Chapter I

Introduction[1]

1. Motivation. In the attempt to characterize the matter of successions, the famous civil law scholar and Professor George Plastara noted: „this body of knowledge is extremely important, due to the fact that the right to succeed is closely tied with the property, as well as with the family and sometimes even with the political structure"[2]. A not to a lesser extent famous colleague of his, Professor Otetelişanu addressed the students in the following manner:

> „You must keep in mind that the manner in which the family was organized was always closely tied with the manner in which property was regulated and the regulation of the property further tied to the right to succeed, which is a consequence of the right to ownership […]."[3]

We have embarked in this research project in the year 2011 because the enactment of a new civil code is a moment of balance in the legal evolution of any nation. A fruit of certain exceptional circumstances[4], it also conveys the reaching of a certain degree of maturity. This forces the Romanian legal specialist to undertake a retrospective examination, in order to be able to ascertain the value and meaning of the shift taken on the 1st of October 2011. The transitory provision of art. 91 LPA mandates that the retrospective should not be of a purely historical nature, but a necessary one: the successional provisions of the Cuza Code have the capacity to be applicable for at least another couple of decades from the time of its loss of force as a normative framework.

Moving from the general nature of the Code when viewed as a whole to the particular nature of its fourth Book which is dedicated to inheritances, we observe that the latter showcases two particular traits: the successional law is one of constant application and is endowed with

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[1] Bob, *Probleme*, p. 16-19.

[2] Plastara, *Curs*, p. 9.

[3] Otetelişanu, *Curs III*, p. 254.

[4] Any code implies an escape from the past, usually caused by a crisis or by a regime or political change (Camille Jaufret-Spinosi, *Pérénité, evolution ou désuétude des codes: aspects de droit compare*, in Revue de la recherche juridique, No. spécial 2005, p. 2688).

a strong technical character[1]. By comparatively analyzing the Romanian Commercial Code of 1888, we notice how it was forced to resist a period of claustration during the communist regime, its application practically undergoing suspension between 1950 and 1990. The ideological changes, regardless of their color, have not though suspended for one moment the utility and application of the successional rules. The technical character basically refers to the fact that it deals with pecuniary legal rapports, which interest the family – a conclusion that is obvious for the inheritances; as far as the liberalities are concerned, their study consists to a great extent of the research of the manner in which the human being is allowed to deny the family members of goods. All these rights are set at the frontier between the law of the patrimony and that of the family[2], a fact illustrated by the dependence of the inheritances and the liberalities on the social factors which bear influence upon the family's regime. ECHR notably held within its decisions that the area of successions and liberalities between close relatives is intimately associated with the life of the family[3].

2. The matter of inheritances thus belongs at the crossroads between family law and property law, depending on the state of the society at a given time. By analyzing the issue in its depth, we notice that the patrimonial rapports between the spouses or between the relatives are archetypal of their personal rapports; in other words, the configuration of the personal relationships between the family members exerts an influence upon the nature and extent of the pecuniary relationships within it.

Apparently, the main role in this determination is played out by the individual wills, while the law only intervenes subsequently: the matrimonial regimes are not applicable except in the absence of the marriage contract, the legal succession will not proceed unless in the absence of the will. This triumph of the will is in reality far from absolute. There are common rules applicable to the various matrimonial regimes,

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[1] Flour, *Droit*, p. 6.

[2] *Id.*, p. 7-8.

[3] *Marckx c. Belgia*, Decision of 13.VI.1979, series A nr. 31, p. 23-24, § 52 and *Pla și Puncernau c. Andora*, no. 69498/01, § 26, ECHR 2004VIII. See the commentary regarding these decisions in S. Gătejeanu, *Dreptul la respectarea vieții de familie și succesiunile*, in RRJ (4) 2012, 2, pp. 246-252.

the majority of them imperative in nature, whose number rises in the last period in the European legislations. Within each conventional regime, there are basic principles which cannot be ignored; as such, the freedom of the spouses is reduced to that of their choice of a legal status. The successional reserve is no different. The legal regime of the liberalities depends on the perspective of the society regarding the family, reflected in the legislative policy: the freedom to enact a will is complete in the Anglo-Saxon law, the result of an individual view in which man is an absolute master of all that he owns and does not justify himself before his relatives; the European continental law, in its Romano-Germanic tradition, limits individual property to the extent of a certain family affection[1].

At an overview, we observe thus far that legal rapports of a pecuniary nature which interest the family and have a pronounced technical character are engaged. These aspects led the French scholarly literature to the introduction of the category of *patrimonial family law*: the matrimonial regimes and the inheritances are the marriage, the family under its patrimony aspect. The patrimonial law is an autonomous one, the family law is a legal and even imperative one: at the border between them, one must proceed to a process of interweaving – an endeavor which our research project aims to achieve in respect to the particular Romanian state of the matter.

