of the founding treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.. [...] (4) The Parliaments, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession instrument and the provisions of paragraph (2) are put into effect". Thus, the accession clause to the European Union includes in the subsidiary a clause of compliance with EU law, according to which all national bodies are in principle obliged to implement and enforce EU law This also applies to the Constitutional Court, which ensures, under Article 148 of the Constitution, the priority of the application of European law. However, this priority of application should not be perceived in the sense of removing or disregarding the national constitutional identity, enshrined in Article 11 (3) in conjunction with Article 152 of the Fundamental Law, as a guarantee of a core identity of the Romanian Constitution and should not be relativized in the process of European integration. By virtue of this constitutional identity, the Constitutional Court is empowered to ensure the supremacy of the Fundamental Law within Romania (see mutatis mutandis Judgment of 30 June 2009, 2 BvE 2/08 ş.a., pronounced by the Federal Constitutional Court of the Federal Republic of Germany). „*

With reference to the latter decision, in the specialized literature [7] it was expressed the idea that it would include the „broadest and most relevant" use of the concept of constitutional identity, set forth in the previous decisions, but without an exact specification of the scope of this concept. Moreover, even this last decision should not be understood as exhaustively defining the concept of constitutional identity, as long as the CCR refers to a „core" of identity. However, the jurisprudential developments of the Romanian court are in the sense of assigning the constitutional identity to a role of „protective shield" of the supremacy of the Constitution.[8]

In view of the topic of the present study, beyond the importance of ensuring compliance with the limits of revision as a guarantee of the preservation of constitutional identity for future generations, a topic for reflection concerns the way in which these limits and values shall be interpreted in the case-law of the Constitutional Court. Over time, the Court referred in the decisions on the initiatives for the revision of the Constitution to the obligations established by Articles 20 and 148 of the Constitution on the component of fundamental rights, which aligns the hard core of the Constitution with the European standards for the protection of these rights. At the same time, the incorporation of the fundamental principles in the assessment of compliance with the limits of the revision matches the standards in the matter with those of the EU, knowing that one of these principles, the rule of law, underlies the monitoring mechanism at the EU level.

In this regard, we recall the evolution of the case-law of the CJEU in the sense of affirming the principle of the identity of the European legal order: „*The values provided for in Article 2 of the TEU have been identified and are shared by the Member States. They define the very identity of the Union as a common legal order. Thus, the Union must be able, within the limits of its powers provided by the treaties, to safeguard the mentioned values*." [9]

Thus, in the context of the recurring and sometimes tense debates on the primacy versus priority of EU law, which have been visibly reflected in the practice of certain constitutional courts and the CJEU, we believe that a more careful approach to the identity topic is necessary from the same view of the Constitution as document for several generations. What do we want for future generations, the perpetuation of tensions often without substance or a harmony in a European space without conflicts? All EU states are united around the same core identity, consisting of the values set forth in the EU Treaties, to which they have all acceded. Therefore, do „identity" struggles really refer to an identity or do they have other origins? What are these and how can they be reconciled? As I have shown in another paper [10] a focus/limitation of the discussions on the relationships between the constitutional courts in the EU diverts the attention from the real issue of the constitutional framework of the EU as a whole, which requires political and legislative regulation, perhaps even starting with full acceptance of the idea of EU *constitutionalism*.

3. Guaranteeing fundamental rights in the light of intergenerational commitment

Fundamental rights are, as we have shown, a plastic core of constitutional identity, in the sense of upward adjustment towards higher standards of protection. However, at the same time, fundamental rights are the preferred field of analysis when we make a projection over several generations. Necessarily, the guarantee of fundamental rights appears as transgressing the needs of the present, in order to accomplish and protect the well-being of present and future generations, in relation to the natural and social environment (see also the concept of „*sustainable development*" in Article 37 of the Charter of Fundamental Rights of EU).

The Constitution of Romania includes a wide catalog of fundamental rights, but from the viewpoint analyzed here, we believe that it represents the most significant general framework of „connection" through Articles 20 and 148 of the Constitution to the international sources of protection of fundamental rights, likely to compensate for the rigidity of the Constitution and to allow its continuous and comprehensive adaptation to the highest standards of protection of fundamental rights, without necessarily requiring a

revision of the Constitution in this regard. Likewise, we note the introduction, during the revision of the 2003 Constitution, of new rights that express intergenerational solidarity, sense in which we have in mind especially the access to culture and the right to a healthy environment.

I have analyzed on other occasions the interpretation and application of Articles 20 and 148 of the Constitution, including within the constitutional review in Romania; Article 20 of the Constitution underlies the constitutional review by referring to the European treaties on human rights to which Romania is a party. By carrying out this review, the Constitutional Court does not carry out a direct „comparison" between the national law and the treaty/international convention, but an analysis mediated by the provisions of the Constitution interpreted in the light of the treaty. Pursuant to Article 148 of the Constitution, the rules of European Union law can constitute a reference instrument for the constitutional review, with the distinctions provided for by the constitutional text, within the limits and at the discretion of the Constitutional Court of Romania. This constitutional framework and its application create a flexible framework for the necessary continuous adaptation of the guarantees of protection of fundamental rights. However, the introduction of new rights requires a revision of the Constitution, so I will focus in this study on the latest generation rights introduced in the Romanian Constitution in 2003 and the concerns of introducing new rights in other initiatives for revision.

Thus, regulating the access to culture, the Romanian framer understood to guarantee in Article 33 that „*freedom to develop one's spirituality and to have access to the values of national and universal culture shall not be limited*" cannot be restricted (paragraph 2) and establishes the State's obligation to ensure „*the preservation of spiritual identity, the support of national culture, the fostering of arts, the protection and conservation of cultural legacy, the development of contemporary creativity and the promotion of Romania's cultural and artistic values throughout the world*". (paragraph 3) It is obviously an orientation „towards the future", of perspective, bringing together the obligation to preserve the spiritual identity and its development in conjunction with the general developments of the society. We note the terminology used by the framer, with the express mention of the concept of „cultural heritage".

As for the right to a healthy environment (Article 35), it represents „*the right of every person to a healthy, well preserved and ecologically balanced environment*" (paragraph 1), with the State's obligation to provide „*the legislative framework for the exercise of such right*" (paragraph 2), but also the duty of natural and legal persons „*to protect and improve the environment*". These guarantees allowed the Constitutional Court to rule in various cases, with express reference in certain cases to future generations.

Thus, for example, examining the exception of unconstitutionality of the provisions of Government Ordinance No 96/1998 regarding the regulation of the forestry regime and the administration of the national forest fund, which prohibit the reduction of the area of forests from the national forest fund and the exceptions provided by law, the CCR held, *inter alia*, that „*the exclusive attribute of the State is the strategy of economic, social and ecology of the forests, regardless of the owner of the property right over them. In such a circumstance, Romanian forests are managed and handled in a unitary system, aiming at the continuous valorization, for the benefit of current and future generations, of their ecological and socio-*

economic functions. As a guarantee of this declared purpose, the provisions of Article 24 (1) expressly stipulate the prohibition of reducing the area of forests from the national forest fund."[11]

Likewise, ruling on the criticisms formulated by the Advocate of the People regarding the regulations on the location of the physical infrastructure elements necessary to support the electronic communications networks on the green spaces located in the inner city, the CCR found their unconstitutionality. As grounds for the solution pronounced, the CCR held, *inter alia*, that „*the provisions of Article 35 of the Fundamental Law establish the positive obligation of the State to ensure a legislative framework for exercising the right of every person to a healthy and ecologically balanced environment. In the specialized literature, it was noted that the phrase 'healthy environment' refers to a certain quality of the environment, and the preservation of a healthy environment means, in reality, the preservation and improvement of the living conditions, the maintenance of the ecological balance, of the ecosystems of which the human being is an integral part. By analogy with this right, public recognition of the right to information on the state of the environment and access to justice in case of violation of the right to a healthy environment, as well as the rights of future generations, was imposed, based on the idea of preserving the natural heritage for the present and future. A healthy environment ensures the framework for the harmonious development of individuals and the possibility of the full exercise of other rights, such as the right to health protection. The State shall ensure the restoration and protection of the environment, as well as the maintenance of the ecological balance, this obligation being also emphasized in the content of Article 135 (2) e) of the Constitution regarding the economy, as a sign of the special importance that the framer has placed on preserving the quality of the environment. Therefore, even when the legislator adopts legislative measures in favor of certain economic interests, he is obliged to legislate taking into account the prevalence of environmental protection and maintaining the ecological balance*."[12]

In another decision [13], the CCR held, *inter alia*, that „*the recognition of the fundamental nature of the right of every person to a healthy and ecologically balanced environment was a natural decision of the framer stemmed from the year 2003, which took account of the European trends and the accession requirements to the European Union (EU), where environmental protection is one of the priorities of the fundamental policies of the Union, the Member States and the civil society. Correlatively to this fundamental right, the constitutional legislator regulated, in Article 35 (2), the State's obligation to ensure the legislative framework for carrying out this right, and in Article 135 (2) d) and e), the State's obligations to ensure the exploitation of natural resources, in accordance with the national interest, on the one hand, and the restoration and protection of the environment, as well as the maintenance of the ecological balance, on the other hand. Therefore, the State's constitutional obligations aim at the maintenance of biodiversity, inclusively, as an integral part of the ecological balance and the sustainable exploitation of natural resources, in accordance with the national interest in ensuring a healthy natural environment*."

Global concerns and developments in the field of environmental protection, such as the debates on the rights of nature and animals or the criminalization of the acts of ecocide, require a reevaluation of the current constitutional framework in the matter. Thus, a more precise description of the concrete obligations of the State for the effective legal protection of the ecological balance/restoration of environmental conditions is necessary, taking

account of future generations as well. It is noteworthy that these concerns were also present in the previous initiatives for revision, for example in 2014, when the legislative proposal established the following: „*In Article 35, after paragraph (2), two new paragraphs shall be inserted, paragraphs (2^1) and (3^1), which shall read as follows: '(2^1) The State shall ensure the protection, sustainable use and restoration of the natural heritage. (3^1) Ill-treatment of animals, defined according to the law, is prohibited'*." This initiative was not completed, but the ideas expressed there can be a source of inspiration for future initiatives.

In addition to these rights that already have a constitutional enshrinement, but must bear readjustments, the sharp evolution of artificial intelligence and digitization require reflection on the imposed limits on the issue of what was called digital constitutionalism. Thus, new rights such as the right to digital connectivity, IT security, the digital space without violence, education in the digital space, combating disinformation are foreshadowed. All this should find a form of expression in a future revision of the Constitution. However, such an enshrinement requires a broad and careful analysis, with the involvement of all interested factors and taking into account both the „lights" and the „shadows" of the development of artificial intelligence and digitalization, the needs of today and tomorrow's society. I call attention to social movements and initiatives in situations where the lack of effective guarantees can determine what the ECHR expressed a long time ago, namely the destruction of democracy under the pretext of its defense. For example, excessive surveillance or the lack of an alternative for making payments have led to widespread reactions at the level of society, the invalidation of certain acts, such as national laws and the so-called Big Brother Directive [19] or, recently, outside the EU, even the initiation of a referendum for introducing cash payments into the Constitution [20].

IV. Conclusions

In recent years, the subject of the revision of the Constitution has repeatedly appeared on the political agenda and in public debates, and the choice of our topic reveals these concerns.

This topic was also expressed at the 30th anniversary since the establishment of the Constitutional Court, as well as at the recent events that marked the centenary of the Constitution of unified Romania held by the Constitutional Court but also by various other public actors. Along with the anniversary messages, summing-ups, congratulations, the idea of constitutional reform was consistently promoted.

In a recent volume [14] that marked 30 years since the adoption of the Constitution, opinions expressed by university professors, current and former constitutional judges, representatives of other State authorities, regarding the revision were collected. The careful reading of the doctrinal and practical material thus established can lead the reader to make a veritable „list" of possible causes for amending the Fundamental Law, which can then be debated to see if they are likely to justify a revision.

Thus, in one work, emphasizing the virtue of the stability of the current Constitution of Romania, the virtues of wisdom and moderation were also emphasized when the change of the fundamental establishment is under discussion. Therefore, it was shown that „the imperfections in the text of the fundamental law and the dysfunctions that manifested themselves in the functioning of the authorities that exercise the three powers in the State can be corrected and have been corrected in part by the set of constitutional customs and by the case-law of the constitutional court"; „the adoption of a new Constitution or the frequent

revision of the existing one would jeopardize the results of the three-decade effort to create the premises of a national constitutional tradition." [15]

To the same effect, the option was expressed for revisions of the Constitution understood as „fine adjustments in the way the State operates, based on the previous experiences and taking account of the behavior of State institutions". [16]

In a different light, it was expressed the idea [17] that the amendments to the Constitution (and, we believe, implicitly the causes of the amendments) can be approached from at least three perspectives: technical (the removal from the text of the Constitution of certain terms that have lost their constitutional meaning from 30 years ago); of political option (in terms of reconfiguring certain constitutional institutions and procedures); innovative (in terms of introducing new elements determined by social and even scientific evolutions).

Irrespective of opinions, as also emphasized in the specialized literature [18], the revision of the Constitution is a peak moment in the life of a country, and the choice for amendment must reflect the will of the community and the legitimacy that a deliberative process confers. This involves an extended dialogue at the level of the Romanian society, a dialogue that, in our opinion, should be structured in the paradigm of the question in the title of this article: *what legacy do we leave to future generations*?

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DESIGNATION OF THE LAW APPLICABLE TO THE INDIVIDUAL EMPLOYMENT CONTRACT ACCORDING TO REGULATION (EC) NO. 593/2008 ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (ROME I)

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Abstract

Like any contract, an employment contract can have connections with different legal systems that give rise to a conflict of laws. The connection with a foreign legal system is given by a series of elements of foreignness, such as: the usual residence or citizenship of the employee, the place where he carries out his work, the seat or the usual residence of the employing enterprise or even simply; the presence of contractual clauses that refer to a foreign law. The criteria that allow the determination of the law applicable to the employment contract with international elements are currently indicated by Article 8 of EC Regulation no. 593/2008 (Rome I), special rule derogating from the general rules of the same regulation, intended to resolve conflicts of laws for contracts, in general.

The adoption of the Rome I Regulation is part of the process of attracting the conventional sources of private international law in the Euro-unitary legal system, which became possible by assigning the European Union the power to adopt measures aimed at guaranteeing „the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction" (Article 81 TFEU).

For contracts concluded after 17.12.2009 – the date of its entry into force –, the Rome I Regulation replaces the Rome Convention of 1980 in all member states, with the exception of Denmark, which did not participate in its adoption. The regulation ensures uniformity in the application of private international law rules in the various member states, rules whose uniform interpretation and application by national courts is ensured by the Court of Justice of the European Union, by means of the decisions handed down on the basis of preliminary questions.

Keywords: *individual employment contract with a cross-border element, applicable law, autonomous interpretation, connecting criteria, provisions from which no derogation can be made by convention, the principle of the more favorable law, place where the employee usually carries out his activity, temporary employee, place where the employing unit is located, headquarters, habitual residence, scope of application.*

1. Determining of applicable law

The law applicable to the individual employment contract is determined according to the special provisions of Article 8 of the Rome I Regulation. The regulation *gives priority to the freedom of will of the parties* in designating the applicable law, but at the same time, it aims to ensure adequate protection to the employee, considered as the weaker part of the contractual relationship.

The conflict solutions offered by Article 8 of the Regulation apply exclusively to individual employment contracts, not to collective employment contracts, which are not

included in the scope of the Rome I Regulation. The exclusion is justified by the difficulty of qualifying the obligations arising from collective labor contracts as obligations within the meaning of Article 1 of the Regulation.

The individual employment contract is a contract between an employee and an employer that obliges the employee to provide the promised service, while the employer owes the agreed remuneration. Therefore, the application of Article 8 depends to a large extent on the interpretation of the term „employee", which must be carried out *autonomously*, taking into account both the purpose of the regulation and the provisions of European Union law.

The jurisprudence of the CJEU brought a series of clarifications regarding the notion of employee in the sense of European Union law, on the occasion of the pronouncement of some decisions in the matter of the freedom of movement of workers provided for in Article 45 TFEU. According to these decisions, the notion of „worker" must be defined according to objective criteria that characterize the employment relationship, taking into account the rights and obligations of the persons involved. The essential characteristic of the employment relationship is the circumstance that a person performs, during a certain period, services for another person and under his direction, in return for which he receives remuneration [1].

The legal employment relationship presupposes the existence of a subordination relationship that involves the issuing of instructions and a control exercised by the employer over the employee. In terms of the employee's subordinate relationship with the employer, in the Court's Judgment of 10 September 2015, delivered in case C-47/14, Holterman Ferho Exploitatie BV and others v. Friedrich Leopold Freiherr Spies von Büllesheim [2], the Court held the following: „*[...] contracts of employment have certain particularities: they create a lasting bond which brings the worker to some extent within the organisational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements.*

That interpretation is borne out by paragraph 41 of the Report by Mr Jenard and Mr Möller on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Lugano on 16 September 1988 (OJ 1990 C 189, p. 57), according to which, in relation to the independent concept of a 'contract of employment', it may be considered that it presupposes a relationship of subordination of the employee to the employer.

More specifically, with regard to the relationship of subordination, the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties.

It is for the referring court to examine the extent to which [...], in his capacity as a shareholder in [...], was able to influence the will of that company's administrative body of which he was the manager. In that case, it will be necessary to establish who had authority to issue him with instructions and to monitor their implementation. If it were to turn out that [...]s ability to influence that body was not negligible, it would be appropriate to conclude that there was no relationship of subordination for the purposes of the Court's case-law on the definition of a worker.".

According to the doctrine, for most member states as well as for European Union law, in the context of Article 45 TFEU, the criterion of the employer's right to issue instructions

is not of exclusive but major importance. This criterion must be checked with regard to the notion of „employee" in the application of Article 8 of the regulation. Therefore, an employee within the meaning of this provision is a person who, in assuming a contractual obligation, performs work for another person, the employer, who in turn has the right to issue instructions [3].

In accordance with recital I of Article 8 (I) of the Rome I Regulation, the *individual employment contract is governed by the law chosen by the parties* in accordance with Article 3 of the regulation. This provision allows the parties to freely choose the law applicable to their contract. According to Article 3 (1), the choice must be express or must result, with a reasonable degree of certainty, from the contractual clauses or from the circumstances of the case. Under the aspect of freedom of will of the parties, in the jurisprudence of the CJEU it was held that the parties of an individual employment contract have the possibility to choose the law applicable to the contract even when the contractual provisions are supplemented by the national labor law, based on a national provision, provided that the national provision in question does not oblige the parties to choose the national law as the law applicable to the contract. It was also specified that the parties to an individual employment contract are considered, in principle, free to choose the law applicable to this contract, even if the contractual clause regarding this choice is drawn up by the employer, the worker merely accepting it [4].

Choice of applicable law may be *express* or *tacit*. In order to determine whether it is a tacit choice of the applicable law, all the circumstances of the case must be taken into account. An implied choice may result from an agreement of the parties to choose the competent court of a particular state [5], from reference to the legislative provisions of a state or from reference to a collective labor agreement, etc. If an individual employment contract expressly or implicitly refers to a collective employment contract that contains an express or even tacit choice of the applicable law, it can be inferred that the employer and the individual employee wanted the law applicable to their employment contract to be the same as the law governing the collective agreement [6].

The principle of autonomy of will of the parties, however, has certain *limitations*. Thus, according to the second sentence of Article 8 (1) of the Regulation, the designation by the parties of the applicable law cannot deprive the employee of the protection granted to him under the provisions from which he cannot derogate by convention under the law which, in the absence of an election, would have been applicable under paragraphs (2), (3) and (4) of that article. Therefore, the mandatory provisions of the law that would be applicable through the objective location of the employment contract, have the role of ensuring a minimum legal protection to which the employee is entitled regardless of the law designated as applicable [7]. This aspect is also emphasized in consideration 35 of the preamble of the regulation where it is stated, in principle, that employees should not be deprived of the protection conferred to them by rules that cannot be derogated from by convention or from rules that can be derogated only for their benefit.

The limitation of the principle of autonomy of will in the matter of individual employment contracts constitutes an application of *the principle of the more favorable law*, which allows the removal of those provisions of the law chosen by the parties that deprive the employee of the protection granted by the law that would apply based on the criteria of objective location of the contract[8]. To this end, in a first step, the national court must first identify the law that would have been applicable in the absence of an election and establish,

according to it, the rules from which it cannot be derogated by convention and, in a second step, to compare the level of protection enjoyed by the worker under these rules with that provided by the law chosen by the parties. If the level provided by the said rules provides better protection, it is necessary to apply these rules [9].

The provisions that cannot be derogated from by convention include, for example: the mandatory national provisions on protection against unfair dismissals, the rules on the minimum wage[10], rules on the protection of employees in case of business transfer, mandatory provisions on working hours and holidays, rules protecting certain categories of people, such as young people, pregnant women, people with a degree of severe disability. Since the text of the law does not distinguish, the notion of protective provisions granted to the employee includes not only those that directly concern the individual employment contract, but also other provisions; such as those in collective labor contracts, to the extent that they apply to the parties in the individual labor contract, or the labor protection or hygiene rules that belong to the public law of the state of the objective location [11].

The expression „*provisions that cannot be derogated from by convention"* should not, however, be confused with the rules of immediate application in Article 9 of the regulation, defined by the CJEU as those rules „the observance of which is regarded as essential by a given country to safeguard its public interests, to such an extent that these rules are applicable to any situations falling within the scope of application, regardless of the law applicable to the contract under the same regulation" [12].

To the extent that the parties have not chosen a legal system to apply to the individual employment contract, the determination of the applicable law is carried out on the basis of objective criteria established by the provisions of Article 8 (2), (3) and (4) of the regulation. These rules, which establish the objective link between the individual employment contract and a certain legal system, have a double function. On the one hand, they have the role of indicating the applicable law in the absence of choice, but also that of establishing the legal system whose imperative provisions, in favor of the employee, are applicable despite the choice of the applicable law, in accordance with Article 8 (1) of Regulation.

Article 8 (2) and (3) of the Regulation contains *two objective connection criteria* in a successive competition, which implies their application „in conjunction". Thus, according to the first link criterion, the individual employment contract is subject to the law of the state in which the employee usually carries out his activity in the execution of the contract (*lex loci laboris*), even if he temporarily performs his duties in another country. According to the CJEU, the objective of Article 8 is to ensure adequate protection for the employee by guaranteeing the applicability of the law of the state in which he carries out his professional activities, since in this state the employee exercises his economic and social function and, also in this state the professional and political environment influences his work [13]. Therefore, the main connecting criterion in determining the law applicable to the employment contract is the place where the employee usually carries out his activity. This criterion must be taken into account as a priority, and its application excludes the consideration of the subsidiary criterion of the place where the headquarters of the employing unit is located[14].

The notion of „*place where he usually carries out his activity*" is to be understood as the place where the employee currently performs the essential part of his duties and tasks, in the execution of the individual employment contract. In qualifying this connection criterion, the guidelines provided by the CJEU jurisprudence are useful in determining the laws

applicable to the employment contract, including when the work activities are carried out on the territory of several states. Thus, the CJEU considered that the place of execution of the contractual obligation is the place where or from which the employee carries out most of his obligations towards the employer [15] or the place where he established his effective center of professional activities [16] or, in the absence of an office, the place where the worker carries out most of his work [17].

According to the CJEU, when the employee carries out his activity on the territory of several Member States, the criterion of the country where the employee „normally carries out his work" must be interpreted in a broader sense. For example, in the international transport sector, in order to determine the law applicable to the employment contract, it must take into account all the elements that characterize the employee's activity such as the state where the place from which the employee carries out his transport assignments, receives instructions regarding his assignments and organizes his work is located the place where the work tools are located, the place where the transport is mainly carried out, the place where the goods are unloaded, as well as the place where the employee returns after his assignments[18].

Therefore, the main connecting criterion used by Article 8 (2) of the Rome I Regulation, namely „the place from where the employee habitually carries out his work in performance of the contract" must be understood independently of the qualification it would receive under national law. The interpretation must be carried out in a broader sense, among the relevant factors in determining this concept can be listed: the place where the employee actually carries out his activity, the nature of the work performed and the factors that characterize the employee's activity, the country where the employee carries out his activities or the vast majority of them, the place from where the employee receives instructions regarding his activities and organizes his work, the place where the employee's work tools are located, the place where he must report before performing his duties or return after performing them, etc.

The temporary employment of the employee in another country is not considered to be a change of the usual place of work. Therefore, the law determined according to the criteria of Article 8 (2) remains applicable even when the employee temporarily works abroad[19]. The notion of „temporary employee" has a legal qualification in point 36 of the preamble of the regulation, which states that the work performed in another country is considered temporary „if it is expected that the employee will resume his work in the country of origin after the performance of his duties abroad". Therefore, whenever the contractual parties expect the employee posted to another country to return to work in the country of origin after the performance of his duties abroad, his status will be that of a temporary employee and the applicable law will continue to be the law of the state in which he usually carries out his activity. The fact that a new employment contract is concluded with the original employer or with an employer that is part of the same group of companies as the original employer does not imply a change in the status of an employee temporarily performing work in another country.

Conversely, the recruitment of an employee to carry out his work exclusively abroad does not give him the quality of „temporarily employed in another country" within the meaning of Article 8 (2) sentence II, given that there was no prior place of business in the usual way. In this case, the law applicable to the individual employment contract will be the

law of the place where the employee normally carries out his activity, unless there is a closer connection with another country, in accordance with Article 8 (4) of the regulation.

The regulation does not provide for a certain period of time until which the employment is considered temporary, for which the distinction between „temporary" and „permanent" is made according to the agreement of the contracting parties and the objective circumstances of the concrete situation. It can be considered that the employment is not only temporary when the employee has taken up a permanent job in another state or there has been a definitive change in his job by relocating the activity to another state, a fact that also leads to the amendment of the law applicable to the individual employment contract.

In the Romanian legal system, the notion of temporary employee, in the sense of the Rome I Regulation, includes the two ways of unilateral modification by the employer of the individual employment contract, namely delegation and secondment (Article 42 of the Labor Code). Delegation represents the temporary exercise, at the disposal of the employer, by the employee, of some works or tasks corresponding to the duties of the service outside his workplace (Article 43 of the Labor Code) and secondment is the act ordering the temporary change of the workplace, at the disposal of the employer, to another employer, in order to perform some work in his interest (Article 42 of the Labor Code). According to the conflict solution provided by Article 8 (2) of the Rome I Regulation, neither the delegation nor the secondment of the employee abroad, can bring changes in terms of the applicable law, the individual employment contract remaining subject to the law of the state in whose territory the employee usually carries out his activity and not to the law of the place where the delegation or secondment takes place.

The designation of the *lex loci laboris* as the law applicable to the individual employment contract does not remove the rules of immediate application in the state in which the employee temporarily works,aspect also emphasized in recital 34 of the preamble of the regulation, where it is mentioned that the rule on individual employment contracts should not affect the application of the immediately applicable rules of the country where a worker is posted in accordance with Directive 96/71/EC of the Parliament European and Council of 16 December 1996 on the posting of workers in the provision of services [20].

According to Article 8 (3) of the Rome I Regulation, in the situation where the employee does not normally carry out his activity in a certain country, the law applicable to the individual employment contract is *the law of the country where the employing unit is located*. By choosing this fixed connection criterion, it was aimed that the repeated changes of the workplace from one state to another would not have the effect of changing the law governing the employment contract.

The provisions of Article 8 (3) of the Rome I Regulation apply when the employee habitually performs his work in several countries, so that the link criterion from Article 8 (2) of the Regulation [21] is not verified. For example, they can be mentioned here:

a) labor contracts in the field of international transport if the means of transport cannot be assigned to a specific state only. Conversely, for the contracts of employees who normally carry out their work on board a ship or aircraft under the flag of a state, the connection criterion provided for by Article 8 (2) of the Regulation remains applicable;

b) employment contracts concluded with sales agents or other professional categories, which, by the nature of the work they perform, move to different states to represent the interests of those who employed them, as long as a center of their activity has not been established. The application of the criterion from Article 8 (3) of the regulation is justified

by the fact that it is not possible to establish a place where the employee carries out his activity „in the usual way, for which, the only element that significantly ensures the connection of the employee with the law of a state, is that of the place where the employing unit is located[22];

c) employment contracts concluded with employees who work in a territory that does not belong to any state [23], such as oil or other offshore platforms.

The notion of the place where the employing unit is located *(place of business)* must be understood as referring to the headquarters through which the employee was hired, and not the place where he actually works. Possession of legal personality is not a requirement that the employer's headquarters must fulfill, but it must exist as an organizational unit for a certain period of time [24]. In this regard, the Court of Justice of the European Union emphasized that the notion of headquarters does not only refer to the employing unit that has legal personality, since the term „headquarters" refers to any stable structure of an enterprise. Consequently, not only subsidiaries and branches, but also other units, such as the offices of an enterprise, could constitute headquarters, even if they do not have legal personality. However, it could not be considered that a purely temporary presence in a state, with a view to employing employees, of an agent of an enterprise originating from another state constitutes a seat that creates a link between the contract in question and that state Conversely, if this agent moves to a country where the employer has a permanent representation of his company, it could be admitted that this representation constitutes a „headquarters" of the employing unit. In principle, it is necessary that the headquarters considered for the application of the connection criterion belong to the company that employed the employee, more precisely, to be an integral part of its structure[25].

The head office of an enterprise other than the one that formally appears as an employer and with which it is connected can be qualified as „headquarters if objective elements allow for establishing the existence of a real situation different from the one resulting from the contract clauses and this even if the right to give instructions and provisions has not been formally transferred to this other company[26].

It should be emphasized that the regulation does not use the criterion of the habitual residence of the employing unit as a criterion for linking the conflicting rule in Article 8 (3) so that, it is not possible to put the sign of equality between the place where the employing unit is located and the place where the headquarters of the central administration is located, a link criterion that is used to determine the usual residence of commercial companies and other bodies, according to Article 19 (1) of the Regulation[27].

Article 8 (4) establishes a derogatory, subsidiary rule, according to which, if it is found from the overall circumstances of the case that the said contract has a closer connection with another country than the one mentioned in paragraph (2) or (3), the law of that other country applies. Thus, even when the usual place of business and, in the absence thereof, the place where the employing unit is located can be determined, the law of another country may be applied to an individual employment contract, if it is found from the circumstances of the case that said contract has a closer connection with another country. The purpose of the regulation is to ensure adequate protection for the employee, but this interpretation must not necessarily lead to the application, in all cases, of the law more favorable to the employee.

In applying the connection criterion of the more favorable law, in a first step the court must determine the applicable law based on the specific connection criteria, which appear in paragraph (2) and (3), respectively, of Article 8, which respond to the general requirement of

predictability of the law and, therefore, of legal security in contractual relations [28]. In the second stage, it is to be established whether the contract has a closer connection with another state than that which results from the application of the criteria specified in Article 8 (2), respectively (3). For this purpose, it is necessary to take into account all the elements that characterize the employment relationship and to assess which is or are the most significant. Among the significant connecting elements, the country where the employee pays his taxes and duties related to the income obtained from his activity must be taken into account in particular, as well as the country where he is affiliated to the social security system and the various pension, health and disability insurance regimes. On the other hand, all the circumstances of the case must be taken into account, such as, among others, the elements related to the establishment of the salary or other working conditions[29].

The derogatory rule from Article 8 (4) becomes applicable, only if most of the connecting factors lead to a single legal system, different from the one indicated by the general connecting criteria of the regulation.

2. The field of law applicable to the individual employment contract

In determining the scope of the individual employment contract law, Article 12 of the Rome I Regulation should be taken into account. In the light of its provisions, the law applicable to the contract regulates in particular: the interpretation of the individual employment contract, the execution of the obligations arising from the contract, the rights and obligations derived from the individual employment contract; the type of work and the methods of performing it, the amount and methods of payment of the salary, the duration of the contract, the obligations of fidelity and non-competition, the execution of the employment contract, the suspension and modification of the contract; the material liability of the employee as well as the patrimonial liability of the employer towards the employee, the damages caused to the employee as a result of non-compliance with the obligations regarding labor protection, the termination of the employment contract, the different ways of extinguishing the obligations, the prescription and forfeiture of rights, the effects of the nullity of the employment contract, etc.

In relation to the nullity of the individual employment contract, it must be pointed out that, in the plan of salary rights, until the moment the nullity of the contract is established, the employee must receive the salary. In private international law, the nature of this obligation may give rise to a conflict of qualifications. The obligation could be qualified as non-contractual, based on unjust enrichment, or on the contrary, a contractual obligation that has its source in the individual employment contract itself, even if it is declared void. The qualification of the obligation as non-contractual, attracts the conflicting solution from Article 10 (2) of the Rome II Regulation, according to which, if the non-contractual obligation arising from unjust enrichment refers to a pre-existing relationship between the parties, relationship closely related to said unjust enrichment, the obligation is regulated by the law governing the legal relationship in question. At the same time, the classification of the obligation as contractual leads to the application of the conflicting rules provided by Article 8 of the Rome I Regulation. Analyzing the two regulations by comparison, it is observed, however, that regardless of the legal qualification given to the obligation – contractual or non-contractual – in the end the applicable law is the same, respectively the law of the individual employment contract [30].

The manner of execution of the individual employment contract, as well as the measures that can be taken in case of defective execution, are subject to the law of the state in which the execution takes place [Article 12 (2)].

The scope of the regulation does not include the ability to conclude an individual employment contract, which is subject to the personal law of the contractors, respectively the employee and the employing company.

Also, in establishing that a party did not consent to the conclusion of the employment contract, a party may invoke the law of the country in which it has its habitual residence, if it appears from those circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law referred to in paragraph [Article 10 (2)].

3. Rules of immediate application

In accordance with Article 9 of the regulation, the application of certain mandatory provisions is required, regardless of the law determined to be applicable. It is about those provisions aimed at protecting the public interests of the forum state [Article 9 (1)] or of the country in which the contractual obligation is to be fulfilled [Article 9 (3)]. In relation to the territorial norms, of immediate application, the Court of Justice of the European Union ruled in a case in which the contracting parties chose the law of a member state of the European Union; other than the member state of the forum, that the application of the law of a member state that offers the minimum protection provided by a European directive, can be removed by the court seised in favor of *the lex fori* for a reason based on the imperative character in the legal order of the latter member state, only if the court finds on the basis of a detailed analysis that, in the framework of the transposition, the legislator of the forum state considered it to be essential, in the legal order in question, to grant a more extensive protection than that provided for by the said directive, taking into account in this respect the nature and the objective of such mandatory provisions [31].

A mandatory provision in the law of a member state can only be taken into account if there is a „sufficient connection" of the employment relationship with the forum state [32].

In the sense of Article 9 of the regulation, such imperative regulations may concern: the salary system, in particular, the minimum wage guaranteed for the national economy, rest leave, length of service, work discipline, collective labor conflicts, unions and employers, some aspects regarding professional training and development, safety and health at work, non-contractual social insurance, administrative conditions regarding work, entry and residence permits, work permits, etc. [33].

Conclusion

In conclusion, we can state that the dynamics of the internationalization of labor relations leads us to constantly ask ourselves the question of the law applicable to the individual employment contract. In this context, Article 8 of the Rome I Regulation enshrines special conflict rules for this contract. As I have shown, the employment contract is governed in principle by the law chosen by the parties. This choice cannot, however, result in the worker being deprived of the protection afforded to him by the provisions from which he cannot be derogated by agreement under the objectively applicable law. In the absence of the choice, the contract is governed by the law of the country in which or, failing that, from which the worker, in the performance of the contract, usually performs his work. If the work is carried out in more than one country, the contract is governed by the law of

the country where the establishment employing the worker is located. If the contract has closer links with another country, the law of that other country applies. However, the freedom granted to the parties is not absolute. An important place is assigned to the mandatory provisions of labor law. Identifying and articulating these mandatory provisions are delicate matters. The intervention of the Court of Justice of the European Union is useful and necessary in this context. Despite the existence of some observations regarding the combination and interpretation of the provisions in question, the solution of the Regulation seems today the most appropriate to regulate the individual employment contract.

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[8] Under this aspect, in the Court Judgement of 15 July 2021 in the related cases C-152/20 and C-218/20, the CJEU ruled „*Article 8(1) must be interpreted as meaning that, where the law governing the individual employment contract has been chosen by the parties to this contract, and it is different from that applicable under paragraph (2), (3) or (4) of this article, it is necessary to exclude the application of the latter, with the exception of „provisions from which it is not possible to derogate by convention" by virtue of it, within the meaning of Article 8(1) of the said Regulation; under which, in principle, the norms relating to the minimum wage can apply*".

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[13] CJEU, Court Judgement of 15 March 2011, pronounced in the case C-29/10, Heiko Koelzsch v. État du Marele Ducat al Luxemburgului, EU:C:2011:151, pct. 42 (on Article 6 of the Rome Convention)

[14] CJEU, Decision of the Court din 15 December 2011, pronounced in the case C-384/10, Jan Voogsgeerd v. Navimer SA, EU:C:2011:842, pct. 32

[15] CJEU, Decision of the Court of 13 July 1993, pronounced in the case C– 125/92 Mulox IBC Ltd v. Hendrick Geels, EU:C:1993:306, pct. 21-23. In Case Mullox, the Court ruled with reference to the provisions of the 1968 Brussels Convention, which did not include specific provisions relating to employment contracts. The Convention was updated in 1989 to introduce special provisions and the Rutten (C-383/95) and Weber (C-37/00) cases were resolved by reference to these provisions. The provisions of the Convention were the basis of the Brussels I Regulation and the Brussels I Regulation (reform), but the meaning given to the concepts is also valid for the interpretation of Article 8 of the Rome I Regulation; Court decision of December 15, 2011 pronounced in the case C-384/10, Jan Voogsgeerd v. Navimer SA, EU:C:2011:842, In the decision, the Court makes the following statement: „*the criterion of the country in which the employee usually carries out his work must be understood as referring to the place where or from which the employee actually carries out his professional activities and, in the absence of a central point of business, at the place where he carries out most of his activities*" (pct. 37).

[16] CJEU, Decision of 9 January 1997, pronounced in the case C-383/95, Petrus Wilhelmus Rutten v. Cross Medical Ltd., EU:C:1997:7, pct. 23.

[17] CJEU, Decision of 27 February 2002 pronounced in the case C-37/00, Herbert Weber v. Universal Ogden Services Ltd., EU:C:2002:122, pct.42.

[18] CJEU, Decision of 15 March 2011,pronounced in the case C-29/10, Heiko Koelzsch v. État du Marele Ducat al Luxemburgului, EU:C:2011:151, pct. 47-50, The Court's decision of 15 December 2011 pronounced in the case C-384/10, Jan Voogsgeerd v. Navimer SA, EU:C:2011:842, pct. 38.

[19] Sub acest aspect, in Case C-29/10, Koelzsch, in section 46, CJEU shows that: „[...] *According to Article 8 of that regulation, to the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract is to be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. That law remains applicable also where the employee carries out duties temporarily in another State. Furthermore, as stated in recital 23 in the preamble to that regulation, the interpretation of that provision must be prompted by the principles of favor laboratoris in that the weaker parties to contracts must be protected 'by conflict-of-law rules that are more favourable*".

[20] Published in JO L 18, 21.1.1997, pp. 1-6. The directive was transposed into Romanian law by Law no. 16/2017 regarding the secondment of employees within the framework of the provision of transnational services, published in the Official Gazette, Part I no. 196 of 21 March 2017.

[21] CJEU, Court Decision of 15 December 2011 pronounced in the case C-384/10, Jan Voogsgeerd v. Navimer SA, pct. 35; Decision of 15 March 2011, în Case C-29/10, Heiko Koelzsch v. État du Marele Ducat al Luxemburgului, pct. 45

[22] See and A.D. Sitaru, op. cit., p. 686

[23] P. Calliess, M. Renner, op, cit., pct. 34, p. 161

[24] Petruța Elena Ipsas, The joint tenancy over property, The Proceedings on the International Conference of Law. European studies and international relations, ed. 9, Ed. Universul Juridic 2021, p. 296;

[25] CJEU, Court Decision of 15 December 2011 in Case C-384/10, Jan Voogsgeerd v. Navimer SA, pct. 53 – 58

[26] *Idem*, pct. 65

[27] D.A. Sitaru, op. cit, p. 686

[28] CJEU, Court Decision of 12 September 2013 pronounced in the case C-64/12, Anton Schlecker v. Melitta Josefa Boedeker, EU:C:2013:551, pct. 35 and Decision of data de 6 October 2009, pronounced in the case C-133/08, Intercontainer Interfrigo SC (ICF) v. Balkenende Oosthuizen BV and MIC Operations BV, EU:C:2009:617, pct. 62

[29] CJEU, Case C-64/12, pct. 39-41.

[30] See D.A Sitaru, op. cit., p. 688

[31] CJEU, Court Decision of 17 October 2013, pronounced in the case C-184/12, United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare, EU:C:2013:663, pct. 52

[32] CJEU, Court Decision of 9 November 2000, pronounced in the case C-381/98, Ingmar GB Ltd v. Eaton Leonard Technologies Inc., EU:C:2000:605, pct. 25

[33] See D.A Sitaru, op. cit., p. 689

THE EVOLUTION OF TESTAMENTARY INHERITANCE IN ROMAN LAW

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Abstract

Power *is the word that best characterizes the Roman people. From whatever perspective the analysis is carried out, whether historical or legal, the construction of all Roman social relations, from family to patrimonial or administrative ones, gravitates around the concept of power. The manifestation of power was materialized in all spheres, including in the average Roman's relationship with death. Thus, just as in opposition to a possible fall from grace, death took the form of a voluntary act, so the will mortis causa of the owner of an estate took the form of a testament. As a result, the testamentary inheritance was also seen as a testimony of the power exercised by the pater familias even after death, since by testament he could dispose of his patrimony according to his own will, having the freedom to favor by institution one or more heirs, to the detriment of others, who would have had the capacity of successors according to the legal inheritance.*

Since they did not shy away from meeting an honorable death, the Romans paid special attention to perfecting the institution of the testament so that it would synchronize with the pulsations of social reality.

This article aims to reveal precisely the seriousness with which the Romans treated the institution of testamentary inheritance.

Keywords: *will, testamentary inheritance, testamentary vocation.*

1 Introduction

„Because life and death are one, just as the river and the ocean are" [1].

Facing death with nobility, without whining and without any ounce of fear is an attribute of the ancient Stoics, and the Romans, without excelling (like the Greeks) in the art of philosophy, were by nature a Stoic nation. „*The Stoic wants to live well, and to live well also means to die well; the stoic lives well if he displays noble character, and death is the ultimate test of character. For the Stoics, memento mori – contemplation of the imminence of death was an essential thought exercise"* [2].

Power is the word that best characterizes the Roman people. From whatever perspective the analysis is carried out, whether historical or legal, the construction of all Roman social relations, from family to patrimonial or administrative ones, gravitates around the concept of power. The manifestation of power was materialized in all spheres, including in the average Roman's relationship with death. Thus, just as in opposition to a possible fall from grace, death took the form of a voluntary act, so the will mortis causa of the owner of an estate took the form of a testament. As a result, the testamentary inheritance was also seen as a testimony of the power exercised by the *pater familias* even after death, since by testament he could dispose of his patrimony according to his own will, having the freedom

to favor by institution one or more heirs, to the detriment of others, who would have had the capacity of successors according to the legal inheritance[3].

The will is the solemn legal document by which a person (the testator) establishes one or more heirs to execute his last volition[4]. In the Roman jurisprudence, a singular theorization of the will was not established, the jurisconsults assigning it various definitions. Although they were expressed differently, all the definitions converge towards emphasizing the elements that compose it. Therefore, fixing the notion of a will is closely related to the knowledge of the three defining features: it is a solemn act, it is an act of last will/volition (particularities by which the will is delimited from the legal inheritance) and perhaps most importantly, the object of the Roman will is the establishment of heirs.

Since they did not shy away from meeting an honorable death, it is natural that the Romans paid special attention to perfecting the institution of the testament.

2 The testamentary inheritance in Roman law

2.1. About the establishment of heirs

As it was said before, the establishment of heirs was of vital importance in the validity of the will, since this was not an act by which to simply transfer a patrimony from one person to another, but an act of entrustment of the last will. Therefore, by establishment, the Romans understood the express appointment in the will of the person to whom they entrust the fate of their family (in the sense of the patrimony as a whole).

At the same time, the object of the will was not limited to the transmission of the patrimony because through this solemn act the execution (by those instituted/established) of several legal operations could be imposed such as: disenfranchisement of slaves, the establishment of a guardian for those *alieni iuris* incapable of fact at the time of death, or the disinheritance of persons who would have had, according to the law, a succession vocation [5].

As the clause establishing the heirs constituted the foundation of the will, it is easy to understand that its absence or the defective stipulation, made without respecting the conditions of form and substance, attracted the nullity of the act. As in the case of the nullity of the will, the legal succession was opened, the attention that the testator had to pay to the establishment clauses was a crucial one.

The formal conditions for the institution/establishment of heirs were summed up in the statement of the clause in imperative and solemn form, positioned at the head of the will[6].

The substancial conditions, instead, were the expression of two principles: *semel heres sempel heres* (once an heir, always an heir) and *nemo pro parte testatus pro parte intestatus decedere potesi* (no one can die separately with a will and partly without a will) [4]. As a result of the first principle, under the penalty of nullity, it was forbidden to institute/establish heirs for a certain term. The effect of the second principle contradicts the rules of positive Romanian law [according to art. 955 para. (2) Civil Code: „a part of the deceased's patrimony can be transmitted by testamentary inheritance, and the other part by legal inheritance"], the Roman institution of heirs having to be universal. Therefore, the Romans did not allow the simultaneous opening of the testamentary succession with the legal succession (for the part of the patrimony not specified in the will).

The importance that the Romans gave to the will of the testator finds its expression including in the creation of the legal institution of substitution of heirs. The consolidation of

the will of the testator (as master of the family/property) before the will of the law led to the possibility of the express replacement of the established heirs, in the event that they either repudiated the inheritance (exclusive capacity of external heirs), or were unable to accept it. For this reason, the clauses of substitution of heirs were known as second degree institutions, or conditional institutions/establishments. These clauses were: *substitutio vulgaris, substitutio pupillaris* and *substitutio quasi pupillaris* [4].

While the common clause of substitution (*vulgaris*) did not provide the causes of the impossibility of the instituted/estblished heir to accept the inheritance, the *pupillaris* substitution and the *quasi-pupillaris* were special clauses, which established the substitution of the heir in certain situations (the death of the heir occurring before the age of puberty, respectively the accidental incapacities – the heir lacking discernment) [7].

2.2. About testamentary capacity

The Romans called testamentary capacity ***testamenti factio***. The ability to leave a will as well as the ability to be a witness when drawing up another person's will were called *testamenti factio activa*, and the ability to acquire through a will – *testamenti factio pasiva.*

As only the Roman citizens who were *sui iuris* and heads of the family had full legal capacity (*caput*), the de facto and de jure incompetents did not have *testamenti factio activa*[4]. In the first category *–de facto–* of incompetents are included the children/offsprings, women and the alienated, and legally incapacitated were the sons of the family (persons alieni iuris, who had neither patrimony to dispose of, nor the capacity to conclude legal acts in their own name), slaves (who for the most part of Roman history had the legal status of property) and the pilgrims (who were recognized as property owners only in the second part of Roman history)[7].

It is already well known that the specificity of Roman law is precisely the dynamism with which legal norms have adapted to social reality. As such, it cannot come as a surprise that the status of individuals has experienced multiple changes over time, and from this have emerged some exceptions to the general regulation of active testamentary capacity.

The social condition of women experienced the most notable progress during the empire period, when gradually, the emperors recognized their discernment, finally removing them from the category of de facto incapables. A first step in this direction was the promulgation of the Julia and Papia Poppaea laws by the emperor Octavian Augustus. Through these laws, Augustus imposed a series of norms designed to encourage family and birth. Of course, the real reasons were related to the state's need to have a steady and satisfying flow of taxpayers and armed force. However, the effects were the most diverse. Regarding the matter of inheritance, we mention the conditioning of the acquisition of the inheritance on the fulfillment, by the heirs, of the obligation to be married and have children (condition addressed to male heirs over 25 years old and women over 20 years old) and the creation of the concept of *jus trium liberorum*. This right directly concerns women's ability to leave a will. Specifically, women who had a minimum of three or four children (depending on how ingenuous or disenslaved they had been) were released from guardianship and implicitly acquired *testamenti factio activa*.

Furthermore, in the age of Emperor Hadrian, women were recognized *testamenti factio activa* insofar as they had the express authorization of their guardian (*auctoritatis tutoris*) [6]. Then, after the year 410, ius *liberorum* became generalized and thus the conception of

the natural incapacity of the woman disappears and with it the prohibition to have *testamenti factio activa*.

The sons that were soldiers were also exempted from the rule of legal incapacity. They had a partial *testamenti factio activa* on the money earned in the army with the title of *peculium castrense*. To the extent that they were agonizing over their salary, they could freely dispose of it by will. The Roman state recognized them this partial ownership as a sign of gratitude for the supreme sacrifice made in its protection.

Similarly, public slaves benefited from a certain testamenti factio activa. Considering that as servants of the state they received a peculium, they had the right to bequeath half of the agonized amount during their lifetime (from the peculium).

the status of the pilgrims also evolved with the development of the state and the Roman law. With the help of the reforms of the praetors, in recognition of their contribution to the development of the exchange economy, peregrine property was consecrated and as a result the peregrines who had *ius comercii* acquired testamenti factio activa[6].

Finally, a testamenti factio activa is recognized even to alienated persons, during intervals of lucidity[5].

Testamenti factio pasiva was also a prerogative of those capable de facto and de jure. In addition to the de facto and de jure incapacitated, there are also uncertain persons who lack the right to inherit. By uncertain persons, the Romans meant moral persons (gods), as well as posthumous persons (persons who did not exist at the time of the inheritance).

But even from this general rule, exceptions were allowed. Thus, certain gods could be appointed heirs (the inheritance went to the temples dedicated to those gods and implicitly to the priests who took care of them), as well as some posthumous ones. Regarding the latter, they benefited from the recognition of the postumus legitimus succession vocation (children born after the death of the testator), *postumi aquiliani* (grandchildren born before the death of the testator, but whose father died before the grandfather), *postumi Vellaeani primi* (children born in the interval of time included between the time of drawing up the will and the time of the testator's death), as well as *postumi Vellaeani secundi* (nephews born in the same interval but whose father died before the testator) [8].

Particular situations are also noted regarding the testamenti factio pasiva of women and *alieni iuris* persons. Women were recognized with a restricted passive testamentary capacity, in the sense that their right to inherit was limited, by the provisions of the Voconia law, to the value threshold of 100,000 aces. More precisely, by the Voconia law of 169 BC. Hr. it was established that women were prohibited from being instituted as heirs by persons who had a fortune greater than 100,000 aces [6]. Even alieni iuris persons could be established as heirs, with the amendment that the inherited goods were not really acquired by them, but entered the patrimony of their family heads.

A completely exceptional situation in this matter concerns slaves, who acquire a successional vocation despite all the factors shaping their social condition. Thus, (under the condition of a disenslavement clause prior to the institution) the testator could establish his slave (or even another's slave) as sole heir. Of course, ignoring the legal property condition of slaves emerged from the need to protect the Roman citizen heirs from the insolvency of the testator[6].

2.3. The evolution of will forms

The civil law of the ancient era enshrines three forms of the will: calatis comitiis, in procinctu and per aes et libram [9].

Specific to the will calatis comitiis was the fact that the testator solemnly declared his will before the comitia curiata. The simple expression of the will in front of the assembly of the people was not sufficient for the valid establishment of the will. This will gained legal force only through ratification.

So, the solemn declaration was subject to a vote, like a law. The people summoned to the committees did not fulfill the role of a collective witness to the will of the testator, but an active role, the will becoming valid only through approval. If the people's assembly concluded that the testator's grievances did not produce effects likely to disrupt social arrangements, they validated the will by approving it. Otherwise, however, they rejected it and thereby declared it null and void. The Law of the XII Tables, however, enshrines the freedom of individuals to leave wills, which translates into overturning the active role of the assembly of the people in drawing up the will, the presentation of the testator before the assembly of the people becoming a mere formality and the curia committee thus becoming only a witness of the will of the testator [8].

Since the Comitia Curiata was the assembly of the patricians and convened only twice a year, in classical law the testament calatis comitiis falls into disuse.

The next creation in this matter is the testament *in procinctu*, that is, the testament made by the soldiers before going to battle, through a declaration of establishment of heirs made before the army. Although it is (unlike calatis comitiis) also accessible to plebeians, the testament in procinctu can be made exclusively by active soldiers (between the ages of 17 and 46) [10].

The most advanced form of testament specific to the ancient era was the testament *per aes et libram*. The first form of will accessible to all Roman citizens involved the merging of two distinct legal operations: mancipation and fiduciary pacts. The perfecting of this form of will involved three phases, namely fiduciary sale (mancipatio familiae), public per aes et libram and secret per aes et libram.

Mancipatio familiae exposed the heirs enormously, as emptor familiae (who had the role of testamentary executor) could be in bad faith. More precisely, from a legal point of view, nothing prevented him from breaking his promise to the testator and keeping the estate for himself. Since by the act of mancipation (sale) he became the owner, in case of non-execution of the fiduciary covenants, the established heirs had no legal action against him [5].

Public per aes et libram appears as a legal remedy designed to remove the harmful effects of mancipatio familiae [6]. Although the form of a so-called sale by mancipation is preserved, the testamentary executor no longer becomes the owner of the estate, but a simple holder [11]. The change of the quality of the emptor from the owner of the heritage to the holder leads to the impossibility of keeping the goods for himself, in such a situation the heirs have legal action against him. However, the public form by which the testator expressed his will generated another new big problem, which this time did not affect the heirs, but the testator himself. More precisely, knowing the way of distribution of the patrimony, some heirs could become very interested in hastening the testator's death[12].

The form of this will is perfected by secret per aes et libram. Although the general framework of the preparation is preserved, the volition of the testator will be expressed in

writing by him, in a sealed document (which could also bear the seals of the witnesses) whose content will be known only after his death.

Classical law marks a general tendency to abandon solemn and rigid legal forms. As a result, only the will per aes et libram is preserved, to which are added the *nuncupative* will, the *praetorian* will and the *military* will.

The nuncupative will required the verbal expression of the will of the testator, in the presence of 7 witnesses, without the need to observe certain solemn forms [7].

The praetorian testament took the form of a deed that had to bear the seals of seven witnesses. Unlike *secret per aes et libram*, the praetorian will did not involve the conclusion of a fictitious mancipation, but only the drafting of the testamentary act, and this time the seals of the seven witnesses are not optional, but mandatory[7].

The military testament denotes the non-solemn but express declaration (written or verbal) of the soldier in military service.

In post-classical law, four forms of testament are known, namely the nuncupative testament, the military testament (both taken over from the previous era), the *apud acta conditum* testament and the *principi oblatum* testament.

The testament *apud acta conditum* consisted of an oral declaration made before the judicial authorities. They received legal force through ratification and were subsequently registered by the magistrate in the archive.

Principi oblatum (entrusted to the emperor) was the will drawn up in the form of a written document and sent for safekeeping to the imperial archive. It is the only form of will by which mutual conjunctive testaments were admitted [13].

2.4. About disinheritance

Nor was the notion of disinheritance foreign to the Romans. In addition to indirect disinheritance, through the creation of legacies in favor of other persons, in Roman law, disinheritance was called *inheritance deferred against the will* and was carried out by inserting the disinheritance clause into the will. The validity conditions of the disinheritance clause differed depending on the identity of the disinherited. Thus, under the penalty of nullity of the will, the disinheritance of each son had to take the form of a nominal, imperative and solemn clause. The legal protection granted to sons of the family is also reflected in the fact that the omission of a son of the family from the testamentary act also attracted its nullity. If the disinheritance of the **sons** was carried out in compliance with the conditions of validity of the clauses establishing the heirs, the disinheritance of the daughters and grandchildren could be done *en bloc*, without being mentioned by name, through expressions such as *ceteri omnes exheredes sunto* (all others are disinherited) [4]. Their omission in the will, as well as their irregular disinheritance, did not attract the nullity of the will, but only a rectification under which those thus excluded from the inheritance could nevertheless acquire a legal fraction (reserve, virile part) of the inheritance.

However, the freedom to leave a will has some limits. Such a limit is constituted by the *Querela inofficios testamenti*, that is, the legal action by which those legal heirs who considered that they were unjustly disinherited by the testator attacked the damaging will, seeking to obtain its annulment. Before the tribunal of the centumvirs, the disinherited attacked the testator's ability to conclude legal acts. Proving the non-existence of an objective reason for the disinheritance, the only reason could be the lack of discernment of

the testator and thus canceling the harmful will, they came to the inheritance as legal heirs (sui heredes).

3 Conclusion

The timelessness of Roman private law is proven yet again by the way they elaborated the testamentary inheritance. From the fundamental principles, to the rules of form and substance, they all find their meaning even after centuries and centuries of social evolution. However, the applicability of some ancient legal constructions in the modern era does nothing but confirm the excellent complexity of Roman legal thought. Regardless of the future directions of development of legal systems, Roman law will retain not only its immeasurable value in the heritage of legal culture, but even a constant degree of applicability. Why? Because the development of legal institutions in the Praetorian law is based on the principle of good faith, or good faith is a value that knows no temporal boundaries.

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THE CANONICAL PRINCIPLE OF APOSTOLIC SUCCESSION AND ECCLESIASTICAL POWER

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Abstract
Within the Church there is a power that is meant to help the whole Christian community achieve its ultimate religious purpose— salvation, employing all necessary and appropriate means (religious, moral and material) and removing any obstacles that could prevent its realization. This power, instituted by Jesus Christ himself on the day of Pentecost, has passed from the apostles to the bishops, through ordination, a fact which is evidenced by the Apostle Paul, when he addresses the bishops he had appointed: „Take care and be on guard for yourselves and for the whole flock over which the Holy Spirit has appointed you as overseers, to shepherd the church of God"[1] The present study aims to make an analysis of the origin and type of power the church holds and how it has been perpetuated, from generation to generation, to this day and will continue until the end of the ages, according to the canonical principle of uninterrupted apostolic succession.
Keywords: *church, canon law, divine law, apostolic succession, ecclesiastical power.*

1. THE ORIGIN OF CHURCH POWER

1.1. *Foundation of the Church*

In the simplest sense, the Church is a space dedicated to the celebration of a Christian cult. From and administrative point of view, it is a lawful institution that exercises its authority within certain limits, dependent on human, subjective and changing opinions and interests. From a religious point of view, the *Holy Church* has received its norms from God, being the organism of those gathered in His mysterious body, where Jesus is the Head – „Christ is the head of the Church, His body, and is himself its Savior" [2]. Therefore, the Church stands between the positive laws, created by man, and *the New Law*, given by Jesus Christ – „A new commandment I give to you – that you love one another."[3]

The establishment of the Church takes place, as recorded in Holy Scripture, fifty days after the Lord's Resurrection and ten days after His Ascension, by the descent of the Holy Spirit in the form of tongues of fire above the heads of the Twelve Apostles (in the meantime, Matthias had been chosen to replace Judas Iscariot). Jesus Christ spoke of this ancestral moment several times „But when He, the Spirit of Truth, comes, He will guide you into all the truth. For He will not speak on His own initiative, but He will speak whatever He hears, and He will disclose to you what is to come."[4] As foretold, so it happened—"And when the day of Pentecost was fully come, they were all with one accord in one place. And suddenly there came a sound from heaven as of a rushing mighty wind, and it filled all the house where they were sitting. And there appeared unto them cloven tongues like as of fire, and it sat upon each of them. And they were all filled with the *Holy Ghost*, and began to speak with other tongues, as the *Spirit* gave them utterance" [5]. This was the birth of the Church, when the Holy Apostles acquired supernatural powers and graces for the fulfillment

of their divine mission in the world, and the moment when they began to preach and baptize those who believed in the Gospel.

1.2. ***Leadership within the Church***

The form of government in the Church is *Christocracy*, a fundamentally monarchical form of government. According to the Gospel and the teachings of the Holy Fathers, Jesus Christ is the only ruler of the Church – „For He must reign until He has put all His enemies under His feet."[6] The Church is governed, therefore, according to the messianic teachings and commandments, by the cooperation of the Holy Spirit with its organs: the Holy Apostles and their successors.

Jesus Christ, the founder, is the holder of the supreme power in the church, remaining forever, above all, its leader – „All authority in heaven and on earth has been given to me. Go therefore and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, teaching them to observe all that I have commanded you. And behold, I am with you always, to the end of the age"[7].

God the Father placed His Son above all „far above all rule and authority, power and dominion, and every name that is invoked, not only in the present age but also in the one to come. And God placed all things under his feet and appointed him to be head over everything for the church"[8]. The Apostle Paul, in his Epistle to the Hebrews, exhorts Christians to stand firm in their faith alongside that „Great High Priest who has ascended into heaven"[9], then offering them a description of this Leader: „holy, blameless, pure, set apart from sinners, exalted above the heavens. Unlike the other high priests, He does not need to offer sacrifices day after day, first for His own sins, and then for the sins of the people. He sacrificed for their sins once for all when He offered Himself."[10]

A major confessional difference between Orthodox and Catholics is that the latter consider that the Bishop of the Church of Rome (the Roman Pontiff), in his capacity as successor of the Apostle Peter, is „the head of the college of bishops, the Vicar of the Savior Jesus Christ, the pastor of the Universal Church" and has „an ordinary, supreme, plenary power, immediate and universal in the Church, which can always be exercised freely" and exercises his power over all particular Churches, according to Canon 331 § 1 Codex Iuris Canonici.[11]

Jesus Christ leads His Church in an **unseen manner**, partly by His teachings and commandments laid down in the Holy Scripture and tradition, and partly by the work of the *Holy Spirit*, as described numerous times in the Gospel of John: „And I will ask the Father, and He will give you another advocate to help you and be with you forever— the *Spirit of Truth*. The world cannot accept Him, because it neither sees Him nor knows Him. But you know Him, for He lives with you and will be in you." I will not leave you as orphans; I will come to you."[12] „"All this I have spoken while still with you. But the Advocate, the *Holy Spirit*, whom the Father will send in my name, will teach you all things and will remind you of everything I have said to you."[13]; „I have much more to say to you, more than you can now bear. But when he, the *Spirit of Truth*, comes, He will guide you into all truth. He will not speak on His own; He will speak only what He hears, and He will tell you what is yet to come. He will bring glory to Me by taking from what is Mine and making it known to you."[14] According to Professor Ion Constantinescu, these sequences capture the promise, a very important one, that Jesus Christ makes to the Apostles, of sending the *Holy Spirit* upon them, who will continue His work, will remain with them forever and enlighten their

minds, helping them understand His teaching, while also strengthening them during troubled times.[15]

In addition to the mysterious manifestations, the Church is also led by Jesus Christ in a **seen manner**, by having invested the Apostles and, through the Apostles, their followers with ecclesiastical power, indicating to them the means to use in its leadership. The means are indicated by the Evangelist Matthew: „If your brother or sister sins, go and point out their fault, just between the two of you. If they listen to you, you have won them over. But if they will not listen, take one or two others along, so that 'every matter may be established by the testimony of two or three witnesses.' If they still refuse to listen, tell it to the church; and if they refuse to listen even to the church, treat them as you would a pagan or a tax collector. Assuredly, I say to you, whatever you bind on earth will be bound in heaven, and whatever you lose on earth will be loosed in heaven."[16] and also „Again Jesus said: Peace be with you! As the Father has sent Me, I am sending you. And with that he breathed on them and said: Receive the Holy Spirit. If you forgive anyone's sins, their sins are forgiven; if you do not forgive them, they are not forgiven."[17]

1.3. *The Apostolic Succession*

The Apostolic Succession is, according to the definition given by the Dictionary of Orthodox Theology, the principle related to the canonicity of a Church and the validity of the clergy and implicitly of the Sacraments, which implies the uninterrupted succession of the ordinations from the Holy Apostles to this day[18]. The church is built on the foundation of the apostles, as the Apostle Paul says, „For we are His workmanship, created in Christ Jesus for good works, which God prepared beforehand, that we should walk in them."[19] Church power was entrusted, as shown above, first to the Holy Apostles, who handed it over to the bishops through the *laying on of hands,* as evidenced in several places in the Sacred Scripture: „Then after fasting and praying *they laid their hands* on them and sent them off."[20]*"*Do not be hasty in the *laying on of hands*, and do not share in the sins of others."[21] and „to fan into flame the gift of God, which is in you through *the laying on of my hands*", thus perpetuating the grace on the basis of apostolic succession[22]. This power is destined for the entire existence of the Church, therefore it could not cease at the death of the Apostles, but had to pass on to their successors. The transmission of this power was accomplished by the *laying on of hands* and invoking the *Holy Spirit* over the heads of the new bishops, who, in turn, repeated this transmission to their successors in episcopal dignity.

In connection with the apostolic succession we also encounter patristic testimonies. Clement of Rome says: „Through countryside and city the Apostles preached, and they appointed their earliest converts, testing them by the Spirit, to be the bishops and deacons of future believers." Also, the canonical principle of apostolic succession is highlighted by St. Basil, who states that „those who denied the Church no longer had the grace of the Holy Spirit upon them, for communication was absent due to the interruption of succession. For the first who distanced themselves had been ordained by the Fathers, and by the laying on of the hands they had received spiritual grace; but those who broke away, becoming laymen, had neither power to baptize nor to ordain; nor could they give to others the grace of the Holy Spirit, from which they had fallen; therefore the Fathers decided that those baptized by them as by laymen, coming to church, should be cleansed again with the true baptism of the

Church."[23] The absence of the grace of the Holy Spirit, therefore, has effects on the validity of the Baptism of heretics and schismatics, because it is considered that the priests of a heretical or schismatic denomination do not have a valid ordination, an apostolic succession and *a communicatio in sacris* with the entire Orthodox Church. According to Professor Liviu Stan, the apostolic succession of bishops must necessarily be doubled by succession in faith, because „the administration of a Holy Sacrament by the unfaithful one, even if he has validly received the power of priesthood, is and must be regarded as dead or, in other words, ineffective."[24]

2. DIVISION OF CHURCH POWER

2.1. *Church power and secular power*

According to the Greco-Roman way of organization, the state was simultaneously a religious organization and, especially among the Romans, the religious worship was a means of citizen education, *jus sacrum* being an integral part of *jus publicum*.[25] The appearance in the Jewish province of the Christian community and the rapid expansion of faith in the resurrection of Jesus Christ have upset both the Roman administration and the simple citizen, who were unable to conceive of leading their life in the modesty imposed by the Gospel and by the preaching of the Apostles; hence, the violent reaction against the Christians of the first three centuries.

The Byzantine society, the *de jure* and *de facto* heir of the Greco-Roman world, had its own philosophy, its own model of structure and political thought. With the establishment of Christianity as the only religion of the Roman Empire, philosophy, political thought, morality and legislation were unified into a single corpus. The Church became one with the empire, in a dual unity of the 2 cities, „one of which will reign forever with God, and the other will be in eternal torment with Satan" [26] in the sense that the role of the Church will be that of the vehicle of Christians to eternal life, to the City of God, as defined by Blessed Augustine. The city of which Augustine of Hippo spoke is different from the city of men, in which „princes and those who subjugate nations are dominated by the passion to dominate".[27] However, the existence of the empire – church binomial must be understood in the letter and spirit of the Christic dictum, „Give to Caesar what belongs to Caesar, and to God what belongs to God!"[28][29]

Subsequently, as a result of the impact of the Enlightenment ideas, it was stated that power cannot be conceived outside society, on the one hand, and can, on the other hand, only be manifested through social relations, apart from relations of power, a society, being an inert body, is incapable of satisfying its reason for being.[30] Furthermore, political power is, according to democratic theories, the power of command over the state that originates from the will of the human community that underlies it. This general will of the nation is the sole title of sovereignty, being a supreme power, since it does not recognize the existence of a superior or competing will.[31]

At present, it is considered that ecclesiastical power differs from worldly power in that, being of a spiritual nature, it employs spiritual means, while worldly power uses earthly mean especially, for the fulfillment of its purpose.[32]

2.2. ***The division of church power — the power of ordination and the power of jurisdiction***

The power of ordination is the ability to perform the acts of divine worship and administer the Holy Sacraments. *The power of jurisdiction* is made up of the teaching power, the priestly power, and the government power.

The teaching power is contained in the right to proclaim the word of God, the priestly power in the right to perform the Holy Sacraments and the other acts of divine worship, and the government power includes the right to regulate something for the good of the Church and its members. The Church's government power, in turn, is divided into: legislative, judicial and executive power. The legislative ecclesiastical power is the right to issue norms regulating the Church's order of law and the conduct of its members, the judicial ecclesiastical power is the right to decide whether the acts of the clergy and the faithful are or are not in accordance with the laws of the Church, while the executive ecclesiastical power is the right to compel the observance of the church law if it were violated. Believers must obey this power until it goes beyond the limits imposed by Christ – „Whoever listens to you listens to Me; whoever rejects you rejects Me; but whoever rejects Me rejects Him who sent Me." [33] and „Obey your leaders and submit to them, for they are keeping watch over your souls, as those who will have to give an account."[34]

According to Professor Mihai Plătica, in the Church, legitimate authority can only exist in interdependence and by the will of its members and, in general, of the people[35].

3. THE OBJECT OF CHURCH POWER

The holders of ecclesiastical power were the Apostles, who, through apostolic succession, passed it on to the bishops. When Jesus Christ instituted church power, He gave this power to all the Apostles, that is to say, to the entire apostolic college, equally – „and whosoever will be chief among you, let him be your servant."[36] Together with this power he also gave the form in which it should be administered, namely: individually, by several apostles and by the apostolic college (as a moral person, for making the most important decisions). Thus, a hierarchy was created, of both divine and positive law, namely a *hierarchy of ordination* and *a hierarchy of jurisdiction*.

Etymologically, the word hierarchy comes from the Greek (ιεραρχία), being derived from ieros (ιερός) – sacred, holy and archo (άρχω) – rule, and the given meaning, theologically speaking, is the ordering of rankings among the persons invested with power and called upon to continue the saving work of Jesus Christ.

The hierarchy of ordination according to divine law consists of three stages, namely: the stage of episcopacy, the stage of priesthood, and the stage of deacon. The 71st Apostolic Canon – Arabic version – states that Christ himself, „the only sovereign priest, who has not taken this honor upon Himself, but was appointed by His Father. When He became our sovereign priest, He offered the spiritual sacrifice to God the Father before He was crucified; and this is what he commanded us to do. Certainly, there were others among us who believed in Him, but He did not give to each of His followers the gift of being a priest or of being worthy of priestly dignity. After His ascension—the same canon confessed—we, by His command, offered a holy, non-bloody sacrifice, and appointed bishops, priests, and deacons."[37]

Initially, because of the small number, the Holy Apostles could not fulfill all the tasks involved in spreading the Gospel to the Gentiles, so they delegated their ministries to

bishops or presbyters. Subsequently, the deacons appeared, appointed to assist them, and then the priests, as a different rank from that of the bishops, when the number of bishops was too small to cope with the development of the local churches, and the newly established parishes were to have at their head a representative of the bishop, a *locum tenens*.[38]

According to the divine law, the bishop can perform all the Holy Sacraments (Baptism, Confirmation, Eucharist, Penance, Anointing of the sick, Marriage and Holy Orders), while priests cannot perform the Holy Sacrament of Priesthood, Deacons form the third stage of the hierarchy according to the divine law. The duties of deacons are to be the helpers of bishops and priests in the divine services. These two latter stages are hierarchically subject to the bishop „the presbyters and deacons shall do nothing without the consent of the bishop, for he is the one to whom the people of the Lord have been entrusted, and the one who shall be held accountable for their souls."[39]

The hierarchy of jurisdiction consists of administrative titles and prerogatives which bishops, priests and deacons have according to the canons, ecclesiastical decisions, and positive law.

Conclusions

The form of government within the Church is a *Christocentric* one, having Jesus Christ as head, along with a collegial, synodal leadership, consisting of bishops, as successors of the Apostles. The Holy Apostles became aware of their spiritual mission and shared the grace received from the Holy Spirit among their successors, the bishops. According to the divine law, a hierarchy was formed of three stages: *the bishops* – since they are appointed by the Holy Spirit to shepherd the Church of God, as direct successors of the Apostles, holders of full sacramental power, teachers and rulers, *priests* – since they are the helpers of the bishops in the internal and external administration of the ecclesiastical jurisdiction, and *deacons* – because they stand by the bishops and priests as organs for the maintenance of good order in the church. Church power, both by purpose and by means, is purely spiritual. Its purpose is the salvation of souls by true faith and good works, and its means are fatherly teachings and exhortations by word and example, then reproofs and, in extreme cases, the exclusion of the disobedient from the Christian community.

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The 39th Apostolic Canon.

ABOLITION OF THE DECEASED'S DOCUMENTS AND THE TRANSFER OF OBLIGATIONS TO THE HEIRS

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Abstract

The transmission of the patrimony to the deceased's heirs at the time of death is a complex process, thoroughly regulated by the succession law. However, the institution of inheritance has been criticized for making it possible to acquire wealth without work and for being a major source of economic inequality. Such attacks have come not only from those who support total income equality and aspire to a social ideal, but also from doctrinaires who believe that large differences in the distribution of wealth are incompatible with modern conceptions of human dignity. In response to criticism, inheritance was defended on both economic and moral grounds, with the most debatable issues within a private property system being: who should be the ones to acquire the succession, whether the freedom of the will is or not allowed and within what limits.

Since inheritance has developed as an incident of kinship in all societies, the sense of belonging, the expression of the individual's generosity and affection are so strong, especially between parents and children, that a person's sense of freedom would not be complete if he did not know that he can transfer his assets the exact way he wishes. The question arises, however, whether the inheritance will extend beyond the circle of persons to whom the deceased was related by kinship or whose welfare he was or should have been concerned with.

Therefore, considering the historical perspective of the institution, but also its evolution within the legislation of the European states, we propose to analyze and clarify herein the main aspects and doctrinal controversies expressed, in terms of the abolition by the heirs of some acts of the deceased and the transfer of obligations to them, highlighting the impact and importance of the succession law in Romanian civil law and taking into account both the freedom of will of the author of the patrimonial provisions for the cause of death, as well as the rights and obligations of his heirs.

Keywords: *inheritance, indivision, the reduction of liberalities, patrimony.*

I. INTRODUCTORY ASPECTS

From a historical perspective, the conceptual foundation of the institution of succession concerns, besides the basic elements, a focus of its interpretative flow via its evolution. It is remarkable that the time mark has removed many gaps in the tandem between the existing rules in the matter of succession and the social needs.

It is worth mentioning that in Ancient Egypt, the inheritance was equally divided between the children of the deceased, who in turn took care of the funerals; in the Babylonian law, the inheritance was distributed only to the sons, while the daughters had the right to receive only a part of the movable property in use; in India, the right to inheritance was initially based on the first borns rule, later giving the right to all sons, specifying that the eldest received a larger share; in Ancient Greece the right to inherit was going to the boys in

the family or, in the case of the existence of a daughter, the inheritance could go to a foreigner, provided he married the daughter. In the Roman law, inheritance knew three forms, legal, testamentary and countertestamentary through which *the pater familias* transmitted the family's patrimony and power to the successors, while in the old French or German law there was only the institution of legal inheritance, they considered that „*Only God can create heirs, but not the will of man*"[1].

During the period of the old Romanian law, the transmission of the inheritance was done either legally or by testament. Within the framework of legal inheritance, legitimate and adoptive children had a legal succession vocation over heritage assets (ocine, dedine) or that were bought by their deceased parents. Natural children were only entitled to their mother's inheritance. The stepchild had the same inheritance rights as the legitimate one, but only to the succession of the blood related parent, not to the inheritance of the spouse's. The law of the country also recognized the surviving spouse a right of inheritance in competition with the children. In the old Romanian law, the institution of testamentary succession took two forms: diata (written will, also known as letter, book or record), act that contained the last will of the testator and the last words (oral, nuncupative will).

According to the terminological explanations, the „chart of heirs'" is a phrase that designates the patrimony transmitted due to death, consisting of all positive and negative assets and values (rights and obligations), which in their totality make up the patrimony/inheritance left after the deceased, constituting the object of the distribution of the inheritance; the notion of inheritance or succession is used in the sense of passing on the patrimony of a deceased natural person to one or more living persons, plus to designate the patrimony transmitted following death, close to the sense of chart of heirs., Since succession or inheritance are mostly used as synonyms from a legal point of view, with a specialized meaning; nevertheless, clarification regarding the phrase *succeede* is required it means „to take the place of another person". Thus, also in the case of the sale-purchase operation, the buyer is to succeed the seller, being a successor with a private title *inter vivos*, where the succession is used in the sense of transmission of rights. Therefore, the term succession can be understood strictly and lato sensu. In a narrow sense, by inheritance we understand the transmission of the patrimony (rights and obligations) of a deceased natural person to one or more living persons, in which case *inheriting* or *succeeding* means „*taking the place of another person*". In civil law, *lato sensu*, the notion of succession can mean any transfer of rights, the buyer being the successor with private title of the seller, *inter vivos*. Therefore, in the present analysis, we will use the notion of succession only in its narrow sense, designating a transmission due to death, a term equivalent to the notion of inheritance.

In accordance with the regulations in force,, inheritance is currently a legal procedure, by which the patrimony of a person who passed away is transferred to one or more living persons, having the capacity of heirs. The two types of inheritance provided by art. 955 para. (1) Civil Code are not mutually exclusive, but can coexist [2], and under art. 955 para. (2) and

[1]Bostan G., *PhD Thesis. Legal succession in the Republic of Moldova and Romania,* Chisinau, p. 91

[2]If the testator has made a bequest (or several) with universal title, but which does not exhaust the entire estate, the devolution of the inheritance will be testamentary within the limits of the bequest (or bequests) and legal for the remainder not covered. Also, if the deceased left the entire inheritance by will to other people than the reserved heirs, the latter will receive (on the basis of the legal inheritance) the part of the inheritance due to the reserve, against the freely expressed will of the testator, so that the devolution of the inheritance will be partly legal and in the testamentary part (for the part that does not violate the inheritance reserve). It follows that the

art. 1102 Civil Code, a person can collect a part of the inheritance as a legatee and another part as a legal heir (so, the same heir can accumulate the two qualities on the basis of multiple inheritance vocation)[3]. Thus, pursuant to the provisions of the Civil Code[4], regardless of whether it is a legal or testamentary inheritance, a person can inherit only if he cumulatively meets three conditions, such as: i) successional capacity, this must exist at the time of the opening of the inheritance, i.e. have the ability to to be subject to the rights and obligations implied by the capacity of successor; ii) to have a vocation to inheritance, based on the law or the will[5]; and, iii) not be unworthy to inherit[6].

testamentary inheritance removes the legal one only if the testator instituted one or more universal legatees, who collect the entire inheritance (they have vocation to everything) or if there are no reserving legal heirs. See MM Soreață, Legislative news in the matter of successions introduced by the new Civil Code, Ed. Hamangiu, Bucharest, 2013, p. 6; AN Gheorghe, Succession Law Manual, Ed. Hamangiu, Bucharest, 2013, p. 5; V. Stoica, L. Dragu, Legal inheritance, Ed. Universul Juridic, Bucharest, 2012, p. 17

[3] For details see Fr. Deak, Succession Law Treaty, Ed. Actami, Bucharest, 1999, p. 10; I. Genoiu, The right to inheritance in the Civil Code, Ed. CH Beck, Bucharest, 2013, p. 7.

[4] See the provisions of art. 957-962 Civil Code

[5]The successional vocation or the call to inheritance is conferred either by law or by the will of the *de cuius,* expressed by will or donation of future assets. Determining the persons who have a successional vocation is called successional devolution (legal or testamentary) and can be general, when it designates the potential (eventual) vocation of some people to collect the inheritance left by another person or concrete (effective or useful), then when the people who effectively reap the inheritance are determined with the help of the succession devolution. Moreover, it should be specified that the legal limits of the general succession vocation are represented by the relatives of the fourth degree inclusive, on the collateral line, and by the ascendants of the deceased's descendants, regardless of the degree of kinship, in the direct line, and in the absence of these heirs, the assets of the deceased will be transferred to the state, as follows: i) immovable assets to the administrative-territorial unit where they are located on the date of opening the inheritance, ii) intangible movable assets (shares, parts social security, copyrights) to the administrative-territorial unit from the last domicile of the deceased, iii) tangible movable goods subject to registration (cars, boats, agricultural machinery, etc.) to the administrative-territorial unit in whose record they are registered. Also, within the effective succession vocation, in order to be considered to have a concrete vocation, a person must be part of the category of heirs with a general vocation and not be removed from the inheritance by a relative of preferable rank. The preferred order is established according to the degree of kinship and the class of heirs, taking into account the principle of priority of the class of heirs, in the order established by law and that of the proximity of the degree of kinship, between heirs of the same class).

[6]Succession indignity is a sanction, which consists in the legal forfeiture of a person from the right to collect a determined inheritance, including the right to the reserve to which he would have been entitled from this inheritance, because he was guilty of a serious act against the one who leaves the legacy or towards his memory. According to art. 958 para. (1) Civil Code, disinheritance occurs in two cases, namely when an heir is convicted of a crime with the intention of killing the person leaving the inheritance and when an heir is convicted of committing, before the opening of the inheritance, of a crime with the intention of killing another successor which, if the inheritance had been opened at the time of the commission of the deed, would have removed or restricted the vocation to inheritance of the perpetrator. As a result of the finding of unworthiness, the unworthy will be legally removed from the intestate inheritance, being considered a stranger to the inheritance, his share benefiting the other co-heirs or universal legatees or with universal title. Being a civil sanction, indignity produces specific effects in relation to the unworthy and his descendants, the main effect being the forfeiture of the unworthy from the right to inherit the deceased, in other words the complete removal of his inheritance, he not being able to collect even the inheritance reserve, at who would have been entitled as a reserved heir. At the same time, according to the provisions of art. 961 Civil Code, the effects of legal or judicial indignity can be expressly removed by will or through an authentic notarial deed by the one who leaves the inheritance, „the effects of indignity cannot be removed by rehabilitation of the indignity, amnesty *after conviction, pardon or by prescription execution of the criminal sentence „.*

II. TRANSMISSION OF OBLIGATIONS TO HEIRS

Unlike Roman law, in which the individualistic idea of patrimonial transmission in the will of the holder prevailed and wherethe law only intervened in cases where this will was not expressed validly and unequivocally, in our current law system the idea of family co-ownership dominates, similar to the German customs, according to which the transmission of patrimony, for the purpose of preserving assets in the family, operates mainly under the power of law.

The transmission of patrimony via inheritance, law regulated, is an effect of family relationships, i.e. a person's patrimony does not lose the character of legal universality through the owner's death, but is passed on as such (universal succession) to the one or those who, either by the power of the law or the owner's will, are called to collect. If the state collects the *de cuius's patrimony*, this transmission does not take place in the power of a proper inheritance right, but instead in the power of the right inherent in the state's powers to absorb an inheritance in its empire[7].

Since the provisions of art. 953 in the Civil Code state that the inheritance represents a transmission due to the cause of death and we can *highlight* its universal character, since it refers to the patrimony of the deceased natural person (not being applicable to the termination of the existence of the person/legal entities), and not to its rights and obligations considered *ut singuli*.. Moreover, the transmission of the inheritance has a a universal nature as its object is the patrimony of the deceased natural person, as legal universality, that is, the totality of the rights and obligations with economic value that belonged to the deceased[8].

The transmission of the inheritance is also unitary, being transferred in its entirety to the legal successors or legatees according to legal norms, regardless of the nature or provenance or origin of the goods. The transmission of the inheritance also has an indivisible character, in the sense that the acceptance or renunciation of the inheritance cannot have as its object only a part of it. Therefore, each heir must accept the inheritance according to the succession vocation or renounce it, a principle that follows from the indivisibility of the succession patrimony, which is transmitted to the successors; in the case of a plurality of heirs, this state subsists until the division/partition is carried out, except if the deceased made an ascendant division by will.

In terms of the inheritance liability, we mention that the universal heirs, with the universal title, have the obligation to pay the debts and burdens of the inheritance proportional to the inheritance share that belongs to each one. The division de jure of the inheritance liability between the universal heirs, with the universal title proportional to the inheritance share that belongs to each one is legally stipulated by the provisions of art. 1.114 and 1.115 in the Civil Code and must be done depending on the part calculated according to the vocation of each heir, even though the actual benefit is lower or higher[9]. The debts of the

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[7] See M. Cantacuzino, *Elements of civil law,* Ed. ALL Educaţional, Timișoara, 1998, p. 205

[8] In principle, non-patrimonial rights and obligations are not transmitted by inheritance; patrimonial rights born ex lege inuitu personae, having a lifetime character, such as use, usufruct, habitation; the patrimonial obligations assumed in consideration of a personal quality of the deceased, such as those of maintenance or those resulting from contracts concluded intuitu personae, such as the obligations resulting from the administration contract or those of the entrepreneur, etc. See *I. Turcu, New Civil Code. Comments and explanations,* Ed. CH Beck, Bucharest, 2011, p. 1282

[9]For example, if the deceased has two children as legal heirs, they will equally bear the liabilities of the inheritance, even if one of them is deprived, as a penalty, of the assets that he stole or hid (art. 1.119 NCC) and from which the co-heir will benefit. In the same way, if one of them has the task of paying a debt or a legacy or

inheritance involve those patrimonial obligations of the deceased which, regardless of their source (contractual, delictual, legal, etc.), exist in the patrimony at the date of the opening of the inheritance, including the debts of the deceased towards the heirs, yet not including the obligations extinguished by the death of the one leaving the inheritance, such as those related to a personal quality of the deceased (for example, the maintenance owed as a relative or spouse) or contracted *intuitu personae* (as an entrepreneur, trustee, etc.). They are not transmitted by inheritance, but the effects produced in the past are opposable to the heirs[10]. At the same time. *inheritance duties* include the obligations that, without having existed in the patrimony of the bequeather, are born in the person of the heir at the opening of the inheritance or later, independently of the will of the deceased or from his will, such as funeral expenses (which must not be excessive), including expenses performed by the heirs with the memorial services to commemorate the memory of their author, at different time intervals, according to the customs and the expenses for the administration and liquidation of the inheritance, including the fees and taxes for the goods from the inheritance or the expenses necessary for carrying out the succession procedure.

However, the law also provides exceptions to the rule of legal division of the liability of the heir proportional to the share of each heir. Thus, pursuant to *art. 1.155 para. (2) Civil Code „*Before the successional division, creditors whose claims come from the preservation or administration of the assets of the inheritance or were born before the opening of the inheritance can ask to be paid from the assets in the division. They can also apply for enforcement of these assets*". Although the obligations are transmitted* to the *heirs in a divided manner, the creditors' general lien remains indivisible as long as the indivision lasts between the heirs. As a result, creditors of the estate will be able to track the succession property for the entire debt and, consequently, the risk of insolvency of some of* the *heirs does not exist, as they are fully satisfied with the price acquired, thus not taking into account the debt division between heirs. Provided that they trail the personal patrimony of the heirs are they compelled to take into account the legal division of the inheritance liability. Moreover, if the obligation is indivisible – natural or conventional indivisibility – any heir can be tracked for the whole (art. 1.425 Civil Code), with the right of sue for compensation against co-heirs [art. 1.157 para. (1) Civil Code].* We emphasize that only the indivisible obligation is transmitted undividedly to the heirs, having as a consequence (advantage for the creditor) the multiplication of debtors bound for everything in case of death of one of the bound debtors[11]. Other exceptional situations concern the obligation that has as its object res

vice versa, he benefits, over his inheritance share, from a legacy with a private title. The legal division of the liability proportional to the inheritance share is not an imperative rule, the deceased can entrust one of the heirs with the execution of the obligation, for example, the bearing of the funeral expenses.

[10] For example, the liability for the destruction of the property handed over to the trustee for sale, the contractor's liability for defects, etc.

