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PHD THESIS

- SUMMARY -

THE RESERVED PORTION OF THE ESTATE- BETWEEN TRADITION AND MODERNITY

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On the 17th of August 2015, the Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession becomes applicable. This can be considered a point of reference not only for international successions in Europe, but also for the internal national successions, because a progressive development of a European legal culture can be anticipated, one that will respect the diversity of the legal systems, being eventually characterized by the unity achieved through European legislation.

In the first chapter, the thesis searches the origins of the reserved portion of the estate in Roman law, starting with the moment when the descendants acquire a legal instrument to complain against a will that allows the alienation of the assets to persons that are not family members, instrument configured under the denomination of *querela inofficiosi testamenti.* The notion of *legitima sau debita portio* is configured, not having a fixed amount or a determined list of beneficiaries. A very fragile position of the surviving spouse can be underlined in *ab intestat* successions, when he came to succession only if no descendant existed, both in maternal and paternal line, until the seventh grade of kinship. Freedom of testate often lead to the lack of interest to accept the succession by the presumptive legal heirs, this being a reason to institute a part of succession of which the author of the succession could not dispose, that was called at that time *quarta falcidica.* The *legitima* was under roman law a claim owed because a relationship of kinship existed, being a net proportion from the assets that would have been actually inherited by its beneficiary if the succession was *ab intestat*; in conclusion, it was not conceived as a quota of the succession, but as a way to determine a quantity of assets to be left to the beneficiary *ex substantia hereditatis* if the author intended to save his will from the violation of *officium pietatis*. In the medieval ages, the roman *legitima* continues to exist as a tool that assured the protection of the family against the excessive donations, at least in the legal system that will influence the legal constructions of the people of West Europe, but its use in daily practice is questionable. In French regions that applied the usage system appears a new institution that did not have an exact name for a long period of time, but that is now known under the denomination of reserved portion of the estate. In French regions that applied the written law, the roman rules continue to be in force and the *legitima* is still used. The sources of inspiration for the Romanian reserved portion of the estate can be found here, because the *legitima* enters into the usage laws and complements the reserved portion. This path is proved by Glava 282 of Pravila of Matei Basarab, the Code of Andronache Donici and the Code of Calimach, all the old laws using the name of *legitima*. The modern notion of the reserved part of the estate appears in Romanian law at the moment of the adoption of the Civil Code of 1864, through the Civil Code of Napoleon. The rules established by the dispositions of the Civil Code were diametrically opposed to Roman law, and children were entitled to the reserved portion

only in their position of heirs - not one text of the Code could have been invoked to create a distinction between the quality of heir and the quality of forced heir. In the XIX century in Romania the reserved portion of the estate was recognized as having a Roman origin, without being an exact reproduction of the institutions of Roman law, but in the sense of being a transformation of those rules under the influence of the archaic French law. In the history of the reserved portion, *officium pietatis* was the first brick of this edifice. Morally, it was inadmissible for a parent to disinherit his child or not to leave anything to his parents who were old and more often than not deprived of means of subsistence. The reserved portion of the estate incorporated this obligation, that functioned reciprocally between the author and the beneficiaries due to their kinship, in the same way in which functioned the maintenance obligation characterised by the same reciprocity. Even though this rule of law was undoubtedly considered a violation of property rights, it was justified by moral and social reasons. The reserved portion was perceived as a modality to both pass on and keep a part of the estate in the circle of family members, through generations, providing a good social organization and stability for the families. Those who manifested against the reserved portion emphasized that the free circulation of goods was blocked in this way, producing almost catastrophic consequences when small or middle assets were transmitted.

The second chapter analyses the way in which the Civil Code of 1864 offered an institution for the reserved portion that resisted for a century and a half through social changes. The text provided for the disposable share without diverging from the translation of the correspondent articles form the Code Civil of Napoléon and fixed the amount of the reserved portion in an indirect manner, by establishing the part of the assets a person could dispose of by ways of will or donation, when he left descendants or privileged ascendants. The surviving spouse was not yet protected against the liberal contracts his/her spouse concluded, and the right to succession of the poor widow could not be interpreted as giving her an entitlement to a reserved portion. The reserved portion did not have a legal definition. Yet, the authors established a definition that described the reserved portion as a part of the estate of the author of the succession to which the heirs were entitled by law, against the wish of the author expressed in donations and wills (legates or acts of disinheritance). This will become the legal definition given to the reserved portion of the estate by the New Civil Code. The reserved portion was a part of the estate, *pars hereditatis,* given to the forced heirs against the wish of the deceased. The transmission of the reserved portion is made as a universal succession, not as a specific devisee and legatee, because it is a part of the *ab intestat* succession. This characteristic was in fact the option of the French legislator who preferred under the influence of the usage law, to see the reserved portion as a succession, not as a simple way to protect the closest family members through a claim given to them to exercise against the heirs. The reserved portion is characterized by a relative and partial unavailability. The possibility of the

