PRESCRIPTION OF THE DECEDENT'S DEBTS, DATING FROM THE TIME OF OLD AUSTRIAN CIVIL CODE FROM 1811 (ABGB) IN SLOVENIA AND CROATIA

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The establishment of the first Yugoslav state in 1918 was, from a legal point of view, the merger of six quite different legal traditions into one common state formation, and did not bring with it immediate legal unification, which was most evident in the field of civil law. Austrian Civil Code (ABGB)[1] of 1811, as an interesting and endurable sub-type of transnational law, governed almost exclusively, with minimal differences, civil law in most of the territory of the present-day Slovenia and Croatia. Its legal rules survived the Second World War and were applied well into the late 1970s, in part even until the enactment of the new Slovene Code of Obligations in 2002 and the Croatian Obligations Act in 2005. However, since ABGB as a source of law has never been definitively abrogated, its legal rules are still applicable for deciding disputes in both countries, even in the case of the liability of heirs for the deceased's debts, if the related contract of delivery was concluded as far back as 1960.

Keywords: ABGB; inheritance; contract of delivery; prescription; kinship; decedent's debts

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[1] Allgemeines bürgerliches Gesetzbuch (ABGB), JGS, No. 946/1811.

1. INTRODUCTION

Consider an example of possible practical value for both Slovene and Croatian judicial practice. In 1960 when Slovenia and Croatia were still a part of the unified socialist Yugoslav state, a contract of delivery and distribution of property during one's lifetime (hereinafter: contract of delivery) as one of contracts of inheritance was concluded, whereby the deliverer delivered certain property to his son as his descendant, in return for which the son was obliged to (also) pay to his sister (the deliverer's daughter) the sum of 60.000 dinars (YUD) within a period of two years from the conclusion of the contract as part of "inheritance dispensations" ("dedne odpravščine"), which the son fails to do either within that period or thereafter. The daughter subsequently as late as 2018 brings a lawsuit against the son's heir for payment of the debt, in accordance with the rules on the joint and several liability of heirs for the decedent's debts, and the Slovenian Court of First Instance takes the stance that the resolution *inter alia* involves application of the appropriate rules of ABGB, in Slovene known as "Obči državljanski zakonik" (ODZ) and in Croatian as "Opći građanski zakonik" (OGZ).

In this context it is also worth taking into consideration the disparity in basic civil law doctrine between the Yugoslav (then socialist) legal regime and the classic continental civil law regime, which in turn demands a thorough analysis of possible applicable laws according to the different legal questions and their nuances. Only then it is possible to delve into subject-matter to ascertain how to solve legal issues in the case at hand, which is prescription of the decedent's debts in relation to claims under the contract of delivery. It is first necessary to assess the nature of such contractual claims. Are they predominantly personal, based on *kinship* and thereby hereditary in nature, or are they (only) "regular" bilateral reciprocal civil obligations? Further on the nature of claims will have to be evaluated in relation to ABGB prescription rules regarding obligations based in kinship and personal law in general. The philosophical differences of two parallel legal regimes, being in force at the same time, thereby tend to produce intriguing interpretations.

The purpose of the present contribution is thus to present the view that the aforementioned claim for payment of a debt cannot be time-barred or lapsed, not only from the point of view of ABGB and the general provisions on civil prescription of the Yugoslav Act on the Limitation of Claims (ZZT)[2], enacted

[2] In Slovene: Zakon o zastaranju terjatev (ZZT), Official Gazette (OG) of FLRJ, No. 40/1953, *et seq*.

in 1953, but also from the point of view of the general rules on the liability of heirs for the debts of the decedent. The hypothesis of the non-lapse of such a claim at the time will be considered from the point of view of a particular time period and legal system at the reference time, which, also due to the then contemporary political nature of the Yugoslav State, had specific and perhaps from today's point of view quite different legal concepts and solutions, especially in this case involving *kinship relations* ("rodbina"), this primarily through the prism of the then in force Yugoslav Basic act on the Relationship between Parents and Children (TZRSO) of 1947[3] and of course the then still in force Yugoslav FLRJ Constitution of 1946[4], which at the time in Article 26(1) stated that: "Marriage and *kinship* are under the protection of the State", thereby by extension and *ex post facto* also ABGB.[5] And lest we forget, the last Royal Yugoslav Constitution from 1931[6] also similarly stated in Article 21, namely: "Marriage, *kinship* and children are all under the protection of the State", as opposed to the Vidovdan Constitution of 1921[7] that offered such protection only to the institution of marriage.

The first step will be therefore the identification of the relevant and applicable legal provisions in force at the time of the conclusion of the contract of delivery, with an introduction to the then in my view still applicable legal rules of ABGB in Republic of Slovenia (RS) and Republic of Croatia (RH). The hypothesis will then be attempted to be confirmed through an interpretation of the comparison with the Slovene Obligations Code (OZ)[8], which in RS since 2002 regulates the contract of delivery, which prior to that was regulated by the Slovene Inheritance Act (in Slovene: Zakon o dedovanju), which was enacted in 1977 (the Slovene ZD 1977)[9] as a statute of the then Socialist Republic of Slovenia (SRS), and before that in basically the exact manner in the Yugoslav Inheritance Act of 1955 (ZN (ZD) 1955).[10] Special attention will therefore be

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3 In Slovene: Temeljni zakon o razmerju med starši in otroki (TZRSO), OG of FLRJ, No. 104/1947.

4 In Slovene: Ustava Federativne ljudske republike Jugoslavije (FLRJ), OG of FLRJ, Nos. 10/1946 and 3/1953.

5 See in particular §§ 15, 40 and 1481 ABGB.

6 OG of Drava Banovina, No. 52/1931.

7 Vidovdan Constitution of the Kingdom of the SHS (OG of the Regional Government [for Slovenia], No. 87/1921), see Article 28.

8 OG of RS, No. 83/2001 *et seq*.

9 OG of SRS, No. 15/1976, 23/1978, OG of RS/I, No. 17/1991, OG of RS, No. 13/1994 *et seq*.

10 In Slovene: Zakon o dedovanju (ZD); in Croatian: Zakon o nasljeđivanju (ZN) (OG of FLRJ, No. 20/1955 *et seq.*).

given to the institute of prescription in the aforementioned context of "kinship" relations, since part of legal theory sees it as a special institute in terms of civil and contractual law. Some theorists explain that applicability of legal norms does not relate to this institute or at least not in the usual manner. According to such theories prescription rules of the newly enacted law could even be used retroactively to also apply to contract claims, which have been concluded under the previous law. However, these concerns, as will be explained, do not take into account the specific characteristics of contractual obligations pertaining to "kinship" relations as enshrined not only in ABGB but also, as we have seen, in the Yugoslav constitutional order of the time.

At the end of this section, Croatian regulation of these issues will be briefly presented, all bearing in mind that in 1960 civil law was still not uniformly regulated in the then joint FLRJ, nor did the Yugoslav Obligations Act (ZOR (ZOO) 1978) exist, as it was only enacted in 1978.[11] Thus ABGB with the notable exception of TZRSO, ZN (ZD) 1955 and ZZT was to a much greater extent applicable to most legal transactions in the now RS and RH, mostly due to the fact, that until the adoption of the Yugoslav ZOR (ZOO) 1978 provisions of ABGB, despite their de- but not abrogation in 1946 still represented the only comprehensive regional civil law codification. The hypothesis will thus be tested by analysing the provisions of ABGB, TZRSO, ZN (ZD) 1955, ZD 1977 and comparatively OZ and the case-law, to which will be added any eventual differences with the relevant Croatian legislation.

An important if not as previously mentioned decisive part of the analysis of the thesis will be the definition of the nature of the claim in the context of inheritance and the delimitation of the claim in question from an ordinary civil claim under the general rules of the law on obligations, by showing the key elements of "kinship" or descendancy which under ABGB, ZN (ZD) 1955 and TZRSO require specific legal treatment, all also through the prism of the aforementioned provision of Article 26(1) of the FLRJ Constitution that at the time afforded special (extended) protection of the State specifically to any "kinship" relations. The analyses described above, together with mutual comparisons, will be used to confirm or refute the primary hypothesis put forward.

