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DEPRIVATION OF THE RESERVED PORTIONS IN FRANCE FROM THE ENTRY INTO FORCE OF THE UNIFIED CIVIL CODE TILL OUR PRESENT DAYS

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In France the private law of the pre-revolutionary period was dominated by customary law: in the southern areas of the kingdom were applying legal books which were basically based on Justinian Roman law, while in the northern areas were dominated by local customs. In the 15th century, legal unification efforts began with the writing of customary law systems, which became the basis of common French private law and traces of which can be found in Code civil as in force today. The French Revolution also had a decisive impact on the unification process and there was an urgent need for a new civil code based on common constitutional principles.

Keywords: *disinheritance, legitimate portion, reserved portion, Code Civil, inheritance, last will, legal history*

Franciaországban a forradalom előtti időszak magánjogát a szokásjogok rendezték: a királyság déli területein az alapjaiban a justinianusi római jogra épült jogkönyveket alkalmazták, míg az északi területek a helyi érvényességgel bíró szokások uralma alatt álltak. A 15. században kezdődtek meg a jogegységesítési törekvések a szokásjogi rendszerek írásba foglalásával, amelyek a közös francia magánjog alapjaivá váltak és amelyek nyomait a ma érvényben lévő Code Civilben is megtaláljuk. A francia forradalom a jogegységesítés folyamatára is döntő hatást gyakorolt, immár sürgős szükség volt egy új, közös, alkotmányos alapelveken nyugvó polgári törvénykönyvre.

Kulcsszavak: *kitagadás, kötelesrész, Code Civil, öröklés, végrendelet, jogtörténet*

Introduction

Before the creation of the common private law code, almost all provinces or territories in France had their own private law systems, there were several different customary law systems in force, and accordingly the law of succession was arranged in different ways. In the Kingdom of France the unification of private law began

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when in the 15th century various customary regimes began to be written down, thus trying to provide some kind of stable framework for the system of private law. In France, the pre-revolutionary legal system – the period of the ancien régime – was interspersed with a number of attempts to unify the law, which undertook to gather the applied solutions and issue their commentaries rather than to renew them. The outbreak of the French Revolution on 14 July 1789 also had fundamental effects on the processes of the unification of law. It is worth to look at the bumpy way of the creation of the unified French Civil Code, with special attention to the development of the legal institution of the legitimate portion, highlighting the enforcement of the freedom of will.

1. The initial difficulties of the entry into force of the Code civil and the debates over the reserved portions during legislation

In France, the revolutionary events had overthrown the French absolutism and swept away the so-far present old legal system – referred to as *ancien regime* – as a consequence of which French politicians, lawyers could start establishing the modern state- and legal system. One of the most significant steps within the circle of establishing a unified legal system in the sequence of revolutionary events was the approval of the Declaration of Human and Civil Rights *(Déclaration des droits de l'homme et du citoyen)* by the Constituent Assembly on 26 August 1789. Besides declaring the equality before the law *and* the separation of powers, the Declaration also recorded the sanctity of the right to property (point 2), as well as it stated that one is free to do everything that is not forbidden to do by law and by which one does not harm anyone, and that practising the natural human rights can only be limited by law, and what is not prevented from doing by law, cannot be prevented by anyone (points 4 and 5). In accordance with the spirit of the Declaration, taking it as a foundation, the Constituent Assembly on 3 September 1791, approved the constitution of the first French Republic, the article I of which *(Titre Premier – Dispositions fondamentales garanties par la Constitution)* decreed[1] the establishment of a common civil code definitive for the whole kingdom. In order to call the codex into life, the Constituent Assembly established a committee on 13 October 1791.[2] *(Comité de législation civile et criminelle.)* The committee was divided into two parts, each consisting of 24-24 members; the first one was the *„section systématique",* while the second was the *„section des rapports"*[3]. In the first – basically the group carrying out codifying activity – Duscatel, Laplaigne and Lesueur got the task of establishing the laws concerning wills, while Delmas, Robin and Bournel got the ones concerning lawful inheritance. [4] Taking into consideration that none of

[1] See the text of the Constitution of the year 1791: https://www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire/constitution-de-1791, 25 December 2019.

[2] RUSZOLY József: *Európa jogtörténete*. Püski Kiadó Kft., Budapest, 1996, 142–143.

[3] Annie JOURDAN: La Convention ou l'empire des lois. *La Révolution française* 2012, 3rd Edition, 1–2. https://journals.openedition.org/lrf/730#ftn6, 25 December 2019.

