

REFORM STEPS IN INHERITANCE LAW REGULATION IN THE PRE-DRAFT OF SERBIAN CIVIL CODE - HAS THE COMMISSION FOR CODIFICATION DONE A GOOD JOB?*

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ABSTRACT

It's been almost twelve years since the Commission for drafting the Civil Code of the Republic of Serbia was established, but the society and the scientific community in Serbia have not yet met the new Civil Code. It came only to the Pre-Draft, on which a public hearing was opened in mid-2015. Some reform steps have been taken in all areas of civil law, and certainly in the area of inheritance. However, the impression is that the legal doctrine neither is satisfied with the scope of the reform in the field of succession, especially because in this civil law area legal interventions were least made, as well as with some proposed solutions. Given the fact that the regulation of inheritance law is mostly similar in countries on the territory of the former Yugoslavia, because it has the same foundation - The Federal Inheritance Act of 1955, we believe that the scientific community in these countries should be notified with the ideas of Serbian codifier, in order to be potentially considered in the case of amendment of inheritance acts. Therefore, in this paper we will point out new solutions proposed by the Commission for codification and briefly analyze some of the proposals that deserve special attention. But, we will not stop there, full stop won't be put there. We will try to answer the question: whether the codifier stopped halfway, i.e. whether it at all reached the halfway point that should be crossed at this moment - the moment when the work on such monumental legal edifice as the Civil Code has been finalizing? This is particularly important if we take into account recent reform steps in the sphere of inheritance law in contemporary comparative legislatures, especially in the EU member states. Therefore, this paper will have strong critical dimension, in terms of some of the proposed solutions, as well as in regard of failures of the Commission for drafting the Civil Code.

Keywords: *Civil Code, inheritance law, legal reform*

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1. INTRODUCTION

Civil Code is a very significant monument of legal architecture of one country and represents a significant feature of national identity. Its adoption is considered as indisputable imperative for a society¹ because it is the act of the high authority that establishes a coherent system of civil law, which contributes to the stability of civil law relations. In the Republic of Serbia, the Commission for Drafting the Civil Code was established in 2006. After almost nine years, the Commission published a preliminary draft of the Civil Code.² Ministry of justice opened a public debate about Pre-Draft in June 2015, which is scheduled to last a year. But, at the beginning of 2019, the debate is still in progress. The Pre-Draft consists of 2,838 articles, with nearly 500 alternative proposals.

In preparing the Book on law of succession, the Commission started from the actual Inheritance Act of 1995, which its creators “modestly” called as reform Act. Also, in legal doctrine, there are opinions that in practice it proved to be a good Act,³ although undoubtedly has significant drawbacks. The Commission intended to improve the existing regulation on the basis of the current changes in the legal life, comparative experience, and law application in court practice. However, the impression is that numerous opened issues, which the Commission itself defined,⁴ are still open.

In this paper, we will analyze some major novelties in the field of law of succession issued by the Pre-Draft of the Civil Code, and try to answer the question whether the proposed novelties are in line with contemporary trends in comparative inheritance law. Moreover, we will point to some significant issues that remain outside the sphere of interest of the Commission, and which, in our opinion, should be regulated, or existing legal solutions modified.

¹ Morait, B., *Gradjanski zakonik ka društveni imperativ*, Pravni život, No. 10, 2016, p. 341

² Commission for Drafting the Civil Code of the Republic of Serbia was formed in November 2006. The Commission published a preliminary draft of the Civil Code (Draft text prepared for the public debate, with alternative proposals - Pre-Draft), at the end of May 2015. Full text of Pre-Draft available at: <https://www.mpravde.gov.rs/files/NACRT.pdf>. Accessed 15 November 2018

³ Salma, J., *O prvom potpunom normativnom Nacrtu Gradanskog zakonika Republike Srbije*, Pravni život, No. 10, 2016, p. 376

⁴ See: Slijepčević, R., *Izrada Gradanskog zakonika Srbije*. Available at: [projuris.org/docx/R_Slijepcevic_Izrada_Gradjanskog_zakonika.doc] Accessed 15.11.2018

2. NEW PROPOSED SOLUTIONS IN PRE-DRAFT OF THE CIVIL CODE

2.1. Introduction of contract of inheritance in Serbian law

In the laws that regulate it,⁵ the contract of inheritance is the strongest legal ground to inherit, because contractual heirs have priority in succession in relation to testamentary and legal heirs.⁶ In Serbian law, as in many European laws, including Croatian, this contract is null and void.⁷ This solution was strongly criticized by significant representatives of Serbian civil law doctrine, who emphasized the importance of this legal instrument to regulate inheritance law consequences of the death of one person, and pointed to a number of its advantages in relation to the contract on support for life, which it was substituted by in Serbian/ex Yugoslav law.⁸

This stimulated the Commission for Drafting the Civil Code to provide, as an alternative to the existing solution, the possibility for the contract of inheritance to be regulated in Serbian law *de lege ferenda*. In four articles (art. 2776-2779), the codifier prescribed among which parties this contract could be concluded, conditions for its validity, the form and the subject of the contract. The Commission proposed that this contract can be concluded only between spouses,⁹ but they

