Study on the relation among legacy, share of inheritance and seisin

Summary

This work aims a thorough study upon three institutions that are part of the inheritance right, that means the will clause (in all its forms), the share of inheritance, the seisin, and the report that exists among them.

Structured in five chapters, the work presents a distinct analysis of the institutions that we have just mentioned, following firstly in the research plan the approach of aspects that are related to the institutions history, the regulatory means and the way they were justified. It then seeks regulatory developments in the presentation of current regulations, but also how these institutions were intended to be covered in the new Civil Code Project of 2009.

As well there are presented in a comparative way those institutions provided in the French Civil Code, as it was modified through reforms that referred to the right of inheritance from 2001 and 2006.

Further on we pointed some suggestions of law proposal.

The first title represents an introduction into the study on the relation among legacy, share of inheritance and seisin.

The first chapter presents general appreciations upon the relation among legal devolution and testamentary inheritance.

Thus, it is presented the legal succession of inheritance and the testamentary one but also the modality that these two institutions evolved in time, as also the way that they interconnected, depending on the organizations and social necessities in different periods.

A great importance was assigned to the study on the intuition evolution concerning the successions in Roman and common law. The conclusion that resulted was that Roman law evolved from the recognition of an excessive individual property law, in order to institutionalize the family right of inheritance, limitting the discretionary law that the testator had of disposing of his entire fortune as wanted. So *quarta legitima* was born or the inheritance part of ¼ that the testator`s family could enjoy.

In the common law the evolution was reverse, from the recognition of an exorbitant family law, where the individual could not dipose as wanted of his goods, that had to remain in family and be transmitted from generation to generation, for then setting up an available share of 1/5 from the own goods, a share to the limit that the individual could dispose freely of the will. In this period, the family share of inheritance was known as *la reserve des quatre-*

quintes, and the available share to the limit that the disposal right of the testator was insignificant.

In modern law, the two institutions, the share of inheritance oughted to the close relatives and to the surviving spouse on one side, and the available share to the limit that the testator could dispose through legacy on the other side, eved up, so it is respected the family solidarity principle, as well as the declared or deduced defunct will.

Further on, we presented several introductory notions concerning the relation between the share of inheritance and seisin, catching the modality in which evolved the seisin institution from the historical point of view, and also the foundation of this juridical institution. We also made reference to the fact that in our right there are ascendants and descendants heirs obtaining seisin of the defunct.

From these ones only the descendants of the defunct and privileged ascendants of the defunct are forced heirs

On the other side the surviving spouse, that is a forced heir, is not a heir obtaining seisin. In this respect the solution of the New Civil Code, that assigns the seisin to the privileged descendants and ascendants, to the surviving spouse and, by default of these ones to the privileged collaterals.

We observe that the New Civil Code establishes a connection between the share of inheritance, on the one hand the seisin, on the other hand, recognising the seisin of the persons that are the closest of the *de cujus*

In chapter II from title I we presented the logic of the relation between legacies and wills showing on the one hand that legacies representing the most important provisions in a will, and on the other hand the wills could contain other type of provisions such as: exheredations, naming a will executor, an ascendant partition, the recognition of a previous will, forgiveness of debt, provisions concerning funerals, etc.

We showed that the will represents a juridical pattern, a coat that must be worn by the last will acts that are the clause of the will or the executor, and in the material unit of the document of the will there are enclosed, from the intellectual point of view a plurality of juridical particular documents, each of them with its own juridical system.

In this chapter we presented as well the juridical dispositions and also the ways the wills are stipulated by law, with the notice that the New Civil Code does no longer provide the mystic will, a form that is rarely encountered into practice.

Further on, we paid a lot of attention to the study of the will clause, as a juridical institution with inheritence right, presenting the modality that performs the designation of the legatee, as also the criteria that the legacies are classified in accordance with that.

We therefore presented, by turns, the universal clause of the will, the universal will clause with title, the particular will clause, as also the different varieties related to the particular will clause, insisting on the juridical

features of the life interest of the will clause, of the will clause for the property of the other and of the will clause for the indivisible good.

Concerning the life interest of the will clause, we presented the controversy issued in literature concerning the qualification related to the life interest of the will clause, as being an universal will clause, with universal or particular title.

