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THE USUFRUCT – A WAY TO EXPRESS THE SUCCESSION RIGHTS OF THE SURVIVING SPOUSE

PhD Thesis – Table of Contents, Keywords and Summary

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KEYWORDS

Succession Law, surviving spouse, right of usufruct, Roman Law, Ancient Roman Law, Classical Roman Law, Imperial Roman Law, the old written French Law, the old customary French Law, *douaire*, connection bridge, matrimonial regime, dowry regime, the regime of community of property and acquired property, the regime of separation of property, the 1804 French Civil Code, the Civil Code of Cuza, family, society, sociology, comparative law.

SUMMARY

The echo caused by someone's death is strong, both through the intensity and the depth of the feelings experienced by the family and those close to the deceased, and through the complexity of the legal mechanisms which are triggered. Far from working in a void, the body of the legal principles which dictate the fate of the inheritance of *de cuius* interacts with an assembly of particles whose multidisciplinary ownership makes from the succession law a surprising field of study. From all this field we attentively studied the crossroads between the actual right of usufruct and the succession rights of the surviving spouse, in light of the heterogeneous elements that influence the field of legal succession.

Designed as a legal vector through which the succession rights of the surviving spouse have the potential to receive a new force within the Romanian legal landscape, we asked ourselves whether is the usufruct attractive enough for the target audience: the successors from the blood family and the deceased's spouse? The final objective of our research was to draw a conclusion on the opportunity of introducing the right of usufruct to the benefit of the surviving spouse in the field of legal succession.

In the first part of our thesis (Title I – Historical perspective), we analyzed the regulations of the rights of the surviving spouse applicable in the Roman Law, in the Old French Law, respectively in the old Romanian Law from Wallachia and Moldavia, between the XVIIIth and XIXth centuries. We equally determined, for each legislation, which were the sociological conditions which imposed a certain regulation and to which extent the legal provisions corresponded to the needs of the society during that period.

In the **Ancient Roman Law**, the surviving wife received a portion of inheritance in property equal to that of the descendants of the same degree with whom she was called to succession. From the analysis conducted we pointed out the incidence of a legal “alchemy” of

the nature of the woman's succession rights in full ownership, resulting in a right of usufruct. In the case of the wife's predecease, the surviving spouse was deprived by any succession right from the deceased's inheritance. The surviving spouse would nevertheless obtain a considerable patrimonial benefit, because he owned the property of the goods which formed the dowry at the moment he contracted the marriage.

In the **Classical Roman Law** the wife married *sine manu* would keep the succession rights in the family of origin, without having succession vocation at her husband's inheritance. Equally, the surviving husband would not be called to the woman's succession, as he was not part of the group of her civil relatives. Between the first century BC and the first century AD, new rules came to life in the field of devolution, known as *bonorum possessio*. Under these provisions, the actual expectation for the surviving spouse to be called to the succession as a legal successor was reduced, because he/she was called in the last and exceptional degree, in the absence of cognates until the 6th or 7th degree. In the unlikely case that the surviving wife was called to the Praetorian succession, she would acquire a right to full ownership. Consequently, the classical Roman Law period restored the property right acquired by the surviving spouse (either a female or a male) from the spouse's intestate succession.

The Imperial Roman Law placed the surviving spouse at the end of the legal devolution. In the aftermath of Justinian's reforms (Novel 53 and 117), the surviving spouse benefitted from a succession right whose nature and extent were conditioned by the existence of a financial imbalance between spouses, as well as by the number and quality of descendants called to the succession. Hence, during the Post-Classical Period of Roman Law, the surviving spouse had succession vocation to a portion in full ownership or in usufruct.

At the end of our research on Roman Law, we noticed that the situation of the surviving wife during the Post-Classical Roman Law was more convenient, to both her rights from the classical period, and her husband's rights from the Imperial Law. However, she did not benefit from such an advantageous place than in the Ancient Roman Law.

In contrast with the Roman's Law unitary, **the old French Law** was characterized by the diversity of regulations applicable to the *ab intestato* devolution. We can distinguish two different legislative trends out of this plurality: customary law and written law.

