EVOLUTION OF SUCCESSION IN ROMAN LAW

Elena ANGHEL[*]

Abstract

At the beginning, the Romans did not accept the idea that patrimonial rights could be passed on to each other, neither by acts inter vivos, nor by the cause of death. Therefore, they considered that, upon the death of the person, the patrimonial rights are extinguished and by taking possession of the succession, the inheritors did not acquire the same rights, but a new right of property. This concept of property-power has also been reflected in terminology, proof that the oldest term by which the inheritor was appointed is "heres", and it comes from the word "herus", meaning owner. Later, it has been admitted that the patrimonial rights of the person pass over to the inheritors, and from that moment in the Roman legal terminology, the terms of succession and successor have appeared.

In Roman law succession evolved under the influence of 2 trends.

A first trend is the decline of formalism. Originally, inheritance deeds required the observance of extremely complicated formal conditions. For example, the first Roman testament, calatis comitiis, took the form of a law voted by the people. In time, the principle of autonomy of will was accepted, so that towards the end of classical roman law, the will could be drawn up by a simple manifestation of will.

The second trend concerns the protection of blood relatives. For a long time in the Roman law, agnation (civil kinship) was the only foundation of inheritance, so that only civil relatives could come to the succession. Towards the end of the Republic, a series of reforms were initiated in order to protect the blood kinship in succession, and during the time of Emperor Justinian, the old system was completely abandoned, and blood kinship (cognation) became the sole foundation of the inheritance.

Keywords: *succession, roman, formalism, civil kinship, blood kinship*.

1. Introduction

Succession means the transfer of the estate of a decedent, named *de cuius*, to certain living individuals, designated as heirs. The succession was opened by the death of the person, and the call to inheritance of those entitled was made either by an act of last will of the decedent, also called testament, or under the law.

The Romans established **3 succession systems**: succession called *ab intestat* was divided under the Law of the Twelve Tables; testamentary succession was deferred on the basis of a will; the third system of succession – the succession deferred against the will – was rather a disinheritance that had to be performed with the observance of certain formalities.

In terms of legal and testamentary succession, the Romans gave preference to testamentary succession, always seeking to construe the will of the testator in order to produce the legal effects sought by him. Two fundamental principles of the Roman law of succession lay as a testimony in this respect. The first principle provided that nobody could dispose in a will only a part of its property leaving the distribution of the rest to the rules of intestacy (*nemo pro parte testatus pro parte intestatus decedere potest*). This meant that legal inheritance could not be opened along with testamentary inheritance, so that the testator disposed by will only a part of his estate, the one determined as pro parte heir collected the whole inheritance[1].

The second principle is *semel heres semper heres* (once the heir, always the heir). Therefore, the determination of heirs was not allowed until a certain term, this being considered to be done forever due to the fact succession is a way of acquiring property, and the right to property is perpetual and not temporary.

According to civil law, the law applicable to Roman citizens, upon the death of a person, the heir who accepts the succession takes possession of the entire estate of the decedent, by continuing his personality. Therefore, the heir replaced the decedent in all his rights and took over both his assets and receivables (succession assets), and his outstanding debts (succession liabilities).

In the doctrine, the idea of continuing the personality of the decedent was explained by the fact that the owner of all goods is the patriarchal family, not the individual. The head of the domus is only an administrator of the goods, and his death does not entail a devolution of the property, in the contemporary sense of the term. According to the rules of agnation, there is a replacement of the one who leads the destinies of the human group united on the basis of the connections of paternal power; the son who succeeds (takes the place

[*] Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: elena_comsa@yahoo.com).

[1] Emil Molcuț, *Drept privat roman. Terminologie juridică romană*, ed. revised and supplemented, Universul Juridic Publishing House, Bucharest, 2011.

of) *pater familias* is a *heres necessarius* (necessary heir) and at the same time *heres suus* – meaning one's own and necessary heir, being co-owner of the goods since life. The family never dies, but some of its members take care in turn to perpetuate the cult of the forefathers[2].

2. Paper content

As we have already mentioned above, the Roman law of succession has evolved under the influence of two tendencies: the tendency of the decline of formalism and the tendency of the protection of kinship by blood. While the old civil law imprinted on the institutions of succession law the same formalist nature found in the origin of all Roman legal institutions, praetorian law was the one to ensure the evolution of successions, by removing formalism and by calling to inheritance kins (cognates), together with civilian relatives (agnates)[3].

Therefore, in in the system of the Law of the Twelve Tables, heirs were called to the *ab intestat succession* in three classes:

a) **Sui heredes** were those to become *sui iuris* at the death of the pater familias: sons, daughters, women married with *manus* (who inherited as daughters), adopted and adrogated children, grandchildren of sons only when their father had preceded the grandfather, in which case they inherited by representation and collected the part that would have been due to their father. These successors were called *heredes necessari*, because they could not refuse the inheritance, given that they had owned the estate since the lifetime of de cuius.