forced heir who waived the succession to claim the reserved portion through a direct action was clearly refused, because once he/she waived the succession he/she lost the quality of forced heir, both of this qualities being facets of the same title of inheritance. The reserved portion received a place in public order, having attached a mandatory feature that came from the modality in which the law established the circle of forced heirs and the amount of it, without the possibility of the two to be modified by the person that left the succession and without the possibility for the forced heirs to renounce in full or in part during the lifetime of their author. The reserved portion was to be left in full property, without any burdens or restrictions regarding its transmission, its dividing, the disposition and the administration of the assets that fell in its composition. All the clauses that aimed to infringe upon the rights of the forced heirs were null and void. The right to the reserved portion was an individual right emphasized by the fact that it was born in their persons from the opening of the succession, and not acquired from the deceased (although this claim has to be reconciled with the claim that the forced heirs are given the reserved portion as an *ab intestat* succession from their author). Since the reserved portion was a part of the succession, it is due in kind, even though this principle results from other dispositions of the code, without being expressedly mentioned in its content. The protection granted to heirs has an individual characteristic when accounted to each of them, not only in the case of the surviving spouse, but also in the case of descendants and privileged ascendants. The reduction of the excessive donations profits only the forced heir that claims it and it is done only to fulfil the reserved portion of the heir that invokes its violation. In my opinion, this equates the recognition of an individual right to the reserved portion more than the attribution of an individual share. The global characteristic of the reserved portion comes from the customs absorbed by the Code of Napoléon, the reserved portion being a part of the succession globally attributed to all the forced heirs. The reserved portion given to ascendants had a variable value and an amount that depended on their number. The heir that waived the succession was not taken into account to determine its amount. This principle became dominant because he/she was never considered an heir. The reserved portion of the ascendants had a subsidiary configuration, as it existed only if there were no descendants. The surviving spouse becomes a legal heir and o forced heir only with the Law no. 319/1944. This new system placed the surviving spouse in the circle of natural heirs, acknowledging the injustice of the Civil Code of 1864 regarding the surviving spouse who came to succession only when there was no other heir, no matter how remoted related. Different solutions for the amount of the reserved portion of the surviving spouse were supported or criticized by practitioners, but eventually it all came back to the initial proposal that was based on the assumption that Law no. 319/1944 never intended to modify implicitly the rights of the existing forced heirs. The reserved share of the descendants and of the privileged ascendants were not supposed to be diminished by the reserved share of the surviving spouse. The diminution was caused to the disposable part of the

estate, as a result of the new reserved share of the surviving spouse being added. Also following the model of the French Civil Code a special disposable part of the estate was adopted in order to limit the rights of the surviving spouse and protect descendants from a previous marriage. When recognizing the special disposable part, the legislator did not create a correlative reserved portion in favour of the children. Later on, it was necessary to take into account the title of forced heir of the surviving spouse, so that he/she should not receive through donations more than the reserved portion of the descendant. The share of the surviving spouse was reduced to ¼ and the surplus of the two disposable parts, being a part of the succession, was divided between all the legal heirs.