In most customs, starting with the Middle Ages up to the XVIth century, in the absence of cognate relatives, the succession passed to the senior and not to the surviving spouse, as this was considered allogeneous from the blood family. The exclusion of the surviving spouse from the succession, respectively placing him/her at the end of legal devolution was tempered both by the rules governing the termination of the matrimonial

regime of community of property, and by the existence of a certain *gain de survie* specific to the widow: the *douaire*. The legal mechanisms that offset the loophole of the succession rights ensured to the surviving wife a right of usufruct from her late husband's inheritance, maintaining at the same time the property core in the blood family.

In the old written French Law specific to the Middle Ages the surviving spouse was not included in either order of heirs, as he/she wasn't considered relative of the deceased. Nevertheless, along with the Praetorian institution *bonorum possessio unde vir et uxor*, the old written French Law also kept the poor spouse's quarter from the Imperial Roman Law, to which it granted reciprocity character. Subject to the constitution of the dowry, the widow's advantages were complemented by the *supplement to dowry* (*augment de dot*) which, like the customary *douaire*, extended over the husband's goods. The *contre-augment de dot* was a correlative right to the supplement to dowry and gave the man the right to keep all or part of the dowry goods in case of the wife's predecease. These patrimonial advantages were granted in full ownership or in usufruct, depending on the existence or the absence of the descendants born from the marriage. The rules governing the termination of the matrimonial regime of separation of property also granted a patrimonial help to spouses, but it was far from being plentiful.

Hence, concerning the old French Law, we may conclude that the situation of the surviving spouse from the customary law was more advantageous compared to that of the written law provinces.

Pravilniceasca Condică (or the Code of Ipsilanti), applicable in Vallachia between 1780-1818, privileged blood relatives in terms of immovables, opting to assign the movables to the surviving spouse. Regardless if the surviving spouse was a female or a male and without conducting an analysis of his/her wealth, the nature and emolument of the succession rights depended on the existence or absence of descendants resulting from the marriage. Along with succession rights, the surviving spouse also acquired other patrimonial advantages from the termination of the matrimonial dowry regime, the only regime enshrined in the old written Romanian Law.

Come into effect the 1st of September 1818, **Legiuirea Caragea (the Caragea Regulation)** established a mutual succession right, regardless of the patrimonial situation of the surviving spouse. The nature and extent of succession rights varied depending on the existence of descendants or other relatives of the deceased, respectively on the length of the marriage or on the descendants' age and the moment they deceased related to the opening of the succession of their parent. Like the Code of Ipsilanti, it protected the female inclusively by

the way the dowry regime worked and ended. Likewise, in the case of the wife's predecease, the man's successors received at least the naked ownership of the gifts preceding the wedding (the counter-dowry).

In Moldavia, between 1814-1817, **The Andronache Donici Manual** established a succession vocation in full ownership or in usufruct depending on the spouse who predeceased, on the relatives with whom the surviving spouse came to succession in competition, as well as on the maintenance of the widowhood. At the same time, the amount and nature of the right could be influenced inclusively by the patrimonial condition of the surviving spouse, especially of the widow, respectively by the time of death of the deceased's unique descendant. Unlike the Code of Ipsilanti, these provisions did not condition the succession rights to the existence of descendants, but their amount depended on their number. The benefits received from the land of the dowry regime did not undergo significant changes compared with the legislations existing in Vallachia, being relatively stable in the old written Romanian Law.

Under the privisions of **the Calimach Code**, the surviving spouse usually benefitted from succession rights in usufruct. These rights varied on the category or number of heirs with whom he/she came in competition. In addition, the nature and extent of the succession rights depended on the contracting of a subsequent marriage, the proximity of the descendants' decease to the opening of their parent's succession, the existence of the dowry or the counter-dowry, as well as the patrimonial situation of the surviving spouse. The dowry, the counter-dowry, the *"ipovolon"* and the *"theoritre"* were legal mechanisms which originally belonged to the wide range of Family Law, but in the case of termination of marriage following one of the spouse's decease, their effect extended to the field of Succession Law.

The second part of our thesis (Title II – Usufruct and its practical implications), focused on a thorough research on the right of usufruct. The study started with the right's origins, went on with a presentation of the confluence of usufruct and sociology and exposed the definition of the legal notion of usufruct, the conditions for its validity, the manner of exercise of the holders' powers, the temporary character of this right and lastly but not least, the cases of extinguishment of usufruct.