[4] Annie JOURDAN: op. cit. 2.

the committee's codification drafts were negotiated, the new legislative body, the National Convent decided to set up a new committee *(*this was the so-called '*Comité de législation civile, criminelle et de féodalité')*, the chairman of which was Régis de Cambacérès and it consisted of 48 members and 14 alternates[5]. During its work, the committee 'set out to supervise in accordance with the republican order' the laws created from the beginning of the revolution in the private law field[6]; they did not aim at creating a completely new draft. On 9 August 1793, the committee submitted the first draft of the Code civil to the National Convent, which was primarily their chairman's, Cambacérès' work. Not surprisingly, the Covent rejected it, explaining that it was created in the spirit of the old times and it bears too much resemblance to the ancient laws of the monarchy, it lacks the new notions, as well as it shows a deficiency in connection with significant principles, which themselves would be meritorious and worthy of serving as the foundation for laws of a free and reviving, reforming nation.[7] Though Cambacérès' draft was not liked by the National Convent, its proposals for inheritance law were enacted as independent act on 6 January 1794 *(17 Nivôse an II)*. Thus the determining event of this period was, from the point of view of inheritance law, the approval of the Act on Inheritance Law of 6 January 1794 – as well as the Act on the Rights of Children Born Out of Wedlock, on 2 November 1793, which meant a final break away from the laws applied in the old system. By abolishing the feudal privileges and the creation of the Declaration of Human and Civil Rights, as well as by approving the Constitution established on the basis of it, equality, providing the equality of rights determined the field of inheritance law, as well. The Act of 6 January 1794 ruled that in the absence of a will the testator's daughters and sons inherit in equal portions and there must not be any distinction between offsprings born in and out of wedlock; furthermore, first-born children no longer enjoy any priority. The act went further than this, as it ruled with a retroactive effect that the estates opened after 14 July 1789 – the day that is considered the breaking out of the revolution – have to be redistributed among the heirs to implement the equal share among the heirs. The repartition has to be implemented regardless of all the law, customary law, legal practice, donation, dispositions of property upon death and the partitions already done[8]. Furthermore, in the spirit of the equality of inheritance, the Act annulled the wills concerning the cases in which the testator deceased before 14 July 1789. During the negotiations over the above-mentioned act, a fierce debate broke

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5 Annie JOURDAN: op. cit. 2.

6 TAKÁCS Tibor: *A francia magánjog fejlődésének története (Code Civil és előzményei)*. PhD-értekezés, Miskolci Egyetem Állam- és Jogtudományi Kar Deák Ferenc Állam- és Jogtudományi Doktori Iskola, Miskolc, 2005, 129.

7 *The monthly law magazine and Political Review*. Vol. I. February to May, London: published by A. Maxwell, Bell Yard, Law Bookseller to His Late Majesty; and Milliken and Son, Dublin, MDCCCXXXVIII, 382.

8 Loredana GARLATI: Women's Succession from the Middle Ages to the Modern Era. In: *Succession Law, Practice and Society in Europe across the Centuries* (ed.: Maria Gigliola di Renzo Villata), Springer, 2018, 223–224.

out over the extent of testamentary liberty; it is worth reviewing the diversity of the arguments pro and contra. The opponents of testamentary liberty – for instance Mirabeau, Tronchet, Dupont de Nemours or Robespierre – basically clung to Rousseau's leading principle, that is, 'property right dies with the person'[9]. According to their opinion, the existence of wills is of opposite nature, harmful for the state, thrusts families into deterioration, as it is the nutritive medium for jealousy and hatred within the family. Restricting the making of dispositions of property upon death was desirable also financially in the eyes of its supporters, because according to them, the lawful inheritance would facilitate the retreat of the latifundium, that is, it would induce the more balanced distribution of land and would widen the spectrum of owners' layer[10]. However, in the light of the principles desired to be enforced by the revolution, their supporters did not wish to fully eliminate the dispositions of property upon death, but its possibly most significant reduction: Mirabeau suggested to determine the testator's free dispositions in one-tenth of his/her assets, Tronchet in one-fourth.

In the eyes of the defenders of testatory liberty – including Cazales and some convent members of southern decent – the dispositions of property upon death was the very same natural right as the right to alienation or encumbrance, which cannot be abolished by written laws[11]. According to their opinion, restricting or abolishing testatory liberty would involve the decrease in entrepreneur spirit, which would entail the decrease of economical production, the general deterioration of the standard of living.

As the outcome of the debate, the act significantly cut the testatory liberty as compared to the previous status: in case of having descendants the testator could decide voluntarily about one tenth of his assets – either with a legal transaction between living persons or in case of his/her death; and if he/she had only collateral relatives, he/she had the liberty to make dispositions over one-sixth of the estate[12], however, he/she could allocate to outsiders from his assets, not to his/her heirs. The explanation for the drastic decrease of testatory liberty is to be found probably in the fact that in harmony with the revolutionary spirit, the legislator endeavoured to provide extremely big reserved portions for the children in the name of equality, since as a result of the provisions, the testator's children more or less equally shared the parents' assets. The general principles of the revolution, such as the fundamental right to property, political liberty and individual equality were the main objectives of the revolution against the old regime; despite this, apparently, the aim of legislation in the revolutionary era was not only realising children's equality, but also eliminating the testatory tyranny in order to keep the family assets together.

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9 Quoting: Jean BRISSAUD: *A history of French private law*. (The Continental Legal History Series), Volume 3. Little, Brown, and Company, Boston, 1912, 746.