⁵ See: sec. 1941 des Bürgerliches Gesetzbuch, BGBl. I S. 42, ber. S. 2909, 2003 S. 738, BGBl. I S. 54; sec 1249 des Allgemeines bürgerliches Gesetzbuch JGS Nr. 946/1811, BGBl. I Nr. 100/2018; art. 481 and art. 494 of Swiss Civil Code (Zivilgesetzbuch), 1907, status as of 1 January 2018; art. 126 of Inheritance Act of the Federation of Bosnia and Herzegovina, Official Gazette No. 14/2014

⁶ It is believed that this is due to one-sided irrevocability of the contract of inheritance - this contract bounds contracting testator until his death. Antić, O., *Ugovor o nasleđivanju i drugi zabranjeni naslednopravni ugovori u našem pravu*, Anali Pravnog fakulteta u Beogradu, No. 5, 1986, p. 512

⁷ Art. 179 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015. See also: art. 102 of Inheritance Act of the Republic of Croatia, Official Gazette No. 48/2003, 163/2003, 35/2005, 127/2013, 33/2015, 14/2019; art. 103 of Inheritance Act of the Republic of Slovenia, Official Gazette No. 15/1976, 23/1978, 13/1994, 40/1994, 117/2000, 67/2001, 83/2001, 31/2013, 63/2016; art. 121 of the Inheritance Act of the Republic of Montenegro, Official Gazette No. 74/2008; art. 7 of the Inheritance Act of the Republic of North Macedonia, Official Gazette No. 47/1996, 18/2001

⁸ Stojanović, N., *Zašto je ugovor o nasleđivanju zabranjen u našem pravu*, Pravni život, No. 10, 2003, p. 163; Đurđević, D., *Uvođenje ugovora o nasleđivanju u srpsko pravo*, Anali Pravnog fakulteta u Beogradu, No. 2, 2009, p. 188 and onwards. Comparative legal theory points to the advantages of this contract. Bonomi, A., *Testamentary Freedom or Forced Heirship? Balancing Party Autonomy and the Protection of Family Members*, in: Anderson, M.; Arroyo Amayuelas, E. (eds.), *The Law of Succession: Testamentary Freedom, European Perspectives*, Europa Law Publishing, Barcelona, 2011, p. 34

⁹ See: alternate art. 2776, par. 1 of the Pre-Draft. The introduction of the contract of inheritance would have resulted in the abolition of the possibility for the spouses to conclude the contract on support for life (see art. 2794 of the Pre-Draft - alternative proposal). The disputable question is whether to restrict the conclusion of this contract only between spouses or to allow its conclusion to a wider circle of sub-

may dispose of the inheritance under this contract also in favor of the children of one or the other spouse, their joint children, adopted children or other descendants.¹⁰

The primary idea of the legislator is that all the descendants who would be called to inherit contractors have to give their consent, in order for the contract to be valid. The descendant may give consent afterward, but if he/she dies before the decedent, does not want to inherit or is unworthy to inherit, and has no descendants - the contract will produce the full legal effect even without his/her consent.¹¹ As an alternative to all this, the codifier foresaw the possibility that for the validity of the contract the consent of the decedent's descendants is not required.

The consequences of opting for one of these two solutions will have to reflect in the field of compulsory inheritance. Such a conclusion, however, does not follow from the solutions proposed in the Civil Code Pre-Draft. Art. 2778 of the Pre-Draft stipulates that the property that is the subject of the contract is not the part of the legacy, and that compulsory heirs can't settle their compulsory portion from that property. We believe that such a solution would be justified only if the validity of the contract sought the consent of all the descendants who are called to inherit.

In our opinion, for the validity of this contract should not be required the consent of the descendants of the contracting parties.¹² If contractual dispositions violate a compulsory portion of compulsory successors, they would be able to demand its settlement. The value of property assets disposed of by the contract of inheritance should be calculated in the so-called assessed value of the succession.¹³ Testamentary and contractual heirs, as well as legatees, would owe the settlement of the

jects, although in comparative law there is an obvious tendency to allow the conclusion of the contract only to a narrow circle of persons (spouses, non-marital partners, possibly fiancés). In the Preface of Civil Code relating to inheritance, the Commission explained this solution by the effort to eliminate the numerous disputes in practice occurring after the death of one spouse - the contracting party of the contract on support for life. See: Prednacrt Građanskog zakonika, *O nasleđivanju*, Book IV, Beograd, 2011, p. 19

¹⁰ See: art. 2776, par. 2 of the Pre-Draft

¹¹ Art. 2777 of the Pre-Draft. This solution is similar to conditions that Inheritance Act prescribes for the validity of contract on assignment and division of property inter vivos

¹² Same: Stanković, M., *Ugovorno nasleđivanje između supružnika*, doctoral thesis, Beograd, 2015, p. 452

¹³ The opinion that property rights disposed of by the contract of inheritance have to be taken into account when calculating the assessed value of the succession (in case of compulsory portion violation), is dominant in Serbian civil law theory. See: Marković, L., *Nasledno pravo*, Beograd, 1930, p. 315; Stojanović, *op. cit.*, note 8, p. 177. The same solution has the Inheritance Act of the Federation of Bosnia and Herzegovina, Official Gazette No. 14/2014 (art. 129). Opposite opinion: Antić, O., *op. cit.*, note 6, p. 512

forced portion, in proportion to the value of the legacy they received, unless the testator especially privileged some of them.