[11] In Slovene: Zakon o obligacijskih razmerjih (ZOR), in Croatian: Zakon o obveznim odnosima (ZOO) (OG of SFRJ, No. 29/1978 *et seq*.).

2. APPLICABILITY OF THE LEGAL RULES OF ABGB IN THE LANDS CONSTITUTING THE TERRITORY OF SLOVENIA AND CROATIA

ABGB entered into force on 1 January 1812 in the then Austrian Empire, which only after the defeat of Napoleon fully encompassed the territories of both current RS and RH, as certain territories of both countries at that time were still part of the French Illyrian Provinces. As far as the present territory of RS is concerned, ABGB was first applied in the territories belonging to the lands of Styria and Carinthia, and after the fall of the Provinces in 1815 in Carniola and Gorizia, as well as Istria. The only exception was Prekmurje, which was in the same way as the now Croatian Međimurje and Baranja part of the Kingdom of Hungary proper until the SHS takeover in 1919, and where ABGB was in force only between 1853 and 1861 during the time of Bach's absolutism, after which Hungarian customary law (*de iure consuetudinario*) applied. In this part of Slovenia, the old Austrian rules, *i.e.*, also ABGB, were enforced for practical reasons, but only *de facto*, never *de iure*, and only after the SHS takeover and subsequent internationally sanctioned annexation in 1920.[12]

As far as the territory of RH is concerned, the circumstances were rather different in some parts as at that time most Croatian lands were part of the Lands of the Crown of St. Stephen (represented by a common Diet) with a rather extensive (legal) autonomy. Thus, for all parts of Croatia that belonged to the later Austrian half of the dual monarchy, ABGB entered into force on 1 October 1815 in Istria, on 1 January 1816 in most of Dalmatia, and a few months later on the Dalmatian islands of Koločep, Korčula, Šipan, Lastovo, Vis, Mljet and Lopud.[13] In all these parts ABGB was in force continuously until and after 1918.

In other parts of RH, which were part of the lands of the then Hungarian Crown but with the exception of Međimurje and Baranja, ABGB was introdu-

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[12] For more details see Skubic, Z., *Najemnine med epidemijo: ali v Sloveniji še velja pravno pravilo paragrafa 1104 ODZ?*, Pravna praksa, no. 20-21, 2020, pp. 10-11. The main reason was, that most of the former Hungarian judges and judicial staff left Prekmurje after the occupation of 1920, and were replaced by Slovene judges from across the river Mura, which mostly did not understand Hungarian as they were much more accustomed to the Austrian regulation, thereby also ABGB.

[13] See Čokolić, A., *200 years of the general Austrian Civil Code: Sources, creation and entering into force of the general Civil Code with the special emphasis on the Croatian legal areas*, Glasnik Advokatske komore Vojvodine, *vol.* 85, no. 12, 2013, p. 659 and Čepulo, D. *Hrvatska pravna povijest u europskom kontekstu od srednjeg vijeka do suvremenog doba*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2012, p. 227.

ced with the Imperial Patent of 1852[14] to the territories of the then joint Kingdom of (narrower) Croatia, Slavonia and Dalmatia. It should be added that ABGB remained in force in all the aforementioned territories after the 1918 with the exception of Međimurje and Baranja, which, like the Slovene Prekmurje, was at the time part of Royal Hungary proper until the 1919. Since the ABGB was repealed there in 1861, in Međimurje and Baranja, unlike in Prekmurje, Hungarian customary law, and not ABGB directly[15], was still in use until the 1918 and beyond, although its rules played an important role there as well.

At the end of the First World War, the State of SHS in 1918[16] and then Kingdom of SHS[17] (later Kingdom of Yugoslavia), declared the legal succession of all the state formations that at the time constituted the territory of this new entity. Thus, all previously existing legislation, including ABGB, remained in force in all territories where this Code had been in force before the 1918, which remained practically unchanged until the Second World War. After the end of that war, all regulations issued before 6 April 1941 were explicitly repealed in the new socialist Yugoslavia, first by a decree[18] and later by a special statute[19]. However, these regulations could still be applied, albeit as *legal rules*, but only to relations not regulated by newly enacted regulation and insofar as they did not contradict the new socialist order. And this, of course, was not the case with ABGB as it regulated civil law relations between private parties, although it was now no longer directly applicable positive law, but had the force and validity of legal rules.

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[14] In orig. Croatian: "Cesarski patent od 29. studenoga 1852, kriepostan za kraljevine Ugarsku, Hrvatsku i Slavoniju […]", Sveobći deržavo-zakonski i vladni list, No. 246/1852. See also Neschwara, C., *Die Geltung des Österreichischen Allgemeinen Bürgerlichen Gesetzbuches in Ungarn und seinen Nebenländern von 1853 bis 1861*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung, *vol*. 113, 1996, pp. 365-366.

[15] Čokolić, *op. cit.* (fn. 13), p. 659.

[16] For an example on Slovenia, see paragraph 6 of the first 1918 State of SHS Proclamation of the Slovene National Government, OG of the National Government [in Ljubljana], No. 1/1918: "All existing laws and all existing regulations shall continue to remain in force (...)".

[17] Vidovdan Constitution, with regard to the repeal of "inherited" legal provisions, contained in Article 142(1) the provision that upon its entry into force, "(...) all legal provisions contrary to it shall cease to be in force", which ABGB, which regulated strictly civil-law relations, certainly was not.

[18] Odlok o odpravi in razveljavljenju vseh pravnih predpisov, izdanih med okupacijo po okupatorjih in njihovih pomagačih (OG of DFJ, No. 4/1945).

[19] Zakon o razveljavljanju pravnih predpisov, izdanih pred 6. aprilom 1941 in med sovražnikovo okupacijo (OG of FLRJ, No. 86/1946).

At the end of the war, however, the territorial validity of ABGB was even extended to all the territories, ceded to Italy by the 1920 Treaty of Rapallo. In these not unsubstantial Slovene and Croatian territories, which officially became parts of the new Yugoslav State first in 1947 by the Treaty of Paris[20] and then in 1954 by the division of the Free Territory of Trieste[21], ABGB superseded the Italian Codice Civile of 1865[22] and its complete revision of 1942, which had been in force in these territories since 1928.

Finally, the rules of ABGB, which are the topic of this article, are part of the provisions of this Code, which were not amended by its partial revisions in 1914, 1915 and 1916, enacted only in the Austrian part of the dual monarchy, which at the time also covered the Slovene lands, Istria and Dalmatia. This means that their applicability is unchanged even if only the unamended text of ABGB is used as reference, such as in the then territories of (narrower) Croatia and Slavonia. In short, the conclusions that will be presented below have *the same applicative value* for legal practice in both RS and RH.[23]

3. LIABILITY OF THE HEIRS FOR THE DECEDENT'S DEBTS IN GENERAL

3.1. Slovenia

The Slovene ZD 1977, that in SRS replaced ZN (ZD) 1955, provides in Article 142 that an heir is liable for the debts of the decedent up to the value of the inherited property (para. 1), that an heir who has renounced the inheritance is not liable for the debts of the decedent (para. 2), and that, if there are several heirs, they are jointly and severally liable for the debts of the decedent,

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[20] Ukaz o raztegnitvi veljavnosti ustave, zakonov in drugih pravnih predpisov FLRJ na ozemlje, ki je po mirovni pogodbi z Italijo priključeno FLRJ (OG of FLRJ, No. 80/1947). On RS see Brus, M., *Veljava ODZ in druge avstrijske zakonodaje od prve svetovne vojne do danes*, in: Polajnar, P. A. (ed.), *Izročilo ODZ*, GV Založba, Ljubljana, 2013, p. 104 and the ruling of the Supreme Court of RS II Ips 256/2009 of 22.12.2011.

[21] Zakon o veljavi ustave, zakonov in drugih zveznih pravnih predpisov na ozemlju, na katerega se je z mednarodnim sporazumom razširila civilna uprava FLRJ (OG of FLRJ, No. 54/1954) and Brus, M., *op. cit.* (fn. *supra*), p. 104.