[11]Art. 1,424 Civil Code establishes the rule of full divisibility of the obligation, without any mention to this effect being necessary on the part of the parties. In the case of a divisible obligation, if the circumstances do not indicate otherwise, it is assumed that the object of the obligation allows it to be divided into as many debts as there are debtors or creditors. The indivisibility of the obligation is the exception, and this must be expressly stipulated or must result from the nature of the obligation. Therefore, the obligation is indivisible: 1) by its nature when it has as its object a performance whose execution is not susceptible to material division (eg: maintenance) or 2) when it is declared as such by the parties, even if, by its nature, would be susceptible to division. Indivisibility has many similarities with solidarity, especially in terms of the main effects of the latter. The main difference between the joint obligation and the indivisible obligation consists in the fact that the joint obligation is divided by law between the heirs of the debtor or the joint creditor (art. 1.442 NCC), while the indivisible

certaor a determined performance on such good, when the possessing heir will be able to act alone, having the right of recourse against the other heirs, if applicable; the obligation guaranteed via a mortgage or other gtangible security, in which case the heir receiving the asset affected by the security will be boundfor everything, but only within the limit of the value of that asset, whilehis participation in the remaining liability of the inheritance is reduced accordingly, and when one of the heirs is charged, by title, to fulfill the obligation alone. In this case, the heir in charge of paying the debt can be pursued alone by the creditor, usually without recourse against the others. If the title from which the assignment derives from is the will left by the deceased, the exemption of the other heirs represents a generosity act, which will produce effects only provided that it does not affect the inheritance portion of the assigned heir, if applicable. If the duty comes from the title of debt concluded by the one who leaves the inheritance with the creditor, the *solvent heir* will have the right of recourse against the co-heirs for everything he has paid over his share of the liability. Any contrary clause would be a deed on a future inheritance, void as such. Finally, the title can be the agreement between the heirs, concluded after the opening of the inheritance. In all cases, the will of the deceased (for example, the will) or the will of the co-heirs can be invoked by creditors to pursue one of them for the entire debt. Instead, if they did not consent, they can pursue the heirs according to the legal division of the inheritance liability.

Regarding the contribution of the heirs to the debts paid and the recourse actions, the problem concerns the relations between the co-heirs, under the assumption that one (some) of them has paid more than his share of the debts and burdens of the inheritance. Such a payment over the contributory part of the debt can be made by the heir voluntarily [12]or as a result of the legal obligation to do so[13].

However, unlike the universal successors or with universal title, the legatees with private title, in principle, do not contribute to the payment of the inheritance liability [art. 1.114 para. (3) Civil Code]; as not having a vocation to a universality, they do not support the passive of that universality either. Only exceptionally, the legatee with private title will be bound to contribute to the payment of the liability in the following assumptions and limits [art. 1.114 para. (3) sentence II of the Civil Code], respectively: i) **if** the testator expressly provided payment, total or partial, through the private legatee of a debt or charge, including a private legatee having a claim as its object[14]; ii**)** if the legacy with private title has as its object a universality, such as an inheritance collected by the testator and not yet liquidated or the share of a company. In these cases, the legatee is responsible for the liability of this

obligation is transmitted indivisible to their heirs (art. 1.425 NCC). Some side effects of solidarity do not occur in the case of indivisible obligations, the relations between debtors or creditors of an indivisible obligation not being governed by the idea of mutual representation as in the case of joint and several obligations. Therefore, the joint and several obligation is not indivisible in the absence of an agreement to this effect.

[12] For example, to save an estate, which is in division, from the pursuit of creditors.

[13] Art. 1157 paragraph (1) Civil Code provides that „The *universal heir or with universal title who, due to the guarantee real or for any other reason, paid more from the joint debt than his part is entitled to recourse against the other heirs, but only for the part of the joint debt that was due to everyone, even when the heir who paid the debt would have been subrogated in rights creditors".*

[14]Art. 1,060 paragraph (1) Civil Code. provides that „ *if the legatee cannot fulfill the task with which his legatee is encumbered without exceeding the value of the assets received under it, se he will be able to release by handing over to the beneficiary of the charge the goods that were left to him through the bequest or the value their „,* , but in the situation where the legatee accepts the bequest, he is obliged to perform the obligation imposed by the testator.

universality; iii**)** if the particular legacy has as its object a mortgaged real estate, a case in which the legatee, according to the common law on mortgages, is not personally bound to pay, but being obliged propter rem, if he pays to save the real estate from the pursuit of *the* mortgagee, is subrogated in the rights of the paid creditor (art. 1.596 letter b) Civil Code), thus being able to recover, through recourse action, the payment made from the universal successors or with universal title, bound to bear the liabilities of the inheritance; iv) if the asset of the inheritance does not cover the liability, indirectly and without being personally bound, the legatee will bear the consequences of the existence of the liability. Indeed, in the competition among the creditors of the estate, including unsecured creditors, and all legatees, including the particular, the former have priority because no one can make gifts unless they had paid (nemo liberalis nisi *liberatus*). Consequently, the particular legacywill be reduced to the extent necessary to pay the inheritance liability if the creditors prove that they cannot satisfy their claims from the other assets of the inheritance.

In all cases, the action is *divisible*, even if the claim of the paid creditor was indivisible, the *solvent heir* (similar to the joint debtor) is able to demand from the co-heirs the part that each of them was bound to pay, but the part of the insolvent heirs will be divided between the other heirs, including the *solvent heir,* in proportion to the succession shares of each one. Since its object is the capitalization of a claim, i.e. it has a personal nature, the recourse action is *prescriptive* within the general limitation period, regardless of whether the request is capitalized through a separate action or within the action to exit the division which is imprescriptible. It is appreciated, however, that the possession exerted by the solvent heir *over* the successional assets in joint tenancy can interrupt the prescription, only if it has the meaning of the recognition of the debt by the other heirs[15].

As a final aspect regarding the transmission of rights and obligations to the heirs, we consider it appropriate to specify who can receive a person's wealth *mortis causa* and in what shares, respectively the classes of heirs, who come to the succession, in the order established by art. 964 para. (1) Civil Code: i) first class: descendants (children and their children, regardless of the degree of kinship); ii) second class: privileged ascendants (parents) and privileged collaterals (brothers and sisters, their children and nephews/nieces; iii) third class: ordinary ascendants (grandparents, great-grandparents, etc.); iv) fourth class: ordinary collaterals (the deceased's uncles, aunts, first cousins and brothers and sisters of the deceased's grandparents)[16]. But in order to determine exactly what shares belong to each

[15] Due to the non-unitary solutions in judicial practice, an appeal was promoted in the interest of the law regarding the legal regime of funeral expenses. By decision no. Decision no. 6 of 2009, the United Sections of the High Court decided that „ *Applications regarding the liquidation of claims related to funeral expenses and the observance of the religious traditions that make up the passive inheritance are prescriptive within the term general prescription both in the situations where they are formulated within the action to exit from indivision, as well as when they are formulated separately „*. As the possession exercised by the solvent heir *over* the successional assets has the character of interrupting the prescription, in this case the 3-year limitation period begins to run from the date of the application for exit from the division, which could result in the creditor's dispossession of the successional assets. However, there are situations when the expenses of the funeral, memorials and memorials were borne by a foreign third party. In such a hypothesis, the *solvent third party* can claim them from his *de cuius successors, within* the general limitation period that runs from the date of making those expenses.

[16] If there are first class relatives and they do not renounce their rights, the relatives belonging to the other classes will not come to the legal inheritance. Likewise, if there are relatives from the 2nd class (and there are no descendants at all or they do not want to inherit), relatives from the other classes will not inherit, following the same reasoning with all four classes of heirs. Basically, those in the 4th class of inheritance will receive

class, we need to determine **what rights the surviving spouse has**[17] **to the inheritance**, which, although it is not part of any category of legal heirs, competes with each class, thus its share is a quarter of the inheritance, if it competes with the deceased's descendants (children), a third of it if it comes in competition both with the privileged ascendants (one or both parents) and with the privileged collaterals of the deceased (brothers, sisters or their children), half of the inheritance, if it comes into competition either only with privileged ascendants or only with privileged collaterals of the deceased, and three quarters of the inheritance, if it comes into competition either with ordinary ascendants (grandparents) or with the ordinary collaterals of the deceased.

Moreover, the provisions of art. 108 Civil Code also regulates the notion of forced heirship, as „*part of the assets of the inheritance to which the reserved heirs have the right by virtue of the law, even against the will of the deceased, manifested through liberalities or disinheritance*". The reserved heirs are the persons who have the right to compulsorily receive at least half of the inheritance share that would have been due to them, as I have shown above. According to the Civil Code, the category of reserve heirs includes the surviving spouse, descendants (children and grandchildren) and privileged ascendants (parents, but not siblings). These categories are protected by law against any situation that would deprive them of their succession rights, therefore, even if the deceased bequeathed to other categories of people more than he should have, disinherited someone from these three categories or made donations during his life and from his wealth, thus leaving almost nothing, then his will cannot be fully complied with, when there are such forced heirs.

III.ANNULMENT OF DEEDS OF THE DECEASED BY THE HEIRS

We believe that the most representative legal operation [18]regarding the abolition of the deeds of the deceased is the summary of donations, respectively the obligation thatfalls on the surviving spouse and the descendants of the deceased to return to chart of heirs the assets donated by the deceased donor, without being exempt from being registered[19]. The reporting

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something only if there are no heirs in the other classes at all or they are not interested in receiving what is due to them from the deceased.

„ *within each class, the relatives of the closest degree to the deceased remove from the inheritance the relatives of a more distant degree „* and „ *between relatives of the same class and of the same degree, the inheritance is divided equally „*, as provided by the Civil Code in art. 964 para. (3) and (4).

[17] The Civil Code requires that, at the time of the opening of the inheritance, **there is no final decree of divorce between the deceased spouse and the surviving spouse**. Therefore, the surviving spouse who was in the middle of the divorce process will also inherit, as long as it has not been finalized by final judgment**. In our legislation, cohabitants do not yet have the right to legal inheritance**, and the only possibility in which they can get something from the deceased partner is if he mentioned them in the will. But even in this situation, it is not guaranteed that they will receive everything the concubine left them, as there are certain categories of close relatives of the deceased who are entitled to some minimum shares of the inheritance, despite the contrary wishes of the one who leaves the will.

[18] In the case of the report, as can be seen from the entire regulation, it is more of a legal operation without a material character, the procedure being carried out mainly through inter-patrimonial operations (between the estate and the heirs' patrimony, or between the heirs' patrimony). Also, due to the fact that the stipulation in question has a very general character, it cannot be precisely determined in whose favor it was stipulated, nor what is the conduct that must be followed by the one who would be held to a so-called task, the reporting obligation incumbent only in the situation where those who justify an interest come out of passivity, according to art. 1148 C.civ.

[19] Art. 1.146 para. (1) Civil Code states that „The donation report is the obligation between the surviving spouse and the descendants of the deceased who come effectively and jointly to the legal inheritance to return to

obligation also exists when the donee's descendant inherits through representation; in all cases it is present only if the obligated heir has accepted the succession. If he renounces the inheritance, the successor is no longer obliged to bring the asset to the chart of heirsunless by a specific stipulation in the donation contract, the donor did not compel him to report even in the case of renouncing the inheritance., In this case, the donee returning to the inheritance only the value of the donated asset that exceeds the part of the deceased's assets to which he would have been entitled as a legal heir, in accordance with the provisions of art. 1147 para. (2) C.civ.

The summary of donations is made by equivalent and the provision requiring the donee to report in kind is considered unwritten. The report by equivalent can be made by taking over, by imputation or in money, while the report in kind can be made only in exceptional cases expressly provided by law. The donor can exempt the donee from the reporting expressly or tacitly[20], and in the case of tacit exemption, the will of the donor must be unquestionable. Donations made by the deceased to the heirs of the obligation to report are subject to reporting, regardless of their form of realization, through an authentic, but manual gift, to the extent that it would not be an ordinary gift, or an indirect donation; on the other hand, the donations that the deceased gave are exempt from registering, as they had been done as such; donations disguised as onerous alienations or carried out through interposed persons, unless it is proven that the bequeather pursued a purpose other than exemption from reporting; ordinary, remunerative donations and, to the extent that they are not excessive, the amounts spent for the maintenance or, if applicable, for the professional training of the descendants, parents or spouse, nor the wedding expenses, to the extent that the bequeather does not ordered otherwise; the derived fruits, the revenues due until the day of the opening of the inheritance and the monetary equivalent of the use exercised by the donee on the donated good; and the donated asset that perished through no fault of the donee.

Regarding the registration obligation, we specify that it is not a simple obligation, but one affected by a double conditioning. The former condition that must be met at the time of opening the succession is that the donated good exceeds in terms of value the share that would be due to it as a legal heir (forced), being a suspensive condition that determines the emergenceof the legal situation premised on the donation report. The fact that the donee renounces the deceased donor's inheritance cannot be accepted as a suspensive condition because it would contravene the art. 1403 C.civ.[21], since the donee has the capacity of debtor of the reporting obligation, being in this case a purely potestative suspensive condition on the part of the debtor, but will be considered a resolutive condition, its fulfillment depending only on the will of the donee. As a result of its fulfillment, his right to keep the donation as a simple donee, alien to the deceased's inheritance, will be extinguished. This stipulation in the donation contract will not take effect from the moment the contract is concluded, but, having a *mortis causa character,* from the date on which the subsidiary legal obligation to report will be born, respectively the death of the donor, establishing an obligation for the donee, since the ratio is not made in kind, but by equivalent. Therefore, from the perspective of the legal devolution of the inheritance, at the time of opening the inheritance *of the*

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the inheritance the goods that were donated to them without exemption from the report by the one leaving the inheritance".

[20] Disguising the donation as an onerous act constitutes a tacit reporting exemption.

[21] Art. 1403 Civil Code, provides that „*The obligation contracted under a suspensive condition that depends exclusively on the will of the debtor does not produce any effect*".

deceased, the legal heirs determined by art. 1148 of the Civil Code, the descendants, the surviving spouse and the deceased's creditors, through indirect action in their capacity as holders of distinct, privileged rights based on their succession vocation will benefit from an additional element of assets in the deceased's estate, respectively from a right of claim against the relinquishing donee representing the counter value of the share of the asset that exceeds the reserve that would be due to him if he had not relinquished. We emphasize that, for this stipulation to be effective, the major premise of the legal situation must be fulfilled, namely the donee's surviving spouse or descendant must renounce the donor's inheritance, because otherwise the report will not be made under this stipulation, but under the law. Likewise, the said donation must exceed his legal quota as a forced heir; thus, in this case, although he is waiving, and according to article 1121 par. (1) Civil Code „the *person who renounces is considered to have never been an heir „*, as an exception he will be calculated the reserve that would be due to him as a legal heir, according to the provisions of art. 1091 in the Civil Code, and the charge will be made according to art. 1099 in the Civil Code. Thus, the donation will first be imputed to the reserve of the gratified renouncing heir and, if is used up, it will be imputed to the available quota.

The summary of donations can be made by mutual consent or by judicial means via an action in progress, exercised either by the main application, or as a head of claim end of the request for joint possession termination. This is a personal action, not a real one, and can only be brought against the donee's heir bound to report, yet not against the sub-acquiring third party. The report requested by one of the heirs also benefits the other heirs entitled to requesting it, except for those who have expressly waived the report. The limitation period for exercising the action is 3 years from the date on which the person entitled to request the report became aware of the donation, but no earlier than the date of opening the succession. The donee cannot defend himself against the action in the report by invoking the acquisitive prescription.

In conclusion, based on the analysis carried out and considering the importance of the institution of inheritance in social and legal relations, we appreciate that both the abolition of some acts within the inheritance concluded by the deceased, such as the summary of donations, or the cancellation of some acts concluded by one of the heirs until the debate of the succession, as well as the transmission and sharing of the patrimony, have a complex nature, hence they have to be investigated systematically, multidisciplinary, in terms of the Civil Code and by reference to other special regulations, such as the Law of notary public and notarial activity no. 36/1995, with which it is closely related.

Thus, since the investigation of a legal institution requires a detailed interpretation of the legal instruments specific to the field and because inheritance involves not only aspects that strictly belong to the field of law, but also social, economic and moral aspects, with a major impact on the normal development of social relations, it remains one of the main pillars of law subject to both criticism and legislative amendments, with the role of improving and adapting its functionality in the context of social dynamics.

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CLARIFICATIONS ON THE NATURE, OBJECT AND CONTENT OF THE APOSTOLIC SUCCESSION OF THE POPES

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Abstract

The legal-canonical domain of the Catholic Church has fascinated secular law researchers for centuries, mainly in the fields of public international law or family law. A very interesting topic worth analyzing, closely related to the notion of „succession" in civil law, is that of the succession to the Apostolic Throne of the Catholic Church, more precisely to the title of Pope. The fascination of such an approach is given on the one hand by the solemnity of such an act, but above all by the special character of the contents of such a canonical-legal institution – the papal succession. Even if we are not talking about a hereditary succession (by birth) or legatee, but through a consecrated formula of „choice", this does not in any way impugn the quality of „heir", but, on the contrary, it consecrates to the chosen one the right to inherit the prerogatives of St. Peter, the first bishop of Rome. The present study aims to present a series of new information that interests both international law regarding the Pope's status as head of state and religious leader as well as other branches of law.

Keywords: *Pope, Apostolic See, Catholic Church, Papal Succession*

1. Introduction

The doctrinal foundation of the pontifical theocracy is the famous passage from the Gospel according to Matthew, XVI, 18-19, which quotes the words that Jesus said to Peter, after he recognized him as the Son of God: [1] „... You are Peter and on this rock I will build My Church... [And] I will give you the keys of the Kingdom of Heaven and whatever you bind on earth will be bound in heaven and whatever you loose on Earth will be loosed in heaven". [2]Papal exegesis has always held that this passage meant two things: the founding of the Church as a body of all believers, laity and clergy alike, and the establishment of government over that body.

The same passage (confirmed, according to the opinion of the pontifical exegetes, also by the exhortation from the Gospel according to John XXI, 15-17 repeated three times by Jesus to Peter: „*Passover to my lambs", „Passover to my flocks", „Passover to my sheep",* which also placed the addressee in a privileged position in relation to the other apostles) was interpreted in a predominantly legal sense, as endowing Peter with supreme legal power in the earthly world to „bind" and „untie" *(potestas ligandi* et *solvendi)* [3].

According also to an interpretation accredited by tradition, it was held that the transmission of these powers was not temporally limited, but *perpetual,* and, on the other

hand, by those who, according to St. Peter the Apostle, had been chosen to exercise, in his name, the powers conferred by *the delegation christiani* were the bishops of Rome. The argument advanced in support of this assertion was the famous *Epistle Clementis,* an apocryphal document attributed to Clement I, more precisely, a letter that he would have sent to St. James in Jerusalem, informing him that, before receiving martyrdom, St. Peter had delegated him, Clement, in front of the gathering of the Romanian people to be your successor. According to the same interpretation, Linus and Cletus, the predecessors of Clement I, were considered only bishops of Rome, while Clement I is, by tradition, the first pope, having been ascribed by Peter both kinds of powers.

The last act in defining the „Petrine doctrine" (modern expression, which evokes the succession of St. Ap. Peter assumed by the bishop of Rome) was fixed in the 5th century, especially through the contribution of Pope Leo I, through the formula which, from him onward to designated the bishop of Rome as „the unworthy heir of St. Peter *(indignus heres beati Petri)",* regulating the succession to the throne of St. Peter by the provisions of Roman law.

According to this law, all the rights, duties, assets, provisions, of the deceased person were fully taken over by the heir, and he followed the deceased to the extent that he had the legal right to do so. From a legal point of view, therefore, there is no difference between the heir and the deceased person, which established, as Walter Ullmann observed, „the principle of universal succession according to the Roman law of inheritance" [4].

2. THE SPIRITUAL AND TEMPORAL HERITAGE OF ST. PETER

In the specific case of the Roman pontificate, it was considered, by tradition, that the application of this right of succession concerned the function of St. Peter, more precisely, the powers conferred on him by Christ. According to Roman law, the Pope did not inherit (nor could he), the personal virtues, the merits – in short, *the qualities* of St. Peter, which had made Jesus raise him above the other Apostles. It was believed that what the bishop of Rome inherited was only the legal status given by Christ to Peter. This is also the reason why the pope considered himself an „unworthy successor *(indignus heres):* it was a formula by which, for centuries, within the Church, the principle of separation between office and person was established." All the successors of Leo I will make this recognition of their „unworthiness" (doubling it, however, by emphasizing their official function, that of successors of St. Peter), the keystone of their magisterium. Inheriting the legal status of St. Peter, the pope transferred to himself the totality of the Petrine powers (*plenitudo potestatis*), preserving them likewise, without any diminution or alteration.

These „powers", which had a legal and decision-making meaning, were two: *potestas jurisdictionis* and *potestas ordinis.* If the latter implied the pope's power to „ordain" (or ordinations), the content of the former was more complex, presupposing three main attributions:

- the universal and supreme right of the pope to decide in all matters of faith;
- his universal and supreme right of judgment or decision in relation to all the faithful and members of the ecclesiastical hierarchy (bishops), who could be ordained („ordained"), transferred or deposed; [5]
- sovereignty over the law, which meant *that* the pope was not only the guardian of the law, but also its creator (*conditor)*. [6]

Insisting a little on this „power to create law", it should be noted that its exercise (and, in general, the pontifical dignity) did not, initially, presuppose the ordination and consecration of the future pope, nor even his membership in the ecclesiastical hierarchy: any Christian was, at least theoretically, capable of inheriting Petrine (legal) powers. The only condition for the exercise of this dignity was that the election of the pope was valid. Established by *election,* the succession of St. Peter followed exactly the founding model of Christian election.

Another consequence, also juridical, of the Petrine succession was the legislative independence of the papacy, in the sense that the Holy Father was not bound by the decisions of his predecessors, in other words, his power to legislate was not limited by any previous papal law; any previous provision (be it canon, decree, etc.) could be transgressed by the exercise of the „full powers" of the pope. The reverse was also true: no pope could lay down any law for his successor. since it was considered that he did not succeed him, but directly, St. Peter. [7]

Another consequence of the same succession was the universal interpretation of the pope's ability to legislate, both in spiritual and temporal matters[8], in which we should see the reflection of the traditional principle of totality (integrity), specific to medieval thought. The justification for this all-encompassing attribute was also an expression of the principle of integrity: since the salvation of all believers depended on their conduct in earthly life, everything therefore having a spiritual implication (finality), the pope's right to legislate could not be restricted by the distinction between *the temporal* and *the spiritual:* both domains fell under his legislative jurisdiction. According to Gratian, „The Holy Roman Church gives the force of law and authority to the holy canons, but is not bound by them, because it has the right to make canons.

As for the pope's capacity to ordain („ordain"), which constituted, as I said, the other side of the pontifical powers, this derives from the pope's status as bishop of Rome, the respective „power" regarding sacramental matters: ordinations, consecrations, confirmations, exposition of doctrine, etc., in short, measures involving the possession of grace. Or, if in the first case, that of the „power to make the right", the pope should – we repeat – only be elected, considering that he immediately and directly succeeds St. Peter, for potestas ordinis, he should first be consecrated as a *bishop,* which, in the Middle Ages, happened a few months after the election, the grace thus received being considered to have a source not direct (the divinity), but indirect, mediated by those who consecrated the pope [8].

The definition of the doctrine of papal supremacy took place in the 13th century. It coincided, perhaps not coincidentally, with the reign of Innocent III (1198-1216), which marks the peak of what has been called the pontifical „hierocracy".

The essence of the new innocent doctrine of power consists, to summarize it drastically, in two elements: the extensive reinterpretation of the pontifical „delegation" to „bind" and „unbind", in the sense of establishing not only a Petrine vicariate, but also a Christic one and, secondly, the emphasis placed on the function of the pope as a divine mediator.

The title *vicarius Christi,* associated by Innocent III with the pontifical dignity, was not his creation. Used occasionally, until the twelfth century, both by bishops and by emperors and kings (to emphasize the spiritual rootedness of the office they exercised), the expression appears for the first time exclusively related to the person of the pope in a *writing* of of Honorius Augustodunensis, entitled „Jewel of the soul" (De *gemma animae)* [9]. Before

him, the association between the pope and the Christian vicariate had been occasionally stated by Petrus Damiani (in a letter of 1147, addressed to Pope Clement II) and by several other authors from the beginning of the century, but without the connection between this title and status of „supreme pontiff" to be so explicit. Its resumption, in 1153, in one of the most famous writings of Bernard de Clairvaux (*De consideralione)* – with reference to Pope Eugene III (1130-1145) – conferred the authority of the most important scholar of the time, which, from the middle of the twelfth century onwards, was likely to make this formula a common place both in theological writings and in pontifical acts[10].

The repeated evocation of this expression in the extensive correspondence and in the decrees of Innocent III had a very specific purpose, both symbolic and practical. In the symbolic order, first, the Christian vicarage of the pope (highlighted, starting from the Innocent era, and by a very suggestive symbolism of colors, used in pontifical ceremonies and rituals[11]) was intended to evoke, through the relationship of homology – in the treatise of around 1100 (but with reference to the royal office), he was a *persona geminata,* uniting in himself all the Christian attributions, both spiritual and temporal.

The following – which I called „practice" – of this interpretation appears all the more clearly: emphasizing the fact that the „Holy Father" was entitled to exercise „all powers" (plenitudo potestatis) – the sacerdotal one (potestas *ordinis*) *and* the of judgment *{potestas jurisdictionis}* – by virtue of his status as „vicar of Christ" – and also of God himself, a consequence which Innocent III did not hesitate to formulate – it also showed the way concrete or „scheme" according to which this exercise took place: namely, as an effect of an *act of mediation,* which arose from the very situation of the pope, as the main connecting link, in the interval between Man and God (more precisely, beyond God, but above the human being) [12].

The perfect logic of this interpretation – repeatedly reiterated, in the 13th – 14th centuries, by pontifical theorists[13] and enriched, also during the time of Innocent III, with the attribute of papal infallibility[14] – it no longer needs any additional proof. For, affirming that he represented the highest court of connection between the earthly and the divine order, and also that *through him* and with him God was worshiped or, on the contrary, despised – since, by virtue of his double nature, the pope was, in the most authentic sense of the word, an *embodiment* of divinity[15] – Innocent III claimed for himself not only the ability to transmit divine grace to the world, but also – together with it – all the powers that manifested in it, including temporal ones.

In addition to the doctrinal ideas presented above, other interpretations, concepts and arguments with symbolic-legitimate value of the superiority and pre-eminence of the pontificate and, in general, of the clergy within Christian society, have been stated over time.

The concept of *justice,* developed and applied especially by Gregory VII, constituted another element meant to strengthen the doctrinal edifice of pontifical supremacy. According to Walter Ullmann 's characterization, *justice* appears as an „amphibious" concept, neither purely ethnic-religious nor purely nomological, but meeting both poses. *Justice* meant the correct norm of Christian life, being a „canon" whose observance placed any believer in conformity with the society (community) of which he was a part.

But what did this „right norm „ of the Christian life consist of? In other words, what did she „canonically" define herself by? Schematically presented, its meanings were two: *humilitas,* meaning humility, and *obedience* or obedience.

It is thus better understood why the pontifical theoreticians, but also the great theologians of the Middle Ages, always affirmed that the only authority authorized to enunciate and formulate this concept was the Roman Church (recte papa), also returning to them the legitimate *right* of to certify the extent to which each believer conformed to the constitutive „gifts" of *her justitia,* which authorized him to live together with his fellows.

From this angle, the Christian prince was recognized, in society, only as a purely auxiliary function, lacking not only autonomy, but also any spiritual dimension. In the interpretation accredited by the papacy beginning at the end of the 11th century, definitively imposed with the settlement of the dispute surrounding the investitures, through the Concordat of Worms (1122), the traditional distinction between *the spiritual* and *the temporal* held more and more more to turn into a separation, the second term of the relationship („temporal things") no longer being recognized as having a proper, internal and immediate functionality, but – by virtue of the well-known analogy between body and soul – only as a consequence of the „enlivening" produced by the „spiritual". „Matters personified," monarchs were not considered „users" unless they acted according to the directives of the spirit, in accordance with Christian principles[16].

In the spirit of the same doctrine, Nicholas I also intervened, interestingly, in the regulation of matrimonial relations, considering them as having a direct impact on the salvation of believers. Their interest, he considered, made ecclesiastical (ie papal) jurisdiction in this matter imperative. As a divine institution, belonging (also) to the spiritual sphere of Christian life', the duty could not escape the pope's sphere of decision. It was primarily a spiritual institution, looking as such at the very foundations of society. Being intimately linked to faith, and faith being the binder of the whole „body" of the Church, marriage, misinterpreted or not respected in its precepts, affects *ipso facto* the whole body of Christendom. Hence the pope's duty to intervene and decide in the matters that concerned her[17].

Continuing the assertions of Nicholas I, Adrian II (867-872) emphasized, in his documents, the function of the pope as the supreme arbiter of Christianity *(populus Dei)* and, implicitly, as the supreme depository of justice *(justitia)* and the establisher and supreme defender of peace, in his capacity as head of the entire Christian community (peace being considered a fundamental condition for the fulfillment of the goals and purposes of Christian society).

Adrian II's immediate successor, Pope John VIII (872-882) evoked as the fundamental theme of his ideas the corporeal, organic dimension of society – which he called *respublica Christiana* –, of which he was the head, and the leading members, the representatives of the priesthood, the most qualified, by their very function, to lead. The Roman Church held *the principatus* over all nations, being the hypostasis on a reduced scale of all Christendom. The empire was only credited with a purely auxiliary function, the monarch – created for the protection of the Roman Church – receiving his dignity, through the mediation of the pope, as a *divinum beneficium.*

3. CONCLUSIONS

As can be seen from the brief enumeration of all the examples above, the dispute known as the „contestation quarrel" and the subsequent pontificate of Innocent III were not, in relation to the evolution of the pontifical doctrine of supremacy until the beginning of the 11th century, a paradoxical phenomenon. On the contrary, both are rooted in a plurisecular

doctrinal elaboration, perfectly coherent, which has established itself as the most complex and profound „discourse" of power in the medieval West.

REFERENCES

[1] *Cf. the Bible or the Holy Scriptures of the Old and New Testaments. With trimeters,* Societatea Biblica, sa, s. *l.,* p. 942-943. Here is the Latin translation of the passage: *Tu es Petrus et super hanc petram edificabo ecclesiam meam... et tibi dabo claves regni coelorum, et quodcumque ligaveris super terram, erit ligatum et in coelis, et quod cumque solveris super terram, erit solutum et in coelis*.

[2] W. Ullmann, *Principles of Government and Politics in the Middle Ages,* New York, 1966, p. 32, 36. The imposition of this interpretation was also considerably favored by the Latin terms used, as a rule, to render it: *ligare* (= „to bind") was interpreted as the matrix notion of *lex* (= „law"), whereby a special „link" was established between those to whom it applied. The term *solveris* also had a strong echo in Roman law, more precisely in the expression *solutio obligationis* (= „release from obligation").

[3] *Ibidem,* p. 37-38.

[4] The title of *sanctus* of the Pope (which is due to Ennodius of Pavia, the first to call the Pope as such, Gregory VII later giving this appellation a legal status) is not in contradiction with the interpretation of *the pontifical magisterium* as being independent of the personal qualities of the officiant, since he did not, according to a traditional interpretation, have a liturgical meaning, but only a legal one, referring to the Pope's powers to „bind" and „loose", with effects – according to Jesus' words – simultaneous, equally on Earth and in Heaven. One of the most tangible attestations of the pontifical status of *sanctus* is the canonization procedure which, from the end of the 10th century, was exclusively reserved for him: only because he was „saint", that is, he had the power to „change" both Earth, as well as in Heaven, he could create, by his verdict *(judgment),* a saint *(cf.* Walter Ullmann, *Principles of Government*..., p. 39-40).

[5] *Ibidem,* pp. 37-39; JH Burns, *op. quote,* pp. 266-268, 269-274.

[6]W. Ullmann, *Principles of Government...,* p. 72.

[7] *Ibidem,* p. 73-74.

[8] *Ibidem,* pp. 269-274.

[9] *Ibidem;* W. Ullmann, *Principles of Government*..., pp. 41-42; *The Growth of the Papal Government* p. 9 sqq. An additional argument of the pontifical supremacy, given in relation to the Empire, was the so-called „Donation of Constantine" *(Donatio Constantini),* a false document, elaborated around the year 750, based on an older writing, *the Legenda sancti Silvestri* (actually: *Acta* or *Gesta Sylvestrii),* containing a „romanticized" version, as we would say today, Roman origin, of Constantine's conversion, conceived at the end of the 5th century. The expression of the papacy's effort to free itself from the tutelage of Byzantium and the Empire alike, the latter text was drafted during a critical period in the relations between the West and the East, characterized by the first conflicts for supremacy between Rome and Constantinople and by the effort of the Roman episcopate to reinterpret in a more restrictive sense the concept of *imperial theocracy*. It is the era in which Emperor Zeno publishes *the Henotikon* (482) – the decree of the religious union of the Empire – and, at the same time, the period when the Gelasian doctrine was enunciated (preceded, by several decades, by the first exposure of the Petrine doctrine by Pope Leo I). The central

idea of the *Legend,* vaguely sketched, however, it emphasized the pre-eminent status of the Christian Church and the somewhat dependent position towards it of the emperor Constantine who, following the Christianization, would have taken back the insignia of power from the bishop of Rome. What was only suggested in *the Legenda sancti Silvestri* became explicitly stated in the „Donation". Here, in brief, is its content: as a reward *for* being cured of leprosy, Constantine offered Pope Sylvester I (314-333) the imperial vestments and insignia, including the crown, scepter, lance, orb and the flags. As an additional sign of submission, Constantine agreed to perform the position of *strator,* that is, to walk on foot in front of the pope, leading his horse. Pope Sylvester, however, refused to wear the crown, Constantine instead placing the so-called *phrygium,* in fact *the tiara, on his crown,* decreeing – according to the anonymous author of the document – *that* only the pope had the right to wear this sign *ad imitationem imperii.* At the same time, Constantine offered to the pope the palatial river, the city of Rome, all the provinces of Italy and the whole of the West, with the related rights of government. To explain, however, why an empire called Roman had its capital at Constantinople, the „Donation" states *that* the transfer by Constantine did not concern the political institution of the Empire as such (which continued to reside in Rome), but only the residence to the emperor, the place where the imperial crown was worn, the transfer being made on the grounds that it was not proper for the emperor to have his residence in the same place as the divinely instituted leader of the Christian religion. According to the interpretation suggested by the document, this transfer of see – and crown – took place with the consent of the pope, who, if he wanted, could have worn the crown himself, since it had been given to him and therefore became his. If Emperor Constantine and his successors continued to wear it, this was only possible because *the* Pope wanted it so. However, he could withdraw this right at any time, which established a clear sign of subordination between the two. From the perspective that the „Donation of Constantine" sought to accredit, the function of the Emperor could only be an auxiliary one; as a Roman emperor, according to Constantinian tradition, he was supposed to follow the Church, not dictate to it. If he had done otherwise, he would have ceased to be „Roman", lost his legitimacy and become „Greek". The „Donation of Constantine" thus linked the notion of „empire" (in the religious and political sense) to Rome, robbing it of any legitimacy Byzantium to pretend to be the successor of the old Roman structure. By virtue of the rights formerly ceded to him by Constantine, the pope could at any time confer the crown – and with it universal temporal government – on the candidate („chosen") for the throne deemed most suitable for the purpose of defending the Church and the faith. The liberation of the papacy from the influence of Byzantium had to be fatally followed by the creation of a (true) emperor in the West, of the nature of associating the spiritual dimension of pontifical universalism with a political, temporal dimension. This must have been (the interpretations, in this sense, agree) the motivation for the coronation of Charlemagne, on December 25, 800 (see Walter Ullmann, *The Growth of the Papal Government...,* p. 74-86).

[10] The author of *the Elucidarium* writes here *that „*the pope is the vicar of Christ and all the bishops are the vicars of the apostles" (*apud* Colin Morris, *The Papal Monarchy. The Western Church from 1050 to 1250,* Oxford, Clarendon Press, 1989, p. 206; the source cited by the author is M. Maccarrone, *Vicarius Christi. Storia del titolo papale,* Rome, 1952, p. 86-100).

[11] Starting with the pontificate of Eugene III, the pontifical chancellery will systematically use this title, associated, from now on, only with the papal dignity *(cf* Agostino Paravicini Bagliani, *Le corps du pape,* Traduit de l'italien par Catherine Delarun Mitrovitsa, Paris, 1997, p. 76-77).

[12] The main colors were *red* and *white,* specific to some pieces of the pope's clothing: the purple mantle – placed over the white vestments, which the pope wears, even today, still, permanently –, the white miter and the shoes, also tomatoes. Mentioned, for the first time, in *Donatio Constantini* among the vestments given by the emperor to Pope Sylvester I, the red mantle symbolized both the passions of the Savior and the royal dignity (the quality valid not only in temporal order, but also as a Christic symbol, denoted by his vestment Jesus with the red cloak as a sign of the title, which was given to him in derision, of „king of the Jews"). The white color was also considered an imperial symbol but of divine majesty (a meaning that first appeared in Byzantium). Also white was the horse on which the pope rode from St. Peter's (Vatican) where he was crowned, to his residence at the Lateran palace. Guillaume Durand gave, in 1286, the earliest symbolic interpretation of the red and white robes of the pope, specifying that they represented the person of Christ: the outer red symbolized supremacy and compassion, while the inner white signified innocence and charity. They are always worn by the pope in his capacity as the embodiment of the Church and the divine person. In the 13th century, the imperial symbolism of the papal clothing became inextricably linked to the Christian symbolism, red and white signifying, in this double ensemble, the color of passion, respectively that of innocence, righteousness, chastity and purity. In the same period, black, the color of death, of mourning, was definitively banished from the pontifical ceremonies (*Ibidem,* p. 102-110, 111 *sqq*).

[13] *Cf.* Ernst Kantorowicz, *L'Empereur Frederic II.* Translated from the German by Albert Kohn, Paris, 1998, pp. 47-48.

[14] One of them, the jurist Augustinus Triumphus (1270-1328), observes in the papal power „a mixture of divine and human elements". He also affirms *that* the „power" *(potestas)* of the pope „is twofold: one – *potestas ordini* – is linked to the true Body of Christ; the other – *potestas iuri[s]dictionis vel administrations* – of the mystical body of Christ". In turn, Iacob (Jacobus) from Viterbo asserts, in *De regimine Christiano* (1302), that the pope is called „the vicar of Christ," both as man, since he is priest, and as God and man, since he is king. Alvarus Palagius (Alvaro Pelayo) also writes in 1332, summarizing the doctrine, *that „*just as Christ has two natures, so also his vicar general – and especially every pope – participates, to a certain extent, in the two natures of Christ: to the divine nature, as regards the spiritual, and to the human nature, as regards the temporal" (cf. *Agostino* Paravicini Bagliani, *op. cit.,* p. 84-88).

[15] Linked only to the pope's quality as a „person", i.e. the embodiment of the ecclesiastical institution and Christian vicar, not that of man and sinner (distinction stated by the Anonymous Normand (of York) (*Ibidem).*

[16] Derived from the doctrine of the „Christian vicariate" and that of the „double nature", the idea of the „Christic visibility" of the pope affirms – according to the expression of the same Alvarus Pelagius – that the one who „looks at him with the eyes of faith [at the pope] sees Christ himself". He also writes further: „the pope is... the descendant of Adam, the first man, and therefore God wanted the vicar of Christ to be made, in a special way, according to his image and likeness" *(Ibid.,* p. 84).

[17] *Idem*, *The Growth of the Papal Government.,* pp. 272-275, 286-287. Apart from the elements mentioned above, the pope's claim to institute kings was yet another expression of the subordinate role assigned to royalty by the Roman Church. The so-called, classic manifestation of this right coincides – again – with the pontificate of Innocent III, a good example in this regard being, among many others, the letter sent by the pope to the Bulgarian king Ioniță Kaloian, where the following can be read: *In spiritualibus et temporalibus paterne sollicitudine providere volentes eius auctaritate per quem Samuel David in regem inunxit, regem te statuimus super eos (In spiritual and temporal things, wanting to ensure with parental care, through the authority of him through whom Samuel anointed David king, te– I put a king over them (scil. Bulgaros et Blachas)* (*Ibid,* p. 82 83).

BRIEF CONSIDERATIONS ABOUT THE TRILEMMA OF ROMANIAN JUSTICE: BETWEEN TRADITION, CONSERVATIONISM AND REVOLUTION

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Abstract
Technological innovations that could be introduced into the judicial system undeniably have immense advantages and disadvantages in equal measure. That is why the mind must not be driven towards exaggeration, nor towards diminishment, but towards the middle path of virtue, of the heart. First of all, such a system could clear up the situation facing the courts, and the litigants' right to a fair trial – in the optimal term – could be respected. Moreover, the participants in the execution of the judicial act (the judge, the litigant, the lawyer and any other participant) can be present at the same time, without being in the same place. At the same time, the costs of the whole procedure would be low. However, in order for all these advantages to be quantified, courts require technological systems which, unfortunately, they do not have. Of course, returning to the disadvantages, such a practice could diminish the human factor, but both the advantages and disadvantages of this technology are obvious.
Keywords*: justice, social justice, rule of law, truth, tradition, technology, digitization*

1. Introductory matters

As is commonly known, Ulpian, one of the great legal authorities of Ancient Rome, said that Justice is „the constant and perpetual desire to give to each his due", and Epicurus, the Greek philosopher, said around 200 BC. that Justice is a „contract of opportunity entered into to prevent people from harming or being harmed"[1]. Without a doubt, justice is one of the oldest pillars of society, a conservative field that has not understood how to evolve with technology. However, the emergence of SARS-CoV-2 proved to be the situation that put the judicial apparatus to the test. In such a context, but not only, it was necessary to find a solution that would continue to ensure the right to a fair trial, in an optimal and predictable period respecting responsible social conduct. In a period of uncertainties and, implicitly, of the consequences of the conflict at our borders on human existence and the democratic organization of society, not even law could escape prospective analysis, in tune with the times, even with expressed conclusions that give off concern more than ever. The computer assault causes us fear, surprise, but possible late regrets are not excluded if we do not take seriously and properly treat the warnings thus and now arriving which confirm that the current Romania is sinking into a deep crisis full of risks in which artificial intelligence (AI) tends to become a pluripotent and omniscient tool, capturing all areas of social life, generously offering efficient and quick solutions for any human task that needs to be fulfilled. With all its present and, above all, future advantages, AI presents itself as a

bivalent tool, capable of facilitating human activities in a society increasingly reconfigured on the risk paradigm, and, on the other hand, due to insufficient development (some forms of AI being still at an early stage of research), presents itself as an important risk-generating factor. The public service of justice, which has already embraced the benefits of AI and implemented algorithmic solutions, seems to be the most vulnerable. The risk was described as being, at present, ubiquitous, diverse and global.

The 21st century is characterized by a true inflation of risks, from the voluntary risks we choose to take (the risk of being subject to a criminal sanction or the health risk due to the consumption of harmful substances), to the involuntary risks, which are imposed on us by factors external to us (environmental pollution). The doctrine also classified risks into personal risks (lifestyle choices) and public risks (committing crimes). Risks have different gravity, different levels of probability and impact (pandemic, nuclear accident has low probability, but high gravity, while material losses due to gambling have low gravity, but high probability of occurrence). Some risks are associated with the proximity of geographical areas with high crime, and others have a global character, their impact occurring far from the area where the event occurred (acid rain, climate change)[2]. Risk is therefore a complex phenomenon, which does not only involve the calculation of the chances of error or the degree of danger, but involves the analysis of a multitude of factors, social, economic, environmental, human, psychological, etc. There is currently talk about a real „risk paradigm", because the debates and conflicts related to the issue of risk have begun to dominate the public, political and private arenas.

According to Dex online, risk is defined as „the possibility of coming into danger, facing trouble, or sustaining damage; possible danger, hazard, danger, exposure to danger or as a probable event that can generate negative consequences". Contemporary sociologists have argued that, due to the severe challenges of capitalism in the 1970s, the relationship between labour and capital and between the citizen and the state has been radically transformed. Due to the phenomenon of globalization, the spread of information technology and technological advances, cultural and social transformations, as well as due to the presence of perpetual debates in which assertions on universal truths are subject to challenges and disputes, we are witnessing a new configuration of the concept of risk. The postmodern risk has globality and relativity as its main characteristics, and requires the identification of new forms of social control, aimed at minimizing its consequences, as in the case of the public service of justice, it involves the analysis of the advantages and disadvantages arising from technological innovations that could be introduced in the judicial system.

First of all, such a system could clear the situation with which the courts are faced with the right of litigants to a fair trial – in the optimal term – which must be respected. Moreover, the participants in the execution of the judicial act (the judge, the litigant, the lawyer and any other participant) can be present at the same time, without being in the same place. At the same time, the costs of the entire procedure would be low. However, in order for all these advantages to be quantified, the courts need technological systems which, unfortunately, they do not have. Naturally, returning to the disadvantages, such a practice could diminish the human factor. As an example, a journalist from the United States took part in a court hearing on the Zoom platform. Some aspects remained the same: there was a judge and a prosecutor, a lawyer and a litigant. However, enormous differences were felt. „It feels so distant and different than it should", the judge can no longer interact with the

litigant, he cannot see his reactions and manner of being, which is why the human factor is drastically diminished, which inevitably affects fairness and impartiality". [3]. Of course, such a practice is not perfect, but it is certainly the best option that the courts in Romania have at their disposal and the only solution by which the right to a fair trial, in an optimal and predictable period, could be respected. Anyone can see that the onerous measures in Romania – including interventions from outside to prevent justice reform, the promotion of mediocre figures, with active crimes, as „heroes" – are initiated by „representatives" of the allogeneic occult, but also by „occult" indigenous people. The past, whatever it was, is already more than thirty years ago, and no country takes it as justification for present errors. Undoubtedly, there are survivals of the past in Romania, such as rigged elections and securism, but they are maintained by the current decision-makers. Romanians are like any other people, only they rarely use the chances to give themselves skilled and cultured leaders[4].

From this perspective, the approach to a modern, highly topical subject – the contingency of AI with law and justice, involves the association in the research approach of two apparently irreconcilable elements: on the one hand, AI – this universal tool, in full ascension, which is painted by IT-ists as the solution to all social problems and tasks, a kind of Philosopher's Stone of the future – and law and the justice system on the other hand – two ancient „bastions" that are hardly conquered by futurists armed with algorithms and computers [5]. Without pretending to be exhaustive, the study addresses several issues related to the triple possible valence of Artificial Intelligence in its connections with the contingent of justice and the legal: AI as a possible subject of law, AI as a means of committing the crime and AI as a tool to achieve of justice, preceded by an introductory contextualization part, in which the current dimension of the AI phenomenon in terms of social relations is presented. And this in accordance with the research object of our study: the trilemma of Romanian justice: between tradition, conservationism and revolution, taking into account that the target of any thinking person is the truth, I consider this fact remarkable and things must be called by name. It is still difficult to understand that in Romania's current situation the truth is not „partisan". It is not the monopoly of those who governed, who do not know how to explain the reforms, nor of those who govern, who combine amateurism with abuse.

I think that integrity is a key value – especially in the organized confusion of values, in which Romania was unfortunately brought. The proportions of the imposture have unfortunately increased. Never, since the days of Stalinism, has the unpreparedness of decision-makers been at today's levels, and there has never been a violation of the Constitution in force, with such far-reaching effects. Never has the compromised pieces of the thirties been resorted to in the face and from the top – taking the „street movement" as a legal source, confusing politics with skills to split society, unscrupulously attacking rivals. Legal ignorance and „official" data falsification have never been more blatant. We can see the results with our own eyes. Just to illustrate, Romania goes into debt every week, burdening the future more than ever. It already has the largest peacetime emigration in the world. Its decision makers are unable to design development. Democracy being undermined, nothing can be solved lastingly. To be clear, I advocate, as always, for pluralism involving the democratic rule of law. Pluralism is in danger in Romania today. The country has entered a vicious circle that attracts destruction. Many facts are evidence. I stop at the more recent string when, in 2019, nothing was discussed, but he „walked with justice" after his

rivals, in order to hit them hard as we will discuss a little further on. Another step was hitting everything that goes out of control. The first target – the Parliament. Doubt is cultivated a priori about it, because it is the only institution that represents the sovereignty of the people and can suspend it. And if Parliament cannot be hit, it is infiltrated. In Romania, for example, the unique phenomenon in Europe of „secret protocols" between judges and the secret services of the „president" could not be analysed in Parliament. Instead, it flatters categories that can be easily misled, such as the diaspora. Every value of the EU and NATO – constitutionalism, democratic rule of law – is disfigured, if not trashed.

These are not exactly easy days, not only for the legal area, for Romanian society, for international society. In our country, I am afraid that it is confirmed that almost none of today's decision-makers is wrong. Did those who say they are teachers even get their teaching degrees? Did engineers run an enterprise? Have economists shaped any organization? Have agronomists created a competitive production unit? Do lawyers have legal culture or are they simply „legal activists"? Let's not ask about the exams, because the citizens will have to take care of themselves! Instead, one can ask where the leaders of the promotions are and whether the current Romania is not of the organized overthrow of values. Was this the aspiration of those who fought for the turning point in December 1989? The crowning step of the current prostocratic regime is the cultivation of phantasms. „They ruled badly" is said emphatically. But one lives on the achievements of those, because according to „my governments" there are only damages. They are fighting the „red plague", the „toxic" ones. Isn't this „struggle" just a cover for imposture and scams and its consequences are real challenges for a judicial management already in crisis?

2. About the challenges of judicial management in crisis situations

We will discuss in the present section the challenges of judicial management in crisis situations, or more precisely, we will refer to old problems and new challenges for justice, a term which, for the purposes of these brief notes, I will rather use in the sense of system judicially, without for a moment forgetting that Justice, in its noblest sense, means, as Benjamin Israeli said, truth in action, or, as Cicero said, the glorious crown of virtue. We emphasize that some of today's problems of Justice are at the same time historical, chronicled have their roots in the near or distant past of our Justice and our social-political life. Perhaps many of these problems would not have been felt if in our post-December judiciary, i.e. in the judicial system after 1990, it had not started with the proclamation of immovability, but prior to that with the proclamation of a „lustration" in the judiciary, in meaning that all those who, in 1989, were simultaneously part of both the judiciary in a broad sense (judges, prosecutors) and the Security should have been „invited" by law to leave the judiciary, stopped from entering the democratic and independent judiciary organized after 1990 [6].

There was a fashionable political slogan in the 1990s, although without much electoral effect at the time, „who spent 5 years with the Russians, cannot think like Bush", a slogan that colloquially stated, like any political slogan, the fact that you cannot build liberal democracy with politicians educated in Bolshevik-style authoritarianism. However, we, as a nation, did not intuit the effect of this contradiction in time and overcame it by voting, but the result was seen in the difficulty with which we started towards a world of European and Euro-Atlantic values. These delays are settled even today, two examples testify: the persistence of the Cooperation and Verification Mechanism and the absence from the

Schengen Area. Therefore, as in the political-administrative organization, also in the judiciary we committed to a judicial organization based on the immovability and independence of the judge, but without a prior „brushing" of the judiciary. The fact is consummated, the retirements solved the problem, but not in time. But how many of the old problems of our democracy and justice do not have their cause in this error committed from superficiality, complicity or geopolitical constraints?! Against this background, the gains of the Judiciary in the 1990s were the immovability, the judicial organization, the independence status of the magistrate, including the improvement of his financial condition. Regarding the incomes of Romanian magistrates, they are comparable to those of their German colleagues.

Returning to the perspectives of the Romanian legal and judicial space, we appreciate that a short excursion to the recent history of Romanian justice would be useful and relevant. In these respects, the Snagov Declaration of June 21, 1995 was the unique moment in Romania's post-December history in which the signatory parties, overcoming group, political, economic, ideological interests, acted in solidarity, constructively and consensually, establishing the trajectory of the future Romanians within the European Union, based on those principles enunciated in the Declaration and provided for in the numerous founding and supplementary documents of the European Union. Without going into details regarding Romania's pre-accession process to the EU, we record the fact that based on this original consensus, treaties, agreements were concluded with the EU, milestones, conditions, preliminary pre-accession evaluations were established, Romania amended the Constitution, the laws, including those of justice, proceeded with major economic restructuring, of administration, education, etc., so that in 2004 the pre-accession chapters were concluded, including chapter 24 – justice and internal affairs (JAI), based on mainly the adoption of the package of justice laws in the summer-autumn of 2004. The European evaluators found compliance with the principles of the Union's operation in the drafting of justice laws, they welcomed the establishment of the Superior Council of the Magistracy, exclusively managing the professional career of judges and prosecutors, the elimination the political influence in the professional career of magistrates, judges and prosecutors, the imposition of meritocracy through competition, the creation of a special institution to fight against corruption [7].

However, in 2005, when the government and the president changed in Romania, something happened in relation to criminal justice in Romania. The justice laws were again amended, this time in the opposite direction to 2004: political control over the appointment/revocation of the heads of the central prosecutor's offices and the supreme court was reintroduced, the SCM's powers regarding the career of prosecutors were amputated in favor of the politically appointed general prosecutor, the minister of justice and of the political president of the country, the right of the political president of the country to refuse at any time the proposals for the appointment of the general prosecutor, the president of the supreme court and their deputies was recognized; derogatory non-transparent and acutely subjective ways of promotion to the top were created, removing competition, professional training and meritocracy, etc. In consideration of an elementary logical reasoning generated by the changes that visibly and consistently affected the principles of independent operation of a European justice system, a blunt and also logical reaction of the entire civil society, the elites and the media in Romania was expected, as well as a harsh

institutional reaction of the European forums in the sense of stopping this legislative regression [8].

It was exactly the opposite. The reaction of those listed was not of rejection, but of massive support of the new amendments and their promoters, given that the principles of the rule of law, the independence of the judiciary and the magistrates had remained in 2005 the same as those declared and accepted by the EU in year 2004. In this context, the question inevitably arose – why? Why did a majority of the media in Romania, of civil society, of the Romanian elites, of politicians, not reject, but supported the visible regress, why did all the European institutions and officials not reject, but supported the regress, how was it possible that the actions of support, internal and external, numerous and diverse, to be concerted in time and space, as well as the actions directed against those few who denounced the gross regress based precisely on the principles publicly proclaimed by the Europeans? What non-public sector could enable all these private or public entities, national and outside the country, to act in concert, to defend/justify the anomalies legislated in 2005 that clearly contravened all European principles on justice – the rule of law, the independence of justice and magistrates, the elimination of political interference in justice, the separation and balance of powers in the state – and why did these steps materialize only for Romania, and not for the other member or candidate countries? At the time, a plausible explanation could not even be asked for, much less given. Criticisms and questions were flooded from all sides with propaganda templates and already usual accusations, „communists", „criminals", „corrupt", „you don't want with Europe, but with Russia" and that's about it. These were the „reformist" explanations then [9]. What is now and especially, what will be? A possible answer in the following lines, in which we will analyse the trilemma of Romanian justice on the verge of decision, between tradition, conservationism and revolution.

3. The trilemma of Romanian justice: between tradition, conservationism and revolution

In contrast to the moment of 2005, today, almost 20 years later, Romanian society is in possession of indisputable evidence provided by its own existential reality during this period, and that is precisely why it can offer its own explanations. The technical-managerial response of the massive internal/external concerted actions to convince the internal and external public opinion that the violation of some principles of the Union actually represents their observance, and the observance constitutes a violation, was relatively simple. Such actions could not be carried out ad hoc, they needed a conceptual and implementation strategy, bridges, contacts, sufficient and qualified human resources, logistical and financial support already existing at the time the action was launched, stage calendar, etc., actions whose potentiation primarily required time measured not in months but in years. The difficulty arose in discovering the purpose of such an effort of legislative diversion and manipulation of Romanian and foreign public opinion. The subsequent evolution over the years of the trajectory of Romanian criminal justice also clarified this aspect. Now, in the year 2023, it can be argued not only on the basis of logical reasoning, but also on the basis of indisputable public evidence, that Romania constituted a large experimental field of a Pilot Project with a well-defined research objective – the possibility the domination of a European democracy through the levers of criminal justice, above and beyond electoral options. Romania was suitable and representative both as a sample (average population and territory), but also from the perspective of other criteria: reasonable level of education,

although with an accentuated downward trend after 1989 and prone to emotional manipulation on traditional themes of antagonism (young reformists vs nostalgic old people, European progress vs communist brakes, Europe-Russia), the only anaemic presence of some solidary reaction factors at the mass level (trade union, professional, civic, political), the tendency of massive displacement of some segments of the active population left without job to Western countries, in economic emigration, the insecurity of the standard of living generated by the economic transition from socialism to capitalism, the errors of economic strategy accentuated by frequent indigenous and foreign criminal connotations, the availability of the overwhelming majority of Romanian politicians to compromises of any kind, a population captive to a given space, before 1989, then conquered by the mirage of free movement in Europe and very receptive to the opinions and opinions of European officials, both those for someone, but especially those against someone [10].

This was the context of the implementation of the Pilot Project on the domination of a contemporary democratic society through the levers of criminal justice, the country chosen as the most suitable in terms of the above criteria, being Romania. Over time, this hypothesis was also advanced in the public space, but only on a case-by-case basis, oriented mainly towards the expository-enumerative side, without concern for a corroborated legal-argumentative analysis of the acts, facts and decisions of this period. The hypothesis, in various variants, was usually advanced in the form of a sporadic response from some public or private persons/entities directly affected by the legal mixer established by the Project, and that is precisely why the echo of these responses was either missing or was quickly and easily annihilated by the components of the Project in two predilected ways: the first, by accusing the rebel of subjectivism, partisanship with penalties and opposition to the anti-corruption fight, the second, by ridiculing and ridiculing him on the subject of conspiracy theories. Both ways, used either individually or combined, depending on the subject and context, were intended to instil in public opinion either that the subject seeks to evade the law, or that he is spreading conspiracy stories about those created and financed by George Soros [11].

Therefore, it is necessary to appreciate that all of the above were ascertained through a Report on the subversive activity of the Justice and intelligence services [12] which constitutes the first document with an exhaustive approach to the anomalies generated by everything that the action on Romanian society meant: components, coordination, implementation, consequences, in order to understand the course through which the notions of criminal, corrupt, arrest, exemplary prison, humiliation, binomial, judicial corridor, protocols, false evidence, judicial abuses, unjust repression, corruption and, last but not least, the republic of prosecutors have become commonplace in Romanian public communication. Like any point of view, the present one can be suspected of subjectivism. That is precisely why in the construction of the work only those argumentative elements based on facts, legal texts, rules and principles, on elementary logical reasoning, but also on legal ones, were selected. It would have been useful if these aspects were clarified. For documentation, we offer an example, that reserved for the serious consequences of the Project's application on the credibility of Romanian public institutions, on the Romanian economy and last but not least on human destinies, exclusively Romanian, programmatically and experimentally trampled. It also details analytically and argumentatively the moment that was the peak of the plenary activity of the Project's components, namely the changes made to the laws of justice in the years 2017-2018, a period in which European political

hypocrisy became transparently abusive, and the internally coordinated actions of the Project's components have became increasingly transparently hostile to the Romanian constitutional order and, implicitly, to the Union's operating principles. The conclusions are self-evident and briefly reiterate its goals: 1. the well-argued public awareness of the fact that Romania was the subject of a successfully finalized Pilot Project; 2. the reasoned dismantling of the claims of principled objectivity of the Project components; 3. Public awareness of the need to reconsider the mode of operation of European institutions 4. warning those interested about the probability of applying the results of the pilot project in Romania to the scale of other state entities or state unions. However, three questions remain unanswered – who conceived, who approved and who paid for the Project [13]?

In another interpretation key, different/antagonistic, even if it refers to the same issue of post-December justice, from that of judge Ion Popa, Cătălin Predoiu, the current minister of justice (April 2023), stated that „the decade 2000-2010 Our justice was temporally almost equally divided into two stages, but contradictory from a factual point of view. The decade actually began in 1999, with the launch into public debate of the first drafts of new codes, drawn up under the „wand" of Minister Stoica, supported by a group of talented young lawyers, coordinated by Professor Marian Nicolae, many of whom are also today in the Ministry of Justice basic pieces in the law-making apparatus. We know well from the doctrine and specialized jurisprudence how our codes were „slaughtered" even by the Constitutional Court of Romania [14]. In the same speech it is stated: „the years 2000-2004 initially marked the peak of ministerial authoritarianism over justice, then the end of the era of the „all-powerful ministry" and the transition, through the laws of 2004, to the organization of justice according to the European community model, the model of self-governance of justice through the Council Superior of the Magistracy (CSM). The justice laws were the direct consequence of the EU accession negotiations, adopted during the mandate of Minister Diaconescu, in the pre-accession process. This formal metamorphosis had three dominant directions. The first consisted in the appearance in the judicial landscape of a SCM strengthened by powers and attributions and represented, almost symbolically, the transfer of the communitarian and eastern model of the organization of justice to the European model.

The main responsibility for the smooth running of justice, however, passed, from that moment, mainly on the shoulders of the CSM and the body of magistrates. Improvements, however, I think are required. The second direction was the appearance of „anti-corruption" as an independent concept circumscribed to justice and as an institutional reality through the establishment, on the model of the Fiscalia General (Spain), of the National Anti-Corruption Prosecutor's Office, the current National Anti-Corruption Directorate. This creation, all the fruit of the pre-accession negotiations to the EU, represented the hangman's rope that the corrupt part of the political class sold itself, in an attempt to convince the West of its good intentions. It was not known back then that anti-corruption does not believe in tears, not even presidential tears. As even „anti-corruption" did not suspect, after 2007, the year of accession, the inexhaustible ability of the corrupt to evade the „noose" of the law, see the devastation produced in the laws of justice and the criminal codes of the years 2017-2019. The third direction was the Cooperation and Verification Mechanism, the direct expression of the „bet" that the EU made for Romania: we invest energy, expertise, money and measures in justice, and this will change Romanian society for the better and strengthen

liberal democracy. Or, the shorter formula of the bet: justice will strengthen democracy, democracy by law." [15]

The historical stake of this process would have been and continues to be the enthronement of liberal and democratic European values in the entire Romanian society and the cementing of our integration in the West. Or, in short: dignity, justice, prosperity. There followed years of tension, trials, progress, errors, successes, but also recently (2017-2023) of great self-inflicted legislative and institutional disasters, which showed that the path found with great effort (just one step away from raising the MCV in 2012) was fragile and in places reversible. What is certain is that today we are facing both old problems and new challenges. I think we're at a point where, before we take action, it's wise to look for the best questions to think about. How do we resolve differences of perspective on justice issues that manifest themselves within justice itself? We have a CSM divided with precision and almost perfect parity on the fault of all essential issues. What an irony, that precisely the ministerial vote is called to destroy this parity and can sometimes unlock decisions of the CSM that can no longer bear postponement, often being the lesser evil! We also have several associations of magistrates equally divided, in turn, on either side of the same fault. How do we prioritize the issues of our justice, those that are indicated in the MCV, or those that are not contained in it, although they are equally important? Can we tackle them all at once? If in 2012 we were one step away from raising the MCV, how quickly can we be at the same point again? If we talk about forms, we ask the question of restoring the laws of justice broken in many places by a majority interested in this purpose through the changes of 2017-2023, which did more harm than good, or we dare to make new laws of justice, in perfect line with European standards and values, but also taking into account all the lessons we have to learn from previous mistakes? If we talk about institutional architecture, we have the courage to admit that today there are practically three „ministries" of justice, the one with this name, the Public Ministry and the CSM, three institutions that deal with the smooth running of justice, three institutions that share their powers, duties, budgets and are equipped cumulatively with almost 1,000 people, with the related expenses and logistics, having results that citizens still complain about?! About 1,000 people in the „three ministries", 15-20 top officials, all with dignified status, even the magistrate members of the SCM, who manage the work of about 6,936 people (judges and prosecutors). Isn't that a bit high?! In economics, a company with 5-10,000 employees has a board of directors of no more than 5-10 people. Of course, we are not comparing apples to oranges, but the science and practice of management teaches us interesting things. Doesn't this approximate coincidence between the number of vacancies in the system (approx. 1,000 magistrates) and those in charge of the system's operation „speak" by itself?

Is it time to discuss a de-bureaucratization of the management architecture of the judicial system and transfer some more decision-making power down to the grassroots, including by rethinking the length of management mandates?! Not to mention that bureaucratization naturally brings with it the disconnection from real problems and solutions, but also the lack of legitimacy and authority, or, authority is needed to impose rigor, discipline, professionalism. These rare flowers do not grow by themselves, like the cornflower, but are cultivated and protected by enlightened and dedicated leaders at every level, not just at the top. But they must also have powers. I mean, of course, the presidents of the courts. Continuing on the system architecture, the hardest part is and must remain the CSM. But are we talking about a CSM correctly structured as tasks or one that cannot go

beyond its limits because of its own way of organization? A CSM with permanent or periodic activity, as in the Netherlands and other European countries, where it works effectively, for example? A CSM that is often tempted to lead operatively indirectly the Public Ministry, by exercising with appetite the attributions conferred in the mandate of Minister Toader to the prosecutor's section or a CSM that is limited to being the guarantor of the independence of the judiciary, as the Constitution expressly says, which does not place the Ministry Public under the authority of the CSM?

More or less managerial operational independence of court presidents in relation to the SCM? More or less stability of SCM members in relation to the specter of removal from office? More or less managerial operational independence of court presidents relative to their governing boards? How far can these governing bodies block the reforms of the presidents of the courts? Justice budgets all at the CSM? With what expertise, with what organization, with what guarantees of „good execution"? Guarantees for citizens, of course, because it's their money. And because it comes to citizens, do we continue to pretend that we do not hear the cry for a real responsibility of the magistrates, both disciplinary and material? Are we left with the embarrassing „reform" operated in 2017-2023, which makes the Ministry of Finance a „prima donna" without a voice in this concert and, in fact, with an illusory system of responsibility? Do we let the Judicial Inspection continue to play behind the scenes, at a simple key on the phone of the president of the CSM, whoever he is, or do we rethink it in the key of a true independence from the CSM, of course also from the Ministry of Justice? In the end, how will we all get along to find the best solutions to the above if not by respecting and trusting each other more? In more or less complete agreement with the administrator of our justice, we conclude here the series of questions-themes for reflection and instead of a conclusion, we believe that the answer to these questions must receive its answer through the laws of justice, the body of magistrates being invited to state his point of view on them, in accordance with the responsibility he has and in accordance with the European, modern, democratic way of legislation, after prior consultation of those who are going to apply the law. But without the rule of law and social justice, the results can be unpredictable, as we will try to demonstrate below.

4. Summary conclusions about the rule of law and social justice

To prevent misunderstandings, I confess that I felt it a civic duty to call things by their names. I always will. If we are still given to live, at least let's do it with dignity and cleanliness. In this capacity I confess that many of the current problems of the Romanian judicial and legal space, basically of our justice, can be solved through a pragmatic approach of a segment of our justice, that of social justice, since the traumas and abuses committed by the state authorities, with attributions in the field, have affected the human security of citizens, with the immediate consequence of affecting/altering the rule of law. The rule of law is that which is based, in essence, on the supremacy of the law, and not on the discretionary power of some leaders, regardless of the name they bear – presidents, heads of state, kings, etc. – and in which the recognition of democratic values and the promotion and defence of citizens' rights constitute a major objective. The definition is not one with doctrinal claims, but it tends to evoke the substance of the rule of law, which is not a very recent creation. Modern constitutions expressly proclaim that the rule of law is a fundamental component of a democratic society. It is also the case of the Romanian Constitution, which in the very art. 1 paragraph (3) stipulates that „Romania is a state of law,

democratic and social, in which human dignity, the rights and freedoms of citizens, the free development of the human personality, justice and political pluralism represent supreme values." From the simple reading of the cited text, it follows, without a doubt, that the idea of the rule of law is indestructibly linked to the existence of a real democracy, based on political pluralism and the imperative to develop the human personality and guarantee the rights and freedoms of citizens. We find very similar provisions in other constitutions that promote the values of the rule of law and social rule. [16]

The concept of the social state is a particularly complex one and includes in its content a set of rights that must be recognized by the state to all citizens in order to develop the human personality and guarantee an appropriate standard of living. The phrase social state cannot be conceived, among other things, without guaranteeing a decent standard of living, a high-performing education, adequate social assistance conditions, the organization of medical facilities with adequate equipment and accessible to all citizens, and even ensuring a high-quality environmental environment. The proclamation by the fundamental law of some social rights characteristic of a democratic society is not enough, but must also be effectively realized. Obviously, such an achievement is dependent on the development stage of the respective society, it being known that education, education, the social insurance and health system involve significant expenses. The current economic crises, caused by the pandemic and augmented by the conflict in Ukraine, have negatively influenced the tendencies to consolidate the welfare state. That is why the problem that I have addressed in the present context is one of the most delicate and has not only social and legal connotations, but also economic and even political ones. And from the latter point of view, the priorities declared by the authorities are often changed and less optimistic for a democratic society and for a state of law in which the social rights recognized by the legal order of a democratic state do not constitute a block of legal prerogatives that can it had other connotations than those linked, ultimately, to a high level of human development and raising the standard of living of its citizens. There is no doubt that the democratic and social state has important obligations from this perspective, and the goal of any organized society must be to achieve a standard of living worthy of the third millennium.

However, not infrequently, political disputes are also generated by the conditions and ways of ensuring some social rights, such as those related to wages, the right to social insurance, the efficiency of the public health system. In relation to these rights, we must strongly emphasize the fact that an important number of them gravitate between the state's obligation to ensure a decent standard of living and the effective possibilities of guaranteeing it. Such an approach cannot ignore the fact that some fundamental laws expressly refer to the state's obligation to ensure a decent standard of living for its citizens. Thus, for example, art. 47 para. (1) of the Romanian Constitution provides that „The State is obliged to take measures for economic development and social protection, such as to ensure a decent standard of living for its citizens". State obligations are not considered as some result obligations. In Romanian doctrine, it is considered that the right to a decent standard of living is a programmatic right, in the sense that the state is obliged to take economic measures to promote the right to a decent standard of living. The actuality of the modernization of the salary and pension system, in Romanian society, justifies more sustained approaches and appropriate legislative efforts to give expression to the democratic and social state (art. 1 para. 3 of the Romanian Constitution) and to translate into facts the imperative of ensuring a decent standard of living for all citizens. However, such objectives

cannot be achieved without the introduction of equity principles in the salary and pension systems, which implies, in our opinion, a rational ratio between minimum and maximum salaries, respectively between minimum and maximum pensions. The establishment of privileges in such matters can only move us away from the objectives outlined by art. 1 paragraph (3) and of art. 47 para. (1) of the Romanian Constitution. We hope that the new law on pensions will represent an important landmark in achieving the indicated imperatives. The Wages Act and the Pensions Act are normative acts of great importance for the fate and well-being of a nation, and legislative stability in these areas should be guaranteed. Unfortunately, legislative stability does not seem to be a priority of the political forces in the Romanian Parliament and of the public institutions involved in the decision-making process.[17]

The repeated, almost obsessive, invocation of poor economic conditions or even the lack of funds necessary to pay salaries or pensions are „arguments" that have nothing to do with the democratic rule of law, and those who argue otherwise should not hold a position of dignity public. This ignorance is strange. The support of such theses does nothing but generate panic and dissatisfaction among employees, all the more so since the incomes of Romanian citizens are among the lowest in the EU. Under such conditions, we can also understand the massive emigration of the labour force from our country to other destinations, where, often, the rights of Romanians are ignored and the authorities take pleasure in shifting the entire blame to those forced to take the path of exile. The last great „scientific conquest" in the economic field is that of the establishment of a solidarity tax on incomes that exceed a certain amount. It is a discriminatory measure and suggested with the aim of covering the „holes" in the budget also at the expense of the citizen. Our approach cannot be without responsibility and economic and social realism. It is foreseeable that the economic difficulties will not disappear, but will be even more accentuated in the post-COVID-19 and armed conflict period. But as long as a law is in force – the pension law – any approach contrary to its spirit is nothing more than an attitude likely to weaken the rule of law, and thus in danger, during the pandemic. Without any doubt, the Romanian Parliament is empowered not only to adopt laws, but also to amend them accordingly whenever this is necessary. And obviously it can do the same with regard to salaries and pensions, but such an approach must be rational and carried out with consideration of citizens' rights. Until then, however, we owe maximum respect to the laws in force, especially from the institutions and public authorities, respectively from those who lead them. In the end, the problem is also one of distributing the national income, of a rational prioritization of expenses and of efficient management of the economy, and not in a harmful manner, as was done by all the post-December governments. Unfortunately, it is talks so much about the situation of wages and pensions, announcing in a more or less explicit tone a real apocalypse, without doing anything to remove the inequities in the system. However, it is well known that there are exorbitant salaries in Romania, difficult to reach even in the most economically developed countries. And we do not mean salaries from the private sector, but those salaries from entities with state capital, which are exempt from the salary scale established by the new law. The situation is the same with regard to pensions from the public system. These formulas are not specific to Romania, but can be identified at the level of the entire European area [18]. In view of the above, we believe that the time has come to have an efficient and fair social justice system that will ensure the progress and prosperity of the entire nation. It has sometimes been held that „human justice is by definition weak". The

assertion may be considered inappropriate and surprising, but unfortunately it expresses a truth that is difficult to dispute even in modern times. However, the time has come for the truth to be told in its entirety and without detours and manipulations. All we have left is the hope of waking up to the reality of all the decision-makers involved in ensuring a decent standard of living for all Romanians. Perhaps the political factors here should also meditate more on the statements of the great French jurist and philosopher Alexis de Tocqueville, according to which: „The people rule over the American political world like God over the Universe. It is the cause and end of all things; everything comes from him and returns to him" [19]. After these assertions, we wonder if the antidote to the chronic affections of justice can come from technology, artificial intelligence as in other areas of life.

4. Digitization and the use of artificial intelligence – a panacea for justice!?

5.1. Introductory questions on artificial intelligence

Starting from the premise that Romanian law is still too rigid for this new subject, I will try to offer certain definitions of this new concept and start with a brief history. The history of AI is as short as it is turbulent. However, it must be emphasized that Aristotle's development of the syllogism and the use of deductive reasoning was a key moment in humanity's quest to understand its own intelligence. The history of AI is less than a century old. In 1950 a researcher, Claude Shannon, proposed the creation of a machine that could be taught to play chess. The machine could have been trained, he said, „either using brute force or by evaluating a small set of strategic moves by an opponent." Shannon's paper described two approaches to computer chess. The Encyclopaedia Britannica defines AI as „the ability of a digital computer or computer-controlled robot to perform tasks usually associated with intelligent beings." The American Association for the Advancement of AI defines „artificial intelligence as the scientific understanding of the mechanisms underlying intelligent thought and reasoning and their embodiment in machines". AI is the ability of a machine to imitate human functions such as reasoning, learning, planning and creativity. So, it is built with the aim of replacing in the near future certain activities that people practice every day. Artificial intelligence allows technical systems to perceive the environment in which they operate, process this perception and solve problems, acting to achieve a certain goal. The computer receives the data, already prepared or collected through its own sensors, processes it and reacts. AI systems are able to adapt, to a certain extent, their behaviour, analysing the effects of previous actions and operating autonomously. What interests us in this regard is the fact that there is a probability that they can develop their own consciousness independent of the operator's system. This function becomes problematic in terms of law. Artificial intelligence is considered a central element of the digital transformation of the association and has become a priority for the EU. It is expected that future applications will bring enormous changes, but AI is already present in our lives. It is almost obvious that in the near future AI systems with functional autonomy will play an important role in areas of social life. As a result, the Romanian legislator will have to be cautious and anticipate certain changes in the legislative texts." We are already living in the future, whether we want to or not."

In this context, from a legal perspective, it can be argued that artificial intelligence can become a subject of law as in the case of machines in hospitals that are systematized to operate instead of doctors. If artificial intelligence has gained so much momentum lately, being accessible to everyone, why exclude the hypothesis that it could become a subject of

law in the next ten years. AI allows technical systems to perceive the environment in which they operate, process this perception and solve problems, acting to achieve a certain goal. That being the case, Artificial Intelligence becomes a challenge for our „old" law especially if we consider its role in criminal liability. The doctrine already speaks of a new type of criminality „AI CRIMES". However, it is true that this type of crime highlights this type of mechanism as a means or method of committing the crime but once this category is created, we cannot exclude the fact that it could become independent of its creator. He will take a concrete example, X systematizes a computer that could alone break the databases of the country's defence system, of course we can talk about a crime committed in the virtual environment, where the obvious criminal would be X because there is a causality and a purpose, but if this program would manage to self-regulate itself and break other databases independently of the will of its creator, can we still talk about X as a criminal, is „the legal system more evolutionary than revolutionary". Starting from these primary considered summaries let's see what is the legal status of Artificial Intelligence. What is an AI entity in terms of legal nature? Artificial intelligence is currently an object (res), a service even a legal fiction, but we can talk further if it could become a person.

5.2. On the legal personality of artificial intelligence

The term person is synonymous with that of an individual seen as a rational human being and consequently capable of self-determination, that is, implicitly we are talking about human consciousness. In abstracto we could say that Artificial Intelligence is res because it meets all its characteristics goods of any type, that is any useful thing that can satisfy the need of people, but I would like to start with the hypothesis that AI could develop consciousness, then surely in concrete we will talk about it as a subject of law. Artificial personality is a concept formulated according to the technical capabilities integrated in AI systems and their ability to interact independently with other legal subjects. Among the functions of an AI system, we find the ability to perceive the environment in which it operates, process this perception and solve problems, acting to reach a certain goal. It can make it possible for AI systems to act on their own and make decisions independent of their creator. And if we consider criminal law, we are talking about guilt as a determining factor of the crime. In the hypothesis that an indiscriminate person can commit a wrongful act and be held accountable, then we can also speak of AI systems as being indiscriminately personalized who will be held accountable for their wrongdoing. And even if this whole theory seems abstract and difficult to achieve, using the historical method let's go back in time and discuss slaves during the Roman period. What were slaves? They were considered things, just as we consider AI systems, towards the end of the Roman Republic, the Roman state recognized slaves with limited legal capacity. Thus, abstractly speaking, res could enter into certain contracts on its own in the name of the masters. Can we not admit that the theory according to which AI is only a good will fall into obsolescence in the coming years? Through a simple analogy we appreciate that yes even if now, in the German system, the legal person is not criminally liable.

Returning to the research object of our study, another idea would be that AI systems could in the future facilitate the efficiency of the legal system. AI would have the potential to benefit the legal system because it can judge impartially and efficiently. However, there are doubts regarding their use as a means of judgment with the minuses and pluses that artificial intelligence systems could have in the legal field. AI could be systematized to lead

to transparency in the penal system because in terms of risk such a system could anticipate it. At the same time, such a device could be efficient in terms of clerks, such a system could exclude human error and it would be a much faster process, because we already live in an era where time is limited. AI can already make connections about patterns of people or crimes. For example, with regard to American society, a large part of racial discrimination persists due to the prejudices of decision-makers, outlining the so-called institutional discrimination. The use of Big Data and the AI tools that work with it leads to an unintentional perpetuation, they pick up these trends even if they were not intentionally programmed to do so, due to the way the data is collected. Discrimination is likely an artifact of the data extraction process itself, rather than a result of poor programming and coding. In May 2014 the White House released a report entitled Big Data; seizing opportunities, preserving values, which highlighted the discriminatory potential of Big Data and suggests that there may be unintended discriminatory effects of data mining, but does not detail how these might occur. These discriminations can also extend into the criminal justice system by creating disadvantaged categories of litigants in the criminal process.

Finally, artificial intelligence is already being used worldwide to facilitate the legal system. So, Predol is the result of a research project involving the Los Angeles Police Department. Created in 2012, PredPol uses a data-driven approach to organize and perform direct patrol operations. Predpol never uses personal data, ethnic or demographic information. Predictions are displayed as a red box on a pink interface. The boxes represent the highest crime areas and change each day depending on whether the officers are on day or night shift. We could even talk about video surveillance of citizens or facial recognition. And with that being said, we are already entering the realm of doubt, the pros and cons of giving artificial intelligence legal personality.

5.3. Pros and cons of giving AI personality

It is obvious that until the moment when new sections will be introduced in the material and procedural codes of the states, dedicated to the criminal liability of artificial intelligence or the procedures that must be followed for the criminal prosecution of artificial intelligence, it is still far, but one thing is certain: these discussions are no longer in the field of science fiction, they are part of our social and legal reality. Until then, a not inconsiderable advantage would be that it would allow a centralization of AI risks in a social, economic, industrial, political, etc. plan. It would create a way for industrial agents to be held accountable for the consequences and damage caused without the need to identify a responsible person, avoiding an expensive process where it would be difficult to identify the person responsible for the damage caused. If in the future AI will evolve to such an extent that it will not be able to be distinguished from a person what would be the arguments logic by which it denies that system the same rights and the same obligations as a human? An instrumental benefit relates to the attainment of efficiency, and can be better understood by attempting an analogy with the slave system already shown. The minuses would be that the European Parliament suggests the creation of a collective insurance fund to cover damages caused by AI systems. Granting legal personality to an AI system would open pandora's box. Since the AI does not have the ability to suffer, nor does it show empathy, we cannot understand how it will be able to perceive the suffering of other people through the lens of its hurtful actions. Suggestive, in this sense, are two cases pending before some courts in the Netherlands and the Philippines. [20]

In the first case, the Amsterdam Court of Appeal, on December 14, 2018, sentenced a defendant to the maximum prison term of 10 years and 243 days in prison for possessing, producing, distributing materials with pornographic content including child abuse scenes, accessing unauthorized use of a computer and possession of software for that purpose, blackmail and deception upholding the previous conviction originally issued by the Court of First Instance. In order to pronounce this decision, the court noted that in 2013, following the receipt by the Dutch police of two reports from the Facebook platform, a criminal investigation was launched. According to Facebool, an unknown person with at least 86 interconnected Facebook accounts collected, produced and distributed images containing scenes of child exploitation. This unknown person blackmailed dozens of underage girls using the mentioned images and a significant number of adult males. Regarding one of the accusations, that of sexual assault, the defendant claimed that since the contact with the victim was made through the web camera, no physical contact took place, and the victim would not have been forced in any way to consent to the acts with sexual connotation. For the crime to exist, under Dutch law the coercion of the victim must have occurred in such a way that the victim had no choice but to cooperate. As the victim did not offer any resistance, this coercion did not exist in the defendant's opinion, thus no attempt at sexual assault was committed. The Court reasoned that the interpretation of art 246 of the Dutch criminal code refers to the fact that a coercion of a person to commit an act by threatening a harmful act against him can only exist if the suspect by threatening this act deliberately determined the victim to perform such acts at will. The fact that the defendant deliberately coerced the victim by threatening to share compromising images made it clear that the victim felt coerced into consenting to the sexual acts. So, from this case we can realize that it is an analogy in favor of the defendant more than that the Facebook platform should not have allowed such things and I think we can talk about both the responsibility of the offender and the responsibility of the Facebook platform, AI entity. [21]

The other interesting case was that of the defendant Mathew Brown Kin in 2019. In this case, a person was convicted for the first time for the live Internet transmission of child sexual abuse that took place in the Philippines, he made the broadcast from his residence in Scotland. The judicial authorities relied almost entirely on the evidence consisting of the images and videos that the defendant recorded. The identity of the victims remained unknown until today. Further problems were encountered during the investigation involving the passing of information from the Hommes company to the National Crime Agency in the UK and the delay in passing that information to Police Scotland. During this entire period, the defendant continued to commit the crime and the defendant paid more than one euro for each abuse committed in the Philippines and broadcast by elLIVE. Among the crimes for which he was convicted include conspiracy to commit rape, conspiracy to commit other sexual crimes against minor victims. He pleaded guilty, so there was no further trial before the court, as the charges, the legality of the evidence administered and in the case were no longer analyzed, nor the legal framework of the committed acts, the judge who ordered the conviction, explicitly stated that he sentenced the defendant as if they had committed the crime in person. Did the defendant commit a crime on the Internet, and not only he is the culprit, but also the platform that artificial intelligence implicitly used as the means by which he committed the crime. And we stop here with the exemplification, the relevant jurisprudence being on the rise, trying, in the conclusive judgments, a forecast of the future of artificial intelligence in our justice system.

6. Conclusions

As far as predicting the future, we observe that daily life is dramatically and constantly influenced by AI: from using GPS programs, to choosing a restaurant, from obtaining information on the weather forecast, to assessing health status and, here, on crime detection; there is a constant demand for better and faster decisions and their objectivity; at the same time we must be aware that the excessive use of artificial intelligence will cause a reduction in our ability to make decisions, a weakening of logical reasoning, because artificial intelligence will logically analyse a problematic situation instead of the human agent and quickly provide them the solution. More directly, in the words of Professor Manfred Spitzer, we will be affected, long-term and irreparably, by the so-called „digital dementia".

In the long term, the use of artificial intelligence will also change the way human agents' approach and perform different tasks; last but not least, we must accept at this stage that the only actors responsible for building, using, monitoring or abusing AI are us humans. It is obvious that the time has come to adapt both our lives and the legislative framework to be up to date with technology, we must find the best legal solutions to properly respond to any harm or endangerment of social values that may occur in our coexistence with AI and „It's difficult to make predictions, especially about the future." So goes an old Danish proverb. But that doesn't stop people from always trying – maybe, just maybe, the adage will be proven wrong in the end. In many of my published articles I have discussed some predictions in detail. Each time, I hoped that the article explained well enough why it is difficult to make predictions, especially about the future of justice in the conditions of the inhuman mechanization of life. all kinds: alarmist, pessimistic, optimistic, cataclysmic, apocalyptic, etc. That is why, although the topic discussed in this paper seems to be of a science fiction nature, it is topical because such a hypothesis, namely that of artificial intelligence becoming a future subject of law, may become a reality in the next decade. There are already global discussions on this subject, a fact evident in the doctrinal current initiated by Gabriel Hallevy, the Israeli professor, whose works in the field of artificial intelligence and law are known worldwide, which anticipates the possibility of recognizing artificial intelligence as a subject of law by identifying the ethical and leal arguments that could allow the granting of legal personality to artificial agents considering the use of criminal risk assessment tools, the use of artificial intelligence in forensic investigation, the use of AI tools in criminal risk management, the risks of their use being followed, as well as their compatibility with the principles that govern the modern criminal process. [22] In addition, electronic justice should also be mentioned, a concept used for the first time in Romania that is delimited by the meaning of terms such as telematic justice, digitized justice, computer justice and electronic justice. It should be noted that in Romania there are also attempts to digitize the judicial system, such as the electronic signature and the electronic file, all circumscribed by the most important initiatives regarding digitization at the international and European level, and the doors to a new branch of law, that of technology, are already open. cyberspace and artificial intelligence. Even if in an information society, excessively technical, a mentality structured by a high trust in technological achievements and promises is developed, a critical assessment of technological implications involves considerable risk. The more they stand out both the advantages and disadvantages of this technology. In these circumstances, the middle path must be chosen, of the virtue that springs directly from the heart and is not started either to exaggerate or to diminish, but is permanently bordered by the golden number.

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[8] The only logical reactions rejecting the amendments to the laws of justice since 2005 came from the professional forums, the Superior Council of Magistracy, which approved the amendments negatively, and the High Court of Cassation and Justice, which adopted in the general assembly of judges a letter of rejection of the amendments, addressed to the Romanian Parliament. All the documents revealed the same consequence – the serious impairment of the independence of the judiciary.

[9] I. Popa, op. cit., p11.

[10] *Idem*, p. 12.

[11] Ibid.

[12] See the Report on the subversive activity of the Judiciary and the intelligence services, published on 9.11.2017 by the website Lumea justicei coordinated by the journalist Răzvan Savaliuc.

[13] I. Popa, op. cit., p. 14.

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Section E

CONDITIONS SO THAT THE OFFENSE OF MURDER OR ATTEMPTED MURDER SHALL ATTRACT THE DEBARMENT FROM SUCCESSION

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Abstract

Once a person dies, those close to him must share the deceased's estate according to the fulfillment of the criteria expressly provided by the civil legislation.

As part of the verification of the fulfillment of these requirements, an interference will be made between civil law and criminal law, in order to establish whether the successor meets the minimum conditions to be able to benefit from the inheritance left by the deceased.

The existing link between the matter of inheritances and criminal law emerges from the need to fulfill the requirements by the persons called to the inheritance in order to be able to have a succession vocation, this being one of the most important conditions established by the legislator in this regard.

In order to carry out this correlative examination, debarment appears as a civil law sanction that intervenes if one of those called to inherit is found guilty of committing a very serious act against the deceased.

Debarment from succession is determined by the type of crime committed by the successor, the group of these facts, although it appears to be restricted, presents a series of special elements that often even present problems of interpretation for those called to solve the cases.

The offense of murder is one of the facts that can attract the status of de jure debarment for the successor, the motivation being more than obvious. Thus, this is included in the category of some of the most serious crimes, therefore, the legislator's choice to sanction the perpetrator is justified both from the perspective of the criminal law and the civil law.

Keywords: *de jure debarment, murder, sanction.*

1. Introduction

The natural law of nature assumes that once a person dies, those close to him inherit his patrimony. Every man has an estate, whether it is a larger one or a less substantial one.

According to the provisions of Article 955 of the Civil Code, the estate of the deceased is to be transmitted through the legal inheritance, unless otherwise ordered by a will.

In the course of this study, we have proposed to examine, in addition to the conditions that must be met in order to be charged with legal indignity, the crime of murder (attempted murder), one of the most serious acts provided by the Criminal Code.

We justify this choice on the fact that a thorough investigation of the conditions that attract legal indignity is required, especially when a person is guilty of committing such a crime, as well as the repercussions that the act attracts, which are among the most diverse, having a series of extremely complex characteristics.