The Pre-Draft of the Civil Code does not stipulate anything about what the consequences would be in case of annulment of the marriage or divorce between the contracting parties.¹⁴ It seems that in the spirit of this legal institute is that if the marriage was not terminated by the death of a spouse, the former spouse should not have the right to inherit the contractual decedent. In case of the termination of a marriage by divorce or annulment, the contractual dispositions should lose their effect *ex lege*.

2.2. Broadening the fiction of *nasciturus*

The primary condition required for a person to inherit the decedent is that was alive at the time of decedent's death or, in case of *nasciturus*, that it was conceived at the time of *delatio hereditatis*.¹⁵ But, many modern laws have adopted the fiction from Roman law about *nasciturus*, under which conceived but an unborn child was considered as it was born, if it was in his best interest. However, the dilemma is whether to recognize the right to the posthumously conceived children to inherit their relatives.

Decades ago medicine gave an affirmative answer to the question whether a dead man/woman can become a parent.¹⁶ By combining the methods of cryopreservation of reproductive cells and embryos,¹⁷ and other methods of assisted reproduc-

¹⁴ In contemporary comparative law we can find different solutions. In German law, the disposal of property rights is ineffective, unless if is to be assumed that the testator would have made it even if the marriage or engagement was dissolved (sec. 2077 and sec. 2279, par. 2 des Bürgerliches Gesetzbuch, BGBl. I S. 42, ber. S. 2909, 2003 S. 738, BGBl. I S. 54). Austrian law has a similar provision, but the spouse who is not to blame for the dissolution of marriage has the right to inherit under the contract, no matter what the marriage no longer exists (sec. 1265 des Allgemeines bürgerliches Gesetzbuch JGS Nr. 946/1811, BGBl. I Nr. 100/2018). In French law, the contract does not become ineffective ipso iure, but contractual testator may unilaterally revoke the contract (art. 1088 and art. 1395 de le Code civil des Français, 1804, dernière modification au 25 mars 2019)

¹⁵ The same solution: art. 3, par 1 and 2 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015

¹⁶ In legal doctrine, for a child who is conceived and born after the death of his parents, the term "posthumous child" has been using. Kindregan, Jr, C. P., *Dead Dads: Thawing an Heir from the Freezer*, William Mitchell Law Review, Vol. 35, Issue 2, 2009, p. 434

¹⁷ Frozen gametes and embryos can be stored for hundreds of years. Well known is the case when the child was conceived using sperm that had been frozen for 21 years. Greenfield, J., *Dad Was Born A Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, with a Focus on the Rule Against Perpetuities*, Minnesota Journal of Law, Science & Technology, Vol. 8, Issue 1, 2007, p. 281

tion, the child can be conceived even after the death of one, in exceptional cases (when there is a frozen embryo) and both parents.¹⁸

Fertilization postmortem may be carried out by using frozen gametes of one or both partners, only if an intentional parent gave certified consent in written form for his/her reproductive cells to be used after the death (we believe that one can give consent in the last will, too).¹⁹ The most common cases are when using the sperm cells of a deceased man to fertilize the woman, but it is possible to use woman's frozen egg cells after her death for fertilization - then it requires the participation of a surrogate mother.

The Commission, which drafts the Civil Code, is in a great dilemma of whether to regulate the birth for another person (surrogate motherhood). As one of the alternatives, the Pre-Draft of the Civil Code offered a solution that only in the case of full surrogacy, for fertilization of a surrogate mother can be used genetic material of the intended parent who died, within a year of his death, if he gave written consent for posthumous use of his reproductive material.²⁰ If this solution is adopted, the legal parents of the child would be considered the intended parents, and not the surrogate mother.²¹

Starting from the above, the Commission decided that the fiction of *nasciturus* should be broadened. In Art. 2597, par. 2 of the Pre-Draft the Commission stipulates that the decedent's child who is not born at the time of his death can inherit him if it is born alive. That guarantees that posthumously conceived child can inherit his biological parents, because there is no longer a condition in the law that it must be conceived before the moment of decedent's death.²²

¹⁸ Vidić, J., *Posthumna oplodnja i njena naslednopravna dejstva*, Zbornik radova Pravnog fakulteta u Novom Sadu, No. 3, 2011, p. 554

¹⁹ Posthumous fertilization is also possible when there is no previously frozen reproductive material, if in the short period after the death, one takes fertilized cells from the deceased (see: case *Stephen v. Comm'r of Soc. Sec.*, 2005). More: Dorogazi, J., *Gillet-Netting v. Barnhart and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children*, Washington University Law Review, Vol. 83, Issue 5, 2005, p. 1598, ft. 6

