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DOCTORAL THESIS

Unworthiness to Inherit and Disinheritance

English abstract

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TABLE OF CONTENTS

List of abbreviations 10
Introduction.. 14

Title I – Unworthiness and disinheritance in the Romanian law of succession 16
Chapter I. The historical evolution of concepts on unworthiness and disinheritance 16
§1. Unworthiness and disinheritance in Roman law... 16
1.1. The unworthiness to inherit.. 17
1.2. Disinheritance, from absolute testamentary freedom to the Novel 115................ 20
§2. Unworthiness and disinheritance in the old Romanian law....................................... 23
2.1. The Code of Matthew Basarab... 24
2.2. The Calimach Code... 27
2.2.1. Unworthiness in the Calimach Code 28
2.2.2. Disinheritance in the Calimach Code 31
2.3. The Caragea Code 34
§3. Unworthiness and disinheritance in French law 35
3.1. Unworthiness in the old French law.. 36
3.2. Disinheritance in the old French law... 39
3.3. The intermediary law and the *Code Napoléon*.. 40
§4. Conclusion... 41

Chapter II. Unworthiness and disinheritance in the old Civil Code 43
§1. Unworthiness to inherit in the Civil Code of 1864 43
1.1. Notion... 43
1.1.1. Legal nature 44
1.1.2. Definition.. 46
1.1.3. Legal traits 48
1.2. Cases.. 48
1.2.1. The attempt to murder the deceased 49
1.2.2. The calumniatory capital accusation 52
1.2.3. The non-denunciation of murder 55
1.3. Legal regime.. 59
1.3.1. Means of operation 59

1.3.2. Range of application 61
1.3.3. Invocation 62
1.4. Effects 63
1.4.1. Effects on the unworthy 63
1.4.2. Effects on the descendants of the unworthy 65
1.4.3. Effects on third parties 67
§2. Disinheritance and the Civil Code of 1864 69
2.1. Notion, demarcation and taxonomy 69
2.2. Firm disinheritance 70
2.2.1. Direct disinheritance 70
2.2.2. Indirect disinheritance 73
2.3. Conditional disinheritance 74
§3. Conclusion 76

Chapter III. Unworthiness and disinheritance in the new Civil Code 78
§1. Unworthiness to inherit in the Civil Code of 2009 78
1.1. Notion 78
1.1.1. Legal nature 78
1.1.2. Definition 80
1.1.3. Legal traits 81
1.2. Cases 82
1.2.1. *Ipso iure* unworthiness 83
1.2.2. Judicial unworthiness 86
1.3. Legal regime 92
1.3.1. Means of operation 92
1.3.2. Range of application 93
1.3.3. Invocation 95
1.3.4. Forgiving the unworthy 97
1.4. Effects 99
1.4.1. Effects on the unworthy 100
1.4.2. Effects on the descendants of the unworthy 101
1.4.3. Effects on third parties 103
§2. Disinheritance in the Civil Code of 2009 105
2.1. Notion, demarcation and taxonomy 105

2.1.1. Range of application and domain ... 105
2.1.2. The doctrine of heirship survival ... 106
2.1.3. Taxonomy ... 109
2.2. Firm disinheritance ... 109
2.2.1. Direct disinheritance ... 109
2.2.2. Indirect disinheritance ... 112
2.3. Disinheritance-sanction ... 113
2.3.1. The issue of inefficacy ... 113
2.3.2. Disinheritance-penalty ... 114
2.4. Effects ... 115
2.4.1. The fate of the share ... 116
2.4.2. The surviving spouse ... 116
2.5. The nullity of disinheritance ... 118
§3. Conclusions on the new Civil Code ... 119

Title II – Unworthiness and disinheritance in the comparative law of succession ... 122
Chapter IV. Unworthiness and disinheritance in the Civilian tradition ... 122
§1. French law after the succession reform of 2001 ... 122
1.1. Unworthiness in French law ... 122
1.1.1. Cases ... 123
1.1.2. Regime ... 125
1.1.3. Effects ... 126
1.2. Disinheritance in French law ... 127
§2. Italian law ... 129
2.1. Unworthiness in Italian law ... 129
2.1.1. Cases ... 129
2.1.2. Regime ... 132
2.1.3. Effects ... 135
2.2. Disinheritance in Italian law ... 137
2.2.1. Notion, demarcation and taxonomy ... 137
2.2.2. Direct exclusion ... 138
2.2.3. Indirect exclusion: preterition or occult disinheritance? ... 139
§3. Spanish law ... 140
3.1. Unworthiness in Spanish law ... 140