Emancipated children were not called to inherit, due to the fact they ceased to be under parental authority under the act of emancipation.

b) **Adgnatus proximus** designated the closest collateral relatives, namely brothers, cousins, fraternal nephews or cousins (in matters of succession, the term of agnates refers only to collateral relatives). They inherited only if there were no first-class heirs. If there were several agnates of the same rank, the inheritance was divided by heads. This category was not fixed, but mobile, because in the absence of closer agnates, very distant collateral relatives inherited. Notwithstanding, the Law of the Twelve Tables provides that when the closest agnate disclaims the succession, it will not belong to the next agnate, but the succession becomes vacant[4].

c) ***Gentiles*** (members of the gens) inherited if there were no *sui heredes* or collateral relatives and divided the inheritance in equal parts, as a reminder of the time when the members of the gens exercised collective ownership over the land.

We note that the system of the Law of the Twelve Tables did not take into account the cognatic kinship, thus excluding from inheritance the emancipated children and other blood relatives *(cognati*) so that it became inapplicable at the end of the Republic, when marriage without *manus* and children's emancipation practice are generalized. By means of the reforms established in order to remove these injustices, the praetor established new rules on succession aiming to protecting blood relatives and to consolidating relationships between spouses within marriage without *manus*. In this way, the praetor laid the foundations of the praetorian succession (*bonorum possessio*) and created four classes of heirs, as follows:

a) bonorum possessio unde liberi included *all sons of the blood*, including those emancipated, as they came to inherit as blood relatives, provided that they made the report of the estate.

b) bonorum possessio unde legitimi *included agnates and gentiles*, who came to inherit only in the absence of descendants. At first sight, it would seem that, by means of this reform, the praetor confirmed the provisions of the Law of the Twelve Tables, but in fact, this is another case when the praetor made an innovation, given that if the closest agnate disclaimed the succession, it did not become vacant as provided in the system of the Law of the Twelve Tables, but passed on to the next category of heirs.

c) bonorum possessio unde cognati designated *blood relatives which were not civil relatives*, namely the mother and the children resulted from marriage without *manus*, who inherited each other as blood relatives.

d) bonorum possessio unde vir et uxor designated man and woman married *without manus*, which inherited each other only in the absence of civil or blood relatives (those married with *manus* inherited each other as civil relatives). Therefore, in the absence of heirs of the first three classes, the praetor designated the living spouse as heir (*vir et uxor*).

However, *bonorum possessio* granted to the one who was not called to inherit according to civil law was

[2] Vladimir Hanga, Mircea Dan Bocșan, *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006, p. 214; For more about sources of law, see E.E. Ștefan, *Drept administrativ Partea I, Curs universitar*, 3rd ed., revised, completed and updated, Universul Juridic Publishing House, Bucharest, pp. 44-49.

[3] Also see I.C. Cătuneanu, *Curs elementar de drept roman*, Cartea Românească Publishing House, Bucharest, 1927; C.St. Tomulescu, *Drept privat roman*, Typography of the University of Bucharest, 1973; E. Anghel, *Drept privat roman. Izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021; E.E. Ștefan, *Legalitate și moralitate în activitatea autorităților publice*, in Revista de Drept Public no. 4/2017, Universul Juridic Publishing House, Bucharest, pp. 95-105.

[4] Emil Molcuț, *op. cit.*, pp. 151.

a fragile possession. The praetorian heir was "assimilated" to the civil one, so that he did not acquire the quiritary ownership over the inherited assets, but only the praetorian ownership, and succession action established for or against him were not civil actions, but praetorian actions, with the fiction of the quality of civil heir.

The praetor's reforms were supplemented by imperial reforms. Therefore, by means of Tertullian *senatus consultum*, given in the time of Emperor Hadrian, mother came to inherit children from marriage without *manus*, in the capacity of legitimate relative, thus passing from the 3rd category to the 2nd category of praetorian heirs.

Subsequently, by means of Orfitian *senatus consultum*, given in the time of Emperor Marc Aureliu, children from marriage without *manus* were called to the succession of their mother in the capacity of children, being passed from the 3rd category to the 1st category of praetorian heirs.

Emperor Justinian initiated a series of reforms whereby blood kinship became the sole foundation of succession. Therefore, 4 categories of heirs were created: a) descendants; b) ascendants, full siblings and their children; c) blood brothers and sisters (from the same father, but not mother) / uterine siblings and their children; d) distant collateral relatives.