10 Jean BRISSAUD: op. cit. 746.

11 Jean BRISSAUD: op. cit. 746–747.

12 See Joseph DAINOW: Forced Heirship in French Law. *Louisiana Law Review* Volume 2, Number 4, May 1940, 675–676.

Cambacérès submitted the second draft to the National Convent on 9 September 1794 and taking the previous reasons for rejection into account, they had significantly decreased its length – instead of the previous 719 articles, the second draft consisted of only 297 articles[13] – as well as they placed the emphasis on defining general concepts as an innovation. However, the National Convent rejected this work, too, because with the use of the general concepts, they were afraid of the "judges' arbitrary interpretation of law"[14].

The third draft of the Code civil was also submitted by Cambacérès – following the termination of the National Convent – this time to the Council of the Five Hundred on 14 June 1796. Cambacérès loyally followed the proposals of legislation and following the second rejection, fully keeping the National Convent's reasons for rejection in mind, he prepared his third draft consisting of 1104 articles[15], which was characterised by the mass of accurate legal categories instead of the general concepts[16]. It would have brought changes in relation to the drafted inheritance law as well, because it would have preserved the extent of transferable assets in case of descendants in one tenth of the assets, while in case of exclusively collateral relatives it would have given the testator the liberty to make dispositions over one-third of his assets.[17] The codex would have brought significant changes in the inheritance law status of adopted children as well. After the marriage it would have provided the acknowledged child born out of that wedlock not only his/her legal share of inheritance; similarly to the adopted children, who would have been entitled to half of the inheritance which was due to the biological children[18]. The endless debates over the inheritance rights of children born out of wedlock, the divorce and the common assets of spouses significantly worsened the chances of codification and these debates greatly contributed to weakening the foundations of the draft.

Thus, Cambacérès' third draft also failed, and instead of being drafted by the defeated Cambacérè, the fourth version of the Code Civil this time was compiled and submitted to the Council of the Five Hundred under the direction of the lawyer Jean-Ignace Jacqueminot on 21 December 1799. The fourth official draft also failed, because the codification work was pushed into the background because of the establishment of the first consular government on 25 December 1799. Furthermore, Jacqueminot would have increased the testatory liberty further by the measure that one could have made free decisions concerning one fourth of the probate assets for the descendants; one third if the testator would have had brothers/sisters,

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13 RUSZOLY József: op. cit. 143.

14 KECSKÉS László: *A polgári jog fejlődése a kontinentális Európa nagy jogrendszereiben*. Bővített, második kiadás. HVG-Orac Lap- és Könyvkiadó Kft., Budapest, 2013, 187.

15 RUSZOLY József: op. cit. 143.

16 Cf.: TAKÁCS Tibor: op. cit. 144–145. and https://www.senat.fr/evenement/archives/D37/code2.html, 27 December 2019.

17 Joseph DAINOW: op. cit. 678.

18 See: TAKÁCS Tibor: op. cit. 146–147.

and one half of it if only more distant collateral relatives had been left, like uncles or cousins.[19]

Thus, during this temporary, codex-less period, the regulation of inheritance continued to take place according to the Act on Inheritance Law of 6 January 1794; however, due to its unpopularity[20], it became necessary to amend it, which occurred with the act approved on 25 March 1800 *(4 Germinal an VIII)*. The Act ruled that the testator can freely dispose of one fourth of his/her testatory assets if he/she had less than four children; of one fifth of his/her assets if he/she had four children; of one sixth of his assets in case of having five children and so on[21]. Besides this, it became possible to allocate portions for some heir as well. The part of the testatory assets to be obligatorily allocated to the entitled persons was particulary big, however, from the appearance of the demand for increasing the testatory liberty we can conclude that the fact that was realised that in the spirit of equality, it is worth endeavouring towards some kind of balance and the state should give more space to its citizens in the field of the free utilisation of their assets.

For Napoleon Bonaparte, the freshly appointed consul, for the sake of the country's unity, it became a priority to create a common, legal codex to be applied uniformly to everyone. Therefore, through his consular decree of 12 August 1800, he ordered the establishment of a committee for the development of a new draft of the Code civil; namely according to the text of the decree, he appointed François-Denis Tronchet, Jacques De Malevillet, Félix-Julien-Jean Bigot De Préameneut and Jean-Étienne-Marie Portalist [22] for this post: two from the field of customary law, two from the land of written law[23]. The committee submitted the so far fifth draft of the Code Civil on 21 January 1801[24], this was followed by a lengthy series of negotiations, during which fierce debate developed about the liberty at dispositions of property upon death and the extent of the reserved portions. Allowing unrestricted testatory liberty never emerged in the French legislature, it was only the extent of restrictions and the circle of persons entitled to the reserved portions that came up as questions.

Many proposals were put forward concerning the extent of descendants' reserved portions, but each person proposing the motions agreed that the reserved portions conceived as a parental obligation of care must be maintained, which is not only in the interest of families, but also via the families and society, it is that of the state's as well.[25]

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19 Joseph DAINOW: op. cit. 678.