Considering these aspects, we appreciate that it is necessary to undertake a thorough study on the indignity of succession by law and its connection with the crime of murder, since in judicial practice we encounter many situations of this type.

Therefore, in order to participate in a succession debate, a person must meet a number of conditions, including having succession capacity, having a succession vocation and not being declared unworthy. In addition to these, the express acceptance of the successor is necessary, since no person can be forced to accept an inheritance.

According to Article 958 of the Civil Code, the following are debarred from succession:

a)the person criminally convicted for committing a crime with the intention of killing the person leaving the inheritance;

b)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 the inheritance of the perpetrator.

If the conviction for the acts mentioned in paragraph (1) is prevented by the death of the author of the act, by amnesty or by the prescription of criminal liability, the debarment operates if those acts were ascertained by a final civil court decision.

Legal debarment can be ascertained at any time, at the request of any interested person or ex officio by the court or by the public notary, based on the court decision from which the debarment results.''[1]

Debarment from succession represents the forfeiture of the successor from the right to inherit under the law or the will, including the right to collect the inheritance reserve due to him according to the law, since he is guilty of any of the serious acts expressly provided for by the legislator, committed against the deceased or a successor thereof[2].

From the foregoing it follows that indignity appears as a civil law sanction that will be taken against the person guilty of committing an act prohibited by the criminal law, against the one who leaves the inheritance or against another person who may have the capacity of successor.

In the category of acts that attract legal indignity is also the crime of murder, which is thus considered to be one of the most serious acts provided by the Criminal Code and with some of the most special consequences.

The term murder has a generic meaning, including any of the forms in which the intentional killing of a person manifests itself, thus delimiting the crime of manslaughter or the pre-intentional acts that resulted in the death of a person. The only requirements from this perspective being the element of intent in causing a person's death and the act of killing. [3]

2. **Conditions for *de jure* debarment**

The first requirement that must be satisfied refers to the fact that the crime must be murder (attempted murder) and must be committed with the form of guilt of intent, because what is actually sought by the legislator is the sanctioning of the perpetrator because he deliberately chose to kill or attempt to kill the *de cuius* or another successor. In this sense, 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 criterion that must be met results from the interpretation of the provisions of Article 958 (2) Civil Code, the existence of a solution to convict the perpetrator being

necessary. The legislator corrected the existing deficiency in the contents of the Civil Code which is no longer in force, as there were cases [4] in which, the person who committed such an act towards the *de cuius* later committed suicide, and the provisions regulating indignity are no longer applicable, because the norms of the old Civil Code required a solution of conviction. In such cases, the prosecutor had to close the case, since the perpetrator was no longer alive.

For example, in the previously mentioned case, it was shown that the said Aurel A. killed his wife and her mother, and after a few hours he committed suicide, leaving behind a letter in which he acknowledged his actions. The death of the perpetrator prevented the continuation of the criminal investigation and the actual sentencing, but his sister-in-law and father-in-law applied for a declaration of debarment under the aforementioned provisions. One by one, the trial, appeal and review courts rejected their request, showing that Article 655 of the Civil Code cannot be applied in the absence of conviction[5].

Later, the plaintiffs addressed the ECHR, in the case of Velcea and Mazăre v. Romania[5]. This time, the Court held that the conviction requirement is legitimate in the sense that it presents „a guarantee of legal security", but the interpretation option of the national court „was too restrictive" in relation to the particularities of the case. Since „there was no doubt about the guilt of Aurel A.", the Court showed that „the courts went beyond what was necessary to ensure compliance with the principle of legal certainty", thus ignoring the „exceptional circumstances of the case in order to avoid a mechanical application of the principles of interpretation of the provisions of Article 655 point 1 of the Civil Code". Consequently, the Court decided that „there was a violation of Article 8 of the Convention".

In addition to these, we must add the need for the deed to be committed by a person who has a legal vocation to inherit, a legal or testamentary vocation (participant in the crime as an author, co-author, instigator or accomplice) [7].

Without digressing from the proposed theme, we will not carry out a thorough breakdown of the elements that characterize legal debarment, but we will insist in what follows on the link between the crime of murder and one of its effects, attracting *de jure* debarment by removing the indignity from both legal and testamentary inheritance.

3. **The conditions of the crime of murder and attempted murder in order to establish *de jure* debarment**

The crime of murder as stipulated in Article 188 of the Penal Code consists of killing a person, punishable by a sentence of between 10 and 20 years in prison. Considering the fact that in such a scenario the victim is a family member, the legal framework is to be completed by the provisions of Article 199 (1) of the Penal Code regarding family violence, the punishment limits in such a situation being increased by a third.

Thus, the text of the law criminalizing murder is very concise and only refers to the killing of a person. This text refers to the provisions of Article 16 (6) of the Penal Code, according to which only the deed committed with intent in the absence of an express provision of guilt is considered a crime. Therefore, it follows that Article 188 Penal Code refers to the deed of a person who acts with intent to kill 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 criminalized the crime separately from manslaughter. Guilt is required in the form of intent, in the both direct and indirect forms. [8]

In this sense, the most important requirement is fulfilled in such a case, since intent (direct or indirect) represents the defining form of guilt for the typical crime of murder we are talking about in the present study.

Therefore, the form of guilt specific to murder is the intention, since it is acted with a view to suppressing a person's life, directly, when the perpetrator foresaw the result of his action (the death of the victim) and watched its occurrence, or indirectly, when the perpetrator foresaw the result of his action and without pursuing it, nevertheless accepted the possibility of its occurrence. [9]

The intention characterizes, among other things, the author's desire both to suppress the victim's life and to try to obtain monetary benefits through malicious manipulations, given that the main consequence, even if he does not expressly want it in such a hypothesis, is to reap the inheritance at a certain time.

Therefore, the intent to kill of the perpetrator can be inferred from the following factual circumstances [10]:

-the use of an instrument capable of causing death (taking into account the type of instrument, its dimensions, its solidity, its weight, etc.);

-the place or body region where the blows were applied, acted upon or targeted by the offender;

-number and intensity of blows;

-other pre-existing, concurrent or subsequent circumstances (for example, the enmity between the perpetrator and the victim or the fitness of the perpetrator after committing the act).

In this sense, the supreme court also showed that the practical approach is required to highlight the form of guilt with which one acts, ruling in a decision by which it resolved a case of murder committed by a person against his brother, showing among other things that, „*the form and modality of the intention, an element of the subjective side of the crime, results from the materiality of the act, among other things, from the previous personal relationships between the defendant and the victim, the offending object used, the number and intensity of the blows, the anatomical area targeted, the subsequent behavior of the defendant, etc.''*[11]

We appreciate that the legislator sought to sanction the perpetrator who deliberately chose to kill or attempt to kill the *de cuius* or his successor, a situation in which it would be immoral to allow him to come and collect the inheritance of his own victim

Regarding the objective side, we believe that we should not highlight certain aspects, because what is important is the socially dangerous result highlighted in the present 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 the concrete circumstances in which it was committed (means used, place and time of commission, relations between the perpetrator and the victim, the motive of the act) [12].

The crime of murder can be carried out both in consummated form or remain in the attempted phase, it being very important that the criminal activity is committed against the one who leaves the inheritance or against another successor who would have removed or

restricted the perpetrator's vocation to inherit, if the inheritance had been opened on the date the act was committed.

The need to sanction including the attempt is imposed because most of the time the deed remains at this stage due to some external implications, although the will of the author was completely different, namely to achieve the purpose of committing the offense.

From what has been presented, it follows that the legislator pays special attention to the passive subject of this crime, which is, in the view of civil law, a qualified one, not being able to be anyone other than the person with whom the perpetrator has a connection – either by blood or testamentary, in order to be a successor, or another person with whom he could enter into contest for the debate of his *de cuius* inheritance.

The blood or emotional connection that would justify a possible testament make such an act all the more dangerous, so that it is necessary to sanction the person in question, including according to the rules of civil law by applying *de jure* debarment.

In addition, the intervention of a final judgment of conviction of the perpetrator for the commission of the crime of murder or attempt at one of these crimes is required. The reason why it is necessary for the decision to be final resides in the fact that until that moment, the possible successor benefits from the presumption of innocence and thus cannot be imposed a penalty of a criminal nature, i.e. the civil sanction of *de jure* debarment.

The presumption of innocence is an important component of the modern legal system, guaranteeing the respect of the rights of those under investigation until their guilt is definitively established.

Attempted murder can be terminated when the perpetrator's activity has been stopped and prevented from continuing due to causes beyond the will of the perpetrator. On the other hand, perfect attempt is achieved when the typical action has been fully executed, but the socially dangerous result, the death of the victim, has not occurred. [13]

In the case of the crime of homicide remaining in the attempted phase, the acts of execution of the homicide, committed until the moment of the intervention of the interrupting event, must reveal, by their nature, the circumstances in which they were committed, that the offender had the specific intent to kill and not the general intent to injure.[14]

In accordance with what was stated previously, regardless of the form of the attempt, since it is criminalized, the perpetrator must be sanctioned including from the perspective of civil law as a result of committing the crime.

Even if the motive and purpose of committing the murder are not typical elements of the basic content of the crime, these can be appreciated as somewhat subsequent conditions in the analysis regarding debarment from succession, they still reveal the social danger that the offender represents, being reflected in the sanction actually ordered.[15]

A possible case in which the perpetrator can continue to hold the title of successor even if he has attempted the life of his *de cuius* is represented by the removal of the effects of legal indignity by means of a will or an authentic notarial deed, as provided for in the provisions of Article 961 of the Civil Code. Forgiveness on the part 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.

In such a hypothesis, nothing else is done than to take into account the will of the victim, since as is normal, she is the only one who can freely dispose of his estate, and such a decision cannot be contested.

The repercussions of the criminal side on the rights that the author should normally enjoy exceed the degree of necessity that such a situation would impose, since, as I have shown above, most of the time such acts are committed by those close to them in moments of weakness, marked by empathy for the suffering the victim endures and who believe that by committing such an act they could help her.

Our intention is not to admit that someone can inherit by committing a crime of murder, since considering what has been presented such cases are quite special, determined by special circumstances, and the deed is not one of murder per se, but one of killing that involves a series of its own characteristics by which it is distinguished from that of murder in the classic version.

4. **Conclusion**

Among the facts that may attract the sanction of indignity of succession is also the crime of murder, which involves a particular complexity and requires a careful evaluation in order to correctly apply the provisions stipulated in Article 958 et seq. from the Civil Code.

Life is a priceless value, and the activity of taking a person's life, or at least attempting to do so, must not go unsanctioned under any circumstances; even if the reasons or circumstances that were the basis for the commission of such an act, and in certain situations, only the sanctioning of the perpetrator from a criminal perspective is justified, being necessary to order some complementary measures, such as the imposition of indignity of succession to the author.

Considering these aspects, we believe that in the case of such crimes, due to the dangerousness of the perpetrator, respectively his aim to collect the inheritance before the deadline, it is necessary to take such a measure.

By means of a correct assessment of the conditions that characterize the crime of murder, both a judicial error from the perspective of criminal law and an error from the perspective of civil law are prevented, thus avoiding the wrongful sanctioning of the innocent person from both perspectives.

As I have shown during this study, a careful analysis of all the elements characterizing the crime of murder is required, as it has a series of complex characteristics that require an extremely laborious analysis.

As it follows from the above, the crime of murder involves a series of problems, especially with regard to these essential elements that characterize the connection with Debarment from succession. In order to avoid any possible misinterpretation, it is necessary to deal punctually and precisely with the characteristic issues, including the relations they have with other crimes.

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THE CRIMINAL PROSECUTION CARRIED OUT WITH THE PARTICIPATION OF THE SUCCESSORS OF THE VICTIM WHO DIED AS A RESULT OF THE COMMISSION OF THE CRIME

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Abstract

The present study aims to bring back into focus the legal content of the concept of „successor" in the context of a criminal trial caused by the commission of a crime resulting in the death of the victim. At the same time, it examines the limits of the transfer to the successors of the rights recognized to their author and how they can exercise the procedural rights thus born during the criminal investigation phase, with the presentation of the correlative obligations of the investigation bodies. The paper also deals with the specifics of the participation as civil parties in the criminal process of the successor who suffered damages as a result of the crime that is the object of the criminal action and the set of rights recognized to them in order to compensate for the respective damages.

Keywords: *Successor, prosecution/criminal investigation, procedural rights, civil party.*

Section I. Brief considerations regarding the notion of „successor" in Romanian law

According to the Code of Criminal Procedure, the purpose of the criminal investigation is to gather relevant evidence regarding the existence of crimes, identify the persons who have committed crimes and establish their criminal responsibility, in order to determine whether it is necessary to send them to court.

However, we believe that we can find a more comprehensive definition of this procedural phase in the doctrine, where it was noted that „The purpose of criminal prosecution is to collect the necessary evidence regarding the existence of crimes, to identify the perpetrators and to establish their criminal and civil liability, as well as to indict the guilty persons and send them to criminal court."[1]

Before analyzing the specifics of the criminal prosecution with the participation of the successors of the victim who died following the commission of the crime, we consider it useful to highlight, first of all, the meaning of the notion of „successor" in Romanian law, as defining the persons who take over the rights and obligations of another person whom they inherit.

In relation to the source of the right, the successors can be legal and testamentary. Legal successors are those persons who inherit by law the assets and rights of the deceased person, when he did not leave a will or when the will is void or ineffective. Generally, legal successors are the surviving spouse, children, parents and brothers and sisters of the deceased.

Testamentary successors are those persons who inherit the assets and rights of the deceased person based on his will. The person making a will can designate any person as a testamentary successor, including those who cannot be legal successors.

At the same time, successors can be divided into three main categories: universal successors, universal title successors and private title successors.

The universal successor is the person who acquires all the patrimonial rights and obligations of its author, considered as a judicial universality. In this category of successors we can find the sole legal heir or the legatee who collected the entire inheritance.

The successor with universal title is that person who acquires a fraction of a patrimony, being held in principle by the obligations that its author had with regard to that fraction. Within this type of successors we can find, for example, the legal successors or the legatee or legatees who have acquired a share of the inheritance.

Between universal successors and successors with universal title there is no qualitative difference, but only quantitative. Both categories are considered successors of their author's personality and take over all, respectively a part of his subjective rights and patrimonial obligations, with the exception of rights and obligations closely related to the author's person, as well as those declared by the parties as non-transferable (art. 1282 para. (1) Civil Code).

The successor with a private title is the one who acquires from its author one or more determined assets, being transmitted, at the same time, only the obligations that its author had with regard to the asset in question.

In relation to the generic legal status of the successors, of interest for the present study are the way and limits in which their rights and obligations are manifested in the criminal investigation phase of the criminal process, aimed at sanctioning the injury of their author, as a result of which he lost his life, both from the criminal and the civil perspective.

Section II. The procedural position of the successors of the injured person, from the perspective of the criminal side of the criminal process

From the perspective of the criminal side, we underline that the injured person, as the main procedural subject, is the passive subject of the crime, respectively the owner of the social value that constitutes the legal object of the crime[2], being the person who suffered a physical, material or moral injury through the criminal act.

Physical injury consists in harming the person's bodily integrity or health, including mental health. The moral (or non-patrimonial) injury consists in affecting the feelings, experiences and psychological states, and the material injury consists in a prejudice caused, directly or indirectly, to the patrimony of the natural or legal person.

If this is not the case in the matter of physical injury, the moral and material injury can be felt, in the case of many crimes, both by the victim of the crime and by the people close to him/her, parents, spouse, children, etc.

Moreover, in the case of moral injury as a result of the victim's death, the legislator expressly recognizes in art. 1391 para. (2) Civil Code the existence of non-patrimonial injury suffered by the spouse, ascendant, descendant, brother or sister or by another person who can prove a similar injury as a result of the death of the victim of the illegal act.

Moreover, in the case of moral injury as a result of the victim's death, the legislator expressly recognizes in art. 1391 para. (2) Civil Code the existence of non-patrimonial injury suffered by the spouse, ascendant, descendant, brother or sister or by another person who can prove a similar injury as a result of the death of the victim of the illegal act.

It is important to bear in mind that in the same time with the death of the victim, which occurred as a result of the commission of the crime, the procedural capacity to use, as well as to exercise, ceases, as he is no longer able to exercise his procedural rights on his own[3].

In such a situation, in the case of the legal transmission of the universal procedural quality or with universal title, the successors will be entered into the process in place of their author and will take over the procedure from that stage.

Section III. The procedural rights of the successors of the injured person from the perspective of the criminal side of the criminal process

Even if the victim can no longer personally assert his procedural rights – he does not even become an injured person as the main procedural subject if the death occurs simultaneously with the commission of the crime[4] –, in the moment of his death all rights are passed on to his successors, who will take over the procedural position that had *de cuius*, except in cases where the law does not allow this, being strictly related to the deceased person.

In other words, not all procedural rights of the injured person are transferred to the rights portfolio of the successors, but only those that were not recognized only for the author.

For example, at the time of the victim's death, her personal right to file a preliminary complaint under art. 295 of Criminal Procedure Code is not transmitted to the successors. This institution has a mixed character, being at the same time a condition of punishability (the court cannot apply the sanction in case of non-introduction/withdrawal of the prior complaint) and of procedure (it obliges and empowers the judicial bodies to carry out investigations).

Since the institution of the preliminary complaint was regulated by the legislator to mainly protect the interests of the victim of the crime, it is important to remember that the right to file such a complaint is strictly personal and cannot be transferred to other persons. Thus, the holder of the preliminary complaint can only be the injured person, respectively the passive subject of the crime as shown above, whose injury is the direct consequence of the crime, not the civil party who does not also meet the condition of being a passive subject of the crime noticed.

However, in order not to leave criminal behavior unsanctioned, art. 157 para. (5) from The Criminal Code states that if the injured person has died before the expiration of the term provided by law for filing the complaint, the criminal action can be initiated *ex officio*.

Therefore, the non-transferability of the victim's personal right to file a preliminary complaint is balanced by the recognized capacity of the Public Ministry to file a complaint and exercise the criminal action *ex officio*. Moreover, if the successor is a minor, apart from the *ex officio* notification, the civil action will also be exercised *ex officio*.

However, even if in the given hypothesis the right to demand the exercise of the criminal action is non-transferable, the right of the injured person, as a passive subject of any substantial criminal law conflict (whether or not it requires the existence of a prior complaint), to participate in the process concerning the crime as a result of which the person lost its life, is transmitted to its successors.

Thus, they will acquire, independently of the capacity of a civil party, the capacity of active procedural subjects in the criminal side, benefiting from the following rights:

a) The right to be informed of their rights; the correlative obligation of the judicial bodies, generated by this right of the successors, is to act actively and to communicate to them the rights they may have at a certain stage of the criminal process. This right also reflects a component of the principle of loyalty in the performance of judicial functions, which does not allow judicial bodies to take advantage of the lack of legal knowledge of procedural subjects;

b) The right to be assisted by lawyers or represented;

c) The right to propose the administration of evidence by the judicial bodies and to formulate any other requests related to the settlement of the case; these rights are included within the right of defense of any procedural subject, within the limits of the procedural quality and its legitimate interest, as well as in accordance with the legal provisions;

d) The right to consult the file, under legal condition; this right, also, is an essential component of the facilities necessary for the defense that the parties and main procedural subjects must benefit from. Also the lawyer of the successors of the injured person has the right to request consultation of the file throughout the criminal process;

e) The right to benefit from an interpreter free of charge when they do not understand, do not express themselves well or cannot communicate in Romanian;

f) The right to appeal to a mediator, in cases permitted by law;

g) The right to attend the hearing of parties, witnesses and experts. At the same time, the lawyer of the successors has the following rights during the criminal investigation: notification of the date and time of the conduction of the criminal investigation documents, assisting in the conduction, consulting the file documents, formulating requests and memorandums;

h) The right to be heard; the right to be heard does not only express the right to be heard (in the case of successors the hearing may have a limited evidentiary thesis anyway), but also includes the correlative obligation of the judicial bodies to listen actively, meaning they should be attentive to the person's arguments, to check them and, if necessary, to supplement them with other evidence, as well as to respond to the requests and conclusions presented;

i) The right to be informed, within a reasonable period, about the stage of the criminal investigation, at their express request, on the condition that they indicate an address on the territory of Romania, an electronic mail or electronic messaging address, to which this information can be communicated.

In addition to these rights, during the criminal investigation, the successors of the deceased injured person, affected by the act or the measure of the criminal investigation body, can attack with a complaint, based on art. 339 of Criminal Procedure Code any procedures or procedural documents of the criminal investigation bodies (for example, the order to start the criminal investigation *in rem*, the order to change the legal classification etc.).

At the same time, they can file a complaint to the preliminary chamber judge, according to art. 340 from the Code of Criminal Procedure, against the acts by which the solutions of non-prosecution or not sending to trial are adopted.

Section IV. The procedural position and the rights of the injured person's successors, from the perspective of the civil side of the criminal process

Regarding the civil side, first of all we recall the provisions of art. 19 para. (2) of the Criminal procedure code, according to which the civil action is exercised by the injured

person or his successors, who constitute a civil party against the defendant and, as the case may be, the civilly responsible party.

Therefore, the heirs of the injured person have the status of active subject of the civil action both in the event that the injured person died for reasons independent of the crime committed, and in the event that his death was caused by the commission of the crime.

Thus, the successors of the deceased victim can participate in the criminal process as civil parties if, as a result of the act that is the subject of the criminal action, they have suffered damage, benefiting from the full corollary of rights recognized to this category of parties in the criminal process.

Of interest for the present study are the successors of the victim who died as a result of the commission of the crime, as it is necessary to make a distinction between them and the successors of the injured person who died during the criminal process, due to causes independent of the commission of the crime.

If in the situation of the latter, according to art. 24 para. (1) of the Criminal Procedure Code, the civil action remains within the competence of the criminal court only if they express their option to continue exercising it, within no more than 2 months from the date of death, being in the presence of a continuation of the exercise of the right to compensation (regardless of its nature) born in the estate of the deceased, if the injured person died as a result of the commission of the crime, his heirs can request in their own name the granting of material or moral compensation in the criminal process, if they personally suffered such damage.

From this point of view, in the interpretation of the right of the injured person's successors to file a civil action in their own name, the High Court of Cassation and Justice decided, in the procedure for disentangling a question of law in criminal matters, that „*the provisions of art. 1.391 para. (1) of the Civil Code is interpreted in the sense that, in a criminal case having as its object a crime of culpable bodily harm, only the victim of the crime, who has suffered a prejudice, is entitled to obtain compensation for being restricted from the possibilities of family and social life."* In the motivation of this solution it was shown that: *„the analysis of the repair of bodily harm must take into account both the repair of the economic component, by applying the rules provided in art. 1.387-1.389 of the Civil Code, as well as the reparation through financial compensation of the moral component, with the purpose of compensating, mitigating or at least alleviating the physical pain and suffering caused to the victims in question.*

In the second case, in order to determine the compensations in the situation where the consequence of the illegal act or another event for which a person is called to answer is the death of the victim, it is necessary to distinguish between patrimonial and non-patrimonial damages caused to the immediate victim, who then died, and patrimonial and non-patrimonial damages caused by ricochet or reflection to the indirect victim/victims, according to the rules derived from the application of the provisions of art. 1.390-1.392 of the Civil Code."

In these conditions, we are talking about „recreational damage", for depriving the victim of certain benefits of a normal family or social life, and „damage by ricochet or reflection" in the situation where third parties, relatives or other close people, are injured indirectly, by harming the injured person.

In the previously mentioned decision, the supreme court showed that: *The possibility of granting compensation to the victims through ricochet for the pain caused to them*

exclusively by the death of the victim is regulated in art. 1.391 para. (2) of the Civil Code, according to which „The court will also be able to grant compensation to the ascendants, descendants, brothers, sisters and husband, for the pain caused by the death of the victim, as well as to any other person who, in turn, would could prove the existence of such damage".

From the examination of this legal text, the following results: a) the emotional damage suffered by the victims through ricochet can be remedied pecuniarily only if it is caused by the death of the immediate victim; affective damages due to the awareness of pain, deterioration of physical and health condition or disability caused to the immediate victim do not give the victims the right to pecuniary compensation through ricochet; b) the entitled persons are expressly mentioned, designated by the relationship of kinship or affection they had towards the victim: ascendants, descendants, brothers, sisters and spouse, but also other persons who, in their turn, could prove the existence of such damage, according to the law."

After being constituted as a civil party in its own name, the successor becomes a party in the criminal process from the perspective of the civil side. As shown before, he can be a civil party in his own name both for a possible material damage, such as the lack of maintenance in the case of the minor child of the deceased victim, and for the non-pecuniary damage consisting in the pain felt, the lack of support as a result of the disappearance of the close person.

The successors have the obligation, according to art. 20 para. (1) of the Code of criminal procedure, to constitute a civil party in the criminal process from the criminal investigation phase or at the latest during the trial, until the beginning of the judicial investigation, with the correlative obligation of the judicial bodies to bring this right to their attention.

Considering the current architecture of the criminal process and the conception of the court's powers, which no longer involve an active role in terms of the civil side, we appreciate that the solution of abolishing the case on appeal with referral for retrial, found under the rule of the previous Code of Procedure, could not be supported anymore if the court of first instance does not fulfill its obligation to identify the injured person's heirs and to inform them of the right to be a civil party.

At the same time, in judicial practice, the issue of the sanction that intervenes in the case of the establishment of a civil party after the term provided by law, that of starting the judicial investigation, was raised. Since the civil side of the criminal process is governed by the principle of availability, we appreciate that the incident sanction is that of relative nullity, so that it is also possible under the current regulation to express an express agreement of the defendant in this regard.

However, in the case of a tacit agreement, the same solution could not be supported, taking into account the jurisprudence of the European Court of Human Rights, which showed that the right to a fair trial was violated if the constitution as the civil side filed after the deadline was not brought to the attention of the defendant, who did not have the opportunity to oppose the late submission of the request and to formulate his defenses on the civil side.[5]

At the same time, we highlight that the successors of the injured person have a right of option: either to request compensation for the damage through a civil action filed before a civil court, or to become a civil party in the criminal process that was started against the defendant for the commission of that crime.

We mention that it is much more advantageous for the injured person to exercise the civil action within the criminal process, because in this case he can use the evidence administered in the resolution of the criminal action by the judicial bodies, with much more effective means.

However, there may be situations in which the successors will choose the option of going to the civil court, with the mention that if it is exercised simultaneously with a separate civil action, the criminal action has priority for resolution according to the legal provisions. Thus, according to art. 27 para. (7) of the Code of Criminal Procedure, the civil court is obliged to suspend the trial of the civil action, after the initiation of the criminal action and until the resolution of the criminal case in the first instance, but not for more than one year (the criminal case holds back the civil case).

From this perspective, the distinction between the different categories of civil party successors is of interest. In other words, would only the continuation of the civil action be admissible, meaning the exercise of the civil action in their own name by the universal successors or with universal title, or is this right also recognized in the case of successors with private title?

The provisions of art. 24 para. (1), respectively of art. 2– paragraph (1) of the Code of Criminal Procedure does not make any distinction from this point of view. Consequently, it is incumbent on judicial practice to interpret the mentioned legal provisions in accordance with the purpose for which they were enacted.

If in the case of universal successors or with universal title it is obvious that they can justify both the continuation of the civil action and the exercise of it in their own name, we appreciate that the successors with private title would only have at hand the first of the two ways of exercising the action civil cases, for example in the event of a crime that affected the property transmitted through legatee with private title. However, a personal injury caused by the death of the testator could not be claimed.

Since the civil action in the criminal process is an accessory action to the criminal one and cannot exist without it, we consider that the successors cannot acquire the status of a civil party before the initiation of the criminal action[6], until that moment participating in the process as a successor in the rights of the deceased victim.

If the heirs of the civil party do not express their option to continue the exercise of the civil action within the term provided by law, the solution available is to leave the civil action unresolved, which opens the possibility for the successors to file an action before the civil court. In judicial practice it has been shown that this possibility exists in any situation where the criminal court has not ruled on the civil claims made, not only in the cases provided for in art. 27 para. (2) of the Criminal Procedure Code. „This way is open even when the injured person or his successors have not constituted as a civil party in the criminal process, according to art. 27 para. (1) Criminal Procedure Code, which means *a fortiori* that they can file an action in the civil court for the reparation of the damage caused by the crime and in the event that they have constituted as a civil party in the criminal process, but the civil action has not been resolved, although a solution of conviction was pronounced and not one of the solutions provided in art. 25 para. (5) Criminal Procedure Code."[7]

Section V. Conclusions

In conclusion, we note the fact that in the event of the death of the victim following the commission of a crime, from the perspective of the criminal side, the legal successors take

over the procedural rights of the injured person, except in cases where the law recognizes the rights in consideration of the quality of the passive subject of the crime, and as regards on the civil side, the heirs will continue the exercise of the civil action initiated by the injured person or will participate in their own name in the criminal process if they have suffered material or moral damages, benefiting from the entire corollary of rights recognized to the civil party.

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DEBARMENT FROM SUCCESSION IN THE CASE OF MURDER FOR MATERIAL INTEREST

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Abstract

Inheritance is an institution in its own right, but which has a number of links with other important legal institutions in the field of civil law, such as family and property, as well as in other branches of law.

The connection between successions and the matter of criminal law emerges from the need to fulfill the requirements by those called to inherit in order to be able to have a succession vocation, this being one of the main conditions imposed to be able to inherit.

In order to carry out this procedure, debarment appears as a civil sanction that intervenes if one of the persons called to inherit is found guilty of committing a very serious crime against the deceased.

Successor debarment is determined by the nature of the crime committed by the successor, the category of these acts, although it is restricted, presents a series of particularities that often raise serious problems of interpretation for practitioners.

Keywords: *succession debarment, murder for material interest, sanction.*

1. Introduction

Since ancient times, the family has been one of the most important elements for the formation and development of the human personality. Due to these aspects, 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].

Due to these aspects, the legislator appreciated that it is necessary to protect family relationships and the patrimony that their members have. Thus, we find norms with applicability in this matter both in the Constitution and in the Civil Code, the Criminal Code and in other similar normative acts. In order to complete their purpose, where required, certain special sanctions of a civil nature also intervene.

Criminal legislation in Romania has over time criminalized the facts that present a particular gravity, ensuring as much as possible an effective response to their consequences. The legislator also tried to adapt the legal texts to the new social realities in order to respond to the challenges and to punish the guilty in relation to the seriousness of the committed acts.

Along with the criminal penalty, as I have shown, in certain cases civil sanctions can be ordered, such as debarment (unworthiness) of succession, which consists in the forfeiture of the heir, legal or testamentary, of the right to collect a determined inheritance, including the right to collect the reserve to which he would have been entitled from this inheritance because he was guilty of a serious offense against the one who leaves the inheritance or against a successor of his. [2]

According to Article 958 of the Civil Code, the following are debarred from succession:

a) the person criminally convicted for committing a crime with the intention of killing the person leaving the inheritance;

b) 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 the inheritance of the perpetrator.

If the conviction for the acts mentioned in paragraph (1) is prevented by the death of the author of the act, by amnesty or by the prescription of criminal liability, the debarment operates if those acts were ascertained by a final civil court decision.

Legal debarment can be ascertained at any time, at the request of any interested person or ex officio by the court or by the public notary, based on the court decision from which the debarment results."[3]

In the present study, we have carried out a detailed examination of the crime of qualified murder for material interest and the link it presents with the legal institution of the debarment from succession. The connection between them is very close, because as follows from the following, debarment of succession is a mandatory consequence that is taken after the commission of such a crime.

2. **Debarment from succession**

As it appears from Article 958 Civil Code, a first requirement regarding legal debarment refers to the need to convict the person for committing a crime with the intention of killing the one who leaves the inheritance.

In the legal literature, among other things, it is shown that this civil sanction, in addition to the criminal one, is justified by the fact that it would be unfair and contrary to good morals and public order as a person, who commits serious acts to be called to the inheritance of the one he killed or tried to kill. In this sense, the Constitutional Court of Romania also decided that [4], „the author of a crime of murder cannot claim a legal status equal to that of other citizens, from among whom he excluded himself by his act, so that the debarment instituted regarding him does not contravene the provisions of Articles 16 and 20 of the Constitution. It would, moreover, be profoundly immoral for the law to grant the perpetrator of the crime of murder the right of inheritance over the estate of his own victim".[5]

Another hypothesis that results from the contents of Article 958 of the Civil Code which refers to the fact that there should be a person criminally convicted for the crime before the opening of the inheritance of a crime with the intention of killing another successor which, if the inheritance had been opened at the time of the commission of the deed, would have removed or would have restricted the vocation to inheritance of the perpetrator.

In what follows, we will try to capture the essence of the topic addressed, so that, in the following, we will detail the characteristics of the crime of murder in the interest of the matter; the practical situations in which we can encounter such prohibitions, the problems raised in judicial practice and those revealed in other analyses.

3. **Murder for material interest and debarment from succession**

Such a circumstance qualifies the crime of murder as being guided by an interest of a patrimonial nature, through which the perpetrator seeks to satisfy a certain goal.

The aggravating nature of the circumstance stems from the serious danger presented by resorting to killing actions to achieve or satisfy material interests. In this sense, judicial practice has shown that „the defendant's act of killing his wife, the divorce decision not being final, was committed with premeditation and material interest, since the author reflected on the end of the victim's life, he thought about hiding the traces of the crime and that he was concerned that, following the division, he would be left without a part of the assets, which he claimed belonged entirely to him, the wife not having any contribution" [6].

Material interest is a selfish motive which, when it is the basis of the decision to kill a person, confers an increased danger to the act. The meaning that material interest has as a qualifying circumstance in the matter of murder is somewhat different from the common one, that of material benefit or advantage (ie money or goods obtained from current activities)[7]. Therefore, the material interest, as an aggravating qualification in the matter of murder, means, in principle, any benefit, advantage or benefit of a patrimonial nature pursued by committing the crime (for example, advantages resulting from the opening of a succession are pursued, certain obligations are extinguished, rights are modified, etc.).

In a first opinion [8] however, the content of the notion of material interest does not include the material advantages resulting from the collection of the victim's property at the time of her killing. In the case of murder for material interest, the perpetrator acquires the use of goods or rights by invoking only the patrimonial vocation resulting from the very fact of the victim's death. This form of qualified murder does not exist when it was committed for other reasons: revenge, jealousy, following arguments, this, even if the death of the victim would bring the perpetrator a material advantage. If the reason (motive) which consists in obtaining a material advantage turns out to be unreal (for example, in reality, the will was not in favor of the perpetrator, but he mistakenly considered that he had a succession vocation), the requirement of the law is still fulfilled because it is relevant in this situation for the legal inclusion of the deed in the legal provision from letter b, it is the subjective side of the crime.

In another opinion [9], material interests are often provoked by pressing needs so that the attempt to realize them by any means, even by murder, becomes extremely inviting for elements devoid of any scruples, for deeply perverted minds. The protection of people's lives and related social relations (such as patrimonial ones) would not be sufficiently ensured without sanctioning such elements. The material interest, as the notion itself shows, must consist in the pursuit of a benefit, an advantage, a tangible material benefit regardless of whether this benefit comes from a patrimonial vocation or from the spontaneous collection of the victim's assets after the commission of the act. Thus, the interest may consist in obtaining a sum of money or material goods or securities or in acquiring an inheritance or paying off a debt or in collecting the promised price for committing the murder. For the existence of the aggravating circumstance of material interest, it is sufficient to establish that the perpetrator pursued such an interest by committing the act of murder, regardless of whether he realized that interest or not.

From the judicial practice emerges the idea according to which „The Criminal Code does not provide a definition of material interest and, as a result, no limitation can be identified in the interpretation of the provisions of Article 189 (1) b) Criminal Code, the notion of material interest having a wider meaning when it constitutes the motive for murder. The material interest is any patrimonial advantage that the perpetrator can obtain directly from the death of the victim, this consisting in this case in the sums of money that

the defendants A and B were to receive from the defendant X, after the murder of his father [10]."

From the above, it follows that the material interest can be represented by the desire to obtain direct or indirect benefits or material advantages from committing the crime of murder (collecting an inheritance, paying off a debt, etc.).

For example, in judicial practice it was shown that, „in order to retain this aggravating factor requested by the civil side, it is necessary for the defendant to obtain goods or advantages in an apparently legal way following the death of the victim, her death becoming a source of legal effects. For this circumstantial element of aggravation, the defendant would enter into the use of goods or rights, invoking the patrimonial vocation resulting from the very fact of the victim's death, a vocation that cannot be removed"[11].

The most important aspect is represented by the fact that obtaining the material benefit will have to be done in a way that presents an appearance of legality, following the death of the victim. For example, through the death of the victim, the perpetrator will inherit the entire fortune.

As the doctrine rightly shows [12], we can consider that in such situations the author tries to speed up a natural natural process, since any person will die at some point, in order to give actuality to the material interests that he would acquire as a result of the death of the victim. The method is apparently legal, since the author relies on the fact that his action will not be discovered, because in the case of knowing the identity of the author of the murder, this aspect would prevent the actual obtaining of the sought-after patrimonial benefit (for example, in the case of an inheritance, the murderer will be debarred).

In this sense, we consider that the deed is typical even if the consequence of committing the crime represented by the benefit for the benefit of the author was actually carried out. Thus, the murder is to be retained in the qualified version even if the benefit pursued by the person committing the act does not exist in reality (for example: the agent kills the victim, having the impression that there is a will that was written by the victim in his favor, although this aspect is not true).

The legislator's approach is determined by the cause of material interest that motivates the perpetrator to kill another person. Therefore, no more is required than that the author acts under the auspices of this motive for the deed to be framed as such.

In a relatively recent decision, it was established that the conditions provided by the law are not met, because „it is necessary that the material interest pursued by the defendant and proven to be acquired by him in an apparently legal way, this invoking an inalienable, patrimonial vocation, resulting from the very fact of death. In the present case, this qualifying circumstance is not incidental, because the defendant does not have that patrimonial vocation"[13].

From the case presented, it follows beyond any doubt that the investigated person would have no way to justify his belonging to the class of heirs, so it is necessary to remove it, since the purpose of the committed act is one that cannot be ignored in any way.

In principle, the value of the advantages or goods is not important, but this aspect must have represented, as I have shown, the motive for the commission of the crime of murder in the cases brought to trial for the deed to benefit from such a legal framework [14].

A solution pronounced in a not very recent case highlighted, among other things, that, „under the aspect of the aggravating factor provided by letter b) of Article 189 (1) Criminal Code, murder committed for material interest, the court found that the material interest is

any benefit, advantage or benefit of a patrimonial nature, which may consist of money, goods, material advantages, the recognition of a right, the extinguishment of a debt. The aggravation exists regardless of whether the material interest pursued by the perpetrator is achieved or not. Also, the aggravation is applicable when the perpetrator acts out of the conviction of achieving some material interests, in an apparently legal way. The circumstance is a personal one, regarding the subjective side of the crime.

In the case, the court held that the defendant A acted in the sense held because of the differences he had with his parents, especially with his father, who did not give him the sums of money he wanted, the decision to commit the act being made in order to get access to the money, respectively on the goods that would have entered the estate of the victims if the result of the defendant's action had occurred, apparently as a result of a fire caused by causes not attributable to the defendant, the aggravation being applicable in the case of the defendant B „[15].

Related to the identical provisions existing in the previous Criminal Code, it was argued in the doctrine [16] that although the legislator used the notion of motive, it referred to the purpose and this is how the legal text should have been interpreted, the latter being important, and not the motive. We believe that, although the mentioned reasons are pertinent, it must be admitted that the link between motive and purpose is one that raises questions and, therefore, the interpretation of the notion of motive as actually being a purpose can only be the consequence of an express legislative amendment and not the result of interpretation, all the more so as sometimes the legislator expressly uses the notion of purpose. Moreover, judicial practice has not analyzed such a problem[17].

Despite the fact that the author inherited the victim's wealth, the deed no longer forms the content of a typical one because the killing was not carried out for material interest, for example, the author kills the person he had to and had the duty to support during his life not because he pursued a material interest, but because he quarreled with the person and became angry because of some remarks which the victim made to him, namely, that he had become an alcoholic.

There are hypotheses in which the crime of material interest murder includes the version of premeditated murder [18] and implicitly the sanction of debarment from succession, but the independent existence of the two forms of murder qualification is not excluded.

As we have shown, the benefit pursued by the author must represent the direct and apparently legal consequence of the victim's death. This result only has an appearance of legality, since, due to the rules established in the matter of succession law, the murderer of the victim will not be able to inherit.

We are of the opinion that the application of a sanction such as debarment of succession is completely justified, since, as it follows from what has been presented, a person found guilty of committing such a crime would have no way to justify his position in order to collect the inheritance from the deceased.

Despite the fact that, most of the time, murders are committed including on the basis of indirect material interests, this aspect does not mean that in all situations the motive of the crime of murder is represented by the satisfaction of a material interest.

It can also be retained in the case of the deviant crime committed in the modality of *aberratio ictus* or *error in personam*.

Committing the crime of qualified murder for material interest is a personal circumstance, as it concerns the subjective side of the crime. Therefore, it is not transferable to other participants. However, in the event that the participants act for the same reason, the aggravating factor may also be applied to them.

In the case of murder committed for material interest, the greater danger derives both from the character of the act itself, namely the resort to the act of murder to satisfy material interests, and from the character of the person who is capable of committing such acts.

4. **Conclusion**

As it appears from the content of this study, and not only, the crime of murder for material interest represents one of the most serious acts provided by the Criminal Code, attracting special consequences from the perspective of the criminal law on the one who commits it. In addition, as we have shown and as is logical, civil penalties are also imposed, given the reason behind the commission of the offense by the perpetrator, a base motivation.

Succession debarment appears as a natural consequence, since as long as the perpetrator is the one guilty of committing the act of killing the one who leaves the inheritance, it would be unnatural for him to be able to participate in the succession debate of his *de cuius.*

The analysis of the conditions regarding the legal classification of the deed requires a laborious examination of the criminal activity in order to clarify all aspects of these matters, as we are considering a very serious crime that entails special consequences.

The sanction of debarment from succession can be seen as a complementary sanction that comes and completes the sanctioning framework, in order to ensure an effective response to the one who is guilty of committing the crime.

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THE STANDARDS OF THE COUNCIL OF EUROPE AND THE NATIONAL LEGISLATION WITH REFERENCE TO THE DOMESTIC VIOLENCE.THE NON-DEDUCTIBILITY OF THE SUCCESSION

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Abstract

Within our contemporary society, domestic violence is a reality and, why not!, one of the most frequently encountered phenomena, which manifests itself in various forms [1]. Subsequently, it is highly justified that such a social manifestation is the preoccupation of sociologists, politicians, social assistants, different reasearchers, as well as (in particular) of the lawmaker.

From a legislative point of view, domestic violence and, most notably, violence against women represents an aspect which is settled in several normative acts, which are of national as well as of international structure. Within the context in which, in conformity with recent statistics [2] from the past few years, in Romania, nearly 800 women have deceased from domestic violence, in the following lines we propound ourselves to expound the mode in which the issue of violence against women, viewed as one of the most frequent forms of family violence in the society of the XXIst century, is addressed and legally settled in an international context and in the internal legislation.

Keywords: *domestic violence, penal offence, the non-deductibility of the succession, the national legislation, The Council of Europe.*

1. TERMINOLOGICAL CLARIFICATIONS

It is necessary to specify that, in accordance with the opinions of specialists, *domestic violence* must not be confused with *family violence*. The clarification of these two concepts helps not only to understand the phenomena as such, but to also understand some legal and legislative subtle differentiation in what concerns the two concepts.

Although in the republished text of *Law No. 217/2003 on prevention and combating family violence[3]*, there is no clear delimitation between the two expressions, it is reminded to us the fact that „domestic violence means any inaction or intentional action of physical, sexual, psychological, economic, social or spiritual violence which produces itself in the family or domestic environment or between two spouses or between two former spouses, as well as between current or former partners, regardless of the fact if the agressor lives or has lived together with the victim" (Article No.3), nevertheless the specialists tend to establish and prefer a strict delimitation between *domestic violence and family violence*. In conformity with the *Institute for the Research and Prevention of Organized Crime from Romania*, family violence comprises (makes reference to) a broader array of actions and inactions (physical, sexual, psychological, verbal, economic violence, and so on), carried out between the closer or more distant members of a family, as opposed to *domestic violence*, which implies the same actions or inactions, carried out on the other hand exclusively between stable intimate partners. In other words, domestic violence is an integral part of the broader

phenomenon of *family violence or of intra-family violence*, the particularity of domestic violence being given exactly by the intimacy and stability of the two partners. „Domestic violence represents a series of systematically repeated behaviours, of physical attack, of verbal and psychological aggresivity, of sexual and economic aggresivity, which one partner manifests towards the other partner in the official context of the family, in the relationship of cohabitation in the same space. Domestic violence manifests itself always in the context of intimate relationships, more often in a restrained and private space „[4].

We opt for this last difference, taking into consideration, as we have mentioned in the above paragraphs, that a settlement as useful socially as possible of the phenomenon we are dealing with is possible only if we have a complete and well documented perspective of the situation. Moreover, given the intimate and private character of domestic violence, this type of violence can be more easily noticed and perceived as *violence against women*, by means of the term „woman" we hereby refer to „life partners", namely, those women in their capacity of wife, concubine, life partner and so on.

2. THE COUNCIL OF EUROPE AND VIOLENCE AGAINST WOMEN, RESPECTIVELY DOMESTIC VIOLENCE

The documents pertaining to the Council of Europe show that domestic violence must not be confused with family violence. Thus, in conformity with the text *of the Recommendation of the Committee of Ministers of the Council of Europe No. R (85)[5] with regard to family violence*, family violence was defined as being that „act or omission committed within the context of the family by one of its members and which is prejudicial to the life, the bodily integrity or to the psychological integrity or to the liberty of another member of that family and which seriously damages the development of his personality"[6]. Taking into consideration the given definition, it may inferred the fact that domestic violence is just a form of concretisation of family violence, which may manifest itself also as violence against children or against the elderly people or against other relatives.

Another important document pertaining to the Council of Europe is *the Convention on prevention and combating violence against women and domestic violence[7]*. In conformity with this Convention, the scope of „domestic violence" implies „all actions of physical, sexual, psychological and economic violence, which surge up within the family or in the domestic unit sau between former or current spouses or partners, regardless of the fact if the offender shares or has shared the same domicile with the victim" (Article No.3, letter b). The same document also comprises clarifications with regard to *violence against women*, which he defines as „an infringement of the human rights of the human being and a form of discrimination against women, englobing all actions of gender-based violence, which result in, or which are probable to result in physical, sexual, psychological and economic harm or suffering caused to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life" (Article No.3, letter a). We notice from the two definitions mentioned by the Convention that *violence against women* is not resumed to *domestic violence*, but is merely a form of concretisation of the latter.

A particular aspect is the fact that the same *Convention* also defines *gender-based violence against women*, which regards „violence directed against a woman for the fact that she is a woman or which affects women disproportionately" (Article No.3, letter d).

Besides the definitions presented above, with a view to violence against women, the *Convention* of the Council of Europe contains also the following settlements: *general*

objectives (Article No.1), the scope of application (Article No.2), the clarification of fundamental rights, of equality and of non-discrimination (Article No.4), the obligations of the State, the due diligence, respectively the policies which are sensitive to the gender dimension (Articles No.5 and 6), integrated policies and data collection (Articles No.7-11), the prevention of violence against women (Articles No.12-17), measures of protection and support (Articles No.18-28), the applicable substantive law (Articles No.29-48), the investigations, the judiciary prosecution, the procedural laws and the applicable measures of protection (Articles No.49-58), the settlements applicable in case of migration and asylum (Articles No.59-61), aspects regarding the international cooperation in the judiciary field (Articles No.62-65), the settlement of a monitoring mechanism (Articles No.66-70), the relationship of the Convention with other international official documents, as well as the procedure by means of which the text may be subjected to amendments (Articles No.71-72), various final clauses (Articles No.73-81).

For reasons pertaining to the economy of the text, we only take note of the following aspects which the Convention in question comprises with regard to the violence against women:

- the obligativity of the State to involve itself actively in the prevention of violence against women: „the Parties to the Convention will adopt the legislative measures and other necessary measures in order to exercise the due diligence in order to prevent, to investigate, to punish and to provide compensation for acts of violence covered by the scope of application of the present Convention, acts which are committed by non-statal actors" (Article No.5, paragraph 1).

- the education of the population in the sense of preventing violence against women constitutes an important coordinate which the State has the obligation to put into practice: „the Parties to the Convention will undertake, where the case is applicable, the necessary steps in order to include educational material on problems such as equality between women and men, the non-stereotype gender roles, the reciprocal respect, the non-violent resolution of conflicts within interpersonal relationships, the gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of students, in the formal school curriculum and at all levels of education" (Article No.14, paragraph 1);

- the applicable substantive law in the matter regarding violence against women is the national internal law: „The Parties to the Convention will adopt the legislative measures or other measures necessary to provide the victims adequate legal civil redress against the offender. The Parties to the Convention will adopt such legislative measures or other necessary measures in order to provide the victims, in conformity with the general principles of the international law, adequate legal civil redress against the authorities of the State, which have not performed their duty to take the preventive measures or the protective measures necessary within the scope of application of their powers „ (Article No.29);

- in what regards the sanctioning of the acts of violence against women, the Convention provides that „the Parties to the Convention will adopt legislative measures or other necessary measures in order to ensure themselves that offences settled in conformity with the present Convention are liable to effective, proportionate and dissuasive sanctions, taking into consideration their gravity. These vindicatory sanctions will include, as the case may be, court judgements involving deprivation of liberty, which may lead to extradition" (Article No.45, paragraph 1);

- at an international level, the Convention provides that „the Parties to the Convention will cooperate the one with the other, in conformity with the provisions of the present Convention and by the application of relevant regional and international acts regarding the cooperation in civil and penal matters, of arrangements agreed upon on the basis of uniform or reciprocal legislation and of internal laws, in the most possibly extensive measure, for the purpose of: a) preventing, combating and tracing in the court of justice of all forms of violence covered by the scope of application of the present Convention. b) protection and provision of legal assistance to the victims; c) investigations or legal procedures regarding offences settled in conformity with the present Convention; d) the enforcement of relevant penal and civil court judgements, issued by the judiciary authorities of the Parties, including the enforcement of the orders of protection" (Article No.62, paragraph 1).

Overall, we consider that, at the present time, *the Convention of the Council of Europe regarding prevention and combating violence against women and domestic violence*, to which Romania is also a party, represents the most important, comprehensive and complete international legislative document, by means of which the Council of Europe has reckoned with the complex subject of the violence against women.

By means of the EU Decision No.866/2017, dated 11 may 2017, the Council of the European Union has signed, on behalf of the European Union, *the Convention of the Council of Europe on preventing and combating violence against women and domestic violence, in what regards asylum and non-refoulement*, the main purpose of which was to „achieve equality between women and men in all areas, a fundamental objective and a fundamental value of the European Union which must be abided by in all its activities in conformity with Articles 2 and 3 of the Treaty on the European Union (The EU Treaty), in conformity with Article 8 of the Treaty on the Functioning of the European Union (TFEU) and in conformity with Article 23 of the Charter of the Fundamental Rights of the European Union" [8].

Other *Council of Europe* documents with a bearing on violence against women and domestic violence include *the Council of Europe Convention on Action against Trafficking in Human Beings (2005), the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007)*, various recommendations of the Committee of Ministers to Council of Europe Member States, as well as: Recommendation R (79) 17 on the protection of children against ill-treatment, Recommendation R (85) 4 on family violence, Recommendation R (87) 21 on assistance to victims and prevention of victimisation, Recommendation R (90) 2 on certain social measures relating to intra-family violence, Recommendation R (93) 2 on the medico-social aspects of child abuse, Recommendation R (2000) 11 on measures against trafficking in human beings for the purpose of sexual exploitation, Recommendation R (2001) 16 on the protection of children against sexual exploitation, *Recommendation Rec(2002)5 on the protection of women against violence, Recommendation CM/Rec(2007)17 on standards and mechanisms for ensuring gender equality, Recommendation CM/Rec(2010)10 on the role of women and men in conflict prevention and resolution and in peace building, and other relevant recommendations*. The aim of these documents is to provide Member States with a unified definition of family violence. They also seek to identify the common factor at European level with regard to the applicable legal rules and procedures, both penal and civil [9].This whole suite of legal documents demonstrates a growing international concern to prevent and eradicate the phenomenon of domestic violence, in particular violence against women, by

highlighting fundamental human rights, together with a series of procedures and solutions oriented towards the dwindling of the phenomenon.

3. THE NATIONAL LEGISLATION REGARDING VIOLENCE AGAINST WOMEN

In Romania, the lawmaker accentuates, starting with the contents of the fundamental law, the fact that „the right to life as well as the right to physical and mental integrity of the person are guaranteed and no person can be subjected to torture and to no sort of punishment or inhuman or degrading treatment" (Article No.22, paragraphs 1 and 2) [10]. Moreover, Article No.23, paragraph 1 settles that „the individual liberty and the safety of the person are inviolable".

Starting with these two fundamental norms, which condemn indirectly domestic violence, the entire Romanian legislation is oriented in the direction of preventing and sanctioning the acts which are englobed in this antisocial phenomenon. An overview of the documents elaborated by the Romanian lawmaker highlights more norms of interest for our research.

In their order of importance, we hereby refer to the following normative acts:

The Civil Code [11] In the text of the new Civil Code we encounter several settlements which regard both the rights and liberties of the person, in general, as well as the rights of the family and of the spouses, in particular. On the other hand, with regard to the chapter family and relationships between spouses, the Civil Code reserves an entire book (The II nd book, *Despre familie*, Articles No. 258-404), in the contents of which we encounter several references with regard to the connection between spouses. In a particular mode, from the contents of the Civil Code, we mention the provisions of Article No.71, in which we make reference to the right at a private life: „any person has the right to have the respect for his private life (paragraph 1), as opposed to the provisions of Article No.72, in which the right to dignity is statuated: any person has the right to the respect of his own dignity. Any harm brought to the honour and reputation of a person is forbidden", respectively the provisions of Article No.74, which in between the invasions of privacy, he also mentions about maintaining private life under observation, by any means" (letter e). In the text of a specialised commentary, it is mentioned the fact that intimate or private life „includes love life or sentimental life, the state of health and, in general, all aspects of life which pertain to the immediate intimacy of the person and which this person wants to keep far from the curiousity of the others" [12]. We consider that the iniative of the lawmaker to fix some limits with regard to private life, as he proceeds in the contents of Article No.74, constitutes a first step with regard to the prevention of acts of domestic violence, due to the fact that, several times, by means of such violence the right to an intimate life of the victim is infringed.

Returning to the provisions of the Civil Code, it is important to remember that, in addition to the articles referred to above, we find in the contents of Articles No. 307-311 several more important norms relevant for the research at hand. Of interest among these are those norms which are settled by Article No. 309, which settles the fact that „spouses owe each other reciprocal respect, fidelity and moral support" (paragraph 1). Such an obligation shall arise by operation of law at the moment of conclusion of marriage and is supplemented also with other responsibilities (imposed, as well, by the marital legal situation), enumerated in the other afore-mentioned articles. Within a dynamic situation, the balance of mutual rights and reciprocal duties between spouses is governed by simple and concise principles:

making decisions by the mutual consent of the spouses (Article No.308) and the independence of the spouses (Article No.310). The Civil Code outlines a veritable non-patrimonial marital „portfolio", composed of various rights and duties, together with operational rules, which create what would be called „a code of good marital conduct", of an imperative and of public policy nature, which is applicable regardless of the matrimonial regime of the spouses [13]. Such a „code" is very important for the theme of research under consideration.

Last but not least, a particular aspect which is settled by the Civil Code and which we consider it necessary to bring to the forefront, is the aspect referring to the legal implications which violence in general (therefore, including domestic violence) has on the validity of civil legal acts. Specialists state that violence is vitiation of consent and, in the light of Article No.1216 [14], paragraphs 2 and 3, of the Civil Code, we agree with the fact that „the category of persons to whom the harm causing the fear refers includes not only the person who is the victim of the violence, that is the person with whom the legal act is concluded under the fear, but also the spouses or, as the case may be, the spouse's spouse, descendants and ascendants, as well as any close person, namely another person to whom the person threatened is bound by a deep affection" [15]. The fact that, in the vision of the Romanian lawmaker, (domestic) violence constitutes an infringement of the social order and of the rights of the person is also proven by the fact that the existence of the acts of violence triggers the relative nullity of the civil legal act (in conformity with Article No.1216, paragraph 1, of the Civil Code).

The Penal Code [16]. Domestic violence (often materialized in acts of violence against women) does not only have implications mentioned in the provisions of the Civil Code. Unfortunately, many acts of domestic violence produce results which are englobed within the scope of the penal law. By means of such serious results, domestic violence becomes subject of settlement also in the penal field.

From the contents of the New Penal Code, we remember three important aspects. First of all, domestic violence, by means of the implications it has at a psychological level over the person, was understood by the lawmaker as being decisive in determining of some mitigating circumstances, respectively some aggravating circumstances. In what regards the actions of the victim of domestic violence, the penal law distinguishes between mitigating circumstances and committing the offence under the control of some strong disturbance or emotion, caused by a provocation coming from the injured party, produced by means of violence, by means of serious injury caused upon the dignity of the person or by means of some other serious illicit act" (Article No.75, paragraph 1, letter a). With a view to the aggravating circumstances, within the contents of Article No.77 of the Penal Code, several situations are presented to us, the majority of these situations not being estranged from the mode of manifestation of domestic violence [17].

A second aspect which was adopted and settled in the Penal Law refers to the complementary penalties and the accessory penalties. Acts of domestic violence which lead to serious results, sanctioned under the Penal Law, may also determine complementary/accessory penalties such as: *the deprivation of parental rights* (Article No.65, paragraph 2; Article No.66, paragraph 1, letter e), interdictions regarding „the right to communicate with the victim or with other members of its family, with the persons with which he committed the offence or with other persons, settled in the court of justice, or to approach these persons" or „the right to approach the dwelling, the place of work, the school

or other places where the victim carries out social activities, under the conditions settled by the court of justice" (Article No.66, paragraph 1, letters n-o).

The third aspect with reference to domestic violence, settled in the Penal Code, more precisely in the Special Part of the Penal Code, constitutes a distinct category of offences, which regard the safety of the person, respectively that of the family. In Title I from the Special Part of the Penal Code, we find a series of penal offences (such as murder, assault and other acts of violence and so on) which may result from acts of domestic violence. This fact may be deduced from the situation that, in case of some offences, the lawmaker has decided as being an aggravating circumstance the intimate connection (the family connection) between the victim and the offender. Among other facts, it is the case of Article No.199 of the Penal Code which stipulates that: „If the offences referred to in Article No.188 (murder), Article No.189 (aggravated murder) and Articles No.193-195 (assault and other violence, grievous bodily harm, assault or injury causing death) are committed against a family member, the special maximum penalty provided for by the law is increased by one fourth. (2) In the case of offences referred to in Article No.193 (assault or other violence) and Article No.196 (culpable grievous bodily harm) committed against a family member, penal proceedings may also be instituted ex officio. The reconciliation removes penal liability".

Moreover, also in the Special Part of the Penal Code, a distinct section is constituted by the penal offences against the family (Articles No.376-380), among which we also find the family abandonment (Article No.378), an offence by means of which the lawmaker sanctions the act of the person which has the legal obligation of maintenance and which exercises this duty in bad faith, by means of various forms, such as: „abandonment, driving away or leaving the person without help, exposing the victim to physical or moral suffering" (letter a); failure in bad faith to comply with the maintenance obligation mentioned in the provisions of the Penal Law (letter b); failure in bad faith to pay the maintenance pension, determined by court judgement, for three months (letter c).

All these settlements (in matters of penal law), supplemented also by other norms from the contents of the Penal Code which we have not mentioned, consolidate the position of the Romanian lawmaker towards the phenomenon of violence against women, respectively domestic violence. Given the complexity of the phenomenon and its variety of forms of manifestation, from the above mentioned facts it is noticeable that acts of domestic violence are also prosecuted (in certain phases) under the penal law, a perspective which reiterates an important aspect, namely that in the society of XXIst century, such situations are criticised and sanctioned, both morally, socially, at the level of the community as well as legally.

Law No. 217/2003 [18]. Within the contents of the specialised legislation, Law No.217/2003 constitutes the main normative act from our country which settles family violence and, in particular, violence against women. In a previous chapter, we have made reference to this updated and republished normative document, by noticing the connection between the concept of family violence and the concept of domestic violence. In the following lines, we are interested in the main aspects referring to violence against women which, in its 41 Articles, this legislative document comprises.

In the first part of the normative act, the principles which were taken into consideration in what regards the protection and the promotion of the rights of victims of domestic violence are mentioned. Moreover, a series of definitions and clarifications in the judicial field are to be found, including the forms which domestic violence may take (under a legal

aspect) [19]. Nevertheless, among others, the normative act outlines an overview of the rights of the victims of domestic violence (Article No.6), some obligations of the authorities of public central or local administration (Article No.7). In chapter II, the competent public authorities to apply the law in the case of situations of domestic violence are enumerated, whereas in chapter III, the lawmaker presents the main social services for the prevention and fighting this type of violence, proof of the fact that the interest of the State is not only centered on the prevention and sanctioning of acts of violence, but also for the aiding and social reintegration of the victims of violence. In addition, the above mentioned normative act settles several aspects regarding the procedure of prevention and sanctioning of actions which are subsumed to the phenomenon of domestic violence. In this sense, we take note of the right of the victim to sollicit the court of justice the issuance of an order of protection, a request which is judged in an emergency regime and which can protect the victim from the offender for a period of time not exceeding 6 months. Of interest are also the measures which the court of justice can take against the offender: the temporary eviction of the offender from the dwelling of the family, regardless of the fact if the offender is the holder of the title of property; the reintegration of the victim and, as the case may be, of the children in the family dwelling; the limitation of the right of the offender to use only part of the common dwelling, when the dwelling can be shared as such as the offender does not come into contact with the victim; ordering the offender to keep a determined minimal distance from the victim, from her children or from her other relatives or from the dwelling, the place of work or the educational unit of the protected person; the interdiction for the offender to travel to certain localities or specific areas which the protected person frequents or visits regularly; the interdiction of any contact, including by phone, by written correspondence or in any other mode, with the victim; obliging the offender to hand over to the police the weapons in his possession; entrusting the minor children or establishing their residence and requiring the offender to pay rent and/or maintenance for the temporary accommodation where the victim, minor children or other family members live or are to live due to the impossibility of remaining in the family dwelling. Although adopted in the year 2003, the text of *Law No.217* was updated after Romania ratified *the Istanbul Convention in 2016*, and the republished form of the document shows a growing interest in preventing such actions, in particular by the lack of tolerance of the authorities towards offenders, and by the increasing the measures adopted to protect victims. The conclusion suggested by the lawmaker is that decision-makers need to work together to save the victims' lives and to punish the offenders.

We have presented in the above mentioned paragraphs the main normative acts which make reference to the phenomenon of violence against women. For reasons pertaining to the economy of the current research, in this last part of the chapter, we propound ourselves to enumerate also other normative acts, respectively administrative acts, subsumed to the scope of domestic violence. Among the normative acts, the following acts are relevant: Law No.211/2004 on some measures to ensure the protection of victims of offences, with subsequent amendments and additions [20], Law No.197/2012 on quality assurance in the field of social services [21], the Law on social assistance No.292/2011, with subsequent amendments and additions [22]; the Government Ordinance No.68/2003 on social services, with subsequent amendments and additions [23].

Among the acts of an administrative nature, we take note of the following: GD no. 1156/2012 on the approval of the National Strategy for preventing and combating domestic

violence for the period 2013-2017 (Official Gazette of Romania, Part I, no. 819 of 6 December 2012); GD no. 797/2017 on the approval of the framework regulations for the organization and functioning of public social assistance services and the indicative staff structure (Official Gazette of Romania, Part I, no. 920 of 23 November 2017); GD no. 118/2014 on the approval of the methodological norms for the application of the provisions of Law no. 197/2012 (Official Monitor of Romania, Part I, no. 172 of 11 March 2014); GD no. 978/2015 on the approval of the minimum cost standards for social services and the level of monthly income per family member on the basis of which the monthly maintenance contribution due by the legal supporters of elderly people in residential centres is determined (Official Monitor of Romania, Part I, no. 959 of 24 December 2015); Order of the Minister of Labour, Social Solidarity and Family no. 383/2004 on the approval of quality standards for social services in the field of protection of victims of domestic violence (Official Monitor of Romania, Part I, no. 698 of 3 August 2004); Order no. 384/306/993/2004 on the approval of the Procedure for cooperation in the prevention and monitoring of cases of domestic violence (Official Monitor of Romania, Part I, no. 745 of 17 August 2004); Order No. 304/385/1.018/2004 approving the Instructions for the organisation and functioning of the units for preventing and combating domestic violence (Official Gazette of Romania, Part I, No. 818 of 6 September 2004); Order of the Minister of Labour, Family, Social Protection and the Elderly No. 2126/2014 approving the Minimum Quality Standards for the accreditation of social services for the elderly, the homeless, young people who have left the child protection system and other categories of adults in need, as well as for services provided in the community, services provided in an integrated system and social canteens (Official Gazette of Romania, Part I, No. 874 of 2 December 2014); Order of the Minister of Labour, Family, Social Protection and the Elderly No. 1343 /2015 for the approval of the Instructions on the completion of self-assessment forms for services in the field of protection of victims of domestic violence (Official Monitor of Romania, Part I, no. 548 of 23 July 2015).

The documents presented above are of a general nature and are supplemented by other documents of administrative interest, adopted at central or local level (instructions, decisions, local council decisions, etc.), of interest in the field of prevention of violence against women.

4. THE LEGAL EFFECTS OF DOMESTIC VIOLENCE. THE NON-DEDUCTIBILITY OF THE SUCCESSION

A major consequence of committing domestic violence in the family is constituted by the non-deductibility of succession. „In order for a person to come to inheritance, that person must also comply with a negative condition, namely the condition of the person of not being unworthy to inherit" [24]. The Civil Code settles the non-deductibility of succession within the contents of Articles No.958-961. More to the point, „the non-deductibility of succession or the unworthiness to inherit represents the forfeiture of the right to inherit of an heir who is guilty of a serious act against the deceased or his memory" [25]. It is a civil sanction or penalty, which is applied to the unworthy person guilty of committing an act prohibited by the law against the person leaving the inheritance. Within the doctrine, a distinction is made betwen the non-deductibility of succession and the incapacity to inherit. As regards the non-deductibility of succession, this concept has been divided into de jure non-deductibility of succession and legal non-deductibility of succession.

In conformity with Article No.958 of the Civil Code, the de jure non-deductibility of succession is the legal situation in which a person is de jure unworthy to inherit. The cases of de jure non-deductibility of succession are the following: 1. The person who has attempted to take the life of the person leaving the inheritance, by commiting an act provided by the penal alw; 2. The person convicted by the penal law for commiting, before the opening of the inheritance, of a criminal offence, with the intention to kill another heir who, if the inheritance had been opened at the time of the offence, would have removed or would have restricted the heir's right of inheritance. De jure non-deductibility of succession can be established at any time, at the request of any interested person or ex officio by the court of justice or by the notary public, on the basis of the court decision establishing de jure non-deductibility of succession.

The legal non-deductibility of the succession is settled by Article No.959 of the Civil Code and it regards the legal situation in which a person is declared inapt for the succesion of the deceased person. The following persons may be declared unworthy to inherit the deceased person: 1. The person convicted by the penal law for committing with intention, against the person who leaves the inheritance, some serious acts of violence; 2. The person who, in bad faith, has hidden, has altered, has distroyed or who has forged the will of the deceased person; 3. The person who, by means of fraud or violence, has prevented, the person who leaves the inheritance, to draw up, to modify or to revoke the will.

The main effects of the non-deductibility of succession are mentioned by Article No.960, paragraph 1, of the Civil Code. These effects have a relative character, in the sense that the heir is excluded from the inheritance left by the person towards whom he is unworthy, and may be divided into: effects towards the unworthy person, effects towards the descendants of the unworthy person and effects towards third parties [26]. It must be mentioned that the effects of the de jure non-deductibility of succession or the effects of the legal non-dectibility of succession can be revoked directly by will or by means of an authentic notarial deed by the one who leaves the inheritance. The revocation of the effects of the non-deductibility of succession, the equivalent of forgiving the unworthy, is performed only by means of an express declaration comprised in the will or in the notarial deed [27].

5. NEVERTHELESS, THE CURRENT LEGISLATION DOES NOT COVER SOME DEFICIENT ASPECTS

By means of analysis of the contents of the normative acts and of the documents enumerated in the above mentioned parapraphs, we notice that, given the complexity of the phenomenon of domestic violence, the Romanian lawmaker has not yet created a legal framework, perfectly viable and useful to the victims of this social phenomenenon. We may discuss, in the following lines, about some gaps in the Romanian legislation in this judicial field, as well as about some settlements which may and must be improved.

Firstly, an educational process of the victims is necessary, in the sense that there are many women who endure an abusive behaviour of their partner, precisely because they do not have a solution and, in particular, in the rural environment, it is impossible for them to inform themselves with regard to their rights and their situation. This situation is all the more saddening as there are organisations whose purpose is to help the abused women to

come out from their toxic and abusive relationships, organisations about which many victims do not know.

Secondly, the development of the counselling centres of the victims and the increase in temporary shelters with secret addresses, which are insufficient from a numerical point of view and which are located mainly in urban areas, is necessary.

Thirdly, it must be accentuated that, in Romania, even though domestic violence is a real and acknowledged problem, the incrimination of its forms is recent in the penal and civil legislation. For example, the penal law does not provide for distinct offences of domestic violence, and this concept can be applied even to some actions directed against family members (and which, under the specialised legislation, are subsumed to family violence).

CONCLUSIONS

It is clear that violence against women represents a phenomenon which varies from one country to another country and which reflects the manner in which the legislation is more or less „permissive" with such a reality. In Romania, although it is perfectible, the legislation is oriented towards the prevention of such an antisocial phenomenon, the lawmaker opting for a legal framework with a divided utility: On the one hand, the legislation sanctions the acts of domestic abuse, on the other hand, the legislation offers support and legal protection to the victims of domestic violence. Depending on the actual realities, this legal framework may be improved, in order to respond as well as possible to the diversity of the reality in the territory.

On the other hand, it must also be noticed that, at the present time, the options of the Member States with a view to defining the prevention policy of cases of family violence are not determined exclusively by the legislative instruments of these Member States, most notably since numerous policy documents have been adopted at an international level. For example, the European Member States (among which Romania is also a Member State) must abide by the recommendations of the Council of Europe, as well as abide by the documents adopted by the Organisation of the United Nations, most notably by the *Platform of Action adopted by the fourth World Conference of Women in the year 1995*. Consequently, the attribution of the national lawmaker to outline a legal framework specialised in what regards domestic violence is imposed at an international level. This fact is also proven by diverse civic initiatives [28].

In the face of such an ubicuous and constant phenomenon in our contemporary society, determined by social, political, economic factors from the most diverse, we manifest our conviction that the Romanian lawmaker, by responding to the international policies in the judicial field, will succed, gradually, to respond to the needs of the victims of violence against women and to perfect a practical, useful and up-to-date legal framework.

I, the undersigned, Raluca PETRE, in my capacity of sworn translator and interpreter for the English language, on the basis of the authorisation No. 26158 dated June 04 th 2009, issued by the Ministry of Justice from Romania, hereby certify the exactness of the translation carried out from the Romanian language into the English language and I do

hereby attest that the text presented before me has been translated in totality, without any omissions, and that by means of my translation, I have not altered the meaning and the contents of this statement.

SWORN TRANSLATOR AND INTERPRETER,

Referințe

[1] Din punct de vedere sociologic, *violența domestică* este definită ca fiind acțiunea (acțiunile) prin care o persoană urmărește să controleze sau să își impună „puterea asupra partenerului său, într-o relație intimă". Cf. *https://www. womensaid.ie/ro/whatisdo mesticv4.html*, consultat în data de 11.11.2018, ora 21.34.

Consider că definiția prezentată poate fi completată, mai ales că, potrivit specialiștilor, *violența domestică* se poate concretiza deopotrivă în abuzuri fizice, emoționale sau financiare. O lucrare interesantă care abordează și analizează tema *violenței domestice* este cea semnată de TURLIUC Maria Nicoleta, KARNER HUȚULEAC Adina, DĂNILĂ Oana, *Violența în familie. Teorii, particularități și intervenții specifice*, Ed. Universității Alexandru I. Cuza, Iași, 2009, 208 p.

[2] Informații preluate de pe site-ul: *https://adevarul.ro/news/societate/despre-violenta-domestica-efectele-familiei-8_527b53bec7b855ff56c8b8a1/index.html*, consultat în data de 11.11.2018, ora 21.34.

[3] *Legea nr. 217/2003 pentru prevenirea și combaterea violenței în familie*, republicată în *Monitorul Oficial al României*, partea I, nr. 415 din 18 iulie 2018.

[4] TURLIUC Maria Nicoleta, KARNER HUȚULEAC Adina, DĂNILĂ Oana, *Violența în familie. Teorii, particularități și intervenții specifice*, pp. 11-12. De asemenea, am consultat și: Asociația Baroului American (Inițiativa juridică pentru Europa Centrală și Eurasia), *Violența în familie în România: legislația și sistemul judiciar. Raport final (30 aprilie 2007)*, pp. 5-6

[5] Acest document a fost adoptat la 26 martie 1985.

[6] Asociația Baroului American (Inițiativa juridică pentru Europa Centrală și Eurasia), *Violența în familie în România: legislația și sistemul judiciar. Raport final (30 aprilie 2007)*, p. 6.

[7] Documentul a fost adoptat la Istanbul, în data de 11 mai 2011. Textul Convenției a fost consultat on-line, la adresa web: *https://rm.coe.int/168046253e*, consultat la 4 decembrie 2018, ora 14.45.

În data de 29 februarie 2016, Parlamentul României a adoptat proiectul de lege prin care a fost ratificată *Convenția Consiliului Europei privind prevenirea și combaterea violenței împotriva femeii și a violenței domestice*, cunoscută și sub numele de Convenția de la Istanbul (cf. *https://violentaimpotrivafemeilor.ro/parlamentul-a-aprobat-ratificarea-conventiei-de-la-istanbul/*, accesat în 4 decembrie 2018, ora 15.20). Este vorba despre *Legea nr. 30/2016 pentru ratificarea Convenției Consiliului Europei privind prevenirea și combaterea violenței împotriva femeilor*.

[8] În același preambul al documentului, se amintește și faptul că: „Violența împotriva femeilor este o încălcare a drepturilor omului și o formă extremă de discriminare, înrădăcinată în inegalitățile dintre femei și bărbați, care contribuie la menținerea și amplificarea acestor inegalități. Angajându-se să pună în aplicare convenția, Uniunea își confirmă angajamentul de a combate violența împotriva femeilor pe teritoriul său și la nivel mondial și își consolidează acțiunea politică actuală și cadrul juridic substanțial existent în domeniul dreptului de procedură penală care prezintă o relevanță deosebită pentru femei și fete". Text consultat la adresa: *https://eur-lex.europa.eu/legal-content/RO/TXT/ HTML/?uri= CELEX:32017D0866&from=RO*, accesată la 5 decembrie 2018, ora 19.00.

[9] Cf. Asociația Baroului American (Inițiativa juridică pentru Europa Centrală și Eurasia), *Violența în familie în România: legislația și sistemul judiciar. Raport final (30 aprilie 2007)*, pp. 13-14.

[10] Textul *Constituției României* a fost consultat la *http://www.cdep.ro/pls/dic/ site.page? id=339*, accesat la 5 decembrie 2018, ora 19.20.

[11] *Legea nr. 287/2009 privind Codul civil*, republicată în *Monitorul Oficial al României*, partea I, nr. 505 din 15 iulie 2011.

[12] Flavius-Antoniu BAIAS, Eugen CHELARU, Rodica CONSTANTINOVICI, Ioan MACOVEI, *Noul cod civil – comentariu pe capitole*, ediția 2, Ed. CH Beck, 2014, p. 71.

[13] Flavius-Antoniu BAIAS,..., *Noul cod civil – comentariu pe capitole*, pp. 250-251.

[14] Art. 1216: „(2) Există violenţă când temerea insuflată este de aşa natură încât partea ameninţată putea să creadă, după împrejurări, că, în lipsa consimţământului său, viaţa, persoana, onoarea sau bunurile sale ar fi expuse unui pericol grav şi iminent. (3) Violenţa poate atrage anularea contractului şi atunci când este îndreptată împotriva unei persoane apropiate, precum soţul, soţia, ascendenţii ori descendenţii părţii al cărei consimţământ a fost viciat".

[15] Gabriel BOROI, Carla Alexandra ANGHELESCU, *Curs de drept civil. Partea generală*, ediția a II-a, Ed. Hamangiu, București, 2012, pp. 155-156.

[16] *Legea nr. 286/2009 privind Codul penal*, publicată în *Monitorul Oficial al României*, partea I, nr. 510 din 24 iulie 2009.

[17] Ne referim aici, în primul rând, la aspecte precum: „săvârșirea infracțiunii prin cruzimi sau supunerea victimei la tratamente degradante" (lit. b) sau „săvârșirea infracțiunii profitând de starea de vădită vulnerabilitate a persoanei vătămate, datorată vârstei, stării de sănătate, infirmității sau altor cauze" (lit. e).

[18] *Legea nr. 217/2003 pentru prevenirea şi combaterea violenţei în familie*, a fost republicată în *Monitorul Oficial al României*, urmare modificărilor și completărilor ulterioare, tocmai pentru ca această lege să fie în concordanță cu cerințele emise prin *Convenția de la Instanbul*. Astfel, legea nr. 174/2018 de modificare şi completare a Legii nr. 217/2003 privind prevenirea şi combaterea violenţei în familie, a fost publicată în *Monitorul Oficial al României*, partea I, nr. 618 din 18 iulie 2018

[19] În acest sens, reținem textul art. 4 alin.(1), conform căruia: „Violența domestică se manifestă sub următoarele forme: a) *violenţa verbală* – adresarea printr-un limbaj jignitor, brutal, precum utilizarea de insulte, ameninţări, cuvinte şi expresii degradante sau umilitoare; b) *violenţa psihologică* – impunerea voinţei sau a controlului personal, provocarea de stări de tensiune şi de suferinţă psihică în orice mod şi prin orice mijloace, prin ameninţare verbală sau în orice altă modalitate, şantaj, violenţă demonstrativă asupra obiectelor şi animalelor, afişare ostentativă a armelor, neglijare, controlul vieţii personale, acte de gelozie, constrângerile de orice fel, urmărirea fără drept, supravegherea locuinţei, a locului de muncă sau a altor locuri frecventate de victimă, efectuarea de apeluri telefonice sau alte tipuri de comunicări prin mijloace de transmitere la distanţă, care prin frecvenţă, conţinut sau momentul în care sunt emise creează temere, precum şi alte acţiuni cu efect similar; c) *violenţa fizică* – vătămarea corporală ori a sănătăţii prin lovire, îmbrâncire, trântire, tragere de păr, înţepare, tăiere, ardere, strangulare, muşcare, în orice formă şi de orice intensitate, inclusiv mascate ca fiind rezultatul unor accidente, prin otrăvire, intoxicare, precum şi alte acţiuni cu efect similar, supunerea la eforturi fizice epuizante sau la activităţi cu grad mare de risc pentru viaţă sau sănătate şi integritate corporală, altele decât cele de la lit. e); d) *violenţa sexuală* – agresiune sexuală, impunere de acte degradante, hărţuire, intimidare, manipulare, brutalitate în vederea întreţinerii unor relaţii sexuale forţate, viol conjugal; e) *violenţa economică* – interzicerea activităţii profesionale, privare de mijloace economice, inclusiv lipsire de mijloace de existenţă primară, cum ar fi hrană, medicamente, obiecte de primă necesitate, acţiunea de sustragere intenţionată a bunurilor persoanei, interzicerea dreptului de a poseda, folosi şi dispune de bunurile comune, control inechitabil asupra bunurilor şi resurselor comune, refuzul de a susţine familia, impunerea de munci grele şi nocive în detrimentul sănătăţii, inclusiv unui membru de familie minor, precum şi alte acţiuni cu efect similar; f) *violenţa socială* – impunerea izolării persoanei de familie, de comunitate şi de prieteni, interzicerea frecventării instituţiei de învăţământ sau a locului de muncă, interzicerea/limitarea realizării profesionale, impunerea izolării, inclusiv în locuinţa comună, privarea de acces în spaţiul de locuit, deposedarea de acte de identitate, privare intenţionată de acces la informaţie, precum şi alte acţiuni cu efect similar; g) *violenţa spirituală* – subestimarea sau diminuarea importanţei satisfacerii necesităţilor moral-spirituale prin interzicere, limitare, ridiculizare, penalizare a aspiraţiilor membrilor de familie, a accesului la valorile culturale, etnice, lingvistice ori religioase, interzicerea dreptului de a vorbi în limba maternă şi de a învăţa copiii să vorbească în limba maternă, impunerea aderării la credinţe şi practici spirituale şi religioase inacceptabile, precum şi alte acţiuni cu efect similar sau cu repercusiuni similare.

[20] Actul normativ a fost publicat în *Monitorul Oficial al României*, partea I, nr. 505 din 4 iunie 2004, şi se remarcă prin aceea că vine în sprijinul victimelor violenței domestice, asigurand acestora protecţie, reglementând unele măsuri de informare a victimelor infracţiunilor cu privire la drepturile acestora, precum şi de consiliere psihologică, asistenţă juridică gratuită şi compensaţie financiară de către stat.

[21] Actul normativ a fost publicat în *Monitorul Oficial al României*, partea I, nr. 754 din 9 noiembrie 2012.

[22] Actul normativ a fost publicat în *Monitorul Oficial al României*, partea I, nr. 905 din 20 decembrie 2011.

[23] Actul normativ a fost publicat în *Monitorul Oficial al României*, partea I, nr. 619 din 30 august 2003. Potrivit acestui act normativ, serviciile sociale reprezintă ansamblul

complex de măsuri şi acţiuni realizate pentru a răspunde nevoilor sociale individuale, familiale sau de grup, în vederea prevenirii şi depăşirii unor situaţii de dificultate, vulnerabilitate sau dependenţă pentru prezervarea autonomiei şi protecţiei persoanei, pentru prevenirea marginalizării şi excluziunii sociale, pentru promovarea incluziunii sociale şi în scopul creşterii calităţii vieţii. Prin urmare, ele sunt incidente inclusiv cazurilor de violență împotriva femeilor.

[24] Liviu STĂNCIULESCU, *Curs de drept civil. Succesiuni*, p. 47.

[25] Liviu STĂNCIULESCU, *Curs de drept civil. Succesiuni*, p. 47.

[26] Liviu STĂNCIULESCU, *Curs de drept civil. Succesiuni*, p. 47.

[27] Cf. Liviu STĂNCIULESCU, *Curs de drept civil. Succesiuni*, pp. 51-52.

[28] Amintim, ca exemplu, proiectul *Manual pentru violențe împotriva femeilor*, inițiat de Rețeaua pentru prevenirea și combaterea violenței împotriva femeilor. Cf. *https://violenta impotrivafemeilor.ro/manual-pentru-specialisti-violenta-domestica-interventia-coordonata-a-echipei-multidisciplinare/*, consultat pe 18 aprilie 2023, ora 10.30.

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SUCCESSION INDIGNITY IN THE CASE OF MURDER COMMITTED FOR MATERIAL INTEREST

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Abstract

The attempt to acquire a person's assets through his inheritance, by suppressing or attempting to suppress the life of the author of the inheritance or the successors with a vocation to the inheritance, constitute cases of legal indignity within the meaning of the civil law (art. 958 C.civ.) and, by correlation, an example of „material interest” – of successional parentage – in the sense of the aggravated version of the qualified murder provided by art. 189 para. (1) lit. b) C.pen., concept with a wider meaning, the relationship between them being of the whole-part type.

These assumptions are relatively rarely retained in criminal judicial practice, a fact that can be explained by the potential accumulation of reasons that can be at the origin of the commission of a crime between actors in family ties and/or likely to attract the incidence of the rules of succession law, among which sometimes, the acquisition of the succession through the appeal to acts of a criminal nature appears as a „final remnant” of motivation, hidden in other reasons that give an apparent justification for the commission of the act (such as revenge, misunderstandings accumulated over time), in order to attract an easier classification of the crime.

This illicit attempt to acquire goods is, however, annihilated by means of the legal indignity with this object, established in the provisions of art. 958 C.civ. by which were regulated (partially by taking over from the old Civil Code) two separate cases associated with the intention to kill the deceased or his successor with priority vocation to the inheritance, which benefits from a precise legal framework in the provisions of the Civil Code, in „cooperation” with those of the criminal law, contribute to the legitimate approach of preserving intact the natural evolution of succession relationships and the premises that constitute the foundation of the institution

Keywords. *qualified murder, material interest, special purpose, legal indignity, inheritance*

Section I. Successor dignity

1.1. ***Subsection I. Preliminaries.*** Even if man, a transient being, inevitably perishes through death and, from a legal point of view, disappears as a subject of law, his patrimony still exists[1]. Composed of all movable and immovable assets belonging to a person (individual), patrimony can sometimes far exceed its life span, be it the owner or simple user of them. Thus arises the natural need to pass on the right to care for and use them, to another person, and this does not belong to them anyway, undifferentiated, but based on a connection between the transmitter and the acquirer of the goods, which justifies the

[1] See, Dan Chirică, Treaty of civil law. Successions and liberalities, Publishing House C.H. Beck, Bucharest, 2014, p. 1.

vocation of the law or, in the case of wills, of the deceased (decuius). This connection can have several sources, the closest being blood kinship, a fact which, since ancient times, explains the legislator's concern for establishing the order in which the deceased (the one who transmits) will be inherited, by which persons in the tree genealogically, to what extent and for what purpose (by right or by will).

Since human life is naturally limited, and this limit is unpredictable, it is naturally accepted that the issue of the destination of the assets that belonged to the deceased person must be resolved and, in this context, the question of the natural merit to inherit was raised, and otherwise, in which situations persons who have this legal capacity (conferred by law) or acquired by will, along the way still lose this right, also based on the law or by a declaration of the competent judicial authority. This philosophy of merit imprints most of the provisions of modern civil codes – including the Romanian one, and can be recognized under the name of *Dignity (successor)*, and its lack, unworthiness to inherit.

1.2. ***Subsection II. Importance and regulation***. The *achievement of dignity* can take place in various forms and degrees of intensity, and can constitute a critical motivational resource in the case of violent crimes, a fact that can also be ascertained from the examination of the provisions of the Criminal Code in force. Thus, we summarize here the existence of the legal mitigating circumstance of the prev challenge. of art. 75 para. (1) lit. a) C.pen. determined by the commission of the crime under the control of a strong disturbance or emotion, determined by a provocation on the part of the injured person, caused, among others, by a serious violation of the person's dignity. Another example is the case of committing certain crimes, when the defendant is considered unworthy to exercise certain rights, being able to be prohibited, in the form of complementary punishment and accessory punishment, from exercising the rights provided by art. 66 para. (1) C. pen.

The dignity of the person is, equally, a constitutional value according to art. 1 paragraph (3) of the Constitution[2], being also recognized by the Code of Criminal Procedure as a fundamental principle of the criminal process (art. 11), being then taken up in other provisions of the Code[3]. Moreover, it is an incident outside of a process, and its violation can cause a reaction from the person concerned, with a mitigating effect on the criminal sanction that will be applied if the reaction manifests itself by committing a crime.

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[2] According to art. 1 paragraph (3) Constitution: „Romania is a state of law, democratic and social, in which *human dignity*, the rights and freedoms of citizens, the free development of the human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution from December 1989, and *are guaranteed*".

[3] For example, art. 113 Criminal Procedure Code on the protection of the injured person and the civil party [„(1) When the conditions provided by the law regarding the status of a threatened or vulnerable witness or for the protection of private life or *dignity* are met, the criminal prosecution body may order against the injured person or against on the civil side, the protective measures provided for in art. 124-130, which are applied accordingly"], art. 156 C.proc.pen. regarding common provisions in the matter of searches [„(2) The search is carried out with *respect for dignity*, without constituting disproportionate interference in private life."], art. 166 Criminal Procedure Code regarding the performance of the body search [„(1) The judicial body must take measures to ensure that the search is carried out with respect for *human dignity*."], art. 190 C.proc.pen. regarding the physical examination [„ (7) The internal physical examination of a person's body or the collection of biological samples must be carried out by a doctor, nurse or a person with specialized medical training, respecting private life and *human dignity*")], Art. 352 C.proc.pen. regarding the publicity of the court session [„(3) If the trial in open session could harm some state interests, morals, *dignity* or private life of a person].

Without going into details specific to civil law regarding the set of conditions that a person must inherit in order to be able to inherit legally or testamentary [4], in the context of the present analysis, we will limit ourselves to the analysis of one of the negative conditions of this right, namely the indignity caused by the existence of a criminal conviction for the commission of a crime of murder, committed *for the material interest of a successional nature*, on the person whose inheritance opens (deceased) or of a person who has a priority vocation for inheritance.