In the third chapter, the texts of the new Civil Code are compared to those of the previous Civil Code and to other European laws in the field of successions. The Romanian legislator proves his attachment to the traditional family model and the reserved portion of the estate goes almost unchanged into the new ruling. The list of beneficiaries is maintained and a strong reluctance against the freedom to organize one's succession during his or her lifetime is expressed. The civil partner is not assimilated with the surviving spouse, not as a legal heir, nor as a forced heir. Giving a definition to the reserved portion, the New Civil Code expresses the choice of a reserved portion having the nature of *pars hereditatis* and excludes the possibility to apply in Romanian law the modern theories of a potestative right to the reserved portion or of the *ex lege* legate. The affirmation that the heir that waived the succession is taken into account when determining the reserved portion of the estate even though the result is divided only between the ones that accepted the succession becomes obsolete. So is the opinion that a heir who waived the succession and also received a donation as an advanced portion, could keep it within the limits of the disposable part cumulated with the reserved share that would have been collected by him if he had accepted the succession. This second hypothesis was clarified by art. art. 1147 para. 2 C.civ. which exceptionally allows the donor to stipulate in the contract of donation the obligation of the donee to bring back the value of the donation to the estate even if he would waive the succession. This disposition can be identified as a potential instrument of estate planning. The most significant change in the field of the reserved portion appears to be the drift of the title to inheritance into the domain of personal subjective rights and the individual protection given to each forced heir. Some practical examples are presented in order to demonstrate mathematically that the sum of the reserved shares cannot exceed one half of the estate, for the mere reason that the reserved share is calculated as a half of the legal quota of the succession, and to also demonstrate that the reserved portion of the estate loses the global characteristic under the new Civil Code. When it comes to the fact that the reserved portion is to be deferred in nature, one can acknowledge that the Romanian legislator is consistent with the path opened by the Civil Code of 1864 and maintains the obligation to restore in kind for the excessive donations. Even though there is no specific article dedicated to

a legate in substitution of the reserved share, the author of the succession is permitted to transfer the reserved share by means of a legate. When the heir was also named as a legatee, he or she has a distinct right to accept or to waive, a right that was also granted by the previous law, even though no article mentioned it explicitly. The new Civil Code extended the principle used to determine the reserved share of the surviving spouse to all the other categories of forced heirs, solving in this manner one of the most debated problems of the doctrine. The reserved share of the descendants appears to be diminished, and the freedom to dispose grew bigger, but only from a quantitative point of view, and not from the perspective of a modern system of estate planning instruments. In establishing the reserved share, the heir that waived the succession is not taken into account, but some practical issues are identified when art. 1147 para.2 C.civ. has to be applied, because it creates a hypothetical part to the succession in favour of the donee that waived the succession. More practical situations are analysed in order to identify a way to determine the reserved share of the privileged ascendants when a privileged collateral relative is also entitled to inherit but waives the succession or is disinherited or deemed unworthy to inherit. A comparison between the methods of calculation shows that taking into account the collateral relative who was disinherited generates sustainable results, even though the rights of other forced heirs are sometimes diminished by the presence of a simple heir. At the same time, the method that assimilates the disinherited heirs with the ones who waived the succession and excludes them from the system of calculation gives conflicting mathematical results when the disinheritance comes indirectly from the depletion of the disposable part, as a result of universal or particular wills or donations. Taking into account the specifics of the reserved share of the privileged ascendants and the particular social situation in Romania, I appreciated that the elimination of this reserved portion and its replacement with a maintenance claim to be executed by those who inherit the assets could be a viable option in the event of new modifications brought to the Civil Code.

Among the instruments of estate planning, **in the IV chapter of the thesis,** we focused on some of the most frequently used in practice, in order to determine their impact on the reserved portion of the estate, but we also focused on the degree to which their utilisation maintains the balance between freedom of disposition of the estate, the interests of the forced heirs and the stability of the circulation of goods. To put the contract of life insurance into the perspective of succession law is a current preoccupation, because of its extended use as an instrument of estate planning. By comparing French, Belgian and swiss law and analysing the international case-law on this topic we reached the conclusion that there is a connexion between life insurance and successions. Only classic life insurances can be removed from the scope of succession law because they are indeed based on an element of randomness. In all the other situations in which the insured person is not exposed to a loss of his or her capital, death being an event that is certain to occur at one point in time, the mere designation of a beneficiary of