We have already mentioned above that the Romans gave preference to testamentary succession, given that the entire organization of the family and estate was based on the all-powerful role of the pater familias, who had to decide on the person entitled to inherit the estate after his death. If *pater familias* did not establish this by means of a last will, legal succession was opened.

The praetor also intervened in the matter of testamentary succession, in order to simplify the formalities that a will had to cover. Therefore, in ancient law, the Romans resorted to **calatis comitiis** in order express their last will, which took the form of a law voted by the people (the assembly of the people was *comitia curiata*). In this way, all the solemnities of the adoption of a law had to be observed: the testator expressed his last will before the people, and the people approved or rejected in the form of a law the respective manifestation of will. The doctrine showed that the role of the people was to approve a change in the ordinary legal order, according to which *sui heredes, adgnatus proximus* and *gentiles* were called to inheritance, in the order established by the Law of the Twelve Tables[5].

This solemn form of will had two disadvantages: it was accessible only to the patricians because they were the only members of the *comitia curiata*, an assembly that met only twice a year, on 24 March and 24 May.

The Law of the Twelve Tables established that the testator was free to make his last will, the *comitia curiata* becoming a simple collective witness of the elaboration of the deed.

In time of war, the soldiers could make their will in front of the army on the eve of battle, by means of **in procintu** will. This form of will entailed a solemn declaration of the Roman soldier made in front of the group of soldiers he was part of, and the members of the group acted as a collective witness. It was also accessible to patricians and plebeians, but only to those who were part of the legions of juniors and who were between 17 and 46 years old. Therefore, those who were over 46 and part of the legions of seniors could not use this form of will.

Another form of will, called **per aes et libram** (with bronze and balance) represents an application of mancipatory contracts *(mancipatio familia*) and evolved in 3 phases.

In the first stage, the testator passed on the estate by mancipatory contract to a person called *emptor familiae*. Certain agreements of good faith, called ***fiduciary agreements*** were subsequently concluded between the purchaser of the succession assets and the testator, whereby the testator showed *emptor familiae* how to distribute the estate. Therefore, the execution of the will depended on the good faith of *emptor familiae*, because he acquired the estate *with ownership title*, and fiduciary agreements were not sanctioned by law, therefore if the *emptor familiae* failed to execute the testator's last will, heirs had no action against him.

In view of these disadvantages, they moved on to the second stage – **per aes et libram public**: the emptor acquired the estate not with ownership title, but *in custody*, therefore if he failed to execute voluntarily, heirs had available actions against him. The disadvantage of this form was that the fiduciary agreements were concluded verbally, and the names of the heirs were known from the moment of drawing up the will, therefore, there could be heirs with the intention to accelerate the death of the testator.

This is why, they moved on to the third stage - **per aes et libram secret:** fiduciary agreements were concluded *in writing* and bore the seals of 7 witnesses, and the document was open only upon the death of the testator.

In order for a will to be validly drawn up, the testator, heirs and witnesses must have testamentary capacity, called **testamenti factio**. The testamentary capacity was of two kinds: active and passive.

Testamenti factio activa is the ability of a person to draw up a last will or to assist as a witness in drawing

[5] Grigore Dimitrescu, *Drept roman vol. II, Obligațiuni și Succesiuni*, Imprimeria Independența Publishing House, Bucharest, p. 353.

up a will. All those bearing *de facto* and *de jure* capacity had *testamenti factio activa*.

Those who lacked patrimony did not have the capacity of making a last will (sons of the blood, women married with *manus*, slaves; those who were struck by certain disabilities, such as insane, impoverished persons, prodigies, women). Notwithstanding, certain exceptions were admitted: state-owned slaves could dispose of half of their money by will; sons of the blood who were part of the Roman legions and had their own assets (*peculium castrense*) could dispose of them by will, in what concerns woman, as of the time of Emperor Hadrian, it was admitted that *sui iuris* woman who had own assets could made her last will, only with the permission of the guardian.

Testamenti factio pasiva was the capacity of a person to come to succession either as an heir, or as a legatee. All those bearing *de facto* and *de jure* capacity had *testamenti factio pasiva*, but it was exceptionally accepted that sons of the blood and slaves could also be entitled to inherit. Roman law allowed a slave to be entitled to inherit due to the fact that there were cases when the succession was burdened with debts and no other person would have accepted it; the slave, however, had no right to refuse the inheritance, thus acquiring his freedom by it.

The master's interest was that his estate to be sold at auction by creditors not in his own name, but in the name of the heir slave, so that the infamy that struck the insolvent debtor would not affect the memory of the deceased, but that of the heir slave. Secondly, a slave being established as heir, with no opportunity to refuse succession, the other provisions referred to in the last will were also saved (such as the appointment of guardians, the release of slaves etc.)[6].