Section II. The material interest in the estate – movable assets of the crime of qualified murder.

1.1. ***Subsection I. Legal indignity in the Civil Code***. In the provisions of art. 958 C. civ. the legislator of the new Civil Code stipulated separately two causes of legal unworthiness associated with the intention to kill the deceased or his successor with a priority vocation to inherit, providing that he is – by law – unworthy to inherit: a) the person criminally convicted for committing a crime with the intention of killing the one who leaves the inheritance; b) 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 would have restricted the vocation to the inheritance of the perpetrator[5].

1.2. ***Subsection II. Succession interest – movable property of qualified murder regulated by art. 189 para. (1) lit. b) from C. pen.*** It is noted that the civil legislator does not talk about „material interest" as a **motive** (mobile) for the intention to kill[6], the terminology being specific and originating in criminal law, more specifically in art. 189 para. (1) lit. b) from C. pen. in force which incriminates as a form of qualified murder also that committed „*b) for material interest*;", normative modality taken from art. 175 para. (1) lit. b) The previous criminal code (1969). In the context, it must be remembered that by committing a crime of „qualified murder" must be understood, in the sense of the criminal law, both the deed consummated by producing the result (the death of the victim subjected to the aggression), and the completed or interrupted attempt to commit this deed[7].

In the absence of a legal definition in the Criminal Code, and capitalizing on the criminal law literature and the jurisprudence of the courts, we note that, conceptually, the phrase „material interest" is not limited to the common meaning that can be intuited at first

[4] See Dan Chirică, Treaty of civil law, in this regard. Successions and liberalities, Publishing House C.H. Beck, Bucharest, 2014, p. 18-34.

[5] This case of inhumanity also existed in the previous Civil Code (from 1864), in art. 655 point 1 of this Code.

[6] We emphasize that in the doctrine there is divergence regarding the qualification of material interest as a motive of the crime or its purpose, the distinction being less relevant, both elements regarding the subjective side of the crime. However, we appreciate that it is about a specific purpose that evokes the result sought by the perpetrator, the motive being a generic notion that rather attests to the premise of discernment, and which must exist in any crime (in the legal sense), while the purpose can exist (as an element that reveals a special gravity) or not. In this sense, V. Cioclei, Criminal law. Special Part I. Crimes against the person and crimes against property, C.H. Publishing House. Beck, 6th Edition, Bucharest, 2021, p. 22.

[7] In this sense, art. 187 C. pen. regarding the phrase „penalty provided by law" states that „Penalty provided by law means the penalty provided for in the text of the law that criminalizes the act committed in the consummated form, without taking into account the reasons for reducing or increasing the penalty."

sight (any kind of interest with content material[8], rather, it has a broader meaning than that in civil succession law (whole-part relationship). The cases of legal indignity thus represent a concrete example of qualified murder for material interest in the sense of art. 189 para. (1) lit. b) from the Penal Code, the latter being a broader circumstance, which also includes other situations.

In essence, the material interest is a reason generated by the perpetrator's need to increase his patrimonial assets, to obtain or retain a profit or to reduce his patrimonial liabilities, to free himself from material expenses. Therefore, the material interest is a personal circumstance that does not extend to other possible participants in the crime, unless they previously knew it.

In the specialized literature it was shown that in order to attract the detention of the aggravated form of qualified murder in the sense of art. 189 para. (1) lit. b) from C. pen. the perpetrator acts driven by a material personal interest *that will be acquired later* (after a certain time, so not immediately) after committing the act[9], *in an apparently legal way, by law*[10], with the mention that, in the case of disinheritance, it takes place on the basis of the patrimonial vocation resulting from the fact of the victim's death and which cannot be removed, or from the will left by her in favor of the perpetrator. In the latter case, the perpetrator thus acts with a *specific purpose*, that of acquiring the victim's assets, through an original way of acquiring property transmission – the succession. For example, the young wife kills her elderly husband who has considerable material resources, in order to acquire his wealth through inheritance (succession), in the absence of other legal heirs (reserved or not), or of testamentary bequests established by the deceased. Or, keeping an example, he kills a son of the deceased with whom he comes to inherit, or the universal legatee established by the deceased husband, whose presence would reduce the value of the estate that would additionally belong to the perpetrator's wife. In any of the situations, for the retention of the aggravating factor, the value of the goods obtained in this way is irrelevant, essential being the motivation behind the intention to kill, which, concretely, can join other motivating factors (revenge, contempt, hatred, etc.).

However, as we will see in the case law below[11], the condition of achieving the material interest in an apparently legal way is appreciated, on the one hand, by the practice, as

[8] In the same sense, in the doctrine it was shown that material interest as a qualifying circumstance for murder has a broader meaning and somewhat different from the common one, that of material benefit or advantage (respectively money or goods obtained from current activities), the law not making any clarification and no limitation; for example, by committing the act, the author aims to settle some debts or other advantages, for example, he hopes to promote professionally instead of the victim. See Alexandru Boroi, Criminal Law. The special part, Edition 4, CH Beck Publishing House, 2019, p. 46.

[9] If the murder is committed on the occasion of stealing an asset from the victim's possession (ie by fraudulent/violent means), the act will constitute the crime of robbery (which will be considered together with the crime of simple or qualified murder by considering other aggravating circumstances). In this sense, Alexandru Boroi, Criminal Law. Special part, Edition 4, CH Beck Publishing House, 2019, p. 47.

[10] In this sense, V. Cioclei, Criminal law. Special Part I. Crimes against the person and crimes against property, C.H. Publishing House. Beck, 6th Edition, Bucharest, 2021, p. 22; Alexandru Boroi, Criminal Law. The special part, Edition 4, CH Beck Publishing House, 2019, p. 46.

[11] See, in this sense, the case contained in Criminal Decision no. 1410 /A of October 30, 2015 of the Craiova Court of Appeal, Criminal Section, in which, through the grounds of appeal against a sentence of the Gorj Court, the Prosecutor's Office attached to the Dolj Court held that the meaning given by the court to the expression material interest (namely to arise on „an apparently legal way") is based on an interpretation given by an older theory without the casuistry at that time being so diversified in terms of the possibilities of committing

restrictive and unjustified, since the notion of material interest used by the legislator does not have a distinct definition in the Criminal Code, it must be considered in its broad and explicit meaning, i.e. that of obtaining a profit by any means.

Commenting on this qualified form of murder, professor Vintilă Dongoroz pertinently emphasized that „The aggravating nature of the circumstance stems from the serious danger presented by resorting to killing actions to achieve or satisfy material interests. Material interests are often provoked by pressing needs, so the attempt to realize them by any means, even through murder, becomes extremely inviting for elements devoid of any scruples, for deeply perverted threads. The protection of people's lives and related social relations would not be sufficiently ensured without a severe sanctioning of such elements. The material interest, as the word itself shows, must consist in the pursuit of a benefit, advantage, concrete material benefit. The material interest can have different content and forms, the law making neither a specification nor a limitation in this regard. Thus, the interest can consist in obtaining a sum of money or some material goods, or some securities, or acquiring an inheritance, or settling some debts or collecting the promised price for committing the murder, etc.[12]. Here, the material interest pursued by the perpetrator of the murder is not confused with the subsequent acquisition of assets for the cause of death (*mortis causa*).

Therefore, for the retention of the crime of qualified murder in the sense of art. 189 para. (1) lit. b) Criminal Code, the material interest must be interpreted in a broader sense, and among the reasons that can attract this qualified form can be the acquisition of an inheritance, directly (the act committed on the deceased) or indirectly (the act is committed on a successor of the deceased who, concretely, has priority over the inheritance of the deceased).

1.3. ***Subsection III. Terms.*** Synthesizing the previously mentioned theoretical considerations, from the reading of the legal indignity cases contained in art. 598 para. (1) lit. a) and b) Penal Code, analyzed from the perspective of the criminal meaning of the material nature of the interest as a motivation for the intention to kill, we note that the indignity of succession can be retained in the sense of this article and, at the same time, constitutes the crime of qualified murder committed from material interest in the sense of art. 189 para. (1) lit. b) Penal Code, if the successor (the equivalent of the concept of „perpetrator" in criminal law) only if the following conditions are met:

a) The perpetrator knows that he has the capacity of a potential legal heir („legal" heir) or is designated by the testamentary forms provided by law (holographic, authentic, or privileged).

From a technical-legal point of view, inheritance means the transmission of the deceased person's (deceased) patrimony to one or more heirs and can be done, as a rule, by legal or testamentary means[13]. This implies that, in the case of legal inheritance, the

such acts. Not retaining this circumstance for those who commit acts of this kind in exchange for obtaining some material advantages would create an equivalence between them and those who commit murders without requesting money in return, creating a feeling of impunity for those who commit acts of murder in these circumstances and encouraging them to obtain obviously illicit income from the commission of serious crimes.

[12] Vintilă Dongoroz, Constantin Bulai, Rodica Stănoiu, Theoretical explanations of the Romanian penal code, Volume III, Second Edition, Romanian Academy Publishing House, Bucharest 2003, p. 179.

[13] In this sense, art. 955 para. (1) Civil Code stipulates that the deceased's patrimony is transmitted by legal inheritance (also called ab intestate, i.e. without a will), to the extent that the bequeather has not ordered

perpetrator is part of the classes of heirs provided for by law, respectively by art. 963 para. (1) Civil Code – the surviving spouse and relatives of the deceased, respectively his descendants, ascendants and collaterals[14]. This test is relatively easy to do, as a rule the legal heirs are the closest people to the deceased, even if this does not necessarily require that they live together or in the vicinity.

In the case of designation by will (with or without the capacity of legal heir), it is necessary to prove by the prosecution (the Public Ministry) that, prior to the commission of the act, the perpetrator had knowledge of the real vocation to the succession, regardless of the way of finding out, evidence that can be made freely in principle – any means of evidence (for example, statements of persons, minutes of the reproduction of intercepted conversations authorized in another case or other recordings made by other persons in compliance with the legal provisions).

b) The perpetrator acts for the commission of a crime with the intention of killing the one who leaves the inheritance, or for the commission, before the opening of the inheritance, of a crime with the intention of killing another successor who, if the inheritance had been opened on the date of the commission of the deed, would have removed or restricted the vocation to inheritance of the perpetrator (direct intention qualified by purpose).

In both cases, the goal pursued must be premised on the fact that through the disappearance of the victim, the perpetrator inherits her assets, thus increasing his own wealth. If the murder is committed for another reason, for example revenge, the aggravation prev. of art. 189 para. (1) lit. b) C.pen. it is not applicable, even if the death of the victim would bring the perpetrator a material advantage.

The intention to kill can materialize in an imputable action or inaction, the perpetrator being able to act as an author/co-author, instigator, accomplice, or in a plurality constituted by the crime (for example, an organized criminal group, whose purpose is to commit and of a crime of murder against the transferor of the inheritance)[15].

In these two scenarios, the agent's intention is a qualified one, big of the death of the person concerned, of a material interest associated with the inheritance. This fact must be proven by the prosecution beyond any reasonable doubt, through clear evidence, and usually involves premeditation of the act, an aggravating circumstance of increased danger, also criminalized as a qualifying circumstance of murder under letter a) of art. 189 C. pen. That is why, as a rule, in judicial practice the apprehension of qualified murder for material interest also attracts the apprehension of premeditation – as will be seen from the

otherwise by will. Along with these, the new Civil Code also regulated a form of inheritance or contractual institution, under the name of „precipitation clause", as an exception to the prohibition of legal acts with unopened successions as their object. See in detail on this form of inheritance, Dan Chirică, Treatise on civil law. Successions and liberalities, Publishing House C.H. Beck, Bucharest, 2014, p. 360-375.

[14] Thus, art. 963 para. (1) Civil Code provides for the category of legal heirs, respectively: „(1) 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. (2) Descendants and ascendants have a right to inherit regardless of the degree of kinship with the deceased, and collaterals only up to the fourth degree inclusive. (3) In the absence of legal or testamentary heirs, the patrimony of the deceased is transmitted to the commune, city or, as the case may be, the municipality in whose territorial radius the assets were located on the date of the opening of the inheritance".

[15] In this sense, Dan Chirică, Treaty of civil law. Successions and liberalities, Publishing House C.H. Beck, Bucharest, 2014, p. 24.

jurisprudence processed further, with consequences for the individualization of the punishment, by adding an increase in punishment.

From the expression of the legislator („for the commission of a crime with the intention to kill him") it does not explicitly follow that it is the crime of murder (simple or qualified), but this is not contested by anyone, but it can be deduced from it that it attracts indignity and the attempt to kill the victim when, for reasons independent of the perpetrator's will, the lethal result is not achieved, the danger being given by the agent's intention, which denotes a deep affront brought to the very foundation of the transmission of the property right to the property and its holder, an indivisible duet that it has at its center the philosophy of merit (respect) and the work carried out by the one whose heritage it may be about.

In order to apprehend the crime, it is not necessary that the intended goal be concretely achieved, it being sufficient for the perpetrator to pursue it[16]. However, if it is not possible to prove the existence of the material interest between the goals pursued by the perpetrator, then prev. of art. 189 para. (1) lit. b) C.pen. cannot be detained, the deed being qualified as simple murder (within the meaning of art. 188 Penal Code), in the absence of other circumstances qualifying the offense.

On the other hand, it was shown that the classification will also be maintained when the author acts out of material interest but, concretely, commits the act against another person (error on the person), or because of the way of execution (for example, the glass of water containing the poison is hurriedly taken by another person at the table, who consumes the drink and dies, or the gunfire hits another person nearby) another person is killed (aberatio ictus)[17].

c) If the conviction for the act of murder for material interest of a successional nature is prevented by the death of the author of the act, by amnesty or by the prescription of criminal liability, it is necessary to have a final civil court decision establishing these facts.

It is a condition derived from the provisions of art. 958 para. (2) C.civ., whose logic starts from the fact that the mentioned hypotheses (the death of the perpetrator, the amnesty of the act and the prescription of criminal liability) represent causes for the termination of the criminal process regulated by art. 16 para. (1) C.proc.pen., which prevents the initiation of the criminal action or the continuation of the criminal process. In this case, it is necessary for the civil court to establish in advance, through the means of proof provided by the Code of Civil Procedure, the existence of the crime in the analyzed form.

However, the expression of the legislator is deficient because, on the one hand, in the modern history of the Criminal Code (starting with the Criminal Code of 1865), considering their gravity, murder crimes (consummated or attempted) were not the subject of amnesty laws, and according to art. 153 para. (2) lit. b) Penal Code, for the same reason, the statute of limitations does not remove criminal liability in the case of the crimes provided for in

[16] Vintilă Dongoroz, Constantin Bulai, Rodica Stănoiu, Theoretical explanations of the Romanian criminal code, Volume I, Second Edition, Romanian Academy Publishing House, Bucharest, 2003, p. 180, where the authors show that for the existence of the aggravated circumstance of material interest is sufficient the finding that the perpetrator pursued such an interest by committing the act of killing is regardless of whether or not he achieved that interest.

[17] V. Cioclei, Criminal law. Special Part I. Crimes against the person and crimes against property, C.H. Publishing House. Beck, 6th Edition, Bucharest, 2021, p. 23; Alexandru Boroi, Criminal Law. The special part, Edition 4, CH Beck Publishing House, 2019, p. 47.

art. 188 Penal Code, art. 189 C. pen. and of intentional crimes followed by the death of the victim.

d) The indignity, even if it is „by right", must be officially brought to the discussion of the competent court or invoked before the public notary invested with a succession procedure, by any interested person and regardless of the time period that has elapsed since the commission of the act proven by the judgment and conviction.

It is a rather procedural condition, established by art. 958 para. (3) C. pen. which provides that „Legal indignity can be ascertained at any time, at the request of any interested person or ex officio by the court or by the public notary, based on the court decision from which the indignity results". In this regard, it was correctly observed that indignity by law is imprescriptible and can be invoked even by the indignity[18], thus making a parallel with the corresponding situation in criminal law, where the crime of murder is not subject to the statute of limitations in terms of liability (criminal prosecution) and the execution of the imposed punishment.

This will be done, concretely, by means of a declaratory action (and not a declaration) which is not time-barred, or by means of an accessory request (counterclaim or procedural exception) within a main civil litigation. From the interpretation of this legal provision, we note first that legal indignity must be ascertained by the court or by the notary public, in contrast to judicial (judicial) indignity prev. of the provisions of art. 959 para. (1) lit. a) C.civ., which must be declared by the court and which completes the reason for the causes of legal unworthiness associated with violence, the text providing that it can be declared unworthy to inherit: „a) the person criminally convicted for committing, with intent, against the one who leaves the inheritance of serious acts of violence, physical or moral, or, as the case may be, of acts that resulted in the death of the victim". It is about crimes such as hitting or other violent prev. of art. 193 Penal Code, bodily injury of 194 Penal Code, the threat prev. of art. 206 C. pen.[19], and other.

Section III. Aspects of judicial practice regarding the intention to kill for material interest in succession

1.1. ***Subsection I. Case history.*** Examining the relevant jurisprudence of the national criminal courts, we find that the material interest having as its object the inheritance patrimony is quite rarely encountered (proved) by the judicial bodies, being as a rule affirmed or invoked by the successors of the victim, who are civil parties in the process. Of course, this problem will arise only when there are ties of reunion between the perpetrator and the victim or based on a will, which justifies the commission of a crime for this reason, mainly or exclusively.

Even if, intuiting, this special purpose exists in the mind of the perpetrator (usually when it comes to the victims having the quality of a spouse, brother/sister or parent), rarely do the criminal investigation bodies pay attention to it, limiting themselves only to the obvious situations usually marked by the recognition of the perpetrator. Therefore, this

[18] V. Cioclei, Criminal law. Special Part I. Crimes against the person and crimes against property, C.H. Publishing House. Beck, 6th Edition, Bucharest, 2021, p. 23; Alexandru Boroi, Criminal Law. The special part, Edition 4, CH Beck Publishing House, 2019.

[19] In this sense, Dan Chirică, Treaty of civil law. Successions and liberalities, Publishing House C.H. Beck, Bucharest, 2014, p. 26.

purpose usually remains at the level of rumor, in the familiar history of the relatives of the deceased person.

In a **case** [20] from recent jurisprudence, by criminal sentence no. 78/2021 pronounced on March 11, 2021 by the **Cluj Court, it was noted that** the act of the defendant M.C. consisting of the fact that on May 10-11, 2020 at around 01:00, while he was at the home shared with his mother M.M. and his brother M.F., against the background of alcohol consumption and the old feeling of injustice from his mother and brother, to avenge this injustice and to obtain the ownership of the apartment in Cluj Napoca, str. Ion Meşter, no. x, sc. x, et. x, ap. x, went to the mother's room while she was sleeping and, taking advantage of the obviously vulnerable state of the sleeping victim, struck her with a knife mainly in the chest and head area, resulting in her death, and then went in his brother's room, M.F., with the intention of taking his life, while he was also sleeping, hit him with a knife in the left zygomatic region (under the temple), put the duvet over his head, holding him down, but the injured person managed to escape, he ran to his mother's room where he closed the door, so the defendant broke the window with his fist and the broken glass caused injuries to the injured person on the lower level of his left leg, causing him through the whole set of aggressive actions injuries that required for healing 45-50 days of medical care and did not endanger the life of the victim, meet the constitutive elements of the crime of domestic violence in the form of prev. qualified murder. of art. 199 para. (1) rap. to art. 188 – art. 189 para. (1) lit. b) Penal Code, with the application of art. 77 lit. e) Penal Code, respectively of the crime of attempted domestic violence in the form of qualified murder prev. of art. 32 para. (1) C. pen. rap. to art. Art. 199 para. (1) C. pen. – art. 188-189 para. (1) lit. b) – paragraph (2) C. pen.

The aspect disputed and analyzed in detail in this case was that of the *criminal motive* presented by the defendant when committing the two crimes directed against his immediate family, respectively if he acted in the presence of the aggravating factor of the qualified murder for „material interest" of succession.

Through *the act of referral to the court* (indictment), it was held that the defendant had killed his mother without having a criminal motive that would attract the aggravation of the crime of murder for material interest, and that he had tried to kill his brother in order to hides the crime of murder committed against his mother. The classification was upheld by the appeals court.

Contrary to the case prosecutor, the Cluj Court (competent court) changed the legal framework, holding, among other things, that the defendant committed the crime of murder for material interest (acquiring the apartment in Cluj through succession), and not based on accumulated frustrations as a result of family understandings and the desire for revenge.

Thus, the Court held that through the statement given as a suspect, the defendant M.C. he specified the fact that in the days following the date of the facts, the mother's pension was due and he decided to kill her to take her pension, and he tried to kill his brother to hide the mother's murder. Compared to this version presented by the defendant with regard to his criminal motive, respectively if this version were to be considered true, the legal framework given to the facts by the prosecutor was correct, as the pursuit of a material interest in

[20] Cluj Court of Appeal, Criminal Section, Criminal Decision no. 890/A/2021 of June 24, 2021, file no. 3221/117/2020, www.rejust.ro.

relation to the intention of the defendant to appropriate the mother's pension that was to come.

Committing the crime of murder for material interest requires that the material benefit, following death, legally reverts to the perpetrator of the crime. However, *the court considered that* this version supported by the defendant (which is neither the first nor the last version presented by the defendant during this criminal trial) could not be accepted and is contradicted by other evidence administered in the case, *and the defendant's criminal motive for committing the two crimes was that of obtaining ownership of the apartment in which the three lived (*together with the defendant's concubine at that time*) by inheritance, considering the following aspects*:

a) First of all, the version regarding the defendant's criminal motive is an implausible one, because it does not explain how the defendant could have concealed the murder committed against the mother by killing his brother, since he claimed that he was going to wait a few days until the mother's pension came he claimed that he wanted to appropriate it after his mother's murder, and on the other hand, there was also his concubine in the apartment – N.S., to whom he would have to give certain explanations regarding the two murders. The initial version presented by the defendant assumed that he had killed his mother in order to be able to take her pension that was coming in the following days, that he had tried to kill his brother because he would have known that the defendant was the author of the murder of his mother, and then explained all these aspects to his concubine (not being able to identify the reason why his brother would have given him away and his concubine not) and together to stay in the house with the two corpses until the defendant's mother's pension arrived (pension from which, otherwise, the defendant, during the trial, claimed that he did not need it to support himself). Such a sequence of events appears *implausible*, especially in relation to the evidence indicating that the defendant felt wronged because he did not in turn have ownership rights to the apartment in which he lived at the time of the facts with his mother and brother, as and that he had been thinking about solving this problem for a long time.

b) Secondly, the inconsistencies contained in the defendant's statements during the trial, the court noting that, during the trial, the defendant denied the fact that he killed his mother to take her pension, as well as the fact that he killed his brother for to cover up the murder of the mother. He stated that during the criminal investigation, during his hearing as a suspect, he was drunk and in a state of shock and that on the night of the facts he cannot understand what was in his head, he was under the influence of alcohol and stressed. The defendant began his statement given during the trial by recounting aspects subsequent to the divorce between the defendant's parents, regarding how his brother came to be the owner of the apartment where they lived in Cluj Napoca and the defendant's brother's contribution to the expenses incurred by the family and the apartment. More than half of the defendant's free account (prior to the questions that were put to him) referred to material misunderstandings between the defendant and his mother and brother, the defendant returning later, on the occasion of formulating the answers to the questions that were put to him, to *these misunderstandings and to the ownership of the apartment* where the three lived at the time of the events.

After recounting the aspects related to the conflicts in the family (which, as it appears from the statements of the witnesses heard in the case regarding the relations between the members of the defendant's family, represented his frustrations rather than concrete

conflicts), the defendant, at the request of the court to narrate and about the incident that is the subject of the present case, he described an alleged conflict between him and his brother that would have taken place the previous day, and then specified that „on that Sunday I drank again and all the grievances gathered in my head and then what happened happened". The defendant specified in his statement that after the parents' divorce, the two children stayed with their mother in Gherla, but at some point the defendant came to Cluj Napoca to his father, who in 1989 transferred the apartment in Cluj Napoca to his brother's name and told him that he could not transfer it to the defendant because he would have no one to pay the rent.

Later, the defendant also showed that when the documents regarding the apartment had to be drawn up, both brothers were called, but M.F. would have stolen his certificate and made the purchase documents in his name. The defendant also claimed that his brother did not contribute anything to paying the rent even after the apartment was transferred to his name and did not contribute to the expenses incurred for the funeral of their parents. According to the defendant, his mother would have told him at some point that the apartment should be in the defendant's name, and the defendant believes that the apartment should have been his because his father paid the rent and the parents understood that the defendant to return the apartment in Cluj Napoca and to his brother the apartment in Gherla, M.F. initially staying in Gherla with his mother. This mode of narration was chosen by the defendant and on the occasion of his evaluation by the probation counselor for the preparation of the evaluation report.

c) Thirdly, the court held that, for the resolution of the matter, *the merits or otherwise of the defendant's claims on the apartment where he lived at the time of the facts with his mother and brother are not relevant*, this aspect can be taken into account when individualizing the sanctions. It is necessary, however, for the court to establish beyond any reasonable doubt whether the defendant sought to obtain ownership of the apartment through their inheritance by killing his mother and brother. The court considered very relevant the answer given by the defendant when he was asked by the court if anyone else had a right to that apartment in the event of the death of the mother and brother. The defendant's first direct answer was „No", and then the defendant immediately stated: „It depends, I don't know if he made a will to leave it to any grandchildren". The court appreciated that this last statement made by the defendant was one through which he tried to defend himself regarding the possible retention of the material interest from which he would have committed the two crimes, also related to the fact that previously, the defendant reported about his brother that he consumed a lot of alcohol, being admitted over time to psychiatry and sanatorium.

The injured person also revealed the existence of misunderstandings over time between the defendant and the other family members (minus his father), after the parents' divorce, but showed that he did not kick the defendant out of the house, who was leaving alone. Also, according to the injured person's statement, the defendant allegedly argued with his mother regarding the ownership of the apartment, M.F. learning from his mother that the defendant accused them of burglarizing his apartment.

The statements of the defendant and the injured person M.F. are contradictory regarding the material help given by the mother to the two sons, as well as details related to the conflicts in the family, but from the corroboration of the two statements and the statements given by the witnesses who knew the family, it follows that the defendant and the injured

person worked at the beginning their adult lives, but from a certain point they no longer had jobs and lived (for a long time) together with their mother in the apartment in Cluj Napoca (the defendant living there sporadically, and the rest of the time living on the street or in Italy where he worked). During this time, both the defendant and his mother and brother supported themselves mostly from the defendant's mother's pension (which was almost double the amount of the disability received by the defendant), but also from the defendant's pension and from the unemployment benefit of his brother. Both brothers consumed alcohol (the defendant consuming alcohol at a more problematic level, according to witness statements) and had personal loans taken from banking units, the monthly rate rising almost to the level of the pension/unemployment benefit, thus it is obvious that mostly were supported materially by the victim M.M. (the defendant's mother), in the last part of her life.

d) Fourthly, the court assessed that it follows beyond any reasonable doubt that the defendant, when committing the two crimes directed against the life of his mother and brother, had a material interest, seeking to obtain through inheritance after the death of the two ownership of the apartment in which he lived with them at the time of the facts.

The arguments presented by the prosecutor in support of the legal classification with which the court was notified are not incompatible with the legal classification retained in the end by the court. The prosecutor confirmed that the basis of the two acts were the defendant's old frustrations, even hatred towards family members and the desire for revenge. Obviously, such feelings of contempt exist in many cases where the perpetrators of murder crimes pursue a material interest, they probably most often represent the impulse that morally justifies such extremely serious acts. But the defendant's previous frustrations related to his alleged injustice by his mother in relation to his brother, the hatred towards the two and the desire for revenge are in no way incompatible with the desire to do his own justice which the defendant believed to be deserves by owning the property over the apartment, from the evidence administered in the case resulting that the basis of the two crimes were all these feelings that the defendant had towards his mother and brother, as well as the desire to solve his housing problem and obtain the property on the apartment which, in the defendant's opinion, should have belonged to him.

The court also mentioned, with relevance, the fact that, ***e)*** the retention of *the criminal motive for committing the acts of material interest does not automatically presuppose the premeditation of the two acts*, and in this case, the evidence administered in the case does not show that the conditions for holding premeditation are met. The defendant really felt wronged by his mother and brother for a long time and considered that the apartment in Cluj Napoca should have been his, feelings intensified by the period of 14 years in which the defendant lived on the street, and on the other part of it emerges from the witness G.'s statement that the defendant had already planned mentally to solve his housing problem and the injustice he felt had been done to him.

But in order to retain the aggravating circumstance of premeditation, it was necessary not only for the defendant to have made the decision to kill his mother and brother long enough before the facts and to have deliberated on this decision, but also for him to have realized certain preparatory acts (at least it would have resulted that the defendant would have waited for the opportunity to commit the acts). However, this last condition does not appear to be fulfilled in the present case, all the more so since the administered evidence shows that in the evening before the facts, the defendant had a new verbal conflict with his brother and mother, and on the basis of this conflict and on the background of alcohol

consumption, the defendant appears to have gained the courage and conviction necessary to actually take action, with the aim of getting the justice he believed he deserved.

Examining the case in the **appeal** declared by the defendant against the sentence, the Cluj Court of Appeal – Criminal Section, by the conclusion of the session dated June 8, 2021, *ordered the change of the legal classification of the facts* for which the defendant M.C. was convicted, from the one retained by the Court in the crimes of murder prev. of art. 199 para. (1) C. pen. rap. to art. 188 para. (1) C. pen. with the application of art. 77 para. (1) lit. e) C.pen. (against the victim M.M.) and attempted murder prev. of art. 199 para. (1) C. pen. rap. to art. 32 rap. to art. 188 – art. 189 para. (1) lit. d) – paragraph (2) C. pen. with the application of art. 77 para. (1) lit. e) from C. pen. (against the injured person M.F.), *thus returning to the legal framework given to the facts by the notification act*, and after the judicial individualization ordered the defendant to be sentenced to prison (18 years in prison for the crime of murder against the mother, 11 years in prison for the crime of attempted murder against the brother).

Analyzing the incidence of aggravating material interest, the Court noted that the legislator appreciated that material interest, selfish and base interest, represents a *criminal motive* capable of aggravating murder. Material interest is any use, advantage or benefit of a patrimonial nature. It can consist of money, goods, material advantages, the recognition of a right, the extinguishment of a debt, etc. It is not necessary that the material interest from which the perpetrator acted was realized, it is sufficient that this motive existed at the time of the murder.

Therefore, for the detention of this aggravated form of murder, specific and unequivocal evidence must be revealed from which the determined purpose that prompted the defendant to plan and then commit the crime can be derived. Both from the statements of the defendant and from the statements of the injured party, it follows that they had small contradictory discussions, which continued into their adulthood. At the basis of these discussions were financial problems and the injustices that the defendant believes have been done to him throughout his life by his mother and brother. It *clearly results that the basis of the commission of the two crimes were the defendant's old frustrations, even hatred towards family members and the desire for revenge*.

Moreover, from the statement given before the court of appeal, it follows that the defendant acutely felt the lack of any support from his mother and indulgence towards his brother („mami's baby"), a circumstance that he recounts recursively, since the initiation of the criminal trial. On the same day of May 10, 2020, around 4 p.m., the victim M.M. scolded the defendant and the witness N.S. because the latter would have used the shoes of the injured person M.F., in a context in which the defendant threatened to throw the injured person out the window because he lives on his and my mother's pension. The frustrations accumulated by the defendant, including regarding the fact that the apartment that was supposed to belong to him, but in general against the background of the lack of the necessary means of living, a lack attributed by the defendant to the behavior of his brother and especially to the protective behavior of their mother towards the injured person, led to a retaliatory reaction of wild violence. In this register can be found the explanation regarding the commission of the crime of murder against the mother, before trying to suppress the life of the brother.

If the defendant's guiding desire had been to acquire the property of the apartment (even through inheritance), he would have tried to suppress the life of the injured person M.F., his

brother, *since he is the owner of the apartment*; the action to suppress his mother's life, in the context analyzed above, reveals a punishment applied by the defendant to the victim whom he considers guilty for his troubles and for his brother's intolerance, encouraged by the mother's biased support. After committing the crime of murder on the victim M.M., the defendant pursued the suppression of his brother's life, expressly stating: in order not to learn about the death of the mother (statement dated May 11, 2020). Such a justification appears to be devoid of rational elements, since he could not have concealed the crime of murder from the victim M.M. by committing the crime of murder on the injured person M.F., but the rational elements are not predominant in the case of such crimes and even less so in the present case, considering the obvious vulnerabilities of the defendant who is a chronic alcohol user and suffers from several affect.

But on the other hand, the defendant's spontaneous confession is not without any explanation. In the context of the adverse and overwhelming emotions that the defendant experienced in the relationship with his mother and his brother, in the context in which he considered his mother to be the main culprit for his brother's behavior, which he encouraged through the special protection he offered him– o, the action to suppress the brother's life immediately after the suppression of the mother's life, has as a motive the defendant's desire that the brother not find out about the mother's murder, without thereby trying to prevent the deed from being discovered. The sum of the defendant's internal contradictions, primitively negotiated against the background of chronic alcohol consumption that removed, at least temporarily, the affection towards the closest family members, did not cancel the prospect of a confrontation with his brother regarding the suppression of the mother's life.

Under these conditions, in order to avoid another conflict with his brother, who did not have many words of appreciation for the defendant, and because the attitude of the injured person contributed, from the defendant's perspective, to the action to suppress the mother's life, the defendant pursued the suppression of the injured person's life so that she does not know about the death of the mother, to punish her equally for all the troubles suffered by the defendant and to claim that the injured person suppressed the life of their mother. Moreover, immediately after the injured person took refuge in the deceased person's room, realizing that he would not be able to carry out the initial plan, the defendant called the emergency service 112, announcing the death of his mother and identifying the perpetrator as his brother. These factual elements confirm the apparently irrational confession of the defendant to have tried to suppress the injured person's life in order not to find out about the murder committed on the victim M.M.: the punishment applied to the victim M.M. it should not be known by the injured person M.F., whom the victim was protecting, and at the same time it should appear that M.F. was the one who suppressed the life of the victim M.M.. Therefore, the call to the emergency service, the hiding of the T-shirt and the weapon used to suppress the life of the victim M.M., are part of a plan and not just the defendant's spontaneous orientation.

In **another case** from the national casuistics[21] it was noted that the trial court correctly judged that the act of the defendant B.A. (a minor at the time of the commission of the deed) who by carrying out acts of preparation for the deed and pursuing a material interest (his father's inheritance) determined the inc. X. to kill the victim B.N. (the father inc. B.A.), on

[21] Craiova Court of Appeal, Criminal Section, Criminal Decision no. 1410/A of October 30, 2015, unpublished.

the night of 15/16/08/2014 meets the constitutive elements of the crime of incitement to the crime of qualified murder for material interest and with premeditation, prev. of art. 47 C. pen. rap. to art. 188 para. (1) Penal Code, art. 189 para. (1) lit. a) and b) C. pen. rap. to art. 199 para. (1) Penal Code, with the application of art. 113 et seq. Criminal Code.

The evidence showed that, following discussions with his father B.N. who refused to allocate large sums of money to him on the grounds that he was going to clubs, during August 2014, the defendant B.A. took the decision to suppress his life, and by killing his father he would have been entitled to the inheritance.

To implement the plan, around 12-13.08.2014, the defendant B.A. got in touch with the defendant I., whom he had known for about 1 year from the Diamond discotheque in the municipality of Craiova, and they determined that the latter should find a person available to commit the murder of the person indicated by the defendant B.A., which he did happened later, the latter accepting 35,000 euros in exchange for the negotiated sum, and the defendant I. the sum of 10,000 euros for the facilitation activity carried out (activity materialized in finding the person available to implement the decision of the defendant B.A. to kill the victim B.N.). Although defendant I. asked B.A. who is the person who was going to be killed, he refused to indicate the name reasoning that it is a person from his locality

Around 05:00 on the night of 15/16/08/2014, X. and B.A. they entered the yard of the latter's residence through the gate, after entering the yard, B.A. looked through a window in the room where the victim B.N. and his wife, cut off the electricity supply to the building, and later, together with X., entered the house, through the access door next to the room where the victim B.N. and his wife Butu Mirela. The accused B.A. indicated to the defendant X., the room where the victim B.N. was, telling him to wait until he arrived in his room. After this moment X. entered the room where the victim B.N. and his wife again, in order not to be recognized, used as a hood, a piece taken from his home. Noting that the victim B.N. and his wife were sleeping, using the knife that had been handed to him earlier by B.A., X. applied to the victim B.N. a single blow, in the neck area, a blow which, due to the position in which the victim was standing, caused several injuries to her, leaving the home, the victim dying as a result of internal and external haemorrhage, as a result of a cervical cut-stab wound.

The accused B.A. did not inform defendant I. and X. of the fact that the person who was going to be killed was the named B.N., his father. Moreover, the two believed that B.A. owns large sums of money because when he went to the Diamond club, he squandered the money on musical dedications. The appellate court held that, the criticism formulated by the defendant-appellant B.A. in the sense that he did not commit the crime out of material interest but out of revenge, invoking in this sense the conflictual relations he had with the victim is unfounded. In the statement given by B.A., as a suspect, during the criminal investigation phase on September 10, 2014, he showed that at the beginning of August 2014 he decided to kill his father, B.N., because he needed everything more money to go and have fun, and because he didn't want to kill him with his own hand, he decided to find someone else to do it. The circumstances indicated in this statement were confirmed by B.A., as a defendant, during the criminal investigation phase in which he showed that he maintains his previously given statement and that he recognizes and regrets the act committed. As a result, the trial court correctly held that the defendant B.A. pursued a material interest, i.e. his father's inheritance, so that it was rightly held aggravating prev. of art. 189 para. (1) lit. b) C.pen.

Regarding the jurisprudential interpretation of the aggravating factor of murder consisting in the commission of „material interest", we also note that in **another case** from the national casuistics[22] it was held that the defendant's activity is specific to the action that characterizes the crime of murder in its simple form, so the requests made by the civil parties regarding the change in the legal classification of the deed from the crime prev. of art. 188 para. (1) C. pen. in the crime of qualified murder for material interest prev. of art. 189 para. (1) lit. b) Penal Code, the court holding that the unfolding of the facts did not confirm an initial intention of the defendant to kill for material interest in order to retain the mentioned aggravation. Thus, the evidence did not prove that the defendant sought, through the committed murder, to obtain a material advantage, which the defendant had in mind before the murder, an advantage pursued and to which the defendant essentially relates. The defendant acted against the background of the spontaneous conflict, as a result of the unanticipated behavior of the victim, the retention of the mobile phone having, in the context, a completely different meaning than that of obtaining an advantage, the initial motive of taking the phone being that of preventing the victim from also use it to communicate with other people.

Equally, the Court of Appeal found that the other objects left in the defendant's car, belonging to the victim, were thrown away by him, so that the pursuit of a material advantage is excluded, keeping the phone was determined only to continue the exchange of messages with those who they had called the victim, with the idea of misleading these people about her condition. In order to retain the aggravating factor, it would have been necessary to prove the premise fact of the initial, direct and unequivocal intention to kill for material interest.

1.2. ***Subsection II. The conclusions***. Acquiring a person's assets through his inheritance, by suppressing or attempting to suppress the life of the author of the inheritance or the successors who would have priority in the inheritance, is only an example of „material interest" in the sense of the aggravated version of the qualified murder provided by art. 189 para. (1) lit. b) Penal Code, being relatively rarely retained in judicial practice. This fact can be explained by the potential cumulation of reasons that can be at the origin of the commission of a crime between actors in family ties and/or of a nature to attract the incidence of the rules of succession law, in which sometimes, the acquisition of successions by appealing to acts of a criminal nature appears as a „final remnant" of motivation, hidden in other reasons that give an apparent justification for committing the act.

This illicit attempt to acquire goods is, however, annihilated by means of the legal indignity with this object, established in the provisions of art. 958 C.civ. by which were regulated (partially by taking over from the old Civil Code) separately two cases associated with the intention to kill the deceased or a successor of his with priority vocation to the inheritance, which benefits from a precise legal framework in the provisions of the Civil Code, in „cooperation „ with those of the criminal law, in the legitimate effort to preserve intact the natural evolution of succession relationships and the premises that constitute the foundation of the institution of succession transmission.

[22] Bucharest Court of Appeal, Criminal Section I, Criminal Decision no. 528/A of March 24, 2016, unpublished..

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THE RIGHT TO INHERIT A HEALTHY AND ECOLOGICALLY BALANCED ENVIRONMENT AND ILLEGAL LOGGING

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Abstract

One of the fundamental rights is the right to a healthy and ecologically balanced environment which enjoys a special attention both at the regional and international level, as well as internal plan having a constitutional consecration, many of the state constitutions being revised in this regard. The constitutional recognition of the right to a healthy environment is very important in the economy, in the legislative framework regarding the environment, a series of normative acts being adopted both at international and internal plan which ensures protection of the right to a healthy and ecologically balanced environment in order to preserve the environment by protecting an important component of it, namely the forest. Through the adopted normative acts the aim is to limit the negative effects of chaotic deforestation and illegal logging.

Keywords: *the right to a healthy and ecologically balanced environment, forest, illegal cutting of trees, deforestation*

Introduction

One of the fundamental rights of citizens is the right to a healthy and ecologically balanced environment having a consecration both at the regional and international level, as well as at the national level. Ensuring a healthy environment and recognizing each person's right, as a fundamental right to a healthy environment is one of the special concerns of states, environmental protection being a vital issue of the contemporary world.

In this sense, the states make sustained efforts to preserve a healthy and ecologically balanced environment which can be enjoyed not only by today's generation but also by future generations. It is our duty to preserve a healthy and ecologically balanced environment that we can pass on to those who come after us.

A healthy environment necessary for the existence of life on earth means an unpolluted environment, a clean and balanced environment, an environment corresponding to the physical and intellectual development of man.

1. Legislative milestones regarding the right to a healthy and ecologically balanced environment

Not having an express consecration among fundamental human rights, but linking them to environmental protection, the „*Declaration of the United Nations Conference on the Human Environment"* in Stockholm in 1972 was the first act to proclaim with principled value that „*Man has the right to freedom, equality and satisfactory living conditions in an environment whose quality enables them to live in dignity and prosperity. He has the sacred duty to protect and improve the environment for present and future generations (...)".*

Likewise, the Rio de Janeiro Declaration on Environment and Development of June 1992 proclaimed that „*human beings (...) have the right to a healthy and productive life in harmony with nature*".[1]

Neither „*The Millennium Declaration"* adopted in New York in September 2000 by the UN General Assembly expressly enshrines this right, nor in the document of the UN Conference on Sustainable Development of June 2012 in Rio de Janeiro, significant progress has been made, limiting –reaffirming the importance of respecting all human rights including the right to development and the right to an adequate standard of living.[2]

However, the explicit consecration of the right to a healthy environment is found in the African Charter of Human and Peoples' Rights (1981, Nairobi) which provides in Art. 24 that „*all peoples must have the right to a satisfactory general environment favorable to their development".*[3]

At the European level, *The European Convention of Human Rights* (1950, Rome) does not expressly enshrine the right to a healthy environment, the explanation being that at that time there was no question of an ecological crisis, and *The European Court of Human Rights* extended the protection rights guaranteed by the convention and rights that are not expressly provided for by it. But *The Stockholm Declaration* had a major impact on the legislation of the European states so that provisions relating to the right to a healthy environment are found in all their legislation. In recent years, the important European states have provided regulations regarding the guarantee of the right to a healthy environment revising their constitutions in this regard.[4]

In the Romanian legislation, the Constitution of Romania from 1991 contained provisions in art. 134 regarding the duties of the state regarding „*restoring and protecting the environment, as well as maintaining the ecological balance"*, „*creating the necessary conditions for increasing the quality of life*", and by Law no.429/2003 revision of the Constitution, a new article was introduced enshrining the right to a healthy and ecologically balanced environment. Art. 135 of The Basic Law guarantees the right to a healthy environment, recognizing every person's right to a healthy and ecologically balanced environment. In this sense, the state ensures the legislative framework for the exercise of this right, and natural and legal persons have the duty to protect and improve the environment. The constitutional recognition had the effect of regulating a general legislative framework regarding environmental protection in Romania.

Thus, Law no.137/1995 on environmental protection was adopted, repealed by the Government's Emergency Ordinance no. 195/2005 on environmental protection, an act that includes in its contents art. 5 the five rights – guarantees of the right to a healthy environment and ecologically balanced are the following:

a) access to information regarding the environment, in compliance with the confidentiality conditions provided by the legislation in force;

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

c) the right to be consulted in the decision-making process regarding the development of environmental policy and legislation, the issuance of regulatory acts in the field, the elaboration of plans and programs;

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[1] Gheorghe Iulian Ioniță, Ștefania Diana Ioniță, *Dreptul protecției mediului*, ediția a V-a, revăzută și adăugită, Ed.Universul Juridic, București, 2022, p. 42.

[2] Gheorghe Iulian Ioniță, Ștefania Diana Ioniță, *op. cit.,* p. 42

[3] *Idem*.

[4] *Ibidem* .

d) the right to address, directly or through organizations for environmental protection, administrative and/or judicial authorities, as the case may be, in environmental issues, regardless of whether or not damage has occurred;

e) the right to compensation for the damage suffered. At the same time, art. 6 of the ordinance correlatively regulates the duties and responsibilities of central and local public administration authorities, as well as of all natural and legal persons.

The creation of the national legislative framework necessary for the protection of this right is not sufficient without the imposition, promotion and taking of concrete and effective administrative measures to ensure its effective exercise. Environmental protection cannot be achieved in the absence of international political, economic, scientific, legal cooperation. At the same time, environmental protection is an object of activity for numerous non-governmental organizations with international activity, but also a constant concern of international organizations.[5]

Recognizing and guaranteeing the right to a healthy and ecologically balanced environment, in addition to the fact that it amplifies the obligations of public authorities to protect the environment, also provides the courts with new means for repairing ecological damage and sanctioning environmental damage.

At the same time, the constitutional recognition of this right is important not only for the economy or environmental legislation, but also for environmental protection policy.

From the perspective of the holders of the right to a healthy and ecologically balanced environment, the constitutional text is not limited only to citizens and speaks of „any persons" as holders of the right and all „natural and legal persons" as holders of the obligation, it being understood that the beneficiaries of an environment healthy are also any natural and legal person, including the international community in a broad sense.[6]

2. The right to the environment and illegal logging

An essential component of the environment is the forest, so a disastrous management of this natural resource has dire consequences for all of humanity, not only immediately, but also in the long term.

As an environmental factor, the forest has an important place in maintaining the ecological balance at the level of the entire planet, which is why we are obliged to preserve it and, at the same time, protect it against improper exploitation, illegal deforestation, illegal cutting of trees because, it is known that that deforestation is the main cause in the expansion of deserts, contributing at the same time to climate change.

It is known that since ancient times the forest has been a means of refuge for people and animals, ensuring a complex balance and stability, constituting a natural wealth that serves to improve the quality of the environment and maintain the ecological balance.

Without this natural resource the planet cannot support life so we have a duty to protect and preserve it not only for us but also for future generations.

However, the forest was and continues to be regarded as a source of raw materials, its role being viewed from an economic perspective.

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[5] Muraru, I., Tănăsescu, E.S. coord., *Constituția României. Comentariu pe articole*, ediția 2, Ed.C.H.Beck, București, 2019, p. 291

[6] Muraru, I., Tănăsescu, E.S. coord., op. cit., p. 288

This is reflected in the greatly reduced area of forests, including at the international level, so that the world's largest forests are in danger, their areas being significantly reduced compared to their original areas.

If the rate of deforestation does not slow down, there is a catastrophic risk of the disappearance of many animal, plant and tree species and the reduction of forested areas, knowing the essential role that forests play in regulating the planet's climate.

Deforestation is actually the main factor in global warming and the extinction of some plant and animal species. Also, deforestation is the main cause in the expansion of desert areas, and the reduction of forest vegetation leads to the favoring of the greenhouse effect, the warming of the climate etc.[7]

Deforestation in a chaotic manner has particular consequences on the environment, so that both at international and national level alarm signals have been raised regarding the urgency of taking measures to ensure a better management of the forest fund for the effective protection of forests from Romania.

The negative effects of illegal tree cutting and improper deforestation are felt not only at the level of our country, but also at the regional and even international level. Among these we mention: favoring erosion on sloping land and soil degradation, increasing climate aridity, aggravating drought and desertification, increasing wind speed and forming dust storms, air, water and soil pollution, destruction of the ozone layer, even with climate change.

Forests represent the most important pillar of resistance of the ecological system, having an existential importance in the life of any people, as a factor of genesis, preservation and development of the national being, which is why the national forest fund needs a set of protection means that to harmonize the sphere of ecological, social and economic interests.[8]

In order to counteract the negative effects, measures and means of forest protection are necessary from the economic, social and legal fields, in the sense that our country has ratified several European and international normative acts through which principles and guidelines for the conservation and protection of forests are established and their sustainable management, meaning that Romania ratified a series of international normative acts, and domestically adopted laws and other normative acts regarding the protection of forests and the protection of the environment.

For greater clarity and normative stability, also taking into account the negative effects that an ecological imbalance entails, with serious consequences that affect several spheres, we are of the opinion that the decisions and decisions of the decision-making factors in our country regarding the environment, with all its components, should be taken and adopted with great caution, in order to eliminate all the risks, dangers and threats that come from the ecological field to people's lives, and last but not least, they come to the national security.

In the current context, protecting the forests, the national forest fund and countering the phenomenon of illegal logging is a priority on the work agenda of the Government, but also of the majority of states that face these phenomena. Illegal cutting of trees, chaotic clearing of forests, but also an irrational exploitation of forests causes a series of serious consequences that are difficult to quantify.

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[7] Mircea Duțu, *Dreptul internațional al mediului,* Editura Economică, București, 2004, p. 419.

[8] BĂDESCU, Valentin-Stelian, *Dreptul mediului. Sisteme de management de mediu*, Editura C.H.Beck, București, 2011, p. 269 și urm.

We must not forget that the forest plays a very important role not only in our lives, but also in the economy of our country, and we have the duty to protect it, taking into account the fact that it takes several years for trees to regenerate and several decades years to restore the forest.

Conclusions

Protecting the environment must be a priority for each member state of the European Union, but also for the other states.

Considering the benefits of a healthy, ecologically balanced environment, a clean environment, each of us has a duty and obligation to protect the environment not only for us, but also for future generations.

In order to counteract the negative effects of irresponsible deforestation and illegal cutting of trees, measures and means of forest protection are necessary, meaning that our country has ratified several European and international normative acts that establish principles and guidelines for the conservation and protection of forests and their sustainable management, and domestically, a series of laws and other normative acts were adopted regarding the protection of forests and the protection of the environment.

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ALTERNATIVE DISPUTE RESOLUTION – PROPOSED FERENDA LAW

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Abstract

For the relief of the courts, for the speed of a trial in court, but also for the saving of material and time resources of the parties involved, alternative dispute resolution through mediation is not only the effective and correct solution at present.

It is well known that the overcrowding of the courts affects the entire judicial system, that seemingly trivial disputes are delayed because of slowness and cumbersome procedures, that court decisions come after repeated deadlines and hearings, in which the litigant wastes money, time, and nerves, and that the result is not always satisfactory. The need for alternative solutions (e.g., mediation, arbitration, and conciliation) is becoming increasingly evident, but for this to happen, there must be a legislative framework to facilitate access to them for litigants. In order to improve the existing legislation, we propose some amendments and additions to two important laws that provide for alternative solutions to resolve conflicts or disputes, as the case may be, before going to court or trial.

Keywords: *mediation, dispute, conflict, alternative dispute resolution*

1. Alternative dispute resolution – a necessity in the traditional justice system

One response to this problem would be to relieve the courts, to ensure that the administration complies with the case law of the courts, and, last but not least, to effectively implement alternative means of dispute resolution, in particular mediation, for which there are express European recommendations [1].

Against this background, a number of alternative dispute resolution methods have developed over time, comprising practices, techniques, and methods that provide an alternative to court proceedings. In fact, there are two types of dispute resolution methods: the traditional system and alternative dispute resolution (ADR).

The classic system is mainly represented by the courts and aims, in most cases, to punish the offender. The system includes the courts, the public prosecutor's office, the police, etc. Parties end up in this system when they are unable to resolve the problem themselves. In the classic system, the parties are not asked what they think is the best solution for them, the magistrates make decisions for them and then force them to comply. The traditional resolution of conflicts by entrusting them to the courts and settling them by traditional winner-take-all methods has led to the conclusion that it is not the ideal solution that can adequately resolve all social and economic difficulties, which have developed and worsened in the absence of specific rules for new types of conflict. Thus, new concepts for the amicable resolution of conflicts, known as ADR (Alternative Dispute Resolution: Facilitation, Negotiation, Conciliation, Mediation, and Arbitration, or hybrid mediation-arbitration models), have emerged. They do not restrict access to justice, but if it is not possible to resolve the conflict through these methods, the possibility of initiating or continuing legal proceedings remains open.

It should also be added that the Romanian justice system is currently facing financial and human resources problems, with decentralization of administrative and financial decisions and rationalization of expenditure being a necessity. Having dealt with the courts in various situations, I have noticed the huge workload. There are judges who deliver and give reasons for over a thousand judgments a year, which is inhuman. The large number of cases before the magistrates directly affects the quality of justice. The latest Report on the State of Justice published on the website of the Superior Council of Magistracy [2] shows that there have been, on average, 2,722,609 cases before the courts in the last three years, which corresponds to a decrease of around 7% compared to the previous period.

The average caseload is as follows:

– ICCJ (High Court of Cassation and Justice) – 736 cases per judge,
– Courts of Appeal – 523 cases per judge,
– Courts – 640 cases per judge,
– Judges – 748 cases per judge.

1.1. Conflict or dispute?

We often hear these terms used when there is a disagreement between parties, and they are considered synonymous or can be used in place of each other. The following briefly explains what each means and when it is most appropriate to use it.

The theory underpinning dispute management and resolution starts with a clearer definition of conflict. It arises in a context where there are several competing interests in such a way that satisfying all of them is impossible. Conflicts are classified according to the number of parties, the obvious or hidden nature of the conflict, and the stage of the conflict. In the Mediation Handbook, C. Ignat and Z. Shustac define conflict as „a contextual social phenomenon determined by the clash of interests, concepts, and needs of individuals or groups when they come into contact and have different or apparently different objectives" [3].

In addition to the concept of „conflict" in Romanian law, we also find the term „dispute". The term „litigation" is of Latin origin, coming from the word „litigium" which means „dispute" or „disagreement". In a broad sense, the term refers to a disagreement between members of the community or to a conflict arising in inter-subjective relations [4]. Another, this time more specific, definition for the term „dispute" belongs to Ilena Constantinescu and Adriana Moțatu. They point out that litigation involves „a problem that cannot be resolved by one party with another amicably, and this problem will be the subject of a court action [5].

The literature has debated whether there is an important difference between litigation and conflict or whether it is simply a change in the legislator's preference over time. Ultimately, on the basis of the definitions of the two concepts, it can be considered that a dispute is a conflict that has come to the attention of a body competent in the field of conflict and is on the procedural path towards its resolution. Thus, the moment at which a conflict becomes a dispute is the moment of referral to the judicial body, when its resolution requires the involvement of a body of specific jurisdiction, thus triggering the procedure established by law. In other words, a dispute is always a conflict, whereas not every time there is a conflict, it is also a dispute.

The iceberg model illustrates the difference between conflict and dispute. Conflict is the more substantial, unseen part that is in the water, while litigation is just the tip of the iceberg, the visible part that ends up being disputed in court [6].

1.2. Mediation – the need for promotion

In this context, mediation, as a means of conflict resolution, and an alternative to court proceedings, may be one of the most appropriate responses to the difficulties mentioned above, while helping to relieve the courts of many cases.

Certainly, mediation is not a panacea. It does, however, have its place in many types of litigation. Thus, in addition to conflicts arising from family relations, which seems to be the preferred area for the use of mediation, there are many types of conflict or potentially conflict-generating environments in which the idea of amicable settlement seems more appropriate than traditional dispute resolution: tenancy, neighborhood, co-ownership, inheritance, performance of obligations undertaken by contract or any other legal act, commercial conflicts, labor disputes, etc.

Enjoying much the same advantages as arbitration, its use allows the focus of the process to be shifted from issues of legal status or procedural niceties to the interests at stake. More specifically, in the case of mediation, the focus is not on the legal aspects of the dispute, but on the parties, through discussion and negotiation in the presence of the mediator, reaching a compromise solution that is acceptable to each party and, of course, in full compliance with the laws on public order and good morals.

Compared to other procedures, mediation has the advantage of providing results that are more convenient for both parties in conflict, better satisfy their interests, and are therefore more lasting [7]. At the same time, these results can be achieved with less expense, time, and stress compared to what usually accompanies court proceedings, arbitration proceedings, or negotiations carried out without the help of a specialist.

An analysis of the period since Law No. 192/2006 on mediation and the organization of the profession of mediator entered into force shows that, to date, it has undergone many amendments and additions, which have led to a distortion of the purpose intended by the legislator, i.e., to create a framework in which the amicable settlement of disputes becomes a practice and only more complex cases are referred to the ordinary courts. In fact, through the provisions of this law, mediation has been assimilated by public opinion and even by other socio-professional categories as a formal procedure, but has not been considered a viable, efficient procedure, characterized by speed and numerous other advantages [8].

Taking into account the situations encountered in the activity of the courts, law offices, from the practical activity of mediators, from their proposals and from collaborations with public institutions and authorities, the imposition of certain legislative changes regarding the mediation of conflicts and disputes resulted unequivocally. For the moment we will refer to the proposals to amend Law no. 134/2010 regarding the Code of Civil Procedure and Law no. 192/2006 on mediation and the organization of the mediator profession, which we will detail in the following lines.

1.3. Proposed Ferenda Law

1. In Law No. 134/2010 on the Code of Civil Procedure, republished, as amended, we propose the following amendments:

– Title III. *Jurisdiction of Courts*, Chap. I. *Jurisdiction,* Section 1. *Jurisdiction according to subject matter and value* Art. 94 *Court.* The courts shall judge: para. 1 lit. k) *any other claim assessable in money up to and including 200.000 lei, regardless of the status of the parties, professional or non-professional*, is repealed.

Reasons for repeal:

a) to relieve the courts throughout the country of all cases containing claims for money up to and including 200.000 lei, regardless of the status of the parties, professional or non-professional;

b) the measure is welcome given the acute shortage of qualified human resources;

c) the yearly caseload of judges with hundreds and thousands of cases [9], some of which are repetitive;

d) the reduction of costs at the level of the courts, which are financed by public money, as highlighted in the State Budget Law;

e) to settle cases registered with the courts within a reasonable [10], optimal, and predictable time [11].

2. Law No. 192/2006 on mediation and the organization of the profession of mediator, as amended and supplemented, is hereby amended and supplemented as follows:

– In Cap. V. *Mediation Procedure*, Section 5. *Mediation in a dispute before the courts*, Art. 60^1 para. 1(f) is amended as follows:

„In civil disputes, any other claim assessable in money up to and including 200.000 lei, regardless of the status of the parties, professional or non-professional."

– In Cap. V. *Mediation Procedure*, Section 5. *Mediation in a Dispute Before the Courts*, Art. 60^1 para. 1 after point f) is added a new point $f)^1$ with the following content: „*Any other disputes which may, according to the law, be the subject of mediation*".

Reasons for amendment and addition:

a) The proposed amendment is intended to take over substantive jurisdiction from the courts and make it subject to mediation by means of a special mediation law;

b) the addition envisaged is that any other disputes governed by other organic or ordinary laws, which may be settled amicably with the help of a third party specialised as a mediator, may follow the legal procedure of mediation in order to reach a mutually convenient, effective, and lasting solution, a solution agreed by all the parties to the dispute.

Conclusions

In order to encourage the use of the mediation procedure to settle disputes before court action is taken or even in the early stages of a dispute, it would be useful to establish obligations for the parties involved in the dispute. For example, the party who refuses to comply with the invitation to mediation should be obliged to bear the costs of the procedure advanced by the party who initiated it, irrespective of the court's decision. This sanction is intended to relieve the courts of cases of low complexity. In addition, it ensures that the parties have the option of resorting to this procedure, provided that they are fully, genuinely, and demonstrably informed of the alternative methods of dispute resolution.

Bearing in mind Decision No. 266/2014 of the Constitutional Court, which ruled that the provisions of Article 2 paras. (1) and (12) of Law No. 192/2006 are unconstitutional, the procedure for information on mediation and its advantages in the cases referred to in Art.

601 of the said law has been repealed. At the same time, it was considered that the presence of the parties for information is not an effective attempt to resolve the conflict through mediation, so the participation of the parties in this meeting is of a formal nature. Moreover, it was held that free access to justice implies access to the procedural means by which justice is administered, it being within the exclusive competence of the legislature to establish the rules for the conduct of proceedings before the courts, a solution which results from the provisions of Article 126(2) of the EC Treaty. (2) of the Constitution.

In the current social context, it is noted that in very few cases the parties are encouraged to resort to mediation, following the recommendation of the magistrates, although this requirement is stipulated in Article 6 of the current law: „Judicial and arbitration bodies, as well as other authorities with powers, shall inform the parties of the possibility and advantages of using the mediation procedure and shall encourage them to resort to this method for the settlement of conflicts between them". Moreover, given the numerous international and community provisions aimed at including and promoting mediation as an alternative method to traditional justice at the institutional level, it is necessary to harmonize with these legal acts and apply them, at least by recommending this procedure as a preliminary stage in matters provided for by law.

The establishment of a judge with powers to grant the mediation agreement may lead to a simplification of the procedure, which has the effect of giving the mediation agreement the force of authenticity. In addition to relieving the courts, the time limits laid down for this purpose will be reduced, allowing the parties to enjoy the effects of the agreement to which they have consented as soon as possible and to restore the good relations that existed between the parties before the conflict arose.

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[11] See Law no. 134/2010 regarding the Code of Civil Procedure, republished, with subsequent amendments and additions, art. 6. The right to a fair trial, in an optimal and predictable period

THE REMOVAL OF HUMAN ORGANS, TISSUES AND CELLS FROM A DECEASED PERSON IN THE LIGHT OF NATIONAL, EUROPEAN AND INTERNATIONAL REGULATIONS

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Abstract
Over the years, organ harvesting has been a topic of great importance, debated by legislators from all over the world. Thus, normative acts were adopted in this sense, aimed at combating the illegal commercialization of organs, a matter encountered, especially, in the state with a mediocre culture.
Keywords: *organ transplantation, law, trafficking*

1. Procurement of human organs, tissues and cells in Romania

The 20th century was the period of the most significant changes in Romanian law, which was in a continuous ascension. Thus, with the emphasis on fundamental rights during the Enlightenment, the focus shifted from the general to the particular with regard to the human body and its inviolability. In this respect, the first regulation that appeared in the Romanian state during the communist regime, namely Law no. 3/1978, which mentions the removal of human organs, tissues and cells, in article 134, section 2, chapter 5, reads as follows: „The removal of tissues and organs from the deceased is carried out only if biological death has been medically confirmed. In this case the removal may be carried out with the written consent of one of the adult members of the family, in the following order: spouse, parent, child, brother or sister".

The content of the above-mentioned rule shows the possibility for the family to decide on the body of the deceased. This rule is followed by another rule of law which refers to the will of the deceased person, given during his or her lifetime in a written document, not to have organs removed after death, which would completely contradict the decision of the family members.

Subsequent regulations have sought to correct the original text and, in order to eliminate the many contradictory meanings, the legislator has culminated in a new regulation in Article 81 of the current Civil Code. According to this article, the removal of human organs, tissues and cells for therapeutic or scientific purposes from deceased persons is carried out only under the conditions laid down by law, with the written consent, expressed during the lifetime, of the deceased person or, failing this, with the written, free, prior and express consent given, in order, by the surviving spouse, parents, descendants or, finally, collateral relatives up to and including the fourth degree.

Therefore, the removal of human organs, tissues and cells requires a valid civil legal act concluded for the purpose of producing legal effects, and it is impossible to „return to the previous situation"[1].

In order to become a post-mortem donor, a person must express his or her consent by means of two procedures, namely a will or an express declaration to that effect. This

requires physical appearance at a notary's office, where the person will decide on the purpose of the donation and be informed of the possible risks. It is also very important to be registered in the National Register of Organ, Tissue and Cell Donors (RND), which ensures that the act is enforceable against third parties[2].

Article 147 of Law 95/2006 specifies the conditions under which a deceased donor is considered a deceased donor:

1– a deceased donor without cardiac activity is defined as a person who has been found to have irreversible and irreversible cardiorespiratory arrest, confirmed in hospital by two primary physicians. Confirmation of the deceased donor without cardiac activity is made according to the resuscitation protocol, in accordance with the model form approved by order of the Minister of Health, with the exception of situations without ambiguity;

2 – a deceased donor with cardiac activity is defined as a person who has been found to have irreversibly ceased all brain functions, according to the protocol for the declaration of brain death in accordance with the model form approved by order of the Minister of Health;

3 – the declaration of brain death shall be made by physicians who are not members of the teams for the coordination, procurement, transplantation of organs, tissues and cells of human origin.

People's prejudices about brain death and misinformation make this process very difficult.

The website dedicated to these procedures is the National Transplant Agency, which provides statistics on post-mortem donors, showing fluctuating changes from year to year. However, if we look at the number on the waiting lists and compare it with the number of donors, we see differences that are impossible to cover. A significant example is 2020, where we have 5198 people waiting for kidneys, liver, heart and lungs[3].

Consequently, the post-mortem donor can save more lives, as not all donated organs end up in the same body, they are distributed according to the need of each patient.

2. European regulations on the removal of human organs, tissues and cells from a deceased person

The European Union mentions three types of systems resulting from Member States' regulations: opt-out, opt-in and mixed system.

The opt-in system or explicit consent requires a clearly expressed, precise agreement. This system is found in countries such as Cyprus, Denmark, Germany, Ireland, Lithuania, the Netherlands and Romania. [4]

The opt-out system, also called presumed consent, supports the idea that silence is equivalent to consent, except for the drafting of a request for non-removal of organs. It is found in countries: Austria, Belgium, Bulgaria, Croatia, France, Estonia, Finland, Greece, Hungary, Italy, Luxembourg, Malta, Poland, Latvia, Czech Republic, Portugal, Slovakia, Sweden and Spain.

The third system is the mixed system, whereby countries keep certain registers, in which donors and people who choose not to donate are recorded. Slovenia has such a system[4].

We note that countries that have opted for the opt-out system are more numerous compared to those belonging to the other systems. So, we can identify the premises of these different views. One of these, on which the opt-out system is based, may be the possibility of receiving the necessary organ more quickly, a greater chance of saving patients on

waiting lists. Unlike the opt-in system, where there is also a chance of receiving the organ, but not always a prior agreement. At the same time, the opt-in system is based on the individual's freedom of decision, leaving it up to the individual or their loved ones to decide whether or not to allow this intervention. Moreover, the system that exists only in Slovenia consists of a precise way of knowing exactly what the population's choices are, recording them in a specific register.

In view of the above comparisons, we cannot say which system is the best, but what we do see is that democracy can take many forms, each of which is emblematic of its supporters.

Another country in Europe, but not part of the European Union, is Belarus, which is based on the opt-out system and has the highest number of donations among CIS countries, with a rate of 50 transplants per million inhabitants[5].

Organ transplantation has been possible in Ukraine since 1999, but the lack of practice in brain death diagnosis and interpretative regulations make it almost impossible. However, in 2019 there have been some changes that have led to a development in this direction, by amending some articles that previously criminalized doctors and licensing hospitals with the necessary equipment[5].

3. Removal of human organs, tissues and cells from a deceased person in the light of international regulations

The regulations of the international states are not very different from those we have presented above in largely the same type of systems.

In the US, which has an opt-in system, 90% of the population supports donation, but only 60% are on donor lists, with the percentage falling further and further as the pandemic emerges in 2020. Furthermore, the HIV Organ Policy Equity Act (HOPE Act) has regulated organ donation rules for HIV-positive people. This bill passed the U.S. Senate during the 113th Congress and was signed into law on November 21, 2013[6].

The first transplants in China took place in the early 1970s by harvesting organs from executed prisoners without their consent. It was specified that transplantation was almost impossible due to religion, which advocates leaving the body whole after death, prompting them to do so. There is now a regulation on involuntary organ harvesting that prohibits this, but evidence has been found to the contrary. In this regard, the emergence of worrying allegations of forced organ harvesting from Falun Gong practitioners (a Chinese discipline involving meditation and moral philosophy rooted in Buddhist tradition) and other political prisoners in China, numbering in the tens of thousands, has sparked interest from the international community. However, the Chinese government continues to deny the allegations[7].

Until 1994, there was no legislation on organ harvesting in India. This made India the largest kidney transplant centre in the world, as people's financial possibilities were limited and the number of family members was quite large. However, the amounts promised were some far too high compared to what was actually received, and patients reported that these procedures were carried out even without their consent, being lied to by being given a false diagnosis. The Human Organ Transplantation Act (THOA) banned organ trade, allowing a person to donate only to a partner, relative or relative with a medical condition. This latter option, despite the legislation, paves the way for the trade to continue, with people taking advantage of the condition through unsubstantiated claims. [8]

So, in the light of the above, we see that on the Asian continent we continue to face the problem of organ trade, although any allegations or evidence to prove this are denied.

4. Conclusions

Organ harvesting is, after all this time, an unclear subject, influenced by various factors, whether religious, political or ethical. While some countries are more restrictive, in others there is an open door to illegal trade.

We believe that regulations in countries with an opt-out system (presumed consent) give people in need a better chance of receiving the necessary organ, eliminating the possibility of people being constrained by various factors, such as the fear generated by confusion between brain death and coma. In this respect, people are not sufficiently informed about what brain death is and it is often confused with coma. The confusion arises from the assumption that if a person is clinically dead, then they are considered to be alive, but the reality is that only the person in a coma can recover, so organ removal in a coma is excluded[2]. Compared to the opt-out system, the other two opt for compliance with human rights, putting the regulation of organ removal alongside them. However, although the idea is compliant with rights, in particular the right to physical integrity, and the person is allowed to decide whether or not to give consent, this freedom is not favourable to people on waiting lists. But this situation could be changed by the creation of a website, accessible to all, where people could declare their consent to a post-mortem transplant more quickly, as is the case, for example, in the USA.

So the conditions for transplantation are quite complicated, making it difficult for people to become donors..

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Section F

VARIETIES OF SALE IN THE LIGHT OF THE CURRENT ROMANIAN CIVIL CODE: SALE OF INHERITANCE

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Abstract
This article tries to highlight some topical aspects regarding the sale of the inheritance, an atypical variant of sale placed by the current Romanian legislator among the ample and tendering tableau of varieties of sale, presenting itself as a useful solution for the alienation, under certain conditions, of inheritance rights.

Keywords*: sale, contract of sale, varieties of sale, inheritance, seller, buyer, sale of inheritance, inheritance rights.*

1. Introductory aspects

Motivated by the desire to provide a regulation as efficient as possible, which meets the requirements of contemporary Romanian society, the legislator of the current Civil Code has integrated among its provisions the varieties of sale, which are a solution applicable to all those situations where the peculiarities of the sale involve an atypical sale, which does not fall within the borders drawn by the classic sales contract.

Thus, the sale of an inheritance may be defined as a contract by which the holder of an inheritance right for consideration alienates this right to another person[1], this taking place only after the opening of the inheritance, because it must be remembered that, according to art. 954 para. (1) C. civ., „*a person's inheritance is opened at the time of his death"*. At the same time, an unopened inheritance cannot be alienated, under the sanction of absolute nullity. In this context, it should be recalled that „*nulla est viventis hereditas" – „the inheritance of a living person is null"*[2], not even with the consent of the person whose inheritance is concerned, because in such a situation the desire for death *(votum mortis)* of another person could be awakened, the manifestation of will being in this case immoral, as shown in judicial practice[3].

We can notice that the term „*inheritance"* acquires a special meaning compared to that applicable in other texts of the Civil Code, according to art. 953 Civil Code[4]. If, as a rule, the inheritance itself is a transfer, giving rise to a translative effect, in the case of the sale of the inheritance or, in other words, of the inheritance rights, it consists in the sale of the right to inherit, having as its object either the inheritance opened in its entirety or only part of it.

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[1] According to art. 1747 para. (1) C. civ., „*For the purposes of this section, inheritance means the right to collect an open inheritance or a share thereof*„.

[2] Therefore, the meaning of this dictum is that it is impossible to inherit a living man.

[3] Civil decision no. 116/2015, Trib. Teleorman, available in electronic format on www.rolii.ro (accessed on 21.11.2022).

[4] Art. 953 of the Civil Code establishes that „*The inheritance is the transfer of the patrimony of a deceased natural person to one or more living persons".*

At the same time, as the judicial practice in the matter has also highlighted[5], in the specialized literature it was argued that with regard to the relationship between „*inheritance*" and „*succession*" certain clarifications must be made, as follows: *lato sensu*, the succession designates any kind of transmission of rights (both *inter vivos* and *mortis causa*), and *stricto sensu*, the succession constitutes the transmission of the patrimony of a deceased natural person to one or more living persons.

We can also note that, while the legislator of the old Civil Code from 1864 used both the term of *inheritance* and the one of *succession*, the current legislator opted for the use of the notion of inheritance, his choice of replacing the notion of succession with the one of inheritance based on the fact that art. 46 of the Romanian Constitution[6] guarantees the right to inheritance[7], as well as the consideration that in the optics of the current Civil Code, the notion of succession enjoys an extended meaning.

In a definition proposed by the doctrine, the sale of the inheritance is considered to be „*a contract whereby the holder of a succession right for consideration alienates that right to another person"*[8]. The doctrine also speaks of this variant of the sale as *„a convention by which the heir sells his hereditary rights to another person, whether he be a third party or his joint heir*[9]*."*

Stepping beyond the scope of the regulations in the Romanian legislation, we appreciate that it is also important to recall the outstanding definition of Aubry and Rau, namely: „*the one who is, or who is believed to be called to a succession, can either give up, as if it were really due to him, the inheritance to which he declares that he has a calling, or limit himself to the transfer of the claims, well or badly founded, that he thinks he has on the inheritance"*[10].

Therefore, from the analysis of the definitions set out above, we can undoubtedly draw the idea that the sale of an inheritance can be achieved only after the moment of its opening, because we recall that the sale of an unopened inheritance is practically a pact on a future succession, which can only be hit by absolute nullity.

2. A few historical milestones of the institution

It should be noted that the sale of the inheritance, named in the specialized literature and under the title of sale of succession rights, is not an innovation of the current civil legislator, because this institution was regulated within the texts of the old Civil Code, more precisely, in the contents of *art. 1399-1401*.

[5] See, in this respect, the Civil Decision No. 1403/2021, Civil Section I, Trib. Dolj, available in electronic format on www.rolii.ro (accessed on 25.11.2022).

[6] The Constitution of Romania of 21 November 1991, published in the Official Gazette no. 767 of October 31, 2003, amended and supplemented by the Law revising the Constitution of Romania no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003, republished by the Legislative Council, pursuant to art. 152 of the Constitution, updating the names and giving the texts a new numbering.

[7] For a deeper perspective of the mentioned constitutional provisions, see B. Patrascu, I. Genoiu, Approach to the Right to Inheritance from a Constitutional Perspective, in Law Revue, no. 3/2017, article available in electronic format on www.lege5.ro (accessed on 10.02.2023).

[8] Fr. Deak, L. Popescu, R. Popescu, Treaty of Civil Law: Special Contracts, vol. I: Sale and Exchange, 5th ed., updated and completed, Juridical Universe Publishing House, Bucharest, 2017, p. 216.

[9] C. Hamangiu, I. Rosetti-Bălănescu, A. Băicoianu, Treaty of Romanian Civil Law, Volume II, All Publishing House, Bucharest, 1997, p. 575.

[10] C. Aubry, C. Rau, Cours de droit civil français, 5 éd., t. V, LGDJ Publishing House, Paris, 1907, p. 236, pt. 359.

In accordance with the provisions of these legal texts, the person who sold an inheritance, without specifying in the contract the assets that were part of the inheritance, only guaranteed his/her capacity as heir, according to those established by art. 1399 of the old Civil Code. The idea was continued by the provisions of art. 1400 which established that, if the seller did not reserve the fruits of any fund, then the hereditary claims received, or if he sold goods belonging to the succession the price received on them, had the obligation to remit them to the buyer[11].

Finally, art. 1401 of the old regulation provided that, in turn, the buyer was obliged to reimburse the seller the amounts that the latter would have paid for the debts and tasks of the succession, as well as the amounts that the succession would have owed to the seller, as creditor of that succession, unless otherwise stipulated.

Currently, in the texts of the current Civil Code, the sale of the inheritance benefits from the legal framework in Section 3 (*Sale of the inheritance*), Title IX *(Various Special Contracts*), Chapter I (*Sale Contract*) art. *1747-1754*. Thus, by the provisions of art. 1747 Civil Code, the legislator establishes that inheritance means, for the purposes of the law, the right to collect an open inheritance or, as the case may be, a share thereof. The estate or its respective share becomes a patrimony within the estate of the heir, having the legal nature of a universality of law.[12]

At the same time, the provisions of para. (2) of art. 1747, which establishes the requirement that, under the sanction of absolute nullity of the contract, the sale of the inheritance be concluded in authentic form. Otherwise, if this contract does not take the authentic form, it will be converted into a synallagmatic promise to sell an inheritance[13], the parties mutually committing in this way to conclude the contract of sale of an inheritance in the authentic form, imposed by law.

In turn, art. 1748 of the Civil Code in force regulates the seller's guarantee, it being expressly established that, in the absence of specifying the goods on which his rights lie, the seller offers only the guarantee regarding his status as heir, but the legislator gives the parties the possibility to exclude, according to their will, this guarantee.

The following two legal texts highlight the obligations assumed by the seller and the buyer, respectively, and in art. 1751 and 1752 of the Civil Code are regulated issues regarding the liability for the debts of the inheritance and the family property.

The latter provisions on the issue of the sale of inheritance highlight the advertising formalities applicable to this contract, as well as the possibility of such an alienation free of charge, in which case there will be incidents related to donations.

3. Parties of the contract

As in the case of the typical contract of sale, and in the case of the contract of sale of the inheritance, we will meet as parts of this variety of sale, on the one hand, the seller of the inheritance, and on the other hand, its buyer.

As regards the *seller of the* inheritance, he is represented by the universal successor or by universal title, legal heir or universal legatee or by universal title. In other words, we can say that we are dealing with a real heir, with a universal vocation or with a universal title to

[11] B. Florea, Varieties of the Sales Contract, Juridical Universe Publishing House, Bucharest, 2016, p. 115.

[12] Fr. Deak, L. Mihai, R. Popescu, Treaty of Civil Law. Special contracts. Vol. I. Sale and Purchase. The Exchange, 5th ed., updated and completed, Juridical Universe Publishing House, Bucharest, 2017, p. 141.

[13] R. Dincă, Variety…, *op. cit.,* p. 69.

the succession, excluding the hypothesis in which the seller of the inheritance is the legatee with a particular title.

Also, if the parties do not opt for the express removal of the guarantee, under the conditions established by art. 1748, IInd thesis of the Civil Code, the seller has the obligation to guarantee his status as heir, so he must be a genuine heir.

The other party to the contract, who wears the buyer's coat, may be a joint heir or a third party. In the first case, when the sale is concluded with a joint heir, it could be an act of division. As regards the capacity required by the legislator to consent to the assignment of succession rights, we mention that this is the one specific to the acts of sale or donation, since this assignment can take place either for consideration or free of charge.

4. Goods that are family memories

The issue of assets constituting family memories has aroused increased interest, but, as we will show, not enough in our opinion, from the current legislator. Thus, art. 1752 Civil Code, bearing the marginal name of „*Family goods*", establishes in para. (1) that „*Family documents or portraits, decorations or other such goods, which have no significant patrimonial value, but which have an affective value for the seller, are presumed not to be included in the sold inheritance*", the second paragraph of the mentioned art. consecrating the fact that „*If these goods have significant patrimonial value, the seller who did not expressly reserve them owes to the buyer their price at the date of sale*".

First of all, although the good intention shown by the legislator regulating such matters is commendable, we consider that the indicative name chosen is not an inspired one, given that family goods can designate any kind of property belonging to a family, and not necessarily only those that have an affective value. However, in the first paragraph, the legislator refers to such objects that, without having a significant patrimonial value, instead present an affective value in relation to the seller, it being established that such objects are not considered to be within the scope of the alienated inheritance, unlike the regulation enshrined in paragraph (2) art. 1752 Civil Code, which states that, if the goods in question represent a significant value on the patrimonial side, if the seller does not expressly reserve these goods, he is indebted to pay their price at the time of sale.

For these reasons, we consider that the name „*Family Memories*" would have been more appropriate and more telling, while also giving coherence to the logic of the legislator, who, moreover, used this indicative name in art. 1141 of the Civil Code[14], this article considering the protection of the assets with affective value in favor of the heirs, being thus evaded from the inheritance division[15].

Therefore, we consider as at least criticizable the marginal name for which the legislator opted in art. 1752 Civil Code At the same time, we note that, although they indicate the same category of goods, in relation to those contained in art. 1141, the provisions of art. 1752 restrict their scope, although, as we have shown, both legal texts aim, in fact, for certain goods of significant affective value to be preserved by the heirs.

[14] This is art. 1141 of Chapter III *(Family Memories)*, Title IV *(Transmission and Division of Legacy)*, Book IV *(On Legacy and Liberalities)*.

[15] Thus, by law, only the rules governing voluntary division apply to these assets, and in situations where these rules are impossible to apply, the assets representing family memories remain in a state of undividedness, in the interest of the family being preserved either to one or more heirs or in a place agreed by them.

At the same time, we mention that among the goods referred to in Article 1752 Civil Code, there are objects such as family documents or portraits, decorations or other such goods, provided that they do not have a significant patrimonial value, but only an affective one for the seller. These goods are presumed not to be included in the sold inheritance, because they would be useless to the buyer, but have a special significance for the seller, testifying to the history of his family. As stated, with regard to the scope of goods contained in para. (2) art. 1141 of the Civil Code, this is an extensive one, thus including correspondence carried by family members, decorations, family archives, collector's weapons, family portraits, documents, as well as any other goods with increased moral significance for that family.[16] On the other hand, the legislature, in our opinion, has not treated with sufficient meticulousness the problem of the lack of patrimonial value of family memories, although in practice, situations may arise that raise sensitive issues. Thus, without counting the patrimonial value of family assets, they cannot form the object of a judicial division. But if, for example, we are dealing with a sculpture of the bust of the deceased, made by a famous sculptor, a high patrimonial value is also involved in the discussion and, even in such a hypothesis, these goods are only subject to amicable sharing.

At the same time, by using the phrase „*other such goods"* in art. 1752 Civil Code, we believe that the legislator took into account that among the family goods there are included, although not under express mention, for example, the archives belonging to it.

We also mention that if the seller has the quality of legatee, although he is not a member *of his family*, he will not be able to reserve the family property.[17]

But is it fair that a family portrait of significant pecuniary value, if not expressly reserved by the heir, should be subject to sale by the heir, but not to judicial sharing? In case of absence of an agreement between the joint heirs, being in a state of indivision, how can a sale of the asset be made, according to those established by art. 1752 Civil Code, by a joint heir ? In this context, correlating the aforementioned provisions with those of art. 1142 Civil Code, we are confident to state that the latter provisions limit the effectiveness of the regulation given by para. (2) art. 1752 Civil Code

Regarding the provision inserted by the legislator in art. 1752 Civil Code, in which the phrase *significant patrimonial value* is used, we note that the court will have the prerogative to decide, if in a certain case, the assets representing family memories meet this criterion of significant patrimonial value, and under these conditions their price will be handed over to the buyer on the date of alienation, thus no longer being incidental the presumption of being kept by the heir-seller.

On the other hand, we must also pay attention to those disposed by art. 1753 Civil Code, by this text of the law being established that the heir-dealer, who did not reserve the right over the assets representing family memories, which also present a significant value from a pecuniary point of view, owes their price, in relation to the date of alienation. We emphasize, in this respect, that the price is appreciated in relation to the moment of alienation, and not that of the opening of the inheritance, as we might be tempted to consider. Therefore, these assets remain with the heir-seller, even if they have significant

[16] Fr. Deak, L. Mihai, R. Popescu, *op. cit*., p. 220; in the same sense, D. Chirică, Treaty of Civil Law, Successions and Liberalities, C.H. Beck Publishing House, Bucharest, 2014*,* pp. 11 – 12 See also C. Munteanu, On Family Memories and Graves, in the Romanian Revue of Private Law, no. 2/2009, pp. 53-65.

[17] B. Florea, Variety…, *op. cit.,* p. 120.

patrimonial value and have not been reserved, the alienator for consideration of the inheritance owing their price to the acquirer.[18]

In conclusion, we consider that it is necessary, first of all, to change the *indicative name*, because, as we have argued, we consider it more appropriate for the marginal title to take the form of art. 1141 of the Civil Code, namely, the assets that constitute family memories. In practical matters, the scope and the legal regime applicable to those goods require a change, since, in my view, only in the case of goods which have sentimental value but no pecuniary value, it should be possible for the division to take place in an amicable manner, the heirs having in such cases the right to keep the goods in question. However, we do not consider it justified to refer in this respect to goods that have both sentimental and patrimonial value, considering them appropriate to form the object of a judicial division and sale, except for those reserved by the alienating heir.

As regards the extinguishment of the right to reserve family property with significant patrimonial value, it, having the nature of a potestative right, shall be extinguished at the latest at the time when the obligations contained in the deed of alienation of the inheritance reach maturity.

For these reasons, although we appreciate the option of the legislator to regulate the issue of goods that constitute family memories, we remain slightly reluctant as to the practical purpose of the provisions in question, therefore considering that there is a need for more clarity in the invoked legal texts, as well as the amendment of these provisions, in the above-mentioned sense, in the form *of the above-mentioned proposals for law*.

5. Advertising formalities

The succession asset of the alienated inheritance can be composed both of real estate rights, these assets being subject to registration in the Land Book, as well as of movable property, in their case requiring registration in the Electronic Archive of Real Movable Guarantees (AEGRM), currently the **National Register of Movable Advertising (RNPM)[19].** We remind, on this occasion, that the object of regulation of land law is the social relations regarding the lands that take place between individuals – natural persons and legal persons of private law, between legal persons of public law, as well as between legal persons of public law and individuals.[20]

Thus, although, as I have pointed out, the sale does not concern single assets, but, as the case may be, a universality or a fraction of it, it is necessary that the real estate contained in the succession asset be determined in accordance with the specific data of the land book,

[18] B. Patrascu, I. Genoiu, Some issues of interest in connection with the sale of the inheritance, in Legal Studies and Research, Year 5 (61), No. 4 October – December 2016, p. 517. The article is available in electronic format *at* http://www.rscj.ro/SCJ-4-2016.pdf (accessed on 28.03.2023).

[19] Law no. 297 of December 3, 2018 on the National Register of Movable Advertising and for the repeal of Government Ordinance no. 89/2000 on certain measures for the authorization of operators and making entries in the Electronic Archive for Security Interests in Movable Property, republished in the Official Gazette no. 1184/7 December 2020, with subsequent additions and amendments. It constitutes a national electronic system of public interest, structured on persons and goods, to record the priority in case of forced execution and to publicize the legal acts and operations provided by law, being the legal system of movable advertising for movable mortgages, trusts, specific notices, securitized receivables and mortgage bonds.

[20] O. Puie, The Legal Status of Land. Cadastre and Real Estate Advertising on Land, Juridical Universe Publishing House, Bucharest, 2014, p. 12.

according to art. 29 of Law no. 7/1996 of the cadastre and of the real estate advertising[21], so that the contract of sale of the inheritance can be registered in the Land Registry. We remind you that prior to the registration of the sale contract, it is necessary to register in the Land Registry the certificate of inheritance, issued according to the law of the alienating heir. Subsequent to this stage, the registration of the sales contract shall be performed, in order to operate the *principle of relativity of the registration*.

At the same time, we mention that, after the registration of the buyer in the Land Registry, any action in rectification of the Land Registry will no longer be possible after the expiry of a period of 3 years from the moment of acquisition, if it is an acquisition in good faith and for consideration and a period of 5 years, in the presence of a free acquisition. Please note that, in accordance with the provisions of art. 909 para. (4) of the Civil Code, the above-mentioned deadlines have the nature of limitation periods, which means that, in the event that a sale of the inheritance was concluded by a person who did not have the status of heir, the action in the rectification of the Land Book becomes inadmissible after the expiry of the deadlines provided by law, since, in such a situation, the rights of the buyer are strengthened, even if, in the present case, it concluded the contract with a non-proprietor.