3.1.1. Cases 141
3.1.2. Regime 144
3.1.3. Effects 146
3.2. Disinheritance in Spanish law 147
3.2.1. Cases 147
3.2.2. Regime 149
3.2.3. Effects 150
§4. Chilean law 152
4.1. Unworthiness in Chilean law 152
4.1.1. Cases 153
4.1.2. Regime 158
4.1.3. Effects 159
4.2. Disinheritance in Chilean law 160
4.2.1. Cases 161
4.2.2. Regime 162
4.2.3. Effects 163
§5. Brazilian law 164
5.1. Unworthiness in Brazilian law 164
5.1.1. Cases 164
5.1.2. Regime 166
5.1.3. Effects 167
5.2. Disinheritance in Brazilian law 168
5.2.1. Cases 169
5.2.2. Regime 171
5.2.3. Effects 172
§6. Argentine law 172
6.1. Unworthiness in Argentine law: notion, legal nature and foundation 173
6.2. Cases 174
6.3. Regime 177
6.4. Effects 178
§7. Conclusions on the Civilian tradition 180
7.1. The Roman model 180
7.2. The Napoleonic model 180

Chapter V. Unworthiness and disinheritance in the Common Law tradition 183
§1. England and Wales 183
1.1. The forfeiture rule in English law 183
1.1.1. Origin, foundation and definition 184
1.1.2. The cause of exclusion 186
1.1.3. Effects 187
1.2. Disinheritance in English law 188
1.2.1. Medieval and Modern law 188
1.2.2. Contemporary law 190
§2. Canada 192
2.1. The slayer rule in Canadian law 192
2.1.1. The cause of exclusion 193
2.1.2. Effects 194
2.2. Disinheritance in Canadian law 195
§3. Australia 196
3.1. The forfeiture rule in Australian law 197
3.1.1. The cause of exclusion 197
3.1.2. Effects 199
3.2. Disinheritance in Australian law 199
§4. New Zealand 201
4.1. The forfeiture rule in New Zealand law 201
4.1.1. The cause of exclusion 202
4.1.2. Effects 203
4.2. Disinheritance in New Zealand law 203
§5. The United States of America 206
5.1. The slayer rule in American law 206
5.1.1. Origin, foundation and definition 206
5.1.2. The cause of exclusion 209
5.1.3. Effects 210
5.2. Disinheritance in American law 211
§6. Conclusions on the Common Law tradition 213
6.1. Excluding the slayer from the estate 213
6.2. The quicksand of testamentary freedom 214

Chapter VI. Unworthiness and disinheritance in mixed legal systems 216
§1. Scotland... 216
1.1. Unworthiness in Scots law 217
1.1.1. The Parricide Act.. 217
1.1.2. The forfeiture rule... 218
1.2. Disinheritance in Scots law 219
1.2.1. The evolution of the Scottish legitim... 220
1.2.2. The legal regime of the Scottish legitim.. 222
§2. Louisiana 223
2.1. Unworthiness in Louisiana.. 224
2.1.1. Cases 225
2.1.2. Regime... 225
2.1.3. Effects 227
2.2. Disinheritance in Louisiana... 227
2.2.1. Cases 229
2.2.2. Regime... 231
2.2.3. Effects 232
§3. Québec.. 232
3.1. Unworthiness in Québec.. 232
3.1.1. Cases 233
3.1.2. Legal regime 235
3.1.3. Effects 236
3.2. Disinheritance in Québec 237
3.2.1. Notion and legal nature 238
3.2.2. Taxonomy... 238
§4. South Africa 239
4.1. Unworthiness in South African law 240
4.1.1. General unworthiness 240
4.1.2. Special unworthiness 241
4.1.3. Legal regime 243
4.1.4. Effects 244
4.2. Disinheritance in South African law 244
4.2.1. The maintenance of close relatives... 245
4.2.2. Discrimination 246

§5. Conclusions on mixed legal systems 246
5.1. Unworthiness to inherit 247
5.2. Disinheritance 248

Final conclusions 249

References 253

ABSTRACT

Titled '*Unworthiness to Inherit and Disinheritance*', this doctoral thesis analyses the legal destiny of the eponymous doctrines within the Romanian and comparative law of succession. The interest served by such a research is ***twofold***:

(i) on one hand, the aforementioned doctrines enjoy *general* application – for they can be found in each of the Western legal traditions (Civilian, Common Law, mixed legal systems), in spite of certain terminological and conceptual variations;

(ii) on the other hand, said doctrines developed a certain *dynamic* during their evolution, both from the time of Justinian to that of Napoleon, and even up to this day.