[22] See, *e.g.*, ruling of the High Court of Koper I Cp 343/2016 of 13.12.2016.

[23] If, of course, Međimurje and Baranja are partially excluded in view of their still somewhat relevant legal heritage of Hungarian customary law. See also Petrak, M., *Roman Law as Ius Commune in East Central Europe: the Example of the Lands of the Crown of Saint Stephen*, in: Sáry, P. (ed.), *Lectures on East Central European Legal History,* Central European Academic Publishing, Miskolc, 2022, pp. 31-32.

each to the extent of the value of her or his share of the inheritance, whether or not the division of the inheritance has already been effected (para. 3). The individual debts shall be divided among the heirs in proportion to their respective heritable shares, unless otherwise provided by the will (para. 4).

The decedent's estate thus passes to his heirs in accordance with Article 132 ZD 1977 at the time of death. The heirs thus (constituently) enter into all the substantive and procedural rights and obligations of their legal predecessor in title at the time of his death, except, of course, those of a strictly personal nature. Upon the death of the decedent, his/her debts and the debts of the estate become the burden of the decedent's heirs.[24] It is also clear from the case-law that, from the moment he/she is (declaratory) proclaimed heir, the heir is also liable for the debts of the decedent.[25]

Under the above conditions (*i.e.*, no renunciation of the inheritance, limitation of any liabilities assumed to the amount of the (positive) value of the inherited property), it is clear that the liability of the heirs for the debts of the decedent is joint and several, which means that the creditor has the right to choose whether to sue all the heirs or only some of them.[26]

3.2. Croatia

In Croatia, the (legal) situation was slightly different, although in principle basically the same conclusions can be reached. Until 2003, when the new Act on Inheritance was adopted in RH (Zakon o nasljeđivanju; ZN 2003)[27], the field of inheritance was (still) governed by ZN (ZD) 1955. Article 145 ZN (ZD) 1955 was a practically a verbatim copy of the provision of Article 142 of the Slovene ZD 1977, and the same conclusion applies to Article 135 ZN (ZD) 1955 which is identical to Article 132 of the Slovene ZD 1977. Furthermore, the currently applicable Croatian ZN 2003 in Article 139 until 2013 contained a regulation essentially identical to the aforementioned Slovene ZD 1977 in Article 142, and the same applies to the first paragraph of Article 3 ZN 2003 (in substance comparable to Article 132 ZD 1977), so that even in the case of retroactive application of ZN 2003, no direct conflict between the Slovene and Croatian inheritance regime can be established in this part.

[24] Ruling of the High Court of Ljubljana II Cp 2000/2018 of 12.12.2018.

[25] Ruling of the High Court of Ljubljana I Cp 3508/2009 of 31.3.2010.

[26] See rulings of the High Court of Maribor II Ips 59/2009 of 19.3.2009 and of the High Court of Ljubljana I Cp 660/2019 of 10.4.2019.

[27] OG of RH, No. 48/2003.

4. REGARDING STATUTORY PRESCRIPTION UNDER THE CURRENT REGULATION IN SLOVENIA AND CROATIA IN GENERAL

4.1. Slovenia

Article 335(1) OZ expressly as an *ius cogens* rule provides, in exactly the same way as the former initially Yugoslav ZOR (ZOO) 1978 provided in its Article 360(1)[28], that the right to demand performance of an obligation ceases with the lapse of the statute of limitations. This legal consequence is the result of the creditor's inactivity after the due date of his claim in the context of any relationship involving civil obligations and occurs when the statutory time-limit within which he/she could have demanded performance of the obligation has lapsed.[29]

As we shall see, a claim arising in the manner described above under a contract of delivery regulated by OZ could be considered to be lapsed which although it still exists but only as an unenforceable natural obligation.[30] Indeed, Article 346 OZ (*ibid*. Article 371 ZOR (ZOO) 1978) provides for a general prescription period of five years, unless, of course, a different prescription period is provided for by OZ or some other statute. Furthermore, the prescription period begins with the first day after the day on which the creditor (for the first time) had the right to demand fulfilment of the obligation, unless otherwise provided by statute.[31] The prescription shall occur when the last day of the period prescribed by law shall pass[32], including the time elapsed on behalf of the debtor's predecessors.[33] The longer prescription period of ten years is laid down in Article 356 OZ (Article 379 ZOR (ZOO) 1978), which implies that all claims established by a final court ruling, a ruling of another relevant authority, a settlement before a court or another relevant competent authority are statute-barred within this period. This rule shall also apply to claims of this kind which are otherwise subject to a shorter limitation period provided for by statute. Only all periodic claims arising from such rulings or settlements and

[28] See Article 339 OZ (*idem* Article 364 ZOR (ZOO) 1978), which provides that a legal transaction may not stipulate a prescription period longer or shorter than the time limit prescribed by statute, nor that some time will be discounted from the period of prescription.

[29] See Article 335(2) OZ.

[30] See Article 342 OZ (Article 367 ZOR (ZOO) 1978).

[31] See Article 336(1) OZ (Article 361 ZOR (ZOO) 1978).

[32] See Article 337 OZ (Article 362 ZOR (ZOO) 1978).

[33] See Article 338 OZ (Article 363 ZOR (ZOO) 1978).

falling due in the future shall be statute-barred within the period stipulated for the prescription of periodic claims.[34] Before the enactment of ZOR (ZOO) 1978 prescription periods for civil claims *de iure proprio* were regulated by ZZT, which was enacted in 1953, and with few exceptions provided the general rule of a proscription period of maximum ten years for such claims, unless another statute provided for a different period.

In the present case, it should be explicitly pointed out that the entry into force of OZ did not only entail a much-needed rethinking of the rules of the law of obligations within the civil-law system of RS, but also explicitly brought the *corpus* of contracts of inheritance back into the framework of the (primarily) general rules of the law on obligations. The rules governing the contracts of delivery, of subsistence and of lifelong maintenance are thus since 1 January 2002 instead of ZD 1977 part of OZ.[35] The same goes for the deed of gift to be performed after the donor's death, with the distinction, that this contract until enactment of OZ was part of the relevant legal rule of ABGB and not of ZD 1977.[36]

The fact that these contracts were (re)integrated among the rules of the general civil law obligations code with the entry into force of OZ is of significance as this fact also fundamentally changed the primary paradigm of interpretive placement concerning the assessment of these three contractual institutes. Whereas until 1 January 2002 these three contracts had to be viewed primarily through the prism of the greater alignment of the *corpus* of inheritance law to family or kinship law[37], since the enactment of OZ such dispositions tend to be viewed primarily through the lens of the (increasingly more) free disposition by each decedent of his/her property in accordance with the general law of obligations.[38]

[34] See Article 356(2) OZ.

[35] The first paragraph of the transitional provision of Article 1061 OZ provides that, upon its entry into force, the provisions of Articles 106 to 122 ZD 1977 pertaining to the contract for the delivery ceased to apply.

[36] See § 956 ABGB, now transposed to Article 545 OZ.

[37] This alignment of the inheritance law with kinship law is already evident in the provisions of ABGB, and is further accentuated by the definite separation of the *corpus* of the inheritance law from the *corpus* of the general civil law after the change of the societal system in 1945, first with the entry into force of 1955 ZN (ZD), where both the contract of delivery and the contract of lifelong maintenance were for the first time regulated as institutes, and then with the entry into force of ZD 1977, which remained in force in a practically unchanged text until 2001.

[38] See in this respect the ruling of the Supreme Court of RS II Ips 324/2016 of 27.7.2017.

4.2. Croatia

The new Obligations Act (ZOO 2005)[39], which in RH in 2005 (came into force in 2006) replaced the original Yugoslav ZOR (ZOO) 1978, in Articles 214 *et seq*. does not regulate the subject of prescription in a substantially different way from the way it used to be regulated in Articles 360 *et seq*. ZOR (ZOO) 1978 and is now also regulated in Articles 335 *et seq*. of the Slovene OZ. This means that, taking into account the above findings, the same conclusions should be reached in Croatia as well. The fundamental difference between the Slovene OZ and the Croatian ZOO 2005 may lie in the fact that the contract of delivery in Croatia is not regulated in ZOO 2005 but still in ZN 2003, in its Articles 105 to 115, and before that in the relevant articles of ZN (ZD) 1955. However, this will in principle not affect the final conclusions, since the rules of ZOO 2005, as we will see established, do not affect legal situations that arose before its entry into force (Article 1163(1) ZOO 2005). In short, despite these differences between the two regimes, the conclusions presented above for the Slovenian legal order can also be transposed to comparable circumstances, if they exist, in Croatia.