In the case of immovable property, ownership is transferred, on the basis of the relevant Land Registry provisions, with a constitutive effect as of right of entry in the Land Registry.[22]

As regards movable property, the contract brings a translative effect of law, reinforced by the actual handing over of movable property forming the object of sale in the possession of the buyer. Thus, the provisions of art. 1753 Civil Code, in conjunction with the provisions of art. 937 Civil Code It is necessary to specify that, in the content of art. 937 para. (1) and (2) of the Civil Code, the legislator established two distinct ways of acquiring the right of movable property by a third party acquiring in good faith that concludes a translative deed of ownership for consideration, on a movable property with a non-dominus, respectively with a usurper. The two ways of acquiring the right to property as an effect of the possession of good faith regulated in art. in question differ, in relation to the role played by the will of the owner in terms of the removal of the good, being, on the one hand, the voluntary removal of the owner (by transmitting the good and losing the *corpus* element in a voluntary manner), and on the other hand, the involuntary removal (for example, in the case of theft, which occurred independently of the manifestation of the owner's will).[23]

At the same time, if, for example, we are dealing with a patent[24] or the right to a design[25] from the estate, it is necessary that the contract of sale of the inheritance be

[21] Law no. 7/1996 on cadastre and real estate advertising, published in the Official Gazette of Romania, Part I, no. 61 of March 26, 1996, with subsequent republishments, the last republication in the Official Gazette of Romania, Part I, no. 720 of September 24, 2015, corrected by the Official Gazette of Romania, Part I, no. 825 of November 5, 2015, as subsequently amended and supplemented.

[22] Please note that, by the provisions of art. 56 of the Implementing Law no. 71/2011, this constitutive effect was suspended.

[23] For more details on this topic, see Fl.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinator), New Civil Code. Commentary on Articles, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, pp. 1043-1049.

[24] Regarding the rights arising from the realization of an invention, see T. Bodoaşcă, Law of Intellectual Property, 2nd ed., revised, Juridical Universe Publishing House, Bucharest, 2012, pp. 231-270.

[25] Regarding the issue of intellectual property right over designs, see I. Macovei, Treaty of Intellectual Property Law, C.H. Beck Publishing House, Bucharest, 2010, pp. 236-280.

registered with the State Office for Inventions and Trademarks and the publication of the mentions required by law in the Official Bulletin of Industrial Property.

In conclusion, the person acquiring the inheritance cannot oppose to third parties the acquisition of other rights contained in the inheritance unless he has fulfilled the formalities required by law to make the acquisition of each of these rights opposable.[26]

At the same time, if the disposition of the inheritance took place free of charge, the rules regarding donations will apply, according to art. 1754 final thesis of the Civil Code. In the current legal framework established by the legislator, the donation institution has its regulation in art. 1011-1033 of the Civil Code, the rules being incidental also in the field of sale of the inheritance free of charge.

6. Brief conclusions

The sales varieties try to provide an efficient and coherent response to situations that concern atypical sales, with particular elements in relation to the classic sales contract, which, although it has an extremely high and undeniable utility, also has some limitations. This is how these varieties enter the scene, from which the *sale of the inheritance* is part of the painting. This institution, also in the optics of the old legislator, currently regulated in *art. 1747-1754* of the Civil Code, is presented as a contract through which the transfer of a succession right is made for consideration, the moment of conclusion of the contract being mandatory after the opening of the succession left *by the cujus*. Of course, as with any civil contract, the legislator has established both *substantive* and *formal* conditions, imposing, in this respect, the conclusion of the contract *in authentic form*, under the sanction of absolute nullity.

With regard to the *parties* to the contract of sale of succession rights, we emphasize that the seller must be a universal or universal title successor, legal heir or universal legatee or universal title, the assumption that the seller of the succession rights is the private legatee being totally excluded, while the buyer may be represented by a third party or even a joint heir, provided that he has the capacity required by law to acquire rights for consideration.

The legal regime of the *assets constituting family memories* represents, from our point of view, another issue of interest, which is worthy of an increased interest, and there are, in our opinion, some shortcomings in the current regulation of the Civil Code, by its regulation the legislator aiming to confer protection of the assets with affective value in favor of the heirs, being thus evaded from the succession division.

At the same time, the *advertising formalities* applicable to this variety of sale constitute an important part of the composition of this institution, since, as we have shown, the succession asset of the alienated inheritance can include both real estate and movable property, requiring compliance with the advertising rules applicable to each category of goods.

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THE ACTUALITY OF AUTONOMOUS GUARANTEES IN INTERNATIONAL TRADE

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Abstract

Autonomous guarantees are an essential condition in the conduct of international trade. The codifications of commercial customs are contained in the C.C.I Publications from Paris starting with1978 (the oil year).

Currently, the Romanian Civil Code 2011 regulates autonomous guarantees in a modern form, which are ways of guaranteeing the execution of obligations.

Keywords: *Autonomous guarantees; The Publications of the Paris International Chamber of Commerce; Romanian Civil Code-2011; Legal nature of autonomous guarantees; Bank guarantee.*

1. History and evolution of the autonomous guarantees

At all times credit insurance has been the concern of the main players on the trade and business scene.

Creditors wanted permanent real assurance regarding the honour of the obligation, which they could achieve through commercial usages or through the regulation of the existing positive law.

Lex mercatoria represented, for a long time, the seat of the matter for autonomous guarantees[1], that is, that sum of conventional customs valid in the practice of international trade, prior to their codification in normative form.

Therefore, autonomous guarantees appeared in international commercial practices, being motivated by the high degree of uncertainty regarding the execution by the creditor of a guarantee offered by the debtor.

These difficulties resulted from the fact that the execution of the classic guarantee (real or personal guarantees) was put under the sign of uncertainty by the existing regulations in the debtor's legal system (real guarantees are usually subject to the law of the place where the good is located, so the law of the debtor).

In their efforts to protect themselves against the risks of default, creditors tried to obtain collaterals that were no longer governed by the debtor's law.

In a first phase, the debtor was required to create an account (a sum of money) at a bank in the creditor's country, to which the creditor had normal access. The solution was not at all favourable to the debtor because he had substantial amounts blocked in the creditor's bank.

In the next stage, this requirement was replaced by a contract concluded between the debtor and the bank, whereby the bank assumed the payment obligation for the benefit of the

creditor, the payment being made from its own liquid assets. In this way, the risk passed from the creditor to the bank.

The first attempts to codify commercial customs were made within the International Chamber of Commerce in Paris in 1978 (the oil shock) by adopting the Publication No. 325, which referred to „contractual guarantees", favourable to debtors. These rules contained in Publication no. 325 had only the role of a simple recommendation, so that the commercial usages continued to have a customary character.

Later, in 1980, the Publication no. 458 entitled „guarantees on demand" was developed which, although it included provisions more favourable to creditors, did not have the impact they wanted. The main reason for the non-application of Publication no. 458 was the fact that most of the operations involved powerful banks under the jurisdiction of the USA, followers of the „pending letter of credit".

It is about the existing differences between the European legal system that regulated the autonomous guarantee starting from the pattern of personal guarantee (suretyship), and the American system that preferred a more pragmatic way, developing the concept of „pending letter of credit", which essentially means, the independence of the obligation assumed by the bank in favour of the beneficiary.

In the elaboration and development of the concept of „pending letter of credit", it all started from the reality of the American law that required personal guarantees. But „because many North American banks could not issue personal guarantees, and in order to circumvent this prohibition they built the hybrid legal figure of „pending acreditio" as a specific letter of credit, alongside the „commercial letter of credit".[2]

Around this subject some theorists have expressed their opinion that „the European independent guarantee is the functional equivalent of the American pending letter of credit" [3], and the French doctrine[4] „recognizes the identity of purposes between the continental independent guarantee and the pending letter of credit, which justifies a common doctrinal treatment".

Currently, an international convention draft is in the works, which is developed by the UN Trade Law Commission, which wants to bring together the European independent guarantees and the „pending letter of guarantee" of American origin.

The International Chamber of Commerce in Paris has reviewed, as Publication 758/2010, the rules regarding the guarantees on demand.

In our domestic law, it has been proven that, also in this area of autonomous guarantees, the practice was one step ahead of the legislator.

The first unitary regulation of autonomous guarantees can be found in Chapter III, alongside Chapter II Suretyship, from the Personal Guarantees title, in which the legislator consecrates their belonging to the category of personal guarantees. Discussed as „modern forms of guaranteeing bank obligations" [5] autonomous guarantees represent a new category of personal obligations.

The economic realities of the period we are going through, as well as international commercial practices in the context of an extensive globalization, imposed on the legislator of the New Civil Code a sufficient regulation which is capable of harmonizing with the European and international law.

This significant evolution of our legal system inevitably leads to an increase in the confidence of professionals, who are otherwise connected to the speed of commercial flow,

especially in import-export economic activities. We specify that the new regulation considers all letters of guarantee issued after October 1, 2011.

We mention the fact that the legal regulation (art. 2321 Civil Code) is generally supplementary; nothing stops the parties from derogating from the established rules and from „subjecting their guarantee to newer rules (for example Publication of the International Chamber of Commerce no. 758)"[6].

We clarify the imperative nature of the provision contained in art. 2321 paragraph (3), final sentence „the issuer cannot oppose to the beneficiary the exceptions based on the pre-existing obligation relationship to the commitment assumed by the letter of guarantee and cannot be held to pay in case of abuse or obvious fraud".

The legislator has held that, in the event of abuse or flagrant fraud that is repressed by our legal system, the issuer cannot be held to pay the guilty beneficiary.

2. Clarifications

The current regulation of autonomous guarantees was motivated, among other things, by the state's interest in this field in which they expanded, becoming the rule. The state is directly interested in how the crediting mechanism works, because we would hardly imagine a situation where the state would not need independent guarantees for public works in favour of contracting authorities.

A first clarification refers to the fact that autonomous guarantees have a precise legal regime, as they are forms of guaranteeing the execution of patrimonial obligations (art. 149 paragraph (1) LPA „the fulfilment of a patrimonial obligation can be guaranteed by the debtor or by a third party by setting up a personal guarantee or a real guarantee"). Moreover, they represent the type of guarantee in which the guarantor is liable with his entire patrimonial asset.

The second clarification refers to the fact that „autonomous guarantees will be subject, to the extent of compatibility, to the general legal provisions in the suretyship matter, seen as the closest contract" [7].

The third clarification concerns the general rule of interpretation of contracts which „allows the application by analogy of the rules applicable to a contract and in this matter, only to the extent that the legal regulation of the letter of guarantee is insufficient to determine a complete legal regime" [8].

Another clarification is required in the situation where certain special laws refer to personal guarantees, these references also including autonomous guarantees. In addition, the provisions of art. 120 of GEO no. 99/2006 mention: „personal guarantee contracts concluded by a credit institution constitute enforceable titles". Consequently, an autonomous guarantee issued by a credit institution will be enforceable. Another example is provided in art. 52 paragraph (1) of Law no. 595/2009 „credit contracts concluded by a non-banking financial institution, as well as personal guarantees affected by the guarantee of the creditor, constitute enforceable titles".

3. About the bank guarantee

From the beginning we will specify that the term bank guarantee is no longer used, it being replaced by the banking concept of „escrow account".

Used in the banking world for a long time, the bank guarantee was confused with the pledge with dispossession or the real surety.

The real surety designates „the contract by which a third party guarantees the obligation of the principal debtor, but not by personally committing themselves, but by mortgaging their real estate or pledging a movable asset belonging to them, up to the value of the principal obligation" [9]. The obligation of the surety is limited to the value of the property constituted as a guarantee.

In the case of a bank guarantee, the debtor deposited an amount of money in an account as a guarantee, and the bank issued to the creditor a document from which it resulted the co-signing of the guarantee deposit and by which it was obliged to release the recorded amount to the creditor, at their request, in the procedure of enforcement of the guarantee.

From this point of view, the Decision no. 756/2011 of the High Court of Cassation and Justice, Commercial Section is instructive: „the letter of bank guarantee the bank security are different categories of personal guarantees, the bank guarantee being a guarantee independent of the validity and the effects of the contract from which the fundamental report originates, unlike the bank security, which is an accessory guarantee" [10].

4. About the legal nature of autonomous guarantees

In the Civil Code, autonomous guarantees are not expressly regulated as contracts, in contrast to suretyship which is defined in art. 2280 Civil Code as a contract.

The main difference between the two legal institutions is the independent obligation nature of the autonomous guarantee. The autonomous guarantee is issued in the context of a pre-existing contract, it does not have an accessory character to the main obligation, and the issuer (bank or credit institution) is not part of the legal relationship between the ordering party and the beneficiary. The bank, as the issuer of the autonomous guarantee, is not interested in the content and clauses contained in the existing relationship between the ordering party and the beneficiary (mandatory relationship).

Typically, there is a link between the (issuing) bank and the ordering party. The ordering party is a client of the bank, where they have accounts, which gives them the right to order, to request the issuance of the autonomous guarantee, respectively the letter of guarantee for the benefit of a third party.

The guarantee obligation arises only after the letter is issued, i.e. after the bank accepts instructions from the authorizing officer. It is therefore about the obligatory relationship between the issuer (the bank) and the ordering party, which must be considered separately from the relationship between the issuer and the beneficiary.

The bank (the issuer) accepts to assume a pecuniary obligation (the obligation to pay a sum of money at the simple request of the beneficiary), because this is what the authorizing officer requires „no credit institution can accept such an obligation without obtaining in return an equivalent amount" [11]

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TO BE OR NOT TO BE ARBITRATION AGREEMENT IN THE INSURANCE CONTRACT

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Abstract

The transposition into domestic legislation of Directive 97/2016 of the European Parliament and of the Council on the distribution of insurance, through Law no. 236/2018 established that „Disputes between customers and insurance distributors can be resolved through alternative dispute resolution procedures."

Keywords: *Rule 18ASF, arbitration agreement, arbitration clause, alternative dispute resolution, recognition of arbitration decisions*

In recent years, this question has created major controversies regarding the way to resolve disputes between insurance distributors and people entitled to insurance compensation, whether they are insured, contractors, beneficiaries, injured persons or their representatives, without reaching a position unanimously accepted by those involved in one form or another in these disputes.

The two relevant directions regarding this controversy are based either exclusively on the provisions contained in the Civil Code regarding arbitration, or on the complex analysis of national and European legislation on insurance, in conjunction with the provisions of the Civil Code.

Why these two major approaches?

On the one hand, because the settlement of a dispute through arbitration requires, according to the provisions of the Romanian Civil Code, as an essential condition, the existence of the arbitration agreement included in the contract concluded between the parties, in this case in the insurance contract.

Thus, the supporters of this opinion believe that disputes in the field of insurance can only be resolved through the courts, not through arbitration as an alternative method of resolving disputes, since the insurance contract does not contain an arbitration agreement, in some opinions this is even prohibited by law.

On the other hand, Law 236/2018, which transposes into domestic legislation Directive 97/2016 of the European Parliament and of the Council on the distribution of insurance, provides in article 4 point 27 that „Disputes between customers and insurance distributors can be resolved by alternative dispute resolution procedures."

These legal provisions, regarding alternative dispute resolution methods, represent a succinct transposition of Article 15 of Directive 97/2016 of the European Parliament, which contains in paragraph (1) provisions regarding extrajudicial dispute resolution, as follows:

„(1) Member States shall ensure that appropriate, effective, impartial and independent out-of-court complaint and compensation procedures are established, in accordance with the relevant Union legislation and domestic law, for the resolution of disputes between

consumers and insurance distributors regarding the rights and obligations arising from this directive, resorting to the existing authorities, as appropriate.

Member States shall ensure that such proceedings are applicable to the insurance distributors against whom the proceedings are initiated and that those distributors fall under the jurisdiction of the relevant body."

The provisions of art.7 are also invoked in support of this opinion of Rule no. 18/2017 of the ASF, regarding the amicable settlement of disputes between companies, brokers and insured, contractors, beneficiaries, injured persons or their representatives, according to which, „at the request of one of the parties, alternative methods are used for the resolution of disputes, provided by the legal provisions in force, respectively in the case of natural persons the entity for alternative resolution of disputes SAL-FIN, and in the case of legal persons mediation or arbitration", specifying that the amicable settlement or through alternative settlement methods of disputes do not limit the right of the parties to address the competent courts.

Related to these provisions, the supporters of the second opinion believe that insurance disputes can be resolved, in addition to the courts, through alternative dispute resolution systems, i.e. through mediation, arbitration or conciliation.

At the European level, they are established as alternative methods of dispute resolution

- mediation
- reconciliation
- ombudsmen
- arbitration
- complaints settlement commissions.

Related to the provisions of EU Directive no. 97/2017 and to the provisions of domestic law, the alternative dispute resolution procedures, provided for by art. 4 point. 27 of Law 236/2018, applicable to insurance disputes, are represented by conciliation, mediation, arbitration or petition settlement committees.

As regards the settlement of disputes by way of arbitration, a procedure provided for in domestic law by Book IV of the Code of Civil Procedure, this presupposes, as an essential condition, the existence of an arbitration agreement concluded by the litigating parties, either in the form of a compromise clause, entered in the contract between the parties is established in a separate agreement, either in the form of compromise, or may result from the written understanding of the parties, made before the arbitral court.

Regardless of the way in which the arbitration agreement is concluded, it must, under penalty of nullity, be in written form, the condition also being met in the situation where the settlement of the dispute through arbitration results from the exchange of correspondence between the litigating parties, regardless of its form or from the exchange of procedural documents.

Thus, the arbitration agreement constitutes the central element of arbitration.

The material competence of the courts being of public order, has only one exception, namely the transfer of the respective litigation from the state justice carried out by the judiciary, to the competence of the private justice, legally organized in the form of private arbitration – institutionalized or *ad hoc*.

As a central element – *the arbitration agreement* is the one that triggers the exception of material jurisdiction, by passing the dispute from the judicial power to arbitration, being a jurisdictional alternative.

The rigor regarding the written form of the arbitration agreement, as was explained above, is explainable, because the arbitration agreement is **an act of disposition.**

According to art. 2 para. 1 of the Convention for the recognition and enforcement of foreign arbitral awards from New-York, to which Romania acceded by Decree 186/1968, each of the contracting states recognizes the written convention by which the parties oblige themselves to submit to arbitration all disputes or certain disputes that – have arisen or may arise between them regarding a determined legal relationship, contractual or non-contractual, regarding a problem likely to be regulated by means of arbitration.

According to the definition, as provided by art. 1166 of the Civil Code, the contract represents *the agreement of will between two or more persons with the intention to establish, modify or extinguish a legal relationship.*

In order to determine to what extent insurance disputes can be settled through arbitration, taking into account the provisions of Law 236/2018, the ASF18/2017 rule and other legal provisions, it is necessary to analyze the legal characteristics of the insurance contract. Thus, by its legal nature, the insurance contract is a consensual, onerous, random, synalagmatic contract, with successive execution and **adhesion**.

According to the provisions of art. 1175 of the Civil Code, „*The contract is of adhesion when its essential clauses are imposed or drafted by one of the parties, for this or as a result of its instructions, the other party only having to accept them as such".*

In this case, the essential clauses of the insurance contract are imposed/drafted either by the insurer in the case of optional insurances, or by the law or ASF Rules in the case of mandatory insurances, the contractor not having the possibility to decide on its essential clauses.

Moreover, in the case of contracts where the insurance indemnity is to be granted to a damaged third party or a beneficiary of the insurance policy, these persons are not related to the agreement of will between the insured and the insurer, not being a party to the insurance contract.

Through the adhesion nature of the insurance contract, as explained above, the law gives the insurer **a dominant position** in relation to the persons entitled to the insurance indemnity, whether they are the insured, contractors, beneficiaries, injured persons or their representatives, the essential clauses of the insurance contract being established exclusively by insurers or by laws or **special rules.**

As regards the clauses regarding the resolution of disputes, contained in optional insurance contracts concluded on the territory of Romania, they exclusively provide for the right of consumers to address the courts for the resolution of any disputes arising from the contract.

With regard to mandatory contracts, it is provided as an alternative method exclusively for conciliation within the SAL-Fin entity, a procedure to which only the insured beneficiary or the injured third party **natural person can appeal,** not the legal persons entitled to the insurance compensation.

Regarding the opinion according to which the introduction of an arbitration agreement in the insurance contract would be prohibited by law, we specify that this point of view has no legal support, art. 542 expressly and limitingly indicating the scope of disputes that cannot be resolved through arbitration, without referring to disputes arising from insurance contracts.

Thus, in accordance with the provisions of art. 10 of the Code of Civil Procedure, „Laws that derogate from a general provision, that restrict the exercise of some civil rights or that provide for civil sanctions are applied only in the cases expressly and limitedly provided by law „„ resulting thus, according to the principles of interpretation of legal norms, the introduction of an arbitration agreement in the insurance contract is not prohibited by law.

According to the provisions of art. 3 point.1 of Directive 13/1993 of the Council of the European Communities „(1) *A contractual clause that was not individually negotiated is considered* ***to be abusive*** *if, contrary to the requirement of good faith, it causes a significant imbalance between the rights and the obligations of the parties arising from the contract, to the detriment of the consumer."*

Returning to the content of art. 4 point 27 of Law 236/2018, which refers to the possibility of settling disputes between insurance distributors and the persons entitled to the insurance indemnity by alternative means, it is noted that the elimination of these ways of settling disputes and the imposition exclusive of their settlement only through the courts or of conciliation **exclusively for natural persons,** represents an abuse of a dominant position on the part of the insurers,

In order to eliminate this abuse and to give legal effect to the provisions of EU Directive 97/2016, as it was transposed into domestic legislation, ASF issued Norm no. 18/2017, by which it confers on insured persons, contractors, beneficiaries, injured persons or their representatives, **the right of option** on how they understand disputes arising from insurance contracts to be settled, **without limiting** this right in any way.

In this sense, art. 7 point 3 of Norm no. 18/2017 of the ASF provides:

„(3) In order to amicably resolve disputes between companies, brokers and insured persons, contractors, beneficiaries, injured persons or their representatives, at the request of one of the parties, alternative dispute resolution methods, provided by the legal provisions in force, shall be used, respectively in the case of natural persons the SAL-FIN alternative dispute resolution entity, and in the case of legal persons mediation or arbitration; amicable settlement or through alternative dispute resolution methods does not limit the right of the parties to address the competent courts."

In order to give effectiveness to the right of option on the method of settling disputes, the same norm provides in art. 7 pt.4.let.d, the obligation of insurers and insurance brokers to participate in alternative dispute resolution procedures, as follows:

„(4) The executive management of the companies and brokers and the coordinator of the group for analysis and resolution of petitions ensure:

.....

d) ensuring participation in alternative dispute resolution procedures, such as conciliation through SAL-FIN, mediation or arbitration, as the case may be,

when requested by the consumer."

Regarding the obligation to accept the form of dispute resolution chosen by the insured persons, contractors, beneficiaries, injured persons or their representatives, natural or legal persons, Norm no. 18/2017 of the FSA provides in art. 8 and the sanctions that can be applied in case of non-compliance with these obligations, as follows:

„(1) Non-compliance with the provisions of this rule is sanctioned by the ASF under the conditions and according to the provisions of art. 163 of Law no. 237/2015 or of Art. 8 and 39 of Law no. 32/2000."

Analyzing the content of Rule 18/2017 of the FSA, it is thus noted that this is a special rule that derogates from the general rule regarding the essential condition of the existence of the arbitration agreement regarding disputes between companies, brokers and insured, contractors, beneficiaries, injured persons or their representatives, natural or legal persons, under two aspects:

A first aspect is the possibility of settling a dispute stemming from the insurance contract through arbitration, even in the absence of an arbitration agreement included in the insurance contract, when requested by the legal entity consumer or his representative.

Another aspect of the derogatory character from the general rule is the possibility of an option regarding the choice of the procedure for settling disputes arising from the insurance contract, the alternative way of settling the dispute through the arbitration method without limiting the right of the parties to address the competent courts.

With regard to the mandatory nature of Norm no. 18/2017 of the ASF, we specify that this normative act has all the characteristics of a special law, whose provisions – according to the „ *specialia generalibus derogant" principle* – have priority over the general law (in this case, the provisions of art..548 Civil Code), as follows:

According to art. 2 paragraph 5 of GEO no. 93/2012 regarding the establishment, organization and operation of the ASF, it is „the competent authority at the national level for the application and monitoring of compliance with the normative acts of direct applicability issued by the European Union in the fields provided for in the field of insurance, such as the transposition and implementation into national legislation of these provisions issued at the level of the Council of the European Union, the Parliament of the European Union, the European Commission, as well as other European authorities".

In accordance with art. 6 paragraph 6 of Law no. 237/2015 on the authorization and supervision of insurance and reinsurance activity, the ASF has a mandate at the level of the European Union and, in the exercise of its powers, ensures the convergence of supervisory practices and instruments in application of the law, the regulations adopted in the field of insurance at the national level and at the level of the member states.

According to art. 8 paragraph 16 of Law no. 237/2015, the ASF is given competence in the exercise of its duties, in the sense of issuing individual documents or, if necessary, notifying the courts.

In addition, the same authority also has within its competence the establishment of appropriate solutions regarding the major difficulties in applying European legislation, in order to facilitate the supervision of insurance/reinsurance activities, which means that it establishes and issues normative acts for which it collaborates together with supervisors from other member states and the European Commission.

In the light of these legal texts, the ASF issued Norm 18/2017, a norm that really represents a materialization in Romanian legislation of Directive 2013/11/EU of the European Parliament and of the Council of 21.05.2013 regarding the alternative resolution of disputes in the matter of consumption and amending Regulation (EC) no. 2006/2004 and Directive 2009/22/EC.

According to the jurisprudence of the Court of Justice of the European Union, EU states cannot justify non-compliance with directives by the existence of provisions or practices from the internal legal system. If the addressees do not transpose the objectives of the directives into national law, the CJEU entitles EU citizens to benefit directly from their provisions.

If a state does not include the provisions of a directive in its internal legislation, it is guilty of violating the provisions of Article 5 of the Treaty of the European Community, according to which „the member states shall take the necessary measures, general or particular, to ensure the fulfillment of the obligations resulting from this treaty or from the action of the Community institutions. They will facilitate the Community's task. They will refrain from any measure that could endanger the achievement of the objectives of this treaty."

Here is that, in the light of the legal texts enunciated, the ASF responds to its role and competence and issues Norm 18/2017, through which it succeeds in harmonizing the Romanian legal system with the law of the European Union in the area of alternative resolution of consumer disputes.

From the corroboration of the two stated texts (art. 7 para. 3 of Norm 18/2017 and art. 7 para. 4 letter d of the same Norm) it obviously follows that the consent of the other party is not necessary to follow the alternative way of settlement of the dispute through institutionalized arbitration, the only necessary condition for establishing the jurisdiction of the arbitral court being the formulation of the arbitration request by the legal entity consumer.

Thus, in an opinion supported by more and more followers, the lack of an arbitration agreement contained in the insurance contract, in its form provided by art. 548 of the Code of Civil Procedure, is complied with by the provisions of ASF Rule no. 18/2017, specifically by art.7 paragraph 3 and art.7 paragraph 4 letter d of this Norm, issued for the purpose of defending the rights of the insured and promoting the stability of the insurance activity in Romania by the Council of the Financial Supervisory Authority, in accordance with the legislation of the European Union.

And yet, the question remains on everyone's attention.

To be or not to be an arbitration agreement in the insurance contract.

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LEGAL TERMINATION OF THE EMPLOYMENT CONTRACT IN THE EVENT OF THE CESSATION OF EXISTENCE OF ONE OF THE PARTIES. CAN EMPLOYEES BE TRANSFERRED TO THE HEIR OF THE EMPLOYER, A NATURAL PERSON?

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Abstract

The legal effects and consequences produced by the death of a part in the employment relationship and the verification of the possibility of transfering employees to the heir or heirs of the natural person employer in the event of the termination of the existence of the employer.

Keywords; *Individual employment contract, Termination, Inheritance, Succession, Employer, Employee, Work Relation.*

1. Introduction of the notion of work and labor law

According to the etymology, the term work comes from the old Slavic language, namely monka and has several meanings.[1]

A first meaning is the one by which it is understood the carrying out of a physical or intellectual activity directed towards a certain goal; activity by which man modifies and adapts things in nature to satisfy his needs.

A second, secondary meaning is workplace, namely having a job, a service, a job, but also the set of workers with the meaning of a collective workforce.

The term can also mean pain, torment or physical or moral suffering, even torture.

Work is an action that is usually considered essential to the survival of the species. According to the legal provisions, work is represented by the provision of a service in exchange for remuneration or any other form of reward, often requested by the provider. It can be perceived as a free, creative action, but also as an obligation.[2]

Labor relations represent the social bonds that are formed between people in the process of providing work. Man is the only being who consciously makes an effort to obtain benefits.[3]

Labor law is the branch of law that includes the legal norms applicable to individual and collective labor relations, which arise between employers and employees during the performance of work.

Labor law has also been defined[2] as that part of the legal system made up of set of legal norms that regulate individual and collective labor relations, the attributions of trade or labor

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union and employer organizations, labor conflicts and the control of the application of labor legislation.

In order to establish the object of labor law regulation, we must analyze the two situations in which the work is performed:

Work within legal employment relationships

Work outside legal employment relationships.

In this work, we only consider work within legal relationships that are regulated by law, norms, decree-law, etc.

The general legislation that regulates labor relations in Romania is Law no. 53/2003, also known as the Labor Code, which through article 1 regulates general employment relationships as well as employment relationships provided for by special laws, but only to the extent that they do not provide derogatory provisions.

The holders of the legal employment relationship are the employer and the employee. Article 14 defines as an employer any natural or legal person who can hire labor on the basis of an individual labor contract, and in exchange for the labor offered by the employee a remuneration will be paid. Although the aforementioned code does not use the terminology of employee, it provides for the term employee, which can be found explained in the provisions of article 10 by which the quality of employee is attributed to any natural person obliged by an individual employment contract to perform work and under the authority of an employer in exchange for a salary. The definition of the term employee is introduced in a very flexible context because the quality of employee can also arise from an administrative act of appointment, for example that of employees in the public domain. Thus, the definition provided by the labor code of the employee is supplemented with the definition of employee given by the law of social dialogue, which also includes the more general relationship of the employment relationship, not only that of the employment contract.

At the level of the European Union, the notion used is that of worker, which was also taken over by the Romanian legislator within the new social dialogue law that was promulgated by Decree no. 1687 of December 19, 2022 for the promulgation of the Law on social dialogue, a term that includes the notion of employee but also that of employee.

In article 1 of the social dialogue law (Law 267/2022) which is closely related to the legislation of the Labor Code, the definitions of the terms can be found and we focus our attention on the notion of employee/worker which is defined as a natural person, part of a employment contract or a service report, as well as the one who performs work for and under the authority of an employer. Thus, we can observe that unlike the definition of employee provided by the labor code, the notion used within the European Union and the social dialogue law is much more comprehensive and in accordance with the social evolution of labor relations.

As I mentioned, the notion of worker is much more comprehensive and by correlating the legislation to this notion, a protection of the rights of both those who act under the auspices of the employment contract and other workers who carry out their activity under the autonomy of other contracts will be provided.

Although we will focus on the institution of the individual employment contract, it should be noted that employment relationships do not only arise from an employment contract, they can also arise from other contracts or conventions, e.g. the mandate contract, the collaboration contract, but also of the employment relationships resulting from

administrative acts of the authorities or public institutions, this list is exemplary and not limiting.

1.1 Termination of the employment contract according to the Labor Code

The problem under this article has its roots in the definition given by the labor code that defines the individual employment contract.

Thus, the individual employment contract is the contract by which a natural person, becoming an employee, employee or worker, undertakes to perform work for and under the authority of an employer, this being a legal or natural person, in exchange for remuneration.

According to the legislation in force, article 55[4] of the Labor Code regulates the three ways in which the employment agreement between the parties, known as an individual employment contract, can be terminated.

Thus, the three ways in which employment relationships are terminated are:

a) by law;

b) following the agreement of the parties, on the date agreed by them;

c) as a result of the unilateral will of one of the parties, in the cases and under the limited conditions provided by law.

It should be stated that the provision from art. 55 lit. a) differs from the rest of the regulations from the same article by the lack of manifestation of will by the parties. Thus, at lit. b) it is necessary for the parties to reach a mutual agreement on the termination of the contract or on the factual or legal situation that can produce this effect, a consensus of the parties' manifestation of will, and for the application of the provision from letter c) it is necessary to show the will of only one party to the contract to terminate the contract, the most common examples in practice being resignation and dismissal. It can be extrapolated and specified that art. 42 paragraph 1 of the Constitution enshrines the prohibition of forced labor, and letter c) of article 55 of the Labor Code has its basis for reasoning in the constitutional provision.

The legal termination of the individual contract is not determined by a manifestation of one's own will in the sense of the initiative to terminate the employment relationship, but takes place exclusively as a result of the intervention of an event or a factual situation, expressly and limitedly provided by law, which no longer allows the continuation of the employment relationship.[5] It is a termination by virtue of the law – ope legis – as a result of the will of the legislator. It intervenes only in the expressly provided situations; the contract is terminated at the very moment of the termination cause, without the intervention of a contractual party being necessary.[6]

From the perspective of the legal employment relationship, between a natural person as an employee and a legal entity as an employer, the death of the administrator or the founder of the legal entity has no immediate effects regarding the employment relationship with the employee, because he has direct employment relations with the legal entity/entity and not with the administrator or founder of the legal entity. According to art. 193 of the Civil Code, the legal entity participates in its own name in the civil circuit and is liable with its own assets for the obligations assumed, which shows us that the contractual relations that take

[4] Labor Code, (Law no. 53/2003) Republished.

[5] Marius-Cătălin Preduț, Commented Labor Code, New organization of work, 2022, Universul Juridic, pp. 253-256.

[6] Alexandru Țiclea, Romanian Review of Labor Law, Bucharest, 2018

place in the case of such a situation are not with the persons who exercise or occupy the functions within the entity but with the entity itself. The employee does not have a contractual employment relationship with the director/administrative bodies of the employer or who signs the individual employment contract, he has a contractual relationship with the employing entity that manifests its intention through the director/management bodies of the legal entity. The administrative bodies of the entity are not parties to the individual employment contract, they are simple agents of the legal entity, thus according to the principle of the binding force of the contract, the agreement has the force of law between the contracting parties, i.e. between the entity and the employee. We consider that the management/administrative bodies or the persons entrusted with the fulfillment of certain duties of the entity are not parties to the employment contract, they are only mandated to carry out the mandate offered by the legal entity.

Specifically, the employee, employee or worker has a direct contractual relationship with the legal entity, which in turn has another legal relationship with the person who manages it or founded it.

Although the labor code does not provide for the employment relationships of civil servants, the provisions of the code are applied in addition to Law 188/1999 (Statute of civil servants) which has a general character even if there are also sectoral laws that concern certain categories of civil servants. The consensus is also Decision 14/2018[7] of the High Court of Cassation and Justice, which enshrined the principle according to which the employment relationships of civil servants are employment relationships similar to those employed on the basis of an individual employment contract or other conventions.

1.2 Legal termination of the individual employment contract

The cases of legal termination of the individual employment contract are expressly and limitedly provided by law.

In the following we will use the structure provided by the Labor Code and we will list the situations that cause the activation of the provisions regarding the legal termination of the individual employment contract provided for in article 56, as follows:

a) on the date of the death of the employee or the employer as a natural person, as well as in the case of the dissolution of the employer as a legal person, from the date on which the employer ceased to exist according to the law;

b) on the date of the irrevocable court decision declaring the death of the employee or the natural person employer;

c) on the date of cumulative fulfillment of the standard age conditions and the minimum contribution period for retirement or, exceptionally, for the employee who opts in writing for the continuation of the individual employment contract, within 30 calendar days prior to the fulfillment of the conditions of the standard age and the minimum contribution period for retirement, at the age of 65; on the date of notification of the pension decision in the case of third-degree disability pension, partial early pension, early pension, old-age pension with reduction of the standard retirement age; on the date of communication of the medical decision on work capacity in case of disability of the first or second degree;

[7] DECISION No. 14 of February 18, 2008 Published in the Official Gazette, Part I no. 853 of 18/12/2008

d) as a result of establishing the absolute nullity of the individual employment contract, from the date on which the nullity was established by the agreement of the parties or by a final court decision;

e) as a result of the admission of the request for reinstatement in the position held by an employee of a person fired illegally or for unfounded reasons, from the date of the court decision on reinstatement becoming final;

f) as a result of being sentenced to the execution of a custodial sentence, from the date of finality of the court decision;

g) from the date of withdrawal by the competent authorities or bodies of the approvals, authorizations or attestations necessary for the exercise of the profession;

h) as a result of the ban on the exercise of a profession or a function, as a safety measure or complementary punishment, from the date of finality of the court decision by which the ban was ordered;

i) on the expiry date of the individual employment contract concluded for a fixed period;

j) withdrawing the consent of parents or legal representatives, in the case of employees aged between 15 and 16 years.[4]

These are the situations in which the individual employment contract is terminated by the effect of the law, as a result of the production of a legal act or fact. The cases in which the individual employment contract terminates by law intervene in the development of employment relations independently of the will of any of the contracting parties.[8]

In all these situations, the individual employment contract terminates ope legis (with the power and effect of the law), when a cause (a legal act or fact) expressly established by the legal rules intervenes, due to which the execution of the respective contract becomes permanently impossible.

The text, therefore, regulates the situations of termination of the individual employment contract, which excludes the will of the parties; it intervenes directly, through the force of law. The phrase „terminates by right" from art. 56 para. (1) „must be interpreted in the sense that the employment relationship with the employer is terminated pursuant to the law, without regard to the option of the employee".[9]

It should be noted that due to the lack of the need to show will regarding the legal termination of the employment relationship, the parties to an individual employment contract do not have to follow a predefined procedure or require a notification or an exchange of documents. Termination occurs automatically from the date of death without the need for any further action.

The parties cannot derogate from the provisions of article 56 by modifying the effects produced on the individual employment contract by the death of one of the parties through different or contrary stipulations to the legal ones included in the agreement. The rules governing the situations that lead to the legal termination of the employment contract have an imperative character and are exhaustively listed and will apply concretely to the situations provided for by the legal provision, not being allowed to apply by analogy in other

[8] Alexandru Athanasiu, Luminița Dima, Magda Volonciu, Oana Cazan, Labor Code, Commentary on articles, Vol.I.Articles 1-107, 2007, C.H.Beck, pp. 64-83,

[9] C.Ap. Bucharest, s. a VIIa civ. and for cases regarding labor conflicts and social insurance, dec. Civ. No. 1080/R/2014, in RRDM no. 7/2014, pp. 142-143

situations that are not the subject of the enumeration within the legal provision that is the subject of the debate.

In the situation where the parties, through clauses agreed and included in the employment contract, agree to give a different meaning to the legal provisions, they do not apply, they become null and void by the effect of the law which will have immediate applicability and regardless of what the parties stipulate through clauses derogating from the letter and spirit of the law.

Thus, it should be noted that if the parties agree through the contractual stipulations that other situations or events not provided for by law may result in the termination of the individual employment contract, this effect of termination of the employment relationship does not constitute a legal termination of the contract, being in law, a termination of the contract with the agreement of the parties even if the parties expressed their agreement before the event, the determining fact of the termination of the contract, occurred.

From the above it is concluded that the legal termination of employment contracts occurs only in the limited and specific cases provided by law and does not apply to similar situations or other situations regardless of whether they are provided for in the contract or not, except for those provided by law according to the example below. If other events not foreseen by the law are present through contractual clauses with termination effect, the contractual provisions produce a termination of the contract at the moment of the occurrence of the event provided for in the clauses and become clauses for the termination of the employment contract by the agreement of the parties regardless of when that agreement of will was manifested.

Apart from the provisions found in the Labor Code, there are also other normative acts whose activation/application produce the same sanction, i.e. legal termination of the contract, as we are going to list.

A distinct situation from the termination of the individual employment contract by law, not foreseen by the labor code, is in article 39 of Law no. 448/2006.[10] The employee, respectively the personal assistant terminates any employment relationship with his employer in the event of the death of the disabled person, i.e. the employer. Without the need for a thorough analysis it is easy to understand why this situation has found this remedy.

The solution provided by art. 56 paragraph (1), letter a) was also found in the case of employment relationships of civil servants, respectively article 98, paragraph (1) of the Statute of Civil Servants, a provision that was taken over in the Administrative Code.

„The existing employment relationship terminates by right:

On the date of the civil servant's death;”[11]

1.3 Legal termination of the service relationship of civil servants

In the Government's Emergency Ordinance on the Administrative Code[12], the methods and means of terminating the service relationship can be found in Section 3a.

[10] The Law concerning the protection of the disabled person 448/2006 (republished in M.Of. no. 1 of January 3, 2008) with subsequent amendments and additions.

[11] Law no. 188/1999 regarding the Statute of civil servants (republished in the Official Gazette, Part I, no. 365 of May 29, 2007)

[12] Government Emergency Ordinance no. 57/2019 regarding the Administrative Code

Article 516 provides that the termination of the service relations of civil servants is done by administrative act of the person who has the legal competence to appoint in the mirror according to the legislative symmetry applicable to the work relations.

Termination of the employment relationship of the civil servant can be by law, by the agreement of the parties provided that it is recorded in writing, this condition being additional to the similar provisions of the Labor Code, by release from public office, by dismissal as well as by unilateral denunciation by the civil servant through the act of resignation.

Art. 517 provides for the cases in which the employment relationship of the civil servant is legally terminated, among which in paragraph (1) letter a) it is found that on the date of the civil servant's death, his work report ceases by law, a provision similar to that of the Labor Code.

Since the grim event of the death by the employer of the civil servant is not possible, we will refer to the situation of the reorganization of the public authority or institution related to the situation of the worker.

It should be noted that unlike the provisions of the labor code, in accordance with the Administrative Code, the termination of employment relations in the case of reorganization or if the public authority or institution has ceased its activity do not produce legal effects. In our case, the employment relationship of the civil servant does not end by the legal effect of the termination of the activity on the part of the public ``employer'', they being released from office by administrative acts.

According to paragraph (1) of art. 518 of GEO 57/2019 regarding the Administrative Code at letter a) it is provided that in the situation where the public authority or institution has ceased its activity in accordance with the law, the person who has the legal competence to appoint to the public office will order the release from the public office only if its attributions or personnel have not been taken over by another authority, by the newly formed institution or the superior public institution.

It is noted that the situation of the institution's dissolution is not provided for by article 517, which lists the situations in which the termination of the service relationship occurs by law, but also that article 519 provides for the procedure for release from public office by administrative act.

It is easy to deduce that some standardization of the legislation was desired in the framework of labor relations, regardless of whether they are carried out in the private or public environment, as well as the benefits of this legislative correlation. However, similar to the case discussed above, it is natural to terminate service relationships in the event of the public official's disappearance as a result of death, considering the personal nature of these relationships, as well as the fact that the exercise of public office is not possible through the effects of the mandate contract, respectively through representative.[13]

1.4 Legal termination of the individual employment contract caused by the death of a party

Taking into account the limitations imposed by the theme of the paper, we will distribute a large part of our attention on the legal termination of the individual employment contract on the date of the death of the natural person employer.

[13] Alexandru Țiclea, Treaty regarding the termination of employment relations, 2018, Universul Juridic, pp. 64-87

In the doctrine[14], the opinion was formed that the legal termination of the individual employment contract operates in the express and limiting cases provided by the law, regardless of the will of the parties, especially that of the employee, on the date of the death of the employee or the employer, a natural person, as well as in the case of dissolution to the legal person employer, from the date on which the employer ceased to exist according to the law.

Starting from the situation presented as well as the regulations mentioned above, the question arises whether the heirs of the deceased employer can take over the employees before their contractual relationship, more specifically the individual employment contract, is legally terminated pursuant to Article 56, paragraph 1, letter a) or in the situation after the termination of the employer's existence.

The most common doctrinal opinion that is supported by the legislative provisions and the reasoning according to which the individual employment contract is a contract intuitu personae, the work cannot be performed by another person than that employee, and the contractual rights and obligations cannot be passed on to the heirs[xiv], unless the law provides otherwise.

It must be specified that a contract has the character of intuitu personae when the respective contract is concluded in consideration of a certain person, at the conclusion of which the determining element was the quality, skills, or professional training of a person. Due to this feature, the obligations assumed by the person in question cannot be fulfilled through the representative and are non-transferable.

Undoubtedly, we can state that the effect of the intuitu personae character of the individual employment contract is the employment procedure itself. Specifically, reference is made to the test of the interview, the competition or the exam that produce the direct characteristics of the intuitu personae character of the employment agreement.

Although I have referred to the employment procedure to which the employees submit, exemplifying the effect of the intuitu personae contract, it should be noted that these „specifications" also produce effects regarding the employer, even more so when he is a natural person and not a legal person of self-standing.

An eloquent example is the case of the employee who, most of the time, chooses the employer when he submits his application and expresses his interest in concluding an employment agreement in consideration of qualities, skills or other considerations acquired or held by the employer, an aspect that confirms the character of intuitu personae of the contract and on the employer.

As a result, the work performed by the employee/employee will no longer be able to be performed at another employer based on the individual employment contract that had as employer the natural person who has ceased to exist, respectively deleted in the case of legal entity employers. The termination of the employment relationship ends by law also when the employee/employee dies, as it is not possible to continue the activity by the successors of the deceased.

In 2006, the legislator through the Government's Emergency Ordinance no. 55 of August 30, 2006 ordered the amendment of letter a) of article 56 of the labor code, which provided:

„a) on the date of death of the employee or the employer, a natural person;"

[14] Marius Catalin Preduț, Labor Code commented, 2016, Universul Juridic, pp. 107-124, 143-153.

with the new provision that had:

„a) on the date of the employee's death;".[15]

The provisions of GEO 55/2006 also provided for the abrogation of letter c) of the same article which ordered that the individual employment contract terminates by law also in the case of the dissolution of the employer of the legal entity, from the date on which the legal entity ceases to exist. Thus, through the abrogation of this provision, the dissolution of the legal entity had no effect on employment contracts, which will be terminated through the other legal mechanisms provided by law.

It was considered in the specialized doctrine[16] that the legislator had in mind the removal from the cases of legal termination of the individual employment contract of the death of the employer as a natural person through the effects of Government Emergency Ordinance no. 55 of 2006, which indicates the legislator's intention that in this case the obligations of the employer based on the individual employment contract should be passed on to the heirs. It was considered that the said change was exclusively for the benefit of the employee, or the employee, who was protected against the loss of his job in the event of the death of the employer, a legal entity, but maintaining the possibility of terminating the employment contract at any time through the effect of resignation.

Thus, considering the change in legislation since that time, it can be considered that it was possible to transfer employees to the heirs of the deceased employer if his death does not result in a legal termination of employment contracts, even more I consider that the transfer of employees was not a faculty on which the heirs had, but a legal transfer through the effect of the quality of heirs of the deceased employer.

The Labor Code went through a new stage of changes produced by Law no. 40 of March 31, 2011, article 56 taking the following form in force at the time of writing this article.

It was considered that the amendment and completion of article 56 cut, in a manner unfavorable to the employee, the doctrine that empowered the employee to be taken over by the heirs of the deceased through the lack of legal termination of the contract in the event of the death of the employer.

However, I consider that the perception according to which the heirs can be held liable for the unpaid rights by the employer of the natural person remain applicable according to the doctrine before the completion of art. 56, but no other rights can derive from that contract and the procedure for denouncing the employment contracts of the deceased employer by the heir is not justified. There was also the issue of vacant inheritance or a late succession debate, as employees were not protected by the mechanisms that the doctrine considered favorable to employees.

For practical reasons, there are no legal impediments for an heir of the natural person employer to be unable to rehire the employee under the same conditions as those of the legally terminated contract.

We must mention that the provisions of article 56, paragraph 1, letter a) do NOT activate their provisions, namely the legal termination of the work agreement and in the case of the declaration of death by court decision provided for by article 49 of the Civil Code. In

[15] EMERGENCY ORDINANCE no. 55 of August 30, 2006 for the amendment and completion of Law no. 53/2003 – Labor Code

[16] Alexandru Țiclea, Labor Code, Related Legislation, Comments. Jurisprudence, 2020, Universul Juridic, pp. 245-284.

the situations presented above, the effect of legal termination of the individual employment contract is produced, but this is not done according to art. 56, paragraph (1), letter a), but the termination of the contract is ordered per letter b).

1.5 The effects of legal termination of the individual employment contract caused by the death of a party

After further research and identification of the legal provisions applicable to the factual situation of the termination of the existence of the employer, the natural person or the employee, it remains to discuss the effects that occur as a result of the application of the aforementioned legal provisions.

The general provisions applicable to inheritance are provided in Book IV of the Civil Code, which constitutes the seat of the matter applicable to civil relations in the case of deceased natural persons.

But according to the principle of the application of the general law in all cases, less in the situations where a derogatory or special regime is established, according to which the special law is applied with priority in relation to the provisions of the general law, the Labor Code by the nature of the provisions applicable to labor relations constitutes a special regime and separate from the civil code, the latter applies in situations not foreseen by the labor code or other special provisions.

Thus, we consider that in the event of the employee's death, the provisions of article 167 of the labor code are applied with priority, which stipulates that „salary rights due until the date of death are paid, in order, to the surviving spouse, the deceased's adult children or parents" the deceased. In addition to and supporting the principle of applying the special law with priority, art. 167 paragraph 2, the final sentence provides that if „there is none of" the previously listed categories, the salaries will be paid" to other heirs, under the conditions of common law".

We can consider that unpaid salary rights until the date of death are not part of the deceased's estate in the initial phase, as the rules for distributing the inheritance according to the rules of legal inheritance are not applicable. In the first stage, the direct distribution of rights will be attempted directly to the surviving spouse, the deceased's adult children or the parents in this order that transcends any succession vocations based on the civil code. In extenso, in agreement with the reasoning presented above, the provisions of art. 167 also applies despite testamentary provisions to remove the surviving spouse, children or parents from the succession, even the prohibitions provided by the institution of indignity in the civil code.

In the situation where the employer, a natural person, has died and the due salary rights have not been paid until the date of death, in the absence of special regulations, the provisions of the civil code regarding inheritance liabilities and those of the civil procedure code apply to bring action against the heirs.

Similar to the text of the labor code, we also find the provisions of art. 426 of the administrative code which regulates the rights of the family members of the civil servant in the event of his death.

At para. 1 it is ordered that if the family members have the right to a survivor's pension, they receive for a period of 3 months the equivalent of the basic salary from the last month of activity of the civil servant, with the possibility of extending the term for several months if the survivor's decision does not is issued by the authorities within 3 months of the death.

2. Conclusions

Summarizing the reasoning and argumentation presented, I conclude that employees cannot transfer themselves to the heir of the employer, a natural person who has ceased to exist, but also the impossibility of providing services by the successors of the employee to the employer under the same individual employment contract.

The opinion by which it would be considered that the successor/successors of the deceased employer could take over the employees or that the successors of the employee perform work for the same employer based on the individual employment contract concluded between the employer and the employee who subsequently ceased to exist, comes into conflict directly with the legal provisions as well as the principles of law.

The prospect of employees being taken over by the employer's heirs is hindered by the effect of the legal termination of the individual employment contract that has the status of active until the date of the employer's death, the rehiring of his employees under a new employment contract remains valid as an option.

We are of the opinion that the abrogated provisions that we mentioned above, which allowed the death of the employer not to terminate employment relationships, would in practice produce many harmful effects and would be a real source of polemics, problems and non-unitary practices. I believe that it should be considered who would take over all the obligations of the deceased employer that were born in the past as well as the fulfillment of the obligations that are to become due and the elimination of the character intuitu personae and the effects arising from this character of the contracts.

From the perspective of civil law, the argument of the successor could be used by which his attributions of responsibility arising from the relationship with the employees will be taken over, but this argument is limited by a possible succession accepted with celerity by the heirs. But in the case of a vacant inheritance or with several heirs, a lot of problems arise in identifying the holder of obligations and rights in relation to employees.

In conclusion, although there were certain legal provisions that omitted the regulation of the termination of the legal employment relationship in the event of the death of a party to the contract, we believe that the current provisions are much clearer, complete and in accordance with the general principles of law and a legislative solution diametrically the opposite will not be optimal or without criticism.

THE SUCCESSION OF STATES ACCORDING TO TREATIES ADOPTED AT THE INTERNATIONAL LEVEL

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Abstract

At the moment when transformations occur in the existence of states consisting in the substitution of a new sovereignty for the existing one, the question arose whether and under what conditions the existing rights and obligations are taken over by the new sovereignty.[1]

The classical doctrine of international law (Grotius, Puffendorf, Vattel) framed this issue in the institution of civil law succession, mechanically transposed from private law to public international law. In contemporary international law, it has clearly emerged that what continues to be conventionally called the succession of states does not represent a successional transmission, but a substitution of sovereignties.

This doctrinal clarification of indisputable main value that modifies the solutions reached by the practice of the states, solutions that are generally divided into two large categories, depending on the concrete circumstances of the succession and the field in which it is produced: the rights and obligations of the predecessor state are not automatically transferred to the successor state, the former being the only one entitled to decide which of them it understands to take over after making a tabula rasa (clean slate); the transmission of such rights and obligations by applying the principle of continuity.

It is also noted that the theory of the succession of states was considered as the most controversial part of international law, within which few rules of international law with a supplementary character were formed, the solutions being found in the regulations of the agreements applicable from case to case. However, the problem of codifying this matter became a priority for the international community, finalized with the conclusion in 1978 of the Vienna Convention on the Succession of States to Treaties and the elaboration of a project – in first reading – regarding the succession of States in matters other than treaties and, mainly, to state goods and debts. In the context of the succession of states, the issue of whether its rules also apply to membership in international organizations was also examined. The solutions given by practice converge in the sense that the successor state (the one that replaced another state) does not automatically acquire the membership status of the predecessor state (the state it replaced).

Keywords: *international legal personality, the state, international organizations, the succession of states to treaties, diplomacy, dismemberment, the status of the individual, other international entities.*

I. Introductory notions

Succession represents that legal institution of international law through which, under the conditions 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.[2]

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[1] Grigore Geamănu – Public International Law, Didactic and Pedagogical Publishing House, Bucharest, vol. I, 1981, page 317.

Also, the succession constitutes an area of development of cooperation with the equal participation of all the states of the world based on the fundamental principles of contemporary international law.

The rules regarding the succession of states have also been renewed in contemporary international law, as a result of decolonization and their alignment with the fundamental principles of this law, which configure it in a new way.[3]

Serving to consolidate and develop peaceful relations between states, international treaties are subject to the same objective and subjective factors that determine international relations, in general, in a certain historical period. Far from being a static phenomenon, the international community has always been the site of profound agitations, turmoil seconded by frequent changes in its structure. New states appear, others disappear, essential changes occur in the internal structure of different states.

In the system of international law, the problems raised by the changes mentioned above are dealt with in the chapter on the succession of states. Within this subject, the changes resulting from the disappearance of states, the formation of new states and cases of the transfer of territories from one state to another are examined.[4]

The rules of international law in the matter of treaty succession are aimed at regulating the issue of whether and to what extent a successor state becomes a party to the treaties that bound the predecessor state.

In international law, the possibility of carrying out a transmission of rights and obligations is admitted, only under the conditions of a manifestation of will of the sovereign state, as well as the possibility of refusing the succession or disengaging from onerous obligations.

In this sense, the 1969 Vienna Convention on the Law of Treaties states that the succession of new states is exercised on the basis of their free consent regarding the acceptance or rejection of pre-existing treaties, under the conditions of respect for the sovereignty of each state over the natural wealth of its territory.

In the practice of the states, there are numerous cases when provisions regarding the succession to the treaties were included in the agreements between the predecessor state and the successor state (devolution agreements) or in unilateral declarations of the successor states. Also, some international treaties have included clauses that provide for the participation of a successor state.

Regarding treaties providing for the participation of a successor state, art. 10 of the Convention essentially provided for the need for a subsequent manifestation of the successor state's consent, removing also in such cases the direct, automatic effects of the respective treaties, which, as res inter alios acta, are not eo ipso opposable to the successor state.[5]

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[2] Grigore Geamănu, Public International Law. Treatise, vol. I, Didactic and Pedagogical Publishing House, Bucharest, 1982, page 28.

[3] Grigore Geamănu, Public International Law, op. cit., page 318.

[4] Ludovic Takacs – The „pact sunt servanda" principle and the succession of new states in contemporary international law, in „Principles of public international law", Bucharest, 1968, page 45.

[5] Grigore Geamănu – op. cit., vol. I, 1981, page 320.

II. Cases of succession to treaties

II.1. Succession regarding part of the territory

In the case when a part of the territory of a state or in the case when a territory that was not under the sovereignty of a predecessor state are incorporated into the territory of another state, the so-called rule of territorial variability of treaty limits is applied.

According to this rule, used constantly in the practice of the states and appropriated by art. 15 of the 1978 Convention, the treaties of the predecessor state cease to apply to that territory from the moment the succession takes place; from that moment on the territory in question applies the treaties of the successor state.

The rule includes the following exceptions:

– there would be incompatibility between the application of the treaty and its object and purpose (eg treaties with a limited field of application);

– the application of the treaty to that territory would radically change the conditions for its execution.

II.2. Succession in case of unification of states

Regarding the succession in the case of the unification of states, we retain only the federation and the merger as methods of the union, or according to the terminology of the Vienna Convention of 1978, the unification of states.

In the case of the federation, the doctrine argued that the old treaties concluded by the member states, prior to joining the federation, will expire to the extent that the constitution will not recognize their capacity to conclude treaties. Treaties will not be transferred eo ipso to the federal state, as a new subject of international law.

The practice was generally based on the principle of the continuity of the treaties, the treaties concluded by the states that became members of the federation continuing their existence, either for the federal state as a whole, or for the territories of the component states.

In light of this practice, the 1978 Convention includes a text applicable to any form of unification (art. 31). The text provides for the continuity, in principle, of treaties (unless the successor state and the other parties to the treaty agree otherwise, if the application of the treaty by this state would be incompatible with the object and purpose of the treaty or would radically change the conditions of its execution), as well as their application only to the part of the territory of the successor state in respect of which they were in force. Treaties apply to the entire territory of the successor state in the following cases: if the successor state notifies the acceptance of multilateral treaties of a general nature (except for the case where such application would be incompatible with the object and purpose of the treaty); if the successor state agrees to this effect with the other parties to a multilateral treaty with limited participation or with the other party for a bilateral treaty.

Regarding the multilateral treaties, the membership of the unified Germany was continued, through a Note addressed by R.F.G. It should be noted that in the Union Treaty there is a provision (art. 12 par. 3) according to which, if unified Germany would like to join international organizations or other multilateral treaties to which only the GDR was also part of R.F.G. it was not, this had to be agreed with the respective co-contractors and with the European Communities, only to the extent, of course, that the powers of the latter would be affected. The only case, in this sense, was that of the INTERCOMS organization, of which

the former D.R.G. and to which unified Germany became a party by a Declaration which was accepted by all other parties.[6]

Another recent case of the union of states is the merger of the two Yemeni states, carried out in accordance with the agreement concluded on May 22, 1990. In this case, neither of the two states continued their previous legal personality, but they merged to give birth to a new entity, a successor state of the two predecessor states, with a new name – the republic of Yemen, with the capital in Sanaa. The originality of the Yemeni unification lies in the fact that it was not conceived as a „continuation" of the legal personality of one or the other of the two states, but as a genuine fusion of them.[7]

II.3. Succession in case of separation of a part or several parts of a state, forming one or more states (secession or dismemberment)

In the case of „secession" for the formation of a new independent state, the tabula rasa rule was constantly applied in international practice, not only regarding the colonies (which were liberated until the Second World War), but also, for example, of Ireland. In the case of dismemberment, if in the practice before the Second World War there was no uniformity, after the war the adopted solutions were registered along the lines of an ipso jure succession to the treaties of the state that dismembered, of the states resulting from the dismemberment.

The Vienna Convention (art. 34) retained, however, in both situations as a supplementary rule the continuity of treaties, providing that in the case of dismemberment, the treaties of the predecessor state remain in force in each successor state, and in the case of secession, for that single state successor. At the same time, the exceptions encountered in other articles were also provided here, namely: if the parties do not agree otherwise and if the application of the treaty would be incompatible with the object and purpose of the treaty, or would radically change its conditions of execution. Of course, the text does not apply to newly independent states, but only to actual secessions, and the exceptions provided give it a flexible character.

The 1978 Convention also regulates the situation of the state that exists after the separation of a part of its territory, providing that the treaties to which it was a party before the separation remain in force, with the following exceptions: if it was agreed otherwise; if the treaty related only to the state that separated from the predecessor state; if the application of the treaty would be incompatible with its object and purpose or would radically change the conditions for its execution.[8]

The recent aspects[9] related to this case of succession can be mentioned in relation to the formation of new sovereign states by separating them from the former federal states, as is the case with Yugoslavia, the former Soviet Federation and Czechoslovakia.

As far as the case of Yugoslavia is concerned, the states that emerged following the breakup of the Yugoslav federal state, namely: Slovenia, Croatia, Bosnia-Herzegovina and the Former Yugoslav Republic of Macedonia, have expressed, within the U.N.U. as well as of other international bodies, the desire to ensure the continuity of old international commitments. They gave declarations of „acceptance of the obligations provided for in the

[6] Victor Duculescu – The right of state succession. International treaties and problems of state succession, Veritas Publishing House, Târgu-Mureş, 2000, page 275.

[7] *Idem*, page 277.

[8] Grigore Geamănu – op. cit., vol. I, 1981, page 322.

[9] Victor Duculescu – op. cit., Veritas Publishing House, 2000, page 278-290.

U.N. Charter." The legal method that ensured the continued participation of the republics in a series of multilateral international treaties, adopted by the majority of the republics that were part of the former Yugoslavia, was that of succession.

III. The historical evolution of the concepts regarding the succession of new states to international treaties

„**Novus populus sui juris nascitur**", this principle formulated by H. Grotius has withstood the ages reflecting a historical phenomenon determined by the objective laws of the development of human society. The emergence of an independent and sovereign state is the result of a historical process of maturation of social forces within the respective human collective, fruit of the people's struggle against all those factors that stand in the way of this ascension. If in the past this process of formation of new states was considered not of interest to international law, being considered as a matter of internal law, today, when the principle of self-determination is included among the basic principles of international law, the obligation of states is not only not to opposes this historical process, but also stimulates it, favors it in the sense of realizing the right of every people to decide its own destiny.[10]

Regarding the method of terminating the treaty, we believe that this should be done by way of notification addressed to the co-contracting status or by way of declaration, in the case of multilateral treaties.[11]

III.1. Legal consecration of the tabula rasa principle by the Vienna Convention of 1978

The Vienna Convention on the succession of states in the field of treaties made an important contribution to the affirmation of a unified concept regarding the succession of new states, to the right of young independent states to adopt a critical attitude towards old international commitments in cases of decolonization, consecrating, unequivocally, the principle of tabula rasa as a rule of international law, applicable to situations arising as a result of the decolonization process and at the same time recognizing certain correctives, likely to guarantee the stability of international relations and the continuity of legal commitments in cases accepted by the parties.

Thus, according to art. 16 „a newly independent state is not obliged to maintain a treaty or to become a party to a treaty only for the simple fact that at the date of the succession of states, the treaty was in force with regard to the territory to which that succession relates". Art. 17 provides that the new state can, through a notification of succession, establish its capacity as a party to a multilateral treaty in force regarding the territory subject to the succession, exempting from this rule: treaties whose application would be incompatible with the object and purpose of the treaty; those whose application would radically change the conditions for their execution; treaties from the nature of which it follows that the consent of the other parties is also necessary (restricted multilateral treaties).

Regarding bilateral treaties, the newly independent states generally maintained a series of cooperation agreements. For this purpose, they had to obtain the consent of the other party, having a third-party position towards the new state.

[10] Ludovic Takacs – op. cit., page 47.
[11] Victor Duculescu – op. cit., Veritas Publishing House, page 131.

At the same time, a series of important provisions contained in the general part of the convention, having a direct connection with the application as a general rule of the tabula rasa principle in the matter of the succession of new states to international treaties, are worth noting.

Thus, there is a provision to the effect that the obligations or rights of a predecessor state do not become the obligations or rights of the successor state only by the simple fact that the predecessor state and the successor state have concluded a „devolution" agreement between them which stipulates that these obligations are transferred to the state successor.

Likewise, neither the unilateral declarations of the successor states regarding the maintenance of treaties in force after the acquisition of independence by themselves constitute a sufficient legal basis for considering the production of a succession of the new state to the respective treaties. Even if a treaty provides that, in the event of a succession of states, a successor state will automatically be considered a party to the treaty, such a provision will not produce its effects unless the successor state expressly accepts, in writing, to be considered a party to the treaty in question.

These important provisions obviously represent dispositions likely to strengthen the value of the tabula rasa principle, to elevate it to the rank of a general norm, applicable to cases of succession of states to international treaties. The importance of this principle is also reinforced by the fact that according to the provisions of the Convention, its provisions apply not only to succession cases that will occur in the future, but also to present succession cases, in the event that the respective states make declarations in the sense that they understand to apply the provisions of this legal instrument to their own succession.

And in the case of the newly independent states, it will not be possible to affect a border established by a treaty or the obligations and rights established by a treaty that relate to the regime of a border. Such a provision was inserted precisely to ensure compliance with the principle of territorial integrity, to prevent the questioning of established borders, a situation likely to create disruptions and difficulties in relations between states.[12]

IV. The significance of the relative effect of the treaties in matters of succession of states

The analysis of the issue of the succession of states in relation to third states requires, in advance, some clarifications in relation to the very meaning that must be given to the notion of „third state" and implicitly the relative effect of the treaties.

Recognized in the doctrine of international law is the principle according to which treaties produce effects only towards the parties, not being able to create obligations or rights in the charge or favor of some states to third states (in relation to which the treaties are res inter alios acta). The justification of this rule is related both to the autonomy of will of the parties, as well as to the principles of sovereignty, equality and independence of the states, based on which third states cannot be imposed rights or obligations to which they have not consented[13]

The principle of the relative effect of treaties is expressly enshrined in art. 34 of the 1969 Vienna Convention on the Law of Treaties, according to which: „a treaty does not create obligations or rights for a third state without its consent".

[12] *Idem*, page 138.

[13] Marțian Niciu – Public international law, Servo Sat Publishing House, Arad, 1999, page 45.

Succession to the treaty would be confused with accession, which constitutes a means available to any state to become a party to the treaty, as a consequence of its previous application on its territory, by virtue of the ratification or accession made by the former metropolis. It would not take into account precisely those elements that militate in support of ensuring the continuity of the obligations arising from the treaty.

We can conclude that even in this conception, in the case of legal relations regarding the succession of states, we cannot speak of the use of the rules of international law regarding the situation of third states in relation to international treaties.[14]

Numerous authors of international law have examined the issue of whether the subrogation of the new independent state in the rights and obligations of the former colonial power can, by this simple fact, continue to generate rights and obligations between the subrogated state and the partner. Various opinions have been expressed in this regard.

Thus, in the negative opinions, it is considered that the devolution agreements cannot oblige third states to accept a transfer of rights and obligations between them and the new state, whatever the situation might be between the predecessor state and the successor state, since the pacta tertiis rule nec nocent nec prosunt, as well as the fact that the mentioned agreements constitute res inter alios acta, combine to prevent a succession to treaties.

We consider[15] that all theories that see the acceptance of the continuity of treaties by third states as an application of the idea of novation attempt a mechanical and artificial transposition of this institution from civil law to international law, without taking into account the need to meet certain conditions. Thus, it is to be observed – following the line of practice – that both states do not always „expressly" modify their desire to continue the treaty, making a declaration to this effect. Many times, the intention to continue the treaty results from its continued execution itself, or from its tacit acceptance by one of the parties, which fundamentally contradicts the acceptance of novation in civil law.

Consequently, the opinion expressed regarding the presumption of novation of treaties that have not been repudiated within a convenient term does not seem acceptable to us because it departs from what is generally accepted under the definition of novation.

The tendency of the co-contracting states to maintain the previous treaties seems to us to be a particularly strong orientation of the practice, which reflects the concern for the stability and continuity of international legal relations.

V. The relationship between the „PACTA SUNT SERVANDA" and „REBUS SIC STANTIBUS" principles

If the observance of international treaties constitutes the indispensable condition of normal relations organized between states, this does not mean that the treaties have absolute validity, that they are immutable. International treaties are also subject to the same objective and subjective factors that determine international relations in general in a certain historical period.[16]

The need to respect the treaties must thus be correlated with the need to terminate them under fundamentally changed conditions compared to the moment of conclusion, through the application of the „rebus sic stantibus" clause. This clause was and is sometimes

[14] Victor Duculescu – op. cit., page 211.

[15] Victor Duculescu – op. cit., page 225.

[16] Ludovic Takacs – op. cit., page 42.

considered as a violation of the „pacta sunt servanda" principle, being qualified as dangerous and likely to threaten the sacred nature of the treaties.[17]

The problem that arises is to clarify the legal consequences of the transformations that took place in the structure of the international community, in the light of the principles and norms of international law, on the continued respect of the concluded treaties.[18]

The idea that international treaties must adapt to the legitimate interests of the parties and that the application of the „pacta sunt servanda" principle must not be taken to absurdity has a history equal to that of international relations. Due to the fact that the problem of the law of treaties did not acquire a universal solution until the Vienna Conference, the states invoked „rebus sic stantibus" of treaties of various nature. Thus, the states tried to annul unequal treaties (such as those stipulating capitulation regimes), in cases of succession of states to treaties occasioned by the dismemberment of some unions of states, in financial problems (to exonerate themselves from the payment of certain monetary debts), to put an end to alliance treaties or to suspend the application of treaties (on the occasion of the outbreak of wars of aggression).[19]

The issue is therefore related to the recognition of the need to agree the provisions of international treaties with the new changes in the parties' situation, changes not due to their will. Only in this way can treaties continue to serve the cause of good interstate collaboration. This recognition led in international law to the formulation of the clause „rebus sic stantibus" according to which, in certain circumstances, essential changes in the situation of the parties can be invoked unilaterally to end or suspend the effects of a treaty. In this sense, it is stated that the „rebus sic stantibus" rule can play the role of a „safety valve" in the law of treaties, going to mitigate the rigors of the „pacta sunt servanda" principle, completing it and making it applicable.

Until the Vienna Convention, most specialists always regarded „rebus sic stantibus" with reservations and although, in practice, there were certain examples of the termination of the effects of certain treaties as a result of a unilateral act, among them the prevailing current of opinion was that the repudiation of a treaty or the withdrawal of a party from the treaty without at least trying to obtain the agreement of the other party was inadmissible.

In some opinions it was stated that „rebus sic stantibus" would be necessary to apply to perpetual treaties on the grounds that along the way such treaties would become obsolete and that such a possibility could not be foreseen initially. We believe that even if international relations are in continuous movement and transformation, this dynamism of them does not determine the automatic change of the texts of the treaties or the rules of international law that regulate them. A change in the initial circumstances, no matter how fundamental we try to justify it, cannot justify the emergence of a legal vacuum in a certain field of general concern as a result of a unilateral act, nor lead to the paralysis of the course towards detente and international security. Therefore, if the parties find that a change of this nature has occurred, then they will agree to modify the treaty or replace it. In this sense, it appears to us to be correct the practice of states to insert compromise clauses – permissive or

[17] Marian C. Molea – The Law of International Treaties, Publishing House of the R.S.R. Academy, Bucharest, 1988, page 132.

[18] Adrian Năstase, Dumitra Popescu – The system of principles of international law, Academy Publishing House of the S.S.R., Bucharest, 1986, page 85.

[19] Petre I. Rusu – The fundamental change of circumstances in modern treaty law in „Romanian Review of International Studies", Bucharest, 1982, no. 3, page 163.

prohibitive – in treaties, as the case may be, regarding the procedure to be followed in the event of changes in the initial circumstances.

Regarding the „unequal" treaties, we consider that the appeal to „rebus sic stantibus" does not seem appropriate nor effective, because these treaties concluded in violation of the fundamental principles of international law, the rules of jus cogens are null and void ab initio as being in conflict with these rules.

Both in the doctrine and in the discussions of the Conference for the codification of the law of treaties in Vienna in 1969, it was emphasized that between the principles „pacta sunt servanda" and „rebus sic stantibus" there is no contradiction, and „rebus sic stantibus" should not be treated as an exception to the application of the „pacta sunt servanda" principle. Far from being opposed, they complement each other, being two autonomous and complementary principles of general international law.

By regulating the „rebus sic stantibus" rule in art. 62 of the Convention on the Law of Treaties, the existence of a rule that has the role of reconciling the requirements of stability of the law with those of the dynamism of international relations was thus consolidated.[20]

Thus, if in the classical sense by applying „rebus sic stantibus" to the treaties, they became void, in the regulation of the Convention in §1 of art. 62, this rule only authorizes a right to invoke the fundamental change of the initial circumstances, which means that the validity of the arguments must first be proven and then accepted.

The exceptional situations of §1 (a) and §1 (b) provide that the change must refer to the initially existing circumstances and be directly related to the extent of the remaining obligations to be performed. Those new changes invoked must be of an objective nature, and the hypothesis of their appearance was not originally provided for in the treaty, because if such a clause was inserted, obviously art. 62 no longer applies.

At the same time, it must be determined whether or not the circumstances initially affected by the change constituted an essential basis for the consent of the parties to be bound by the treaty. Therefore, a fact or a situation that determined the consent of the parties must have disappeared. It is basically a matter of interpretation.

We consider that with the entry into force of the Convention, art. 62 has acquired a subsidiary role due to the fact that day by day the states are convinced, a conviction based on the experience of history, that no major problem of interest to the international community has found its definitive solution through the application of „rebus sic stantibus". On the contrary, the political solution has always been imposed. But what is essential to the practice of negotiations is that they take place on the basis of the full equality of rights of the parties.[21]

CONCLUSIONS

In the present paper, I intended to make a transition in the matter of the succession of international treaties, in that the theory of the succession of states was considered to be the most controversial part of international law, within which few rules of international law of character were formed additionally, the solutions are found in the regulations of the agreements applicable from case to case.

[20] Dumitra Popescu, Adrian Năstase – op. cit., page 86.

[21] Petre I. Rusu – op. cit., in „Romanian Magazine of International Studies", Bucharest, page 172.

The treaty is considered to be the most important source of international law, being constituted as a written agreement concluded between subjects of public international law, with the aim of producing legal effects.

The issue of the succession of states was finalized in 1978 with the conclusion of the Vienna Treaty on the succession of states to treaties relating to the rights and obligations of states.

The main conception of the Vienna Treaty of 1969 regarding the rights of international treaties shows that the succession of new states is exercised on the basis of their free consent regarding the taking over or rejection of pre-existing treaties in the conditions of non-respect of the sovereignty of each state over the territorial wealth of each one.

Succession to treaties, in the case of merger and dismemberment, according to the provisions of the Vienna Convention on the Succession of States to Treaties, as a general rule, operates the continuity of treaties, except for the situation where other agreements have intervened between the parties or when the application of treaties would be incompatible with the purpose and their object or would radically alter the execution of its clauses. They operate only with respect to the territory for which they were concluded or the entire territory only with the consent of the successor state and following the understanding of the parties.[22]

In the case of transfer, the treaties concluded by the transferring state cease to have effect in the ceded territory, and the treaties concluded by the acquiring state begin to have effect in this territory. Treaties concluded with regard to the ceded territory, as a rule, retain their validity, the general rule being that political treaties cease, and technical ones are preserved.

A succession of states does not affect borders established by a treaty, as well as specific territorial regimes (art. 11 and 12 of the 1978 Convention).

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„THE FATE OF SUCCESSORS IN THE RIGHT TO LAND PROPERTY RESTITUTION AND COMPENSATION, AFTER THE ERA OF THE COMMUNIST REGIME, IN ROMANIAN LEGISLATION AND PRACTICE – CONTROVERSIAL ASPECTS –"

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Abstract

During the communist era, private property was abolished in Romania, and extensive expropriations took place without compensating the affected property owners. Following the overthrow of the communist regime, various laws were enacted to grant owners the right to reclaim their lost properties from the communist period. If restitution was not feasible, owners were entitled to compensation.

Keywords: *Reconstituirea dreptului de proprietate (Property Rights Restoration) Despăgubiri (Compensation)*

1. Title: Injustice of Law 18/1991 Regarding the Issuance of Property Title for the Determined Land Area in the Name of All Heirs

The process of property restitution can vary significantly from one country to another, depending on history, traditions, and the local legal system. Generally, after the fall of the communist regime in Eastern Europe, properties confiscated by the state or collectivized were returned to their owners or heirs. However, the procedures and legal requirements for obtaining restitution can be very different depending on the country and the type of property in question (e.g., agricultural land, residential properties, industrial buildings, etc.). In Romania, owners or heirs were required to submit an application to request the restitution of their property. The legislator conceived a similar format for applications regarding the restitution of property, signifying that just as owners „requested" to transfer land to the Agricultural Production Cooperative (CAP), now owners or heirs must submit an application to reclaim the land. The term „application" for landowners should be in quotation marks because collectivization was accompanied by a campaign of reprisals against peasants opposing the new order, and the request to give land to the collective was, in most cases, carried out forcibly, often at gunpoint.

In cases where the owner who applied for entry into the Agricultural Production Cooperative (CAP) is no longer alive, their heirs had to request the land from the authorities, and certain problems arose in this context.

During the interwar period and until the establishment of the communist regime in Romania, private ownership of agricultural land was widespread, and peasants mainly lived off the produce of their own land.

Thus, from a household with several children, some of them got married before the establishment of the CAP. They received dowries, donations, and a portion of the land from their parents to start their own lives.

After the establishment of the communist regime in 1949, agricultural lands were collectivized, meaning that all private properties were taken by the state and organized into agricultural cooperatives (CAPs), with peasants becoming mandatory members of these cooperatives. At the formation of the collective, parents were left with less land, contributing to the CAP a reduced area of land, subtracted by the size of the land given as dowry to other children.

Following the Revolution of 1989 and the fall of the communist regime, the process of restitution of confiscated or collectivized properties began. However, this has been a complicated process and is still not fully concluded.

Heirs request the restitution of property after 1990, not only those who were unmarried at the time of collectivization but all heirs. The law states that the property title is issued for the determined land area in the names of all heirs: Law on Land Fund No. 18/1991, republished in the Official Gazette, Part I, No. 1, dated January 5, 1998: „Art. 13 (3) The property title is issued for the determined land area in the names of all heirs, and they are to proceed according to common law."

The property title is issued for the land area that the author contributed to the CAP. Those married at the time of collectivization request, in their own name, a potential restitution of property rights, as they, in turn, had contributed land to the CAP.

For this reason, when they come to divide the land from the property title, the heirs no longer agree because those who did not receive dowry before collectivization believe that what they received from the author should be brought to the sharing table for equity among all. It was not a manual gift, as it involved real estate.

Another issue that arises is that at that time, although the old Civil Code specified that the donation must be made in authentic form (Civil Code of 1864, in effect from July 1, 1865, until July 25, 1993, „Art. 813. – All donations are made through an authentic act"), in practice, peasants would marry off a child in the 1940s-50s, and the newlywed would establish a new agricultural role in the records of the local public administration (town hall). On the author's role page, there was a mention of a decrease in the land area. Mentions were also made on the page of the newlywed about who received the land (from parents, in-laws, etc.).

However, Romanian judicial practice has perpetuated this inequity, not considering the land registry records of local public administration. Judges have affirmed that the one who received land is equal to the one who did not receive land, and the issue is still being debated in the current court proceedings.

2. The Inequity of the Regulation Regarding the Procedure for the Establishment, Duties, and Functioning of Commissions for Determining the Right to Private Property over Lands, the Model and Method of Allocating Property Titles, and the Possession of Owners, dated August 4, 2005, lies in the fact that if there are multiple heirs, the application can be made jointly, being signed by each of them.

There are cases where an heir comes forward and requests the restitution of property for themselves and another relative, but not for all heirs.

The heir requests both in their own name and on behalf of another relative with whom they have maintained close ties, stating: „I, the undersigned, together with..., request the restitution of the property."

The County Commission issues a decision that approves the request of the heir but grants the entire land to them because the application was signed only by the person who made the request, that is, by a single individual. Although in the application, the heir requests restitution both in their own name and for another relative, that relative did not sign, as there is only one signature on the application.

The Regulation governing the implementation of the land fund law stipulates that a joint application can be made by multiple heirs, but each of them must sign the request. Accordingly, the Regulation on the Procedure for Establishing, Duties, and Functioning of Commissions for Determining the Right to Private Property over Lands, the Model and Method of Allocating Property Titles, as well as the Taking into Possession of Owners, dated August 4, 2005, an integral part of Decision 890/2005 published in the Official Gazette, Part I, No. 732 of August 11, 2005, specifies: „Art. 11. – (1) In accordance with legal provisions, the determination of property rights is made only upon request, formulated by each eligible person, personally or through an authorized representative. When there are multiple heirs, the request can also be made jointly, being signed by each of them."

A portion of the heirs (not all of them) challenges the Decision of the County Commission. The court accepts the complaint, stating in its considerations that the heir acted as a representative for all heirs, even though there is only one signature on the application. They had a mandate from all heirs, an implicit mandate akin to agency by necessity. The verdict remains final.

An implicit mandate, in this context, is a form of implicit authorization that automatically forms in the absence of explicit agreement between two parties. Generally, a mandate refers to an agreement in which one person (the principal) grants power to another person (the agent) to act on their behalf in a specific situation or for a specific purpose.

In the case of an implicit mandate, this agreement is not explicitly expressed in words or written documents but is formed through the behavior of both parties or through implicit circumstances.

It is important to note that proving an implicit mandate can be more challenging than proving an explicit mandate because there is no written document to attest to it. Generally, for an implicit mandate to be considered, there must be a relationship of trust between the two parties, as well as consistent and repeated behavior over time suggesting that the agent has the authority to act on behalf of the principal.

The legal concept of business management is defined in Article 1330 of the Civil Code of 2009, an integral part of Law 287/2009, republished (r1) in the Official Gazette, Part I, No. 505 of July 15, 2011: „Art. 1330 (1) Business management exists when, without being obligated, a person, called the manager, voluntarily and timely manages the affairs of another person, called the principal, who is unaware of the management or, knowing of the management, is unable to appoint an agent or otherwise care for their affairs."

In other words, business management is a legal institution through which a person, known as the manager, voluntarily and without a mandate, administers the assets or affairs of another person, known as the principal, with the aim of protecting the latter's interests. This involves an action of administration, protection, and preservation of the assets and interests of the principal.

Business management can be applied in situations where the principal cannot administer their assets or affairs independently, for various reasons (for example, they may be absent or ill), and does not have an appointed agent to manage their affairs. In such cases,

the manager takes on the responsibility of administering the assets or affairs of the principal, acting in their best interest and in good faith. The manager has a legal obligation to protect the interests of the principal and must act with diligence and responsibility in the context of business management. The manager is liable to the principal for any loss or damage caused by their actions in the course of business management.

The other heirs (who did not challenge the Decision of the County Commission) file a Motion to Set Aside, motivated by the fact that if the heir acted as an agent for all heirs (as per the Court's decision), it means that he acted on behalf of all, and they should have been summoned as well.

The Civil Procedure Code of 2010, an integral part of Law 134/2010, republished in the Official Gazette, Part I, No. 247 of April 10, 2015, states: „Art. 503. (1) Final judgments can be contested through a motion to set aside when the contestant was not legally summoned and did not attend the trial."

Since they were not summoned, the other heirs have exercised the extraordinary remedy. The heirs justify their action by the fact that if the judge states in the considerations that the heir acted for all heirs, it means that the judge has ruled on the rights of those who were not summoned.

The County Commission accepted the request regarding one heir but rejected the request regarding the other heirs. If the other heirs were part of the administrative procedure, why were they not summoned? Because „the others" mean all heirs, not just a part. In this case, there is still no final judgment from the judicial courts.

3. The inequity of Law 165/2013 lies in the fact that the assessment of properties for which compensation is granted is expressed in points and is done by applying the notarial grid valid for the year preceding the issuance of the decision by the National Commission.

The Constitution of Romania (republished in 2003), published in the Official Gazette, Part I, No. 767, dated October 31, 2003, enshrines the Right to Private Property: „Art. 44 (3) No one can be expropriated except for a cause of public utility, established according to the law, with fair and prior compensation."

This article in the fundamental law guarantees the right to private property and ensures that expropriation can only be carried out for purposes of public utility, such as the construction of roads or other significant public projects. However, expropriation must be legally justified and accompanied by fair and adequate compensation for the expropriated property.

Thus, this article ensures the protection of private property and establishes that expropriation can only be carried out under certain conditions and with appropriate compensation for the owner.

Law No. 165/2013 regarding measures for the completion of the restitution process, in kind or equivalent, of properties unlawfully taken during the communist regime in Romania, published in the Official Gazette, Part I, No. 278, dated May 17, 2013: „Art. 21 (6) The assessment of properties for which compensation is granted is expressed in points and is done by applying the notarial grid valid for the year preceding the issuance of the decision by the National Commission, taking into account the technical characteristics of the property and the category of use at the time of its takeover. One point has a value of one leu."

Market prices can vary widely depending on several factors, such as the location of the property, the size of the property, the level of development in the area, market demand and supply, etc. For this reason, market prices are significantly higher (often over 10 times...) than the rates set in the notarial grid.

Law No. 33/1994 regarding expropriation for a cause of public utility, republished in the Official Gazette, Part I, No. 472, dated July 5, 2011: „Art. 26. – (1) Compensation consists of the real value of the property and the damage caused to the owner or other entitled persons. (2) When calculating the amount of compensation, experts, as well as the court, shall take into account the price at which properties of the same kind are usually sold in the administrative-territorial unit, on the date of the expertise report, as well as the damages inflicted on the owner or, as the case may be, other entitled persons, considering the evidence presented by them."

Law No. 255/2010 regarding expropriation for a cause of public utility necessary for achieving objectives of national, county, and local interest, published in the Official Gazette, Part I, No. 853, dated December 20, 2010: „Art. 22 (6) The experts, in preparing the expertise report, as well as the court, shall take into account the expert reports drawn up and updated by chambers of notaries public at the time of the transfer of ownership."

The High Court of Cassation and Justice – The Panel for Deciding Legal Issues by Decision No. 78/2021 regarding the examination of the referral made by the Court of Appeal Cluj – Section I Civil, in Case No. 1.602/117/2020, for the purpose of rendering a preliminary ruling, published in the Official Gazette, Part I, No. 1185, dated December 15, 2021: „Admits the referral made by the Court of Appeal Cluj – Section I Civil in Case No. 1.602/117/2020 regarding the pronouncement of a preliminary ruling and, consequently, establishes that: In the interpretation and application of the provisions of Article 22 paragraph (6) of Law No. 255/2010 regarding expropriation for a cause of public utility necessary for achieving objectives of national, county, and local interest, with subsequent amendments and completions, and of Article 26 paragraph (2) of Law No. 33/1994 regarding expropriation for a cause of public utility, republished, with subsequent completions, in the judicial stage of the expropriation procedure, in determining the amount of compensation, the provisions of Article 22 paragraph (6) of Law No. 255/2010 are interpreted extensively, meaning that both the „expert reports drawn up and updated by chambers of notaries public at the time of the transfer of ownership" and the legal criteria provided by the provisions of Article 26 paragraph (2) of Law No. 33/1994 are taken into account."

Among all the arguments presented, perhaps the most revealing are those included in the „section" of logical interpretation (paragraphs 128-134), where the High Court of Cassation and Justice (ÎCCJ) decisively emphasizes certain points, indicating that:

„accepting the mechanical takeover of this calculation method (...) would mean prejudicing or even emptying the right to challenge in court, recognized for the expropriated dissatisfied with the amount of compensation (...) the right of access to justice becoming, consequently, theoretical and illusory";

„the constitution of a commission composed of 3 experts for the realization of a specialized work whose difficulty can be summarized to a simple arithmetic calculation, but which could generate potential negative effects in terms of costs and duration of the judicial procedure, is devoid of any legal logic";

„reductio ad absurdum, the real value of expropriated properties within an administrative-territorial unit would be uniform, regardless of their specific characteristics (for example, location, utilities, servitudes, access roads, street frontage, actual operating mode), which cannot be rationally accepted."

There is a significant difference between the compensations awarded to owners who are currently being expropriated and those awarded to owners expropriated during the communist regime. Owners who were expropriated during the communist regime received very low compensations, calculated according to a notarial grid that is much below the actual value of the expropriated properties. This injustice was also noted by the European Court of Human Rights (ECHR) in the Văleanu and Others v. Romania case: Maintaining the ineffectiveness of the restitution mechanism regarding properties confiscated or nationalized by the communist regime, despite the new remedies introduced under Law no. 165/2013, which result in disproportionate burdens.

So, a primary discrimination exists between an owner who received compensation after the enactment of Law no. 165/2013 according to the notaries' grid and a potential neighboring owner who is currently being expropriated at the market price, sometimes over 10 times more for the same land area in the same zone with the same category.

