"Inheritance Institution under the Influence of Foreign Elements: Regulation (Eu) No 650/2012"

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Abstract

Inheritance is one of the most important institutions of Civil Law and this is not only a legal relationship that has the most frequent and continuous application in practice, but what is most important for this institution comes as a result of the object of this institute, which has to do with the transfer of rights and obligations only as a result of the death of the owner of the property.

The aim of this paper is to give an overview of the hereditary right in its general aspects regulated by the International Private Law. In order to present a complete picture, the heritage institution at European level has been analyzed, based on the Regulation (EU) No 650/2012, as long as Albanian has the status of a candidate country for the European Union integration. The Regulation, "European Justice Certificate" is nothing other than harmonization, unification and international coordination in the field of private law, and in particular in hereditary law, which will regulate the entire hereditary relationship at the European level. It also brings with it a series of facilitations, but also various problems which in practice have not been missed and will continue to display again.

At the same time, the Regulation introduces some significant changes in the jurisdiction area where it provides some mechanisms allowing harmonization of the rules for dealing with cases of succession in all the countries of the European Union.

The authors conclude that although this regulation comes as one of the most important instruments the European Union has drafted, doubts arise again whether this normative will be effective at the level that can provide solutions to all issues related to legacy at the international level.

Keywords: International Private Law, Inheritance, European Union, European Justice Certificate, Legal Norms.

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1. Introduction

1.1 The issue presentation

Judging that the inheritance relationship constitutes one of the most important institutes of law, both nationally and internationally, in this article we have decided to talk about the hereditary right in its general aspects related to regulating this relationship in private international law. In order to present a complete picture, the heritage institution at European level has been analyzed, based on the Regulation No.650 / 2012, as long as our country has the status of a candidate country for the European family.

1.2 The purpose of the article

The Regulation, "European Justice Certificate" is nothing other than harmonization, unification and international coordination in the field of private law, and in particular in hereditary law, which will regulate the entire hereditary relationship at the European level and at the same time providing a series of facilitations, but also various problems, which in practice have not been missed and will continue to display again doubts or raise questions about the specific arrangements that this norm provides and necessarily applies to countries belonging to European space.

In this way, the aim of this paper is to give an overview of the hereditary right in its general aspects regulated by the International Private Law1.

Inheritance is one of the most important institutes of law, and not only for the legal relationship, which has more frequent and continuous application in practice, but what is more important for this institute is the consequence of the object of this institute, which relates to the transfer or transfer of rights and obligations only as a result of the death of the rightful owner of the property2.

Article 316 of the Civil Code of the Republic of Albania provides that: "Inheritance is the passing of the deceased person, one or more persons (heirs) by law or by testament, according to certain rules".

Article 317 of the Civil Code of the Republic of Albania provides: "Inheritance by law shall apply when the testator has not made a will, or has made only part of his estate, or when the will is wholly or partially invalid". This means that the first form, the inheritance by law, will apply when de cujus has not drafted a will, or has drafted only a portion of his estate, or when the will has been declared by a judicial body, partially or wholly invalid. From the very understanding of the wording of

[1] Article 2 of Law No. 10428 date 02.06.2011 'On Private International Law', provides that : the application of the international treaties ratified by law has priority upon this law when the provision of this law affect the regulation of the relationships with an international element as established in an international treaty.

2 From "Private Law", by Galgano. F, 2006, Third edition, p.971, Copyright "Luarasi" Tirane.

the above norm, it turns out that when it comes to the hereditary relationship, the testamentary will shall apply.

Immediately after the death of the person, the institution of inheritance comes to life in order not only to enable the transfer of these rights, but also to regulate all dealings, such as the transfer based on legal provisions relating to the separation, transfer and designation of persons who inherit. This is precisely the time when the heirs or non-heirs (the persons who will benefit from the transfer of rights and obligations without having to exercise any power over them) become the heirs of the taxes previously enjoyed by the *de cujus*[3]. And it is precisely the opening of will, the essential element that gives rise to the transfer of property rights and obligations, which comes immediately after the death of the person who enjoyed it.