20 See: Joseph DAINOW: op. cit. 676–677.

21 Jean BRISSAUD: op. cit. 747.

22 Jean-Étienne-Marie PORTALIS: *Discours, rapports et travaux inédits sur le Code civil*. Joubert, libraire de la cour de cassation, Paris, 1844, XXXV–XXXVI.

23 Joseph DAINOW: op. cit. footnote Nr. 49, 678.

24 PORTALIS: op. cit. XXXVI.

25 See: Joseph DAINOW: op. cit. 679–682. as well as DELL'ADAMI Rezső: A köteles rész. VIII. *Magyar Themis*, 1879, 40th Edition, 310.

In his introductory speech in front of the State Council, Portalis presented one's rights over his/her property cease to exist after his/her death and that the state's intervention into the issues of inheritance is inevitable, because the interests of the persons entitled to the survival reserved portions are much wider than those of the testators. He detailed that a restricted space has to be provided over the parental power, because the formation of good family spirit serves the interests of the state as well.

Maleville highlighted that the unrestrictedness of the disposition of property upon death might evoke the hatred and jealousy of the other, not beneficiary children. Undoubtedly, most fathers are just and know that they owe the same tenderness towards each of their children, but there are opposite examples, therefore the law must prevent their injustice and whim.[26] At the same time he stressed that the *raisons d'être* of testatory liberty is indeed justified, because it provides an opportunity for fathers to compensate possible disadvantages among their children that are caused by nature or assets; the second argument is that they deliver sorrow or reward into their hands so that they maintain subordination and the calm in the families, that allows the state to rest.[27]

Bigot De Préameneu presented that restricted disposition of property upon death cannot be contrary to the parents' wish; instead it is in harmony with their assumed emotions. Besides this, providing for the children is not exclusively the task of the parents, but it is also an obligation of the citizens and the society to provide the appropriate civil existence for the children.

Furthermore, Portalis, Maleville, Jollivet and Galli encouraged the positive departure from the inheritance law of March 1800: they suggested that the testator – either with a transaction among living persons or in case of his/her death, if he/she has left surviving children or descendants – should be able to freely dispose of one-fourth of his/her assets, of the half of his/her assets if there are surviving ascendants or siblings, and of three-thirds if only a nephew or a niece is left behind him/her.

Tronchet argued for the curtailed testatory liberty and was holding to the legislation so far, because according to his opinion, if it were allowed that the testator allocates a major part of his/her assets to a person outside the family, it would enhance feud and inequality within the family, while it is an obligation of the fathers to pass their assets down to their heirs.

Napoleon himself came up with the proposal[28] that it would be worth defining the reserved portions of the descendants in accordance with the size of the testator's assets; in case of assets under one hundred thousand Frank half of the assets, while in case of assets over one hundred thousand Frank one child's portion could be alienated by the testator. In this model, Napoleon envisioned to prevent the fragmentation of smaller assets and the formation of larger ones.

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[26] Jacques de MALEVILLE: *Analyse raisonnée de la discussion du Code civil au Conseil d'État*. Deuxième édition. Paris, 1807, 386.

[27] Jacques de MALEVILLE: op. cit. 388.

[28] DELL'ADAMI: op. cit. 310.

Despite the difficulties earlier, Cambacérès did have a fundamental influence on the creation of the first French Civil Code, because the State Council eventually accepted his proposal, which was included in the 913 Section of the Code civil: in case of leaving one child behind, the testator's liberty to make dispositions of property upon death extends to one-half, in case of two children to one- third, in case of three or more children to one-fourth[29].

Section 914 regulates the principle of substitution: in case of the children falling out, their children step to their places. The antecedents were entitled to the reserved portion if the testator had left no descendant: the reserved portion was half of the assets in that case if the testator left antecedents in both branches and one-third if in only one branch (Section 915).

It is important to mention that the entitlement of the surviving spouse did not get included in the original text of the Code Civil; therefore, the widowed spouse was not entitled to reserved portions, although he/she was considered a lawful heir according to the provisions (Section 767).

The State Council finally rejected the reserved portions of collateral relatives; according to Portalis, the mutual obligation of care existing between descendants and antecedents lays the foundation for entitlement to the reserved portions, but there is no such obligation among siblings. The state council acknowledged the arguments of the Tribunate for the debate of the drafts[30], saying that in case of collateral relatives, the mere affinity cannot be the basis of restricting the owner's testatory liberty[31]. In accordance with this, Section 916 recorded that in the absence of antecedents and descendants the testator could consume the whole assets. The draft submitted as the fifth was eventually approved and the code civil was proclaimed on 21 March 1804. Thus, in relation to the reserved portion of the testatory estate, the act is worded differently from the European legal codices, which determined the particular extent of the reserved portions; but it determines the extent of the portion of the assets that is the testator is free to make dispositions of – in case of transactions among living persons or in case of his/her death in total.