During the communist era, private property was abolished, and massive expropriations were carried out without any compensation for the expropriated owners. After the fall of the communist regime, Law 10/2001 was adopted, which provided for compensation in kind or in cash for properties expropriated during the communist period. Regarding compensations awarded before the adoption of Law 165/2013, owners deprived by the communists generally received compensations at market prices.

There is a significant difference between compensations awarded to owners expropriated during the communist regime before the adoption of Law 165/2013 and those awarded after the enactment of this law. Thus, an owner who received compensation in 2014 according to the notaries' grid is discriminated against compared to a potential neighboring owner who received compensation in 2012 at the market price, sometimes over 10 times more for the same land area in the same zone with the same category.

If when the Romanian State „gives" or „restores," the principle is to evaluate the property at a minimum, in the case of other laws – see, for example, Law no. 550/2002 regarding the sale of commercial spaces, private property of the state, and those for the provision of services, under the administration of county councils or local councils, as well as those from the patrimony of local autonomous administrations – the fundamental principle is that the sale is based on an appraisal report. According to Article 8 of Law no. 550/2002: „(1) For the purpose of selling the commercial space or service provision, the commission establishes a minimum selling price, based on an appraisal report prepared by individuals or legal entities authorized according to the law. The appraiser will be selected by the commission through a public auction organized within 10 days from the constitution of the commission. (2) The minimum selling price, established according to paragraph (1), will be taken into account as a negotiation basis, in the case of a sale through direct negotiation, or it will be included in the offer for sale through public auction. (3) The appraisal report and the determination of the selling price can be contested by interested parties within 5 days of the report being submitted, at the administrative litigation section of the tribunal. The trial is conducted urgently, with the citation of the contestant, the

commission, and the appraiser. The commission is represented by its president. The prosecutor's participation is mandatory. The decision is final and irrevocable."

The question arises: Why doesn't the State sell its private property at the level of the Notaries' Grid if, when it restitutes, it does so at that amount?

Controversies also arise when the street from which the owners were expropriated no longer exists at present.

As a practical example, we will refer to the case file no. 5295/99/2021 on the rolls of the Iasi courts, with the object of annulling the decision on compensation – Law no. 165/2013.

Thus, in the 1950s during the communist regime, the owners of a plot of land in Iasi were dispossessed of 840 sq.m. of land and a house by a decree of expropriation. To be eligible for compensation for the house and land, the owner from Iasi (Varvara Cornelia) made a request under Law 10/2001.

After 9 (nine) years of requests and visits to the town hall, by Order no. 3567/30.12.2010, the local public administration decides that the owner who made the request should receive 25% of the compensation because only one of the four heirs made the request. This is followed by a legal process concluded with a civil court judgment from the Court of Appeal Iasi (no. 788 of 23.11.2011), in which the Court decides that if only one heir made the request, they benefit from the entire compensation and not just parts of it. As a result, Decision no. 214/21.03.2012 is issued by the City Hall of Iasi. Subsequently, the file is sent to the Prefect Institution Iasi, which forwards it to the National Authority for Property Restitution, N.C.N.I.

After another 9 (nine) years of requests, on 24.08.2021, a Decision on compensation is issued following approval in the N.C.N.I. meeting on 28.07.2021, in accordance with the notaries' grid in Zone C of the Municipality of Iasi.

The heirs contacted an expert who argues that the area where the expropriations took place is Zone B and not Zone C. The street „Strada Gârlei" no longer exists but started from an area where expropriations were made, and buildings were constructed; it crossed over a boulevard and stopped after a railway (indeed, this is Zone C).

Once again, the heirs addressed the Court requesting the annulment of the compensation decision and the issuance of a new validation decision in accordance with legal provisions, which is to be established through an appraisal report prepared by a technical judicial expert and real estate appraiser of the property. The Court requests the expert to create an expertise report, and the expert calculates, according to Law 165/2013, the value of compensation according to the notaries' grid but in Zone B. Additionally, the Court asks the City Hall to clearly specify where the property was located, in which zone, and the City Hall responds in accordance with the expert's opinion, namely Zone B.

The court decides: „Admits the action. Cancels compensation decision no. 41020 and compels the defendant to issue a new compensation decision in the amount of 1,402,180 lei (p. 102 in relation to the provisions of Law no. 165/2013, not modified by Emergency Ordinance no. 72/2020).

The National Commission for the Compensation of Real Estate appeals, mentioning the market value (although neither in the considerations, nor in the expert report, nor in the judgment is there any mention of a possible market value). According to Article 476 of the Code of Civil Procedure, „(2) In case the appeal is not motivated or the motivation of the

appeal or the response does not include new reasons, means of defense, or evidence, the appellate court will decide, on the merits, only based on those invoked at the first instance." In the appeal, the National Commission for the Compensation of Real Estate did not provide new reasons, means of defense, or evidence; it did not even contest the expert report or the letter from the City Hall indicating the area where the expropriations took place.

Judges are obliged to rule only on matters that constitute the subject of the case submitted for judgment, and the court cannot exceed the limits of its jurisdiction. The principle of availability refers to the fact that the parties involved in a lawsuit have control over their actions and the way the proceedings unfold. Concerning the appeal, this principle applies in the sense that the appellate court cannot examine every aspect of the case but only the issues raised by the appellant. Thus, the appeal can be considered a devolutive remedy, meaning that the case is transferred to a higher court, which can objectively review the decision made by the trial court. However, the appellate court must restrict itself to the issues raised on appeal and cannot examine new matters that were not discussed previously. In conclusion, the appeal is a devolutive remedy, but the appellate court must adhere to the principle of availability and limit itself to the examination of the issues raised by the appellant. In this case, the appellant has set the limits, indicating that the court should not decide according to market prices but in accordance with the notaries' grid.

Court of Appeal: „Accepts the appeal filed by the appellant, the National Commission for Property Compensation, against civil judgment no. 2295/2022/29.09.2022 of the Iași County Tribunal, Section I Civil, a judgment it partially amends. Compels the respondent, the National Commission for Property Compensation, to issue a new compensation decision... In zone C, where the railway passes through... Unfortunately, the appellate court did not specify the exact route of the railway, whether through the living room or the kitchen..."

In conclusion, there are certain issues and controversies in the practical application of laws that provide for the right of owners who lost their land properties during the communist period to either have them reconstituted or, if reconstitution is not possible, to receive compensation.

For example, the reconstitution process can be lengthy and challenging, and local authorities may delay or even obstruct the granting of compensation. There are also situations where the properties in question have been sold or mortgaged by the authorities that expropriated them, making it difficult to reconstitute the property or provide compensation.

Additionally, there are issues related to the evaluation of expropriated properties and determining their value. Sometimes, the compensation values are considered to be significantly lower than the real value of the expropriated properties. There are also cases where owners disagree with the evaluations made by authorities, leading to conflicts and lengthy legal processes.

Although there is a legal framework for the reconstitution of land properties and the provision of compensation for properties expropriated during the communist period, there are challenges and controversies in the practical application of these laws. It is crucial for authorities to continue addressing these issues and take measures to ensure that expropriated owners receive fair and adequate compensation for their lost properties.

REFERENCES

The Constitution of Romania

The Civil Code of 1864, in force from July 1, 1865, until July 25, 1993

The Civil Code of 2009

The Civil Procedure Code of 2010

Law on Land Fund No. 18/1991

Regulation regarding the procedure for establishing, attributions, and functioning of the commissions for determining the right of private ownership over land, the model, and the manner of awarding property titles, as well as the delivery in possession of owners, dated August 4, 2005

Law No. 165/2013 on measures to finalize the process of restitution, in kind or equivalent, of properties arbitrarily taken during the communist regime in Romania

Law No. 33/1994 on expropriation for public utility reasons

Law No. 255/2010 on expropriation for public utility reasons, necessary for achieving objectives of national, county, and local interest

Decision No. 78/2021 regarding the examination of the referral made by the Court of Appeal Cluj – Section I civil, in Case No. 1.602/117/2020, for the purpose of pronouncing a preliminary ruling

CONSIDERATIONS ON THE TRANSMITTAL OF THE AFFECTED PATRIMONY BELONGING TO THE INDIVIDUAL FREELANCER THROUGH THE INHERITANCE

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Abstract

The effects deriving from the transmission, through inheritance, of the affected (assigned) patrimony (Rom: patrimoniu de afectațiune) of the individual freelancer, ***hereinafter referred to as IF,*** *are not clearly and specifically regulated by the current legislation, respectively the Civil Code and the Govern Emergency Ordinance no. 44/2008 regarding the conduct of economic activities by the individual authorized freelancers, individual enterprisers and family enterprisers,* ***hereinafter referred to as Ordinance 44****.*

Thus, there may be different interpretations regarding the limits of the IF's liability, as a professional trader, which is unlimited, versus the impact generated on the IF's heirs, in the absence of the specific legal provisions regarding the distinct legal regime of the affected patrimony in comparison to the other rights and obligations that form the inheritance.

The purpose of this article is to identify a solution in relation to the current legislative context and to submit proposals (de lege ferenda), which will bring the necessary clarifications, for the benefit of the legal practitioners and theoreticians, but also for business community in general.

Keywords*: individual freelancer, affected patrimony, succession, succession rights, commercial creditors, commercial activity*

Section I. The individual authorized freelancer. Concept. Main traits.

In the light of the Ordinance 44, the IF is a professional trader who is characterized by the following:

a) the IF carries out an economic activity in an organized, permanent and systematic way, combining financial resources, labor force, raw materials, logistic means and information, at his own risk, in the cases and under the conditions provided by law, being reached the constituent elements of the economic enterprise, in the sense of the Article 2, letter f) from the Ordinance 44.

It should be noted that the *economic enterprise* notion has similarities with **(i)** the concept of *exploitation of an enterprise* as provided by the Article 3, 3rd paragraph from the Civil Code, respectively with regard to the systematic and organized nature of the activity carried out, the existence of the purpose to get profit, specifying that it is included in the content of the notion provided by the Civil Code also the non-profit activities, as well as with **(ii)** the area of activities that can be carried out, in this sense being also the provisions of the Article 3, 2nd paragraph from Ordinance 44, according to which the economic

activities can be carried out in **all** fields, trades, occupations or professions that the law does not expressly prohibit for free initiative.

b) the IF has its professional headquarters on the territory of Romania, according to the Article 5 from the Ordinance 44

This requirement, although apparently it could affect the right of establishment, in reality, is of a purely bureaucratic nature, in the sense that the IF, having **voluntarily** established its professional office on the territory of Romania, is subject, from an administrative perspective, to the Romanian authorities/institutions that have legal competences on the IF area (e.g. registration, authorization).

c) must have obtained, before the start of the activity, the authorizations, notices, licenses and other similar, provided for in special laws, for carrying out certain economic activities, according to the Article 6, 2nd paragraph from the Ordinance 44;

d) the IF uses its workforce, mainly, according to the Article 2, letter i) from the Ordinance 44;

Although the IF has the possibility to hire other persons, the rule is that the activity is carried out only by the IF, considering its own qualities and professional expertise.

However, in cases where the IF carries out its activity using only its labor force and that of other people, the economic activity carried out can be *permanent or temporary*, without it having any effect on the capacity of the professional-trader in relation to the provisions of the Article 3, 3rd paragraph from the Civil Code, which provides about the **systematic** nature of the operation of an enterprise, a fact that could provide a **permament** character to the commercial activity.

Anyway, the Ordinance 44 is a special law in relation to the Civil Code in this regard and, therefore, it applies prevalently.

e) the activity carried out by IF is subordinated to obtaining profit

Thus, being an economic enterprise, the IF carries out economic activities intended for sale or exchange[1].

Although a IF may practically not always make a profit, especially in cases where the activity is carried out temporarily when income is obtained, this is not likely to affect the IF's professional trading status. Also, a IF acts at its own risk, so it is necessary that in current activity (such as the signed contracts) to be protected against potential risks (competition, changes in circumstances), through specialized assistance provided by professionals.

f) the IF's activity is authorized by the trade register attached to the Court of law in the county where the applicant establishes his professional office

Thus, through the latest legislative changes, especially those brought by Law no. 265/2002 regarding the trade register and for the modification and completion of other normative acts affecting registration in the trade register, the *proximity* is capitalized, in the sense that a IF is authorized by the trade register attached to the Court of law in the county where the IF has its professional office (and not situated in the area of the Court of Appeal) and *velocity*, respectively the authorization of the traders by the commercial register has been streamlined significantly as an effect of the Law no. 265/2022.

g) the IF does not acquire legal capacity and, nevertheless, may have patrimony

Although the legal capacity presupposes the existence, among other things, holding its own patrimony, however, in this case, the IF can have an affected patrimony defined as a patrimonial mass within the patrimony of the entrepreneur, representing all the rights and

obligations **affected, by written declaration** or, as the case may be, through the incorporation deeds or through an additional act to it, of **exerting an economic activity** in line with the Article 2, letter j from the Ordinance 44.

h) the IF has full capacity of exerting his rights and assuming obligations

In the situation of acquiring full exercise capacity through the effect of marriage, before the age of 18, we reasonably deem that, in such a case, the legal requirement for obtaining the capacity of IF is not met, because the goals pursued are different, respectively in the case of marriage before 18 years old, it is about the fulfillment of a civil act, and in the other case, it is about acquiring the capacity of a professional-trader (who will exercise an economic activity). Also, the legal provision in the field of civil marriage applies prevalently, having a special character compared to the general provision.

In any case, this requirement responds to the desired security of the civil circuit and good faith.

i) the IF must meet the requirements of the law regarding the capacity of use

Thus, according to the Article 8 from the Ordinance 44, an IF must not have committed acts sanctioned by the fiscal, accounting, customs laws and those regarding the financial-fiscal discipline.

Also, by signing the application for registration in the trade register, the individuals who apply for registration as an individual authorized person, assume the responsibility that they are not incapable and that they have not been forbidden by a final court decision the right to exercise the capacity of an IF as a complementary sanction deriving from the conviction for infraction against patrimony through breach of trust, infraction of corruption, embezzlement, infraction of forgery in documents, tax evasion, infractions provided by the Law no. 129/2019 on the prevention and combating of money laundering and terrorist financing;

j) the IF can carry out those economic activities regarding which there are no incompatibilities, prohibitions;

Thus, according to Article 1 from the Ordinance 44, it does not apply to the liberal professions, as well as to those economic activities whose exerting is regulated by special laws, as well as to those economic activities for which, by law, certain performance restrictions are established or those activities are expressly prohibited by law for free initiative.

k) the IF must hold the citizenship of a member state of the EU or of the European Economic Area (the Article 3, 1st paragraph from the Ordinance 44)

Such a requirement derives from the right of free association, the right of establishment and the right of free intitiative.

l) the IF can have in its object of activity no more than 5 classes of activities provided by the Classification of the Occupations in the National Economy in line with the Article 16, 1st paragraph from the Ordinance 44;

m) with regard to the area of labor relations/collaboration and social insurance, the IF:

(i) can have a maximum of 3 employees (the Article 17, 1st paragraph from the Ordinance 44);

(ii) is insured in the public pension system and other social security rights and has the right to be insured in the social health insurance and unemployment insurance system, under the conditions provided by law. Also, the IF's spouse benefits from the same rights, under the conditions in which the spouse will sign a social insurance contract according to the Article 21^1 from the Ordinance 44;

(iii) may establish contractual relations, under the law, with any natural and legal persons, with other IF, individual enterprises or family enterprises, for the performance of an economic activity, without being changed its acquired legal status (the Article 16, 2nd paragraph from the Ordinance 44);

m) the IF may be subject to insolvency proceedings, being a trader[2];

n) the IF is liable with the goods from the affected patrimony, for the obligations derived from the commercial activity, if such patrimony has been constituted. If the assets from the affected estate are not sufficient, the IF is liable with the assets from the personal patrimony. If the affected patrimony has not been established, it is directly liable with the goods from the personal patrimony.

Section II. The affected patrimony. The transmittal of the affected patrimony

The definition of the affected patrimony comprised by the Article 2, letter j from the Ordinance 44 is correlated with the general definition of patrimony provided by the Article 31 from the Civil Code, according to which it includes all the rights and liabilities that can be assessed pecuniarily and that belong to the owner of the patrimony, natural or legal person.

The patrimony can be the subject of a division or appropriation only in the cases and conditions provided by law. Although the Civil Code is too little generous in providing the explanation of these two notions or criteria for their determination, at least, this role has been taken over by the doctrine.

Thus, it was decided that the **division** of the patrimony is the way in which the content of the patrimony (which preserves its **uniqueness,** because the owner of the patrimony is unique) is divided into at least two patrimonial masses that have specific rules, being so, for example, in the case of the legal community, which it consists of the patrimonial mass of the common goods and the patrimonial mass of the common debts[3].

The same author states that the **patrimonial affectation** is impacted by the division of the patrimony, namely once there is a division of the patrimony, it can be affected for a specific purpose[4].

The definition of the affected patrimony as provided by the Ordinance 44 (the Article 2, letter j) is more **expository**, because the it does not confer to the IF the necessary effectiveness or traceability, namely the IF's **obligation** to constitute its affected patrimony by the deed of incorporation (proposal *de lege ferenda*).

Such an approach would have been a strong argument in support of the IF's creditors pursuing **only** the assets existing within the affected patrimony.

From the current wording of this legal text, the dispositive/optional nature, respectively, the IF will constitute its affected patrimony only the IF it wishes to do so.

In the same line, the obligation to establish the affected patrimony through the IF's deed of incorporation could have been supported by the first sentence of the Article 2324, 3rd paragraph from the Civil Code according to which the creditors whose claims arose in connection with a certain division of the patrimony, authorized by law, **must first pursue the goods that are the object of that patrimonial mass.**

The second thesis of the Article 2324, 3rd paragraph from the Civil Code dilutes the scope of the **priority** pursuit of the affected patrimony by the IF's heirs, because, according to this legal text, if the assets from the affected patrimony are not sufficient to satisfy the

claims, the other assets of the debtor can also be pursued, namely the goods from the **personal patrimony**.

Thus, the existence of this legal possibility may generate a **reduced interest** for IF/creditors to constitute their affected patrimony on the date of establishment/incorporation or during the period of holding the IF capacity, if the goods from the personal patrimony can also be pursued by creditors.

It should be noted that the legislator establishes a different pursuing regime for the assets that are part of the affected patrimony that derives from the exercise of a profession authorized by law, in the sense that these assets can **only** be pursued by creditors whose claims arose in connection with the respective profession, without them being able to pursue the IF's other assets as well.

The rationale for establishing this special regime for professions authorized by law is justified by maintaining the economic attractiveness of the debtor by avoiding the spread of the risk of insolvency to the entire patrimony of the debtor and by the fact that certain professions authorized by law (lawyer, architect, notary public) cannot be exercised by other professionals[5].

This perspective should be transferred, by law, to the Article 2324, 3rd paragraph from the Civil Code, in the sense that the professional creditors should pursue **only** the assets from the IF's affected patrimony and not those from the personal patrimony.

Otherwise, there may be a risk of interpretation in the sense that the principle of equality of professional or non-professional creditors, derived from the constitutional principle of equal rights, is not respected.

As a consequence, the rights (such as the right to inherit and the right to private property) of the heirs of different classes who meet the conditions of the law to come to the inheritance, respectively their existence at the time of the succession opening, the inexistance of legal or judicial indignity and the existance of the vocation to inherit (the Article 957-962 from the Civil Code), could be impacted.

This risk currently exists and it derives from **the inadequate overlap between the personal and professional patrimony** and, obviously, from the insufficient regulation of the legal regime for purduing assets from the IF's affected patrimony. Of course, it could be argued that the IF's turnover is generally not high, and this is a quantitative argument and not one that justifies maintaining the current rules.

In relation to the legislative context, in the event of the IF's death, his professional creditors can also pursue the goods from the personal patrimony, if those from the affected patrimony pursued with priority are insufficient.

Considering the aforementioned, we make the following legislative modifications (*de lege ferenda*):

a) it is useful to establish the **economic criteria** regarding the IF's activity, for delimitation from micro-enterprises, small and medium-sized enterprises, according to the Law no. 346/2004 regarding the stimulation of the establishment and development of the small and medium enterprises.

Per a contrario, it could be considered that a IF can have an annual turnover of up to 2,000,000 Euros, which is currently specific to the micro-enterprises, and a maximum number of employees, respectively a **different** maximum number of employees could be

defined in comparison to the current one, of course, based on an economic analysis carried out by the competent institutions;

b) a single electronic record can be created at the national level, administered by a legally authorized body, which includes all the affected assets, detailing the component assets, created by IF **mandatorily** before the start of the authorized activity;

c) since the composition of the personal patrimony and affected patrimony is **dynamic**, it is advisable for any professional creditor to periodically receive written information from the IF regarding the status of the assets existing in the affected patrimony or for the professional creditor to have online access to the aforementioned database mentioned at letter b);

d) the transfer of the assets from one patrimonial mass to another should be refined in the sense of establishing a procedure to be followed, respectively assets that exceed a certain value or percentage (established legally or contractually by the parties) from the value of the claim can be transferred to another patrimonial mass, with the prior agreement or with the subsequent notification of the professional creditor, without such an agreement being unjustifiably rejected;

e) although the professional creditors have at hand the remedies to counteract some fraudulent actions of the debtor, it is to be analyzed whether it is appropriate that the assets of the personal patrimony can be pursued in a **minor** percentage by the professional creditors, in certain thoroughly justified situations (such as defrauding the professional creditor by the IF with the effect of the objective impossibility of satisfying him at least partially).

Section III.Conclusions

The legal regime of pursuing the assets from the IF's affected patrimony, by the IF's successors, is currently inadequate/insufficiently regulated in the legislation, the pursuing of the assets from the IFA's personal patrimony being also allowed.

The calibration of this situation can be achieved by implementing *de ferenda law* the proposals from the

Section II, the purpose being that of achieving a necessary and useful specialization of the patrimonial masses, so that each category of creditors can pursue exclusively the goods from the patrimonial mass that are related to the claim in question, respectively the professional creditors can pursue only the goods from the affected patrimony and the extra-professional creditors can only pursue the goods from the personal patrimony.

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THE MYSTIC WILL, A REVOLUTIONARY LEGAL INSTITUTION OR A NECESSARY LEGAL INSTRUMENT?

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Abstract

Central to the novel is the institution of the mystical will, a will that keeps existing only in the light of the Old Civil Code. The reason why we chose this theme is because we believe it is worth to be brought back, due to its particular importance. Firstly, the classified component is a primary aspect that deserves to be reintroduced into the legislation. Secondly, it can be signed and presented only before the judge or the notary, aspects that increase the solemn component. At the same time, since it would be placed in an envelope and no one would know about its contents, the causes of indignity would decrease because no one would pay attention to the life of the testator, since they would not know that he submitted a will.

Keywords*: mystic will, heritage, types of wills, testator, judge, notary*

1. Introduction

The character of this novel emodies considerations of necessity, following the fact that the institution of the mystical will lost its own regulation with the entry into force of the New Civil Code. There was no *expressis verbis* reason in this regard, the doctrine appreciating, by law, that this form of testing was not sufficient to be used in practice. We believe that it is necessary to point out the benefits brought by this institution in order to reintroduce this form or even to replace it with the international will, by adopting the Washington Convention by Romania or even by developing a new form of will.

Moreover, the novel portrays the institution of the „mystical", so-called and „secret" testament, an institution whose imprints remained printed only between the covers of the Old Civil Code. The mystical testament – whose name comes from the ancient Greek – means the quest to attain communion, identity or consciousness of reality, spiritual truth, through direct experience, intuition or penetrating understanding.

With this in mind, we will use the historical method of law research that helps to know the legal evolution from a historical perspective, being necessary to analyze the institution of the mystical testament, an institution that can only be found under the empire of the old Civil Code, a fact that obligatorily sends us to its influence from the past. We will also analyze certain concepts using the sociological method, as it analyzes the legal phenomenon from the perspective of society's influence on the legal phenomenon in a general way, being necessary to concretely delineate the potential influences of the institution of the mystical testament in today's society.

1.1. General Considerations regarding the Origins of the Inheritance and the Will

In its early days, the institution of inheritance was governed by the principle that there was no gender equality, and the male sex was entitled to the parental estate, while women were to receive dowries. Testamentary inheritance arose after the consolidation of individual

property at the level of village communes, and the use of testaments arose as a consequence of the abolition of these forms of organization.

Today, inheritance is governed by a set of uniform provisions, it being attributed to citizens regardless of social category, there being no rules governing it according to social class, gender difference, marital status etc.[1] Succession in the light of civil law is intended to ensure a continuation of the patrimonial relations of the deceased, ensuring the transgenerational cohesion of the family and the nation, but also an immaterial continuity of his spiritual values, without discriminatory criteria and without the institution of inheritance being affected by facts that would attract any form of indignity.

Within the new definition of the testament, the definitions given during the Roman period were taken into account, so that the name „testament" comes from „testatio" which means confession and from „mens" which means mind. In other words, the will is a „confession of the general intentions of the testator, a legal template, and not a legal act reduced to pecuniary dispositions".[2]

1.2. The Testament in Roman Law

If at the beginning the legal documents claimed for the transmission of the deceased's patrimony to his successors were outlined by the rigor of solemn forms, with time, in relation to the requirements of the continuously expanding social sphere, the forms are increasingly simplified, so that, currently, we find that the simple manifestation of will is sufficient to trigger legal consequences.[3] For instance, only the fact that in the very old Roman law the will required extremely cumbersome forms, as for example in the case of the will which was subject to formal conditions similar to those required by the adoption of a law; in the classical age, however, this character was countered by mere verbal declaration or even by letter.

In the definitions of the will dating back to the classical jurisconsults, the solemn and last will character of the act is especially emphasized. According to Ulpian, the testament is the manifestation, in accordance with the law, of our will, in order to have strength after death.[4]

1.3. Types of Wills in the Old Civil Code and in the New Civil Code

According to art. 955 para. (1) Civil Code, the deceased's patrimony can be transmitted not only under the law, but also under the will of the bequeather, manifested by will, in which case the inheritance is testamentary. In Roman law, testamentary inheritance appeared with the establishment of the patriarchal family, when the man acquired an increasingly dominant position in the family, exercising unlimited power over the persons and goods under his power.

The current romanian Civil Code opens Chapter III designated „The Will", among other things, with Section II, entitled „Forms of the Will". Therefore, the legislator briefly presents the forms of the ordinary will in the content of art. 1040. „The ordinary will can be

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[1] See Deak F., Popescu R., *Tratat de drept succesoral, Moştenirea legală*, vol. I, Universul Juridic Publishing House, 4th Rev. ed., Bucharest, 2019, p. 32

[2] For details, see Marcu L.P., *Drept Roman, Note de Curs*, Bucharest, 2011, p. 75

[3] S.P. Scott, *THE RULES OF ULPIAN, Fragments of the Rules of Domitius Ulpianus, The Civil Law*, I, Concinnati, 1932, n.p.

[4] See Molcuț E., *Drept privat roman*, Universul Juridic Publishing House, Bucharest, 2011, p. 226

holographic or authentic." If we go back to the era of the great reforms, an era that dates back to 1864, the year in which the old Civil Code was drawn up, we will find in the content of art. 858 the following text: „A will can be holographic, or made by authentic act, or in mystical form." In order to place this act in a legal framework, we will say that the mystical will is regarded as an intermediate form between the holographic will and the authentic will, based on the fact that the testamentary dispositions are found in the form of the document under a private signature, and the overwriting – aspect to which we will return to the content of the work – it is recorded in the form of the authentic act.

2. The mystical will

From the simplicity of the legal text in the current Civil Code, the following question arises: why eliminate a form of testing, when, indeed, they are numerically reduced?[5] By law, it is expected that the lack of its use in practice is the reason for renouncing this testamentary form. We consider that, following a mirroring between the covers of the two civil codes – the old and the new – the text regarding the mystical variety had no influence on the rest of the articles in the code, so that it could continue to hide without contravening any legal provisions, the testator enjoying freedom of will at the time he wanted to test with respect to his patrimony.

2.1. The Mystic Will in the Light of the Old Civil Code

In the old civil code, this form of will was regulated in the content of art. 864-867 Civil Code, articles sufficient to present the main legal characters, incapacities and conditions of substance and, respectively, of form.

From the point of view of the formalities required by the law, the mystical testament could be drawn up and written both by the testator and by another person, with the only condition that it expresses the will of the testator and not of another person.[6] Another positive aspect was the fact that it was not relevant if the will was handwritten or typed, since in all cases it had to be signed by the testator, an aspect that gives even more veracity to the considerations in which it was written by another person.

Another argument that nuances the particularly safe nature of this type of will is given by the fact that the paper containing the provisions of the last will was to be gathered and inserted into an envelope, and then to be sealed. The rationale stems from the fact that, in this way, the theft and fraudulent replacement of the testamentary document could be avoided. At the same time, the insufficiency of closing the will entailed its nullity. Sealing it hermetically in an envelope was all the more beneficial in the sense that the heirs or even third parties – prompted by the heirs in bad faith – not knowing the testamentary dispositions and, implicitly, if and how much they will inherit, had no reason to threats to the life of the testator.

Legal and judicial indignity appear most often as penalties in the aftermath where a person threatens the life of the testator or changes the provisions of the will left by the latter, as the case may be. These internment and malicious acts arise from situations in which the heirs find out through various abusive methods that they have been disinherited, that they

[5] Bob M.D., *Probleme de moșteniri în vechiul și în noul Cod civil*, Universul Juridic Publishing House, Bucharest, 2012, p. 139

[6] Chirică D., *Drept civil. Succesiuni*, Lumina Lex Publishing House, Bucharest, 1996, p. 105

will not receive a significant part of the inheritance or, why not, the entire inheritance. Thus, the sealing of testamentary dispositions represents a worthy solution to continue to be applied in practice, both to ensure respect for the deceased and to increase his life expectancy, in case he tests long before he dies.

After filing, the document was to be presented to a court in the country. This could be any court, because no text of the law expressly stated that the court at the testator's domicile was the only competent authority to draw up the mystical will, an aspect that again brings a benefit, in case the testator is either not at home and there was an urgent situation to create the will or he had not fulfilled all the formalities in order to establish a new domicile, in case he had established his residence in another part.

Once before the judge, the testator would declare that the will expressly contained his last will and testament and that it was written and signed by his own hand or, as previously stated, that it was written by someone else and signed by himself. Similarly, in the event that, due to a serious illness or infirmity, the testator is physically unable to appear physically at the court, the mentioned formalities were to be completed in front of the judge, delegated judge with the trip to the testator's residence. Regardless of the circumstances, the judge's role remained the same, namely to draw up a report in which to record the testator's presentation or the actual trip to his residence, but also his statement that the will strictly represents his personal agreement of will, untainted.[7] Also in the minutes was recorded the material state in which the will was under the criteria of the aspect, to be signed by both the judge and the testator. In cases where the testator could not sign, this aspect was mentioned in the record of overwriting prepared by the hand of the judge.

The solemn character of the mystical testament was conferred by the fact that the overwriting minutes were in the exclusive competence of the judge, an aspect that offers a special solemnity, considering that the profession of judge best wears the mantle of justice.

Following the proper preparation of the will with the fulfillment of the formalities required by law, it could be kept both by the testator or by another person, as well as by the registry of the court that instrumented it, all within the scope of legality. This last privilege conferred not only a secret character, but above all a special solitude, since it could neither be modified nor destroyed, and even more so neither stolen. It is necessary to specify that, in time, by art. 9 of Decree no. 40/1953 regarding the notarial succession procedure, the overwriting powers were exercised by the state notary; public notary in whose territorial radius the succession was opened. We mention that, even if the notary public was the instrument of the will, the act could also be kept in the archive of the notary's office, having the same secret character.

2.2. The Actuality and Necessity of the Mystical Will

Another argument in favor of the mystical will, a necessary legal instrument, is penciled in by the probative value that the act confers. Since the document includes not one, but two documents: one under a private signature – the will itself – and another authentic – the overwriting protocol – it is necessary to make a distinction between them. While the statements contained in the will (the testator's signature, per se) are proof until proven otherwise, the statements contained in the overwriting report (such as the finding of the

[7] Eliescu M., *Moștenirea și devoluțiunea ei în dreptul republicii socialiste România*, Academia Republicii Socialiste România Publishing House, Bucharest, 1966, p. 221

testator's presentation, the statement from which it appears that the will is his express consent, date, etc.) prove it until the false registration. As a result, the mystical testament did not necessarily have to be dated, being, until overwritten, a simple draft. The date of the appearance before the judge, recorded in the minutes, was to be the date of drawing up the will.

The role of the minutes was to prove, up to the false entry, everything that the instrumenting agent declares that he found, within the limits of his duties, through his own senses, for example the fact that the testator declared that the will was his. The sincerity of this statement of the testator, however, could be challenged by any means of proof. If the testator's statement presented to the judge was false, that is, if he declares that the testamentary dispositions were written by him and not by another, the will will be null and void. Consequently, however, the sincere but incomplete statement, i.e. the one according to which the will is written by another, when it also includes some additions and interpolations by the testator's hand, does not affect the formal validity of the will, considering that it was signed in an end by the testator himself and he also contributed directly to its drafting.

The registered will, being a document under a private signature, could prove until the contrary proof. In the same considerations, we will specify that the document under private signature could still be contested under the conditions of the common law of private documents. If the heirs or legatees established by another will, for example, did not recognize the signature, the legatees who based their claims on the contested mystical will had to prove the origin of the signature with the script verification procedure, as in the case of the holographic will. During the evidentiary hearing, the court had to consider the testator's authentic statement recorded in the superscription deed that the will belonged to him and that the signature was his.[8] The mystical testament could be written in Romanian or any other language known to the testator, including the special alphabet for the blind, provided it expresses the will of the testator. For example, the challenger could also prove that the testator did not know the language in which the will was written.[9]

It is imperative to mention that the mentioned formalities were provided under the penalty of absolute nullity, as well as that the minutes had to be drawn up without interruption, so that in the meantime another will could not be substituted. Continuity refers only to judicial work and not to the writing and presentation of the will before the court. Thus, if the delegated judge went to the testator's home, and the overwriting act is later done at the court's headquarters, the mystical will will be null due to the interruption of the formalities.

We note that not every person had the ability to make a mystical or secret will. They could not test in this form those who did not know or, due to infirmity, could not read, because, implicitly, they were not able to verify by their own senses the conformity of the document with the dispositions of their last will. Thus a blind man was unable to test in mystical form. The second incapacity was represented by those who did not know or could not sign. Since the mystical testament could be drawn up by another person and only signed by the testator, we think that it should be admitted that the one who, without knowing how

[8] Deak F., *Tratat de Drept Succesoral*, Actami Publishing House, Bucharest, 1999, p. 78

[9] Cornell Law School, Legal Information Institute from *https://www.law.cornell.edu/wex/mystic_will* Accessed 7 April 2023

to write, knew how to sign is able to test in the mystical form if, knowing how to read, he is in measure to control through his own senses the conformity of the content of the document with what he wanted, because where the purpose of the law ceases, its application also ceases – ubi cessat ratio legis, ibi cessat lex. In our law, the mute was capable of making a mystical will. If he was literate, he could establish in writing before the judge that the will expressed his last will. In the case of the illiterate, however, the declaration could be made with the help of an interpreter, who was also required, in both of the above scenarios, to know how to write his name, since the mystical testament must necessarily be signed by the testator in the end. In conclusion, those who did not know how to write or read at all, could not draw up this form of will at all. The rationale of the text was to ensure the testator control of the identity of the will presented to the judge, the one who does not know or cannot read being unable to do so.

3. Comparative law

3.1. International Testament

Considering that the Romanian legislator completely repealed this institution of the mystical will from the legislation, through the Washington Convention of October 26, 1973 regarding the uniform law on the form of the international will we encounter a new form of testing. This Convention is developed under the auspices of UNIDROIT and regulates a new form of will likely to be admitted in the domestic law of the countries that ratify this act. The international will is a completely new form of will, however, in our legal system we can compare and even liken it to a simplified form of the mystical will. From the preamble of the Convention it appears that this form of international will aims to ensure to a greater extent respect for the last will of the deceased. Regarding the formalities imposed by the law, we note that, like the mystical testament, it goes through two successive phases.

The first, the drafting phase, allows drafting either by the testator's hand, or by another person, regardless of the language in which it is written, or even techno-redacted drafting. Afterwards, the second phase involves the presentation of the will before an authority, the testator being required to declare that the document bears his own signature, a mandatory declaration in the presence of two witnesses and a person authorized to execute the document. France, for example, has designated notaries public, on the territory of the state, and diplomatic and consular agents, abroad, as persons authorized to implement the will. The testator must either sign the deed in front of the mentioned persons or just acknowledge the fact that it is signed by his hand, if this formality is already fulfilled when he appears in front of the persons designated for this purpose. In case of non-compliance with the formalities provided by the Uniform Law of the Convention, the sanction that will intervene is absolute nullity, thus creating another similarity between the two institutions – the mystical testament and the international one. Finally, from the perspective of probative force, both forms of testing benefit from a special character in the matter of solemnity, the international will being also drawn up in two copies, being at the same time presumed to be valid until proof to the contrary.

Another key fact to remember is a brief description of the testing procedures under European legislation.

3.2. France

French legislation presents four types of will, including the mystical one. The conditions for the testator to be able to draw up such an act require, first of all, that the author be in full mental faculties (901 French Civil Code) and have the capacity to exercise (art. 902 French Civil Code). The French legislator offers the possibility that the mystical testament can be both typed and written by the testator's hand or even by another person, provided that it is signed by the testator, then it must be closed and stamped in front of a notary, mandatory in the presence of two witnesses (art. 976 French Civil Code). As I stated previously, however, France ratified the Washington Convention of October 26, 1973, thus regulating it in domestic law and the international testament. It must be presented by the testator in front of a notary and two witnesses, with the mandatory signature of the testator, and will then be attached to a certificate drawn up by the notary responsible for preservation. In both cases, the wills will be registered by the notary in the Central Register of Wills. The registration in the register does not cover the content of the will, content that will remain secret, but only the civil status of the person in question and general information about the notary who will keep the will. Therefore, the role of the register is to direct the applicant to the notary who holds the document and not to reveal its contents, which increases its secrecy. Any successor can have access to the register only after presenting an extract of the death certificate or any other document proving the death of the person whose will is sought. The notary can only communicate the contents of the will to the heirs and legatees, unless there is a decision of the president to this effect „Tribunal de grande instance de Paris", decision requiring communication to other persons.

3.3. Luxembourg

Regarding the different forms of probate provided for in Luxembourg succession law, the Civil Code lists, among the classic types (holographic and authentic will), the possibility of drawing up a mystical will. Thus, depending on the form of testing chosen, the approaches and methods vary, as appropriate. The mystical will (also called secret will) is a document issued by the testator or another person and presented by the testator in a closed, stamped and sealed format to a notary, in the presence of two witnesses or a second notary, in this in the latter case, the presence of no witness being necessary. The notary who receives the mystical will draws up a deed of overwriting in minute or patent. All the notary also ensures and guarantees the preservation of the mystical will and therefore excludes any risk of replacement, alteration, destruction and forgery. The mystical will, like the authentic will, allows the secrecy of the dispositions given by the testator during his lifetime, but with greater rigor. Likewise, by submitting the will to a notary public, the mystical will will only be accessible after the death of the testator.

3.4. Malta

And in Malta the disposal of assets after a person's death can be carried out in several ways, among which we identify the secret will. It must be submitted to the court by the testator or by the notary. The secret will can be submitted by the testator to a judge or magistrate within the Voluntary Jurisdiction Section or delivered personally to a notary who, within four working days from the date of receipt, must send the will for safekeeping to the registry of the Voluntary Jurisdiction Section. Succession begins when an interested person presents himself to a notary or a lawyer who makes inquiries to verify whether any genuine

will has been entered in the public register or whether any secret will has been filed with the court. Following these steps, the succession opens: the notary or lawyer identifies the heirs and legatees, if applicable, and informs them of the results of his research. The assets are then divided according to the will of the testator. If the deceased left no will, the assets are divided according to the provisions of the common law.[10]

3.5. Quebec

Proceeding further, in the light of international legislative regulations, we find in the content of art. 716 – 725 provisions of the Civil Code of Quebec. In this state, a completely new type of will is regulated, more precisely the notarial will. It will be received by the notary, assisted by a witness or, in some cases, the presence of two witnesses being necessary. The notary has the duty to state the date and place where the reception takes place. The notarial will is read by the notary only to the testator or, as the case may be, at the choice of the testator, and in the presence of a witness. Once the reading is completed, the testator must declare in the presence of the witness that the document read contains his last will and testament. The will is then signed by the testator and witness(es), as well as by the notary public, with everyone listed signing in each other's presence. This Code also regulates, but in a distinct way, the manner in which they will test people with hearing or sight impairments. Thus, through a legal will drawn up by the blind, the provisions of the act will be read by the notary, the testator and in the presence of two witnesses. The notary has the obligation to declare in writing that the will has been read in front of the two witnesses and the testator, a declaration that will be subject to reading. The legal will of the deaf or deaf-mute, however, will be read in the situation where the testator is deaf by the testator himself, whether only in the presence of the notary or, at his own choice, the notary and a witness. In the will, the testator declares that he has read it in the presence of the notary and, as the case may be, the witness.

If the testator is deaf-mute, this declaration is read to him by the notary in the presence of the witness; if he is deaf, he reads himself aloud, in the presence of the notary and the witness. The person who, unable to express himself orally, wishes to make a notarial will, informs the notary about his wishes in writing. The notarial will cannot be received by a common notary, relative or ally of the testator, neither in direct line nor in collateral line up to and including the 3rd degree. The witness called to appear at the notarial will must be named and designated. Any adult can be present as a witness to the notarial will, with the exception of employees of the interim notary who are not yet notaries, but only practitioners.

4. Conclusions and propositions of lex ferenda

To conclude, analyzing the circumstances presented in detail with regard to the institution of the mystical testament which, although revolutionary, has an exceptional legal potential, especially in terms of secrecy and probative force, we support our opinion that the institution represents an imperative legal instrument necessary which could be re-added to the legal system or even undermined to the international will or to a new type of will. Thus, the closing and sealing of the will protects to a much greater extent the secrecy of the dispositions of the last will compared to the rest of the wills.

[10] European e-Justice Portal from *https://e-justice.europa.eu/517/RO/inheritance* Accessed 12 April 2023

The institution of the secret will is regulated in many legal systems – even in various forms – and produces legal effects; in essence, all the types of will presented in the content of the article present the same formal conditions, it being necessary to draw it up in a sealed envelope, to present it to the court or to the notary, the need for the act of overwriting and the verbal declaration of the testator according to which the dispositions of the last will from the will they belong to him entirely. In addition, the costs would be much lower than those required for the authentic will, taking into account the fact that the person who receives it in the registry must keep it for preservation, but not authenticate it.

Society is in constant development, and the legislative limits must be as benevolent as possible to the citizen, giving him the possibility that, depending on necessity and especially on the basis of free will, all included in the sphere of exceptional solemnity, the deceased can choose to test in this form as well.

THE SITUATION OF SUCCESSORS IN THE MATTER OF SIMULATION

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Abstract

This study aims to present the regime of simulation in civil law, which allows contracting parties to keep their true agreement hidden. In addition, simulation illustrates a legal operation that intends to create a judicial appearance, established in the public act deliberately made by agreement of the parties which does not exist or is different with that which was really executed in the secret act also called counterletter that produces the real effects. Moreover, this paper will focus on the rights of the universal successor and the successor with universal title in relation to the counterletter and if they are entitled to ignore the benefits and the obligations created by the secret agreement. In this sense, the conditions, forms and effects of the simulation will be analyzed with the legal provisions in force.

Keywords: *simulation, legal operation, secret agreement, third parties, counterletter, universal successor, successor with universal title*

1. Simulation regulation

The simulation is a complex legal construction which appears distinct both from a technical perspective where it constitutes an exception to the principle of opposability of the binding effects of the contract, and from the perspective of the parties, context in which the operation is governed by the principle of binding force of the contract. In the case of third parties, the simulation is governed by the principle of relativity but not by the principle of oppositeness. In particular, by simulation, the contracting parties conceal from third parties the content of the true legal will that exists between them. This important institution of civil law is highlighted by the provisions of the Civil Code in the section on the effects of the contract towards third parties and which underlines the exceptional character from the principle of opposability, stating that the secret act produces effects only between the parties and, if the nature of the contract or the stipulation of the parties does not indicate otherwise, between their universal successors or successors with universal title[1], while a public act which is not in conformity with reality produces its effects in regard to third parties.

It is necessary to specify that the simulation thus represents the concealment of the real will of the parties, consisting in the simultaneous conclusion and existence of two agreements: an apparent or public one, through which a legal situation is invented that is not in conformity with reality and a secret one, which annihilates or modifies the effects produced under the public contract.[2]

Simulation conditions

For the valid existence of this legal figure [3] certain special conditions are claimed to be fulfilled, namely, the joint intention of the parties to simulate and the concurrent existence of two acts: one public and another hidden.

The common intention of the parties to simulate

Based on the principle of autonomy of will, the simulation can be carried out on the basis of the simulation agreement that consists in the realization of their will that the operation produces all the legal effects specific to the simulation. The condition of the existence of the common intention to simulate is not expressly indicated by the legislator, this is understood from the provisions of art. 1293 Civil Code, which provide that in order for there to be simulation in the case of unilateral legal acts, the agreement between the author of the act and its addressee is required.[4] in the absence of this agreement we will not be in the presence of simulation, but in the event that the parties conclude a secret act, they subsequently modify or revoke it through a new agreement, the two persons manifesting their will successively through several acts, which do not produce the effects corresponding to the simulation. In this regard, the High Court of Cassation and Justice, held as follows „ The simulation (...) constitutes an agreement between the contracting parties in order to conceal the true convention intervening between them. In this case, because there was no convention (...) there was no simulation". [5]

Consequently, we consider that for the existence of the simulation it is necessary, first, the common intention to simulate, which implies the joining of the two wills in a simulator agreement, whereby the parties externalize their intention to simulate. Furthermore, it is pertinent to add that the existence of the simulator agreement together with the secret act make up the secret part of the simulation giving it legal relevance.

Conditions of counterletter and public act

Just as I mentioned, the simulation consists of two acts: a public one, which does not exist in fact and a secret one, which fixes the true legal relations between the parties. For this legal operation to be valid, both contracts must in turn meet certain conditions. The act characteristic of this institution is represented by the secret or counter letter as it was called by the French Civil Code[6], the content and existence of which must not be known by third parties. Therefore, the secret character of the counterletter will be absent whenever it has been subjected to real estate advertising operations such as tabulation, registration in the electronic archive, transcription of the act or when it is indicated in the public act. Regarding the validity conditions that the secret contract must fulfill, the Civil Code clarifies in art. 1289 para. (2) the fact that the secret act will not take effect even between the parties if it does not meet the substantive conditions required by law for its valid conclusion – capacity, consent, object and cause. Therefore, for the secret act it is not required to comply with the conditions of form, a context in which a deviation from the principle of mandatory force that imposes the requirement of a „valid contract concluded", with reference to both substantive and formal conditions. [7]

In the case of a public act, it must meet the formal conditions of the transaction it depicts (for example, in the case of a real estate sale or in the case of a donation contract, the public deed must be concluded in authentic form). In addition, another condition that the public act must fulfill, unlike the secret one, is to dress a form susceptible to being brought to public knowledge.

1.3 Concurrent existence of the two acts

Contemporaneity, in the matter of simulation, implies the coexistence in time of the counterletter with the apparent act. According to the case-law [8] for this requirement to be

met it is not mandatory for them to end simultaneously, the contemporary character existing and then the secret act ends first in the sense of legal operation and subsequently, the public act, which completes the operation of the simulation and which masks the reality that the secret act has already established. [9] At the same time, the contemporary character of the simulation is respected also in the hypothesis in which the counterletter was simultaneously with the public act. What is of interest in this regard is that the legal operation must be prior to the apparent act or concurrent, in order to expressly contradict the apparent act. We emphasize, finally, that there will be neither contemporaneity nor simulation, when the public act is concluded first, and after the secret act, which modifies or annihilates either the effects or the clauses of the first act, given that both contracts are consistent with the real will of the parties. In such a circumstance we are in the presence of modification of a contract by another contract. [10]

If these requirements are met, the simulation can become an applicable mechanism, with the delimitation that the field of simulation covers patrimonial acts, valuable in money, unilateral and bilateral contracts (sinalagmatic), unilateral legal acts. The restriction exposed by the legislator concerns non-patrimonial acts according to art. 1294 Civil Code such as fictitious marriage or adoption which, if agreed, will be sanctioned with absolute nullity

1.4 Simulation forms

In this section, we will analyze the procedures used to hide the true legal relationships. Thus, the forms that a simulation can portray are: fiction, disguise, which can be total or partial, and interposition of persons.

1.4.1 Fictitious public act

Fiction presupposes a complete dissimulation of reality that intervenes when the parties conclude a public act, the existence of which is denied in the simulated agreement, establishing that that act will be devoid of any legal effect. Consequently, the public contract is illusory being concluded only by form, the parties being interested in believing that that contract subject to publicity exists and engages them from a legal perspective, which is why the doctrine calls this form of simulation, lifeless body. [11] For eloquence, I mention that the process of fiction is used to mislead by fraudulent purposes or by circumventing certain legal provisions. An example of this can be when a person who has by law the obligation to declare his property, before completing his declaration in question, fictitiously alienates certain assets in order to remove any suspicions and certain investigations as to the provenance of his property. [12]

1.4.2 Disguise

This form is materialized in that the parties conclude a contract, but intend to keep it secret, in whole or in part, hiding it through another contract. As a rule, the public act hides either the nature of the secret act (donation contract disguised as a contract of sale) or some of the effects or counterletter clauses such as price simulation are hidden or modified. In this first case, we are talking about the total disguise by which the public act masks the gratuitous or onerous nature of the real act. For example, A concludes with B a contract of sale, the public act, and in reality, by a counterletter, they conclude a contract of donation. Even if the donation is simulated, it must comply with the substantive conditions provided by law.

Partial disguise occurs when the contracting parties conceal the terms or effects of the secret act, as is the case when the parties stipulate in the public act a price other than the true one, the date of the conclusion of the act (a spouse postdates an act of purchase of an asset so that the date of acquisition is after the divorce so that that asset is not subject to division [13] or the manner of performance of obligations.

1.4.5 Interposition of persons

The last form of the simulation, interposition of persons, involves the concealment of one of the contracting parties. This operation is based on the existence of two legal acts – the public act, which is concluded with a certain person, and the secret act, by stating that the true beneficiary of the right transmitted by the apparent act is a person other than the one stipulated in the simulated contract. The specificity of the interposition of persons consists in its tripartite configuration, namely, the interponent (the actual beneficiary of the operation in the public act), the interposed (the person apparently appearing in the public act) and the third party (the true beneficiary). [14] The three contracting parties meeting in this simulation process must know both the content of the public act and that of the secret act. Moreover, the parties must know that the legal effects of the apparent act are born in the patrimony of the third party, and not in favor of the apparent beneficiary. This simulation mechanism is used when, for example, an interposed person appears in a donation contract because the true donor cannot receive the donation due to a legal incapacity. [15]

2. Effects of simulation in relations between contracting parties

The rule stated by the provisions of art. 1289 para (1) Civil Code it is that the secret act takes effect only between the parties and, unless the nature of the contract or the stipulation of the parties shows otherwise, between their universal successors or successors with universal title. Therefore, the legislator presents a first hypothesis in which the secret contract does not produce effects in relation to the successors mentioned, namely, the „nature of the contract", which limits the principle of opposability. A circumstance of this kind can be found in the case of intuitu personae contracts – the contract of mandate. The second hypothesis allows the parties concluding the secret act to specify whether they restrict or extend the possibility that the effects of the act may affect universal successors or successors with universal title. In other words, if the nature of the secret contract allows this and if the parties so stipulate, the secret contract shall also have effect in respect of this category of persons concerned. [16]

3. Universal successors and successors with universal title, third parties in the matter of simulation?

In view of the fact that this paper will be held at the Annual Session of Student Scientific Communications on the topic: „Law, European Studies and International Relations – The Patent Universality of Inheritance Law. Lex successionis between legislative tradition and modern values", we will dedicate this section to the analysis of universal successors and successors with universal title in the field of simulation. By the effect of the transmission of the entire patrimony or a fraction of the patrimony that belonged to the deceased, the Universal successors and those with universal title will assume the contractual rights and obligations of the latter, [17] with the exception of those that arose from the contracts intuitu personae mentioned above, becoming the continuators of the

personality of their author. Therefore, they will have the prerogative to introduce all the actions that their author would have had at his disposal in order to be able to capitalize on his patrimonial rights. Will universal successors and those with universal title be held to the position of their author in all cases? In practice, it has been shown that universal successors and successors with universal title can become third parties to the public act when the simulation was a means to defraud their legitimate interests, situation in which the successors are entitled to refuse the effects of the secret act. Such would be, for example, when by simulation their author pursued through the donation disguised as sale, the violation of the reserve of succession. [18] In this case, the successors may resort to the action in declaring the simulation although their right is not based on the appearance created by the simulation but on the quality of reserved heir [19] by which they claim the abolition of the counterletter, taking advantage of any means of proof according to art. 1290 thesis I Civil Code, and then ask for its reduction [20].

In the sense of the foregoing I bring to my attention the decision pronounced by the court [21] according to which the court confirmed the status of the applicant's legal heir, who requested the establishment of the simulated contract of sale and purchase of a real estate. With regard to substantive matters, the deceased had in fact concluded a contract of sale during his lifetime and if he had made a donation, in the present case no evidence of a secret document attesting to the existence of an apparent contract is produced. For the purposes of the above, the applicant, successor with universal title, acquires the quality of third party in relation to the act concluded by his uncle, but cannot invoke the fact that the operation committed by the deceased violated his reserve of succession, given that the liberalities can be challenged only by the reserved heirs, creditors or other interested third parties-the applicant being legal heir of the third degree. Taking these considerations into account, the court dismisses his action as unfounded.

In conclusion, we could consider that in this hypothesis we are in the presence of a derogation from the transmission of the patrimony, given that although they are universal or universal heirs, they become third parties in relation to the secret act, being prejudiced their interests, concretely, the legal reserve.

4. Sanction of simulation

Even if the simulation is not invalid for the mere fact of the parties ' willingness to hide from third parties the true relationships between them, this does not mean that the simulation is exempt from the application of a specific penalty. The regulations of the Civil Code indicate the sanction of the inoposability of the secret act to third parties not being therefore held to respect the legal situation invented by that contract that they does not know. In relation to the public act, however, of which they are aware, it is opposed to them. Through art. 1290 para (1) Civil Code, third parties are allowed to invoke the inopportunity of the secret contract in order to protect their legitimate interests. The text of the law attests that the secret act cannot be invoked against third parties who, based strictly on the public contract, have already acquired rights from the apparent acquirer. In order to invoke inoposability, third parties are required the condition of good faith that implies not knowing the existence of the secret act, and until proven otherwise, according to the principle provided by art. 14 Civil Code, good faith is presumed.

In this way, the law gives it protection against the effects of the secret act and the right obtained will remain in the patrimony of the third party unless proof is made that it was in bad faith. For this reason, the simulation is integrated among the exceptions to the opposability of the contract. [22]. The parties to the secret contract are prevented from demanding to third parties the observance of the counterletter, which can only produce effects between the signatory parties, being able to oppose them only the situation inappropriate to the reality of the public act. As a derogation, third parties may waive the inoposability of the secret act according to par. (2) of the same article stating that they „may invoke against the parties the existence of the secret contract, when it violates their rights". In order to ensure the protection of their rights, third parties may invoke in their favor either the public act or the secret act. For example, the right of option of third parties can be exercised when, under a conflict between the universal successor, the reserved heir capitalizes on the right to demand the reduction of excessive liberalities, and the third party who acquired the property from the recipient of a donation disguised as a contract of sale. [23] Thus, it is obvious that the successor will invoke the secret act, i.e., the donation, and the sub-acquirer the public contract of sale that he knew at the time of the transfer of ownership. If, however, the third party renounces its inoposability to the hidden contract, he will be entitled to use it in his interest, as is the case of the chirographar creditor of an insolvent debtor, who prefers to avail himself of the counterletter concluded by the debtor resulting from a fictitious sale and those assets did not come out of his patrimony and can be traced.

In the sanctions area, the legislator also shows some simulated situations that will be affected by nullity if it turns out that they were committed with the fraud of certain legal provisions, namely, art. 992 Civil Code, donations made in favor of a person unable to receive the donation will be invalid, art. 1033 para. (1) Civil Code any simulation in which the donation represents the secret contract in order to circumvent the revocability of donations between spouses will be sanctioned with nullity and in para. (2) it is provided that any relative of the donee to whose inheritance he would have vocation at the time of donation and which did not result from the marriage with the donor, will be presumed interposed person.

5. Simulation evidence

The provisions of art. 1292 Civil Code establish a different system for testing the simulation as the secret act is invoked by a third party, a creditor or by one of the contracting parties. Third parties, including creditors of the parties, may prove the content of the secret document by any means of evidence even with witnesses or presumptions, the legal act having the value of a legal fact in the narrow sense. The contracting parties will be able to test the simulation only according to the rules of common law, and if the object of the legal act exceeds 250 MDL, it will be proved only with documents.

However, when the signatory parties claim that the simulation is unlawful, they may also prove the existence of the secret act by any means of evidence. In addition, the common law lists other exceptions in which the parties may use any means of evidence to attack the counterletter, namely, for the violation of consent, the impossibility of pre-establishing the

written evidence, the beginning of the written evidence, the loss due to fortuitous or force majeure of the proving document. [24]

6. Conclusions

The extent of the simulation brings together in its assembly a series of general rules, but at the same time it is based on certain derogations, which makes it a special construction. Although viewed from the outside as an exception to the principle of opposability of the contract, the analysis carried out leads us to perceive it also as a legal operation separate from the others and which justifies its place in the Civil Code. It is not to be overlooked that this legal deviation is granted by law in order to support the real will of natural or legal persons, thereby granting the parties the possibility to keep secret certain conventions in accordance with the principle of freedom of contract.

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ABOLITION OF THE DEEDS OF THE DECEASED BY THE HEIRS OF THE DEEDS OF THE DECEASED BY THE HEIRS

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Abstract

When a person dies, his rights and obligations are transferred to his/her legal heirs or heirs designated by will. Regarding the deeds of the deceased, the heirs can cancel or replace them to protect their property or fulfil their obligations. To cancel the deeds of the deceased, the heirs must obtain a death certificate and a notarized copy of the will, if there is one. Other documents may also be required to prove their status as heirs and to prove that they have the legal authority to carry out these actions.

The certificate of heir is, in essence, an authentic and consensual act that can be drawn up exclusively by the notary public, with the procedure provided by law.

If a person dies, the heirs can request the annulment of the deceased's deeds in certain circumstances, such as the discovery of vices of consent, fraud or other wrongful acts that could make these deeds void or voidable. These actions are obtainable in court and must be accompanied by solid evidence to support the claims made by the heirs.

Donation revocability refers to the donor's right to cancel or revoke a previously made donation, which can be important if the donor wants to change the distribution of his wealth in the most efficient way or if circumstances change after the donation has been made. In certain cases, donations may be revocable in relation to reserved heirs, that is, those who have the legal right to receive a certain part of the donor's estate at the time of his death. In this case, the donor can revoke part of the donation so that he can ensure a fair distribution of his wealth according to the law.

Keywords: *successors, legal documents, act of heir, notary public, property, reduction of excessive liberalities, cancellation.*

Inheritance and its annulment

Civil law covers many aspects of human life, from birth to death. These aspects of life are regulated by law, so every rule has application in human life.

Inheritance is found in the second section of the patrimonial law[1], called successions, which regulates the consequences of death on the deceased's patrimony.

According to Article 953 of the Civil Code „*inheritance represents the transmission of the patrimony of a deceased person to one or more living persons*", which can be natural persons, legal entities, even administrative-territorial units or the Romanian state[2].

It may be notice that instead of the notion of „inheritance" the notion of „succession" is used, which in the matter of civil inheritance law has the same meaning[3].

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[1] See M. Grimaldi, Droit civil. Successions, Litec, Paris, 2001, page 2

[2] See G. Boroi, Fișe de drept civil, Hamagiu, București, 2021, Sheet no. 35 (in Romanian)

[3] However, in civil law, the notion of „succession" is also used in a broader sense, including any transmission of rights, between the living or due to death

It is taken into account the fact that the inheritance involves the appropriation of both the active patrimony which includes real estate (land, houses, apartments), movable property (cars, jewellery, money), rights (intellectual property, contracts, copyrights), as well as of the passive one that involves the obligations (debts, taxes) of the deceased, in other words, in the sense of inheritance, it is a legal universality[4].

Definition of terms

Inheritance is a transmission of the assets, rights and obligations of a deceased person to his heirs. This transmission is done by succession, that is, by law or by will, in accordance with the norms of civil law.

Unlike the old Civil Code, which used the term „succession"[5], the new Civil Code reverts to the term originally established by the civil legislation, namely „inheritance", while still having an exceptional character and the term „succession", integrated in the phrases: „share succession", „succession reserve", „ probate estate or successional mass (in Romanian –masă succesorală „„ „succession option", as well as various variations of these phrases. We must mention that, especially in current practice, the term „succession" is used in parallel with that of „inheritance" with reference to the same institution.

We can admit that, in principle, in the matter of inheritance law, the notions of „inheritance" and „succession" are synonymous, their differentiated use throughout the present work being dictated exclusively by considerations of form. By inheritance, in its narrow sense (*mortis causa*) can be understood: both the transmission of the deceased person's patrimony, but also the inheritance mass (*successor estate*)[6].

Mainly, the persons of interest regarding the right of inheritance are: the deceased person (the deceased, whose patrimony is transferred) and the person(s) who acquire (acquire) the patrimony left by the deceased.

The deceased is the person whose inheritance is in question, but he is also called „author" (for example, the joint author of the co-heirs), but also de cuius, abbreviation from the Roman law formula „*is de cuius successionis (rebus) agitur*" (the whose inheritance/assets it is about) [7].

The persons who acquire the patrimony of the deceased are generally called heirs or successors (sometimes legal successors). In the case of testamentary inheritance, the one who leaves the inheritance is called the testator, and the acquirer the legatee (universal, with

[4] S. Sztranyiczki, Drept civil. Drepturile reale principale conform noului Cod civil, Editura C.H. Beck, București,

2012, page 8. (in Romanian)

[5] Although the New Civil Code refers in particular to „inheritance", the term „succession" (lat. successio – replacement) is at least equally used in the field; see M. Eliescu, Moştenirea şi devoluţiunea ei în dreptul R.S.R., Editura Academiei, Bucureşti, 1966, page 19 (in Romanian). Opinăm în favoarea termenului de „succesiune" consacrat în doctrina naţională şi europeană (dar şi legislaţia nord-americană, a se vedea Codul civil din Québec). We are in favor of the term „succession" enshrined in national and European doctrine (as well as North American legislation, see the Civil Code of Québec).

[6] See Fr. Deak, Tratat de drept succesoral, Editura Actami, Bucureşti, 1999, p. 6 (in Romanian). Apparently, it could also be understood that the term „succession" concerns only legal inheritance (ab intestate). The interpretation cannot be retained, among other things, because the French doctrine itself recognizes that „it (**the will** – emphasis added) is, in essence, a succession act, regulated by the law of inheritance"; see M. Grimaldi, op. cit., page 3.

[7] The use of the term was imposed mainly due to grammatical requirements, using, for example, the formula „the death of the *cuius* (deceased)", being somewhat inappropriate to speak of the „death of the deceased"

universal title or with private title). The law and specialized literature use the term „*heretics*" or „*followers*" with the same meaning. In the case of testamentary inheritance, or in the case of mixed inheritance, the term „*testamentary heir*" or „*legatee*" is also used.

The term „possible successor", according to the Civil Code, means the person who has met all the conditions imposed by law to inherit, but has not yet expressed his succession option and has not completed the procedure in this regard. The definition is given by Article 1.100 par. (2) of the Civil Code.

The difference between „heir" or „successor" and „successor" is given by the fact that the former completed the succession procedure, expressed his option and obtained an heir certificate attesting the quality of „heir", while the latter (the possible successor) has a vocation, but has not yet expressed his succession option and has not completed the transfer procedure of the deceased's patrimony through the inheritance debate.

According to Article 955 para. 1 of the new Civil Code „*The estate of the deceased is transmitted by legal inheritance, to the extent that the deceased has not ordered otherwise by will*." So we distinguish two types of inheritance: legal and testamentary.

By legal inheritance or inheritance *ab intestate* (inheritance without a will) we understand that it is the inheritance that is being debated under the law, the author of the succession (the deceased) not leaving a will. Consequently, the legal succession occurs only when the deceased person did not make a will or when his will is null or invalid. In this situation, the heirs are determined by law, which establishes the order and proportions in which they receive the assets.

In the case of a testamentary inheritance, if the author of the succession (deceased) left a will in which he expressed his will regarding both the way of division and transmission, as well as regarding to whom his patrimony should be transferred after he will not is still alive, testamentary succession takes place. In this situation, the heirs are determined according to the provisions of the will.

By „*testator*" we understand that it is the person who disposes through a will regarding the transmission of the patrimony or after the death of the author of the will.

The *legatee* is the person who receives the testamentary heir by will.

The *testamentary bequest* is the testamentary clause by which the testator disposes of the patrimony or for cause of death.

According to the Civil Code, the surviving spouse, parents of the deceased and children/grandchildren/great-grandchildren are *reserved heirs*. The inheritance reserve is the part of the inheritance that is due, under the law, to the reserve heirs and that the deceased could not dispose of through liberalities or disinheritance. However, if the deceased does not have reserved heirs among those listed above, he can dispose of his assets as he pleases through liberalities or any other documents.

The matter regarding inheritance is given by the regulations of the Civil Code, Book IV – „On inheritances and liberalities", Chapter „Provisions regarding inheritance in general" – Articles 953-962; Chapter II – „Legal inheritance" – Articles 963-983; Chapter III – „Liberalities" – Articles 984-1099; Chapter IV – „Transmission and sharing of inheritance" – Articles 1100-1163; Article 557 para. (1).

Considering that the inheritance debate is carried out (with the exception of litigious cases) through the notarial succession procedure, we must also mention Law no. 36/1995, the law of public notaries and notarial activity as main source in the matter of successions.

In the context of strengthening the right to free movement within the European Union of its citizens, as well as the need to standardize or establish common rules and regulations in the case of procedures with elements of foreignness, we must mention in this context some of the European norms that have an impact on the succession procedure, such as Regulation (EU) no. 650/2012 of the European Parliament and of the Council of July 4, 2012 regarding jurisdiction, applicable law, recognition and enforcement of court decisions and the acceptance and enforcement of authentic documents in matters of succession and regarding the creation of a European heir certificate.

The right to inheritance being a guaranteed fundamental right, we mention that, from a constitutional point of view, the matter regarding the inheritance is provided in Romanian Constitution, Chapter II – „Fundamental rights and freedoms" Article 46.

Competent authority

In matters of successions, the competent authorities are the following: the notary public for non-contentious successions and the court of first instance (Court) for contentious successions[8].

The successor/other interested person can directly notify the court, with the obligatory submission of a notarial conclusion verifying the succession records.

Acceptance is express when the successor explicitly appropriates the title/quality of heir. Acceptance is tacit when the successor does an act/deed that he could only do as an heir[9].

The declaration of renunciation is made in authentic form at the notary public/diplomatic mission and consular office of Romania.

In the National Notarial Register of Record of Succession Options (RNNEOS), all notarial acts relating to the acceptance or renunciation of the inheritance are registered.

After the opening of the inheritance, liberalities that violate the inheritance reserve are subject to reduction, at the request of the reserving heirs, the successors and the unsecured creditors of the reserving heirs. In the case of a plurality of reserve heirs, the reduction operates only within the limit of the reserve quota due to the applicant and only he benefits. The reduction has the effect of ineffectiveness of legacies or termination of donations[10].

The notarial succession procedure is opened upon request. The request is recorded in the notary's succession register, after registration in the succession records at the level of notaries' chambers. The notified notary verifies his territorial competence and orders the summoning of those who have a vocation to inheritance, and, if there is a will, summons the legatee, the executor of the testament, the legal representative of the incapacitated heir, the guardianship authority (if applicable), the representative of the public administration (in the case of succession holidays). The notary establishes the quality of the heirs and legatees, the extent of the rights and the composition of the estate.

The number and quality of successor and/or the title of legatee are established by civil status documents, by will and with witnesses. The goods are proven by documents/any other means of evidence allowed by law[11].

[8] See Law no. 36/1995, Article 103 and et seq, and Article 193 in Code of Civil Procedure.
[9] See Article 1108 Civil Code
[10] See Articles 1092– 1097 Civil Code
[11] See Law no. 36/1995 Articles 103 to 120

The successor/other interested person can directly notify the Court with the attachment of a notarial conclusion regarding the verification of the succession records. The judicial division can be achieved through the understanding of the parties or, otherwise, the court will determine the assets, the co-heir status, the share, the claims, the debts and the duties.

The court can rule on the reduction of excessive liberalities, as well as on the donation ratio. The division of assets is done in kind, by forming lots or by assigning the asset to one of the heirs with the payment of the sums due to the other heirs. The court can order the sale of the property, by the consent of the parties or by the bailiff, by public auction. The court renders a decision, and the sums deposited by one of the co-heirs for the others and those resulting from the sale are divided by the court[12].

The notary will be able to proceed with the following: the liquidation of the inheritance liability, with the consent of all the heirs, respectively with the recovery of debts; payment of debts and liabilities; capitalization of movable and immovable assets; execution of private legacies. The notary will issue, in the mandatory preliminary phase, a succession certificate of liquidation, which includes the estate (active and passive), the heirs and shares and their agreement on the method of liquidation of the liability, the appointment of the liquidator and the deadline for completion.

The liquidator realizes the claims of the estate, pays the debts and valorises the assets. The liquidator submits to the instrumenting notary a report that includes the operations performed for the recovery of claims and the method of extinguishing the liability. After completion, the notary issues the heir's certificate, in the estate the net product of the liquidation will be highlighted[13].

Succession sharing between the heirs is done after issuing the heir certificate issued after the liquidation. Sharing may be voluntary. The ratio of donations is the obligation of the surviving spouse and the descendants of the deceased who come to the legal inheritance to return the donated goods to the inheritance without exemption from the ratio.

A person can inherit if he exists at the time of the opening of the inheritance and/or has the capacity to receive liberalities, has a succession vocation, is not unworthy, is not disinherited[14].

The one called to the inheritance can accept/renounce the inheritance. The legal heir legatee may exercise his option in any of these capacities. If, although the reservation was not violated, it follows from the will that the deceased wanted to reduce the share that would have been due to the legal heir, the latter can only opt as legatee[15].

The notary draws up reasoned conclusions, and at the end of the debate the final conclusion on the basis of which the certificate of heir/legacy is drawn up.

The certificate of heir includes the method of establishing the extent of the rights and proves the quality of the heir and the right of ownership. The notary can issue a certificate of heirship, which certifies the number, quality and extent of the rights, without the estate.

In the absence of heirs, it is established that the succession is vacant and a certificate of succession vacancy is issued.

The notary can resume the procedure in order to complete the final settlement with the omitted assets by issuing an additional heir certificate.

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[12] See Law no. 36/1995 Article 110, and Code of Civil Procedure Article 193 par. 3 Cod de proc. civilă

[13] See Law no. 36/1995 Articles 121 to 134A, and Article 1114 in Civil Code

[14] See F. Deck, R. Popescu, op. cit., page 75

[15] See Articles 957 to 963, 987, 989, 993, 1074 to 1076, 1100 and 1102 of Civil Code

Those who consider themselves disadvantaged can ask the court to cancel the certificate and establish their rights. In case of cancellation, the notary will issue a new certificate based on the final court decision. Interested persons can also contact the public notary in order to conclude an authentic act that certifies the amicable settlement of the dispute. In this situation, a new heir certificate is issued. Until the settlement of the dispute amicably by the conclusion of the notarial deed or until the annulment of the certificate of heir by a court decision, it proves the quality of heir, legal or testamentary, as well as the proof of the ownership right of the accepting heirs over the assets of the estate, in the share which belongs to everyone.

Through the petition of inheritance, the heir with universal vocation/with universal title can at any time obtain the recognition of this quality against the person who possesses without title goods from the succession patrimony.

During the debate of a contentious inheritance, the courts issue record/minutes of the Court proceedings and judgments. The partition decision has constitutive effect and, after it remains final, constitutes an enforceable title[16].

The certificate of inheritance and its getting

According to the provisions of Article 1133 para. (1) of the Civil Code, „*The certificate of heir proves the quality of heir, legal or testamentary, as well as the proof of the ownership right of the accepting heirs over the assets of the estate, in the share due to each one.*"

The heir's certificate is that declarative act, issued by the notary public as a result of the graceful succession procedure. This document shows which are the assets that belonged to the deceased that the heirs share, who are the heirs and what is the share they benefit from.

Article 1130 of the Civil Code regulates the persons who can obtain the recognition of the quality of heir, as follows: „*The heir with universal vocation or universal title can at any time obtain the recognition of his quality of heir against any person who, claiming to be based on the title of heir, possesses all or a part of the assets of the estate."*[17].

According to the dominant doctrinal opinions, it was considered that, although the heir's certificate proves the ownership of the heirs over the transferred assets, it does not represent a translational or constitutive act of rights, but only one with declarative value, the transfer of ownership over the assets from the estate, as well as the liability, occurring on the date of death.

In order to obtain a certificate of heir, an application must be submitted to the notary public to follow a specific procedure in the jurisdiction where the person died. In general, the following information must be provided to the notary public to complete the application:

1. Information about the deceased person, including the name, date and place of death, and a copy of the death certificate.

2. Information about heirs and descendants, such as name, address, date of birth and relationship to the deceased.

3. Information about the deceased person's estate, including real estate, bank accounts, investments and other assets.

[16] See Articles 1130 to 1134, 1635 to 1639 in Civil Code, and Articles 113 to 120 et seq in Law no. 36/1995

[17] See V. Tereza, 2014, Noul Cod civil – Volumul I. (Art. 1-1163). Adnotat cu doctrina și jurisprudentă**, Editia a II-a (in Romanian)**

4. The documents necessary to support the inheritance claims, such as birth certificates, marriage certificates or other documents attesting the relationship with the deceased person, to prove the quality of the heir.

After verifying the information, the notary public will issue an heir certificate, which will establish the identity of the heirs and the share of each of them in the deceased's estate. This application for an heir certificate can vary by jurisdiction, and the process can take weeks or even months. In addition, there may be a cost associated with obtaining such a certificate.

The heir's certificate is issued as a result of a complex procedure that has strict regulations, it cannot be revoked either by the notary who issued it, or by the heirs, being nevertheless subject to the annulment action similar to the expedient's decision, and its content is, in general, determined by law. It should also be mentioned that the heirs do not have the possibility to change by their consent, for example, the inheritance quotas due to them under the law, the will of the heirs always being expressed within its limits, under the careful verification of the public notary. Several decisions of the Supreme Court of Justice, as well as of the lower courts, pronounced under the old regulation, are able to reveal the fundamental change brought by the legislator of the new Civil Code on the probative power of the heir's certificate regarding the findings of the notary public relative to the composition of the estate. For example, it was shown that the certificate of heir filed in a claim action against a third party does not represent a property title, but an administrative act with limited power between the successors, it not having an *erga omnes* effect. Next, the Supreme Court ruled that the heir's certificate provides full evidence against the successors, until it is annulled for defects of consent, incapacity or grounds of absolute nullity.

Therefore, in order to definitively settle the controversies, the new Civil Code expressly provided in the content of Article 1133 that the heir's certificate[18] also proves the ownership right of the accepting heirs over the assets of the estate.

The agreement of the heirs is expressed during the succession procedure by signing the final agreement in front of the notary, and not the heir's certificate, which will always only bear the signature of the notary public. Then, even Article 246 of the Regulation implementing Law no. 36/1995 enshrines in its last paragraph the non-mandatory citation in the case of issuing the certificate of heir or legatee as a result of a final court decision, unless the public notary considers the citation necessary for clarification. There is, therefore, at least one situation in which the heir certificate loses its conventional character.

In another qualification it was shown that, although the public notary takes over the content of the heir's certificate the convention established in the final conclusion of the succession procedure, the heir's certificate is not confused with a simple convention, but borrows from the features of the judgment pronounced on the basis of Article 2278 of the Civil Code, also called expedient decision[19],, which, although it is based on the understanding of the parties, does not lose its character as a judicial act. Many other arguments highlight its character as a jurisdictional and voluntary act.

In conclusion, we can define the heir certificate as that declarative act, issued by the notary public as a result of the amicable succession procedure, based, in principle, on the

[18] See M.Mureşan, I.Urs, op. cit., page 31; F.Deak, op. cit., pages 111 to 112 (in Romanian)

[19] Represents the act by which, following the consent of the parties, the trial is terminated, the court pronouncing the expedient decision that includes the aspects stipulated by the parties in the transaction and brought to the attention of the court

will of the heirs materialized in the final conclusion, which proves the quality of heir, legal or testamentary, as well as proof of the ownership right of the accepting heirs over the assets in the estate, in the share due to each.

Termination Procedure

The cancellation of the deceased's documents can be carried out through the following procedures:

1. Obtaining the death certificate of the deceased

This is an official document issued by the competent authorities that confirms the person's death and must be presented during the deed cancellation process.

2. Identification of all supporting documents of the deceased

This process can be quite difficult, as documents may be stored in several places and may be associated with different institutions or organizations.

3. Contacting relevant institutions and organizations

After identifying the documents of the deceased, the heirs must contact each individual institution or organization to request the cancellation of the documents in question.

4. Presentation of the necessary documents

In order to cancel the deeds of the deceased, the heirs must submit the necessary documents such as the death certificate of the deceased, identity documents of the heirs and any other relevant documents.

Cancellation of heir certificate

Cancellation of an heir certificate can be done in two ways:

1. In court: thus, according to the provisions of Article 1134 of the Civil Code, „*Those who consider themselves that their rights have been violated by the issuance of the heir's certificate can ask the court to establish or, as the case may be, declare its nullity and establish their rights, according to the law*," or, according to the provisions of Article 120 para. (1) from Law no. 36/1995, „*Those who consider themselves that their rights have been violated by the issuance of the heir certificate can ask the court to cancel it and establish their rights, according to the law. Until it is cancelled by a court decision, the certificate of heir proves the quality of heir, legal or testamentary, as well as the proof of the ownership right of the accepting heirs over the assets of the estate, in the share due to each one.*"

The action for the annulment of the heir's certificate[20] in court is a personal and patrimonial action, through which the plaintiff requests the court to declare the relative or absolute nullity of the heir's certificate issued by the public notary.

The one who can formulate this action (has active procedural status), according to Article 119 of Law no. 36/1995, is any person who considers himself disadvantaged in his right by issuing the heir certificate. Thus, both the heir who participated in the notarial succession procedure, as well as the third party (heir or not) who justifies an interest, can bring the action to cancel or declare the certificate of heirs invalid. The summons request is formulated in opposition to all parts of the heir's certificate (passive procedural quality). Even if a reason for nullity is cited that concerns only one of the heirs recorded in the

[20]See M.Mureşan, I.Urs, op. cit., page9. For some more details, see G.Boroi, L.Stănciulescu, *Instituţii de drept civil în reglementarea noului Cod civil,* Editura Hamangiu (in Romanian)

certificate issued by the notary, all the heirs must be summoned to court so that the decision to annul the deed is enforceable against them.

The plaintiff can request both the cancellation of the certificate of heir[21] or testamentary legatee issued on the basis of Article 115 of Law 36/1995, as well as of the certificate of quality of heir, issued on the basis of Article 116 of the same law.

The heir's certificate is the document issued by the public notary, which states, based on the final conclusion drawn up by the notary, the estate, the number and quality of the heirs, as well as their shares from the deceased's estate. The certificate of the quality of heir will include only the mention regarding the quality of the heir.

2. By concluding an authentic deed in front of the public notary attesting to the amicable settlement of the dispute; according to the provisions of Article 1134 Civil Code, „*Those who consider themselves disadvantaged in their rights by the issuance of the heir's certificate can ask the court to establish or, as the case may be, declare its nullity and establish their rights, according to the law*", also according to the provisions of Article 120 para. (2) from Law no. 36/1995, which stipulates that: „*In this situation, a new certificate is issued. This procedure does not apply with respect to the succession vacation certificate.*"

It is mentioned the fact that the High Court of Cassation and Justice decided, in the event that in the context of the judicial succession debate and in close connection with the main heads of request regarding the opening of the succession, the determination of the quality of the heir and the cancellation of the certificate of heir, the cancellation of the subsequent acts is also requested concluded on the basis of the contested heir certificate; the jurisdiction of the court is determined by the value of the object of the subsequent documents whose annulment is requested as an effect of the possible annulment of the heir certificate indicated in the summons application. Thus, in the present case, the High Court held that, since the object of the litigation is a request in matters of inheritance, and the value of the object of the action, respectively of the sales-purchase contracts that could be terminated in the event of the admission of the action, exceeds the amount indicated in the provisions of Article 94 para. (1) Point k) New Code of Civil Procedure (NCPC), in establishing the competence to settle the dispute, the provisions of Article 118 NCPC, regarding the last domicile of the deceased, in conjunction with those of Article 99 para. 2 of the NCPC, according to which the value criterion attracts the jurisdiction of the court, as a „higher level" court in relation to the amount of the claim deducted from the judgment.

Decree no. 40/1953 marked the transfer of the competence to resolve the non-contentious succession procedure from the courts to the former State Notaries. This competence was also maintained by the new regulation of the activity of public notaries, Law no. 36/1995. However, neither the aforementioned Decree nor Law no. 36/1995 in its initial version did not recognize the possibility for interested persons to amicably resolve those disputes resulting from the issuance of the heir certificate without complying with certain legal provisions that could lead to its cancellation. Starting from 2013, litigants benefit from a new legal way to declare the inheritance certificate null and void.

The solution offered by the legislator by Article 120 para. (2) from Law no. 36/1995, which provides for the possibility of persons whose rights have been violated through the issuance of the heir certificate to address the public notary in order to conclude an authentic

[21] For more details,see F.Deak, op. cit., pages 32 to 33

act certifying the amicable settlement of the dispute is a commendable one, in accordance with modern theories on the nullity sanction, such as and with the new regulation from the Civil Code, which expressly enshrines the existence of amicable annulments. Prior to the entry into force of this rule, those disadvantaged by the issuance of the heir's certificate had as their only solution the appeal to the court of law for the correction of those found in violation of the legal provisions by the notary public in the content of the certificate.

Prior to the entry into force of this rule, the persons whose rights have been violated by the issuance of the heir's certificate[22] had as their only solution the appeal to the court of law for the correction of those found in violation of the legal provisions by the notary public in the content of the certificate.

The new regulation expressly excludes the application of the non-contentious procedure for the cancellation of the succession vacation certificate, given the fact that this certificate proves the ownership right belonging to the state or administrative-territorial units over the goods thus acquired, the law establishing an increased degree of protection in this situation, even if these goods will enter their private domain. Thus, the legal heirs or legatees will have to prove this quality in front of the court in order to obtain the cancellation of the succession vacation certificate, through the inheritance petition.

The heir or heirs participating in the notarial succession procedure cannot ask for cancellation unless they prove a defect in consent or a reason for absolute nullity (fraud on the law, illicit cause, illicit object, etc.). Not to be confused with a contract, the heir certificate is nevertheless the result of an agreement between the heirs participating in the non-contentious notarial succession procedure. This agreement must be unaffected by defects of consent or causes of absolute nullity[23].

In relation to third parties, however, the heir's certificate has only a relative probative force, its mentions can be contested by any means of proof allowed by law. Thus, foreign heirs who have their own rights over the goods included in the heir certificate as part of the estate can request the annulment of the heir certificate.

The plaintiff has the capacity of a person whose rights have been violated[24] by the issuance of the heir certificate, in which sense it will be shown what the damage caused by the issuance of the certificate consists of and in what way he is affected by it. The quality of person whose rights have been violated through the issuance of the heir's certificate constitutes a condition for exercising the action in relation to the provisions of Article 119 para. 1 of Law no. 36/1995: „*Those who consider themselves that their rights have been violated by issuing the heir certificate can ask the court to cancel it and establish their rights, according to the law*."

The reason for the cancellation must contain: the heirs mentioned in the heir certificate whose cancellation is requested, and the cause of invalidity affecting the heir certificate.

If the party formulating the action participated in the succession-notarial debate, then the heir certificate has the value of a convention, thus, the grounds of relative nullity invoked will concern the incapacity or defects of consent, and the grounds of absolute nullity invoked will be those provided by common law.

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[22] See Article 1134 Civil Code

[23] See Civil Decision no. 385, 2nd December 2009, Apeal Court Suceava – Civil Section for cases involving children and family

[24] See Supreme Court, Civil Section, Decision no. 576/1972, in R.R.D.nr.10/1992, page 174 and Decision no. 613/1973, in C.D. 1973, pages 147 to149

If the claimant is a third party to the heir's certificate, the mentions of the certificate are objectionable until proven otherwise, he can ask for the cancellation of the certificate due to the holder's lack of heirship or the wrong determination of the extent of his succession rights, or the declaration of nullity for reasons of absolute nullity according to common law.

Nullity and prescription of the heir certificate

The action for the annulment of the heir's certificate in court is a personal and patrimonial action, through which the plaintiff requests the court to declare the relative or absolute nullity of the heir's certificate issued by the public notary. Delimitation, by Article 119 of Law 36/1995, of the circle of persons considered interested in requesting the annulment of an heir's certificate, should not lead to the idea that the heir's certificate cannot be found to be absolutely null, according to the rules governing the regime of absolute nullity.

Cases of **relative nullity** of the certificate of heir: defect of consent represented by violence or if an heir with lack of discernment participated in the succession.

Cases of **absolute nullity**: the omission of an heir or the participation of a person who did not have the capacity of an heir.

The regime of absolute nullity is common to all legal acts, including authentic and consensual ones. Thus, „any interested person" can make a request to establish the absolute nullity of an heir's certificate, for reasons that can lead to the application of this sanction (eg. illegal cause or fraud).

With regard to the types of invalidity invoked in the request to cancel the heir certificate, the courts, through their jurisprudence, especially noted that: „*The present action, in the cancellation of the heir certificate, is prescriptive within the general limitation period, since they are invoked reasons of relative nullity of the legal act, and not absolute, for the action to be time-barred.(...) Therefore, to request the annulment of the heir certificate and to establish that the deceased has the capacity of heir after her late husband, who died in 1995, after the expiration of the general limitation period and without invoking grounds of absolute nullity according to common law, is clearly illegal.*"

The omission of some goods from the estate does not lead to the cancellation of the certificate. In that case, a certificate supplement will be issued and a voluntary sharing supplement can also be made. Likewise, material errors found in the works of the succession file or in the certificate of heir or legatee, which do not impinge on the rights and quality of the heirs and legatees, can be rectified by a rectification order.

After obtaining the total or partial cancellation of the heir certificate, the public notary will issue a new certificate based on the final court decision. For this purpose, the courts have the obligation to send to the office of the public notary competent in solving the case a copy of the final decision, together with the notarial file, if it was requested during the trial.

A special case is the cancellation of an heir's certificate declaring succession vacant. If there are no legal or testamentary heirs, the notary public will declare the succession vacant and issue a certificate of succession vacancy, after the expiration of the legal term for acceptance of the succession. Persons who are prejudiced by the issuance of such a certificate may request the competent court to annul it and establish their rights (inheritance petition).

It is quite rare to meet the express regulation of those situations in which a cause of nullity can be ascertained amicably; as a rule any convention can be subject, within the

limits, to such nullity. But in addition to the possibility recognized by law of the conventional cancellation of the heir's certificate, another case of amicable nullity can be found in Article 57 para. (6) of the Labour Code, which states that, when the employee and the employer identify a cause of invalidity within the individual employment contract, they can ascertain it and determine the effects produced by it. In addition, the possibility of conventionally establishing the nullity of a contract was often disputed under the provisions of the old Civil Code, arguing that no one can make justice for himself, only a judge can determine the incidence of nullity on a legal act. The new Civil Code regulates the general possibility of an amicable declaration of nullity, but without enshrining the conditions or effects of such a manifestation of will.

In practice, this nullity is sometimes confused with other reasons for termination of the contract, such as resolution and conventional termination or termination of the contract by agreement of the parties. Of course, although nothing prevents the person called to solve a cause in which this problem arises to qualify the convention himself according to the will of the parties, this confusion must be avoided from the beginning, since the nullity convention will produce retroactive effects in the absence of derogation express, in contrast to a termination or denunciation agreement, which will not affect the services already performed. Moreover, what separates the nullity convention from the rest of the aforementioned conventions is that, in order to be validly concluded, it is mandatory for the parties to identify a reason for nullity provided by law in the act that is sought to be annulled, since the establishment or the suppression of any cause of nullity is considered unwritten[25].