The primary function of the inheritance right is to identify persons inheriting *de cujus* (inheritor) and identify the property that passes on to them.

The right to the inheritance derives from the institution that regulates the continuity by providing and facilitating the smooth transition of property after the owner's death. Thus, due to its vital importance on the social stratification, it needs to be analyzed in a broad economic and social context as long as it fulfills both of these functions.

The economic function is related to the regulation of the transfer of property of the deceased person. This function is closely related to the principle of the willpower of the decedent, under which it is possible for a person to decide, after certain conditions, to divide his property after death.

On the other hand, the social function of the right of inheritance relates in particular to the support and protection of the family as a social unit, thus, imbuing this institution with a major impact on the family and often on the family law as a whole. The social function of the right to inheritance is related to the preservation and protection of the family as a social community and more like the nucleus of society, and this fact explains why the right to inheritance is influenced by social developments affecting the family.

2. The Importance of the Institute of Inheritance

Naturally, the question arises: where is the importance of the institute of inheritance when its functions are defined?

It is precisely the importance of the right of ownership in today's society, connected with the special way of acquiring ownership, as defined in Article 41, paragraph 2 of the Constitution[4], which provides: "the property is acquired by donation, by inheritance, by purchase and in any other classical way envisioned in

3 Article 316 of the Civil Code of the Republic of Albania provides that: "An inheritance is the transfer by law or will of the deceased's estate (inheritance) to one or more persons (heirs), according to certain rules.

4 The Albanian Constitution, Article 41, paragraph 2.

the Civil Code ". In this way, our Constitution has listed inheritance as one of the classic ways of gaining ownership, but the Constitution as the fundamental law of every state only provides for a general norm of declarative character, as further regulation of this institute is laid out by the Civil Code. The Code, for its part, not only provides for the institute of inheritance, but also regulates it in detail with a large number of legal provisions.

The heritage institute is becoming increasingly important in judicial practice. This proves the fact that judicial conflicts over this institute are increasingly occupying the work of judges and lawyers.

When we talk about the importance of the heritage institute at national level, it is worth remembering the importance of this institution in such challenging times of globalization that society is facing today. The creation of a European common space has enabled attempts to harmonize the inheritance law in each European Union country. To clarify this, it is enough to mention the legal norms. Historical and doctrinal development has highlighted the importance of legal norms, which tend to regulate the behaviour of entities in a given society. On the other hand, it has been identified that legal norms may also pose a conflict with the legal order, which have no binding nature.

The legal norms of a state will constitute the legal order of that state and the question rightly arises: “Should these legal norms be upset or attempted to regulate a certain behavior or relationship that carries foreign elements in itself?

To answer the above question comes the hypothetical example of the marriage of an Albanian citizen with an Italian citizen, who marries in the French state, and after several years of marriage, the spouse demands divorce of marriage, therefore filing a law suit requesting divorce. The first question that arises in this case rightly will be: Who will be the law that will regulate the termination of this relationship? “Who will be the competent court that will proceed and will have jurisdiction to pronounce itself in this case?” Both of these questions arise only as a result of the different citizenship of the subjects and the interference of the third state, where they have linked their marriage, different from the citizenships of the subjects. Thus, when a particular legal relationship would have to touch another legal order, we would say that we are dealing with legal relations with foreign elements. All norms that will regulate relationships with foreign elements will be defined as norms of international law. We may take as an example the inheritance relationship, which tends to be regulated by a particular law, but that the immovable property that requires to be transferred to the heirs is located in a state other than the state in which the testator has drafted and registered the act of his testamentary. The object of international legal norms will be only those legal relationships that apply between sovereign states and other entities that are legally recognized as international actors. Both the international and domestic legal norms can and have the authority and jurisdiction for judging or regulating the legal relationship between their citizens.