5. THE QUESTION OF STATUTORY PRESCRIPTION CONCERNING THE LIABILITY OF THE HEIRS FOR THE DECEDENT'S DEBTS

5.1. Prescription rules for heirs' liability in Slovenia, Croatia and former Yugoslavia

Slovene legal theory[40] and relevant case-law[41] establish the rule that an heir's liability for the debts of the decedent ceases only when the heir has actually paid the creditors' claims and/or his/her own claim up to the (positive) value of all the inherited property.

There is no explicit provision, that regulates prescription of the claim described above. In fact, the Slovene ZD 1977, similarly to the Croatian ZN 2003, and before that ZN (ZD) 1955, expressly provides only for:

- time limitation of a legacy – the right to request the fulfilment of a legacy is time-barred within one year from the date on which the legatee be-

[39] OG of RH, No. 35/2005.

[40] See, *mutatis mutandis,* Galič, A., *Fizična oseba in sposobnost biti stranka v pravdnem postopku*, Podjetje in delo, no. 6, 2003, p. 1778.

[41] See, *mutatis mutandis,* for example, the ruling of the Supreme Court of RS II Ips 265/2011 of 19.9.2013.

came aware of his right and was entitled to request the fulfilment of the legacy[42], but this rule cannot be applied in the present case, as a legacy consists in the testator's granting one or more specific things or rights to a specific person in his/her will, whether he/she may direct either the heir or any other person to whom he/she bequeaths something, that out of what he/she received he/she should give a thing to a particular person, pay him/her a sum of money, forgive him/her a debt, maintain him/her, or do something for his/her benefit, or forbear or suffer something for his/her benefit[43],

- time limitation of the right to claim the succession – the right to claim the succession as the decedent's heir shall be time-barred against a possessor in good faith within one year of the heir becoming aware of his right and of the possessor, but at the latest within ten years, counting from the death of the decedent for a intestate heir and from the proclamation of the will for a testamentary heir, and within twenty years against a possessor in bad faith[44], and
- time limitation for filing a lawsuit for the reduction of testamentary dispositions, which may be claimed within three years from the proclamation of the will, and the return of the gifts within three years from the death of the decedent or from the date on which the ruling declaring the decedent dead or the ruling establishing his/her death became final.[45]

Given that neither the Slovene ZD 1977 nor the Croatian ZN 2003 or ZN (ZD) 1955 contain any specific provisions on the prescription of the decedent's debts, it is clear that the other statutory provisions must be applied in the assessment.

In the circumstances of the present case, taking place in 1960, and given the indisputable "kinship" nature of such claims the provisions of ABGB must be applied, since the legal basis for the application of the legal rules of ABGB are the transitional provisions of OZ (Article 1060) and its predecessor, ZOR (ZOO) 1978 (Article 1106). Both, as well as the Croatian ZOO 2005 in its Article 1163(1), contain the same transitional rule: for legal relationships that arose before their entry into force, the legal rules in force at the time when the

[42] Article 94 ZD 1977 (similar in Croatia to Article 59 ZN 2003, before that Article 100 ZN (ZD) 1955).

[43] Article 85(1) ZD 1977.

[44] Article 141 ZD 1977 (*idem* Article 138 ZN 2003, before that Article 144 ZN (ZD) 1955).

[45] Article 41 ZD 1977 (*idem* Article 84 ZN 2003, before that Article 46 ZN (ZD) 1955).

legal relationship was formed apply[46], not even ZZT, as its rules concerning prescription in 1960 as will be elaborated further applied only to all other, that is all non-“kinship” claims or claims arising out of civil obligations of a general nature.

In general, the principle of non-retroactivity applied in aforementioned transitional rules, is one of the most important legal principles in civil law, underpinning notions like legal certainty, transparency and foreseeability. But when it comes to the institute of prescription different views with underlined theories emerge and should be discussed. With the enactment of ZOR (ZOO)1978, its Article 1106 noted, that the provisions of this statute cannot be applicable to the obligational relationships that were concluded before its entry into force. However, in addition to this ZOR (ZOO) 1978 in its Article 1108 also explicitly derogated the ZZT. This discrepancy has lead some to believe, that the rules of prescription are somehow exempt from the general prohibition of retroactive use, dictated by Article 1106, or should otherwise be interpreted differently. Some have even speculated, that this inconsistency might even suggest, that the special derogation rule of Article 1108 ZOR (ZOO) 1978 concerning ZZT implies, that the new prescription rules of ZOR (ZOO) 1978 should be used retroactively as to be applicable even to the obligational relationships already established when this statute came into force in 1978.

From annotations in Dr Stojan Cigoj’s Grand Commentary of ZOR (ZOO) 1978[47] it can be ascertained, that opinions on this issue vary. On the one side we have the view of Stojanović in Perović-Stojanović Commentary of ZOR (ZOO) 1978[48] that supported the notion, that in the case of newly enacted prescription time limits can be applied retroactivity even to already established obligational relationships and even in cases, where new time limits for prescription are shorter than the ones that were in force when aforementioned relationships were first concluded. This was at the time also the established stance of the relevant Anglo-American legal theory.[49]

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[46] See the accompanying text by Dr Miha Juhart to ABGB (facsimile edition from 1928, GV Založba, Ljubljana, 2011, p. 19).

[47] Cigoj, S., *Komentar obligacijskih razmerij: Veliki komentar Zakona o obligacijskih razmerjih*, *vol.* IV, ČZ Uradni list SRS, Ljubljana, 1986, pp. 2811, 2816-2818.

[48] Perović, S.; Stojanović, D., *Komentar Zakona o obligacionim odnosima*, *vol.* II, Novi Sad, 1980.

[49] Kisker, G., *Die Rückwirkung von Gesetzen: eine Untersuchung zum anglo-amerikanischen und deutschen Recht*, J. C. B. Mohr, Tübingen, 1963, p. 154.

However, Vizner in Vizner-Bukljaš Commentary of ZOR (ZOO) 1978[50] argues the opposite, *i.e.,* that the general rule of non-retroactive use of new legal provisions, enacted by the aforementioned statute and formulated in its Article 1106, must apply to prescription rules as well. According to Vizner the peculiarity of Article 1108 ZOR (ZOO) 1978 can be explained away by the fact, that in the field of Yugoslav general civil law of the time the only real official statute in force was ZZT as all other relevant sources of civil law, including ABGB, were due to their de- but not abrogation in 1946[51] converted into a *corpus* of legal rules, so it makes perfect sense, that ZOR (ZOO) 1978 had a special provision, that was intended to abrogate ZZT. This also means, that the rule of non-retroactive use of ZOR (ZOO) 1978 also pertains to the field of prescription, which is a much more plausible and persuasive legal interpretation of the relation between the provisions of Article 1106 and 1108 than the aforementioned Stojanović's. It should be noted, that the general principle of non-retroactive use of newly enacted regulation is intended to maintain legal transparency and certainty, thereby duly protecting contracting parties, that have concluded obligational relationships under the previously valid regime. And since the aforementioned parties at that time were not (and could not be) familiar with the content of the new regulation, they also could not have formed in advance a legally valid will to conclude any obligational relationships under these not yet enacted new provisions.[52]

This is, in our view, a principle which must be equally respected whether the previously valid but now abrogated law was a *corpus* of legal rules (such as ABGB) or pre-existing legal statute. It is also important to note, that Vizner's interpretation of this (in our opinion nominal) discrepancy between Article 1106 and 1108 ZOR (ZOO) 1978 as well as the aforementioned arguments were at the time also strongly supported by the eminent Strohsack.[53] Moreover, Blagojević in Blagojević-Krulj's Commentary of ZOR (ZOO) 1978[54] explicitly draws attention to the provision of Article 211 of the Yugoslav SFRJ Constitution[55] in force at the time, according to which neither laws nor thereby other

[50] Vizner, B.; Bukljaš, I., *Komentar Zakona o obveznim (obligacionim) odnosima*, *vol.* IV, Narodne novine, Zagreb, 1979, pp. 2951-2952, 2964-2965.