We argued the opinion that in current law the will for the will clause life interest must be considered a will clause with particular title, but we presented the conception of the New Civil Code in this matter, where the will clause for the life interest is considered a will clause with universal title, a conception that is also encountered in the French doctrine.

Concerning the will clause of an another individual, we appreciated the validity for this one in connection with the situation where the testator knew or perhaps he did not know that the good was his and we considered that if the testator did not know, the moment when he made his will that the good was not his, the will clause is valid, and the person in charge of the will clause execution is obliged either to surrender the good in kind or to offer its value the moment of the opening inheritance. This solution was embraced by the New Civil Code.

As well, we analyzed the problem related to the will clause for the indivisible good, considering that, if the testator disposed of the good found in indivison, believing in a false way that the it is only his possession, the will clause will be null for the persons that go beyond the testator`s share.

Further on, we analyzed the legacies affected by modalities, presenting distinct juridical features in accordance with the term, condition or the charge that affects legacies.

Chapter III from the title II is reserved to the study for the reasons of inefficacies for legacies, analyzing by turns the invalidity legacies, revocation legacies and the accretion right.

Concerning the legacies revocation, it is analyzed the voluntary revocation of the will clause, under the two forms – direct and indirect, keeping the fact that the direct or the deliberate revocation could be made only in written form, under the penalty of the absolute nullity, while the voluntary tacit revocation could be made in two ways: the elaboration of a further will that contains disparate or contrary stipulations with the previous will stipulations, only these disparate or opposite stipulations will be cancelled, following that the provisions in the previous will, that were not cancelled, in order to be carried out in a cumulative manner with the new provisions.

If the revocation of the will clause took place by the alienation of the legacy, we consider that the revocation works whether the alienation is under relative nullity or absolute nullity, and in this case, it does not cause effects anymore. What is important to remember is the testator’s intention to dispose in another way of his property, than by the clause of the will. To this rule is

allowed one exception, namely, if the alienation is canceled for the reason of incapacity or the vitiation of the testator's consent. In this case, the revocation will not work, because, as legal act, the revocation supposes a valid consent expressed, and if the willingness to alienate is irregular, it results that also the willingness to repeal, being contained in the will to alienate, is affected by the same flaws.

This exception was provided in the New Civil Code, art.1068, par. 3, point a and stipulates that the nullity of the alienation does not affect the revocation only if it is determined by the incapacity or the vitiation of the testator's will.

The art. 1068, point b from the New Civil Code brings the second exception, namely that the nullity of the alienation will not affect the revocation of the clause of the will, if the alienation represents in fact a gift in the favor of the beneficiary of the will clause and it has not been done under condition or with tasks substantially different of those that affect the clause of the will.

The solution seems correct, if the testator had the good of the legacy, also in the favor of the legatee, but as a gift. This does not mean that the testator is changing his mind of rewarding that person, but, *per a contrario*, the testator's wish is that the person rewarded enjoy the legacy, even during the testator's life and not after his death, which can be possible by gift.

Next, we analyzed the revocation if it is through voluntary destruction of the will.

This case is not provided by law among tacit revocation cases, but it is a creation of the doctrine and jurisprudence.

We consider, as a **law proposal**, that the voluntary destruction of the will must be expressly provided by law as a way to carry out voluntary revocation of the will. The New Civil Code provides expressly, in art.1068, par. 4 that the testator can repeal the will handwritten also by destruction, tearing or erasing.

Next, we analyzed the institution of withdrawing voluntary revocation of the will, which can be, in turn, deliberate or tacit. In this subject, particular interest was granted to withdrawal effect of voluntary revocation, a problem that has born many controversies in the literature.

We believe that, whenever there is doubt regarding the establishment of genuine will of the testator,- to preserve or not the first testament, by the withdrawal of the revocation, - this testament should not be put into effect, and more than that both wills should have no effect and inheritance will be distributed to legal heirs. They should not be deprived of it, only by the unequivocal will of the testator. In this regard, we propose as **law proposal**, this solution to receive a statutory dedication and the court is the one that considers, on case by case, which was intended when the testator has made voluntary revocation retraction.

In what concerns the court revocation of the clause of the will, there were incorporated in the Civil Code in force, as in the New Civil Code, only two cases in which court revocation of the clause of the will may be held, namely revocation for pregnancy non-performance and ingratitude legatee.