Usufruct is defined as the temporary real right to the use and enjoyment of the property of another, without alteration of its substance.

We asked ourselves which of the legal institutions has more advantages for the successors: the successive usufruct or the joint/common ownership. We reached to the conclusion that there is not any universal solution, because the parties' interests regarding the

good's use represent essential landmarks for choosing the usufruct instead of the joint/common ownership or the other way round. Thus, if the holders of the right of use aim to acquire use over the entire good, as a state of things, either at the moment of constitution of the right of initial usufruct, either later on, as a result of fulfilment of the suspensive term represented by the decease of the first usufructuary, then the ideal solution for them would be the successive usufruct. In return, if the parties aim to exercise at the same time the specific ownership powers, accepting to divide the ownership in equal shares, with all its advantages and drawbacks, then they will choose the joint ownership.

Regardless of its holder, the usufruct is an essentially temporary right that may take the form of a successive or joint usufruct. Choosing to exercise a joint usufruct in common ownership brings with it the advantage to administer the good by each holder individually, without owing to the joint usufructuary damages for the lack of use. Or, the exercise of the joint usufruct in timeshare exclusively by one of the parties may constitute a tort action for coverage for harm by unilateral use. The best example of exercise of joint usufruct in common ownership is the situation in which there is a close emotional relationship between the persons involved. For the hypothesis in which the two spouses exercise a joint usufruct in common ownership over a good we claimed that, though not indispensable in order to ensure the exercise of usufruct exclusively by the surviving spouse, the reversion clause („*clause de réversion d'usufruit*") becomes extremely useful to provide the free use of the good for the benefit of the subsequent degree holder.

We further showed that the indirect incurrence of the right of usufruct (*per deductionem*) is not a possible operation reported to the legal nature of the right, revealing at the same time which could be the specific ways through which the alienator, full owner, could grant his/her wish to keep the usufruct in his/her heritage, unencumbered by the expression of consent from the other party within the legal relationship.

Analysing the *modus operandi* of the reasons behind the extinguishment of the right of usufruct we found that the potential abuses from the usufructuary may be corrected, the later realising the possibility of extinguishment of the right as a result of the abusive exercise of his/her powers.

In the light of the dynamics of usufruct, we retained that the maintenance of the real accessory rights held by third parties over the right of usufruct even in the case of the premature extinguishment of the right of usufruct guarantees the security of the civil circuit, adequately defending third parties' interests.

As an innovation, we presented our own solution which has the potential to more effectively correct the inconveniences pointed out by the doctrine, aiming at the alignment of the legal rules to the demands of today's society. In this regard, for a sustainable service of the thing that makes the object of the right of usufruct, we proposed some **connection bridges** between the two autonomous spheres of rights and obligations existing in every holder's patrimony. By connection bridge we understood the sum of interactions between the two right holders, consisting of rights and obligations, the source of which is the law or the contract, subject to judicial review and coercion from the state, throughout the whole dismemberment of the right of ownership.

In our terms, it is not necessary that the connection bridges be based on a massive legislative intervention, as the closeness between the usufructuary's interests and those of the naked owner may be realised through the simple mechanisms of social cohabitation, too.

In the absence of a legislative intervention enshrining a permanent cooperation between the right holders, we noticed that the existence of family and affective relationships between the usufructuary and the naked owner has the ability to remove or at least to diminish the potential antagonism between them. At the same time, the regulation of important repair work, respectively of obtaining refund of the amounts advanced for their execution, as well as the economic interests of the persons involved lead us to place the right of usufruct in the category of feasible real rights, minimising, at a more attentive analysis, the inconveniences raised by the literature. Furthermore, the possibility of extinguishment of the usufruct as a result of the usufructuary's misconduct constitutes the basis of supervision and control measures necessary for a proper functioning of the real right of usufruct.

To sum up, the usufruct represents an attractive legal institution, maybe having a smaller target audience compared to other real rights. Finding itself a richer applicability ground within the free legal acts, it is not excluded that it be found in the field of legal succession.