[51] See *op. cit*. (fn 19), Article 4.

[52] Vizner, B., *op. cit.* (fn. 50), pp. 2952 and 2965.

[53] Strohsack, B., *Uveljavitev zastaralnih rokov po Zakonu o obligacijskih razmerjih*, Združeno delo, *vol*. VI, 1978, p. 470; (in English: *Enforcement of limitation periods under the Obligations Act).*

[54] Blagojević, T. B.; Krulj, V. *Komentar Zakona o obligacionim odnosima*, *vol*. II, Savremena administracija, Beograd, 1980, pp. 709 and 713.

[55] In Slovene: Ustava Socialistične Federativne Republike Jugoslavije (SFRJ), OG of

legal regulations can have retroactive effect, which of course also applies to the entry into force of ZOR (ZOO) 1978.[56] As to the question which rules of prescription are to be followed, if at the onset of ZOR (ZOO) 1978 the previously valid prescription time-limit has not yet expired, Blagojević in his comments to its Article 1108 is clear: this situation is still subject to any legal regulation, in force before the enactment of the aforementioned statute in 1978[57], which in the circumstances of our case means also the relevant legal rules of ABGB, pertaining to prescription time-limits concerning obligations concerning "kinship" relations, *i.e.,* its § 1481.

The position that new rules on prescription, regulated by ZOR (ZOO) 1978, should except in a few special and limited instances[58] not have any retroactive effect as to previously in force time-limits that with the enactment of the said statute have not yet been expired, was also upheld by the relevant case-law of Yugoslav courts, be it on the federal but also on the level of the judiciary of the various federative republics and autonomous provinces[59], thereby also by the representatives of the judiciary of the now RS and RH.[60] But even taking into account the aforementioned special cases this exemption as such can only be applicable to claims which are of pure contractual nature and not, as has been evidenced, to claims arising from "kinship" relationships, that also include inheritance dispositions, enacted through appropriate inheritance contracts. The latter in our view has to be in the circumstances of the presented case from 1960 governed by the aforementioned § 1481 ABGB, which as a rule has remained unchanged since 1812 even in Austria, where this statute still has the status of directly applicable positive law. Therefore also modern Austrian commentaries concerning the provisions of this § may still apply. Koziol Commentary of ABGB[61] in relation to the provisions of its § 1481 reiterates, that obligational relationships, based on family (in a broader sense) and personal law in general,

SFRJ, No. 9/1974.

56 *Ibid.*, p. 709.

57 *Ibid.*, p. 713.

58 See in this respect the ruling of High Court of Maribor Cpg 147/95 of 7.7.1995

59 See Official standing No. 6/83 of the XXIII. Joint Session of judges of the Federal Court of SFRJ and Supreme Courts of Federative Republics and Autonomous Regions of SFRJ, 14. and 15.12.1983; Glasnik No. 19/3, IV, p. 30; Report on judicial practice of Supreme Court of SRS No. I/85.

60 *Simile* the ruling of the High Commercial Court of the Socialist Republic of Croatia (SRH) Pž 543/82 of 31.8.1982; see also Blagojević, T. B.; Krulj, V., *Komentar Zakona o obligacionim odnosima*, (Second Edition), *vol.* II, Savremena administracija, Beograd, 1983, p. 2268.

61 Koziol, H.; Bydlinski, P.; Bollenberger, R. *et al.*, *Kurzkommentar zum ABGB*, Springer-Verlag, Vienna, 2007, p. 1744.

can not be time-barred, thereby establishing that the same finding shall also apply to the rights deriving from these relationships, *i.e,* in the present case also performance of the obligations under the contract of delivery from 1960.

Additionally as already mentioned, the principle of non-retroactive use of new legal provisions is also respected in the provisions of the new Croatian ZOO 2005, *i.e.*, in its Article 1163(1), which is also *inter alia* evidenced by the Gorenc Commentary[62], which goes even further to reiterate, that with the aforementioned article ZOO 2005, just as the Yugoslav ZOR (ZOO) 1978 before it, upheld the general rule of non-retroactivity of its newly enacted provisions.

And even if interpretations regarding non-retroactivity of prescription rules in connection with ZOR (ZOO) 1978 are not unified due to some dissenting opinions, this question however seems to be unanimously answered also in case-law of Croatian courts. Using different rules regarding the remaining prescription time doesn't seem very practical and is prone to more mistakes and further points of contention. Since non-retroactivity of new legislation is even now constitutional guaranteed, it would also be wrong (or even unlawful) to allow a side door to retroactivity of prescription rules to contractual relations, which were created before the new legal provisions came into force. The lawmaker could have easily included in the new law a special, exemptive rule regulating how the new rules should be applied to older legal relations, but in the case of ZOR (ZOO) 1978 he did not.[63] In the opinion of the author of this article the most sound, transparent, foreseeable and practical solution is the continuous use of the principle of non-retroactivity concerning all abovementioned legislation, especially in the light of the fact, that in 1978 Article 211 of the then in force the Yugoslav SFRJ Constitution already contained the aforementioned constitutional guarantee. It is not logical or sensible in the opinion of the author that in the same statute the general principle of non-retroactivity of new regulation without explicit provisions to the contrary would not apply only to a certain legal institute (*i.e.* to the prescription rules) but would still remain in force for all other institutes, regulated by the aforementioned statute. Especially as we have seen no such dilemma existed in the courtrooms of previously Yugoslav[64] and at the present also Croatian[65] and Slovenian judges.[66]

According to relevant Croatian case-law the non-retroactivity principle in the aforementioned context concerning ZOR (ZOO) 1978 seems to be strictly

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62 Gorenc, V. *et. al.*, *Komentar Zakona o obveznim odnosima*, RRiF-plus, Zagreb, 2005.

63 See for example the ruling of the Supreme Court of RH Rev 845/07-2 of 23.12.2008.

64 See fn 58.

65 See fn 62.

66 Ruling of the Supreme Court of RS II Ips 79/93 of 21.10.1993 and fn 57.

applied to prescription rules as well and there is no mentioning of different applications, even if only the jurisprudence of the Supreme Court of RH is taken into account, where no mention of the alleged discrepancy between Articles 1106 in 1108 can be even established.[67] Therefore it should be noted that the alleged retroactivity of provisions of the ZOR (ZOO) 1978 concerning prescription has no firm standing in practice and should therefore be considered substantially unfounded.

5.2. Case details and the contents of the contract of delivery from 1960

The relevant contract of delivery, concluded in 1960, specified the distribution of all the assets of the father as deliverer to his eldest son as recipient and included a farm with all the allotted buildings and lands, a vineyard, forests, meadows and fields, including livestock and all other movable property. The sum total of all mentioned assets was valued at 750.000 YUD for which the recipient had to fulfil certain inheritance stipulations to the deliverer, his wife[68] and also to his other five remaining children, including the aforementioned sister. These recipient's sisters and a brother were allotted by way of "inheritance dispensations" a sum of 50.000 or 60.000 YUD each to be paid in two to five years. In the fourth section of the contract there is stipulated a guarantee to fulfil the abovementioned stipulations to deliverer, his wife and to his children. The recipient was also allowed to mortgage three separate pieces of land to fulfil his stipulations. There is also a stipulation by the other children of deliverer that they concur with the delivery contract and thus renunciate their inheritance in advance. If we analyse the contract in terms of stipulations, it is necessary to notice the deadlines for the fulfilment of specific claims, (*i.e.,* two to five years), but it is quite clear, especially taking into account the possibility of taking out a mortgage to secure these obligations, that these deadlines were meant instructively and by possibility of a guarantee, provided by a mortgage meant as necessary to comply with.