The action for annulment of the heir's certificate is time-barred when it aims to ascertain the quality of the heir, establish the estate of succession and the rights of each heir, include in the estate of an asset the property of another (situation in which the action for annulment meets the characteristics of an action for claim or ascertainment) [26].

The action of the heirs to cancel the heir's certificate for defects of consent is subject to the 3-year limitation period provided by Article 3 para. 1 of Decree no. 167/1958, which begins to flow according to the distinctions provided for in Article 9 of the mentioned normative act.

Renunciation of the inheritance is not confused with non-acceptance of the inheritance, because only the successor who accepted the inheritance can subsequently renounce it. It is necessary to make a distinction regarding the cancellation of the heir certificate, according to whether the party requesting it participated in the notarial succession procedure and consented to its release, or is a third party who did not consent to the issuance of the certificate[27].

Revocability of donations in relation to reserved heirs

Donation revocability refers to the donor's right to cancel or revoke a previously made donation, which can be important if the donor wants to change the distribution of his wealth in the most efficient way or if circumstances change after the donation has been made.

[25] See G. Boroi, Fișe de drept civil, Hamagiu, București, 2021, Sheet no. 3, page. 165 – Clauses considered unwritten. It is mentioned the opinion of C Todică according to which there are no legal nullities without being ascertained or pronounced by the court.

[26] See Civil Decision no.385/05.07.2007 of Dolj Court and Civil Decision no. 53/21.01.2008 of Craiova Apeal Court – Civil Section

[27] See Civil Decision no. 45/24 January 2013 of the Alba Iulia Apeal Court

In certain cases, donations may be revocable in relation to reserved heirs[28], that is, those who have the legal right to receive a certain part of the donor's estate at the time of his death. In this case, the donor can revoke part of the donation, so that he can ensure a fair distribution of his wealth according to the law. However, this option is generally only available in certain circumstances, and it is important to note that the law on the revocability of donations in relation to reserved heirs can vary from country to country and that there are many exceptions and exceptions to the rules.

The **reduction** is a civil sanction applicable to excessive liberties, lacking their effectiveness to the extent necessary to complete the reserve, but without causing their nullity[29].

This sanction is applied, if applicable, not only to proven or presumed donations, but also to testamentary legacies, including private legacies in the form of testamentary provisions having as their subject sums of money, values or securities deposited with specialized institutions or universal legacies, with a universal title or with a private title, intended for the establishment of a foundation, against which the heirs have the same rights as in the case of any other liberality made by the de deceased.

If, following the determination of the actual value of the inheritance reserve, it is found that the liberalities made by the deceased (donations and/or bequests) exceed the available quota, affecting the reserve, they are to be reduced within the limits of the available quota. Article 1092 of the Civil Code provides in this sense that: „*After the opening of the inheritance, liberalities that violate the inheritance reserve*[30] *are subject to reduction, upon request*."

Until the moment of the opening of the inheritance, the reserved persons have no right to the succession, but only a simple expectation, not being able to take any kind of measure to preserve their eventual rights.

In all cases, the issue of reduction can arise only after the opening of the inheritance, both in the case of legacies – which produce effects only from this moment, and in the case of donations, the rights of reserved heirs being born on the date of opening the inheritance.

The reduction can be invoked not only in the case of liberalities made in favour of third parties or in favour of non-reserving heirs, but also in the event that the beneficiary of the liberality is a reserving heir, if this has affected the reserve of the reserving co-heirs. Protection of the reserve is required in all cases.

The reduction of excessive freedoms can be achieved with the good will of those interested. In the absence of such permission, it can be invoked before the court *by way of exception* or *by way of action*.

The exception to the reduction will be raised by the reserving heir when the asset that is the object of the bequest is in his possession, and the legatee claims the payment of the bequest, i.e. handover of the asset. The exception to the reduction is *imprescriptible extinguishing*.

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[28] See Fr. Deak, Drept succesoral, pp. 7 (in Romanian)

[29] See M. Mureşean, I. Urs, op. cit., pp. 110

[30] As it was shown in the legal literature „*the acts concluded with non-compliance with the legal provisions regarding the reservation are sanctioned with absolute nullity, since the disinheritance of the reserved persons contravenes the most basic norms of morality and equity, the inheritance reserve having, in the last instance, also a social character, the family being the core of society*" (see F.Deak, op. cit., pp. 304).

The reduction action is exercised when the donated property is already in the possession of the recipient, and the reserved heir requests the reduction of liberties and the return of the property. The action in reduction is *prescriptive with extinction*.

According to Article 1093 Civil Code, „*The reduction of excessive liberties can be requested only by the reserving heirs, their successors, as well as by the unsecured creditors of the reserving heirs.*" Thus, the reduction[31] can be invoked by:

- **Reserving heirs** – in favour of which the reservation and its means of defence were established by law, but only if they have accepted the inheritance and did not renounce the right of reservation after the opening of the inheritance.

The right to claim the reduction[32] arises together with the inheritance reserve, on the date of the opening of the succession, directly in the patrimony of the reserved heir, who does not exercise it as the successor of the deceased, but in his own name.

If there are several reserved heirs, they can exercise the right to reduction collectively, but this right has an individual character, so that if one of them renounces to exercise the right, in order to respect the liberal will of the deceased, the liberalities will be reduce only to the extent necessary to complete the reserve of the others.

- **The successors of the reserved heirs**, i.e.: the heirs of the reserved heirs – the right being transmitted as a patrimonial right to their own heirs, the assignees between the living, with onerous or free title, of the succession rights that belong to the reserved heirs and which they pass on. These assignees are successors with a private title of the reserved heir, but the assignees acquire a right that they carry over a universality or over a share-part of a universality, of which the right to reduction is also a part.
- **The unsecured creditors of the reserving heirs** – who exercise the right to reduction through the oblique action, as this patrimonial right is not exclusively personal.

Persons who cannot claim the reduction:

- **The acquirer with private title from the reserved heir**: the acquirer with private title from the reserved heir (the buyer or the donee of an individual asset from the inheritance) has, in this matter, the capacity of a third person and, as such, cannot exercise the right of the reserved heir to reduction.
- **The creditors of the deceased**: in principle, even the creditors of the deceased cannot invoke the benefit of the reduction of excessive liberalities, distinguishing themselves according to whether the liberalities made by the deceased are donations or related:

o regarding the donations, the deceased's creditors cannot ask for the reduction, because for them the donated goods have definitively left the deceased's patrimony, so they no longer form the object of their general pledge, if they have not requested the revocation of the donations through the Paulian action;

o even in respect of legacies, the creditors of the deceased cannot ask for the reduction; but the gross asset of the inheritance forms the object of their general lien and, as such, according to the principle *nemo liberalis, nisi liberatus* (no one can liberalize until he has paid his debts), they can demand payment of debts in priority to linked.

- **Grantees or legatees**: the reduction cannot be claimed by the donees or legatees either, because the reduction operates against and not in their favor.

[31] See F.Deak, op. cit., pp. 327; M.Mureşan, I.Urs, op. cit., pp. 105

[32] See D.Chirică, op. cit., pp. 344

The problem arises only if the bequeather has made several liberalities (donations and/or bequests) by which the available quota has been exceeded, regardless of whether a single person or different persons have benefited from the liberalities. Article 1096 of the Civil Code enshrines three rules governing the order of reduction of excessive liberties:

„(1) Legacies are reduced before donations;

(2) The legacies are all reduced at once and proportionally, except if the testator decided that certain legacies will have priority, in which case the other legacies will be reduced first;

(3) Donations are reduced successively, in the reverse order of their date, starting with the newest."

The first rule is applied where the deceased made both donations and legacies. The legacy will be reduced to the extent necessary to ensure the reserve of the reserving heirs. The rule of reduction of those bequest before donations, regardless of the date of the will, is justified by the fact that they are the last liberalities made by the deceased, they only take effect on the date of the opening of the inheritance and because of them the inheritance reserves were affected, the previous liberalities (donations) being made, at least in part, from the available quota and through the principle of irrevocability of donations. This rule is mandatory. This being so, the testamentary clause that would provide for the priority reduction of donations or their reduction simultaneously with legacies, will be invalidated.

Universal or universal legacies, as well as private legacies, regardless of whether they were provided for in the same will or in different wills, are subject to simultaneous reduction and proportional to their value.

The second rule is subject to the reduction of the charge clause. According to Article 333 Civil Code, *„(1) By matrimonial agreement it can be stipulated that the surviving spouse takes over free of charge, before the division of the inheritance, one or more of the common assets, held jointly or as co-ownership. The precipit clause can be stipulated in favour of each of the spouses or only in favour of one of them. (2) The fee clause is not subject to the donation ratio, but only to the reduction, under the conditions of Article 1.096 para. (1) and (2)."*

This rule according to which the legacies are all reduced at once and proportionally is explained by the fact that the legacies produce effects from the same date – the date of the opening of the inheritance, but it has a dispositive character. In this sense, the law allows the testator to order the payment of one (some) related with preference over others, in which case the preferred ones will be reduced only if the inheritance reserve will not be completed by the reduction of the others. Also, no legal principle prevents the legatees themselves from deciding the order of reduction of legacies, provided that the rights of reserved heirs are respected. It is also admitted that those entitled to request the simultaneous and proportional reduction of the legacies can unilaterally waive the application of this rule, bearing the difference necessary to fulfil the reservation.

The third rule is justified by the idea that newer donations have affected the inheritance reserve, being also claimed by the principle of the irrevocability of donations. This reduction rule is mandatory, the donor not being able to establish another order of donation reduction either through the contracts concluded or through the will left. But it cannot be applied to donations that have the same date. Thus, Article 1096 para. 4 Civil

Code provides that „*Concurrent donations are all reduced at once and proportionally, except if the donor ordered that certain donations will have priority, in which case the other donations will be reduced first.*"

According to Article 1097 para. 1 Civil Code, the reduction has the effect of the *ineffectiveness of legacies* or, as the case may be, *the abolition of donations*, to the extent necessary for the registration of the inheritance reserve.

In the case of bequests (when the bequeathed goods are usually in the possession of reserved heirs, who invoke the reduction by way of exception, refusing to pay the excessive bequest), the reduction has the effect of their lapsing, that is, they will become ineffective, in whole or in part, to the extent necessary to complete the inheritance reserve[33].

In the case of donations made by the deceased during his lifetime (when the donated goods are in the possession of the respective donors), the reduction has the effect of revoking the donation contract, the right of the donee being abolished with retroactive effect, but not from the moment of concluding the act of donation, but only from the date of the opening of the inheritance, because at this moment the reserve must be completed. According to Article 1097 para. 2 Civil Code, the completion of the inheritance reserve as a result of the reduction, is carried out in kind, the donee will have to return the property, but keeping the natural or civil fruits received before the opening of the inheritance.

The reduction is carried out by equivalent if, before the opening of the inheritance, the donee disposed of the asset or constituted real rights over it, as well as when the asset perished due to a cause attributable to the grantee[34]. When the donation subject to the reduction was made to a reserve heir who is not obliged to report the donation, he will be able to keep in his reserve account the part that exceeds the available quota.

If the object of the donation or bequest is a usufruct, use or residence or an annuity or life support, the reserved heirs have the option either to execute the liberality as it was stipulated, or to abandon the property of the available quota in favour of the beneficiary of the liberality, or to request the reduction according to common law. If the reserved heirs do not agree on the option, the reduction will operate according to common law.

Regarding the *imputation of liberalities*[35], if the beneficiary of the liberality is not a reserve heir, the liberality received is imputed on the available quota, and if it exceeds it, it is subject to reduction. At the same time, if the gratuity is a reserved heir and the generosity is not subject to the ratio, it is imputed on the available quota. As the case may be, the surplus is charged on the reserve quota to which the beneficiary is entitled and, if it exceeds it, it is subject to reduction. If the beneficiary is a reserve heir and the liberality is subject to the ratio, it is imputed on the reserve of the beneficiary, and if applicable, the surplus is imputed on the available quota, except for the situation in which the disposer stipulated his imputation on the global reserve. In this last case, only the part that exceeds the global reserve is charged on the available quota. In all cases, if the available quota is exceeded, the liberality is subject to reduction.

If the donee is a successor liable to report, and the part subject to the reduction represents less than half of the value of the donated asset, the reserved donee can keep the

[33] See I. Urs, op. cit., pp. 114

[34] See Article 1097 para. 3 Civil Code

[35] For more details, see D.Chirică, op. cit., pp. 363

asset, and the reduction necessary to complete the reserve of the other reserved heirs will be made by taking less or the monetary equivalent.

According to Article 1095, the limitation period for the reduction is a general term, it is prescribed within the period of 3 years from the date of the opening of the inheritance or, as the case may be, from the date when the reserved heirs lost possession of the goods that form the object of the liberalities. The abatement exception is non-prescriptive by extinction, and the action in abatement is prescriptive.

Specific aspects in some succession law systems

Canada – Quebec

Introduction

Canada is a federation that includes ten provinces and three territories. Most areas of private law (including succession law) which in the Canadian Constitution are designated under the title „Property and Civil Rights" are the exclusive competence of the provincial parliaments. The province of Quebec is the only one that has a civil law system, derived from the French Civil Code. However, important institutions from the common law system, applicable in the rest of Canada, have been incorporated over the years into the Quebec system, such as for example the concept of trust, today integrated into the Civil Code of Quebec. This Civil Code was adopted on December 18, 1991 and entered into force on January 1, 1994.

Legal inheritance

In case the decedent did not make a will or all the designated legatees had passed away, the Civil Code provides for the classes of heirs and the shares they are entitled to from the inheritance. Thus, if there are descendants and a surviving spouse, the latter collects 1/3, and the children 2/3. In the absence of the surviving spouse, the entire inheritance is collected by the descendants. Between them works the principle of closeness of the degree of kinship, of division by heads and then of successive representation. No distinction is made according to whether the children are out of wedlock, adulterous or adopted.

In the absence of descendants, the privileged ascendants (father and mother) as well as the privileged collaterals (brothers and sisters) of the deceased and their first-degree descendants are called to inherit. In competition with the surviving spouse, the privileged ascendants reap 1/3 of the inheritance. In competition with the privileged collaterals, the surviving spouse has the right to 2/3 of the inheritance. If there are no descendants or surviving spouse, privileged ascendants and privileged collaterals have equal rights to the inheritance. In the absence of descendants, privileged ascendants or privileged collaterals, the surviving spouse collects the entire estate.

It follows that there are several classes of heirs: the first includes the descendants and the surviving spouse; the second one includes the surviving spouse, the privileged ascendants and the privileged collaterals. The third class is relevant only in the absence of the surviving spouse, descendants, privileged ascendants or privileged collaterals. Here are included ordinary ascendants (other ascendants than father and mother) and ordinary collaterals (other collaterals besides brothers, sisters, nephews and nieces of the first degree).

If there is no person belonging to the three classes or all have renounced the inheritance, the state collects the vacant inheritance of assets located in Quebec. This rule derives from the Hague Convention on the law applicable to successions and allows assets left outside the

territory of this state to be collected by the foreign state. Apart from this situation, there are no differences between movable goods and immovable goods, the law does not distinguish even according to the origin of the goods, according to the principle of the unity of the patrimony.

The law prohibits pacts on future successions, even if there is the consent of the person whose inheritance it is about. In practice, however, by way of exception, such a clause included in joint stock company contracts was recognized as valid. In general, *mortis causa* donations are only allowed if they are concluded between spouses and are part of the prenuptial agreement.

The issuing authority of the heir certificate

Holographic (handwritten) wills and those made in the presence of witnesses must be confirmed by a court decision before the assets are distributed. All universal legatees must appear before the court to support their claims. The disposition taken by the court only certifies the validity of the will, and upon request, certified copies of this decision can be issued to interested persons.

Succession administration

In Quebec, the persons responsible for managing estates are called liquidators. They have the role of identifying and summoning the heirs, determining the contents of the estate, paying the debts of the estate, executing private legacies, giving an account and handing over the surplus the heirs. Any capable person can exercise the function of liquidator. And trust companies authorized by law can have this quality. As a rule, the liquidator is designated by the testator in the will. The inventory of assets from the estate, drawn up by the liquidator, must be entered in a public register, with reference to the name of the deceased, so that every interested person can consult it. The inventory is drawn up either in the form of a notarial act, or as written under a private signature, in the presence of two witnesses.

The creditors of the estate are paid first, before the legatees with private title and before the spouse who claims the rights deriving from the dissolution of the family patrimony. If the testator did not appoint a liquidator or the succession is legal, the administration of the inheritance falls to the heirs who will appoint a liquidator by majority vote.

The applicable law and procedures in the case of successions with an element of foreignness

According to Article 3153 of the Civil Code, the Quebec court is competent if the place of opening the succession (place of death) is in this country, if the deceased was domiciled in Quebec or had chosen the law of this country to be applicable.

The national court will apply different laws, as it relates to movable property (the law of the last domicile of the deceased) or immovable property (the law of the place where the property is located).

The Code provides an exception to the freedom to choose the law applicable to the succession, if that designation would remove the surviving spouse or children from the rights to the inheritance. In addition, the designation will also be ineffective if it affects the succession rules to which certain assets are subject, provided in the law where they are located, for reasons related to their economic, family or social destination.

Spain

Introduction

Spanish law is part of the civil law system and that is why many of the institutions are taken over from Roman law.

According to the 1978 Constitution, the state organization includes, in addition to the central state, seventeen autonomous regions. From the point of view of succession law, only six of these have their own rules, the rest of the territory being governed by the Spanish Civil Code. The regions with their own succession regime are Catalonia (Succession Code of 1991 and Civil Law Compendium, revised in 1993), Aragon (Civil Law Compendium of 1985, Succession Law of 1999 and Law on Matrimonial Regime and Widow's Right to Life Pension of 2003), Navarre (Civil Law Compendium of 1973), Basque Country (Basque Country Civil Law Act of 1992, revised in 1999), Balearic Islands and Galicia (Balearic Islands Civil Law Compendium revised in 1990).

Legal inheritance

If the deceased did not make a will or it does not refer to the entire estate or if the will is not valid or the legatee does not want or cannot accept it, the inheritance is deferred according to the law.

The order of the classes is practically the same in all successional regimes in Spain, because they incorporate the rules of Roman law. Thus, the children of the deceased and their descendants enter the first class; in the absence of the descendants, the ascendants are called; in the absence of descendants or ascendants, the surviving spouse; if there is no heir from the first three classes, the collaterals up to the fourth degree are called, first the brothers and sisters, on the heads, and their children on the stems, finally, in the absence of collateral relatives up to the fourth degree, the inheritance is collected by state.

It should be mentioned that in the first two cases the surviving spouse has the right to collect his inheritance reserve in usufruct. If the heirs are the descendants, the ascendants or the surviving spouse, the public notary can attest to their status as legal heirs. Instead, in the case of collaterals, only the court, with the participation of the prosecutor, gives them the status of legal heirs (Articles 977 to 1000 of the Code of Civil Procedure 1881).

However, there are regions (such as Aragon, Navarre, Biscay in the Basque Country and the Aran Valley in Catalonia) where the law states that real estate from a certain branch of the family can only be acquired by people belonging to that branch.

The testamentary freedom and the problem of reserve

In the Civil Code there is a whole section that refers to the inheritance reserve (De las legitimas) Articles 806 to 847. It is regarded as part of the inheritance and in this way restricts testamentary freedom. The beneficiaries of the reserve are the children and their descendants and – in their absence – the ascendants and the surviving spouse. The reserve for children and descendants is 2/3 of the father's and mother's wealth. However, 1/3 of this quota can be disposed of in favour of one/some descendants, preferably. The available quota is 1/3. The parents' or ascendants' reserve is half of the estate, except in the case when there is also a surviving spouse and it can be agreed that the parents' reserve is only 1/3. In the absence of the father or the mother, the reserve is due in equal parts to the two lines of maternal and paternal ascendants, operating the principle of proximity of the degree of kinship.

According to Article 811 of the Spanish Civil Code, if an ascendant inherits from his descendant assets that he had received free of charge from a relative, the heir is obliged by law to keep the asset at the disposal of the donor or a relative until third degree, on the line from where it originates.

The surviving spouse has the right to receive the usufruct of his share, but never the property. In competition with the children, the surviving spouse has the right to one third, half in contest with ascendants and two thirds in contest with other relatives (Articles 834 to 840 Civil Code). According to the Constitution, all descendants (legitimate, illegitimate, including adulterous, adopted) have equal rights.

In the regions that have their own succession law, there are some special provisions regarding testamentary freedom and the reserve. Thus, in Aragon, only the children are reserved heirs, and the surviving spouse acquires the usufruct of the entire fortune. In Catalonia, the inheritance reserve is one-fourth of the inheritance, which goes to the descendants or, in their absence, to the parents. The surviving spouse is only entitled to a quarter of the inheritance, provided that he has no financial resources at the time of opening the succession. In Navarre the absolute right to test is enshrined. The surviving spouse has the right to the lifetime usufruct of the entire estate of the deceased. In the Basque Country, descendants are entitled to a four-fifths reserve; in their absence, the parents and other ascendants have the right to a succession reserve of half of the inheritance. Within each category, the testator has the freedom to divide the estate into equal or unequal parts. The surviving spouse receives half of the usufruct of the entire estate if he competes with the descendants or ascendants. In their absence, he has the right to three quarters of the usufruct of the estate.

Special rights. In Spanish law, in general, there are no provisions regarding the maintenance obligation in the matter of successions, because it is regulated by family law. In Catalonia, in the first year after the opening of the succession, the surviving spouse has the right to live in the house that constituted the conjugal domicile, and to keep the assets of the household. In the Basque Country, in the absence of descendants, the surviving spouse has the right to live in the rural house of the deceased for one year and one day. It should be noted that the alimony established in favour of a divorced person does not automatically end with the debtor's death, but his heirs can request a reduction up to the limit of the available quota. If there are reserving heirs, the donations must be added up in value to determine the extent to which they violate the reservation, in which case they are subject to reduction, according to the principle that no one can donate more than they could have tested.

Competent authority

According to the Spanish Notarial Law, if the inheritance concerns descendants, ascendants or the surviving spouse, the competence belongs to the notary of the last domicile of the deceased; if the inheritance is to be collected by the collaterals or the state, the jurisdiction belongs to the court, with the participation of the prosecutor.

The law and procedures applicable in the case of successions with an element of foreignness

The rules of private international law are found in the Spanish Civil Code, in the preliminary title. According to Article 9(8), the succession is governed by the national law

of the deceased on the date of opening the succession, regardless of the nature of the goods or the country in which they are located (principle of unity); however, the succession provisions or conventions drawn up according to its national law, by which another applicable law has been designated, are valid. And, according to Article 9(1) of the Civil Code, the personal status of natural persons is given by the law determined by citizenship, the law that regulates civil capacity, family rights and obligations and succession.

Spain has ratified the Hague Convention regarding conflicts of laws in the matter of the form of testamentary dispositions. According to Article 11 of the Spanish Civil Code, the *locus regit actum rule* applies, regarding the form of wills. With regard to jurisdiction, Article 22.3 of the Judicial Organization Law provides that Spanish courts are competent in succession matters if the deceased had their last domicile in Spain or immovable property in this country.

In order to take possession of the inheritance, if the heir's certificate was issued abroad, the requirements of the 1961 Hague Convention on the legalization or application of the apostille must be met and translated into Spanish.

We examined and briefly observed several succession systems, to see the rules of material law, as well as those of international law applicable to successions, in several states.

The comparative analysis demonstrates the need for predictability in succession cases, in order to avoid solving the same type of case differently in different states. As long as some states subject the succession to the law of the citizenship of the deceased, and others consider the domicile as the connecting point, on the other hand some states subject the entire inheritance to the same rules, while others make a distinction according to the place of their location, it is difficult to ensure the desired space of unitary justice.

Conclusions and final remarks

We note that the annulment of the deceased's deeds by the heirs can be done through different actions; in this paper, we highlighted the cancellation of the heir certificate, the revocability of donations in relation to reserved heirs.

We conclude that cancellation of the heir certificate is possible in certain limited circumstances provided by law, and generally, once an heir certificate is issued, it is considered to be final and executory, meaning that it cannot be easily cancelled. The nullity of an heir certificate can be invoked if it was issued in violation of the law or if there are defects of consent on the part of the person who requested it. The certificate can also be declared void if there are errors in the documents submitted to obtain the certificate or if the court was misled.

- The certificate was issued on the basis of falsified or inaccurate documents.
- There is new evidence that was not taken into account when the certificate was issued, but which could have had a significant impact on the decision.
- The certificate was obtained by fraud or other illegal means.
- Another heir, who was not considered when the certificate was issued, is now in possession of evidence showing that he is entitled to a share of the inheritance.

It is important that the application for cancellation of the heir certificate must be submitted within a limited time frame.

Donation revocability refers to the donor's right to cancel or revoke a previously made donation, which can be important if the donor wants to change the distribution of his wealth in the most efficient way or if circumstances change after the donation has been made.

In certain cases, donations may be revocable in relation to reserved heirs, that is, those who have the legal right to receive a certain part of the donor's estate at the time of his death. In this case, the donor can revoke part of the donation so that he can ensure a fair distribution of his wealth according to the law.

The reduction has the effect of ineffectiveness of legacies or the abolition of donations to the extent that is necessary in order to complete the inheritance reserve, depending on the case. The entire reserve, as a result of the reduction, is made in kind. The reduction is carried out by equivalent if, before the opening of the succession (inheritance), the donee disposed of the asset or established real rights over it, as well as when the asset perished due to a cause that can be attributed to the donee.

In general, the statute of limitations represents the loss of the right to act in court as a result of the passage of a certain period of time after the occurrence of the facts that could have been contested.

In the case of heir certificates, but also in the case of reduction, the limitation period may vary according to local jurisprudence and legislation. In Romania, but also in many other countries, the limitation period is 3 years, but it can be longer or shorter depending on the specific circumstances of the case. For example, I noted that the Indian legislation regarding the cancellation of inheritance documents is similar to Romanian law, having roughly the same procedures for cancelling the certificate of inheritance.

The statute of limitations can be interrupted by filing a motion in court or by other legal means, such as written communication with the executor or those holding the assets of the estate. In this way, the limitation period can start again and can be restored for a certain period of time.

It should also be noted that the statute of limitations does not always apply to applications for cancellation or invalidity of heir certificates. These applications can be submitted at any time, without being affected by the limitation periods.

In view of the above, this paper covers some of the aspects of inheritance regarding its annulment and revocation, with clearly justified and proven reasons.

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Section G

THE PERCEPTION AND DIMENSIONS OF DOMESTIC VIOLENCE IN THE RURAL ENVIRONMENT AND ITS EFFECTS ON THE INHERITANCE

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Abstract

Domestic violence is a reality of the contemporary world, constituting a violation of human rights, which manifests itself in all states, without distinguishing according to the level of development, the dimensions of this phenomenon taking on an increasingly large scale, which determines the adoption strict and complex regulations aimed at reducing its effects.

The article analyzes domestic violence in the rural environment, as a space where ancient traditions and customs are strongly manifested, dominated by the concept that the man is perceived as having a dominant force in the family, which gives him the opportunity to impose his will, including resorting to forms of violence, not only physical, but also verbal, psychological, social or economic, which cumulatively, over time have harmful consequences for the victims.

At the same time, as part of the scientific approach, the dimensions of the phenomenon of domestic violence, its impact on the family in the rural environment, but also the effects it has in the area of succession law regarding the right to inheritance will be exposed, concluding that the forms of aggression it manifests itself with greater frequency in the rural environment than in the urban one.

Keywords: *domestic violence, rural environment, succession, aggression.*

1. Introduction

Domestic violence is a phenomenon that has taken a large scale at the level of society in recent years, determining at the level of the Romanian state, in accordance with European and international policies, the intensification of efforts to try to limit it, in relation to the legal implications, but also to the of a psychological, sociological or economic nature.

The forms of domestic violence have diversified in recent years, which led to the adaptation of the legislation in force, in order to create a broad framework for the protection of victims, by sanctioning not only physical violence, but also verbal, psychological, social, economic, sexual, spiritual or cyber[1], as ways of violating the principle of equality between men and women and of the existence of cases of discrimination, which affect vulnerable groups of society[2].

In fact, the national framework legislation is consistent with the international provisions on the matter, the most important of which is the Istanbul Convention[3], adopted to be a legal instrument able to ensure real protection for victims, as an expression of the global policy to prevent and combat domestic violence and the recognition of de jure and de facto equality between women and men, as a defining element in the prevention of violence against women.

The idea of family was initially protected at a normative level in Romania through the prism of the protection of marriage, the rights of spouses, respecting the traditional conception enshrined in the Civil Code[4] related to the fact that, according to the legislator, marriage is a freely consented union between a man and a woman, which is based on their equality and gives them the right, but also the duty, to ensure the growth, education and training of children[5], the family benefiting from protection from society and the state.

Although the legal regulations are unitary, their application and the understanding of the purpose of the enactment of legal norms in the field must be particularized in relation to the specifics of the region where individuals live, but also to the environment from which they come, respectively rural or urban; despite the fact that at a conceptual level, the specific principles of a marriage must be analyzed equally within the state, however, we cannot ignore the fact that the environment from which the subjects come and live has great relevance in perceiving the idea of family and in discussing the concept of domestic violence.

The implications of the phenomenon of violence in the family environment are important in terms of the effects it has including on the criminal side, through the crimes that occur between family members and which are certainly much more than those officially reported to the institutions of the Romanian state with attributions in the field, but also of the consequences produced at a psychological level not only on the direct victim, respectively the abused person, but also on other members of their family, such as children, brothers/sisters, parents, etc., who live with the victim this psychological, physical, verbal or emotional trauma process.

Many times, victims of domestic violence who are subjected to forms of emotional, psychological, social or economic abuse become aware quite late of the vicious circle they are in and with great difficulty accept that they are being abused, with long-term effects long, which by extension, can lead to a change in mentality in a negative sense, in the sense of appreciating it as a normality, which creates real dysfunctions within society.

In the rural environment, still dominated by patriarchal concepts related to the idea of family, by the difficulty of accepting the idea of divorce, of separation, by the fact that this legitimate approach is still considered shameful, difficult to accept for the victim's family of origin, which is generally made up of elderly people, determines that the number of victims who report cases of domestic violence to the authorities is limited, so that people who are subjected to abuse alert the authorities only when the extent of this phenomenon has already acquired considerable dimensions and the situation can no longer be be hidden from those around.

An environment of domestic violence cannot be beneficial for the growth and education of children either, who, by witnessing scenes of verbal, physical or psychological violence in the family environment, take over voluntarily or not certain behaviors seen in the family of origin and end up applying them in the families they form as adults, perpetuating violence in various forms.

2. Domestic violence in rural areas

In the rural environment, in Romania, the idea of equality established and protected at the international, European and national level is not fully applied, in the sense that often women are not perceived as equal partners with men in family life, although in the last years, they have overcome the state of passivity and the idea of not working and dedicating

themselves exclusively to the household and raising children, noting an emancipation of women, which has definite influences on family life [6].

Despite this, the rural mentality related to the status of women within the family, although much different from that of the early 1990s, is not fully in line with the international one, which has a direct influence on the concept of domestic violence and on the number of cases of abuse that are reported to the authorities, many of these forms of abuse, such as verbal, psychological, economic, social or emotional, not being perceived as true forms of violence, but being appreciated as a relatively normal situation consistent with the role of women in a rural household.

That is why stereotypes related to the idea of violence are still accepted in rural areas, with victims appreciating it as a situation specific to family life, in which men are superior to women and in which they must always obey their partners, this being in in their opinion the essence of coexistence in the couple relationship, which causes a real challenge in terms of preventing domestic violence, in the sense of trying to change mentalities and develop the concept of positive masculinity [7].

In fact, this conception is inherited from the families of origin and applied further, being perceived as normality in the absence of access to information and the courage to assume a life that involves separation from an abusive partner and raising children without a father figure to live with them, thus determining a lower number of cases in which men are victims of domestic violence by their life partners, the most frequent situations being those in which the victims of domestic violence are women.

Throughout their lives, representatives of both sexes in rural areas are subjected to forms of violence, from childhood to adulthood, experiencing domestic violence, the extent of which is determined by the social context in which it occurs.

Women are most often subjected to forms of violence, given the fact that physical violence is the most frequent form of violence, through which the male sex tries to show its physical strength, which can cause injuries, but also considerable trauma, especially since they are much more vulnerable from an economic point of view and are much less likely to resort to forms of violence in the family environment, compared to the fact that their mentality is to be subordinate to the man.

In the rural environment, domestic violence is based on the creation of the prejudice that women have a lower status than that of men, the acceptance of the idea of violence as a private, family issue in which third parties or the state must not be involved, through coercive measures, under the conditions that, once married, the woman considers herself to be subservient to the man, she must respect his will and obey him in everything, regardless of the consequences on the victim's health and personality.

It should be noted that in Romania, especially in the rural areas, there is still an unequal distribution of domestic and care work, which has a negative effect on equal opportunities between women and men in the sense that women continue to be of specific activities family life and in the household[8], including raising children.

The risks associated with domestic violence in rural areas are generally constant and mainly consist in the excessive alcohol consumption of the aggressors, their criminal antecedents, regardless of the type of crimes for which they were convicted in the past, which are specific to an abuser profile without studies[9].

Most of the cases that cause various forms of violence are based on the poor living conditions that are predominantly manifested in the rural environment and that can

determine, on the one hand, a much higher degree of acceptability of the forms of violence on the part of the victims, and, on the other hand, a greater inclination towards aggression on the part of the aggressors.

In addition, an essential role is played by the idea of violence in childhood, in the family of origin, which determines the perception of a normality of these manifestations in adult life, both in the family of the victim who considers that such behaviors are specific to a marriage relationship, and and from the aggressors who apply in their families the way they saw in the families of origin and which they consider to be normal in a marriage relationship where the man must impose himself and have a dominant position.

Unfortunately, these forms of violence can degenerate, even reaching cases of murder, their number being higher in rural areas than in urban areas, respectively double, including due to the lack of information, the perception of the aggressors and the minimization of the risks related of consequences, including those of a criminal nature.

Another factor that generates violence in rural areas is based on isolation from family and friends, in the sense that the perception related to the fact that once a woman marries, she must stay at her partner's house, submit to his will, has slowed down –there is a break with the family of origin, which remains stuck in the idea that a marriage is for life, the idea of divorce not being accepted, the woman being subject to the will of her husband.

Thus, we end up creating a mentality that accepts and overlooks domestic violence, this phenomenon becoming a normality in the lives of partners, against the background of the lack of education and the non-granting of an equal status of women with men, but also of the fact that single women, elderly women, but also women with dependent children from rural areas are most exposed to the risk of poverty and social exclusion[10].

Although when we analyze the concept of domestic violence, we generally refer to cohabitation between spouses, in fact, this phenomenon is much broader and more complex and also analyzes the relationship with children[11], but also with more distant relatives, the effects his being equally strong and creating the same effects on the victim in the medium and long term.

It should not be overlooked that the legislator in this case does not only protect the family in the traditional sense, namely ascendants, descendants, brothers / sisters, their children, but also life partners, concubines, regardless of whether they lived together or not, which determines a broadening of the scope of violence in the family, in essence, the idea of violence, based on the expression of a disproportion of physical or mental forces between the victim and the aggressor, regardless of the degree of kinship between them, most often being grafted on the inequality between the sexes.

As for the forms of violence, in the rural environment forms of physical violence are most often identified, some of which are indeed perceived as aggressions causing physical suffering, and others being considered as normal, such as slaps given to children who are appreciated as suitable methods to attract the attention of minors when they have attitudes contrary to the wishes or expectations of their parents.

The forms of physical violence that cause serious harm to the victim and that lead to his injury or death are, in general, limited, but due to the moral suffering that doubles the physical ones, they are equally harmful, being the expression of an abuse of power.

However, we cannot ignore the fact that there are situations in which the feeling of inferiority of one of the partners generates violence, the aggressor feeling the need to impose

his will and be the one who has the representation that he holds the power in family life and finds this way of committing violence that would give him satisfaction.

After the violence between spouses, another important aspect that must be analyzed is the violence committed in the family environment against minor children, which is practiced not only by fathers, but also by mothers; thus, in this case, the aggressions are not only produced by one of the two sexes, but by both and directly influence the children from the rural environment, whose situation is anyway delicate due to the fact that they face illiteracy, poverty, dropping out of school or serious social problems [12].

It must be mentioned that aggressions produced in the family environment are the most important forms of violence, including from the perspective of the fact that they are produced at home, that is, in the environment where the victim is often alone, cannot ask for help from those around and in which with difficulty can produce evidence in its favor, especially in the case of psychological, economic, social or emotional violence.

The victim's vulnerability is sought by the aggressor, being an essential element in domestic violence and in his desire to impose his control over him, without taking into account the effects his actions have on his life partner or other family members.

The most frequently encountered forms of violence identified in practice are related to psychological, physical, social, economic, but also sexual violence, the specificity in their case being that they are difficult to recognize and prove in a judicial proceeding.

Thus, physical violence is easily perceived by the victim, but also by the aggressor either at the time of the acts of aggression, or afterwards (for example in the situation where at the time of the violence the aggressor is under the influence of alcoholic beverages or psychoactive substances and cannot have a clear representation of his actions), being the only one that leaves physical traces, in the case of the other forms of violence, their effects are difficult to determine, including their existence being put into question many times, due to the difficulty of proof, there are doubts about concrete effects on the victim, as well as the duration of the consequences from a moral point of view.

Many times, at least in the rural environment, these forms of violence are not perceived as such, under the conditions of a mentality different from that in the urban environment that tolerates the use of words intended to induce a state of inferiority to the victim, intimidation, distance from the family of origin, controlling current activity, violating her right to information, restricting or stopping access to financial resources or forcing the victim to have sexual relations with the aggressor, without her desire, which are not perceived in all cases as genuine violations of the rights of the victim, interference in private life, which must be brought to the attention of the public authorities in order to order legal measures accordingly.

Most of the time, the relationships that are created between the aggressor and the victim are not unitary, but alternate periods of violence with those that presuppose a normal development of family relationships, which causes a lack of reaction on the part of the victims, in the sense of to take legal steps to stop the behavior of the aggressors, which may consist of criminal complaints or the request to issue protection orders, including on the basis of the fact that, although she is sympathized by the community of which she is a part, many times the victim of violence is blamed for the situation in which he arrived[13], which determines the lack of courage to act, in the absence of moral and emotional support from those around him.

Thus, the aggressor ends up making the victim believe every time that he will change his behavior and that their relationship will be one full of tenderness, which causes her to continue to believe that family life will resume its natural course and that the aggressor will change, that he will realize that family life is important and that through his attitude he will get the definitive distance from his life partner.

In these conditions, the victims end up in an uncertain, confused mood, in which, on the one hand, they want to distance themselves from the aggressor and continue a life free of abuse and violence, and, on the other hand, they show intention in preserving family life, which brings them to a situation where they are once again put in a situation of uncertainty, of psychological abuse, in which it is very difficult for them to choose, especially when the aggressors try to justify themselves actions by blaming the victim and placing the blame only on him.

Therefore, the victims come to believe that they actually caused the violent behavior of the aggressors and that they must be the ones to change their attitude in order for family life to be harmonious; the reality they do not want to accept is that once the violence is manifested, it will not constitute an isolated episode, but will be repeated frequently in the absence of a prompt and radical reaction to stop it, the forms of violence diversifying and amplifying in intensity.

What both victims and abusers realize with difficulty is that each spouse must be treated with respect, as a basic duty of a marriage, with the assumption of each one's role in the relationship and understanding of each other's way of thinking, without trying to of exerting some psychological pressure, which has a manipulative purpose of imposing a point of view, considering the fact that a normal marriage relationship involves a balancing of the points of view of the parties, who actively participate in building a couple relationships and to the exclusion of the idea of violence, in any of its forms.

3. The effects of domestic violence on the inheritance

Through its consequences, the phenomenon of domestic violence can have effects not only during the life of family members, in the sense of imposing legal obligations, as in the case of the protection order or when restrictive measures of rights or freedoms are ordered, as in the case of preventive measures adopted in criminal law, but also at the time of opening the succession.

Thus, the analysis must take into account several aspects, which differ according to whether the effects on the successional patrimony intervene under the law or as a result of the will of the deceased person.

In the first category, the situations in which the cases of inheritance indignity intervene, both by law, as well as the situations regulated by the provisions of art. 958, paragraph, 1, respectively the hypothesis in which the person criminally convicted for committing a crime with the intention of killing the person leaving the inheritance or the person criminally convicted for committing, before the opening of the inheritance, a crime with the intention of killing cannot inherit to kill another successor who, if the inheritance had been opened at the time of the commission of the deed, would have removed or restricted the vocation to inheritance of the perpetrator.

Specifically, the application of the law can be made in the case of the crime of murder or attempted murder committed between family members, the number of which is almost double in the rural environment compared to the urban one[14], referring exclusively to the

situation of crimes committed between spouses, without taking into account other crimes of the same kind committed against other family members, which shows that the real number is much higher.

At the same time, the effects of domestic violence on the patrimony can also be identified in the case of judicial indignity, respectively for the person who was criminally convicted for committing, with intent, against the bequeather serious acts of violence, physical or moral, or, as the case may be, of acts that resulted in the death of the victim, the situation referring to crimes committed in which both the active and the passive subjects have a relationship, in the sense that they are family members; anyway, it is noted that the meaning of the notion of family member in the Criminal Code, art. 177 is narrower than that provided by the provisions of art. 5 of Law no. 217/2003 on the prevention and combating of domestic violence, which adds to the category of family members children from other relationships/marriages of spouses, ex-husband/wife, siblings, parents and children from other relationships of the spouse or ex-spouse spouses, people who have established relationships similar to those between spouses or between parents and children, current or former partners, if they did not live with the aggressor, the ascendants and descendants of the partner, as well as their brothers and sisters, the guardian or another person exercising in fact or in law, the rights towards the person of the child, but also the legal representative or other person who takes care of the person with mental illness, intellectual disability or physical handicap, with the exception of those who fulfill these duties in the exercise of their professional duties.

However, because the situation premised on the retention of the provisions of art. 959, para. 1, lit. a) Civil Code is the existence of a conviction, family members will be taken into account only those provided for in the rules of the criminal law, respectively ascendants and descendants, brothers and sisters, their children, as well as the persons who became by adoption, according to the law, thus of relatives, the spouse, the persons who have established relations similar to those between spouses or between parents and children, if they live together, the provisions being applicable in case of adoption, and the adopted person or his descendants in relation to natural relatives.

At the same time, as a case of judicial indignity that can be applied to family members in an act of domestic violence, there is also the hypothesis in which a person, in bad faith, hid, altered, destroyed or falsified the will of the deceased, assuming that this can be done more easily between family members than by a stranger.

In addition, judicial indignity can also be held in the case and against the person who, through deceit or violence, prevented the one leaving the inheritance from drawing up, modifying or revoking the will.

All these cases lead to the removal of the indignity from the succession of the deceased person, but it should be noted that the effects of both forms of indignity can be expressly removed either by a will or by an authentic notarial deed, drawn up by the one leaving the inheritance, which actually assume a form of forgiveness on the part of the author of the succession towards those who are guilty of serious acts against them, their property or affect the rights of other heirs, in the sense that they want either their removal from the inheritance or the reduction of their inheritance share.

Successor indignity is equally applicable to acts committed in urban and rural areas, those that are the basis of the application of the provisions of the articles relating to indignity

being the criminal and civil acts provided for by art. 958-959 Civil Code, the effects being applied based on the law and not on the will of the parties.

With regard to the second category, namely the effects produced on the succession patrimony determined by the wishes of the deceased person, two hypotheses can be listed, namely the situation in which during the lifetime the author disposes of all his assets, through a contract of sale, emptying the patrimonial mass, which implies that at the time of death the table of divisible assets will no longer contain any asset, so it will be an objective impossibility for the legal heirs to have the effective possibility to take over assets of the deceased person.

The decision to dispose of assets during life can be determined by the desire that the legal heirs do not benefit from the assets of the deceased person who during his life was a victim of domestic violence.

This situation is valid for the hypothesis in which the owner of the goods is the sole owner or has a determining share of the property, it being difficult to create a deed of sale in the case of goods purchased during a marriage, under the legal community regime, in which they are separate, so that the share of each of the owners is not known.

Another possibility is for the owner of the right of ownership to make a will during his lifetime, by which he designates the persons who come to his inheritance for all the assets or only for a part of them, this legal act producing its effects at the time of the testator's death, which implying that up to that point it can be revoked, even multiple times.

At the same time, through a will, the author can order the disinheritance of family members, which implies their removal from the inheritance, it is not mandatory to mention the reasons that led to the application of this civil penalty [15], but it is certain that domestic violence can be one of them.

In addition, another way in which assets can be disposed of during life is through a deed of donation, but it should be noted that in the case of liberalities, namely the will and the donation, there is a right of inheritance reserve that the law attributes to the closest relatives, in this case the surviving spouse, the privileged ascendants and the descendants of the deceased person, which implies that, despite the will of the person who draws up the deed, these categories of relatives will still receive a part of the inheritance share, but this is reduced, in the sense that it is only half of as they would normally be entitled to.

Conclusions

Domestic violence represents one of the most serious problems at the level of any society in terms of the fact that the rights of citizens are affected not only in terms of the physical component, respectively the aggressions committed against them, but also the psychological, social or economic one, which determines the complexity this concept and the need to take concrete measures to combat it.

Although this phenomenon affects the whole society, its effects are felt more strongly in the rural environment, both through the lens of the conceptions that govern family relations and the role of women within a marriage, but also through the lens of the reluctance shown in many cases to formulate reports to the authorities regarding to acts of violence for fear of the reaction of family members, who, on the one hand, may not even perceive some forms of violence as representing real reasons for concern for the victim, and, on the other hand, believe that in every family the man must he imposes the will, and the woman must submit to his wishes.

Despite the fact that the connection between the phenomenon of domestic violence and the effects produced on the succession patrimony is not widely studied in the doctrine, nevertheless we cannot fail to notice that there may be situations in which, against the background of the traumas produced during life due to domestic violence, the victims do not want that their property should return to the aggressors after their death, and then they either draw up legal documents during their lifetime by which they alienate all their property, and at the time of the opening of the succession, the patrimony no longer contains any property, or make a will or donation deeds, but these can it only leads to a partial disinheritance of the aggressors, relative to the institution of the inheritance reserve.

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CRIMINAL PROSECUTION PERFORMED WITH THE PARTICIPATION OF THE HEIRS OF VICTIM WHO HAS DIED AFTER COMMITTING THE OFFENCE

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Abstract

In this article we set out to examine the participation in criminal proceedings of the successors of a victim who died as a result of a crime. In this context, we considered it necessary to present the successors of the deceased victim through the prism of their participation as a civil party in the criminal proceedings and, at the same time, to set out a series of rights that they can exercise, thus playing an active role in this procedural phase of the criminal process.

Keywords*: prosecution, victim, injured person, successors, civil party.*

I. Prolegomena

1.1. Criminal prosecution – first phase of the criminal trial

The criminal trial has, usually, four processual phases: criminal prosecution, preliminary chamber, trial and execution of judicial decisions. These processual phases represent divisions of criminal trial which includes a complex of activities which take place gradually, progressively and coordinately, within the purpose of solving the criminal case subject to trial[2].

In the legal doctrine[3], it is mentioned, for good reason, that the criminal trial knows always the phase of criminal prosecution considering that, from the provisions of the current criminal procedure code, the court cannot proceed to the extension of criminal trial concerning other facts and persons, thus it can be seen clearly the intention of lawmaker to exclude the possibility that a criminal case pending trial is not proceeded by the phase of criminal prosecution.

The criminal prosecution represents the first phase of the criminal trial and has as object, as it results from the provisions of art. 285 criminal procedure code, a series of activities which the criminal prosecution bodies perform to in order to gather the necessary evidences regarding the existence of offences, identification of persons who have committed an offence and establishment of criminal liability and, if applicable, civil to acknowledge if it is or not necessary to decide the arraignment.

Consequently, from the content of the abovementioned article, it can be concluded that the criminal prosecution begins by the performance of an assembly of research activities performed by the prosecution bodies and it ends, as applicable, by the decision of

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[2] N. Volonciu, Criminal procedure treaty. *General part, Vol. I*, Ed. Paideia, Bucharest, 1993, p. 21.

[3] M. Udroiu, *Synthesis of criminal procedure. Special part*, Ed. C.H. Beck, Bucharest, 2020, p. 1.

arraignment by indictment or recognition agreement or by adopting a solution, by order, of closure or withdrawal from the criminal prosecution.

The criminal prosecution presents three processual phases[4], respectively: the phase to investigate the offence, begins with the commencement of criminal prosecution *in rem* until the continuation of performing the criminal prosecution towards the suspect / implementation of criminal action, the phase for the investigation of person, takes place after the criminal prosecution towards the suspect / implementation of criminal action and the third phase which consists of solving the case by the prosecutor.

Even though in the provisions of art. 285 criminal procedure code, no reference is made concerning the offence victim, it is concluded that from the activity of collecting the evidences by the criminal prosecution bodies it is considered compulsorily the identification of victim, the establishment of damage caused by the commission of offence and the possibility of victim to be injured person and / or civil party. Also, it must be mentioned that if the victim dies after an offence, his / her heirs can be civil party in the criminal prosecution phase.

1.2. Victim after the offence – injured person

In the literature[5], it is underlined that the notion of victim is not synonym with that of injured person.

The injured person is the individual or legal entity who has suffered a physical, material or moral injury by a criminal offence (art. 79C criminal procedure code) and to whom the right of participating actively to the criminal trial by exercising some rights granted by the law is recognized.

For a person (individual or legal) to become injured person within the criminal trial, it is necessary to fulfill two conditions[6]: to have vocation to become injured person, respectively to have suffered a physical, moral or material injury and not to manifest the will of not participating to the criminal trial. The physical injury can be caused only to the individual, instead the moral or material injury can be caused to legal entities too.

In the case of offences by which the criminal action is implemented ex officio, this right of the injured person to participate to the criminal trial is maintained until the contrary manifestation of will, expressed expressly, in writing or oral, not to participate to the criminal trial in this quality[7]. In this situation, if the judicial bodies consider necessary, they can hear the injured person as witness [art. 81 align. (2) criminal procedure code]. Instead, in the case of offences in which the criminal action is implemented upon the prior complaint of the injured person, he / she cannot withdraw from the quality of injured person, but he / she can withdraw the prior complaint[8].

Concerning the offence victim, he / she is represented only the individual from the position of passive subject of offence[9]. In this regard, Law no. 211/2004 concerning some

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[4] *Ibidem.*

[5] Gh. Mateuț, *Criminal procedure. General part*, Ed. Universul Juridic, Bucharest, 2019, p. 282.

[6] G. Gr. Theodoru, Ioan-Paul Chiș, *Criminal processual law treaty*, 4th edition, Ed. Hamangiu, Bucharest 2020, p. 159.

[7] *Ibidem*, p. 161.

[8] M. Udroiu, *Synthesis of criminal procedure. General part*, Ed. C.H. Beck, Bucharest, 2020, p. 95.

[9] Gh. Mateuț, *op. cit.,* p. 282.

measures to provide information, support and protection for offences' victims[10] defines the notion of offence victim as *individual who has suffered a damage of any type, including a damage of physical, psychic or emotional integrity or an economic damage, caused directly by an offence, as well as the family members of the deceased person as consequence of an offence and who have suffered damages after the death of that person.*

The quality of victim of the individual is obtained since the commission of offence[11] on him / her as it results from art. 1 of Law no. 211/2004, as follows: *(1) Any person victim of the offence is entitled to be recognized as such from the identification, to be treated respectfully, professionally, to benefit of protection and individualized support, to obtain financial compensations and to have the rights reestablished. His / her family members benefit of the same rights. (2) The information, support and protection measures, including the evaluation, given within the conditions of this law are not conditioned by the introduction of a complaint in front of the criminal prosecution bodies.*

Therefore, from the abovementioned statements, we can conclude that the individual, victim of an offence, obtains the quality of victim, a series of specific rights being recognized since the commission of offence before the quality of injured person, considering that the latter quality is obtained *ope legis* once with the commencement of the criminal prosecution *in rem*.

Referring to our proceeding, considering that the victim who has died after an offence does not have the possibility to give up to the quality of injured person and considering that the personal and untransferable feature of this quality, it is imposed to mention that the victim's heirs cannot obtain the quality of injured person, but they can be civil party becoming part of the criminal trial.

II. Participation of heirs of the deceased victim after an offence within the criminal prosecution

2.1. Heirs of the victim deceased after an offence – civil party – party in the criminal trial

The heirs are processual subjects who can appear in the criminal trial, civil, instead of the main processual parties or subjects, valorizing personal rights[12].

According to the provisions of art. 32 align. (2) criminal procedure code, the parties from the criminal trial are the defendant, civil party and the party responsible civilly, and according to the provisions of art. 84 align. (2) criminal procedure code the heirs of the injured person have the quality of civil party. Therefore, the victim deceased after an offence obtains the quality of injured person by the effect of law once with the commencement of the criminal prosecution *in rem*, and his / her heirs become part of the criminal trial by the

[10] Published in the Official Journal of Romania, Part I, no. 505 of 4th June 2004.

[11] Andrei-Iustin Coste, *Passive subject of offence and injured person by its commission. The comparative analysis of the two notions by the establishment as civil party in the criminal trial,* available here: https://www.universuljuridic.ro/subiectul-pasiv-al-infractiunii-si-persoana-vatamata-prin-comiterea-acesteia-analiza-comparativa-a-celor-doua-notiuni-din-prisma-constituirii-ca-parte-civila-in-procesul-penal/#r26

[12] C., S., Paraschiv; M. G. Teodorescu; A. S. Nicolescu; *Criminal processual law. General part. Notes*, 3rd edition, reviewed and completed, Ed. Hamangiu, Bucharesti, 2021, p. 53.

enunciation of a request for establishment as civil party. B the possibility of heirs to be civil party and, by default, to exercise the civil action within the criminal trial, they obtain a series of rights, and by their execution they can participate actively at the criminal prosecution.

The civil action is the legal mean by which the persons who have participated at the commission of offence are hold accountable for civil liability in tort[13].

Without detailing, we consider necessary to emphasize some matters concerning the establishment as civil party in the criminal trial of heirs. Thus, the establishment as civil party of heirs can be done by written or oral request, mentioning that in the case of a request enunciated orally, it is necessary that the judicial bodies register it within the content of a report, of a statement or of a conclusion depending on the processual moment in which the case is.

The heirs can be established as civil party in a criminal prosecution, in the phase of preliminary chamber of in front of the court until the commencement of the judicial investigation, respectively until reading the apprehension document, thus the request for the establishment as civil party will be rejected as inadmissible.

In the legal doctrine[14] it is mentioned that during the criminal prosecution the establishment as civil party is efficient only after the implementation of the criminal action, thus if the heir of the victim deceased after the offence requests to repair the damage before the implementation of the criminal action, this statement for the establishment as civil party will have effects only after the implementation of the criminal action.

From the provisions of art. 20 align. (2) criminal procedure code, it results that the heirs must indicate in the statement for the establishment as civil party the type and extent of claims, reasons and evidences on which this request is based.

As effect of the failure to observe the conditions mentioned above, the heirs cannot be established as civil party in the criminal trial losing the quality of party in the criminal trial, and a consequence of this fact consists of that the heirs cannot exercise anymore the rights provided by the law and they cannot perform an active role within the criminal prosecution, but, they have the possibility to enter the action to the civil court.

Considering that the heirs of the victim deceased after an offence can be in various situations concerning the capacity of use and exercise, certain mentions are imposed regarding the admissibility of the request to be established as civil party and, by default, to obtain the quality of party within the criminal trial. Thus, if the heirs have the capacity of full exercise, only they or by a special agent, can enunciate a request for the establishment as civil party in the criminal trial, instead the heirs who do not have capacity of exercise (the minor who is not 14 years old and the one who benefits of the measure of special guardianship) can be established as civil party in the criminal trial by the legal representative, and if he / she is passive, the prosecutor is obliged to exercise the civil action on behalf of the heir. Concerning the heir with limited capacity of exercise (the minor who is 14 years old and the adult who benefits of legal advice), he / she can be established as civil party personally in the criminal trial with the consent of parents or, as applicable, of the guardian.

[13] *Ibidem*, p. 78.

[14] M. Udroiu, *Criminal procedure synthesis. General part.*, Ed. C.H. Beck, Bucharest, 2020, p. 119.

2.2. Heirs of the victim deceased after an offence – active participation in performing the criminal prosecution

From the provisions of art. 305 criminal procedure code, it results that the criminal prosecution body decides by order the commencement of the criminal prosecution when the apprehension act fulfills the conditions provided by the law and there is not case to prevent the implementation of criminal action provided in art. 16 criminal procedure code.

The commencement of the criminal prosecution represents a processual moment of special importance considering that it triggers the criminal trial. Once with the commencement of criminal prosecution and establishment as civil party of heirs *de cuius* the criminal procedure code provides a series of rights which they exercise during the criminal prosecution. Among these, we mention the following: the possibility to be established as civil party, to refer to the file, to submit evidences, to enunciate requests and notes, to be informed, within a reasonable term, concerning the phase of criminal prosecution, to ask questions to the defendant, witnesses and experts, to submit a complaint against the actions and measures decided in the criminal prosecution, to benefit of an interpreter for free and to use a mediator, to be heard and to be assisted by a lawyer. Also, it must be mentioned that the heirs have the following obligations: to observe the order of certain processual activities, to inform any modification of address, to be present at the summons of the judicial bodies, to exercise on good faith the processual rights granted by the law.

Consequently, the heirs *de cuius* once established as civil party in the criminal prosecution phase become part of the criminal trial, and based on this quality they can have an active role during the criminal prosecution by the possibility of exercising a wide range of rights.

2.2.1 Possibility of submitting evidences

Considering that the criminal prosecution bodies are obliges to clarify the case, under all matters, based on evidences, the heirs have the possibility that as civil party to propose evidences within the criminal prosecution.

During the criminal prosecution phase, the liability of evidence in the criminal action belongs to the prosecutor (mainly) and to the criminal investigation body, and concerning the civil action the liability of evidence belongs to heirs of the victim deceased in an offence established as civil party (mainly) or, as applicable, to the prosecutor who exercise the civil action if the heirs do not have exercise capacity.

By evidences, according to art. 97 align. (1) criminal procedure code, it is understood any de facto element which serves to the acknowledgment of existence of inexistence of an offence, to the identification of a person who has committed it and to the cognition of necessary events for the resolution of case and which contribute to finding the truth in the criminal trial.

The legal mean by which the evidence is administered in the criminal trial is represented by the evidence mean.[15] Between the „evidence" notion and the „means of proof", an indissoluble connection exists considering that the evidences can be obtained only by the means of proof provided by the law.

[15] I. Neagu, M. Damaschin, *Criminal procedure treaty. General part*, *Ediția a IV-a*, *reviewed and completed,* Ed. Universul Juridic, Bucharest, 2022, p. 497.

The criminal procedure code provides among other means of evidence the statements of the civil party, respectively of the heirs when they have this quality in the criminal trial. The heirs' statements can be obtained by hearing, representing an obligation of the criminal prosecution bodies or by confrontation when differences exist between statements, and the confrontation is necessary to clarify the case. The criminal prosecution body can agree that the confronted persons address questions mutually, these being registered in a report.

The victim's heirs during the criminal prosecution have the possibility to enunciate requests of evidences, and the criminal prosecution bodies can admit it or reject it, motivated, considering the following matters of the evidence proposal: lawfulness, relevance, utility of evidence, as well as the material possibility of administering the evidence.[16]

2.2.2. Possibility of referring to the criminal file

Once established as civil party within a criminal prosecution, the heirs have the right to refer to the file. The competence to decide concerning the date and duration of reference belongs only to the prosecutor who can appoint to the investigation bodies the activity of making available the file.

We mention that the right to refer to the file is not an absolute right whereas it can be limited by the prosecutor by motivated order. Considering, as we have mentioned previously, that the civil action can be exercised legally after the implementation of criminal action, the reference of the file by the heirs (civil party) can be limited for a duration of at most 10 days.

The reference of file involves the possibility of performing a series of activities: proper study of file, noting data or information from the file, obtainment of photocopies of documents from file and the possibility of obtaining the file in electronic format.

2.2.3. Possibility of enunciating appeal concerning the duration of criminal prosecution

From the analysis of provisions of art. 488 criminal procedure code, it results that the heirs can enunciate appeal requesting to accelerate the procedure after at least 1 year from the beginning of the criminal prosecution if the activity of criminal prosecution bodies does not fulfill a reasonable duration.

It must be mentioned that, if the heirs have enunciated appeal, it can be withdrawn anytime until resolution, but the appeal cannot be repeated during the criminal prosecution if it has been withdrawn.

The competence for the resolution of appeal in the criminal cases in the phase of criminal prosecution belongs to the justice of peace from the court which would have the competence to judge the case in first instance.

2.2.4. Possibility of enunciating complaint against the documents disposed in the criminal prosecution

The heirs, when their legal interest has been injured or susceptible to be injured by an action of the criminal prosecution bodies, can enunciate complaint against it.

[16] M. Udroiu, *Criminal procedure synthesis. General part*, Ed. C.H. Beck, Bucharest, 2020, p. 401.

If the complaint concerns the actions of the criminal investigation bodies, the competence for the resolution belongs to the prosecutor who supervises the criminal prosecution activity. This complaint is submitted directly to the prosecutor or to the criminal investigation body who has the obligation that within 48 hours from the receipt to submit it to the prosecutor together with the explanations when it considers that these are necessary.

Concerning the complaint directed against those actions performed by the prosecutor or performed based on the decisions taken by him, the competence for the resolution belongs to the line prosecutor. If the line prosecutor rejects the complaint by order, it cannot be appealed by the heirs, and if a complaint will be enunciated against the resolution for rejection decided by the line prosecutor, it will be rejected as inadmissible[17].

The competent body is obliged to solve the complaint within 20 days calculated from the registration date of complaint at the prosecutor's office, the failure to resolve it within the term mentioned previously can incur at most a disciplinary sanctioning of the prosecutor.

It must be mentioned that the enunciation of a complaint by the heirs does not have any suspensive effect, the action will continue to have effects.

Referring to the term within which a complaint can be enunciated, it depends on the type of appealed document, thus, the complaint directed against the actions of the criminal prosecution bodies can be entered anytime during the criminal prosecution, and exceptionally, according to art. 340 criminal procedure code, in the case of closure order, the complaint can be entered within 20 days from the communication of the order copy to the line prosecutor. And if this complaint has been rejected, the heirs who are not pleased with the solution can address to the judge of preliminary chamber. If the heirs have not received the copy of the closure order, they can enunciate complaint within 20 days from the date when they have been informed about this solution decided by the prosecutor.

2.2.5. Possibility to participate to expertise

According to the provisions of art. 172 align. (1) criminal procedure code, the expertise represents the evidence procedure by which the opinion of an expert is used to acknowledge, clarify or evaluate some facts or events which represent importance for finding the truth.

In the phase of criminal prosecution, when the conclusions of the report of findings are appealed by heirs, the criminal prosecution body has the possibility to decide the performance of an expertise. It must be mentioned that a simple appeal of heirs is not enough, it is necessary that they indicate explicitly pertinent objectives of expertise as to the assembly of rules of evidence administered is satisfied by the exigence of evidence utility[18].

The request enunciated by heirs by which it is requested to perform an expertise must be enunciated in writing, indicating the facts and events subject to evaluation and objectives which must be clarified by the expert. The criminal prosecution body decides on the performance of expertise by motivated order.

Based on the concept of „fair trial", provided by art. 6 par. 1 of the European convention of human rights, which guarantees an equal treatment between the parties from the criminal trial and the right to benefit of a trial which is solved by an independent and impartial court, within a reasonable term, the heirs must have the capacity to appeal to

[17] M. Udroiu, *Criminal procedure synthesis. Special part*, Ed. C.H. Beck, Bucharest, 2020, p. 189.
[18] M. Udroiu, *Criminal procedure synthesis. General part*, Ed. C.H. Beck, Bucharest, 2020, p. 703.

experts and the possibility to choose experts which are going to be appointed to intervene within the trial[19].

Based on art. 172 align. (8) criminal procedure code and art. 173 align. (4) criminal procedure code, the heirs can request the participation of an expert party to the performance of the expertise under the condition that he is independent, authorized expert and is not under incompatibility.

After performing the expertise, the findings, evaluations and opinion of expert will be registered in an expertise report which represents a mean of evidence in the criminal case and is submitted to the criminal prosecution body. Upon the request of heirs, the expert can be heard by the criminal prosecution bodies if it is considered that this procedure is necessary to clarify the findings or conclusions of expert. If it is decided to hear the expert during the criminal prosecution, the heirs can ask questions to the expert concerning the expertise report drafted by him. The expert's hearing is done according to the provisions regarding the hearing of witnesses.

Also, upon the heirs' request, the criminal prosecution bodies can decide the performance of an expertise supplement by the same expert if he finds that the expertise is not complete, and this deficiency cannot be supplemented by the hearing of expert. If the appointment of the same expert is not possible, it is decided to perform a new expertise by another expert. A new expertise can be decided by the criminal prosecution bodies, ex officio or upon the request of heirs, when the conclusions of the expertise report are not clear or contradictory or between the content and the conclusions of the expertise report, differences exist and these deficiencies cannot be removed by hearing the expert.

2.2.6. Possibility to conclude a transaction

Transaction is defined in art. 2267 civil code as the contract by which the parties prevent or cancel a litigation, including in the phase of enforcement, by concessions or mutual withdrawal of rights or by the transfer of some rights from one to the another.

From the provisions of art. 23 criminal procedure code, it results that during the criminal prosecution, the heirs have the possibility to conclude a transaction with the defendant or with the party responsible civil concerning the amount of civil indemnifications. In principle, to conclude validly a transaction, it is necessary only the parties' consent, and *ad probationem*, it must be registered in writing. By exception[20] the transaction must be concluded in authentic form when it has as effect the transfer or establishment of a real estate right.

Concerning the validity conditions of transaction, it must be mentioned that the parties (heirs, defendant or party responsible civil), must have capacity of full exercise to dispose of the rights which form the object of transaction. It can be concluded personally by heirs, but it can be concluded by agent provided that the latter submits a special power of attorney.

The possibility of concluding a transaction in the phase of criminal prosecution is provided expressly in art. 2268 align. (2) Civil code which provides that it can carry on the civil action deriving from the commission of an offence. For example, a transaction for civil indemnifications resulted from manslaughter in the case of a road accident can be concluded

[19] Gh. Mateuț, *op. cit.*, p. 629.

[20] G. Boroi, C. A. Anghelescu, I. Nicolae, *Civil law files. Obligations, contracts, heritance.* Ediția a 6-a, reviewed and completed, Ed. Hamangiu, Bucharest, 2021, p. 499.

without affecting the criminal action which follows its normal proceeding. In the legal doctrine, it has been underlined that under the sanction of absolute nullity, the parties who conclude the transaction must not follow the performance of illegal purposes.[21]

Probative in this regard is a sentence[22] of Constanta District Court by which the court finds that during the criminal prosecution concerning the offence of manslaughter contracts of transaction have been concluded on the civil claims between the insurer and the victim's heirs, N.A., N.C, N.M. and S. R.. Analyzing the transaction contracts concluded between the party responsible civil and the civil parties, the court considers that these observe the formal conditions provided by art. 2267 civil code and subsequent. Consequently, it will find as annulled the civil actions enunciated by the civil parties N.A., N.C., N.M. and S.R. by the conclusion and execution of transactions concluded during the criminal prosecution by the person responsible civil S.C A. T. A. S.A.

2.2.7. Possibility to invoke the absolute or relative nullity

As effect of the Constitutional Court Decision no. 302/2017[23] referring to the exception of unconstitutionality of provisions of art. 281 align. (1) let. b) of the criminal procedure code, the absolute nullity can be invoked by the heirs during the criminal prosecution when the provisions referring to the material or personal competence of criminal prosecution bodies are violated (for example, when the criminal prosecution is performed by the Prosecutor's Office attached to the District Court, even though according to the rules of personal competence, it must be done by the Prosecutor's Office attached to the County Court). This case of absolute nullity can be invoked by the heirs in any phase of the criminal trial, even in the criminal prosecution. However, in the doctrine[24], it has been underlined that according to the provisions of art. 325 criminal procedure code, which allow the takeover of criminal prosecution by a higher prosecutor's office and considering if the takeover order has been decided legally, the absolute nullity cannot be incident anymore.

Concerning the relative nullity, it can be invoked by the heirs if they prove that the legal provisions by which an injury has been committed have been violated, and this injury can be removed only by the annulment of document. If the violation of rule has occurred during the criminal prosecution, the heirs of the deceased victim can invoke the relative nullity during or immediately after the performance of action or at latest until the closure of procedure of preliminary chamber.

2.2.8. Possibility of requesting to take insurance measure

According to the provisions of art. 249 align. (2) the insurance measures consist of freezing of some movable or immovable goods, by establishing a seizure on them.

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[21] F. Deak, L. Mihai, R. Popescu, *Civil law treaty. Special contracts*, Vol. III, Ediția a IV-a, Universul Juridic, Bucharest, 2007, p. 167.

[22] Constanta District Court, Judgment in the criminal case no. 316/06.03.2017, available here: https://sintact.ro/#/jurisprudence/527214651/1/sentinta-nr-316-2017-din-06-mar-2017-judecatoria-constanta-ucidere-din-culpa-art-192-ncp-penal?keyword=succesori%20parte%20civila%20tranzactie%20urmarire%20penala&cm=SREST

[23] Published in the Official Journal no. 566 of 17th July 2017, available here: https://legislatie.just.ro/Public/DetaliiDocumentAfis/191291.

[24] M. Udroiu, *Criminal procedure synthesis. General part*, Ed. C.H. Beck, Bucharest, 2020, p. 1161.

During the criminal prosecution, it can be decided by the prosecutor by order to take insurance measures, and not by the criminal investigation bodies. The decision to take insurance measures is, in principle, facultative, it can be decided ex officio or upon the request of heirs (civil party) in order to repair the damage caused by offence. Exceptionally, it is compulsory to take the insurance measure when the law provides expressly this matter or if the injured person by the offence does not have the exercise capacity or has limited exercise capacity.

In legal doctrine[25], it has been considered that the following conditions must be fulfilled to take the insurance measure: a) to be necessary to avoid the hiding, alienation or avoidance from the tracking of goods; b) the goods on which the measure is decided can be object of special seizure or extended seizure or can serve to guarantee the execution of punishment, fine or judicial expenses or repair of the damage caused by offence. Another condition[26] would be that the insurance measure provides the just proportionality between the restriction of title and the purpose targeted by imposing the insurance measure.

To take the insurance measure to repair the damage consists of freezing the goods or the incomes of the suspect, defendant or party responsible civil until the concurrence of probable value of caused damage. To take the insurance measure which targets this purpose is decided upon the request of heirs who are civil party in the criminal trial.

Considering that this measure is decided until the concurrence of probable value of damage, we mention that it is not appreciated at the amount of heirs' claims and not to the probable amount of material damage upon committing / exhausting the offence, but to the probable value of effective loss suffered by the heirs as consequence of committing the offence (*damnum emergens*), as well as of the unmade benefit (*lucrum cessans*) upon the establishment of insurance measure[27].

2.2.9. Possibility of being part of performing other criminal prosecution action to which they are summoned

During the performance of the criminal prosecution, some situations in which the heirs of the deceased victim are summoned to identify persons, objects, voices, sounds or other objects which are the object of sensorial perception can occur to clarify the case events.

This evidence procedure is decided by the prosecutor or the criminal investigation bodies by order in the phase of criminal prosecution, its absence leading to the relative nullity of identification within the conditions of art. 282 criminal procedure code.

From the provisions of art. 133 criminal procedure code, it results that after deciding this measure and before the identification, it is necessary to hear prior the heirs.

The performance of identification activity, as well as the heirs' statement are registered by the criminal prosecution bodies in a report.

III. Conclusions

In conclusion, in all the criminal cases, the performance of a criminal prosecution is compulsory considering the provisions of art. 305 align. (1) criminal procedure code which provides that the criminal prosecution body informed by complaint, criminal complaint or

[25] Gh. Mateuț, op. cit., p. 903.
[26] M. Udroiu, Criminal procedure synthesis. General part, Ed. C.H. Beck, Bucharest, 2020, p. 1036.
[27] *Ibidem*, p. 1045.

ex officio, is obliged to begin and perform the criminal prosecution. For that matter, the criminal trial generally has always as initial phase the criminal prosecution.

His / her heirs *de cuius* once established as civil party on the criminal prosecution have the right to participate in this processual phase based on this quality. Consequently, the victim heirs have the right to be part of performing the criminal prosecution documents to which he / she is summoned, to enunciate complaints against the illegal and unsolid prosecution actions which affect him / her, to request the acceleration of the criminal prosecution by appeal, to submit requests and to present notes.

Finally, we underline that the heirs of the victim deceased after an offence have wide processual rights in the criminal trial, and by the exercise of these rights they can participate actively to the criminal prosecution.

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ASSISTED SUICIDE: LEGAL ISSUES AND CURRENT CONTROVERSIES

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Abstract

In recent decades, ending life on demand by methods such as assisted suicide or euthanasia is a controversy, both legally, religiously or socially. Opinions are often divided, with each side advocating for their own beliefs.

Throughout this paper we will analyze the subject of assisted suicide from an objective perspective, analyzing on one hand the actual situation, determining the reasons why the cessation of life on demand is not only a useful procedure, but also necessary in certain situations, and on the other hand the state of law, the legislative regulations of different European countries.

This paper aims to analyze the assisted suicide procedure from a legal and sociological point of view, aiming to understand and maintain a holistic perspective. In the first part of the paper, we will define the key concepts, necessary in expanding the concept of cessation of life on demand and the contemporary social perspective on the phenomenon. We will then look at the legislation in several countries to make a comparative analysis of the legislation on assisted suicide. In the final part of the paper, we will present the constitutional implications for assisted suicide and debate the right of people to resort to this procedure.

As we observed during our research on the subject, the concept of physician assisted suicide or euthanasia has legal implications all over the globe, in a contemporary world in full development, but, in the fairly distant future, it would rather be legally possible to implement such an idea.

Keywords: *Assisted suicide, rights and freedoms, constitutional challenges, diseases, autonomy, etc.*

INTRODUCTION

In an ageing European society, chronic diseases are becoming increasingly prevalent among citizens. In such situations, where treatment is no longer an option and the symptoms of the disease are increasingly severe, causing both physical and psychological suffering for patients and their relatives, various countries have adopted legislation allowing assisted suicide and euthanasia in order to give these patients the right to a dignified death and autonomy in the way they wish to end their suffering. Thus, patients who establish with their doctors that it no longer makes sense to continue treatment because of their low life expectancy can have recourse to end-of-life procedures in around 8 European countries.

The challenge of legislating assisted suicide or euthanasia is made even more complex by the possibility that it may not be due to significant medical conditions but simply to personal considerations. Therefore, the legislator has tried to distinguish between the concepts so as not to contravene other fundamental human rights, creating a climate that meets current social needs. It is imperative to consider, as various authors point out, that

certain rights can be considered universal, because in theory they can be regulated, but in practice the situation is found to be at least different. For this reason, there are regulations and provisions that either criminalize assisted suicide or accept and support it.

1 THE CONCEPT OF SUICIDE – DIFFERENCES AND IMPLICATIONS BETWEEN EUTHANASIA AND ASSISTED SUICIDE

The literature defines assisted suicide as prescribing or otherwise making available a drug that allows the patient the option to commit suicide. Thus, in this way the final act is carried out by the patient himself.

Often the public confuses assisted suicide with euthanasia. The difference between the two lies in the subject of carrying out the act.

Euthanasia is the intentional killing of a patient by doctor or other medical personnel by administering lethal substances at the patient's voluntary and competent request.

There are three types of euthanasia:

- Direct active euthanasia aims to kill the patient in order to end their suffering;
- Indirect active euthanasia occurs in those cases where the patient is given substances whose side-effects are likely to shorten his/her life;
- Passive euthanasia is the non-implementation or discontinuation of life-sustaining measures.

In most cases, legislation does not explicitly distinguish between euthanasia and assisted suicide, which often creates ethical problems in the medical field, especially for staff working with patients at the end of life.

2 COMPARATIVE STUDY – LEGISLATION IN ROMANIA, SWITZERLAND, GERMANY, BELGIUM, AND THE NETHERLANDS

Switzerland

Article 115 of the Swiss Penal Code (StGB) allows physician-assisted death (PAD), provided it is not carried out for „selfish reasons". The article states that anyone who helps another person to commit suicide for selfish reasons risks up to 5 years in prison. So, as long as the person assisting the suicide is not doing so for selfish reasons, they cannot be punished. These reasons may include inheriting property or money or ending a debt, but there are many more other reasons.

However, Swiss federal law does not specifically regulate who has the right to assist and organize such a suicide, and there is no universal agreement between the professional societies concerned.

On the other hand, direct active euthanasia (killing on demand) is prohibited in Switzerland under Article 114 of the Swiss Penal Code.

Belgium

In Belgium, assisted suicide has been legal since 2002.

According to the Belgian law, for the practitioner assisting the procedure not to face any criminal consequences, he must ensure that a number of conditions are met, such as: the patient must be an adult or be an emancipated minor; the decision must be well thought out and repeatedly expressed, not caused by any other external influence; the patient must be in

a very serious state of health or suffer from an incurable condition resulting from illness or accident.

This assisted procedure must be requested by the patient voluntarily, with the patient's wishes expressed in written form. If the patient changes his/her decision, the request can be withdrawn at any time.

Before starting the procedure, certain steps must be followed. In the first stage, the practitioner must discuss the patient's health and life chances with the patient, and if the two conclude that there are no suitable palliative care options, the patient may opt for assisted suicide.

After the patient makes this decision, several sessions follow, during which the practitioner must observe how both the patient's condition and the patient's decision on the requested procedure are progressing. If during these sessions the patient's condition does not improve and the decision is maintained, another practitioner must review the findings of the first practitioner and give a favorable opinion to start the procedure.

The Netherlands

As far as Dutch law is concerned, the Act on Termination of Life on Request and Assisted Suicide, which came into force on 1 April 2002, lays down the rules for this procedure.

Although assisted suicide is legal, no patient has an absolute right, and no doctor has an obligation to perform such a procedure if they refuse. Patients' requests must be made in earnest, based on the conviction that ending life is the only option and that the condition they suffer from has no cure.

In order to facilitate the resolution of moral conflicts encountered by doctors, the Royal Dutch Medical Association has developed a guide at the request of the Public Prosecution Service's Council of Attorneys General and the Health Inspectorate. These rules are only intended as guidance for difficult situations. Among the provisions of the guide, practitioners are advised that in situations where the patient passes into a reduced state of consciousness shortly before the scheduled procedure, the doctor may carry out euthanasia according to the rules if he or she considers that the patient is in a state of distress.

Minors can request euthanasia themselves from the age of 12, although parental or guardian consent is required until the age of 16. In principle, 16– and 17-year-olds do not need parental consent, but their parents must be involved in the decision-making process. From the age of 18, young people have the right to request euthanasia without parental involvement.

If all the conditions set by law are not met, doctors can be criminally punished with up to 12 years in prison for euthanasia and up to 3 years for assisted suicide.

Germany

In February 2020, the German Federal Constitutional Court declared, for the first time in its history, a prohibitive criminal law as null. The legal rule in question is Section 217 of the German Penal Code, a section that addresses the issue of assisted suicide.

Prior to the entry into Section 217 of the Penal Code, aiding or abetting suicide did not attract any punishment as long as the victim acted of his own free will. Given that all homicide offences mentioned in the Penal Code require action against another person, suicide is not a crime. Therefore, complicity or assisting in suicide, on the basis of the

principle of complicity enshrined in German law, according to which criminal liability for complicity depends on the criminal liability of the principal perpetrator of the offence, does not entail any criminal penalty.

Later, in 2015, with the enactment of Section 217, lawmakers established that anyone who helps another person commit suicide can be criminally punished with up to 3 years in prison or a fine.

As public opinion was divided and many people were unhappy with the regulation, complaints to the German Federal Constitutional Court were not long in coming. Among the reasons given were violations of a number of rights and freedoms, such as the right to self-determined death, general freedom of action, freedom of association, professional freedom and the right to freedom of conscience.

In the end, the complaints were successful, with the Court's decision declaring Section 217 invalid, stating that it violated the right to self-determined death and the individual's right to autonomy, and in the case of the complaints brought by professional associations, the right to freedom of employment.

Romania

Currently, neither assisted suicide nor euthanasia are legal in Romania.

On the other hand, the right to life is enshrined both in national legislation, through Art. 22 of the Romanian Constitution and Art. 58 of the Civil Code, and at international level through Art. 2 of the European Convention on Human Rights and Art. 6 of the International Covenant on Civil and Political Rights. Given this absolute right to life, we also assume a freedom over it. In theory, therefore, anyone who enjoys the right to life should also enjoy the freedom to make whatever decision he or she wishes with regard to his or her fundamental right.

Although the subject has been constantly debated in legal, sociological, and theological literature, no new regulations on assisted suicide have been legislated in Romania. Currently, the only legal norm dealing with complicity in suicide is Art. 191 of the Penal Code. This clarifies the penalties for the offences of causing or facilitating suicide.

Thus, the determination to commit suicide is punishable by imprisonment from 3 to 7 years if the act is committed against a minor aged between 13 and 18 years or against a person with impaired judgment with imprisonment from 5 to 10 years, against a minor who has not reached the age of 13 years or against a person who could not realise the consequences of his actions or inactions or could not control them with imprisonment from 10 to 20 years and prohibition of the exercise of certain rights.

3 ASSISTED SUICIDE UNDER CONDITIONS OF DISCERNMENT - A CONSTITUTIONAL RIGHT? (CURRENT CONTROVERSIES)

In a climate of step-by-step evolution of law as a need to respond to the contemporary rigors of a rapidly developing society, there is a desire to intervene and propose provisions to regulate all areas of social life. The need for legislation to provide a fundamental basis for the exercise of the right is becoming urgent, so that the issue of a regulation including a constitutional right to suicide and autonomy over one's own life is becoming a debate that many lawyers, psychologists and political scientists are considering.

The concept of the autonomy of the person was first advocated by R. Wolff who argued that the *existence of an obligation to obey the state is incompatible with a defining*

characteristic of the human person – that of being autonomous[1]. In this sense, the discussion has taken on a controversial character, whereby there are two main arguments in support of assisted suicide: the right to be autonomous and the obligation to contribute to the good of society.

A social movement has emerged in contemporary times, supported by a large number of philosophers and jurists, who consider that suicide is neither tragic nor wrong, but a simple human right, which is contrary to the legal provisions of most countries in the world. For example, in Romania, in Chapter II, Article 22, it is expressly stated that every person is guaranteed the right to life. Of course, such a comparison may be exaggerated from a holistic point of view, but public opinion maintains that the right to life and a right to end life cannot coexist. For this reason, societal needs have not yet provided a strong motivation for policymakers to regulate such a right, which is not of pressing necessity.

At the same time, although suicide is a multifaceted and causal event that cannot be reliably predicted, the law could focus only on the immediate cause[2]. Therefore, there are authors, such as Robert Sedler who argue that: *the law does not recognize any notion of rational suicide*[3]. The legal perspective on suicide encompasses the idea that a person who commits suicide suffers from some form of mental illness, so that attempted suicide is regarded as pathological and irrational.

[1] Miroiu A. (2009) *Introduction to Political Philosophy*, POLIROM Publishing House, p. 33.

[2] Thomson West Staff, eds. (2004) *Proximate cause*, 57A Am Jur 2d. St Paul (MN): Thomson West, sec 436-438.

Inexorably, John Stuart Mill's view that the *only purpose for which power can legitimately be exercised over any member of a civilized community against his will is to prevent harm to others*[4], supports the view that suicide impedes the smooth running of society, and for this reason it should be avoided rather than supported. This view can also be found in Roe v. Wade, in which the US Supreme Court pointed out that: *it is not clear to us that the claim asserted by some... that one has an unfettered right to do as one pleases with one's own body is closely related to the right to privacy previously articulated in the Court's decisions.*

There is an interesting perspective of the Michigan constitution, which has in the past banned all forms of suicide, with the law making no exception for the terminally ill, and specifically defines assisted suicide to include the prescribing of lethal drugs by a physician to a terminally ill patient for the purpose of enabling the patient to use them to hasten inevitable death[5]. In other words, in Michigan, a terminally ill person, no matter how excruciating their pain and suffering, will not be able to receive any assistance from a physician, family member or friend to implement that person's decision to hasten their own death. The hypothesis put forward by supporters of the Michigan law rightly argues that regulating assisted suicide may lead to abuse by suicidal people, because there is the possibility that they will end their lives „just because they want to". Thus, this imposes significant constitutional restrictions on any government effort to „ration" health care needed to prolong the lives of the terminally ill or very old or to improve the condition of the weak or physically disabled. Through the Michigan perspective, the foundation was laid for

the idea that there is an obligation in society to participate in its well-being. without abusing public services to the detriment of one's own beliefs or illnesses. Protecting one person's right to life can harm and endanger the lives of others by limiting their access to health, counselling, etc.

4 CONCLUSIONS

Considering all that has been presented in the paper, we can conclude that assisted suicide is a controversial subject and opinions on it are divided. Although some countries have regulated this procedure, not all of them have very clear regulations. In most cases, the decision to proceed with assisted suicide must be accompanied by good reasons and certain conditions must be met.

Although the practice is common in some Western countries, in Romania the adoption of a legislative text allowing such procedures is still under discussion, as they are currently prohibited by the Penal Code regulations.

5 PERSONAL NOTES

In the course of our research, the perspective from which we started became more interesting and more ambiguous. Of course, in a legislative climate in which the right to life is supported and considered fundamental in the area of any state, the adoption of such a change, which can endanger the order of social life, becomes a prerogative of continuous debate. Although it is considered that the right to life and the right to assisted suicide cancel each other out, we believe that they can be seen as distinct and limited by each person's desires. Inexorably, certain directions of regulation of such a right must be outlined, we support the views of the authors who believe that the right to assisted suicide should be granted to persons suffering from chronic or terminal illnesses and for whom there is medically no chance of life.

In our view, it is imperative to consider that such a potentially controversial right can be regulated with certainty in most countries of the world without thorough research on its effects and benefits. Our paper has aimed to draw a line, in extenso, of the patterns of adoption of this concept in different European countries, in order to form an overview of the whole legal perspective on the idea of assisted suicide.

[3] Sedler, Robert A (1994), *Are Absolute Bans on Assisted Suicide Constitutional--I Say No*. U. Det. Mercy L. Rev. 72: 725.

[4] Mill, John Stuart. (2002) *On Liberty*. Dover Publications.

[5] Michigan Supreme Court, 22nd March 1995.

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[4] *European Journal of Health* Law 10: 329-335, 2003.

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[10] RADBRUCH, L., LEGET, C., BAHR, P., MULLER BUSCH, C., ELLERSHAW, J., DE CONNO, F.,

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[12] *The Belgian Act on Euthanasia* of May, 28th 2002

[13] SEDLER Robert A (1994), *Are Absolute Bans on Assisted Suicide Constitutional--I Say No*. U. Det. Mercy L. Rev. 72: 725.

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CULTURAL HERITAGE AND NATIONAL HERITAGE PROTECTION. THE ROLE OF THE CHURCH PAINTING COMMISSION

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Abstract

The preservation and transmission of cultural heritage is a major concern at global and European level, involving wide-ranging debates on the protection of national and universal heritage. As a member state of the European Union, Romania values and protects its cultural heritage, an element of tradition and identity. At national level, the protection of cultural heritage is regulated by the Constitution, the supreme law of the state, as well as by infra-constitutional legislation. The Ministry of Culture plays an important institutional role in the preservation of the national cultural heritage, as well as the Romanian Orthodox Church and, within it, the Commission for Church Painting. This study examines, from a constitutional perspective, the role of the Romanian Orthodox Church in general and the Commission for Church Painting in particular in the transmission of cultural heritage and the protection of national heritage.