²⁰ See: art. 2277 of the Pre-Draft - alternative proposal

²¹ See: art. 2272 of the Pre-Draft

²² We think that because of legal certainty and the protection of the interests of other heirs time limits for using reproductive material of a deceased person for conception should be stipulated. More: Krstić, N., *Naslednopravna dejstva post mortem reprodukcije*, Pravni sistem i zaštita od diskriminacije, zbornik radova sa konferencije u Kosovskoj Mitrovici, 2015, p. 267 - 268

2.3. New reasons for unworthiness of inheritance

Contemporary laws stipulate the reasons for unworthiness of inheritance in cases where a potential successor makes unlawful conduct towards the decedent. Determining the conditions for unworthiness needs to be approached with the necessary measure for precaution, because this is the most serious inheritance-law sanction for the heirs. The reasons for unworthiness to inherit are set as *numerus clausus* so there is no place for any analogy and expansion of reasons beyond the legally defined framework.²³

In art. 4, par. 1, Serbian Inheritance Act provides the reasons for unworthiness of inheritance that are almost identical to the reasons prescribed in Croatian Inheritance Act.²⁴ However, the codifier considered that some new reasons for unworthiness should be stipulated. Thus, according to the proposed solution, unworthy to inherit will be the successor who intentionally committed a criminal offense against the testator that took him in the state of permanent incapacity for making a will. Also, unworthy is going to be the heir who prevented or attempted to prevent the realization of the order of inheritance, which the decedent ordered or tried to order, or with whom he counted.²⁵ A unique position in the legal literature is that the first proposed reason is justified, but in regard to the second reason, there are doubts whether it should be stipulated.²⁶

In addition to this, as another alternative solution, in art. 2598, par. 1, point 7 of the Pre-Draft of the Civil Code the codifier proposes two alternatively prescribed reasons of unworthiness. The first is when an heir intentionally commits a serious criminal offense, and to the death of the decedent does not return to the country (ratio is in sanctioning the perpetrators of serious crimes who have fled abroad to avoid criminal sanction). The second alternative for unworthiness to inherit is when the successor by committing criminal offense with intent gains a more favorable position to inherit. We think that only the second proposed reason is acceptable.

²³ Durđević, D., *Institucije naslednog prava*, Beograd, 2015, pp. 68 - 69

²⁴ Art. 125 of the Inheritance Act of the Republic of Croatia, Official Gazette No. 48/2003, 163/2003, 35/2005, 127/2013, 33/2015, 14/2019

²⁵ See: art. 2598, par. 1, point 3 and 5 of the Pre-Draft

²⁶ More: Stojanović, N., *Prednacrt Građanskog zakonika Republike Srbije i nasleđivanje*, Zbornik radova Pravnog fakulteta u Nišu, tematski broj "Zaštita ljudskih i manjinskih prava u evropskom pravnom prostoru", No. 62, 2012, p. 193

2.4. The date as the condition for validity of a holographic will

A holographic will is one of nine forms of the last will in Serbian law. Conditions for its validity are minimal: 1. that is handwritten by the testator, and 2. that he signed the will.²⁷ This will is valid even if testator missed to put on it the date when the will was made, because the Inheritance Act doesn't stipulate such condition.²⁸

The Pre-Draft, as one of the possibilities, provides that for the validity of the holographic will is necessary to indicate the date of its making.²⁹ Legal doctrine outlines many arguments that indicating the date on the holographic testament should be mandatory: 1. the date indication is helpful in determining whether the testator had testamentary capacity at the time of writing the testament; 2. in the case of multiple testaments the date determines which testament shall take effect, and to what extent; 3. finally, placing the date demarcate the last will of the testator from the testament draft.³⁰

Although these arguments stand, it seems that prescribing that indicating the date is mandatory would lead to an excessive and often unnecessary formalization of a holographic will. This type of testament is private, usually made by legal laymen, without witnesses or help by legal experts. Therefore, it would often happen that the testator fails to indicate a date on his will. As a result, the testament would be voidable and may be annulled by the court, so the last will would not be respected. In addition, the importance of dating the holographic testament is significant in very few cases: when there are multiple testaments or when there is a suspicion that the testator has lost an active testamentary capacity. If indicating the date would be stipulated, it will open the question of whether the date could be written only by testator's hand, or is it possible to be printed.³¹

²⁷ Art. 84, par. 1 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015.ZON-a. More about writing and signing holographic will: Đurđević, D., *Sloboda testiranja i formalizam olografskog testamenta*, Pravni život, No. 11, 2009, p. 851 and onward; Čeranić, D., *Svojeručni testament*, Anali Pravnog fakulteta u Zenici, No. 5, 2010, p. 40 and onward

²⁸ Dating the will is not mandatory, but it is desirable (art. 84, par. 2 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015). Croatian law has a similar provision, with the difference that Croatian legislator prescribed that not only dating the will is desirable, but also putting on the will the place where making it (art. 30, par. 2 of the Inheritance Act of the Republic of Croatia, Official Gazette No. 48/2003, 163/2003, 35/2005, 127/2013, 33/2015, 14/2019)

²⁹ See alternative for par. 2 of the art. 2678 of the Pre-Draft. Same solution: art. 970 de le Code civil des Français, 1804, dernière modification au 25 mars 2019; art. 505, par. 1 of Swiss Civil Code (*Zivilgesetzbuch*), 1907, status as of 1 January 2018; art. 602, par. 3 di Codice Civile Italiano, *Gazzetta Ufficiale*, 79/42, con le ultime edizione di 75/17.