We explained at length in the contents of the work that it is compulsory, as **law proposal**, to be incorporated among the cases of court revocation of the clause of the will also the case when appears a child, especially if the child is born after the testator's death and without knowing in his life that he is designed.

Analyzing judicial revocation for pregnancy non-performance, we noted the solution that it can not operate if the non-performance is due to unforeseeable circumstances or force majeure, except the case when the efficiency of the will clause was under the condition of pregnancy non-performance. The solution was retained also by the New Civil Code, following the changing of the limitation period for judicial revocation action for pregnancy non-performance from 3 years to 1 year.

The clauses of the will court revocations for ingratitude may be pronounced if committed by the legatee of the following facts: testator attempt on his life, crimes, cruelty or serious insults on the testator person, serous insult made to the testator's memory.

Next, we analyzed each of the cases in which the nullity of the clause of the will may arise, namely: death of the legatee, failure to execute the suspensive condition under which the clause of the will was made, the legatee inability to receive the legacy and the total ruin of the good which forms the legacy (it assimilates to the alienation of the testator's property without his will and made during his life). The New Civil Code adds another case in which the clause of the will nullity arises, namely the indignity of the legatee.

It should be mentioned that under the new law, it is excluded not only the unworthy of the legal heritage, but also of the testamentary heritage, case in which the clause of the will made to the heir who is unworthy to receive the legacy becomes void. Regarding the clauses of the will inefficiency, the rule in this matter is that from the clause of the will invalidation, revocation or caducity benefit those responsible for execution of the legacies or those with heir ship title from whose part the legacy had to be executed and namely: legal heirs, absolute legatees, residuary legatees and even the legatees with particular title, if the testator imposed to them the duty to execute the legatee became ineffective. This solution was taken also by the New Civil Code.

To this rule, two exceptions are provided by the law, namely the gross substitution, -by which the testator designates another person who will receive the clause of the will in which the legatee does not accept the legacy or he can not receive it- and the conjunctive clause of the will, by which the testator leaves a clause of the will with private title to several legatees in the

same time, without showing the individual part of each legatee, but giving each legatee inheritable title to all property related.

As to the consequences of the accretion, we implicitly shared the view that the accretion right operates compulsory by law and we propose as **law proposal** that this solution be established also in the current legislation.

Further, we showed the limits that the law imposes on the right to have by clause of the will, stopping us for the beginning at the analysis of the pacts opinion on an unopened (future) heritage and on fidei-commissary substitutions.

In the pacts on inheritances not opened (future), we showed their differentiation to the right condition suspensive and to "suspensive" term, indicating that under law, these pacts are absolutely void.

As **law proposal**, we considered that some pacts on future inheritances could be valid, such as so-called family pacts, made with the participation of the person whose legacy is the subject.

A special attention was paid to the study of fidei-commissary substitutions, presenting the history, foundation and legal characteristics of that judicial institution. In this respect, we found that the fidei-commissary substitution violates general principles of common law, disregarding public order (political, economical and social). Therefore, the nullity of the fidei-commissary substitutions can not be covered by the clause of the will confirmation, ratification and voluntary execution by the heirs of the holder, those being able to ask the return of the legacy, according to common law.

The New Civil Code has a major change in the fidei-commissary substitutions, meaning that they take effect, if they are allowed by law (art. 993 of the New Civil Code). In this respect, the New Civil Code takes the solution offered by the French Civil Code, as amended by the reform brought in the inheritance law in 2006. The French Civil Code calls the fidei-commissary substitutions gradual freedom, starting as the New Civil Code, a generosity that may be encumbered by a task that is required to the institute, grantee or legatee, to preserve the property that is the subject of the generosity, and to transmit, at his death, to the substituted designated by the holder.

We do not share the solution proposed by the new Civil Code and we consider, by **law proposal**, that the fidei-commissary substitutions should not be allowed and their penalty should be an absolute nullity, because in this way it can make a serious prejudice to the right to freely dispose of their own property and we can get to a situation where a person can dispose also of another person`s succession. (that of the legatee).