Herein lies the ***novelty*** of this thesis: as far as one can tell, it is the first doctoral research concerning the unworthiness-disinheritance dualism, at least in Romania. Apart from a number of monographs published in Spain[1] and Brazil[2], the dualism is sometimes explored in treaties, textbooks or studies more limited in scope (articles or conference papers). Still, one is expected to find more monographs dedicated to either doctrine. With regard to Romania, the explanation is rather simple: the legal transplant of the *Code Napoléon* suppressed not just the unworthiness-disinheritance dualism, but any practical interest in said phenomenon altogether. Instead, the new Civil Code of 2009 arguably revived interest in this subject.

Methodologically, it involves an exegetical study of positive law, legal literature and case law, specifically employing the logical, historical, and comparative methods. ***Structurally***, it is divided into two titles: (I) *Unworthiness and disinheritance in the Romanian law of succession* and (II) *Unworthiness and disinheritance in the comparative law of succession*, respectively. These titles contain three chapters each, comprising six chapters in total:

(1) The first chapter examines the **historical evolution** of the doctrines of unworthiness and disinheritance. Being temporally demarcated by the codes enacted under Emperor Justinian and Emperor Napoleon, this chapter explores the *Roman law*, the *old Romanian law* and the *old French law*. It concludes that, until the Civil Codes of France (1804) and Romania (1864) came into force, both legal systems had experienced the Roman conception of an unworthiness-disinheritance dualism. Essentially, this conceptual model *entwined the necessity of punishing the unworthy conduct of an heir with the principle of testamentary freedom*: if the testator was unable to disinherit the offender, the law assumed such an intention through *indignitas*. Its final

[1] F. Jordano Fraga, *Indignidad sucesoria y desheredación*, Editorial Comares, Granada, 2004.
[2] S.A. Cateb, *Deserdação e indignidade no direito sucessório brasileiro*, Del Rey, Belo Horizonte, 2004; C.E. Minozzo Poletto, *Indignidade sucessória e deserdação*, Saraiva, São Paolo, 2013.

iteration was achieved in the Novel 115, which set down a *limited* number of grounds on which these doctrines could operate.

(2) The second chapter explores the doctrines of unworthiness and disinheritance **in light of the Romanian Civil Code of 1864**. Borrowing the model set down in the *Code Napoléon*, said legal transplant marked a brutal break with the old Romanian law. The Napoleonic model based the doctrine of unworthiness upon public policy in an attempt to supress the subjective foundation of the Roman model: the deceased could no longer forgive the unworthy heir, nor disinherit a forced heir. In fact, the so-called disinheritance acknowledged within case law and literature was quite different from the reserve-depriving civil penalty abolished by the Civil Code. The underlying reason was political: the younger, revolutionary generation sought to disarm the older one, still loyal to the previous regime. Although the Roman model restricted disinheritance through the requirement of invoking a just cause, the goal of replacing the ancient aristocracy with another was disguised under the pretext of abolishing the discretionary power bestowed upon testators within the *Ancien Régime*. As a result, the Napoleonic monism failed to ensure a fair balance between the interests of the deceased and those of the forced heirs: the latter would enjoy legal protection whenever the former failed to perform his moral duty (i.e., the hereditary reserve was based upon an absolute presumption), yet the deceased did not enjoy a similar device apart from the doctrine of unworthiness (i.e., another absolute presumption, for it could not be lifted by forgiving the unworthy heir).

The third chapter examines the doctrines of unworthiness and disinheritance **within the frame of the Romanian Civil Code of 2009**. This time, the lawmaker explicitly enshrined both concepts. In the case of the former, the new Civil Code allows the deceased to lift its effects by means of explicit forgiveness. For this reason, certain authors have signalled a departure from the Napoleonic model towards its Roman counterpart, announcing the restoration of the ancient dualism.[3] However, in the case of disinheritance, the new Code fails to restore the forced-share-depriving civil penalty. As a result, one must conclude that the Civil Code of 2009 belongs to a Post-Napoleonic model: the current trend indeed suggests a restoration of the conceptual pair formed between unworthiness and disinheritance, yet this puzzle lacks an essential piece. As long as disinheritance is not capable of extinguishing the compulsory share, one must conclude that the new regulation established *a duality without dualism*.

(4) The fourth chapter discusses the doctrines of unworthiness and disinheritance **within the Civilian legal tradition**. Thus, said concepts are examined through the lens of six systems:

[3] M.D. Bob, *Probleme de moșteniri în vechiul și în noul Cod civil*, Universul Juridic, Bucharest, 2012, p. 112.