In case at hand, the dispute was between a sister and brother as the recipient (and subsequently against the brother's heir), arising out of the latter's failure to comply with a *kinship* commitment on the basis of a provision in a contract of delivery drawn up by their father as deliverer in 1960. It is apparent from the

[67] See for example rulings of the Supreme Court of RH Rev-3494/1994-2 of 17.1.1996, Rev 6/08-2 of 17.9.2008, Rev 749/07-2 of 5.12.2007, Rev 3236/1993-2 of 15.3.1995 and Rev 1021/1994-2 of 7.2.1996.

[68] These included room and board for life, provisions, clothes, medical care and in death adequate funeral arrangements for both, all valued at 250.000 YUD total.

contract that the deliverer stipulated that the recipient was to pay his sister a sum of 60.000 YUD[69], which was not insignificant at the time, within the aforementioned (instruction) period in exchange for the movable and immovable property which he had thus acquired. However, the brother did not make such a payment within that period and not subsequently. In 2018, the sister brought a lawsuit, which in the light of the brother's death, was addressed against his son as his heir.

It was not disputed by the Slovene courts for the purposes of legal assessment that, in the light of all the relevant circumstances of the particular case, legal rules of ABGB apply, but at the same time the question arose as to which of its various legal rules should be applied.[70]

5.3. The nature of the contractual claims

If there is any doubt as to the prevailing nature of the contract of delivery, it must first be determined whether or not the contract of delivery also contains some elements of pecuniary interest. This follows even more directly from the ruling of the Supreme Court of RS II Ips 192/2007 of 26.8.2009:

> "*The legal consequences of the contract concluded, its effects between the contracting parties and its effects in relations of inheritance depend on the legal nature of the contract concluded. In assessing the latter, it is not only the formal title of the contract that is crucial, but the common intention of the contracting parties that must be sought. The decisive factor in this respect is the interest pursued by the contracting parties in concluding the contract or the purpose which they sought to achieve by the contract.*"

The ruling further explains the interest of the contracting parties at the time of the conclusion or the purpose of the contract from the point of view of the contracting parties: "*whether the deliverer wished to make a deed of gift of his property and to settle in advance the inheritance relations between the deliverer and his heirs, or whether he wished to secure to himself the right to maintenance for life, the right to ho-*

[69] The wording of the contract: "[the brother, as] recipient, commits himself to pay to the children of the deliverer and to his siblings by way of inheritance dispensations (...)".

[70] See the ruling of the High Court of Ljubljana II Cp 484/2020 of 24.6.2020, which however *inter alia* disregarded the fact that in the present case a division of property was enacted with the exact purpose of settling – kinship relations.

using, food, assistance and care, as a counter-value in exchange for the property handed over. A contract between an ancestor and a descendant cannot, therefore, always be judged solely by the provisions of Article 106 ZD [1977] et seq."

In this context it is important to point out, that the legal rule § 1481 ABGB, which exceptionally provides that certain civil claims are not to be subject to prescription, again cannot be disregarded. Indeed, § 1481 ABGB explicitly provides for such an effect both for (1) "obligations (...) based in kinship and personal law in general, *e.g.*, to provide the necessary maintenance [alimony] for children" and for (2) "the [owner's] right to dispose freely of one's property, *e.g.*, the obligation to divide up the common property or to determine the boundaries". In the light of the foregoing, it is necessary to assess the exact nature of the contractual claims. Are the claims predominantly personal or hereditary in nature, or are they bilateral reciprocal obligations of general nature?

In the present case there is on the one side the obligation of the recipient under the contract to pay to his sister a certain large sum money in respect of "inheritance dispensations" in return for the property received and the reciprocal obligation to the deliverer for all the thus transferred assets to provide the latter and his wife with maintenance and care till their deaths on the other. The recipient was thus obliged to fulfil a certain obligation to his sister out of his property. In this respect, it is important to reiterate the aforementioned Article 116 ZD (ZN) 1955 and later Article 111 ZD 1977 (in force before OZ), according to which the deliverer may reserve certain rights for himself, his spouse or for someone else.

The ruling of the Supreme Court of RS II Ips 192/2007 of 26.8.2009 draws the clearest distinction between the delivery purpose and other purposes that may exist alongside the delivery purpose. It essentially refers to the dilemma of whether the deliverer actually intended to distribute his property and to settle the inheritance relations with his heirs beforehand, or whether he may have wished to obtain a certain equivalent, *e.g.*, maintenance, care, assistance, *etc.*, by means of a contract of delivery.

It is clear from the circumstances of the case there are two sets of obligations. One between deliverer and the recipient and the other between the latter and his siblings based on explicit mandate from deliverer to fulfil certain "inheritance dispositions". While the first obligation is reciprocal, the second is purely one sided to fulfil the deliverer's intent to settle his inheritance issues with the delivery contract as it was a common practice in those times to give the eldest son the farm as a whole, so the estate would not get broken up, thereby keeping it economically viable. And had there been no express written addition in the sense of the phrase "by way of inheritance dispositions", the matter could have

been understood in terms of a "pure" obligations relationship, but by expressly stating the underlying cause of action, the deliverer framed his intention to arrange for the distribution of his then property in two forms of execution, namely the delivery of property to one of his children and the payment of money to the other by the recipient. This is an essential qualification which must be pointed out also as an emanation of the "kinship" principle, protected by the then constitution and, in the event of non-compliance, substantiated by concrete arguments, since the will of the deliverer is stated clearly. This is reinforced by contractual possibility of mortgages on the transferred land, if obligations to deliverer's other children wouldn't be fulfilled, and by their renunciation of inheritance.

5.4. Time limit of contractual claims

There is also the question of the meaning of the two-year time limit for the payment of the money. The two-year time limit is indeed more indicative of a typical contractual relationship, after the expiry of which the prescription period also starts to run. However, in the light of the intention of the contracting parties in the contract of delivery, the two-year time limit must be seen as a time-limit for the settling, during the lifetime of the deliverer, of the inheritance situation with regard to his current assets. It is unlikely that the deliverer would have intended that, if the son did not fulfil his obligation towards his sister, the *inheritance dispensation* should simply lapse. Nor does it stand up to logical scrutiny to argue that the obligation to pay the sister is part of the statutory provision of Article 116 ZD (ZN) 1955 and later *verbatim* Article 111 ZD 1977 in the sense of reserving certain rights for another person, since the deliverer is distributing the property between his descendants, and it would be difficult to argue that the other person is also necessarily a party to the contract. In the same way, it is also not logically sustainable to consider the obligation to pay the deliverer's daughter as a contract in favour of a third party. It seems essential to identify the intention of the contracting parties, which is expressly defined to be the recipient's obligation to pay out in respect of the *inheritance dispensations*. By so doing, the deliverer gave the obligation a typical personal and inheritance law flavour, and, in the event of default, the property delivered should be considered as a deed of gift and should revert to the succession, or the obligation should be recognised as exempt from the rules of prescription in the light of the general rules on the liability of heirs for the debts of the decedent, as well as under the legal rules of ABGB, as they are in this part far more protective of the kinship relations as the relevant provisions of ZZT.

5.5. The prescription question and ABGB application explanation

It is worth noting that ABGB in §§ 15 and 40 defines personal rights and kinship as follows:

> § 15. Personal rights relate partly to personal characteristics and conditions, partly on the basis of the kinship relationship.

> § 40. Kinship ["rodbina"] is understood to mean the ancestors with all their descendants. The bond between these persons is called consanguinity; and the bond formed between one spouse and the relatives of the other spouse, affinity.

It follows that the marital status of the contract of delivery in question defines only the immediate kinship as the parties to the contract. The subject-matter of the contract is the disposition of one's own property and, more specifically, its distribution among one's own descendants. The manner of distribution is by way of delivery and, indirectly and subordinate to the delivery, by way of payment to the sister by the recipient.