³⁰ Marković, *op. cit.* note 13, pp. 196 - 198; Antić, O., Balinovac, Z., *Komentar Zakona o nasljedjivanju*, Beograd, 1996, p. 323; Stojanović, N., *Nasledno pravo*, Niš, 2011, p. 213

³¹ More: Kaščelan, B., *Svojeručno zaveštanje u italijanskom pravu*, Godišnjak Pravnog fakulteta u Istočnom Sarajevu, No. 1, 2010, p. 148

We think that Serbian codifier should take the example from the German *Bürgerlichen Gesetzbuches* (sec. 2247, par. 5). German legislator does not insist on dating the holographic will (sec. 2247, par. 2 of the Code only states that the testator may indicate the place where and the date when he made the testament, but that's not obligatory), and stipulates that it is going to be valid if there is no suspicion in its validity. However, if there is doubt of its validity, and only then, undated testament shall be deemed as legally invalid. In the case of multiple testaments, undated will be considered earlier made up of dated, and therefore revoked by the later.³²

2.5. New general rule of testament interpretation

Serbian Inheritance Act stipulates two general rules of testament interpretation: first, testament must be interpreting in a way that finds real intention of the testator, and second, that testament must be interpreting in a manner favorable to the legal (intestate) heirs or persons burdened with something in the testament.³³

Inheritance-law theory pointed out that these two general rules of interpretation sometimes will not be enough, which would lead that the testament, due to ambiguities or contradictions, does not produce effects. Because of that, between two existing general interpretation rules, the third one should be "inserted" - it is so-called favorable interpretation (construction). This interpretation rule applies when the last will has more than one meaning, and when at least one of the possible meanings results in its invalidity. Then, it is used in order to eliminate the meanings of the testator's words which would cause his will to be null and void, or not to have intended effects.³⁴ The favorable interpretation means that in any case the will should be interpreted in a way to have legal effect, or at least one or more testamentary provisions to produce effect, especially when there is a *non-liquet* situation (*favor testamenti* principle).

The Commission adopted this view and amended the first existing interpretation rule In Inheritance Act by prescribing that testamentary provisions should be interpreted according to the real intention of the testator "and in the sense with which they may have a legal effect."³⁵ No changes were made in the second

³² Đurđević, *op. cit.* note 27, pp. 861 - 862

³³ Art. 135 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015

³⁴ Đurđević, D., *Blagonaklono i dopunjujuće tumačenje testamenta*, Pravni kapacitet Srbije za evropske integracije, Beograd, Vol. 4, 2009, pp. 126 - 127

³⁵ Art. 2730, par. 1 of the Pre-Draft

interpretation rule, although in most modern laws, including Croatian,³⁶ dominates the solution that the ambiguous provisions should be interpreting in favor of testamentary heirs.³⁷

2.6. Violation of testamentary form as a reason for nullity of the testament

In Serbian law, testaments are voidable when they fail to comply with the formalities prescribed by law.³⁸ The same solution contains Pre-Draft in art. 2764. Only the persons with direct legal interest can claim the will to be voidable,³⁹ and they must file their claim within one year from the moment they became aware of the will, but no longer than ten years from the official reading of the will.⁴⁰ These time frames are preclusive and the court observes them *ex officio*.⁴¹

However, codifier made a significant step towards tightening the legal consequences of testamentary form violation and stipulated that the testament would be considered null and void if completely deviates from the form prescribed by law.⁴² The impression is that this solution will cause confusion in practice and that for the courts will not be easy to determine when a will “completely deviates from the form”, and when there are “minor” violations of form. The application of this regulation would especially complicate the fact that in Serbian law there are nine forms of wills, whose validity laid down on substantially different conditions and form requirements. Therefore, it seems that the codifier should opt for an identical sanction when there is a violation of the form. We are supporters of the existing solution because after the expiry of the deadlines for testament annulment - it

³⁶ Art. 50, par. 2 of the Inheritance Act of the Republic of Croatia, Official Gazette No. 48/2003, 163/2003, 35/2005, 127/2013, 33/2015, 14/2019

³⁷ About the reasons which led the Serbian legislature to opt for this solution, see in detail: Antić; Balinovac, *op. cit.* note 30, pp. 404 - 405

³⁸ Art. 168 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015

³⁹ Art. 165 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015

⁴⁰ Art. 170 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015

⁴¹ Svorcan, S., *Komentar Zakona o nasljedivanju, sa sudskom praksom*, Kragujevac, 2004, p. 364; Stojanović, *op. cit.* note 30, p. 301; Đurđević, *op. cit.* note 23, p. 206. The judiciary took the same stance. See: Judgment of the Supreme Court, Rev. 4953/95, from November 15th 1995 (cited from: Krsmanović, T., *Upućivanje na parnicu u ostavinskom postupku*, Bilten sudske prakse Vrhovnog suda Srbije, No. 2-3, 1997, p. 270); Decision of the Supreme Court, Rev. 970/06, from November 8th 2007 (cited from: Vuković, S., Stanojčić, G., *Aktuelna sudska praksa iz građansko-materijalnog prava*, Beograd, 2011, p. 344)