2. Regulating the deprivation of the reserved portions in the Code Civil up to 2001

The dispositions of the Code Civil have stood the test of time so much that the major part of the codex had been untouched since the dispositions set in 1804. The issue of testatory liberty in the field of inheritance law repeatedly came into view in the second part of the 20th century and the debate focused on the social consequences of the strongly restricted testatory entitlement. What generated the debate

[29] "913. Les libéralités, soit par actes entre-vifs, soit par testament, ne pourront excéder la moitié des biens du disposant, s'il ne laisse à son décès qu'un enfant légitime; le tiers, s'il laisse deux enfans; le quart, s'il en laisse trois ou un plus grand nombre."

[30] Joseph DAINOW: op. cit. 682.

[31] Maleville did not agree with this, according to whom, providing for the indebted brother/sister is a moral obligation of the testator. See: Jacques de MALEVILLE: op. cit. 395.

was Frédéric Le Play's work titled *La réforme sociale en France* published in 1864, in which the author explained among several things that through restricting the dispositions of property upon death, the fragmentation of assets prevent the maintenance of safe homes and the formation of equality within the families.[32] Le Play supported the unrestricted testatory liberty, because according to his opinion, this system would protect society from corruption, as it would legalise property transfers[33], furthermore, it would encourage the economy by actually providing the opportunity to each testator to choose among his/her children, train, then couple the best performing man[34]. Le Play had several supporters, however, their attempts to amend the Code were useless, to which the inspection covering the whole country in 1866 also contributed[35], which had the result that there were no particular desires to alter the liberty of wills, but the existing system got almost a complete approval. The reform of the Code Civil did not take place until 2006, however, at this time the legislator made fundamental changes in the system of rules concerning the reserved portions by abolishing parents' entitlement to the reserved portions and at the same time, by introducing the reserved portions for the surviving spouse. In the absence of children, the surviving spouse of the testator now was due one- fourth of the estate[36] as long as he/she did not divorce the testator.

Since its entry into force to our present days, the Code Civil allows to deprive the persons entitled to the reserved portions of their portion of the estate to be allocated mandatorily by law only when referred to unworthiness. The *ancien régime* before the unified Civil Code knew the possibility of disinheriting, what is more, the case of disinheriting because of getting married without parental consent as introduced with a royal decree; the legal institution still disappeared from the French law. The Act on Inheritance Law on 6 January 1794 did no longer mention, neither is there any legislation concerning it in the Code Civil. Favard de Langlade, the chairman of the Tribunate quoates in his work[37], that the ancien régime knew and applied a less drastic way of disinheriting, which was rather based on fatherly affection, farsightedness and care than having any feature of punishment. Indeed, fathers had the possibility in relation to their profligate children to dispose that they let only the usufruct for the portion of the estate that would be due to the descendant in question, but the property rights of the portion of the estate would be trans-

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[32] See: M. F. le PLAY: *La réforme sociale en France déduite de l'observations comparée des peuples européens,* Tome second. Paris, 1864, 6.

[33] Lásd: M. F. LE PLAY: op. cit. 77–78.

[34] M. F. LE PLAY: op. cit. 86.

[35] Joseph DAINOW: op. cit. 690.

[36] Code civil Section 914-1. The Nr 2006-728 Act proclaimed on 23 June 2006 was amended and the provision became effective on 1 January 2007.

[37] Cf.: FAVARD DE LANGLADE: *Répertoire de la nouvelle législation civile, commerciale et administrative, ou analyse raisonnée*. Tome second, Paris, MDCCCXXIII, 482–483.

ferred to the other children. The reason had to be marked, as in the absence of it, the child was entitled to demand his/her part of the heritage.[38]

Favard de Langlade continues to quote that the Civil Code did not take over disinheriting, primarily this way avoiding the development of scandalous lawsuits and taking into consideration the legislation so far, it established the right of inheritance in a way so that the reserved portions suffered no harm under any condition.

Section 727 of the Act regulated – and it regulates today as well – the rules of depriving of the heritage[39], namely in relation to all the persons entitled to the reserved portions. The dispositions of Section 727 remain in effect with the following text-content until the amendments made in the Code Civil in 2001:

> *'727. Unworthy and thus to be excluded from the inheritance are:*
> *1. Who has been convicted of committed or attempted murder of the deceased;*
> *2. Who initiated such capital crime suit against the deceased that the court ruled as calumny;*
> *3. Heirs of age who, although had known of the murdering of the deceased, failed to report it to the court"*[40].

It can be stated that the original dispositions of the Code Civil concerning unworthiness are rather laconic; they raise several important issues, the answering of which remained the task of theory and jurisprudence. It can be observed that the attitudes are rather limited in scope. Maleville mentioned this in his commentary[41] when he described that Roman law contained far more dispositions of unworthiness, which is right, because there are far more serious attitudes than the above-mentioned three reasons, which can serve as the basis for the deprivation of the heritage.

In connection with the first point, Maleville highlighted[42] that for the realisation of unworthiness, the suspicion of murder or its attempt, as well as murder committed or attempted out of self-defence do not belong to this category either.