3. This explains the existence of a special approach plan, intimately linked to each and every one of us, which is added herein. The death of an individual is an event of maximum importance in the human society. The role of the legal specialist that is confronted with the inevitable passing away is not limited to presenting and applying certain patrimonial transmission techniques, as it is sometimes believed[2]. This is only the

[1] Flour, *op.cit.*, p. 10, where he also offers specific examples applied to the French legislative evolutions.

[2] In other words: "If law is the art of dividing the goods and attributing to everyone that which justly belongs to them, death is an intense opportunity to request that it be done: the death of a human person mechanically brings the end of the legal personality which corresponds to it, death determines a redeployment of the property and debts of the deceased which sits often at the center of the conflicts, not only between those who have the vocation to receive all or part of this patrimony, but also between the latter and third parties (the creditors of the deceased, the creditors of the creditors, the financial administration etc.). The succession of the heirs of the deceased even represents a model-concept for the lawful resolve of the conflicts of interest" (Zenati, Revet, *Successions*, p. 17).

final step, an end mandated by situations generated by a multitude of consequences that are subsequent to any death:

- the psychological shock that was caused, felt by the ones close to the deceased as well as the ones that knew him either directly or indirectly;

- the array of social rituals and individual reactions, more or less linked to the occult and to the instinctual, that the death of a person triggers automatically;

- the reorganizing of the human group (of smaller or larger dimensions) in which the death of the person leaves a void which may reinstate everything;

- the technical reactions to the disappearance of a tax paying subject, patrimony holder and professional, worker or/and holder of an office;

- the revealing (by the opening of a will, the posthumous publication of memoirs, discovery of a correspondence etc.) of certain deeds and decisions belonging to the past which have the effect of disturbing the present: unknown filiation issues, illicit holdings, hidden bigamies, hereditary diseases, withheld fraudulent activities, unconfessed antipathies, questionable moral inclinations ... and the surprises may continue.

Romanian civil law authors sadly do not take these aspects into account more than extremely superficially. The matter of successions is analyzed in a unilateral manner by our scholarly literature. Successions are viewed as a purely technical field, in which mathematically convenient solutions are communicated in a cold manner to some law abiding citizens which have anyway already proceeded to hide or divide (appropriate) a large part of the estate.[1]. Neither our authors nor the civil lawmaker deal with the involved human factor, with its echoes in the micro (family) and the macro (social) planes.

[1] With the notable exceptions of the monografies authored by N. Titulescu, *Împărţeala moştenirilor*, Bucureşti 1907 (see chap. III sect. II) and by F. Vădeanu, *Transmisiunea moştenirii*, Bucureşti 2009. More recently: *** *Culegere de practică notarială. Spețe comentate*, D.Rotaru [and] D. Dunca (coord.), 2 vol., Bucureşti 2013-2014; I. Popa, *Drept civil. Moşteniri şi lliberalităţi*, Bucureşti, 2013; D. Negrilă, *Moştenirea în noul cod civil. Studii teoretice şi practice*, Bucureşti 2013; id., *Testamentul în noul cod civil. Studii teoretice şi practice*, Bucureşti 2013; id., *Dreptul de opţiune succesorală. Studii teoretice şi practice*, 2 vol., Bucureşti 2014-2016.

4. In our opinion, a correct approach is founded upon the analytical use of three aspects:

- the sociological evolutions (1);
- the historical evolutionary perspective upon the institutions (2);
- the contextualized approach (3).

(1) The surveys and the statistics represent the accurate reflexion of the sociological tendencies. We will not comprehend the manner in which the surviving wife became main actor in the legal devolution if we do not pay attention to the manner in which, at a certain given historical moment, our co-nationals used to perceive the family. And this conception is derived not only from the experience of the case law, but also from the conclusions of the sociology of the family, which our authors and lawmakers do not make use of. We will understand why the apparently obsolete special available quota of the surviving spouse in concurrence with the descendants of the deceased originating in previous links is still relevant only if we observe the fact that the average life expectancy, the professional validation opportunities and the individual mobility have all increased. These led to a plurality of successive family homes, to the decline of the institution of marriage and to the divorce becoming common, as well as to the emergence of the mono-parental families[1].

(2) The current successional institutions were not created by the codifying pioneering work of the tribunes of Napoléon in 1804, nor by the genius of Austrian Franz von Zeiler in 1811 or by the richness of the drafters of the German BGB in 1896 – and certainly to an even lesser extent by the commissions established by Cuza in 1859 and 1862. If we are to look at the example of the legal inheritance, it will be revealed how the rules set forth by Justinian in the VIth century did not become essentially different in the XXIst century. Similarly, the solemn nature of the final will was practiced even before the Law of the XII Tables (Vth century B.C.), and the changes that the metaphysical atmosphere surrounding the will has suffered up until the present have not stripped it of this character.

(3) Our authors expose the problems and seek solutions without taking into account the legal transplant nature of the regulation

[1] See for other supplemental evolutions, for the moment though specific only to the Western context Maury, *Successions*, p. 2.