⁴² Art. 2753 of the Pre-Draft

would be reinforced and testator's last will would be respected. We think that the nullity due to testamentary form violation is too excessive sanction.⁴³

2.7. Liability for the decedent's debts in case of renunciation of inheritance in favor of coheir

Renunciation of inheritance in favor of coheir has the character of the positive hereditary statement: the successor accepts the heritage and then gives his inherited portion (i.e. offer) to one or more coheirs. If coheir accepts offered hereditary part, on the relationship between them apply the rules as for gifts.⁴⁴

As the successor, who gave a statement on the renouncement of inheritance in favor of coheir, accepted heritage, he is considered the universal successor. Consequently, he is also liable for the decedent's debts up to the amount of his hereditary portion.⁴⁵ This solution may be regarded as unfair because the heir didn't get anything from the succession estate, and certainly did not have in mind that he will be liable for the decedent's debts. Accepting this argument, the Commission provided in Pre-Draft that in case of renunciation of inheritance in favor of coheir, the receiver is liable for the decedent's debts unless something else is agreed.⁴⁶

New proposed solution gives the assignor of the hereditary part a more favorable and fair position (if hereditary part transferred without compensation). On the other hand, although the legal significance of this regulatory change is big, its practical value is much smaller, because in most cases in probate rulings the courts didn't state the property assignor as heir, but only the heir to whom hereditary share ceded, and only he was liable for the debts of the decedent.

3. SOME RELEVANT ISSUES THAT THE COMMISSION FOR DRAFTING THE CIVIL CODE DID NOT CONSIDER

In the previous part of this paper, we presented the most important novelties that the Commission for Drafting the Civil Code included in the Pre-Draft. Some of

⁴³ The effects of the declarative court decision proclaiming the will null and void are such as if the will had never existed. There is no time frame for declaring a will null and void and every interested person may invoke the reasons for its nullity (art. 161 *in fine* of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015)

⁴⁴ Art. 216 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015

⁴⁵ Although it is not explicitly prescribed, the attitudes about this issue in legal doctrine are undivided. Kreč, M.; Pavić, Dj., *Komentar Zakona o nasljedjivanju*, Zagreb, 1964, p. 449; Antić; Balinovac, *op. cit.* note 30, p. 563; Stojanović, *op. cit.* note 30, p. 344

⁴⁶ Art. 2822, par. 2 of the Pre-Draft

them represent a qualitative improvement in the regulation of succession-law relations. However, in our opinion, even more important is the question of whether the Commission has done enough, i.e. whether the codifier failed to regulate some very important issues that were pointed by legal doctrine, and jurisprudence as well.

The document entitled “*Drafting the Civil Code*”, which came from the pen of Secretary of the Commission Ratomir Slijepčević, presented the list of open issues in the area of inheritance that deserve profound consideration. Those issues the Commission has defined itself somewhere at the beginning of drafting the Code.⁴⁷ It’s enough to compare the circle of these issues with what has been done, and one can clearly see that for almost half of them the Commission did not offer a single normative novelty. They did not even propose alternatives to existing solutions from the Inheritance Act, so obviously these questions will remain open after the adoption of Codification. More importantly, some significant issues of inheritance law, which theory suggests for years, not even entered into the catalog of these open questions, and certainly have not been the subject of consideration by the Commission. Above all, it seems that the codifier in the area of succession law did not follow the trends and reform steps in contemporary comparative legislation. We will look at just a few, in our opinion, the most important.

3.1. Heterosexual cohabitants and same-sex partners as intestate heirs

In comparative law, there is a visible trend of strengthening the position of non-marital partners as intestate heirs, primarily from the registered same-sex partnerships, but as well from the heterosexual partnerships in some laws. Partners from registered same-sex partnerships have the right to inherit partner as an intestate heir in Sweden, Denmark, Finland, Germany, Czech Republic, Austria, Hungary. Some countries guarantee succession rights both to the partners from heterosexual and registered same-sex partnerships (Croatia, Slovenia, Netherlands, Belgium).⁴⁸ Finally, some laws recognize mutual inheritance rights only to the heterosexual cohabiting partners (Greece and the Federation of Bosnia and Herzegovina). Heterosexual cohabiting partners, as well as same-sex partners have no right to inherit intestate one another in Serbian law, regardless how long they lived together and regardless of whether they had common offspring. The “argument” that in the various forums can be heard in favor of this solution is that the form is crucial in

⁴⁷ See: Slijepčević, *op. cit.* note 5

⁴⁸ See in more details: Vidić Trninić, J., *Vanbračni partner kao zakonski naslednik u savremenim pravima Evrope*, Zbornik radova Pravnog fakulteta u Nišu, No. 68, 2014, p. 408 and onward; Micković, D.; Ristov, A., *Reformata na naslednoto pravo vo Republika Makedonija*, Skopje, 2016, pp. 80 - 84

inheritance law, and there is an absence of a form at cohabitation. On the other hand, same-sex partnerships are not being regulated at all in Serbian law, and these partners do not have any legal rights.