According to the Act (Section 728), failing the obligation to report, which is regulated in Point, 3 cannot be applied to the descendants or antecedents, spouse, brothers or sisters, uncle, aunt, neither the nephews or nieces of the murderer. The circle of persons is far wider than that of known from Roman law, which provided such concession to the father, mother, son, as well as the husband or wife of the

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[38] Favard de Langlade mentioned as an example the quoated practical precedents collected by de la Combe in Rousseau's work about civil case law – the ones dated on 18 January and 30 June 1678, on 31 May 1680, on 1 April 1686, as well as the judicial decisions made in July 1729 – which the author marked under the entry 'Disinheriting'.

[39] Code civil des Français. Édition originale et seule officielle. Paris, de l'Imprimerie de la République. An XII. 1804, 177–178.

[40] *Franczia Polgári Törvénykönyv (Code Napoleon)*. Fordította KÚN Barna. Kiadja Kugler Adolf, Pest, 1866, 140.

[41] Jacques de MALEVILLE: op. cit. 203.

[42] Jacques de MALEVILLE: op. cit. 201–202.

murderer. Alexandre Duranton also criticised the narrow circle of unworthiness reasons in his grandiose commentary written to the Code Civil. According to his opinion,[43] although there may be several attitudes or situations caused by the persons entitled to the reserved portions, which harm the testator in his/her person, honour or wealth, the serious consequence of full deprivation of their heritance cannot be extended to them on the basis of an analogy. Duraton pointed out in connection with Point 1[44] that complicity also has to be listed here, considering that the penal laws impose the same penalty for them as for the direct perpetrator. He added that the unworthiness of the heir cannot be established on the basis of this point if the charge against him/her was dropped, or he/she acted in self-defence or in the defence of others, as well as if he/she was forced to commit it, as in such cases it does not classify as a crime. Duranton also pointed out that the completed or attempted crimes must be intentional, negligence is out of the question. According to Duranton's opinion, injury or death during a duel cannot be considered as a part of the circle of disinheriting described in Point 1, as death or injury may be an inherent feature of duels. At the same time, he mentioned[45] that the royal courts classified death in a duel as murder several times, while the Supreme Court of Cassation represented the opposite opinion compared to this practice, which was based on the fact that the Criminal Code did not have any dispositions against duels; furthermore, if the winner of the duel respected the related rules and the court did not convict him of murder, there cannot be ground for disinheriting either. In connection with Point 1, jurisprudence pointed out that one cannot be pronounced unworthy until the proceedings against him/her have been completed.[46]

The circle of cases regulated in Point 2 suggests that the legislator did not intend to extend unworthiness together with false accusation to all crimes, just to the cases of establishing the capital crimes. Thus, the falsely alleged crime had to be so serious that may have entailed capital punishment, life imprisonment, the application of the loss of citizen status [47] or even deportation[48]. Duranton felt it important to highlight that it would have been more correct if the legislator had extended the circle of unworthiness to other serious charges, there may be numerous crimes which harm the testator not only in his/her life, through his/her civil rights, liberty, but also through losing his/her honour. As far as issues of jurisprudence are concerned, Duranton wrote in general that the existence of unworthiness must be stat-

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[43] M. DURANTON: *Cours de droit français suivant le Code civil*. Quatrième édition. Tome sixième. Paris, 1844, 109–110.

[44] M. DURANTON: op. cit. 111.

[45] M. DURANTON: op. cit. 114–115.

[46] Tribi civ. Montreuil-sur-Mer, 5 March 1897, D. P. 97. 2. p. 184. In: *Code civil annoté d'àprès la doctrine et la jurisprudence. Avèc renvois aux ouvrages de MM. Dalloz. Quatorzième édition revue, corrigée et augmentée*. Librairie Dalloz, Paris, 1913, 181.

[47] Chabot DE L'ALLIER: *Commentaire sur la loi du 29 germinal an XI, relative aux successions*. Formant le Titre I[er] du Livre III[e] du Code Civil. A Paris, Chez Artaud, Libraire, Quai des Augustins, N°42, AN XIII-1805, 26.

[48] See: M. DURANTON: op. cit. 22–123.

ed in a suit, with a judicial decision, and the suit has to be initiated in front of the court competent at the residence of the unworthy person. In most frequent cases when the unworthiness comes up during the probate, the suit has to be started at the court competent at the residence of the deceased.[49] Point 3 is less accurate compared to the first two circle of cases, as the legislator did not set a final deadline for the announcement. Answering the question separately in each case probably belonged to the consideration of the judge; considering the circumstances, the announcement must have occurred with no delay so that the heir could not be punished with unworthiness. In connection with Point 3, the case is interesting in which the Supreme Court of Cassation with its Nr 88-13766 verdict of 11 October 1989 it maintained the verdict of the La Cour d'Assises de l'Hérault which ruled the wife unworthy of inheriting after her husband. According to the case, the wife's lover killed the husband with a weapon on 4 October 1977, as a consequence of which, the Hérault Assize Court imposed a 15 years' imprisonment on the lover for wilful murder, while the wife was sentenced to 5 years' imprisonment for failing to help a person in danger. The wife initiated a suit in relation to sharing the estates, demanding the portions due to her. The La Cour d'Assises de l'Hérault rejected the motion and ruled the wife unworthy, because she did not report the planned murder to the authority, although she had information about it. The wife filed an appeal against the verdict, which the Supreme Court of Cassation pronounced unfounded.