How does the norm of private international law achieve this function? Function is a characteristic element of the structure of private international norms that refers to the legal order that will regulate the legal relationship, which links the facts or issues of law to a given legal order, thereby, defining the foreign norm that must be implemented. The European Union has undertaken legislative initiatives that pertain to private law. All normative acts have tried to reach inevitable harmonization and uniformity of private law, bringing a much needed harmonization of international private law regulations among their member states. It is understandable that the Europeanization or instrumentality of private international law will have significant effects on the laws of the Member States' private international law, but on the other hand, it sets out certain objectives that are not always feasible or easily implementable in the domestic legal regulation of the member states' conflict rules.

3. Regulation No. 650/2012

The new law of the European Union, Regulation No.650 / 2012 "On jurisdiction, applicable law, recognition and enforcement of judgments and acceptance of original instruments in inheritance is of relevance and introduces a European Certificate of Succession.

The Europeanization or instrumentality of such a delicate issue of law, which seems closely linked to internal legal regulation, is indeed the most fulfilling ambition that the European Union has taken in the field of coordination and cooperation in the field of civil law.

Among other things, it is worth mentioning that the purpose of the regulation is to subject the inheritance relationship to a universal and single jurisdiction, according to which the jurisdiction of a single court is to be decided on the whole of the inheritance issue.

From this point of view, it follows that jurisdictional norms and norms on applicable law are constructed in parallel way. The basic criterion that the regulation provides for the settlement of inheritance issues will be the criterion of the relationship that provides for "its habitual residence", thus, it will be adequate to resolve the inheritance relationship issue, the court of the state in which the testator has his / her place of residence at the moment of death (Article 4).

The criterion of permanent residence is accepted by many different acts of private international law and constitutes an autonomous criterion, but on the other hand, it must not be forgotten that this criterion has in its complexity a factual nature and will vary according to the circumstances of the specific cases and the assessment that the judicial authority will present5. To go towards the criterion of a common place of residence, it must include not only the objective elements (dealing with the type and duration of the socio-economic-cultural relationship between the subject and a state), but also the subjective element (will / desire) of the subject who wants to have a stable relation in the state that interests him most.

5 Article 7 of Law No. 10428 date 02.06.2011 'On Private International Law".

Given the two elements it turns out that it will become possible to highlight the center of interests of the deceased, related to "personal, family, professional and economic order". A special importance introduces Article 10 of the regulation, which deals with a subsidiary jurisdiction (supportive). This article mandates that in those cases in which the testator's ordinary place of residence is not in the territory of a Member State, then the court of the State in which the property is situated shall have the jurisdiction over the entire inheritance issue and, respectively, when: 1) the tenant at the time of death holds the nationality of that state and, if that is impossible, when: 2) the testamentary has had his former residence in that state and from the time the court has considered the case has not passed 5 years from the change of his or her residence.

The issue would be problematic when the deceased was a citizen of two or more member states. For these cases, it was necessary to create the above mentioned European Certificate of Inheritance. The reasons that justify the creation of a European Justice Certificate are many:

On the one hand there is the free movement of persons, which encourages individuals to purchase material goods (for the necessity of living, of working or business, for investment, or for tourist holidays) in states other than in which they are citizens. On the other hand, there is the frequency with which the same forms of inheritance issues are presented, such as death inheritance, a relationship that is often disciplined through a single law (that may be of citizenship, residence, or the law chosen by the decedent). The combination of these two elements (ownership of a majority of assets belonging to one entity, though located in different countries) has made the phenomenon of so-called inheritance with foreign elements or international heritage increasingly important. Here, facing the elements resulting from different legal systems.

At the same time, legacies with foreign elements have become much more evident the need to protect the multitude of legal relations, especially when the latter have as their object "the goods" (assets) that are included in the inheritance relationship (not only real estate, but also participation as a shareholder in a company, or loans such as for banking institutions, etc.).