Keywords: *cultural heritage, national heritage protection, Commission for Church Painting, Romanian Orthodox Church*

Introduction

In the European Commission's view, „*Europe's cultural heritage is a rich and diverse mosaic of cultural and creative expressions, a legacy left by previous generations of Europeans for future generations. It includes natural, built and archaeological sites, museums, monuments, works of art, historic cities, literary, musical and audiovisual works, as well as the knowledge, practices and traditions of European citizens. Cultural heritage enriches the life of every citizen, is a driving force for the cultural and creative sectors and plays an important role in creating and strengthening Europe's social capital. It is also an important resource for economic growth, employment and social cohesion, with the potential to revitalise urban and rural areas and promote sustainable tourism*."[1] The legal framework promotes and implements integrated and participatory action on cultural heritage and contributes to its integration into EU policies. The European Parliament, the Council of

[1] European Commission, Culture and Creativity [online], [accessed 14.04.2023], available at: https://culture.ec.europa.eu/ro/policies/selected-themes/cultural-heritage;

the European Union, the Committee of the Regions and the European Economic and Social Committee support this approach.[2]

The Romanian Constitution regulates access to culture in this respect in Article 33, establishing the state's obligation to ensure „*the preservation of spiritual identity, support for national culture, stimulation of the arts, protection and preservation of cultural heritage, development of contemporary creativity, promotion of Romania's cultural and artistic values".*

The Romanian Orthodox Church (hereafter BOR) plays an important role in the protection of the national cultural heritage, in the sense that, through its special regulations, it contributes to the preservation and transmission from generation to generation, for a better development of society with the preservation of a genuine vein of identity. Although not provided for in the Constitution as such, the Church has made an important contribution to the protection of the national cultural heritage. Over the years, there has been a concern to introduce into the Constitution the recognition of the role of the Church in the development of the Romanian state. Thus, the proposal to revise the Constitution, put forward in 2014, proposed the introduction of a new paragraph regulating this role of the BOR. It is true that at that time the Constitutional Court (hereinafter CCR) recommended the deletion of the proposed text, by paragraph 25 of Decision No. 80/2014.[3] It should be noted, however, that the reason for the recommendation of deletion was not one of substance in the sense of not recognizing the role of the BOR in the development of the state, but the problem was one of conception of the proposed text, which was insufficiently developed.

From this perspective, it is interesting to analyse the concrete way in which the BOR carries out the preservation of Romania's cultural heritage, and one of the most conclusive activities is that of the Commission for Church Painting, as an institution that supervises and controls the application of church legislation, in order to respect the essential norms for the protection of cultural heritage. The Commission for Church Painting supervises, together with the Ministry of Culture, works of church art financed by European funds. As a result, in this study we will present, in the first chapter, some aspects of characterization of the national cultural heritage, preservation and conservation of the spiritual and cultural heritage of the BOR and its ancestral heritage, and in the second chapter, the role of the Commission for Church Painting in the protection of the national cultural heritage, as a concrete way in which the BOR manifests itself in the realization of the mentioned role.

1. CULTURAL HERITAGE AND PROTECTION OF NATIONAL HERITAGE

1.1. National Cultural Heritage

According to Article 16 of the Cultural Heritage Code, „National cultural heritage is the set of cultural goods and traditional intangible cultural elements, identified as such, which represent a testimony of values, beliefs, knowledge and traditions in continuous evolution,

[2] Publications Office of the European Union, European Framework for Action for Cultural Heritage [online], [cited 14.04.2023], available online at: https://op.europa.eu/ro/publication-detail/-/publication/5a9c3144-80f1-11e9-9f05-01aa75ed71a1;

[3] Decision No 80 of 16 February 2014, published in the Official Journal No 246 of 7 April 2014, Issuer: Constitutional Court;

integrating the elements resulting from the interaction between human factors, respectively between human and natural factors, over time".[4]

Romania's cultural heritage is one of the country's most valuable assets. It creates bridges between past, present and future generations, being a source of religious and artistic inspiration, an attraction for pilgrims and tourists, contributing, in time, to economic development. Many of these works of art and human creativity, which have conveyed beauty over the centuries, are increasingly fragile: „the survival of these works of ecclesiastical art depends on long-term care and investment in their conservation, restoration and maintenance".[5]

The Romanian cultural heritage is, to a large extent, a religious cultural heritage, both material, tangible and spiritual. The BOR possesses a significant mobile and immovable cultural heritage. More than 60% of the historical monuments in Romania are ecclesiastical monuments: cathedrals, monastery churches, parish churches, wooden churches of rural communities, cemetery chapels, paraclises and cloister churches, belonging to old monastic complexes. Some of them are inscribed on the UNESCO World Heritage List, such as: churches in Moldova with exterior painting (Arbore, Humor, Moldovița, Pătrăuți, Voroneț, Sucevița, Hurezi Monastery) and some wooden churches in Maramures.[6] Museums, church collections, as well as conservation centres, warehouses belonging to monasteries, parishes or eparchial centres house a rich heritage of „movable cultural heritage, such as icons, cult objects and embroideries, old books, pieces of furniture, historical documents and archaeological material".[7] Thus, over time, at the happy encounter between the post-Byzantine and Western European traditions, between East and West, hierarchs, clerics, scribes, icon builders and church builders have created a rich heritage for our country, which is one of the fundamental elements that have sustained the perpetuation in history of that historical „enigma and miracle" (Gheorghe Brătianu), which is the Romanian people. The unity of the Church and the unity of the Romanian state were closely linked to each other, mutually supporting and confirming each other, through the affirmation of the national consciousness of the Romanians, which was the joint work of the Churches, the rulers and the scholars who assimilated the tradition of the Enlightenment.

Thus, with the Church and through the Church the great national ideal of unity was transmitted, the

Church remaining an integral part of the people in promoting the political, state unity of the Romanians.[8] Since 1990 and until today, the Church has been actively involved in the

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[4] The Cultural Heritage Code, *adopted by the Romanian Parliament, in compliance with the provisions of Articles 75 and 76 of the Romanian Constitution, republished,* Article 16;

[5] Daniel, PATRIARCH OF THE ROMANIAN ORTHODOX CHURCH, *Church Art – a national cultural treasure that must be preserved, enriched and highlighted*, presented in the NATIONAL CONFERENCE, *Dogmatic Unity and National Specificity in Church Painting, National Church Heritage: Living Testimony to the Unity of Faith and Nation*, ROMANIAN PATRIARCHATE, *Culture and Religious Heritage Sector, Commission for Church Painting*, *Basilica* Publishing House, *Bucharest, 2018*, p. 13-14;

[6] Ibid;

[7] Ibid;

[8] Victor OPASCHI, SECRETARY OF STATE FOR RELIGIOUS AFFAIRS, *Message of the Secretary of State for Religious Affairs*, presented at the NATIONAL CONFERENCE, *Dogmatic Unity and National Specificity in Church Painting, National Church Heritage: Living Testimony to the Unity of Faith and Nation*, ROMANIAN PATRIARCHATE, *Culture and Religious Heritage Sector, Commission for Church Painting*, *Basilica* Publishing House, *Bucharest, 2018*, p. 18;

spiritual, material and political reconstruction of Romania, becoming an active supporter of the recognition of Romanians and their cultural and spiritual heritage as part of the United Europe. The restoration and proper preservation of heritage is an obligation of the State and the Church towards Romanian culture and Romanian society. The Romanian Government, through the Ministry of Culture (MC) and the State Secretariat for Religious Affairs (SSC), supports the efforts of the Romanian Orthodox Church and the other religious denominations in Romania, allocating funds for the renovation and restoration of churches, monasteries and buildings of the church heritage, thus restoring their dignity and giving Romanians the joy and pride of having such a rich Romanian heritage.[9] „Church heritage, as part of the national heritage, is not static, a closed or dead space in which any possibility of development has been exhausted. The richness and diversity of the historical tradition are extremely important for us, as today's generations feed on it, updating and finding new forms of expression, of manifestation of their own identity. On the basis of the historical heritage, each generation builds its present heritage, which will remain as a testimony for centuries to come".[10] The national cultural heritage, in general, and the movable and immovable cultural heritage owned by the Romanian Orthodox Church, in particular, bear important values and a special significance, coordinates that bear witness to the tradition and faith of the Romanian people, to the sacrifice and heroism of our ancestors, as well as to the role that the Church and the word of the Gospel have played in the formation, consolidation and preservation of the identity of the Romanian people. Thus, referring to the old churches and monasteries in Romania, Nicolae Iorga remarks that they still preserve „the memory of the Romanian past, which is dear to us"[11], no matter what this past is like. Through the goods that make up and complete the cultural heritage, the BOR preserves a valuable part of the unwritten history of the Romanian nation.

1.2. The Cultural and Spiritual Heritage of the Church as Ancestral Heritage

The cultural and spiritual heritage of the Church is a „calling card" for the history of the Romanian people. Preserving and cherishing it is a practical means of cultivating the unity of nation and faith, developing respect for the memory of our forefathers. The goods that make up the cultural and spiritual artistic „treasure" of the Church and of Romania, which are preserved with sanctity, carry a sacred charge, both for the Church and for all Romanians, bringing to mind history, ancestors and saints. For their cultural and spiritual value, heritage assets must be cherished. They are mirrors to the past, testimonies of our history, evidence of the existence and presence of the Romanian ethos[12] and treasures of history, full of meanings, symbols, memories, evocations, but above all they are testimonies and means of witnessing and preserving the unity of faith and nation.[13] Therefore, the importance of the cultural and spiritual heritage of the BOR cannot be neglected. The movable and immovable property classified as part of the national cultural heritage,

[9] Ibid, p. 19;

[10] Ibid, p. 20;

[11] Nicolae IORGA, *Inscriptions from the Churches of Romania*, vol. I, Institute of Graphic Arts and Minerva Publishing House, Bucharest, 1905, p. VI;

[12] *Ethos* means *cultural specificity of a community*, according to DEX (dictionary of the Romanian language);

[13] Daniela BUȘĂ, *Foreign travellers about Romanian countries in the 19th century*, vol. I, Romanian Academy Publishing House, Bucharest. 2004, p. 674;

respectively the cultural and spiritual heritage of the Church, protected and administered by the BOR, are all testimonies of communion and dialogue between man, God and his fellow men, as well as genuine means of preserving and promoting the role and the parable of the unity of faith and nation.[14] In the cultural and spiritual heritage of the Church there are many testimonies that embellish and underpin the message transmitted, above all, to the younger generations, who must grow up not only with the awareness that they were born and are Romanians, but that they are practising Christians, grandchildren and great-grandchildren of an authentic Orthodox Christian nation, in which faith, bravery, sacrifice and martyrdom are the four important coordinates, which endure both through national consciousness and through the spiritual and cultural heritage that the BOR cares for.[15]

1.3. Preservation and Conservation of the Spiritual and Cultural Heritage of the Romanian Orthodox Church

The active life of the Church implies the social reality of the existence and importance of goods. The immovable cultural heritage is represented by historical monuments, and the movable cultural heritage by collections of objects presented in specialised museums. At present, both immovable and movable heritage are regulated separately in Romanian legislation. For the BOR they form a single whole.[16]The current legislation does not specify in any particular way, except by reference to the legal status of the owner, which it calls cult, the category of goods that make up the cultural heritage of the Romanian Orthodox Church.

Thus, as far as historical monuments are concerned, Law no. 422/2001 on the protection of historical monuments clearly regulates in its content that such protection actions combine efforts of identification, research, inventory, classification, recording, conservation, guarding and maintenance, consolidation, restoration, enhancement and social-economic and cultural integration of such monuments in the life of local communities.[17]

In the context of the fact that the heritage of Orthodox places of worship includes numerous places of worship that are classified as historical monuments, there is a moral and legal responsibility to protect them, having a priority role in the Christian mission. There are many cases where work to protect such monuments is hampered or delayed by various factors, one of which is the very high cost of restoring or preserving some monumental

[14] Ieronim SINAITUL, PATRIARCHAL BISHOP-VICAR, COORDINATOR OF THE SECRETARIAT OF CULTURE AND RELIGIOUS HERITAGE OF THE ROMANIAN PATRIARCHATE, *The Spiritual and Cultural Heritage of the Romanian Orthodox Church – the Missionary Responsibility of Preserving and Valuing the Romanian Past*, presented at the NATIONAL CONFERENCE, *Dogmatic Unity and National Specificity in Church Painting, National Church Heritage: Living testimony of the unity of faith and nation*, ROMANIAN PATRIARCHATE, *Culture and Religious Heritage Sector, Commission for Church Painting*, *Basilica* Publishing House, *Bucharest, 2018*, p. 30;

[15] Ibid;

[16] Ieronim SINAITUL, PATRIARCHAL BISHOP-VICAR, COORDINATOR OF THE SECRETARIAT OF CULTURE AND RELIGIOUS HERITAGE OF THE ROMANIAN PATRIARCHATE, *The Spiritual and Cultural Heritage of the Romanian Orthodox Church – the Missionary Responsibility of Preserving and Valuing the Romanian Past*, presented at the NATIONAL CONFERENCE, *Dogmatic Unity and National Specificity in Church Painting, National Church Heritage: Living testimony of the unity of faith and nation*, ROMANIAN PATRIARCHATE, *Culture and Religious Heritage Sector, Commission for Church Painting*, *Basilica* Publishing House, *Bucharest, 2018*, p. 24;

[17] *Law No 422/2001 on the protection of historical monuments*, Article 2, para. (3), published in the OFFICIAL MONITOR No 938 of 20 November 2006;

churches. One solution to this problem is the European funds earmarked for the protection of cultural heritage, which can be accessed by religious establishments.[18] Another important factor is compliance with current legislation. Each holder of immovable or movable property that makes up the national cultural heritage is obliged to coordinate each intervention on this category of property, taking into account the regulations that the Romanian State has adopted in this regard.[19] Thus, for immovable cultural heritage or the category of historical monuments, the main legislative document is Law no. 422/2001 on the protection of historical monuments, and for movable cultural heritage, the main normative act is Law no. 182/2000 on the protection of movable national cultural heritage. In addition to these, there are also other legal acts containing measures, procedures and regulations on how to protect and enhance the national cultural heritage. The significant fines and preventive measures that the relevant public institutions take in the event of non-compliance with the legal rules in this field are guarantees that the Romanian State closely monitors the procedure and the way in which the national cultural heritage is protected.[20] By protecting the goods that make up the spiritual and cultural heritage, the BOR preserves and enhances the value of significant goods for the national and universal history, culture and civilization. In other words, the Church's mission of leading the faithful to salvation is in harmony with the action of enhancing the Romanian identity, tradition and past. Therefore, the cultural-spiritual heritage of the Church is identified with that particular class of movable and immovable property which, together with its historical, linguistic, ethnological, ethnographic, architectural, iconographic and hymnographic implications, highlights the most important element: the ancestral Orthodox faith of the Romanian people, humility and religious sentiment, requiring the appearance and preservation of such property.[21] The activity carried out by the BOR, in the field of protection and promotion of the value of the goods that are part of the national cultural heritage, is so present in the life and mission of the Church, being contained in many of the decisions of the Holy Synod and regulated in the Statute for the organization and functioning of the Romanian Orthodox Church, as well as in some of the regulations applicable in the BOR.[22]

2. ROLE OF THE CHURCH PAINTING COMMISSION

2.1. General Considerations on the Rules for the Organisation and Functioning of the Church Painting Commission

The Commission for Church Painting is organized and operates on the basis of its own Regulations, the Decisions of the Holy Synod and the Statute for the Organization and Functioning of the Romanian Orthodox Church, and, in its activity, special laws such as

[18] Ieronim SINAITUL, PATRIARCHAL BISHOP-VICAR, COORDINATOR OF THE SECRETARIAT OF CULTURE AND RELIGIOUS HERITAGE OF THE ROMANIAN PATRIARCHATE, *The Spiritual and Cultural Heritage of the Romanian Orthodox Church – the Missionary Responsibility of Preserving and Valuing the Romanian Past*, presented at the NATIONAL CONFERENCE, *Dogmatic Unity and National Specificity in Church Painting, National Church Heritage: Living testimony of the unity of faith and nation*, ROMANIAN PATRIARCHATE, *Culture and Religious Heritage Sector, Commission for Church Painting*, *Basilica* Publishing House, *Bucharest, 2018*, p. 25;

[19] Ibid;

[20] Ibid, pp. 25-26;

[21] Ibid, p. 26;

[22] Ibid, p. 27;

Law no. 422/2001 on the protection of historical monuments, Law no. 489/2006 on religious freedom and the general regime of cults (the Law on Cults) and the Cultural Heritage Code and, of course, the general rules on the subject are also applicable.

The Regulations for the organisation and functioning of the Commission for Church Painting were adopted by the Holy Synod and published in 2012. It includes in the Preamble two provisions of Law No. 489/2006 on religious freedom and the general regime of cults (Law on Cults) and ends with a reference to the Statute for the organisation and functioning of the Romanian Orthodox Church. The Preamble also quotes Article 8(1) of the Law on Religious Denominations, which states the autonomy of religious denominations according to their own statutes or canonical codes. Autonomy refers to the right of communities to govern themselves according to their own rules.[23] In the ecclesiastical sphere, the link between this autonomy, which refers to the idea of regulation and legal relations, and painting, i.e. art, which means the artist's freedom of expression according to his or her own talent, techniques and imagination, should be recognised. Thus, individual talent is not excluded, autonomy being based on specialist work, on the possession of legal personality, enabling the entity in question to acquire, hold and manage its own assets.[24] The Preamble also highlights Article 27(1) of the Law on Religious Denominations, which explicitly refers to the ownership or management of assets which the religious body can dispose of in accordance with its own statutes.[25] The Preamble also outlines the hierarchy of legal rules concerning the activity of church painting. The basic law is the Cults Act, under which the cults adopt their own statutes, recognised by the State. The Commission for Church Painting is an entity without legal personality, integrated into the administration of the Romanian Patriarchate, within the Culture, Painting and Restoration Sector. This commission is headed by the Patriarch of Romania and is a specialized patriarchal commission with an advisory role.[26]

„The Regulation for the organization and functioning of the Commission for Church Painting of the Romanian Patriarchate expresses the current state of regulation by the Church of its own activity of church painting, being an expression of the specificity and autonomy of the Church".[27]

[23] Law on Religious Cults, *published in the Official Gazette No 201 of 21 March 2014*, Article 8 para. 1;

[24] Pr. Ionuț-Gabriel CORDUNEANU, PATRIARCHAL ADMINISTRATIVE VICAR, *Brief legal considerations on the Regulation for the organization and functioning of the Commission of Church Painting*, presented in the NATIONAL CONFERENCE, *Dogmatic Unity and National Specificity in Church Painting, National Church Heritage: Living Testimony to the Unity of Faith and Nation*, ROMANIAN PATRIARCHATE, *Culture and Religious Heritage Sector, Commission of Church Painting*, *Basilica* Publishing House, *Bucharest, 2018*, p. 31-32;

[25] Law on Religious Cults, *published in the Official Gazette No 201 of 21 March 2014,* Article 27 para. 1;

[26] Pr. Ionuț-Gabriel CORDUNEANU, PATRIARCHAL ADMINISTRATIVE VICAR, *Brief legal considerations on the Regulation for the organization and functioning of the Commission of Church Painting*, presented in the NATIONAL CONFERENCE, *Dogmatic Unity and National Specificity in Church Painting, National Church Heritage: Living Testimony to the Unity of Faith and Nation*, ROMANIAN PATRIARCHATE, *Culture and Religious Heritage Sector, Commission of Church Painting*, *Basilica* Publishing House, *Bucharest, 2018*, p. 33;

[27] Ibid, p. 35;

2.2. Regulations and Practices in the Procurement Procedure of Ecclesiastical Art Works and Restoration of Religious Heritage

Misinterpretation and misapplication of the Rules for the Organisation and Functioning of the Church Painting Commission (CPB Rules) can lead to a practice that is incomplete, with negative effects for both the beneficiary and the executor, situations that are contrary to the spirit of church law.[28] Therefore, the CPB Regulation must be applied by reference to the general principles of law and, at the same time, by complementing the provisions of national law.[29]

2.2.1. General Principles of Law

„Grigore Fiodorov shows that the general principles of law are basic beginnings, which determine the main features of law, in its content, and the peculiarities of regulating social relations, as a whole. These principles extend to all legal norms and act in all branches of law, irrespective of the character and specificity of the regulated relations".[30] The general principles of law are those basic ideas which coordinate society and are the source of law for all legislation, and are transposed into the fundamental law – the Romanian Constitution – and into other important laws, such as the Civil Code or the Criminal Code. They ensure a balance between respect for rights and the fulfilment of obligations, by imposing rules, promoting models and limiting the scope of action of each individual in order to prevent infringements of the rights and interests of others. These principles are the foundation of social life, conferring legitimacy and stability on legal rules, and are binding throughout society. The most common principles in the interpretation and application of the CPB Regulation are: the special rule is that which derogates from the general rule and is of strict interpretation; where the law does not distinguish, neither can we distinguish, in the sense that when the law does not make an interpretation with regard to a legal relationship, neither can we; the exception provided for by the law is of strict interpretation and application and cannot be extended to other situations; the accessory follows the principal; a valid contract concluded has the force of law between the contracting parties; that which is null and void cannot produce the intended effects, so that the legal relationship arising from the legal act which is null and void is dissolved; he who cannot do less cannot do more, in the sense that where the law prohibits less, it implicitly prohibits more.[31]

2.2.2. Legal Framework for the Protection of National Church Heritage

The protection of national cultural heritage is understood to be the set of measures, of a scientific, legal, administrative, financial, fiscal and technical nature, designed to ensure the identification, research, inventory, classification, conservation, security, maintenance, preparation, restoration and enhancement of national cultural heritage, with a view to ensuring democratic access to culture and the transmission of this heritage to future

[28] Nicolae HRIȚCU, Legislation and practices in the procedure of acquisition of works of ecclesiastical art and restoration of religious heritage, presented in the PROCEEDINGS OF THE NATIONAL CONFERENCE, *Dogmatic Unity and National Specificity in Church Painting, Unitary Norms and Guidelines in Iconography and Restoration of Church Heritage*, ROMANIAN PATRIARCHATE, *Culture and Religious Heritage Sector, Commission for Church Painting*, *Basilica* Publishing House, *Bucharest, 2022*, p. 319;

[29] Ibid;

[30] Ibid;

[31] Ibid, pp. 320-321;

generations.[32] From a legislative point of view, the protection of national heritage is legislated by organic laws, simple or urgent ordinances, government decisions or ministerial orders. In addition to these legal acts, there are also related regulations contained in various statutes, organisational and operational regulations or internal regulations. Starting from the legal principle that a special law derogates from the general law, in order to understand the whole legal framework governing the protection of the national church heritage, we can see that the legislator has understood to establish special rules for the autonomous administration, management and protection of the church heritage.[33] Thus, the Romanian Constitution states: Religious cults are free and are organised according to their own statutes, under the conditions of the law[34], and the general regime of cults is regulated by organic law.[35] The Statute for the Organisation and Functioning of the Romanian Orthodox Church expressly stipulates that: The administration of the church patrimony [...] is carried out in accordance with the statutory and regulatory provisions[36]; The Statute for the organization and functioning of the Romanian Orthodox Church is applied through specific regulations of activity, which have the same canonical and juridical authority as the BOR Statute. The specific regulations for the various fields of activity of the Church are approved by the Holy Synod[37]. In the light of these statutory provisions, the CPB Regulations are the special law governing the protection of religious heritage, with the aim of preserving the dogmatic, artistic and execution unity of works of ecclesiastical art and restoration. The central administrative body, the Commission for Church Painting, is also the only competent institution able to supervise and control the application of the statutory and regulatory provisions[38] and to decide on the most appropriate solution for solving the problems concerning the church painting ensembles.[39]Since the special law derogates from the general law, these rules of the CPB Regulation are of strict interpretation and mandatory in application, for everything that means the protection of the patrimony in the property of the Romanian Orthodox Church. Chapter V of the CPB Regulations expressly regulates the procedure for the acquisition of ecclesiastical art and restoration works in the Romanian Orthodox Church, starting with the drafting of the execution project, continuing with the tendering, contracting and execution of the works and ending with the acceptance of these works. At present, ecclesiastical art and restoration works can be carried out through multiple sources of funding (public, private or non– reimbursable European funds). Thus, the procedure to be followed by the place of worship when it intends to carry out works of art or restoration is that laid down in the CPB Regulation, which applies in priority to national legislation and cannot be overridden by it, and when the source of financing for the execution of the works comes from European funds, European legislation transposed into national law must be supplemented by the provisions of the CPB Regulation.[40]

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[32] Ibid, p. 321;

[33] Ibid;

[34] Romanian Constitution, *revised in 2003*, Article 29 para. 3;

[35] *Ibid*, Article 73 para. 3 lit. s)

[36] Statutes of the BOR*, published in the OFFICIAL MONITOR No 97 of 10 February 2020,* Article 179 para. 1*;*

[37] *Ibid*, Article 204 para. 2;

[38] CPB Regulation, Publishing House: *Orthodox Biblical and Mission Institute, Bucharest, 2013*, Article 4 para. 2 lit. a);

[39] *Ibid*, Article 109 para. 3;

[40] Nicolae HRIȚCU, Legislation and practices in the procedure of acquisition of ecclesiastical art works and restoration of religious heritage, presented in the PROCEEDINGS OF THE NATIONAL CONFERENCE,

2.2.3. Procedure for the approval of applications by the Church Painting Commission

The CPB procedure comprises four stages: design, award, contracting and acceptance of church art works. For a CPB opinion to be positive, the provisions of the CPB Rules must be respected at each stage, otherwise, if all the conditions of the Rules are not met, the CPB opinion is negative. The document flow for any application is as follows:

For the design stage, a project will be drawn up by a CPB-certified Category I or II painter for mural painting works and by a CPB-certified restorer for conservation-restoration works. The file must contain the actual project of the works with the estimated economic estimate and specifications, the minutes of the parish council on the necessity of the painting/restoration works, the address of the parish priest to the Eparchial Centre, endorsed by the diocese, requesting the blessing of the Archbishop for the preparation of the project, the address of the Eparchial Centre to the parish/monastery giving its consent to the preparation of the project and to the designer, the address of the parish/monastery to the Eparchial Centre requesting the blessing and submission of the file to the CPB, the address of the Eparchial Centre to the CPB. Thus, the file from the parish must be checked by the diocese, which will forward it to the Eparchial Centre, which will then send it to the CPB for verification and approval. If the dossier contains all these documents and meets the complete procedure, it will receive a positive opinion from the CPB so that the cult unit can then proceed to the awarding stage. If not, the file will receive a negative opinion and the project will be redone.

For the awarding stage, the file must contain the minutes of the Parish Council for the organization of the tender, a minimum of 5 invitations sent to specialists corresponding to the category of works at least 15 days before the date of holding the tender by the cult unit, and also the submission of the public notice to the Light Newspaper of the Romanian Patriarchate, there must be a minimum of 3 valid bids. The price of the winning bid must be within the initial proposed estimate approved by the CPB. Specialists must also be eligible by the following criteria: they must have at least two works committed, as well as the agreement of the respective cult units for the opening of a new building site, up-to-date works situation and proof of payment of the 2% contribution to the CPB for the works carried out. The file must be checked by the diocese and then by the Diocesan Centre so that it can be sent to the CPB for approval. If the procedure is properly prepared, the CPB's opinion is positive and the cult unit can proceed to the contracting stage, otherwise it will receive a negative opinion and the tender procedure will be repeated.

For the contracting stage, the file will contain the contract, in three original copies, which must be identical to the model in Annex 10 of the CPB Rules and the contract price must be the same as the winning tender. The contract concluded between the specialist and the cult unit will be presented to the Bishop for approval, then sent to the CPB via the Diocesan Centre. If the dossier fully complies with the provisions of the CPB Regulations, the CPB's opinion will be positive and the cult unit will be able to proceed to the stage of receiving the church artwork.

For the acceptance stage of the church art works, the file will contain the partial or final acceptance report, depending on the case, bearing in mind that before the final acceptance, a

Dogmatic Unity and National Specificity in Church Painting, Unitary Norms and Guidelines for Iconography and Restoration of Church Heritage, ROMANIAN PATRIARCHATE, *Culture and Religious Heritage Sector, Commission for Church Painting*, *Basilica* Publishing House, *Bucharest, 2022*, p. 323;

partial acceptance will be done to check the accuracy of the works and the respect of the legal procedures. Finally, a final acceptance will be made by a commission made up of the delegate of the Bishop, at least one authorized painter delegated by the Bishop, with a higher category or, exceptionally, equal to that of the painter executing the works, but not less than category II, the Protopope, the parish priest and the executing painter. The final acceptance report will include the final details of the work, such as how it was carried out, how many square metres it totalled, the amount received by the specialist for the work carried out, the 2% contribution to the CPB and the grade awarded to the specialist carrying out the work. If the final acceptance is in accordance with the regulations, the CPB's opinion is positive. If not, the CPB opinion is negative and the acceptance of the church art works will be repeated.

So, the circuit of documents is a long one, since for each stage the file starts at the unit of worship, is sent for verification to the protoparchy, then to the Diocesan Centre, which is the only body that can send requests to the CPB. In other words, the CPB communicates only with the Eparchial Centres for the resolution of requests, being the central administrative body. However, the CPB also authorises specialists in the field of ecclesiastical art, in the sense that by applying for registration in the CPB's records, they follow a path so that they can be authorised specialists and work legally, in accordance with the provisions of church law. Anyone wishing to register with the CPB must go through several periods, such as apprenticeship, traineeship and then authorisation, through various examinations and tests. Also, in the case of Historic Monuments, CPB authorised specialists must also be authorised by the Ministry of Culture.

Conclusions

Cultural heritage is a substantial universal value that needs to be protected. At both national and EU level, there is a concern to achieve this objective, which is why we note the provisions of Article 167 para. (1), (2) and (3) of the TFEU, according to which „the Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore".[41] (2) „Union action shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: improving the knowledge and dissemination of the culture and history of the European peoples; conservation and safeguarding of cultural heritage of European significance; non-commercial cultural exchanges; artistic and literary creation, including in the audiovisual sector."[42](3) „The Union and the Member States shall foster cooperation with third countries and international organisations competent in the sphere of culture, in particular the Council of Europe."[43]

Being the one that creates bridges between past, present and future generations, the national cultural heritage is a source of artistic and religious inspiration, a tourist attraction, as well as an economic development for the state. The identity of the people is defined by this rich heritage, first and foremost by the multitude of essential values it promotes. By

[41] *Ibid*, Article 167, para. 1;
[42] *Ibid*, Article 167, para. 2;
[43] *Ibid*, Article 167, para.

contributing to the protection of the national cultural heritage, the BOR ensures the transmission of an invaluable cultural heritage to future generations.

We believe that this role should be better understood and, with specific reference to the work of the Commission for Church Painting, the essential role it plays and the complexity of the work it carries out, reconciling the idea of regulation and freedom of expression through art, should be known.

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SUCCESSION SITUATIONS DETERMINED BY SPORTING EVENTS IN THE ROMAN EMPIRE

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Abstract

Sporting events have been an important part of Roman life. They were attended, in different positions, of course, by both emperors and slaves, free men and prisoners, rich and poor. The cultural impact is undeniable, as evidenced by the statues, inscriptions and artworks dedicated to athletes. From an economic point of view, sporting events became a source of income in ancient Rome and marked the emergence of the first professional athletes. In addition to this festive side of the Games, however, there were also negative aspects. The competitions were often marked by fierce fighting, bloodshed, and death. Before the fight, the athletes prepared for their demise, and the spectators watched the disputes. Despite not being direct participants in the races, spectators were not spared from death either. Death was sometimes present among them. Therefore, during sporting events in ancient Rome, the problem of the succession of participants in sporting competitions arose. The way in which they chose to prepare for a possible occurrence of death changed over time and the categories of heirs changed as well. From the Law of the Twelve Tables to the reforms of Emperor Justinian, each participant tried to weigh and distribute as wisely as possible the inheritance they were to leave on earth. Nevertheless, the question arises as to whether certain categories of heirs also regarded with keen interest the moment when they truly became entitled to the inheritance.

Keywords: *Roman Empire, succession, Olympic Games, sports competitions, gladiators, chariot races.*

1. Sporting events in Ancient Rome

The Latin poet Juvenal, in Satire X, evokes the human weakness for two things: bread and circus [1]. There are also numerous historical sources that attest to the fact that physical activities played an important role in Roman life. On days when 'games' or 'festivals' were held, all commercial activity was suspended. As time went by, days off became more and more numerous. At the end of the Republic, 66 days were allotted to games and during the reign of Marcus Aurelius (161-180 AD), the number reached 135 days. Additional days off could also be granted for various extraordinary events [2]. The scale of the events can also be measured by the capacity of the arenas. The seating capacity of an arena in London in the Roman period is recorded at 6000 spectators, which was approximately one third of the population of London at the time (20,000 people) [3]. At the same time, sporting events were predominant both because of their popularity and because there were not many other leisure activities. There are few actual descriptions of 'children's' games, with historical sources mentioning horse riding, swimming, and wrestling as 'boys' activities'[2]. Presumably this was similar to the situation today with football, one of the most popular

sports in the world, regardless of age and level of education. It does not present changes to the rules as such, but ad hoc adaptations made to facilitate the practice of the sport [4].

A particularly important milestone in the development of sport in the Roman Empire was the conquest of Greece following the Battle of Corinth in 146 BC [5]. This event marked the beginning of a new era for Greece, a forced reorganisation, and a chimerical independence. At the same time, for the Romans it meant a series of socio-political changes. With a history of about 3000 years, the Olympic Games had their first edition in 776 BC. Named after the sacred site of Olympia, located on the west coast of southern Greece, the Games originally lasted five days and the sporting competitions were the central element. The competition programme included only individual sports (running, pentathlon, boxing, wrestling and chariot racing) and was held in a stadium, palestra, gymnasium, or hippodrome.

Although in sporting and cultural terms the Roman conquest of Greece meant a decline, in terms of the popularity of athletics it meant a significant increase. The largest number of spectators at the Olympic Games in antiquity was recorded in the 2nd century AD, with 40,000 spectators in the stands on each day of the Games. Obviously, this lasted until 393 AD, when Emperor Theodosius decided to suspend the Games, and the Olympics disappeared until 1896, the year of the first modern Olympic Games.

The Romans loved sport, even the brutal and bloody games [2]. Chariot races and gladiator fights were part of religious festivals. An impressive number of spectators gathered in stadiums or „forums" to watch the performances. Their organisation was financially supported by wealthy citizens as an expression of their wellbeing. Historical sources documented how the Olympic Games were adapted after the conquest of Greece. The Romans were mainly interested in wrestling and chariot races, with the Olympic spectacle and the theatre plays associated with the Games relegated to the background.

1.1. Death during sports competitions

In an extensive description, Carter (2006) [6] presents the main aspects of gladiatorial combat. Of the sporting events of the time, these were the most likely to involve the death of the participants. As the author describes, the very purpose of the fight was not for one of the combatants to die, and there were multiple factors on which death depended.

However, as Carter (2006) also states, the gladiators took this aspect into consideration, preparing for possible defeat and inevitable death. Although we have not been able to identify a historical source where a will left by a gladiator prior to their battle is attested as such, there is indirect evidence that they expressed their wishes prior to fights. Thomas (1978) [7] and others consider 246 BC as the year of the first gladiator fight but Welch (2007) [8] considers the dates of gladiator fights uncertain. However, there is a high probability that gladiator fights were initiated around the 3rd century BC. Junkelmann [9] notes that there were different categories of fighters among gladiators; they could be slaves, volunteers, convicts, or even emperors. Commodus will forever remain in history as, among others, the mad Roman emperor – who considered himself the incarnation of Hercules, constantly demonstrating his skills as a supreme gladiator against people weakened by various diseases, disabled or even in chains. Of course, not all of these categories of people had the right to own property and thus, the capacity to make a will. Nevertheless, for those who did, in the old days, if they wished to leave an inheritance, they could resort to making a will.

In principle, Roman citizens *sui iuris* (factually capable) had *testamenti factio activa*. However, even public slaves had *testamenti factio activa*. Since they received a *peculium*, they had the right to bequeath half of the amount they had earned during their lifetime (from the *peculium*)[12].

In ancient times, the most accessible form in which they could leave their wills was called „*per aes et libram*". This was basically an application of fiduciary mancipation. According to historical sources, this method developed in three phases. Initially it appeared in the form of a „*mancipatio familiae*". In this the testator designated an *emptor familae* to whom the entire estate was assigned. Thus, by concluding fiduciary pacts for the fictitious sale of the estate, the testator (the gladiator, in our case) presented the way in which the emptor familiae would manage the assets after his death. Obviously, a major drawback of this way of leaving an inheritance was that the emptor familae could abuse the trust of the testator and seize the entire inheritance. Over time, emptor familae's function became that of a detentor. This meant that heirs could take legal action. Thus, even if the emptor familae had the intent to commit abuse, legal action could be taken against them. A new problem arose, however: because the will was made public, the heirs knew what they were going to receive. Thus, particularly in the context of fighting, where death could be 'eased', heirs could act in various ways to facilitate it. Choosing a stronger opponent, motivating the opponent with material benefits, the use of forbidden substances[2], were causes that could lead to a quicker death of the gladiator. Legislative changes favoured gladiators. The third form „per aes et libram secret", which appeared in the meantime, was different in that the contents of the will were no longer publicly stated. Witnesses would only have the role of attesting that the author of the will had made it personally, but would not know its contents. This was the option that offered the most benefits to the gladiators.

Gladiator fights reached their peak from the 1st century AD. The construction of the Colloseum in Rome was a milestone in this direction. It is estimated that over time 400,000 people died inside it, about 1000 deaths/year [11]. From a sporting point of view, over time, the risk of death in combat increases. If in the 1st century BC, the chances of death were about 10%, after the advent of the Republic, the chances increased to 25%. This is attributed to the more relaxed warfare context between 27 BC and 180 AD, when the need for blood and violent fighting increased among citizens. Thus, in relation to the legal changes of the time, the wills that gladiators could leave underwent various changes.

Other testamentary forms were introduced: the nuncupative will and the praetorian will. Both were available to Roman citizens, the difference between them being the form in which they were made – orally or in writing. The nuncupative will was an oral declaration made before seven witnesses. At the same time the praetorian will was in written form and bore the seals of seven witnesses.

As time goes by, the phenomenon of gladiator fights becomes even more widespread and the fights get even bloodier. Thus, the need for a will increases. In line with the legislative changes of the time, two new methods of inheritance came into force: the testament *apud acta conditum* and the *principi oblatum* [12]. These wills were more formal than the previous ones. *Apud acta conditum* was a verbal statement presented before the courts, subsequently ratified, and then registered in the archives by the magistrate; whereas *principi oblatum* was a written document sent to the imperial archives, where it was kept [12].

1.2 The issue of testamentary capacity and the value of inheritance

According to multiple historical sources, gladiators came from different social categories. As mentioned above, they could be slaves, convicts, autocrats, free persons, etc. These categories were similar in terms of their earnings from combat. In 177 AD, a victorious gladiator received between 15 and 75 sestertii for a victory [12]. The amount was not impressive at all, 1 kg of beef being equivalent to 2 sestertii, a day's work 2-3 sestertii and a funeral monument 1600 sestertii [13].

However, these payments were intended for gladiators who were not free. Thus, in practice, their first objective was to buy their freedom. There were various ways in which this could be done, either by direct ransom or as a result of the outcome of various fights. There is a testimony about a gladiator from the time of Emperor Trajan who went through 9 consecutive fights in 9 days to free himself [12].

There are accounts of a gladiator who died at the age of 21 in his fourth fight and of a gladiator who died at the age of 30 with a total of 34 fights, 21 won, 9 undecided and 4 lost [12]. The same author, therefore, assumes that, considering the time needed for recovery between fights and the opportunities to fight, a gladiator probably had on average between 2 and 4 fights per year.

The financial benefits were much higher for free (professional) gladiators. For a victory, such an athlete could receive up to 10,000 sestertii. This explains the very large differences in the inheritances left behind.

In this regard there is the record of Carter (2006) [6] where he writes about the gladiator Urbicus leaving a sufficient fortune to his wife and two daughters to have a crypt and engraved tomb. Thus, we infer that he was a free man who had the right to leave his inheritance by will.

In the context of the specific legislation, the establishment of the heirs was an extremely important step in the testamentary procedure. Any deviation from this clause resulting in the invalidity of the will. The conditions for a valid establishment involved two aspects, one of form and one of substance. The aspects of form concerned the solemn establishment and the initial positioning within the will. Thus, if the name of the person who was to inherit was not mentioned in an imperative form from the outset, that person was no longer entitled to what should have been his or her share [10]. The substantive conditions referred to two aspects: semel heres sempel heres (once an heir, always an heir) and nemo pro parte testatus pro parte intestatus decedere potesi (no one can die with a will in part and without a will in part). Thus, the person who became heir by accepting the inheritance became heir forever, and no 'term' of inheritance could be established, which practically contradicted the essence of the principles of property. Also, the estate had to be left in its entirety in a will; failure to do so would have rendered the will null and void, making it impossible to open two successions simultaneously: one testamentary and one legal.

1.3 Order of succession and its relation to sporting competitions

The first inheritance categories were established by the Law of the Twelve Tables. Thus, considering the agnatation, there were three distinct categories of inheritance: sui heredes, adgnatus proximus and gentiles. As Joshua (2020) [14] states, the average age of marriage, for men, was 26. The *sui heredes* category included all persons who were *alieni iuris* to the *pater familias* and who, following his death, became *sui iuris*. We consider here his sons and daughters, the wife married to *manus*, grandchildren of sons, adoptees and

adrogatives. There are a few remarks to be made about these categories[10]: the wife married with manus was equated with a daughter, and thus, although genetically she was the mother of his children, testamentarily she was a sister; the adoptee and the adrogate were considered as brothers to the sons and daughters of the deceased, although they were not related to them by blood; the grandchildren of sons could come by proxy, if their father (the son de cujus) had died before his father and they could receive his inheritance. The category adgnatus proximus includes the closest collaterals. Here we list siblings, cousins, uncles and, under certain conditions, siblings' children). Of course, each category comes into the inheritance only in the absence of any heir from the previous one. The members of this category are not set., there is always a search for a descendant. If there are no siblings, one looks for first cousins, if there are no first cousins, one looks for second cousins, and so on. A specific situation applies in the case of repudiation of inheritance. If an heir (e.g., a brother) repudiated the inheritance, the inheritance did not go to the other heirs, but became vacant and became the property of the State. The last category provided for by the Law of the Twelve Tables were members of the gentiles. If there were no heirs in the first two categories, they divided the deceased's inheritance equally.

Thus, in the sporting context of the time, the chances of a gladiator having heirs in the first category were quite low, considering their social status and age. However, the likelihood of second and third category heirs was quite high. This raises the question of how they proceeded if they were aware of the existence of a will. The use of performance-enhancing substances has been recorded since ancient Rome [15], [16]. Strychnine, a very powerful pesticide, is thought to have, in low doses, performance-enhancing properties. In ancient Rome, both „doping" and pesticide features were known [15]. Thus, one can raise the question of the honesty of the one who recommends this doping treatment. Did he really have the right intentions towards his direct relative or was he in fact aiming at a quicker succession to the inheritance? Nevertheless, as long as doping was not banned, technically, no relative who administered pesticides to „help" a gladiator could be accused of foul deeds.

With the passage of time, the praetors also reformed the issue of legal succession. They also introduced civil relatives – who were not civil relatives of the deceased with de cujus. These included emancipated sons and wives married without a manus, who were considered to be strangers to the deceased. Thus, following the reform of the praetors, four main categories of heirs were created: bonorum possessio unde liberi, bonorum possessio unde legitimi, bonorum possessio unde cognati, bonorum possessio unde vir et uxor. Bonorum possessio unde liberi basically adds to the previous category, sui heredes, the emancipated sons. The addition is as fair as can be, as they lived a large part of their lives under the pater familias, and were also his first-degree blood relatives, their only 'fault' being that they became sui iuris before his death. However, their access to the inheritance was not without duties, as they were obliged to bring to the succession all the assets they had accumulated after emancipation. In the category bonorum possessio unde legitimi are included categories II and III of the Law of the XII Tables, adgnatus proximus and gentiles. A significant change is that if one of these repudiated the inheritance, it passed to the next category, bonorum possessio unde cognati, and no longer became vacant. Bonorum possessio unde cognati was a very important category for blood relatives on the maternal line, as they acquired mutual inheritance rights (if there was no heir from the previous categories). The newly established fourth category also gave married persons without a manus the right to inherit from each other. Although it was the last category and its intervention occurred only

in the absence of all the other categories, it opened up a small – but existing – possibility for its members.

In the light of the above, the establishment of new categories of heirs has remedied a number of inconsistencies. However, in the sporting context of the age (1st-2nd century AD), we can again analyse the fairness of the heirs in relation to the death of those leaving wills. The categories of heirs increase in number, their members become more and more numerous, and at the same time deaths in battle increase. Historical sources blame peace and the popularisation of the Games, but is this the only cause? Although not an aim in itself and not a particularly frequent phenomenon, a death in a Gladiator battle was not an unusual event to arouse suspicion.

During the Empire two senatusconsulte are recorded which have value for the order of succession, the Tertullian and the Oroftian senatusconsulte. The first provided for the right of a married mother without manus to come to the inheritance of her children as a legitimate relative, so that she was no longer removed from the inheritance by her collateral lineage. The second senatusconsult modified the position that children resulting from a marriage without manus could come to their mother's inheritance from the position of unde liberi. However, the most significant and radical change was made by Emperor Justinian, who abolished agnatia as a hereditary vocation and introduced the basis of cognatia. He established four new categories of heirs: descendants; ascendants, siblings and their children; half-siblings or uterine siblings and their children; other collaterals (uncles, aunts, cousins, etc.).

As more and more people become heirs, the number of voluntary gladiators, with impressive earnings, increases and thus the hypothesis of a new cause of their death and an acceleration of the execution of their inheritance may arise.

2. Conclusion

Although they came from different social backgrounds and had various roles in society, the gladiators certainly had something in common. In every battle they fought, they faced death. Over time and depending on different historical situations, the likelihood of dying in battle was greater or lesser. There are records attesting to the fact that the public decided [17] (Mitte vs. Lugula). At the same time, once they died, the issue of succession arose, when they had a specific vocation. The wealth of the gladiators could range from symbolic to impressive inheritances (Urbicus). As human society has not been free from acts of injustice since ancient times, the question arises as to whether death in battle was a purely 'sporting' event or a favoured one. Choosing a much more valuable opponent, motivating him, using substances that put the gladiator in question at a disadvantage, increasing the number of fights, were just some of the ways in which an athlete's death could be hastened. Nevertheless, no historical source has been identified that directly presents these suspicions, and they will remain only as hypotheses related to the succession issue of the Roman gladiators and the way it occurred in those times.

The way in which a will could be made underwent many changes in ancient Rome. Although these changes were not made with a specific purpose for gladiators, they were found to meet their needs. Like other social and professional categories, the athletes of Rome also benefited from legislative adaptations. This again demonstrates the outstanding legal capacity of the Romans and their ability of innovation in this field. At the same time,

the changes required both testators and heirs to be aware of the legislative changes, to know their rights and to be able to defend them.

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GENDER EQUALITY AND THE INSTITUTION OF INHERITANCE

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Abstract

On the global stage, the fight for women's rights has made significant progress. Women's right to a fair share of inheritance is no longer seen as an exception but rather as a rule in most parts of the world. The progress in legislation reflects the direction in which society has developed over the past few hundred years. There are still countries where equal rights are not yet considered part of the „norm," and this limited vision affects the quality of life for women and even for children who are part of these societies.

In this paper, I will attempt to demonstrate why equal inheritance rights between men and women are of significant importance, and how developments in legal systems have a major influence on social and economic consequences. I have chosen specific examples to highlight the fact that women from all social statuses and geographical areas are affected by this gender-based inequality. From women in developing countries to women in the British aristocracy.

Keywords: *equality, inheritance, rights, legislation*

Introduction

Throughout history, the role of women within the legal system has been constantly evolving, while the role of men has largely remained the same. Starting from ancient times, legislation varied significantly from one country to another. While in Ancient Egypt, women could have inheritance rights and own properties, during the same period in Greece, women did not have legal rights independent of their husbands[1].

Currently, despite significant progress being made in the recognition and guarantee of the principle of equality, including gender equality, the issue of inequality persists regarding the recognition and guarantee of the right to inheritance in various countries/regions around the world. This inequality is determined by culture, traditions, religion, and legal systems that have not been sufficiently modernized.

1. Gender Equality in some countries on the African Continent

I chose to refer to this region of the world as I believe that the most relevant examples for the analyzed subject can be found here. Typically, constitutions provide for equal rights between women and men, and as examples, we can consider constitutions from African

[1] Janet H. Johnson, Women's Legal Rights in Ancient Egypt, Fanthom Archive, https://fathom.lib.uchicago.edu/1/777777190170/

states such as the Constitution of Tunisia (2014) – Article 21: „*Citizens are equal in rights and obligations, regardless of race, color, gender, language, religion, political opinion, social origin, wealth, or any other personal or social condition. The state ensures the protection of all citizens, regardless of gender, against all forms of violence"*.[2], Senegal (2012) – Article 7: „ *Every individual has the right to life, to liberty, to security, to the free development of his personality, to corporeal integrity, notably to protection against all physical mutilations"*[3], Namibia (1990) – Article 10: „ *All persons shall be equal before the law. No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. „*.[4], Mozambic (2004) – Article 35: „ *All citizens are equal before the law, and they shall enjoy the same rights and be subject to the same duties, regardless of colour, race, sex, ethnic origin, place of birth, religion, level of education, social position, the marital status of their parents, their profession or their political preference*".[5]

Sometimes, legislative changes that support women's rights to inheritance require time to be assimilated into society. Equal inheritance rights are sometimes not properly or even at all enforced by justice systems due to social pressure and traditions that hinder women from claiming and exercising their legal rights.

Article 3.1 lit. g[6] of the Constitution of Zimbabwe stipulates that all citizens have equal rights and freedoms without gender discrimination. It is important to mention that, despite legislative provisions, cultural practices and customs in Zimbabwe still often limit women's access to property and the right to inherit.

In this society, it is sometimes sufficient for a man to create a will in which he can deny his wife or daughters the legal right to inherit. Additionally, according to a survey conducted in 2010, up to 9.06% of women between the ages of 15 and 49 were widows.[7]

In 2015, in the case of Chiminya vs. Estate (Chiminya v Estate (Late Dennis Mhirimo Chiminya) & Others (HC 4201/14) [2015] ZWHHC 272 (11 March 2015)), the wife sought recognition of her rights to inherit from her husband, with whom she had been married for 42 years through a customary law marriage. The husband had made a will eight years before his death, in which he named his nephew as the sole inheritor of the property.[8].

In the adjudication of this case, the higher court in Zimbabwe ruled in favor of the surviving wife, declaring the will invalid as it violated section 5(3)(a) of the Wills Act, which states that any provision made by a testator that prejudices the rights of a recognized legal beneficiary is invalid. However, despite this ruling in 2015, a year later in 2016, Human Rights Watch documented that not all similar situations receive a favorable resolution, and there are still many women who are evicted from the homes they shared with their husbands by their families.

[2] https://www.constituteproject.org/constitution/Tunisia_2014?lang=en

[3] https://www.constituteproject.org/constitution/Senegal_2016?lang=en

[4] https://www.constituteproject.org/constitution/Namibia_2014?lang=en

[5] https://cdn.accf-francophonie.org/2019/03/mozambique_const-en.pdf

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[8] http://www.zwla.co.zw/media-room/news/integration-marriage-and-inheritance-laws

2. Gender equality in legislation under the influence of religion

Similar situations to the one presented above occur, this time under the influence of religion, in India, where in 2005 an attempt was made to reduce gender inequality in inheritance through the amendment of the Hindu Succession Act. This amendment aimed to grant daughters equal rights of inheritance and make them coparceners on an equal footing with male members of the family.[9]

In the case of „Vineeta Sharma vs. Rakesh Sharma," the Supreme Court of India (Justices Arun Mishra, S. Abdul Nazeer, and M.R. Shah) „ruled that a daughter is a coparcener by birth, and the fact that the father died before or after the amendment of the law is irrelevant." According to Dr. Saumya Uma, Associate Professor at Jindal Global Law School, O.P. Jindal Global University, Sonipat, Haryana, this ruling has put an end to the uncertainty regarding the correct interpretation of the Hindu Succession Act of 1956.[10].

As a result of this change in legislation, there has been an increase in the number of arranged marriages between cousins in India with the aim of preserving wealth within the family.

In the United Arab Emirates, a Muslim country, women have the right to inherit up to half of what a male sibling inherits, according to Sharia law, which is also the country's law for the Muslim population[11].

As the United Arab Emirates has sought to become more internationally open, attracting more expatriates and aiming to become more modern, their inheritance laws for non-Muslim residents have proven to be a hindrance.

The general rule, starting from 2005, has been that individuals (non-Muslims) with assets in the United Arab Emirates should make a will deciding how their property should be distributed in the event of their death. If the owner of the assets passes away without such a document, then the law of the country, namely Sharia law, would be applicable.[12]. To cater to the needs of non-Muslim residents, starting from February 1, 2023, the Federal Decree-Law No. 41/2022 on Personal Status has come into effect, amending the previous inheritance law for non-Muslims.

According to this law, the inheritance of non-Muslims will be divided between the spouse and the children of the deceased, following the international example of equality. [13]. The spouse is entitled to half, while the children will have equal rights to the other half of the inheritance. The gender of the surviving spouse or children no longer plays a role in the division of inheritance.

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[9] https://evaw-global-database.unwomen.org/en/countries/asia/india/2005/the-hindu-succession-amendment-act-2005#:~:text=Brief%20Description,same%20manner%20as%20the%20son.

[10] Saumya Uma, Interview, in The Wire, link https://thewire.in/law/hindu-succession-act-women-supreme-court

[11] Mahmoud Hamed, Changes to the Inheritance Laws in the UAE from 1 February 2023 – What you need to know, link https://www.horizlaw.ae/news/changes-inheritance-laws-uae-1-february-2023-what-you-need-know#:~:text=Under%20Sharia%20Law%2C%20sons%20typically,father%20and%20mother%20or%20not.

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3. The right to inheritance under the influence of the form of the government – European monarchies

The history of succession rights among the aristocracy and monarchies has undergone changes over time. In many cases, in some countries, the inheritance of properties linked to noble titles was limited to members of the royal family or aristocrats, and succession rights were determined by the specific laws of each country. There were also laws that dictated how inheritance was transmitted within families that held hereditary noble titles.

European countries have made significant progress in the past 150 years in accepting equal rights for women and men in the social sphere. Monarchies, like religion, are based more on traditions and resistance to change. Social and political movements, as well as intolerance towards inequality in the 20th and 21st centuries, have exerted pressure that forced legislative progress regarding succession rights among the aristocracy and monarchies.

Most European monarchies have followed this natural progression towards gender equality and, by the end of the last century, have adopted laws granting the right to succeed the throne to the firstborn child in the royal family, regardless of gender.

Sweden was the first European country to adopt the „firstborn" law in 1980, which grants the right of succession to the throne to the firstborn child, regardless of their gender. This legislative change resulted in a change of the apparent heir. In 1977, King Carl XVI Gustaf's daughter, Princess Victoria, was born, followed by his son, Prince Carl Philip, in 1979. For a period of approximately one year, Prince Carl was set to inherit the Crown and become the next monarch. The adoption of the law in Parliament also brought about a modification in the order of succession. This legislative change was made without the approval of King Gustaf, who has expressed his dissatisfaction on several occasions, the most recent being this year in an SVT documentary.[14]

Denmark, in 2009, following a referendum, decided that the right to become the next monarch would be granted to the firstborn offspring.[15]

În acest moment singura monarhie europeană unde se aplică în continuare „agnatic primogenitura" adică moștenirea coroanei pe parte masculină este Principatul Liechtenstein.[16]

These legislative changes regarding the heirs to the throne for European monarchies were adopted relatively late compared to equality in rights among members of society.

In 2013, the United Kingdom of Great Britain, following the example of other European monarchies and relatively late compared to the evolution of English society regarding gender equality, adopted the law of primogeniture to inherit the Crown. Until that moment, the firstborn male could inherit the right to be king, and in the absence of a male heir, the firstborn daughter could become queen. However, now the firstborn inherits this right regardless of gender. This legislative change represents an important step towards gender equality and eliminates a major inequality that existed for centuries regarding royal succession.[17]

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[14] Sven R. Larson, Swedish King Criticizes Succession Law, European Conservative, link https://europeanconservative.com/articles/news/swedish-king-criticizes-succession-law/

[15] Jess Ilse, The Laws of Succession in…Denmark, Royal Central, link https://royalcentral.co.uk/features/the-laws-of-succession-in-denmark-181817/

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[17] Heather Evennett, Women, hereditary peerages and gender inequality in the line of succession, Lords Library, link https://lordslibrary.parliament.uk/women-hereditary-peerages-and-gender-inequality-in-the-line-of-succession/

This struggle for the recognition of the right to inherit hereditary titles and properties associated with these titles, regardless of gender, is not yet over.

The United Kingdom remains actively involved in efforts to amend some of its ancient laws that are still in effect, despite no longer representing the current attitude towards gender differences. This modern country recognizes and supports gender equality as natural, yet the right to inherit an hereditary noble title continues to belong predominantly or solely to male heirs, to the detriment of women.[18]

In Scotland, in the absence of a male child, the first-born daughter can inherit from her parents according to the inheritance legislation.

The rule of inheritance solely through the male line has consequences in that the hereditary noble title, along with the lands associated with that title, as well as the right to be elected to the House of Lords in the English Parliament, are inherited exclusively through the male line.

In the past 25 years, there have been several attempts to amend this law in order to eliminate gender discrimination. In 2003, Belinda Crowe, head of the Gender Recognition Department within the Department for Constitutional Affairs, proposed a bill for „Gender Recognition".[19]

In year 2020, Lord Grocott[20] mentioned that there should be a stop to elections to the House of Lords as they currently stand, for the peer group with hereditary rights, as this system is ridiculous and outdated since members can only be chosen from male heirs, thus excluding women from the possibility to participate in the selection process. By limiting women's access to the House of Lords, they are excluded from the process of making important decisions that affect their future and society as a whole. This undermines the principle of gender equality and affects the ability to make policies and laws that take into account the perspectives and needs of all members of society.

4. The economic consequences of inequality regarding the right to inherit

Alexis de Tocqueville and Thomas Jefferson, along with other renowned individuals, agreed that gender equality in inheritance rights is the foundation for creating social and political equality. As evidence, they stated that countries where wealth is inherited by the first-born male are societies with significant financial inequality, where political power is mostly held by elites, and women's involvement in politics is greatly reduced. These great thinkers supported the idea that gender equality in inheritance rights is essential to build a fair and democratic society, where women have equal opportunities as men in all fields, including politics and the economy.

Support programmes for women[21] to encourage entrepreneurial activities, such as „Mama Cash"[22] such programs have been implemented in both developing countries and countries with a long history of gender equality to continue supporting and promoting equal opportunities and financial independence for women. Moreover, studies have shown that the presence of women in positions of power and business leadership can lead to more balanced

[18] Alicja Zelazko, British nobility, Britannica, link https://www.britannica.com/topic/British-nobility

[19] https://daughtersrights.co.uk

[20] https://hansard.parliament.uk/Lords/2021-12-03/debates/42685059-1B26-444B-A928-344620C2F8A5/HouseOfLords(HereditaryPeers)(AbolitionOfBy-Elections)Bill(HL)#main-content

[21] https://www.unwomen.org/en/news-stories/feature-story/2023/04/empowering-women-protecting-the-earth

[22] https://www.mamacash.org/en/en-homepage

and equitable decisions, as they bring a different and broader perspective to the decision-making process.[23] Therefore, supporting and promoting gender equality in business and politics can contribute to creating a more balanced and prosperous society for all its members.

It is important to acknowledge that the right to property, including land and other assets, is crucial in promoting women's economic autonomy, especially in less developed countries. When women are excluded from decision-making processes and denied access to economic resources, it leads to a vicious cycle of poverty and powerlessness that affects the entire society.

NGOs continue to play an important role in educating and supporting women to be aware of their rights and in the fight for gender equality acceptance. Additionally, governments and international organizations should take these issues into consideration and adopt policies and programs that support women in their struggle for equality and development for the benefit of the entire society[24].

Conclusion

Although most European countries have made significant progress in the fight against gender inequality and recognition of women's rights over the past two centuries, there are still many countries worldwide where women face daily discrimination when it comes to inheritance rights. In these countries, society is accustomed to traditions and customs that favor men and do not recognize women's equal rights. Even when there are laws protecting women's rights, they are often ignored or not properly enforced. Therefore, continuous efforts are needed to promote gender equality worldwide.

It is true that certain religions and cultures have perpetuated gender discrimination in some countries, and these attitudes can be difficult to change. As we have already mentioned, in Islamic countries, women continue to face discrimination in the recognition of their inheritance and property rights, and the interpretation of religious laws has a negative impact on the natural progression towards gender equality. In other countries, such as India, the caste system and cultural traditions also perpetuate gender inequality, and women may still be viewed as inferior to men. However, there have been progress made in these countries through activism and legislative changes.

The right to inheritance is a fundamental right. When women have access to property and inheritance, they have more control over resources and their financial decisions, leading to increased autonomy and independence within society. Furthermore, when women have more economic power, they tend to invest more in the education and health of their children, contributing to an improvement in the overall standard of living for the entire community. Therefore, eliminating inequality in inheritance rights between genders is not only a moral objective but also a strategic one for the social and economic development of a society. It is important to promote the fight for women's rights and ensure that they enjoy all the rights that men would have in order to create a stable society in all respects. Persistent elements of discrimination are being addressed by international forums that continue the struggle for

[23] https://press.un.org/en/2019/ga12126.doc.htm

[24] Nadia Steinzor, Women's Property and Inheritance Rights: Improving Lives in a Changing Time, link https://pdf.usaid.gov/pdf_docs/PNADA958.pdf

gender equality through the promotion of relevant information and the protection of women's interests and rights.

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SUCCESSOR'S UNWORTHINESS. A BRIEF EXPOSITION ON CRIMES THAT RESULT IN SUCCESSOR'S UNWORTHINESS IN LAW

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Abstract

The human being occupies the first place in the hierarchy of social values protected by our legal system, and the act of one person intentionally killing another symbolizes a violation of the absolute right, erga omnes – the right to life. It is not a novelty that life has an end, but what matters is what happens to one's estate after their passing, given that in the case of the universal successor, their personality continues. From these considerations arose the requirement that demands the successor to be worthy in the face of succession. In this work, we attempt to cover the issue of unworthiness in law by succinctly exposing the crimes that entail it. Keywords: unworthiness in law, successor, right to life."

I. Introduction

The life of an individual constitutes the most significant social and legal value, acknowledged and protected in all legislations. The right to life stands as the essential condition for the exercise of all other rights.

Article 2, Title I of the European Convention on Human Rights enshrines the principle that the right to life of every individual is protected by law, and no one shall be intentionally deprived of life except in cases specified within the same article where the death is not deemed to have resulted from the violation of the aforementioned provisions.

Another fundamental right of an individual, recognized both at the constitutional and international levels, is the right to family life and its protection. The term 'family' has undergone various definitions within different domains of both private and public law. Understanding the subject requires defining it from the perspective of common law as well as that of criminal law.

The Civil Code does not provide a specific definition of 'family'. However, from the entirety of regulations, it can be deduced that the family represents a group of individuals among whom rights and obligations arise from marriage, kinship, adoption, as well as from other relationships assimilated by law, to some extent, to those of a family nature. On the other hand, the Penal Code contains a separate article within Title X, understanding certain terms or expressions in criminal law, the General Part. Accordingly, according to article 177, a family member is understood as a) ascendants and descendants, siblings, their children, as well as persons legally adopted as such relatives; b) the spouse; c) individuals who have established similar relationships to those between spouses or between parents and children, in cases where they live together.

II. General Aspects

Presenting itself as a negative condition that must be met by the person who has the legal capacity and succession entitlement to be named as the heir of the deceased (de cujus),

successor's unworthiness represents a civil penalty based on the principle that no one can benefit from an unlawful act.

In the new regulation, there are two types of successor's unworthiness: legal unworthiness and judicial unworthiness. Considering the focus of the article on legal unworthiness, it should be noted that according to Article 958 of the New Civil Code, one is legally unworthy to inherit if:

1. A person convicted of committing a crime with the intent to kill the individual leaving the inheritance.
2. A person convicted of committing, before the opening of the inheritance, a crime with the intent to kill another potential heir who, if the inheritance had been opened at the time of the act, would have excluded or restricted the perpetrator's right to inherit.

The Civil Code presents two scenarios for legal unworthiness differentiated by the passive subject but sharing the common element of guilt: intention. Thus, in this work, we aim to analyze the crimes that are found in both cases of legal unworthiness, understanding the rationale behind the regulation, as well as highlighting its importance.

Crimes against a person's life are regulated in the Penal Code, specifically in the Special Part, Title I: Offenses against the Person, Chapter I: Offenses against Life, Articles 188 – 192. Among these, for the consideration of the form of guilt, the offense provided and penalized by Article 192 – Manslaughter, is not of interest. Regarding the second scenario regulated by the Civil Code, Article 200 of the Penal Code is also noteworthy, which stipulates and penalizes the crime of killing a newborn committed by the mother.

III. Requirement of Criminal Conviction

The reason for imposing the requirement of a criminal conviction arises from the principle of „in dubio pro reo," which aims to guarantee the discovery of the truth within the criminal justice process. This principle ensures that a conviction is based on conclusive evidence of guilt, and in cases of doubt not dispelled by evidence, a verdict tends towards acquittal.

The guilt of the accused is established within the criminal justice process while respecting procedural guarantees because mere accusation does not equate to establishing guilt. The accused maintains the status of being presumed innocent until the finality of the conviction decision.

In other words, the legislator deemed it necessary to impose this requirement to ensure legal security for citizens against arbitrary state repression, mitigating the stringent demand for criminal conviction by having the civil court establish the facts.

IV. Offenses that entail legal unworthiness

Legal unworthiness occurs when the following conditions are cumulatively met:

- The successor must commit, intentionally and directly against the deceased or another successor, an act that fulfills the requirements of the objective aspect of one of the offenses against life, regardless of whether the offense was consummated or remained in the stage of attempted commission, or whether they acted as the perpetrator, co-perpetrator, or accomplice.
- The act must be legally imputable to the successor. If it can be proven that the individual responsible for actions that might lead to legal unworthiness did not possess discernment at the time of the act, the penalty of unworthiness cannot be applied to them.

- There must be a criminal court judgment convicting the successor for the committed act or a civil court decision confirming the commission of the respective act, in situations where they cannot be criminally convicted due to death, amnesty, or the expiration of the statute of limitations for criminal liability.

4.1. Homicide, Article 188 of the Penal Code

Starting from the premise that the human being occupies the foremost position in the hierarchy of social values protected by our legal system, we can assert that the act of one person intentionally killing another person represents an increased social danger, as it involves an action with irreversible repercussions that infringe upon the fundamental right to life.

Unworthiness intervenes as an equitable solution that seeks to balance the scales in the context of respecting public order and good morals. Thus, in a situation where the active subject could, under the law, inherit from the deceased person they killed, the legislator has intervened to revoke their right to inherit in that particular case.

The difference between murder provided for in Article 188 and qualified murder outlined in Article 189 paragraph (1) letter b) lies in the intent pursued by the perpetrator in committing the act. In other words, it matters whether the perpetrator seeks to obtain material gain, manifested in acquiring an inheritance or a corresponding portion of it.

4.2. Aggravated Homicide, Article 189 of the Penal Code

The offense of homicide always presents the same characteristics – the intentional act of killing a human being, resulting in the death of the passive subject, as qualified in this case. However, in its specific realization, it may have various particularities depending on the diverse elements surrounding the typical act. These elements, without altering the substance of the act, lend it a different nature, thereby increasing its level of social danger.

Aggravated homicide represents the act committed by a person who commits murder under the following circumstances provided by law: a) with premeditation, b) for material gain, c) to evade or help another evade criminal liability or punishment, d) to facilitate or conceal the commission of another offense, e) by a person who has previously committed murder or attempted murder, f) against two or more individuals, g) against a pregnant woman, h) through cruelty.

4.3. Killing at the Victim's Request, Article 190 of the Penal Code

This represents a mitigated form of the crime of homicide, differing in that the killing is committed at the explicit, serious, conscious, and repeated request of the victim suffering from an incurable disease or a serious infirmity medically certified, causing enduring and unbearable suffering.

The form of guilt is intention, thereby, from a legal standpoint, falling within the realm of offenses that entail legal unworthiness.

However, in doctrine, there is a discussion about analyzing this issue in a subjective light, requiring clarification in the civil realm. The majority opinion supports the idea that the circumstance in which the discussed offense is committed represents the manifestation of the victim's will, as one of the conditions required by criminal law involves the existence of an explicit, serious, conscious, and repeated request. On this basis, authors argue that the offense of killing at the victim's request should be exempted from civil penalties.

On the contrary, we consider that the offense of killing at the victim's request falls among those that entail legal unworthiness because the legislator does not make any distinction in the text of the law. Furthermore, Article 961 of the Civil Code provides the testator with the possibility to remove the effects of legal unworthiness expressly through a will or a notarized authentic act. Thus, the legislator has not overlooked this aspect but has imposed the condition of explicit expression of will.

4.4. Inducing or Assisting Suicide, Article 191 of the Penal Code

The offense is not explicitly defined in the text of the law, but we encounter two scenarios: the first scenario considers situations where the suicide has occurred, while the second scenario, representing the mitigated version, refers to situations where the suicide did not occur.

The act of inducing suicide refers to convincing a person to commit suicide, regardless of whether the idea was suggested by the perpetrator to the victim or had already arisen in the victim's mind beforehand, and the perpetrator managed to dispel any hesitations the victim might have had. Assisting in suicide involves providing material or moral assistance by the perpetrator to the person committing suicide to carry out their decision to commit suicide.

In the case of this offense, the perpetrator is not directly involved in the termination of life; otherwise, the charge of homicide would be considered. However, this offense meets the criteria for legal unworthiness because the act is committed with the intention to kill, irrespective of, from a civil law perspective, the manner in which the physical element is realized.

4.5. Killing or Injuring a Newborn by the Mother, Article 200 of the Penal Code

The first standard form of the offense is of interest, namely, the killing of a newborn immediately after birth but no later than 24 hours, by the mother experiencing a mental disorder. Essentially, this pertains to a homicide offense subjected to a more lenient penalty considering the mental disorder of the mother. This condition should not eliminate the discernment of the qualified active subject since, in this case, the act is not attributable.

From the perspective of inheritance law, the circumstance that mitigates the penal sanctioning according to criminal law is not relevant, as it still triggers legal unworthiness.

V. Case of Velcea and Mazăre v. Romania

In case 8, the plaintiffs Ștefan Velcea and Florica Mazăre are the father and sister of Tatiana A., who was killed along with her mother on January 7, 1993, as a result of a dispute with her husband, Aurel A. Shortly after committing the act, Aurel A. committed suicide, leaving two letters confessing to having killed his wife and mother-in-law.

The criminal investigation against Aurel A. was concluded with a decision of dismissal issued by the Bucharest Tribunal. This decision was made on the grounds that the perpetrator of the crimes was deceased, and no other person had been involved.

The succession partition procedure resulting from the deceased Tatiana A. was initiated in the same year. The plaintiff requested the removal of Aurel A.'s family from the succession because his daughter had been killed by him. The old Civil Code contained a provision similar to the current regulation in Article 655 paragraph (1). This article stipulated that a person convicted of killing the deceased is unworthy to inherit from them.

We notice the similarity concerning the requirement of a criminal conviction, a condition maintained in the New Civil Code.

The Court mentioned that succession rights constitute an element that cannot be overlooked within family life. The Convention does not impose on member states to adopt legislative provisions regarding successor unworthiness. However, if these provisions exist, as in Romanian law, they must be applied in line with their purpose. Therefore, in civil matters, it cannot be accepted that due to a person's death, the illicit nature of their actions would remain without effect.

VI. Conclusions

In light of the previously presented information, we can affirm that the form of guilt, intention, characterized by the fact that the perpetrator foresees the result of their action and pursues or simply accepts its occurrence, leads to the conclusion that no one can inherit through homicide9. This argument also supports the reason why crimes of negligence or excess intent are not subject to the regulations concerning unworthiness of rights.

Also, it must be attributable to the successor to have committed the act, to be criminally convicted, or there should be a civil court decision confirming the deed, except when that person can demonstrate they didn't act with discernment. The existence of a criminal conviction can be replaced by a civil decision establishing the deed if the conviction couldn't be enforced due to the death of the perpetrator, amnesty, or the statute of limitations on criminal liability.

We believe that the civil penalty in the form of legal unworthiness represents the necessary premise for acquiring patrimonial rights in good faith from the inheritance of a deceased person, so as to prevent an unworthy heir from inheriting the victims of their unlawful acts.

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FINANCING OF POLITICAL PARTIES THROUGH DONATIONS, LEGACIES AND OTHER LIBERALITIES

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Abstract

Financing of political parties through donations, legacies and other liberalities constitutes a subject that knows a wide and detailed regulation, both at national and international level. The complexity of the subject, added to the insufficient information of the citizens, determines that the problem it involves is not well known. The present study proposes the analysis of some of the ways of financing political parties, namely through donations, legacies and other liberalities, revealing the normative framework, as well as regulatory gaps, foreshadowing future legislative amendments in this regard.

Keywords: *Financing of political parties, donations, legacy, transparency, equality, sources of income*

Introduction – The importance of transparency of the electoral procedure, political financing and democratic processes

The transparency of the electoral procedure, political financing and democratic processes plays an important role in the substantial evaluation of the electoral candidates, and alongside those lines it also emphasize to the public the stoicism of the political parties that will lead our country.

The need to know the details of the financing of political parties helps to respect the other principles promoted by them and strengthens the trust that every supporter is looking for. This can be done by exposing and punishing undue influence on politicians, by reducing the infiltration of illicit money into politics and by encouraging political parties and candidates to comply with the rules imposed by existing legislation.

The importance of transparency in reducing political corruption and publication of funding sources for political parties and electoral campaigns has been internationally recognized by the UN Convention against Corruption (UNCAC), which states that countries should „*to consider taking adequate legislative and administrative measures... in order to increase the transparency in the financing of the candidates for the elected public office and, as the case may be, the funding of political party „*.[1]

Looking at the political party transparency project from a broader perspective, its necessity comes from the desire of public oversight institutions to accurately account and verify the financial data and accounts of financiers in compliance with the law. As GRECO (Group of States against Corruption) highlighted in the third round of assessment that „*a system that does not ensure the correct disclosure of income sources and accounts makes it more difficult to monitor the enforcement of the law and to impose the necessary sanctions*”.[1]

Taking into account the importance of this objective, in the present study we will focus on the analysis of the financing of political parties, especially in terms of financing through donations, legacies and other liberalities, also taking into account the special concern that the legislator has given to this type of financing.

Regulation of political party financing

The constitutional frame of reference

Political parties arise from the fundamental right of Romanian citizens to associate, as the Romanian Constitution establishes in art.(article) 40. To this is inevitably added the right to vote (art. 36), the right to be elected (art. 37), the right to freedom of assembly (art. 39) and the freedom of expression which is guaranteed by art. 10 and 11 of the Convention European Commission on Human Rights. The exercise of these rights may be restricted in accordance with the law, provided that the restriction is necessary in a democratic society to pursue one of the legitimate aims listed in the European Convention on Human Rights. In a general sense, political parties are political associations of Romanian citizens with the right to vote, who freely participate in the formation and exercise of their political will, fulfilling a public mission guaranteed by the Constitution. They are legal entities under public law.[2]

Congruent to the European Commission for Democracy Through Law (Venice Commission) through the document entitled Code of Good Practice in the Field of Political Parties and Explanatory Report, political parties encapsulate some guiding principles that are followed by all political parties in the countries belonging to the European Union, such as: *rule of law* (political parties must comply with the values expressed by international rules on the exercise of civil and political rights. Parties must respect the Constitution and the law. However, nothing can prevent them from seeking to change both the Constitution and the legislation through lawful means); *democracy* (parties are an integral part of a democracy, and their activities should ensure its good functioning. Hence, a commitment to internal democratic functioning reinforces this general function);*non-discrimination* (political parties should not act against the values of the European Court of Human Rights and the principle of equality);*transparency and openness* (the parties should offer access to their programmatic and ideological documents and discussions, to decision-making procedures and to party accounts in order to enhance transparency and to be consistent with sound principles of good governance).[3]

The Infraconstitutional legislation

Funding of political parties refers to the total financial resources that political competitors may attract or that are provided to them from various public or private sources, for the performance of current activities, during election campaign periods and outside it, in order to cover various political activities such as election campaign costs and day to day operations.[4]

In order for political parties to be able to carry out a timely political activity, their constant financing is necessary, so a plethora of sources of political financing is known.

Law no.(number) 334/2006 establishes in art. 3 that „(1) The sources of financing the activity of a political party are: a) dues of party members; b) donations, legacies and other liberalities; c) income from own activities, d) subsidies from the state budget; e) loans from individuals and legal entities.”[5]

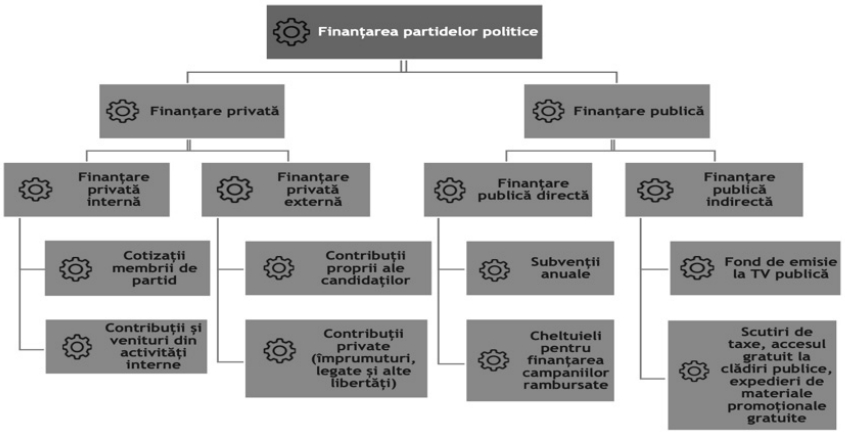

Fig. 1 Chart on the types of funding of political parties[6]

Financing of political parties through donations

Legal framework

At the national level, private financing means a multitude of sources of income, among which: contributions of party members; subscription fees; donations, legacies, liberalities; cultural, sports and entertainment activities; alienation of movable assets from the heritage, only if they do not represent commercial documents.

Funding political parties through donations is preferred by party supporters, thereby improving the financial situation of political parties, giving them the opportunity to appear in as many electoral campaigns as possible and succeed in winning them. The donation of funds, both by individuals and by legal entities, is regulated by Law no. 334/2006 and is controlled by the Department of Control of the Financing of Political Parties and Electoral Campaigns within the Permanent Electoral Authority.

According to article 6 of Law no. 334/2006: „Donations received by a political party in a fiscal year cannot exceed 0.025% of the revenues provided for in the state budget for that year".[7]

Donations to political parties can be sent by donating material goods necessary for political activity, by bank transfer, in bank accounts opened at banks in Romania, in lei and in foreign currency, but also online, on the respective websites of the political parties. A donation option is usually presented on the party's website because the accessibility of this option attracts a larger audience. On various sites where donations are allowed, the legislation is found in the specially designed column, which informs party supporters of the maximum amount of donations that can come from a natural or legal person. At the same time, you can select the amount of money chosen to be donated and the method of donating to the chosen political party, monthly or one-time donation.

In order to avoid sanctions regarding the transparency and legality of the donation transaction, it is necessary to present an identity document or a form of identification of the donee, otherwise the donation cannot be accepted. If the donation is refused, the money will be returned or unblocked in the donor's account. However, if all the data is in accordance with the legal norms, the donation will be accepted, after which the money will not be able

to be returned to the donor. Donations from abroad, that is, from Romanian citizens outside the country, are allowed.

Although not recommended, confidential donations do exist and are regulated independently from other types of donations.

Confidential donations are accepted and regulated by Romanian legislation, provided that the donation is within the limit of the annual amount of 10 gross minimum basic salaries per country. At the same time, Law 334/2006, Article 11 stipulates that „the total amount received by a political party as confidential donations cannot exceed the equivalent of 0.006% of the revenues provided for in the state budget for the respective year".[8]

Article 12 of the same law establishes the accounting of confidential donations as follows: „All donations, including confidential ones, will be properly recorded and highlighted in the accounting documents, mentioning the date on which they were made and other information that would allow the identification of the sources of funding and donors".[8] The purpose of the regulation is to maintain the transparency of the electoral system is regulated by Law 334/2006. These documents containing the lists of donors from the respective year must be published in the Official Gazette of Romania, Part I, by April 30 of the following year, according to article 13 of Law no. 334 of July 17, 2006, which states that: „(1) Political parties have the obligation to publish in the Official Gazette of Romania, Part I, the list of natural and legal persons who made donations in the previous fiscal year whose cumulative value exceeds 10 gross minimum basic salaries per country, the list of individuals and legal entities who have granted loans the value of which exceeds 100 gross minimum basic salaries per country, as well as the total amount of confidential donations, respectively the total amount of loans with a value below 100 minimum basic salaries per country received, until the date of 30 April of the following year."[8]

Each political party chooses how to publish its annual income and expenditure reports, so there are discrepancies regarding party transparency. Some parties provide a detailed report, illustrating the transparency that is required following the latest laws and projects, while other parties choose to distribute a compressed form that does not indicate the sources of the respective year's balance.

Donations from individuals, romanian citizens and legal entities from Romania

Law 334/2006 does not establish very restrictive conditions regarding the donor status of an individual, as long as he is a Romanian citizen. Donations can be made from all the categories exemplified above. The rule established under this aspect by Law 334/2006 on the financing of political parties and electoral campaigns is contained in art. 6 paragraph (2): „Donations received from an individual in a year can be up to 200 gross minimum basic salaries per country, at the value existing on January 1 of the respective year".[7]

As for legal entities, art. 6 para. (3) and (4) of Law no. 334/2006 provides the limits as follows: „(3) Donations received from a legal entity in a year can be up to 500 gross minimum basic salaries per country, at the existing value on January 1 of the respective year. (4) The total amount of donations made by legal entities controlled directly or indirectly by another person or by a group of individuals or legal entities cannot exceed the limits provided in paragraph (2) and (3)."[7]

At the same time, within the same article, paragraphs (7) and (8) regulate special situations that can be encountered when accepting a donation from legal entities: „(7) It is prohibited for legal entities that, on the date of making the donation, have payable debts older than 60 days to the state budget, social security budget or local budgets to make donations to political parties, except when they have to recover amounts greater than their own debt. (8) When making the donation, the political party has the obligation to request the donating legal entity to present a declaration on its own responsibility regarding compliance with the condition provided for in paragraph. (7)".[7]

Law 334/2006 presents severe legislation in relation to making a donation by any type of public institution. In addition to national legislation, the prohibition of donations by public institutions to political parties can be found in various projects, documents and international publications. Thus, according to Law 334/2006 on the financing of political parties and electoral campaigns, respectively article 14, „the use of financial, human and technical resources belonging to public institutions, autonomous governments, national companies, companies regulated by Companies Law no. 31/1990, republished, with subsequent amendments and additions, or credit institutions in which the state or administrative-territorial units are majority shareholders, to support the activity of political parties or their electoral campaign, other than under the conditions established by electoral laws. Political parties cannot accept donations or services provided free of charge from a public authority or institution, from an autonomous government, from a national company, a company regulated by Law no. 31/1990, republished, with subsequent amendments and additions, or credit institution with full or majority state capital. It is forbidden to accept donations from a trade union or a religious cult, regardless of their nature."[9] The sums received in violation of the above provisions are confiscated and made income to the state budget.

Foreign individuals and legal entities

Foreign donors are regulated by most international and national documents, because they raise specific problems, regarding unreliable sources of income due to the distance between the donor and the donee and the fact that they live in different legislations, which prevents good legal communication. In Romania, donors from abroad are regulated by Law no. 334/2006 on the financing of political parties and electoral campaigns. The subject is developed in the document entitled „Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources" of The Venice Commission.

Art. 15 of Law 334/2006 establishes the rule and exceptions in this regard, as follows: „Acceptance of donations from other states or organizations from abroad, as well as from individuals who do not have Romanian citizenship or by legal entities of nationality other than Romanian is prohibited, except for those received from citizens of the member states of the European Union who are domiciled in Romania and hold the status of a member of the political party to which the donation was granted. I make an exception from the provisions of para. (1) donations consisting of material goods necessary for political activity, but which are not electoral propaganda materials, received from international political organizations to which the respective political party is affiliated or from political parties or political formations in political collaboration relationships. Propaganda materials that are used only

in the electoral campaign for the election of Romania's representatives in the European Parliament can also be received."[10]

A case of reference for the sensitive issue of external financing of political parties is the case of the Basque Nationalist Party – Regional Organization Iparralde against France resolved by the European Court of Human Rights. The applicant party is the French „branch" of the Spanish Basque Nationalist Party. In order to be able to benefit from funds, especially financial contributions from the Spanish party, he established a funding association in accordance with the 1988 law on the financial transparency of political life. However, the application for authorization of the association, a necessary precondition for its operation, was rejected on the grounds that most of the applicant party's resources came from the financial support provided by the Spanish party. The applicant party complained of adverse effects on its funds as well as on its ability to continue its political activities, particularly in the electoral field. The Court decided that there was no violation of art. 11, considered separately or in conjunction with art. 10 (freedom of expression) of the Convention. It considered, first of all, that the rejection of the authorization request of the financing association constituted an interference in the exercise by the complaining party of its rights guaranteed by art. 11, which was provided by law and pursued the legitimate goal of defending order. Regarding the necessary nature of the interference, the Court observed that the fact that political parties are not allowed to receive funds from foreign political parties is not, in itself, incompatible with Art. 11 of the Convention. The Court therefore found that the measure in question did not have a disproportionate impact on the applicant party's ability to carry out its political activities.[11]

The issue of accepting donations from external sources is widely regulated by the Venice Commission through the document „Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources" which grimly indicates that the measures taken to prevent abuses of power that would distort the donations received by partied from foreign sources were taken following the analysis of history over the years. In the quoted document, four conclusive reasons for the need to internalize donations are marked, such as: „the experience during the years between the two World Wars of the international policies of extremist parties of the political right and left. A second reason is the similar experience during the Cold War years and the polarisation of the Western World on the one side and the Eastern on the other. A third reason is the existence or fear of separatist movements. A fourth reason – finally and quite differently – is the advancement of public funding of political parties and the wish to keep any provided funds within the country."[12]

Financing through legacies

Legacies, like donations, are regulated by Law no. 334/2006, but the references to this method of financing are very brief, which means that their regime is not very clearly outlined.

The Permanent Electoral Authority devotes its attention to the control of the financing of electoral campaigns and the constant financing of parties by creating an accessible platform that increases the transparency of the electoral process at the national level. In the column dedicated to the control of campaign financing, the legislative regulation regarding

legacies is indicated: „donations or legacies from individuals or legal entities are made only through a financial trustee, designated for this purpose by the party leadership, according to art. 26 para. (1) from Law no. 334/2006 on financing the activity of political parties and electoral campaigns, republished, with subsequent additions".[13]

From the content of the law we learn that the receipt of bequests by political parties can be done by „the financial representative is appointed by the leadership of political parties, political alliances, organizations of Romanian citizens belonging to national minorities or by independent candidates".[14]

The national legislation also imposes limits, which provide an accessible information space for supporters of political parties, referring to article 28 of Law 334/2006 which stipulates that" (2) The collection of electoral contributions and the payment of electoral expenses can only be made through the accounts bank accounts notified in advance to the Permanent Electoral Authority. (14) The contribution for the electoral campaign is declared to the Permanent Electoral Authority by the competent financial trustee, in no more than 3 working days from the date of receipt in the bank account notified to the Permanent Electoral Authority."[15] Article 56 of that law specifies the introduction of a more concise of the financing of electoral campaigns in light of the fact that „the Permanent Electoral Authority ensures the public knowledge of the list of political parties, political alliances, electoral alliances, organizations of Romanian citizens belonging to national minorities and independent candidates who have submitted detailed reports of electoral income and expenses, as they are submitted, through successive publications in the Official Gazette of Romania, Part I".[16]

Conclusion

In conclusion, the need for an electoral process and an honest and transparent political life, accessible to the public, is both a Romanian objective and an international one.

As portrayed in the present study, on an international level, there are a multitude of legislative norms and reference documents that constantly adhere to the maintenance and improvement of the field of financing political parties and electoral campaigns.

In Romania, Law no. 334/2006 which regulates the financing of the activity of political parties and electoral campaigns, modified by various Emergency Ordinances, in application of which Government Decisions were adopted for the approval of the methodological rules of application, is the basic regulation at the national level in order to finance political parties. However, there is a new initiative that takes international legislation as an example, and this initiative is the Project „DIGI-EMB – Digitization for increasing the level of transparency of ethics and integrity of electoral management activities and financing of political parties and electoral campaigns" established by the Authority Permanent Electoral. This project aims to „increase transparency, ethics and integrity within the Permanent Electoral Authority, but also within the political parties in Romania, by implementing measures to prevent corruption, by applying the mechanisms, procedures and norms of ethics and integrity, as well as by improving knowledge and skills regarding the prevention of corruption" and at the same time „forming a civic culture of confronting the phenomenon of corruption and strengthening the transparency and integrity of electoral processes and the financing of political parties and electoral campaigns by carrying out an information campaign among voters".[17]

Regarding the analyzed topic, we believe that the financing of parties through ties should be clearly and distinctly regulated, in order to provide a precise and accessible legal framework under this aspect.

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