It is obvious that the Serbian law remains conservative and does not have enough liberal capacity. Inheritance law, like all other branches of law, must strive forward. Therefore, we believe that in line with a dynamic and evolutionary approach which we represent, the same inheritance rights with spouses should be recognized for heterosexual cohabiting partners (as intestate and compulsory heirs). As for same-sex partners, we presented our thoughts ten years ago, in one of our first articles.⁴⁹ Although the discussion about this in Serbia will take a while, we are convinced that the partners from registered same-sex partnerships, when the law of registered partnerships is adopted, will have the right to inherit deceased partner. This, especially because these partnerships can produce legal effects only if they are registered, and then the “formal requirements” will be met.

3.2. The circle of compulsory heirs

Each country, starting with the doctrinal positions, views on the importance of family and the supposed solidity of family relationships, and following contemporary social trends, defines subjects and conditions under which they are entitled to get a certain part of the inheritance after the death of the decedent. The imperative nature of legal rules regulating the area of compulsory succession ensures the protection of property rights and interests of the decedent’s close family members from excessive gratuitous dispositions *mortis causa* and/or *inter vivos*, by which they have been unjustly evaded from succession. Compulsory heirs are guaranteed the right to request their compulsory portion of the succession estate irrespective of the decedent’s expressed will on the distribution of the succession assets.

The circle of compulsory heirs varies greatly from country to country.⁵⁰ It can be seen that in this field in recent years and decades there have been significant

⁴⁹ Krstić, N., *Nasleđivanje partnera iz istopolnih partnerskih zajednica u savremenom pravu*, in: Petrušić, N. (ed.), *Pristup pravosuđu - instrumenti za implementaciju evropskih standarda u pravni sistem Republike Srbije*, tematski zbornik radova, Niš, *Vol. 4*, 2008, pp. 275 - 277

⁵⁰ In the Netherlands, the right to compulsory portion is recognized only to descendants of the decedent (art. 4:63, par. 2 and art. 4:64, par. 2 of Dutch Civil Code (Burgerlijk Wetboek, Boek 4, Geldend van 19-09-2018 t/m heden)). In French law compulsory heirs are all the descendants and the spouse (art. 913, art. 913-1 and art. 914-1 de le Code civil des Français, 1804, dernière modification au 25 mars 2019). In Austria (sec. 762 and 763 des Allgemeines bürgerliches Gesetzbuch JGS Nr. 946/1811, BGBl. I Nr. 100/2018) and Italy (art. 536 di Codice Civile Italiano, *Gazzetta Ufficiale*, 79/42, con le ultime edizione di 75/17) a wider range of forced heirs is prescribed: except the descendants and the spouse, the ancestors of the decedent also have the right to forced share. In German (sec. 2303, par. 2

changes, ambivalent by its character, in accordance with current social thoughts. Main trends in European laws are: restriction of the circle of relatives entitled to compulsory portion, improvement of legal position of the spouses and cohabitants and diminution of amount of forced share.⁵¹

In Serbian law, there is the widest range of relatives-compulsory heirs in Europe. All decedent's descendants, ascendants and brothers and sisters as well, are entitled to claim a compulsory share, if they are called to inherit (besides them, the right to claim a compulsory share have decedent's spouse, adoptee and his descendants and adopter).⁵²

This solution is opposite to the tendency, that exists in comparative law, of narrowing the circle of compulsory heirs and in particular the abolition of the right to a compulsory portion of the decedent's ancestors and other relatives (except descendants). In comparative legal theory, the dominant view is that testator should be guaranteed a wider freedom to dispose of his property rights at his discretion and therefore narrow circle of heirs should be entitled to claim compulsory portion.⁵³ Having regard to the fact that the importance of kinship has been reducing when constructing the rules of inheritance, and with the aim of favoring freedom of testamentary disposition, it is our opinion that we should reduce the circle of relatives that may be compulsory heirs. Except for descendants, this right should be guaranteed only for the parents, not for the further ancestors or siblings.⁵⁴

des Bürgerliches Gesetzbuch, BGBl. I S. 42, ber. S. 2909, 2003 S. 738, BGBl. I S. 54; art. 10, par. 6 des Gesetz über die Eingetragene Lebenspartnerschaft (Lebenspartnerschaftsgesetz L-PartG) and Swiss law (art. 471 of Swiss Civil Code (Zivilgesetzbuch), 1907, status as of 1 January 2018), beside offspring and the spouse, this right is recognized to the parents and the homosexual partner from registered partnership

⁵¹ Fontanellas Morell, J. M., *La professio iuris sucesoria*, Madrid, 2010, p. 287

⁵² See: art. 39 of the Inheritance Act of the Republic of Serbia, Official Gazette No. 46/1995, 101/2003, 6/2015. The reason for this solution the legislator found in respecting the principle of reciprocity: if the grandchildren may have the right to a compulsory portion on their grandparents' succession estate - the grandparent should be recognized the same right on the succession estate of their grandchildren. Antić; Balinovac, *op. cit.* note 30, pp. 123 - 124