In **the third title of our thesis (Title III - Modernity)** we focused on the Romanian private law reforms starting with the XIXth century that directly influenced the patrimonial advantages acquired by the surviving spouse as a result of the opening of his/her spouse's succession. The research did not focus exclusively on inheritance matters, as the benefits of the surviving spouse are reaped both from the realm of inheritance law and from the sphere of matrimonial law.

The year 1864 brought a change in the local tradition of granting the surviving spouse his/her specific succession rights. The French import led to a repositioning of the surviving

spouse, so that Cuza's Civil Code granted the later a succession vocation of 13th degree. Foreseen as a tangible reality, the surviving spouse's succession right in full ownership was illusory.

Without denying the possibility of the incidence of isolated situations where the surviving spouse fulfilled all the general conditions to inherit, we showed that the legal nature of the right received from the deceased's succession is not that of a right in full ownership. The legal procedures that the surviving spouse was bound to carry out, as well as the attributes he/she disposed during thirty years from the moment of first taking possession of it, entitled us to treat his/her succession right as a usufruct.

Regarding the succession right of the poor widow, we analysed the consequences of including it within the category of succession rights, respectively the legal tools he disposed of in order to protect her right in case she came to the succession in competition with lawful heirs under a will.

The decease of one of the spouses triggers a mandatory interference of the successional rules with the ones governing the matrimonial regime applicable to marriage. The transposition of the surviving spouse's *ab intestato* rights from the Napoleonic Code did not come accompanied by the rules of the French legal matrimonial regime of community of movables and acquisitions. Adopting the separation of goods or assets, the 1864 Romanian Civil Code deprived even more the surviving spouse of any economic benefit which may have resulted from the termination of the community of interests built during the marriage.

Reluctant to most of the provisions of our old written and unwritten law, ignorant of the necessity of having unity between the private law rules set out in a civil code and true to the French model, the 1864 Romanian legislator made a regression in terms of legal succession rights of the surviving spouse.

About eight decades from the coming into effect of Cuza's Civil Code, the Romanian legislator reacted to the criticism brought to the provisions of this legislative act, by actively intervening with a view to address the shortcomings concerning the rights of the surviving spouse received from the legal succession. In this regard, a remarkable reform on succession took place in 1944.

Due to the positive echo of the 1944 regulation, the current Civil Code kept in its structure a continuation, in almost identical terms, of the rights of legal succession of the surviving spouse.

From 1944 until now, the surviving spouse has succession vocation to a portion in full ownership from the succession patrimony, being called to the *ab intestato* succession in

competition with any order of legal heirs. However, the extent and nature of his/her succession rights are not influenced by variables like the age of the surviving spouse or the length of the marriage with the deceased. The only oscillation is determined by the increasing number of orders of legal heirs, inversely proportional with the extent of rights in full ownership of the surviving spouse.

The wish to strengthen the position of the surviving spouse determined the legislator to grant him/her some special succession rights: habitation rights over the house he/she shared with the deceased, respectively the right over the furniture and the assets belonging to the household.

Starting with the second half of the XXth century, the mark of usufruct on the succession rights of the surviving spouse was extremely low. The improvement of the patrimonial condition of the surviving spouse was mainly done by granting a succession vocation in full ownership, even in competition with the descendants, avoiding the use of usufruct within the legal succession. The only area where the notion of usufruct made its presence felt was the habitation right of the surviving spouse. Unlike the Romanian Law, countries like France or Belgium kept in their respective law systems the usufruct of the surviving spouse, conditioning its extent to different factors depending on each state.

Equality, introduced by the political regime established in March 1945 meant inclusively the removal of all the regulations permitting families to adapt the rules governing property relationships according to their own needs. Thus, the Family Code from 1954 regulated a unique matrimonial regime – the legal community of goods. Starting with 2011, the severe critics expressed in the light of the Family Code triggered a long-awaited regeneration of the principle of freedom of choice of the matrimonial regime. However, the legislator drew certain limits in line with the law systems that served as a model.