Convinced it can be said that the European Justice Certificate was born as a vehicle with the purpose intended to allow faster and safer circulation of material goods transmitted due to death.

The necessity for international administration and regulation of inheritance issues has been identified since The Hague Convention in 1973, which came into force only 20 years after its drafting. This convention specifically provided for the creation of an "international certificate" which on the one hand had to designate (Article 1) "the person or persons responsible for administering the immovable and movable property of the inheritance" and on the other to show the "power of these persons". Although the previous model for foreign (international) heritage management, The Hague Convention, did not prove successful and was not effective in its application.

Immediately after the failure of The Hague Convention, the new model applied was the French Law in 2002. In particular, this right recognized greater efficiency the *acte de notoriete* (notary act). Thus, the *acte de notoriete* (notary act) became the principal instrument for proving the quality of the heir, (as Article 730/3 provides) would be authentic and true. All these initiatives paved the way for the development of the newest European perspective mentioned throughout the article's handling the regulation No. 650/2012, which followed the development of the European Heritage Certificate.

4. Results

Regulation no. 650/2012 represents the first attempt to "achieve" the realization of a holistic unification of international law norms related to the heritage institute.
Regulation and solutions provided for in Regulation No. 650/2012 seems to best reflect the effort to overcome all the barriers or technical difficulties encountered in inheritance law with foreign elements.
At the same time, the need for this new instrument at the community level turns out to be indispensable so that it can address all the problems that may arise in the discipline of inheritance law internationally.
Although this regulation comes as one of the most important instruments that the European Union has drafted, doubts arise whether this normative will be ineffective at the level that can provide solutions to all issues related to heritage at the level international.
It is understandable that during the implementation of this regulation, numerous problems will arise that may have to do with: the selection of the law to be applied to a particular legacy; with positive and negative conflicts of laws; cases of litigation (litigation); the decline contrary to the public internal order; lack of legal certainty; the obstacles encountered in the recognition and enforcement of foreign decisions and many other cases that would really raise questionable doubts whether this regulation would be or not fully effective in achieving a unified regulation.

5. Conclusions

In the end, it is important to emphasize that the Regulation No.650 / 2012 is the main instrument in international private law, which regulates uniformly in all EU countries, the important heritage institute.
The new instrument, which tends to regulate and include in its scope of application all those situations or hereditary relations that are affected by the foreign element, based on the transitional provisions provided in Article 84 of this regulation, has started to apply from 17 August 2015.
The new European norm is undoubtedly one of the most ambitious achievements ever undertaken by the European Union in the framework of judicial cooperation on civil law issues. Almost all other regulatory instruments previously undertaken or even those that have managed to enter into full effect (including Regulation "Brussels 1" and today "Brussels 1 bis"), do not have managed to fully cover the

regulation of the institute of inheritance, thus, allowing a considerable gap in the field of inheritance issues. This has all but vanished with the advent of Regulation 650/2012. The reason for its entry into force may be seen in two main perspectives: on the one hand, Regulation no. 650/2012 represents, not only the European community but also beyond, the first attempt to "achieve" the realization of a complete unification of the norms of international law related to the institute of heritage.

On the other hand, it can be said that the regulations provided in the new text of this regulation reflect a wider scope which constitutes the entire framework of this regulation. Also, the regulation strengthens and develops in its entirety the "language" of private international law by enriching it with various elements that are related and different from each other according to the connection criteria or provisions contained in this regulation.

This paper succinctly stresses the importance of the most rigorous application of this regulation taking into account not only its fluctuations, but also the interstate coordination between the member states. On the other hand, the cases are specified when in practice problems may arise that have their genesis in the interpretation of the provisions of Regulation 650/2012.

Finally, considering that the inheritance relationship is one of the most important institutions of law, both nationally and internationally, the applicability and validity of this new norm will be based almost entirely on the will and the degree of coordination shown by the member states and third countries, which will not infrequently be affected by the arrangements provided for therein.

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