the life insurance constitutes a liberality. Yet, the revocability of the beneficiary rises questions on the *ex oficio* qualification of this contract as an indirect donation. This is why more precise rules would have been useful in the new Civil Code to regulate the way in which the subscribed capital or the insurance payment are reunited into the net estate, or are being subjected to the obligation to account or restore for gifts. The second instrument that could be used for planning the succession is the way in which the author can modify the order of the obligation to restore or account for gifts. We compared the older regulation with the new one and we explored the permission to designate a preferable donation as well as the reasons that could justify a greater freedom to account or restore for gifts made between spouses. The matrimonial regime of the author of the succession influences the amount of the reserved portion, and a *praecipium* clause in a matrimonial agreement proves how this actually works. The analysis made is nevertheless limited to the impact of this clause on the rights of the forced heirs, leaving aside the contradictory manner in which the provisions of the Code require the application of both rules on claw back of donations and on reduction of legates. In conclusion, the Romanian legislator, inspired by the French one, put on the first place the matrimonial freedom, and protected the surviving spouse from the claims of the non-forced heirs. When forced heirs are present to the succession, the Romanian legislator more generously gave preference to their safety, giving them the right to act against an excessive *praecipium*. Also, from the way the provisions are drawn, even though the content is reduced, we disagree with the idea that one can state as a principle that in all situations the assets that fall within the dispositions of *praecipium* are excluded from the net estate of succession, and, as a consequence, do not follow the rules of legal succession. Two different hypothesis are presented, depending on the presence or absence of forced heirs. In international successions a new dimension of the *praecipium* can be discovered, together with the necessity to delimit it from the agreement as to succession, as it is defined in Regulation (EU) no. 650/2012. In this context, also relevant are the arguments raised by the E.C.J. in Case no. C-588/16 to include aspects that traditionally were considered as being part of matrimonial regimes, into the scope of the European regulation regarding international successions. For a possible reform in Romanian law, we would suggest the maintaining of the reduction of an excessive *praecipium* only when descendants come to succession, excluding other categories of forced heirs. Regarding the application of art. 1091 para. 4 C.civ. a preferable technique of anticipation in successions would be to conclude a contract for valuable consideration, under the charge of usufructus, right of use, right of habitation or against an obligation to maintenance or life annuity, having obtained the unanimous or partial consent of the forced heirs who will no longer be able to raise claims against this contract after the death of the author. It is more difficult to deduct or to account for a donation made through a division of goods contract that is a particular type of transmission of the succession. Some examples are accompanied by mathematical hypothesis to determine

the impact on the reserved portion of the operation of accounting this donation from the disposable part or, on the contrary, from the reserved shares. Explanations are offered to justify the appearance of an equalisation of the values received by each beneficiary when two different methods of calculation are used.

In the fifth chapter, relevant European systems of forced heirship are presented. In France, successions and donations went through significant changes following the Law from 23rd of June 2006. This reform ended the reserved share of ascendants and promoted the surviving spouse into a forced heir when no descendants of the deceased came to succession. The ascendants other than the parents benefit from a maintenance claim when they are in need and the succession is deferred to the surviving spouse. Same law gives the forced heirs the right to waive the claim against an excessive donation, during the lifetime of the author, through an authenticated document drafted by two notaries, under the condition that the author would accept this renunciation, and no counterparts, charges or conditions are stipulated for the latter to be executed. In Germany, the reserved portion of the estate was declared a constitutional value by a decision of the Constitutional Court in 2009, but the reform of the Law regarding successions and statute of limitations from 24th September 2009 did not add significant changes to the provisions protecting the forced heirs. The weakening of the reserved portion occured in Catalunya through the Law no. 10/2008 from 10th of July to adopt Book IV of the Catalan Civil Code. *Llegitima* is a claim, having a value fixed to a quarter of the net estate, being a unique part regardless the number of beneficiaries, that will be distributed between them in equal parts. In 2009, the intention of the legislator from Catalunya tended to reduce the *llegitima*, one new reason to disinherit being introduced, that was justified by the manifest and continuous absence of family-like relations between the deceased and the beneficiary, but only when this absence was exclusively reproachable to the latter. In Scotland, freedom of testate is balanced with the protection of forced heirs assured by *Succession (Scotland) Act 1964* that sets a category of legal rights that apply not only in a *ab intestat* succession, but also in a testamentary succession. Succession still takes into consideration the distinction between *heritable property* and *movable property*. The claims of the widow that bear the name of *jus relictae*, of the widower under the name of *jus relicti*, and of the children under the name of *legitima* are calculated only upon movable property. Legal rights are untouchable, meaning that the author of the will cannot deprive the beneficiaries off their rights, which makes these rights very similar to the reserved portion of the estate recognized by continental laws. In England and Wales, by comparison, *The Inheritance (Provision for Family and Dependants) Act 1975* is applied, permitting a claimant who was not satisfactorily provided for in the succession of the deceased to take the matter to a court of justice in order to obtain a right from this succession, that will be discretionarily established by the judge. This claim is only admissible if the author of the succession had his or her domicile in England or Wales at the time of death. The definition of

domicile does not correspond to the term of habitual residence used by European regulations, especially the one mentioned in Regulation (EU) no. 650/2012, but it is a distinct notion created by the *common law*.