The same solution is required also in the case of fideicommissum residue by which the deviser forces the beneficiary to transmit at his death all the property remained to another person. This clause of the will is not a fidei-commissary substitution, but violates the principle that no one can dispose of another person`s death. From our point of view the fideicommissum

residue will be an absolute nullity every time the testator will force the legatee not to dispose of the property inherited by gratuitous juridical acts (will or donation) and so much more by onerous acts and we consider that, the **law proposal**, this should be the solution adopted by future legislation.

This solution is not embraced by the new Civil Code, which adopts in this respect the rules laid down by the French Civil Code, allowing the fideicommissum residue and calling it residual liberality.

The third title of this paper is restricted to study of share of inheritance, a brief history and then the characteristics of this legal institution.

In Chapter II of this title shall be presented in detail the categories of forced heirs such as: descendants, priviliged ascendants and surviving spouse.

The New Civil Code takes over the method of determining the heirship from the Law no.319/1944 referring to the the right to inheritance of the surviving spouse and establishes the extent of the share of inheritance of each forced heir as being half the share of the estate that in the absence of liberalities or disinheritances, would have been entitled to him as the legal heir.

A particular attention was given to the sutdy of the categories of unworthy and renouncing descendants, because the institution of unworthy succession and that of renouncing to the inheritance presents some changes in the New Civil Code, so as the releasor and the unworthy can be represented, so their descendants come to inheritance only by representants.

The New Civil Code was inspired by the French Civil Code and increased the number of cases that may arise unworthiness of succession, which is in turn of two kinds, legal and judicial (in the French Civil Code the unworthiness can be by right or optional).

We believe that, by **law proposal**, also the cases provided under the new Romanian Civil Code project from 2009 should fiind its rules in the future Civil Code.

Regarding the calculation of the amount of the descendants heirship, calculated after the rules of the New Civil Code, we observed from all the analysed axamples that the descendants` heirship will be smaller towards that calculated in accordance to the rules in force and the available quotity is higher. We can therefore draw the conclusion that the New Civil Code emphasizes the freedom right to dispose by the legacies of his own property, putting a limit to stretching the heirship in relation to available quotity that can allow legacies.

The draft of the New Civil Code of 2004 provided other legal allowances for surviving spouse, in the trial to favour his position in competition with the heirs in IInd class, when he receives half of the heritage and in competition with privileged collaterals which he removes from inheritance.

Next we made some clarifications regarding the status of cohabitation between spouses, showing that this juridical situation has already received legal regulation in many EU countries, and in France it is recognised also a right of inheritance, of tenancy and mutual aid.

In Romania there was a draft to that effect in 2002, without being materialized in a legal act.

We point out that, by **law proposal**, the institution should receive legislation in our country too because it is a situation increasingly common

Regarding how it should be done charging of heirship of the surviving spouse on the inheritance we considered that the heirship of the surviving spouse is charged on the inheritance as a whole, decreasing the heirship both of the other forced heirs and the avilable quotity.

The solution is required also by the fact that Law no. 319/1944 recognized to the surviving spouse inheritance rights „from the fortune of the other spouse", and on the other hand, as for the legal inheritance we admit the fact that the share of the surviving spouse is imputed on the inheritance mass, decreasing in this way the shares of the legal heirs he competes with.

The New Civil Code does not specify which part of the legacy is imputed the surviving spouse heirship, but clearly establishes that, as far as the legal inheritance is concerned, the first is reduced the share due to the surviving spouse and then are calculated the shares due to the other legal heirs.

By **law proposal**, we consider that future legislation should clearly specify the part of the legacy on which the surviving spouse is charged, in order not to have so much diversity of opinions in this matter.

We believe that the solution presented by us would be the correct one and should receive confirmation in a future legal regulation in this area.

After entry into force of Law no. 319/1944, in doctrine and jurisprudence, there were differences of opinion on how to calculate the available quotity specified in Art. 939 Civil Code, which stipulates a special available quotity from the part of the surviving spouse in competition with the children from a previous marriage of the deceased

This special available quotity applies in the case the surviving spouse comes in competition with children from another marriage of the deceased and will be equal to the share of the child that received less, but it will not exceed one fourth of the inheritance. As to the way of imputation of this special available quotity, it was assumed that this will be deducted from ordinary available quotity, the cumulation of all these quotities being impossible, because in this manner the shares designated to the deceased`s descendants would have been prejudiced.