The relationship, defined by this contract is undoubtedly a kinship relationship, while the subject matter of the contract is definitely a personal right to dispose of one's property. It may be argued that a distribution during lifetime is not rightly comparable to the necessary maintenance of children and, similarly, that it is not a distribution of common property. However, in the above cases, in the light of § 1481 ABGB, these are merely examples of the possibilities listed, and the present case is reasonably similar to the latter. The purpose of the contract of delivery is to divide the property among the descendants before inheritance and is therefore the other side of the coin of the division of the future common property of the heirs. The nature of the contract of delivery, which is possible only between close relatives within the framework of express statutory provisions, makes it possible to act in a variety of ways, ranging from preventive, to protective, to purely pragmatic or any other kind of dispositions. The contract expressly refers to the relationship or the purpose of the distribution as "by way of inheritance dispensations". Taking all the above in conjunction with the rules in force at the time the contract was concluded and the special rule of ABGB on prescription in personal and kinship relationships, together with the principle that contracts must be respected, it must be acknowledged that the legal rule of § 1481 ABGB corresponds to the situation in question.

In this respect, the view that this rule can be applied exclusively to maintenance (alimony) obligations would be incorrect, since ABGB in this part explicitly (*i.e.*, the use of the "*e.g.*,") provides for an enumeration by way of example only, rather than an exclusive reference to one and only possible legal situation (*i.e.*, the obligation to pay alimony). It is of course not in dispute that the alimony obligation is of predominantly pecuniary nature. This means that other comparable legal situations which in essence correspond to "obligations (...) based in kinship law" also fall within the scope of the rule of § 1481 ABGB. As will be explained below, in the circumstances described above, in view of the legal situation in 1960, this also reasonably covers a property claim between siblings arising out of a contract of delivery.

The state of the law in force in the year of the conclusion of the contract of delivery (1960) was such that, instead of the unity of civil law established by ABGB, there had already been a partial division of the formerly general substantive civil law into the following categories:

- a body of substantive law and law of obligations, which was primarily governed by the rules of ABGB, with sectoral statutory exceptions (including ZZT), mainly conditioned by the new social order established after 1945[71],
- the *corpus* of inheritance law, which was governed by the Yugoslav ZN (ZD) 1955, which was the direct basis for both the Slovene ZD 1977 and the Croatian law that preceded ZN 2003, and finally
- the *corpus* of family or "kinship" law, which was subject to the rules of the Yugoslav TZRSO of 1947, as such predating ZZT, which further strengthens the argument that the provisions of ZZT did not apply in this part of the now divided *corpus* of civil law, again further reinforced by the aforementioned "kinship" provision of Article 26(1) of the FLRJ Constitution.

These findings are relevant for the final understanding of the application of the legal rule of § 1481 ABGB, since that Code initially laid down rules which, in principle, in the absence of express literal exceptions, were to apply uniformly to the entire spectrum of substantive civil law. This reasoning is also apparent from the Slovene legal literature of the time when the contract of delivery was concluded and this even with the provisions of ZZT clearly taken into consideration. Thus, in this type of literature from 1959, which was also

[71] *I.e.*, the institute of commonhold property.

the basis for the study of law at that time[72], it can be seen that, with regard to the absence of prescription for certain of rights, even taking into account the provisions of ZZT, at the time the following still applied, having regard to the still applicable legal rules of ABGB:

> "Prescription does not arise from the non-exercise of any right. Thus, *e.g.*, there is no prescription in personal property law, not with regard to *definite rights arising from kinship-law relationships*, and also not with regard to certain [other] property rights (*e.g.*, division of the community between co-owners, restoration of boundaries)".[73]

This further reinforces the finding, that the rules of ABGB, concerning the (non-)prescription of claims, based in *kinship-law relations*, are still to be regarded to be in (applicable) force at the time. As regards the definition of "*kinship*" at the time the contract of delivery was concluded, it was defined as all persons descended from a common ancestor, and "*of kin*" in the legal sense was understood to include, in particular, those individuals who belonged to a family in the sociological sense, primarily, of course, the parents and their direct descendants (children). In this connection, it is worth noting, that TZRSO[74] provided, that kinship law also regulated the mutual rights and obligations of certain persons who are considered to be "*of kin*" in the broader sense of the word, which of course also includes the relationship between siblings. These persons are therefore expressly considered to be "of kin" in the legal sense of the word (under TZRSO), since the law of the time, taking into account the particular ties of kinship, provided them certain rights or imposed certain obligations in this respect.[75] This fact (*i.e.*, the relationship between the siblings to their common ancestor) was, also in context of inheritance law in force at the time also a key element and the essence of the very institution of such contracts.

And lest we forget, Article 32 of TZRSO from 1947 mandates, that not only are parents obliged to maintain their children and *vice versa*, but also all other

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[72] See Leskovic, S., *Stvarno, dedno in zemljiško-knjižno pravo*, Second edition, DSPU LRS, Ljubljana, Cikl., 1959.

[73] *Ibid*., p. 9.

[74] See in particular Article 32 TZRSO (descendants and ancestors, brothers and sisters).

[75] See Vlach, J., *Rodbinsko pravo*, UŠ LRS, Ljubljana, 1960, pp. 1 *et seq*. Dr Vlach was known in his time as "the best civil judge of the Ljubljana District Court". See Fortuna, S., *Doktor,* Odvetnik, no. 61, 2013, p. 54. Same Ilc, J., *O odvetniški tarifi*, Odvetnik, no. 4 (54), 2011, p. 27.

relatives in the ascending and descending line of the marriage have a duty of maintenance as do siblings with regard to the maintenance (incl. alimony) of their minor siblings, thereby in essence confirming the kinship principle as the predominant factor. As already mentioned, not only does TZRSO predate ZZT, but its aforementioned regulation on maintenance duty in the light of the already mentioned "*kinship*" protection provision of Article 26(1) of the FLRJ Constitution also clearly indicates, that at the time such relationships, which also explicitly included relations between siblings, enjoyed special protection also in the field of prescription regulation as opposed to "regular" civil pecuniary obligations, (only) the latter being subject to ZZT regime. This finding is also supported by the aforementioned legal theory from the time, which also takes into account this distinction between the general rules of civil prescription, set out by ZZT, and other sources of such rules, primarily regulating kinship-law relations (*implicite* particularly ABGB), thereby by extension at the time also inheritance law.[76]

5.6. The nature of Yugoslav inheritance law in 1960

In my view, it would be incorrect to interpret the obligations arising from the contract of delivery as purely "ordinary" contractual obligations, which were consequently subject to the (general) rules of prescription, found at the time in ZZT[77] and before that in §§ 1478 and 1479 ABGB. In 1960 the contract of delivery was not part of the *corpus* of general substantive civil law, nor was it part of the law of contractual obligations but of inheritance law (which is still applicable in RH, but not RS), which at the time was far closer to (extended) family or kinship law than that might be the case today. This is also apparent from the leading legal literature of the time, for example from the works by

[76] See Leskovic, S., *op. cit.* (fn. 72), pp. 9-10. This is further emphasized by the indisputable fact, that FLRJ until 1963 had no constitutional court established neither at the federal or at the republic's level, thereby not having any (judicial) constitutional checks in place.

[77] Notwithstanding its Article 24, which provides special rules for prescription between spouses and between parents and their offspring, as in the light of the aforementioned these rules apply in my view to the ordinary civil claims between these subjects and not to the claims, that were essentially rooted in their kinship-relationship. And lest we forget, Article 41(2) ZZT explicitly stated that: "The provisions of this Act relating to the time required for prescription shall not apply if a special period of prescription is laid down by a special statute for the prescription of certain claims."

Dr Stojan Cigoj[78], a respected professor at the Faculty of Law in Ljubljana and the later author of the grand eminent commentary to ZOR (ZOO) 1978. The contract of delivery is of course not to be found there, since it was already included in the *corpus* of special rules of the inheritance law, but in this part with a predominant, family- (or at that time, kinship-) law overtone, thereby as already explained necessitating the application of the (special) legal rule od §1481 ABGB and not the provisions of ZZT. And lest we forget, a contract of delivery can only be concluded between a closed circle of subjects, that all share the same, as *conditio sine qua non*, relationship of close kinship.