In what concerns passive capacity of women, at first, woman could be entitled to inherit, but in order to end women's luxury, a law was passed in 169, the Voconia law, which established that woman was not entitled to inherit a patrimony with a value greater than 100,000 asses.

The person established as heir had to have capacity both at the time of drawing up the will and at the time of the testator's death. If the testator had not the capacity to make a will or if the formalities required by the law were not fulfilled, the will was void (*ruptum*).

In what concerns succession deferred against the will, Roman law considered that as the testator could establish the descendants as his heirs, just as well he could disinherit them, provided that certain solemn forms were fulfilled.

Therefore, sons of the blood had to be disinherited individually, by specifying the name of the disinherited son ("my son Filip to be disinherited"); otherwise, if the solemn forms were not observed, the will was void (*ruptum*). Therefore, *heredes sui*, co-owners of the family estate, could not be tacitly deprived of this quality, but by means of an express act, which would be the obvious materialization of such a will on the part of the head of the family[7].

Moreover, the doctrine states that, at the time when the will was made before the assemblies of the people, such an express disinheritance could, if it had been unjust, be rejected by their vote, while a simple omission, caused by the negligence of those called to discuss and approved the will, could be unfair to legal heirs[8].

Daughters and grandchildren could be disinherited in general terms ("all the others to be disinherited"). Those disinherited without observing the solemn forms could still acquire a part of the inheritance by amending the will so that to acquire a share of the succession.

3. Conclusions

The full freedom of the testator's will, defined in the Law of the Twelve Tables, was gradually restricted. To the end of the Republic, there was a practice of challenging before the centumviral court the wills made in favor of strangers, considering that the testator would have violated the *de officium* obligation to his close relatives, namely the obligation to love his descendants, ascendants, brothers and sisters. Therefore, the descendants disinherited in observance of the solemn forms were entitled to file a special action– *querela inofficiosi testamenti*, by which they obtained the annulment of the will in view of the fact that the testator was not in full command of his mental faculties.

The action could be filed by ascendants, descendants, as well as by brothers and sisters, relatives that had been disinherited in favor of strangers and considered unworthy (such as infamous persons). If they won the lawsuit, the will was annulated and the legal succession was opened.

However, there were certain cases that justified the disinheritance of the descendants (such as patricide

[6] Vladimir Hanga, Mircea Dan Bocșan, *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006, p. 222.

[7] Also in Mesopotamian civilization, disinheritance was permitted – "Disinheritance of children was not allowed except by judicial act. The father had to justify his desire to exclude a son from the succession by proving serious misconduct, and the judge then pronounced decree cutting off that son from family rights", please see Laura-Cristiana Spătaru-Negură, *Legal Sanction in Ancient East*, in CKS Proceedings CKS (Challenges of the Knowledge Society), 2010, vol. I, Pro Universitaria Publishing House, Bucharest, p. 993, http://cks.univnt.ro/cks_2010_archive.html.

[8] Vladimir Hanga, Mircea Dan Bocșan, *op. cit.*, p. 226.

attempt), but these were not listed, but were left to the discretion of the court. In order to end contradictions, Justinian listed all the cases that justified the disinheritance of the descendants, as well as the cases that justified the filing of the complaint.

References

- E. Anghel, *Drept privat roman. Izvoare, procedură civilă, persoane, bunuri*, Universul Juridic Publishing House, Bucharest, 2021;
- C.St. Tomulescu, *Drept privat roman*, Typography of the University of Bucharest, 1973;
- Elena Emilia Ștefan, *Drept administrativ Partea I, Curs universitar*, 3rd ed., revised, completed and updated, Universul Juridic Publishing House, Bucharest;
- Elena Emilia Ștefan, *Legalitate şi moralitate în activitatea autorităţilor publice*, in Revista de Drept Public no. 4/2017, Universul Juridic Publishing House, Bucharest;
- Emil Molcuț, *Drept privat roman. Terminologie juridică romană*, ed. revised and supplemented, Universul Juridic Publishing House, Bucharest, 2011;
- Grigore Dimitrescu, *Drept roman vol. II, Obligațiuni și Succesiuni*, Imprimeria Independența Publishing House, Bucharest;
- I.C. Cătuneanu, *Curs elementar de drept roman*, Cartea Românească Publishing House, Bucharest, 1927;
- Laura-Cristiana Spătaru-Negură, *Legal Sanction in Ancient East*, in CKS Proceedings CKS (Challenges of the Knowledge Society), 2010, vol. I, Pro Universitaria Publishing House, Bucharest, http://cks.univnt.ro/cks_2010_archive.html;
- Vladimir Hanga, Mircea Dan Bocșan, *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006.