We then presented five opinions regarding the calculation of special available quotity, retaining as correct the one according to which the calculation of special quotity is the following: first, it will be determined the surviving spouse inheritance. The descendants` share will be calculated on

the part of the legacy that remains after the division of surviving spouse`s share. Then it will be calculated the total share of the surviving spouse and of the children he comes in competition with, calculating in this way the ordinary available quotity, of which it will be calculated the special available quotity of the surviving spouse. If the deceased did not have the benefit of a third of the difference between the ordinary and special available quotity, this will be divided in accordance to law nr.319/1944.

We mention that the New Civil Code stipulates that the difference between ordinary and special available quotity goes to the descendants. Regarding this solution we have brought arguments to explain why our solution seems the most accurate solution.

To determine the mass of calculation on which both the share and available quotity will be calculated three operations performed successively are required: determining the value of existing property of the deceased at the date of opening of succession; substracting inheritance liabilities from gross assets of inheritance to get net assets; bringing fictional net assets (to calculate) the value of donations made during life time.

Further we showed the way to make imputation of liberalities and share accumulation with available quotity.

If the beneficiary of liberality is not a forced heir or if he is an outsider to the inheritance (for example a friend), the liberality is only imputed on the available quotity, and if this one is exceeded, the excessive liberality will be subjected to the reduction until the limit of the available quotity.

If the forced heir renounces at the inheritance, he loses the right to his share and he will be able to keep the donation made by *de cujus* during his life, but only to the limit of the available quotity.

If the designated forced heir accepts the inheritance, we will distinguish on how the liberality was made, free or not free report. If the liberality is not subjected to the report, the forced heir can cumulate the available quotity with his share of the inheritance, on condition to not bring prejudice to the share of all the other forced heirs.

If the liberality is subjected to the report, the liberality will be shared first of all on the share of the gratified heir, and if the liberality exceeds the share part due to the donor as forced heir, we consider as correct the solution adopted by the New Civil Code, according to which the surplus is being held on the available quotity, unless the deviser stipulated its imputation to the global reserve.

As to the order in which is made the reduction of excessive liberalities, the following laws are obeyed: legacies are reduced before donations, all the legacies are simultaneously reduced, proportionally to each one`s value, and the donations are reduced succesively, starting with the most recent.

If the donor subjected to the reduction is insolvent, we consider the risk has to be undergone by the previous donor, sacrificing the principle of

irrevocability of the donation in favour of the principle of intangibility of the share.

In this way, by the **law proposal**, is important to establish the laws of this solution, because otherwise the deceased could dissolve the share, making the last donations to some persons whose poverty he knew. This solution receives explicit confirmation in the New Civil Code.

Next we explored the procedural ways of achieving the reduction, namely the reduction by extrajudicial way and the reduction by judicial way, as well as the effects of the reduction in both of the two cases.

In Title IV of this paper we presented the institution of seisin.

Legal heirs who enjoy the benefit of the seisin are descendants and ascendants of the deceased, regardless the nature of their relation to the deceased.

The new Civil Code provided that the heirs enjoying the seisin are the surviving spouse, privileged descendants and ascendants, and in their absence, the privileged collaterals.

It is noted that the New Civil Code grants seisin particularly to the forced heirs, and in their absence, the seisin is granted to the privileged collaterals, as the deceased`s closest persons.

Next we presented the legal characteristics of the seisin and its effects. The main effects relate both to the real possession by the heirs enjoying the seisin for all the goods of the succession, and the exercise of rights and actions of the property acquired by inheritance.

In chapter II of this title, we analyzed how can be acquired the possession of inheritance by the heirs who don`t enjoy the seisin and also by the state.

The heirs not enjoying the seisin and the state must require sending in possession. The procedure is to check the title under which the heirs claim the possession of the inheritance or, in the case of the state finding inheritance vocation. Effects of sending in possession of the legal heirs not enjoying seisin are identical to the effects of the seisin in the case of legal heirs enjoying the seisin.

The legatees are not heirs enjoying the seisin, in this way they can`t gain possession of the property by themselves, but they must seek transfering the legacy from the persons who have the obligation to transfer it.