3. Regulating unworthiness in the Code Civil from 2001 up to our present days

The legal institution of unworthiness was completely untouched by the French legislator until the reform of the Code Civil in 2001[50], at this time significant changes were made in the concerning legislation.

From 1 July 2002, the law categorises the attitudes realising unworthiness around two circles of cases: those that 'automatically'[51] entail the legal consequence (Section 726) and the ones in which the legislator leaves it to the choice of the testator or other heirs whether to initiate the proceedings to pronounce the unworthiness (Section 727).

Therefore, in accordance with Section 726, excluded is from inheriting after the testator:

> *1. The person who as perpetrator or as accomplice has been convicted by the court of committing or attempting the wilful crime of murder against the testator;*

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[49] M. DURANTON: op. cit. 134–135.

[50] Act Nr. 2001–1135, effective from 1 July 2002. Source: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000582185&categorieLien=id, 31 December 2019.

[51] Brigitte BELLOIR-CAUX: *Le droit des successions et des libéralités en schémas*. Ellipses Marketing, 2016, 288.

> *2. The person who as perpetrator or as accomplice has been convicted by the court of the wilful crime of violence leading to the death of the deceased.*[52]

Additionally, according to Section 727, it is possible to consider the following persons unworthy of inheriting:

> *1. The person who as perpetrator or accomplice has been convicted by the court of the misdemeanour of wilful murder or its attempt;*
> *2. The person who as perpetrator or accomplice has been convicted by the court of the misdemeanour of violence leading to the death of the deceased;*
> *3. The person who has been convicted by the court of making false testimony against the deceased in criminal proceedings;*
> *4. The person who has been convicted by the court because he/she deliberately failed to prevent a crime against the life, physical integrity of the testator, although he/she could have done it without risking himself/herself or a third party;*
> *5. The person who has been convicted by the court of the defamatory criminal charges against the testator if a punishment was also imposed because of the reported facts.*[53]

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[52] „Sont indignes de succéder et, comme tels, exclus de la succession:
1° Celui qui est condamné, comme auteur ou complice, à une peine criminelle pour avoir volontairement donné ou tenté de donner la mort au défunt;
2° Celui qui est condamné, comme auteur ou complice, à une peine criminelle pour avoir volontairement porté des coups ou commis des violences ou voies de fait ayant entraîné la mort du défunt sans intention de la donner." https://www.legifrance.gouv.fr/affichCode.do;jsessionid=E6AEFCCCA566621BC5C8DD5869F34CD9.tplgfr28s_3?idSectionTA=LEGISCTA000006165513&cidTexte=LEGITEXT000006070721&dateTexte=20200117, 17 January 2020.

[53] Peuvent être déclarés indignes de succéder:
1° Celui qui est condamné, comme auteur ou complice, à une peine correctionnelle pour avoir volontairement donné ou tenté de donner la mort au défunt;
2° Celui qui est condamné, comme auteur ou complice, à une peine correctionnelle pour avoir volontairement commis des violences ayant entraîné la mort du défunt sans intention de la donner;
3° Celui qui est condamné pour témoignage mensonger porté contre le défunt dans une procédure criminelle;
4° Celui qui est condamné pour s'être volontairement abstenu d'empêcher soit un crime soit un délit contre l'intégrité corporelle du défunt d'où il est résulté la mort, alors qu'il pouvait le faire sans risque pour lui ou pour les tiers;
5° Celui qui est condamné pour dénonciation calomnieuse contre le défunt lorsque, pour les faits dénoncés, une peine criminelle était encourue. https://www.legifrance.gouv.fr/affichCode.do;jsessionid=E6AEFCCCA566621BC5C8DD5869F34CD9.tplgfr28s

In Section 726 we find the expression *'peine criminelle'*, which according to the French criminal law, is a punishment in case of crimes sanctionable from ten years' to lifetime imprisonment, while the expression *'peine correctionnelle'* in Section 727 is a punishment imposed in cases of misdemeanour, the circle of crime cases punishable with a maximum of 10 years' imprisonment and other criminal law sanctions (e.g. fine)[54].

The difference between Points 1–2 of Sections 726 and 727 is that on basis of the reasons existing in Section 726, the court has to state the unworthiness (in case of a request for this), while the unworthiness reasons of Section 727 can be considered; following the inspection of all the circumstances of the case, the court may as well reject pronouncing the unworthiness[55]. According to the Section 221-2 of the Code pénal, someone who wilfully murders someone is punishable with 30 years' imprisonment, the classified cases of which are also listed by the French Criminal Code (Sections 221-4); in these cases lifetime imprisonment can be imposed. Homicide thus always may entail unworthiness, which has to be pronounced by the court in accordance with Point 1 of Section 726 in case of imprisonments exceeding 10 years[56], a more lenient punishment is of optional nature, according to Point 1 of Section 727. In accordance with the Sections 222-7 of the Code pénal 222-7, someone causing violence resulting in death is punishable with 15 years' imprisonment, however, it is a condition that his /her intention does not extend to causing the death. It is also true here that imprisonment exceeding the duration of 10 years is to be judged according to Section 726, while punishment lighter than that may lay the foundation for the reason for unworthiness.