There is also one clear indication, that the ZN (ZD) 1955 as the primary source of Yugoslav inheritance law at the time was still very much focused more on kinship in the sense of at least also covering the relations between siblings, otherwise this statute – as in the case of the subsequent ZD 1977 *et al.* – wouldn't afford to all members of the first line of succession, *i.e.,* the surviving spouse and all the remaining children equal instead of differing shares of the inheritance. This clearly indicates, that at least at the time the relationship between spouses and the relationships between siblings in this regard has been given at least (co)equal "kinship" significance, comparable to "proper" kinship law, primarily regulated by TZRSO, all further validated by the special protection, afforded to "kinship", as provided by Article 26(1) of the FLRJ Constitution.

As mentioned in 1960, the right to inheritance was primarily governed by ZN (ZD) 1955, which entered into force on 11.7.1955.[79] This statute, in a manner different from the relevant legislation in force in the Kingdom of Yugoslavia until 6.4.1941, which was essentially regulated by ABGB[80], also expressly regulated contracts of inheritance, which – unlike the pre-war Yugoslav legislation – were no longer a title to inheritance. This included, in addition to the contract of lifelong maintenance, also the contract of delivery.[81] Under ZN (ZD) 1955 regulation, the latter could be concluded – unlike the pre-war regime, under which such a contract was admissible only between spouses and up to a maximum of ¾ of the value of the subsequent succession estate – only between the ancestor, his children and any other descendants.

Precisely in the case of a contract of delivery, ZN (ZD) 1955 (for the first time) established an express *conditio sine qua non* that one of the contracting parties (as a rule) could only be a child or siblings as a direct descendant or

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78 *I.e.,* Cigoj, S., *Obligacijsko pravo: poslovne in neposlovne obveznosti*, Uradni list LRS, Ljubljana, 1962, pp. 13 and 47.

79 See Vlach, J., *Dedno pravo*, UŠ LRS, Ljubljana, 1960, p. 2.

80 See Vlach, J., *op. cit.* (fn. *supra*), p. 35.

81 *Ibid*.

direct descendants of the deliverer as a still living ancestor. It is in this part that the "*kinship law*" connexity or the linking of the contract of delivery with the otherwise independent "*kinship*" law is most clearly established.

Consequently, all pecuniary claims, as well as claims expressed in other ways, between siblings arising directly out of a contract of this kind must also be regarded as claims which, in the light of the rule of law still in force in 1960, § 1481 ABGB, are to be regarded as "definite [proprietary as much as is the case with the necessary maintenance for children] rights arising from the kinship-law relationships". All this provides further proof that in the light of the legal rules of ABGB already presented in connection with the provisions of ZN (ZD) 1955 relating to the contract of delivery as a *corpus separatum* from the otherwise general legal regime of contracts, the interpretation that the rule of § 1481 ABGB is inapplicable in the present situation does not withstand further scrutiny.

6. CONCLUSION

On the basis of the determination of the law applicable at the time of the conclusion of the contract in question, it is clear that ZN (ZD) 1955, which governed the contract of delivery, is to be applied in the present relationship, both in Slovenia and in Croatia, and that ABGB, with particular reference to the rule of § 1481, which specifically deals with relationships with a personal and kinship element in relation to prescription, is to be applied to the assessment of the civil substantive institute of prescription in the present case. It is important to note, that ZZT from 1953, in force at the time of contract enactment, in Article 41(2) explicitly mandated the use of another statute, if a special period of prescription is laid down by a special statute for the prescription of certain claims. In this context, of course, the ABGB rule mentioned above must be applied, as the nature of the contract is distinctly "of kin", since only the parents and their descendants may be parties to the contract. The object of the contract is to have the disposal of part or all of one's property. It provides for the distribution of the property and the payment by the recipient to his sister, the payment being a subordinate obligation arising from the delivery of the property to the recipient (son and brother). The rule of § 1481 ABGB provides for no statute of limitations for claims arising out of personal non-property relationships and those arising out of kinship-law relationships, as well as certain property relationships. However, the distribution of one's property among one's children (by handing it over and ordering payment) certainly has elements of personal law, since it is a distribution of one's property, and of kinship law, since the subordi-

nate obligation involves two siblings. ABGB expressly deals with prescription in personal and kinship matters differently, and it would be difficult, in the light of the arguments given to logically interpret that the specific occurrences of the case are not based in personal law and/or kinship relations.

Finally, a point to consider is the practical value of such an in-depth consideration of the issue of (non-) prescription of a debt arising under a contract of inheritance concluded almost 60 years ago, which, as we have seen, may be very similarly judged both in Slovenia and Croatia. It is true that the above interpretation of the relevant legal rules in both jurisdictions is slowly losing its real applicability with each passing year. The fact is that the application (and practical applicability) of the legal rules of ABGB in the field of obligations was severely impacted on 1.10.1978 when ZOR (ZOO) 1978 was enacted. However, with the entry into force of OZ in Slovenia in 2002 and ZOO 2005 in Croatia in 2006, the body of (still) valid legal rules of ABGB – albeit with few narrow exceptions[82] – was practically dealt a death blow. However, given the fact that the longevity of the population is increasing in both Slovenia and Croatia, it is by no means excluded that such complex cases would continue to be on the court docket in the future. And it is precisely in the area of inheritance law that such cases – and consequently the challenges they pose, which are quite demanding to assess – are and will be the most frequent.[83]

[82] For Slovenia see Juhart, M., *op. cit.* (fn. 46), p. 15 and Brus, M., *op. cit.* (fn. 20), pp. 65 and 108. Dr Juhart points out here that the legal rule of §§ 1270 and 1271 ABGB, *i.e.*, that the performance of a bet cannot be enforced by litigation, can still be applied in Slovene judicial practice. Dr Brus, however, considers that the provisions on the rights of unborn children in §§ 22 and 23 and on the presumption of death as defined in § 25 are still applicable. The same applies to rules on the performance assistant (§ 1313a) and §§ 1267 *et seq*. governing gambling contracts. See also Keresteš, T., *Uporabljivost pravnih pravil ODZ v sodobnem civilnem pravu Republike Slovenije*, Zbornik PF Univerze v Mariboru, *vol.* 7, no. 1, 2011, pp. 12-13, where the same is argued for the rule of § 885 ABGB concerning head of terms (*Punktation*), as this institute is not regulated in OZ.

[83] For Slovenia, *cf.* Ekart, A., *Pravno izročilo ODZ v slovenskem dednem pravu*, Zbornik PF Univerze v Mariboru, *vol.* 7, no. 1, 2011, pp. 37-44.

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Sažetak

Nana Weber*

ZASTARA OSTAVITELJEVIH DUGOVA IZ RAZDOBLJA PRIMJENE STAROG AUSTRIJSKOG OPĆEG GRAĐANSKOG ZAKONIKA (ABGB) IZ 1811. U SLOVENIJI I HRVATSKOJ

S pravnog gledišta, uspostava prve jugoslavenske države 1918. značila je ujedinjenje šest često sasvim različitih pravnih tradicija u jednu zajedničku državnu tvorevinu, a nije sa sobom donijela i pravno ujedinjenje, što je najočitije bilo u građanskom pravu. Ono je bilo gotovo isključivo regulirano starim austrijskim Općim građanskim zakonikom (ABGB) iz 1811., kao zanimljivom i dugovječnom podvrstom transnacionalnog prava, na najvećem dijelu današnjega područja Slovenije i Hrvatske. Njegovi pravni propisi preživjeli su čak i Drugi svjetski rat, a potom su se u velikoj mjeri rabili sve do kraja 1970-ih, a u znatnom dijelu i do stupanja na snagu novoga slovenskog Zakonika o obveznim odnosima iz 2002. i hrvatskog Zakona o obveznim odnosima iz 2006. godine. Budući da ABGB kao izvor prava nikada nije konačno ukinut, njegova su pravila još uvijek relevantan izvor pravnih pravila za odlučivanje u konkretnim sporovima u obje zemlje, čak i u slučaju odgovornosti nasljednika za ostaviteljeve dugove ako je odgovarajući ugovor o ustupu i raspodjeli imovine za života sklopljen još davne 1960. godine.

Ključne riječi: ABGB, nasljedstvo, ugovor o isporuci, zastara, srodstvo, ostaviteljevi dugovi

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