⁵³ In this context, in inheritance-law theory, calls to abolish the institute of compulsory portion, or at least modify it, are increasingly stronger. On these endeavours, see in more detail: Cámara Lapuente, S., *Freedom of Testation, Legal Inheritance Rights and Public Order under Spanish Law*, in: Anderson, M.; Arroyo Amayuelas, E. (eds.), *The Law of Succession: Testamentary Freedom, European Perspectives*, Europa Law Publishing, Barcelona, 2011, pp. 283 - 289. In North Macedonia, the Commission for Drafting the Civil Code has the view that only decedent's children should be compulsory heirs, but only if they are permanently unable to work and without the necessary means for life. About the reasons that justify this solution: Micković, D.; Ristov, A., *The Reforms of the Inheritance Law in the Process of Codification of the Macedonian Civil Law*, Harmonius, 2016, pp. 160 - 161

⁵⁴ As one option, it might be considered that siblings and ancestors, for a certain period of time after the death of the testator (e. g. within a year), should be entitled to the support from the succession estate,

3.3. Testamentary forms

There is small number of legislations that stipulate as many testamentary forms as it is the case with Serbian law. Serbian Inheritance Act envisages nine forms of wills, and therefore it gives the opportunity for the one who wants to make a will, to do it in the way and in the form that suites its' needs the most, or that match the circumstances in which the testator is. That's the good side of this regulation.

However, the question is whether the existence of some testamentary forms in Inheritance Act is justified, especially if one takes into account that some of them in Serbian legal life (almost) never have been made, and they virtually represent a dead letter. That's the case with testament on the boat and military testament. Also, the question is whether we should have both judicial and notary testament, because the rules for making these two forms are almost similar. Furthermore, one can discuss that some forms of wills are outdated, so it can be considered if their deregulation is opportune, or at least a modification of the foundations on which they should be based in the future. The Commission for Drafting the Civil Code was of the opinion that nothing should be changed.

On the other hand, the inevitable question is whether it is justified to stipulate in Serbian law some new testamentary forms that existed in comparative law for a long time (e. g. the mystical testament).⁵⁵ Finally, one can debate is it really always necessary for the law to insist on strict compliance of the form when making a will, and whether there are situations when the formalities should be mitigated, in order to give the opportunity for the testator to make a will buy audio or video recording in particularly justified circumstances, such as exceptional circumstances (in Serbian law the testator is allowed to make nuncupative will in exceptional circumstances). These new testamentary forms are going to be regulated *de lege ferenda*, no doubts about that. Why not be regulated now, in the new Civil Code? Why not to allow the possibility for making a will by phone, camera, even on the internet (e.g. on social networks or by e-mail)? Smart devices are an indispensable part of our lives, we use them constantly. We should be able to record our last will on these devices - it can be considered more authentic than when one writes the will on the paper. Of course, defining the rules, form demands would be a challenge for every legislator, but for the start - making video or audio wills should be allowed at least in exceptional circumstances.

in order to ensure their subsistence minimum. This right would be granted only to those relatives that the decedent was obliged to maintain by law if maintenance ended due to his death

⁵⁵ About the significance of the mystical testament and the way how to be regulated in Serbian law, in detail: Arsenijević, B., *Tajno zaveštanje u pojedinim evropskim pravnim sistemima*, Zbornik radova Pravnog fakulteta u Nišu, No. 78, 2018, p. 408 and onward

4. CONCLUDING REMARKS

The Commission for drafting the Civil Code of the Republic of Serbia has been working on this Act for more than thirteen years. Entire lawyers public eagerly expects the adoption of the Code. But, the big question is whether the Code is going to satisfy public expectations.

In the sphere of succession law, the Commission imported into the Pre-Draft of the Code most of provisions from Serbian Inheritance Act, which served as a solid foundation. Bearing in mind that the inheritance law develops, the Commission proposed some new solutions that constitute a qualitative improvement in relation to existing solutions. The most important are: introduction the contract of inheritance, as the strongest legal ground to inherit; broadening the fiction of *nasciturus*, in order to recognize to the posthumously conceived child the right to inherit; prescribing new reasons for unworthiness to inherit; prescribing new general rule for testament interpretation *in favorem testamenti*; prescribing new rule for liability for the decedent's debts in case of renunciation of inheritance in favor of coheir, etc.

On the other hand, the impression is that some very important issues were not in the focus of the Commission. We believe that the Commission left a lot of open questions that should be carefully considered by the codifier. In this paper, we accented some of them. Our opinion is that heterosexual cohabitants and partners from registered same-sex partnerships should have a mutual right to inherit one another intestate. In order to give more freedom of testamentary disposition to the testator, we think that Serbian codifier should reduce the circle of relatives that may be compulsory heirs - except for descendants, this right should be guaranteed only for the parents. Finally, special attention should be dedicated to the reform of testamentary forms. Some forms of the last will do not exist in legal life for decades, and therefore the question is whether it is justified to continue to be regulated in the Code. Instead of them, some new forms should be regulated (e.g. mystical testament). Also, the legislator should follow the digital revolution and rapid changes in the modern world, which reflects in the legislation. Recording the last will on the smart devices is the future of testamentary succession and we believe that Serbian codifier should make efforts to provide conditions for the validity of this new form of the last will.

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