FORMS AND CONTENTS OF THE WILL IN ROMANIAN CIVIL LAW

ABSTRACT

The doctoral thesis is structured in five titles divided into chapters and sections. It constitutes an unitary and rigorous whole. Along almost 300 pages, it achieves the detailed picture of the essential assets belonging to the studied juridical institution. The will's particular features are pointed out, placed into the frame of the general institution of the inheritance.

Being the result of a significant doctoral research, as well through its extent as through its insight, the present doctoral thesis does constitute the issue of a scientific and methodological enterprise aiming to a double purpose: the almost exhaustive presentation of the will is a juridical institution, of its main usual stipulations; of the influence that the new Civil Code exerts upon the studied institution, in the terms of a balance between continuity elements and innovations which this new Code introduces into this matter.

Through the juridical institutions of the inheritance and of the will are perennial ones within our juridical system, their analysis is useful and pertains to our strict actuality, due to the profound mutations which have taken place in the Romanian society during the last two decades, through which the private ownership as regained its status of center in the social structure.

As a result of these new structural and mental settlements we do appreciate that the will is going to reconquer its status of highest importance among the juridical instruments mode available at the disposal of individuals enabling them to take the actions they wish in regard to their own patrimony.

The doctoral research has been carried on within two major dimensions: this is why we had to make use of several methods for the analysis to be done, in order to establish an unitary concept able to integrate and synthesize all the examined aspects. This concept was destined to shape as well the level of work's hypotheses and of the employed arguments as, particularly, the level of the obtained theoretical results.

The methodology chosen for our analysis was grounded, preferentially, upon the use of the systematical, historical and teleological interpretations.

It is in their sense that the work was structured in titles, chapters and sections.

Our purpose was to identify what effects the actual institution of the will does generate, in theory and practice, in terms of essential features and juridical impact.

In our study of the will, in respect to the stipulations of the new Civil Code we have taken into account the innovative elements which it does bring up.

This is why we have made use of logical and grammatical methods too, apart from the two others, previously mentioned.

Our purpose was to grasp, with the highest acuteness we could the positive sides, but also the ones which could be subjects to criticism, as we found them in this new regulation. Along our whole work, we have permanently adopted a comparatist perspective in looking at how the two codes have, respectively ruled over various notions and concepts.

Our work's first title contains some introductive notions, which outline the larger frame where the author's scientific guest will be performed.

The representative concepts are the ones of inheritance and ownership right, and the connection between them is analyzed, since it allowed the features of the ownership right to influence upon the essential assets of the inheritance.

The first title of this work also tackles with the juridical features of the inheritance's transmission, as distinct elements from the other possible ways of transmission applicable for the rights and obligations of the individual or moral person. The date and place of the inheritance's opening are discussed, in respect to the juridical consequences they generate.

The will's evolution historically depicted, starting from its Roman sources and finishing with the specific forms it vested into the ancient Romanian law: the diata(written will) and the oral will (nuncupative).

After realizing the passage from the general concepts of inheritance and ownership right towards the motion of testament, the thesis II-nd title is preoccupied to analyze the essential elements required from the will's validity.

We do identify the problems generated, in time, by the lacunary definition given to the testament by the actual Civil Code, and we make use, for the concept's analysis, of the systematical methods. Our opinion is sustaining a more extinction definition of it as we stand for the inclusion to the testament's contents, apart from the concept of legacy, of other last wish type dispositions made by the testator.

We also point out the positiveness of the regulation provided by the new Civil Code to the testaments; the distinct feature of it, is that the motion of testament and the contents itself of the testament are differently defined.

We have studied in detail the principles through which should be interpreted the contracts pertaining to this matter, due to our comparative analysis we have pointed out two new rules, that are specific to the interpretation given by the new Civil Code to the testament: in order to express the applied principle of priority given to the real wish of the testator, the elements which are external to the testament could be the testament's intrinsic elements; also, the legacy made in favour of a creditor of the testator is not presumed to be done in order to compensate the claim owned by the former; thereby to such a type of legacy is attributed a relative presumption of validity.

The second title continues by an analysis of the juridical features of the will as a civil juridical act (meaning capacity, consent, object and cause), with a focus placed upon the detailed analysis of the incapacities of disposing or receiving through a testament, as they are up-to-dated by the latest news in doctrine and jurisprudence.

We make use of systematical and comparative methodologies, in order to point out some innovative elements within the actual Civil Code both in the cases of the capacities to dispose and to receive: the actual incapacity of the minor who has reached his 16^{th} year of life, who is legally able to dispose` of only half of his inheritance until now, is foreseen to disappear, when it comes to receiving, the sphere of the persons to be granted legacies is extended, to: the public notary who has authentified the testament, the translator who has participated in such

procedure; the person who has , being enabled to do that by the law provided to the testator the juridical assistance this latter needed, in order to elaborate his will.

In the III rd title of the thesis, we do achieve a comprehensive synthesis of the actual doctrine and jurisprudence of this matter. Thus we dwell upon some aspects regarding the testament's forms as they are started by the Romanian civil law, we have directed our investigation towards three distinct research paths, according to the forms into which might be "clothed": the ordinary form; the privileged forms, the simplified forms.

In our analysis, we make use of the systematical method.

We do integrate and corroborate the relevant stipulations of the actual Civil Code with the corresponding statements of the Law nr. 36/ 1995 on public notary clerks and on the notaries' activity. We think we have managed to outline, for each of these testament's forms, the specific physiognomy of their own.