A very important innovation of the legislator is that he mentioned after the circumstances of unworthiness that heirs who had committed the crimes described in Point 1 or 2 of Section 727 have to be considered unworthy, but because of their death, the penalty could not be implemented or state coercion could not be applied, or the possibility of applying state coercion ceased to exist. We could see that the attitude defined in Point 1 of the above mentioned reasons entails inheritance law consequences only if the heir has been convicted by the court of crime committed against the life of the testator. The law did not take into consideration the cases in which the perpetrator could not be accounted for due to criminality obstacles. In

_3?idSectionTA=LEGISCTA000006165513&cidTexte=LEGITEXT000006070721&dateTexte=20200117, 17 January 2020.

54 See: Code pénal Sections 131-3 and 131-4.

55 See: Brigitte BELLOIR-CAUX: op. cit. 289.

56 For example, the Cour d'appel de Montpellier in its Nr. ct0050 decision of 11 October 2005, ruled the husband unworthy, who was finally sentenced to 12 years' imprisonment for murdering his wife. The Supreme Court of Cassation maintained the verdict in its effect with its Nr. 09-14353 decision of 1 June 2010, which ruled the husband sentenced to life imprisonment unworthy of inheriting after his wife.

connection with this, a well-known case in France [57] is very interesting, in which Richard X murdered his parents on 3 November 2000, then on the basis of the psychiatric expert opinions involved in the evidentiary proceedings – according to whom the defendant, due to his pathological brain functioning, was unable to realise the consequences of his actions – the French court of the first instance pronounced him irresponsible in accordance with Section 122.1 of the French Criminal Code and resumed the proceedings. Richard X using his inheritance claim, initiated a suit against his brother, Laurent X for sharing their parents's assets, however, his brother referred to the unworthiness of the former defendant, which was rejected by the court and the brother was obliged the brother to relaese the inheritance portion. With Laurent X's appeal the case arrived at the Supreme Court of Cassation, which rejected the appeal saying that the text of the law is unambiguous; the legislator requires judicial conviction because of homicide or its attempt.

Moreover, the situations of unworthiness against the life of the testator (Points 1 of Section 726 and 727) do not need any particular explanation.

In relation to Point 2, it seems evident that the intention of assault does not extend to homicide, because in that case the attitude would belong to Point 1. This was annulled by the verdict of the Supreme Court of Cassation[58], in which the Supreme Court of Cassation ordered the second instance court Cour d'appel de Paris to launch new proceedings and it stated that the state of the facts worded in the Point of the Section 727 does not require the intention of homicide to establish unworthiness. The legislator filled an important void by the fact that now the details of the unworthiness are also recorded by the law: the court can state the unworthiness of the heir based on the request of the heirs, which motion can be submitted within six months following the death of the testator; in the absence if heirs, the prosecutor can also start the motion (Section 727.1). The testator also allows starting the motion in his/her life, namely within six months following the establishment of the heir's guilt in the above acts, thus the testator too can start the proceedings for it. The legislator carried out significant clarifications; the law records the possibilities for forgiving unworthiness, namely the testator can do it in a valid will after learning about this attitude (Section 728). The existence of unworthiness is based on facts related to persons, therefore the Code Civil also records that the unworthiness does not affect the descendants (Section 729-1). The cases of unworthiness in French law, according to the former rules and following the changes as well, apparently belong to the category of criminal law; rules extended in 2001 are the wider variations of the previous dispositions. All the circles of cases are concrete; each contains an objective, indisputable fact, namely the

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[57] Nr. 11-10393. Supreme Court of Cassation decision. https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000025603375&fastReqId=1911360434&fastPos=1, 1 January 2020.

[58] 04-11910 2006. 3 October: The husband died of the wilful assault committed by his wife. During the procedure, it was proved that the intention of the wife was not aimed at causing death.

conviction against the heir. The former Point 3 proved to be a bit unclear, because we could find no guidance as to till when heir's announcement should take place.

Summary

The disappearance of the legal institution of the disinheritance clearly meant a weakening of the freedom of will in France. According to the regulations, the testator's freedom of disposition over his or her property consists in the fact that he or she may alienate his or her property over the legal portion, so he or she needs to leave untouched the legitimate portion parts. Unlike other civil codes in Europe, we do not find in the Civil Code a subjective category that – beyond the category of criminal law – could provide a morally or humanly appreciable, comprehensible basis for reducing the legacy of the testator, for example invoking immoral living or not expecting behavior. The testator has the opportunity to invoke unworthiness in a narrow circle, but the limits of this are set by law and not by the testator.

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