(a) *French law after the succession reform of 2001*, (b) *Italian law*, (c) *Spanish law*, (d) *Chilean law*, (e) *Brazilian law*, and (f) *Argentine law* respectively. Two main conceptions derive from this analysis: on one hand, the Iberian American world (e.g., Spain, Chile, Brazil); on the other hand, legal systems with Napoleonic roots (e.g., France, Italy) have adopted a Post-Napoleonic model under which the unworthy heir may be forgiven, albeit lacking a disinheritance capable of extinguishing the compulsory share. The Argentine Civil and Commercial Code of 2014 is a peculiar case in that it marked the departure from the Roman dualist model directly towards the Post-Napoleonic model.

(5) The fifth chapter explores the doctrines of unworthiness and disinheritance **within the Common Law tradition**. Thus, the aforementioned concepts are discussed through the lens of five jurisdictions: (a) *England and Wales*, (b) *Canada*, (c) *Australia*, (d) *New Zealand*, and (e) *the United States*, respectively. On this occasion, one could notice the following constants: on one hand, the unworthy heir rule has an objective basis, consisting in public policy, since it can be incurred by the archetypal wrong (i.e., homicide); on the other hand, the power to disinherit is restrained by the testator owing a duty of maintenance towards close relatives – an attempt to reconstruct the Civilian compulsory share under its *pars bonorum* model, at a time when its corresponding legal tradition seeks means of supressing it.

(6) The sixth chapter discusses the doctrines of unworthiness and disinheritance **within the mixed legal systems** of Scotland, Louisiana, Quebec and South Africa. In their case, there is no singular legislative conception, but rather two patterns:

(i) on one hand, *a* ***postcontinental*** *model*, represented by the so-called 'isles' of Civilian tradition surrounded by an 'ocean' of Common Law, under the influence of which the restraints brought upon testamentary freedom in the Continental law were abolished (e.g., in Quebec, said principle experienced the Anglo-American constraints instead – the maintenance obligation; in Louisiana, the compulsory share was limited to the children of the deceased up to the age of 23 or even beyond if they are permanently incapable of taking care of themselves);

(ii) on the other hand, *a* ***hybrid*** *model*, which combines eclectically elements drawn from the so-called 'pure' legal traditions – Civilian and Anglo-American (e.g., in Scotland, forfeiture was borrowed from English law, yet the power to disinherit comes under constraints similar to those found in Continental law; South Africa borrowed the doctrine of unworthiness from the Roman-Dutch law, yet limited testamentary freedom in similar fashion to certain Common Law jurisdictions).

The final conclusions stress that the Civil Code of 2009 introduced a novel conception on the doctrines of unworthiness and disinheritance, one the author has called the ***Post-Napoleonic***

model. The power to lift the effects of unworthiness falls short of restoring the Roman dualism, for disinheritance is yet to be configured as *a civil penalty capable of depriving forced heirs of their compulsory share*. Or, in the current legislation, the incongruence between said doctrines can be easily noticed in terms of effects: unworthiness endures as a general requirement of the right to inherit (i.e., it deprives unworthy heirs of their compulsory share), yet disinheritance is subordinated to the vocation for inheritance (i.e., the deceased only hurdles the concretization of said vocation in the case of ordinary heirs).

A restoration of the civil penalty of disinheritance is supported by arguments of historical, comparative and logical nature:

(a) ***historically***, a restoration of the dualism would signify a return to the Roman tradition followed by the old Romanian law, which was brutally interrupted by the transplant of the *Code Napoléon* into the Civil Code of 1864;

(b) from a ***comparative*** standpoint, such a reform would be in line with the contemporary propensity to rationalize the Napoleonic model (e.g., France, Italy, Argentina) and has the merit of easily overcoming historical gaps by capitalizing on answers found in the meantime by legal systems which have continuously preserved the Roman tradition (e.g., Spain, Chile, Brazil);

(c) from a ***logical*** perspective, the dualist model responds more adequately to the question of ensuring balance, for it safeguards the interests of both the deceased and his heirs.

De lege ferenda, the following measures are needed:

(a) to establish *a reserve-depriving disinheritance* (e.g., the provisions of Article 1207 of the Chilean Civil Code state that ‘disinheritance is a testamentary disposition under which it is disposed that a [forced heir] is deprived, in whole or in part, of his legitim’);

(b) to list *a limited number of cases* in which the person leaving an estate may enact such a punishment (e.g., Articles 1962-1963 of the Brazilian Civil Code; Article 1208 of the Chilean Civil Code; Articles 852-855 of the Spanish Civil Code).

Keywords: unworthiness to inherit, disinheritance, testamentary freedom, hereditary reserve, civil penalty.