The sixth chapter springs from the priority granted by the political and legislative actions of the European Union to family law and succession law, the reserved portion of the estate having specific characteristic in an international succession. Whenever the estate is situated in different countries, every national authority will apply the national rules of conflict of laws and this situation could very easily end up with different liquidations for one and the same succession, with completely different forced heirs or different values for the reserved shares in each country. This was the situation before the entering into force of the Regulation (EU) no. 650/2012, when the case-law was constantly in favour of a complete distinction between the reserved portions created from each different estate, that remained completely autonomous one from another as a result of different laws being applied. To correct this situation the right to a deduction was created in France, Belgium and Netherlands, as well as the right to obtain a corrective partition under the law of Quèbec. Once the ESR. entered into force and the right to deduction was abolished, the unity of succession was obtained by using a single and identical connecting factor for the law applicable to the succession and for the international jurisdiction. Still there are exceptional hypothesis that were identified in this chapter that continue to allow for a division of an international succession that falls within the application of the ESR. No solution to compensate this is offered by the European regulation in order to allow the practitioners to proceed to an equitable division of the succession within the respect of the reserved portion of the estate. Therefore, arguments were presented to ascertain that, whenever the succession is connected with third party states and more laws are applicable, the spirit of ESR will validate the reintegration of the estate located abroad and the calculation of a unique reserved portion, with the agreement of heirs, even though more applicable laws govern the estates situated in different states. The reserved portion was also analysed when a *praecipium* was stipulated, along with the possibility to include this clause in the scope of ESR. The life insurance contract and all similar agreements are excluded from the scope of ESR, but without prejudice to the obligation to account or restore for gifts, that will continue to protect the reserved portion in respect of the law applicable to succession. On the contrary, the protection of the reserved portion of the estate is left to the member states level when the author created a trust to transfer the succession. The choice of the law applicable to succession is most commonly used to organize one's succession giving heirs predictability regarding their expected succession rights. The *de cujus* can follow his/her own interests in the transmission of the succession, overcoming the difficulties that arise from the determination of the last habitual residence. Taking into account the impact of the choice of the law applicable to succession on the reserved portion, practical cases were presented to demonstrate how

proffesio juris worked before ESR and how it does in the present, how the reserved portion is determined in both cases and what are the changes ESR made in this area. Recent practice proves that the fraudulent circumvention of the law is almost incompatible with *professio juris.* The reserved portion is not assured by using the overriding mandatory provisions under ESR. When it comes to public policy, the exception cannot be used to violate the unitary application of the regulation or to pronounce a discriminatory decision based on the proximity of the case with the forum. A possibility to exclude the application of a foreign law was not refused as a principle when it came to the reserved share of the estate, mostly if it had as a result the lack of subsistence means for the forced heirs or their placement in a situation that excludes any means of protection for them, but not necessarily their access to a part of the succession. Finally, the recent case-law from 2017 of the French Court of Cassation was analysed, regarding the applicability of the public policy exception in connexion with the violation of the reserved portion.

This thesis identifies and emphasizes arguments in favour of the reserved portion of the estate, or in favour of the freedom of testate, the latter being a model that stimulates the behaviour of those that aim to inherit and sanctions the lack of interest of those who keep the family relationship at a formal level. The laws based on the reserved portion are numerous in Europe and they resist the pressure induced by those laws based on a succession claim granted in correlation with the actual financial needs of the applicant. Choice of the law applicable to succession and the extended admissibility of the agreement as to succession are vectors that promote new models of succession between member states in the European Union, from which the reserved portion of the estate benefits as well. Even though ESR. does not consider the reserved portion of the estate a fundamental value of European law,it does not preclude member states to keep it in their national legal architecture and to take national measures of protection if those continue to respect and provide the common space of liberty and justice for European citizens.

KEY WORDS

Reserved portion

International succession

Law applicable to succession

Donations

Proffesio juris

Public policy

Disposable part

Obligation to restore or account for gifts

Life insurance