With a view to concluding about the changes occurred in the field studied between the second half of the XIXth century and the first decade of the XXth century, the surviving spouse acquired more and more benefits to the detriment of blood relatives. Regardless of the ground on which he/she based his/her right, the surviving spouse fructified the community resulting from contracting the marriage. Over the course of time, the legislative reforms aimed at the alignment of legal rules to the inevitable changes in the organization and functioning of family.

In **our thesis' last title (Title IV – The usufruct – A viable adaptation solution of the succession rights of the surviving spouse to the structure and physiology of the**

contemporary Romanian society), we studied the sociological trends of the last decades and we sought to show how should the legislator address these new challenges.

The undeniable dependence of legal rules to the essential elements of the universe (time and space) determined us to expose a new insight of the rights of the surviving spouse, which, in our vision, resonates more smoothly with the modern and local social demands than the one prescribed by the positive law.

Statistical data provided us essential information on the changes that operate at the level of the component elements of the contemporary family, from its formation until the end of life. The relatively small number of particular situations in which at the moment of contracting marriage there is a difference of more than 25 years between the spouses, as well as the low weight of blended families illustrate that, most frequently, the surviving spouse comes to the succession of the deceased in competition with common descendants. Moreover, the average length of life, together with the average age of the mother at the birth of the first child tell us that the first order of heirs will be about half a century old at the time they will be called to their ascendant's succession. The high level of employment of young people, the last years' drop in unemployment, as well as the ratio between the monthly average pension and the pensioners' consumption expenditure are all elements that lead us to conclude that the descendants gain economic independence and offer, in turn, financial assistance to their parents in their old age. Thus, the immediate transmission of the full ownership resulting from the opening of the ascendant's first succession is not urgent, as, from an economic perspective, the heirs manage themselves effectively. Hence, the constitution of a life right of usufruct to the benefit of the surviving spouse, having as result the delay of replenishment of whole property over succession goods following the usufructuary's decease brings a double advantage: maintain the spouse's lifestyle, on the one hand, and increase the descendants' portion of inheritance, on the other hand.

In order to build up the conclusion of the opportunity of adopting the right of usufruct with regard to the surviving spouse, we explored some punctual situations that may give birth to certain legal particularities and whose effects could dissuade the legislator in starting the succession law reform.

To get started, we showed that the succession vocation in usufruct of the surviving spouse would not impede the deceased's right to dispose of his/her things through gratuitous acts, as the usufruct drawn by us would only target the things *de cuius* did not transfer through *inter vivos* or *mortis causa* acts.

Related to the composition of succession property, in case it includes fungible goods (for example, sums of money), the most appropriate approach is to grant a portion in full ownership to the surviving spouse who comes to the succession in competition with the descendants. Thus, maintaining the same ratio as in the positive law, the surviving spouse will receive ¼ of the sum of money existing at the moment of the deceased's death, the remaining being left to the descendants.

We also noticed that the question of invading the first order of heirs' reserved share through adopting usufruct is only apparent. We stated two main arguments in order to make the case. First of all, the reserved share becomes incident in the field of testamentary devolution and/or donation, but our intention is to pass on the usufruct to the surviving spouse within the legal succession. Secondly, legal heirs are protected through the allocation in full ownership of the succession rights having as object fungible goods and through the deceased's will, expressed through gratuitous acts.

With an overview of the position of the surviving spouse within the family and the legal succession, and considering the approach of other law systems that served as a model for the Romanian legislator, we concluded that the surviving spouse needs to be excluded from the category of reserved heirs, when the later is called to succession in competition with the deceased's descendants.

Last but nor least, literature pointed out different inconveniences that may be attributed to the right of usufruct. In our analysis we treated each of its shortcomings and we argued the negative aspects' lack of foundation. In this regard, we designed and drew the notion of connection bridges. Then, we identified and explained the content and the physiology of the elements forming the structure of the connection bridges existing between the sphere of the rights and obligations of the holder of usufruct, respectively of naked ownership. The interest community created between heirs, along with the incident economic and legal mechanisms effectively regulate the relationships between the players of the succession law's scene.

Summa summarum, in our terms, and for all the arguments exposed, establishing the right of succession of the surviving spouse in usufruct, when he/she comes to the legal succession in competition with the first order of heirs, represents an appropriate choice for the contemporary Romanian society, as well as a viable choice from an economic and legal perspective.