Through, in the domain we have examined, the legislator has chosen to be rather traditional than innovative when elaborating the new Civil Code, we have managed to precise the existing balance between continuity and changement instituted by the new regulation.

Obviously, we aimed to the purpose of framing into each of the analyzed forms of testament the largest possible spectrum of situations that would fall under their incidence (for instance, the significant extent of the cases when privileged testaments could be used).Due to methodological reasons, we thought necessary to distinctly discuss the legacy-as the most important stipulation of the will- to which we have vowed the IV-th title.

We made use of methods: systematical, historical-teleological and comparative in our attempt to achieve an exhaustive analysis of the examined juridical institution.We tried to catch in a glimpse, then to draw an accurate panorama of the specific features of the legacy, which do form an unitary ensemble.

We were preoccupied to study in detail all the juridical items which gather to from its contents (the concept itself, the legatee's designation, the receipt's given acceptance and transmission in the case of legacies).

We also continued the methodological attempt of the representing "in the mirror" the common elements, as well as the distinct ones, which exist in comparison of the two versions of the Civil Code. (the actual one and the foreseen one)

We thought of as being relevant to present innovative aspects which exist in the new Civil Code, through the systematical and comparative methodologies using as main example the institution of the legatee's designation. In this sense we have argued that the new regulation expressedly en forces, by its text, the principle of the feature, for the legacy's beneficiary, of being precisely determined or either the method of his determining to be exactly precised.

Thus is instituted the prohibition of the legacy under the faculty of choice, while the possibility of testing for the benefit of a person who does not yet exist at the moment of the will's elaboration does acquire legal enforcement.

This case of legacy should suppose its entrusting to intermediary person, which would be fully capable in juridical terms to administer the legacy for the due time required.

Our next step was represented by the study various categories of legacies, with an obvious focus upon the universal legacy (sole heir, residuary legatee); the entitled universal legacy; the particular entitled legacy.

We have managed to outline the specific features for each of these types (definitions, forms, what exactly are the rights and obligations they do create).

We made use of this frame in order to expose a documented argument concerning some questions debated as a controversial by the doctrine. So would be, for instance, the question of the juridical nature of the legacy made of the usufruct over the whole inheritance or over a fraction of it.

We do share the opinion that this type of legacy is a particular entitled, one because its object is constituted of a strictly determined food (that is to say the usufruct), and is exclusively limited to it. Therefore, the non-effectiveness of other legacies cannot be brought as a supplemental benefit to be added to it.

The last chapter is dedicated to the analyses of the non-effectiveness causes for legacies. They are defined as circumstances, stipulated by the law, where the testator's last wish stipulations become deprived of juridical effects. These are the cases of nullity, cancellation and caducity (lapse).

Apart from examining these causes as they treated by the actual Civil Code, we were preoccupied as well by presenting them through the analysis of the perspective they have acquired in the new civil code.

To this purpose, we made use of the some research techniques as for the other juridical institutions which constitute the object of this work.

As an exception from the rule which is applicable in the case of non-effectiveness for legacies, we have discussed of the conjunctive legacy from the doctrine's actual perspective and we corroborated to the accretion right.

The specific form feature of the conjunctive legacy is that the part of the co - legatees who do not come into the inheritance would be taken not according to the rule stipulated by the actual Civil Code (that would be the legal heirs, the residuary legatees, the ones entitled as universal and the ones entitled as particular) but by the other co-legatees designed over that respective good by testator, and this would happen precisely in virtue of the accretion right.

We have realized systematical and logical interpretation, to which comes to be added the use of the comparative method. Therefore we may identify, within the new Civil Code, these two above mentioned institutions as being totally different from the actually enforced regulation.

We do remark in the matter of the accretion right that this right is instituted as the usual rule in the matter of legacies' non-effectiveness, since this right intervenes always when a case of non-effectiveness should appear. This fact makes the conjunctive legacy the exception from the rule which is represented by the accretion right.

The Title V is finalizing our scientific research. This title contains, hierarchically ranged, the possible stipulations which might be contained into a testament. Yet the title's focus lies upon the institutions of the disinheritance and of the testament's executor.

These institutions are seen as last wish stipulations which do produce each different juridical and practical consequences once arrived the testator's death.

By the use of the same juridical research instruments, above mentioned, the aim we have pursued is to depict the profound essence of the specific features and of the juridical effects created by these two juridical institutions, as they are both seized by the actual and the new Civil Codes; we have managed to analyze comparatively these two institutions, in their specific stipulations, in order to point out the traditional elements, but as well the innovative ones which exist in the two normative acts.

Raising no question on the viability of the disinheritance as a juridical institution, since it is the result of a long lasting conjugated effort made by doctrine specialist with an undoubtful reputation, the new Civil Code, for the first time ever, offer for, it, within our law system, a distinct definition and depicts its effects under the circumstances of the simultaneous presence of various categories of heirs.

Last but not least, it is a visible fact that, apart from the above mentioned instruments, we have made use of a rich and relevant jurisprudence, issued by the courts of law, including the one where we are functioning in order to illustrate the features of the analyzed institutions, especially in the cases of testaments and of the legacy.

The entire scientific research we have performed would have been not fruitful, the aim of the doctoral thesis would not have been fulfilled, without the guidance and coordination offered by Academician Professor Dr. Ion Dogaru, who has surveyed us in our scientific labour along the whole duration and with every step of this work's elaboration; the professor advised us even since(and on) the choice of our theme, as well as about the thesis' structure, contents and bibliography, watching it grow with a careful eye.