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CROSS-BORDER SUCCESSION ISSUES AND THE ATTEMPTS OF SERBIAN LEGISLATION TO BE HARMONIZED WITH THE EUROPEAN LEGISLATION ON SUCCESSION MATTERS

ABSTRACT: The study deals with the importance of harmonization processes related to the succession rules in the European Union. During the examination of the harmonization processes, a particular attention has been paid to migration, which nowadays has a deep impact on inheritance cases. In this regard the study demonstrates how the judicial cooperation is being realized in the European Union when it comes to succession-related issues. Among these, the study examines the current norms of the Serbian Act on private international law, which, from some aspects, has an obsolete system considering the conflict of laws rules in matters of succession with an international element. Namely, these rules are not harmonized with those of the European Succession Regulation, which means that the Serbian IPL system does not currently follow the European trends in legislation. Furthermore, it does not take into consideration certain current phenomena, especially the international migration and globalization. At the same time, Serbia is working hard to achieve a certain level of legal harmonization with the EU legislation. One proof of the harmonization attempts is the draft of the new PIL act of Serbia. The new concept of the conflict of laws rules and the new systemic approach of connecting factors is nearly completely identical with that of European legislative trends, especially regarding the scope of succession. If the draft act comes into

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force, it will mean, beyond any doubt, a giant leap for the country towards the European Union.

Keywords: the *European Succession Regulation, harmonization, mobility, citizenship, habitual residence, applicable law, jurisdiction.*

1. The causes and the importance of legal harmonization in matters of succession in the European Union

As a result of international migration that has a greater importance nowadays than ever, new problems are arising in the area of family law and succession law. Benefiting from the freedom of movement and freedom of residence, different cultures mix with one another, and people from different backgrounds and diverse legal systems meet in foreign countries. Thus, they are placed under the jurisdiction of a foreign state on the basis of their actual habitual residence but considering their cultural and religious convictions they cannot necessarily identify themselves with the prescribed rules and the culture of said state. Usually, they are still more closely linked to their country of origin.

By way of the abovementioned freedoms, transnational relationships develop, and some of these progress into cross-border family relationships. As it follows from the natural course of things as well as from the finiteness of human life, succession issues also come into focus more and more in a cross-border dimension. The continuous increase of foreign assets owned by people from different nationalities and the increasing number of citizens who settle abroad and acquire assets there requires a comprehensive knowledge of succession norms from legal practitioners at the international and European level not only in theory, but also in practice. It is well known that succession issues are regulated differently by each and every state, but according to the increasing number of cross-border succession matters of fact a certain level of harmonization was necessary in these questions. In order to overcome the difficulties arising from cross-border succession issues, the European legislator also recognized, that a comprehensive instrument which deals with the succession cases including cross-border implications was paramount. The European legislator's recognition resulted in the establishment of the 650/2012/EU Succession Regulation (European Parliament and Council Regulation 650/2012/EU on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate

of Succession),which is applicable nowadays in the states of the European Union.[1]

Within the framework of the integration processes in Europe, the expansion of the European Union which took place on 1 May 2004, has significantly increased the number of European citizens.[2] This was followed by the next expansion in 2007 with the entry of Romania and Bulgaria, which led to further growth in both the territory of the European Union and its population.[3]Following the most recent accession of Croatia,[4]the European Union counts 28 countries by 2013. The significant increase in Europe's population has also clearly had an impact on the increase in cross-border succession cases (Lübcke, 2013. p. 196).The number of succession issues including a foreign element has increasingly necessitated the creation of an EU-level regulation that would allow the smooth handling of succession cases involving several countries. At the same time, the expansion of the European Union has not only made it increasingly necessary and urgent to legislate, but has also made it more difficult, as the number of legal systems to be harmonized has automatically increased with the entry of new Member States (Lübcke, 2013. p. 198).

The privilege of the European citizenship has allowed citizens of the new Member States to move and reside freely, which has also helped more and more people to build up a connection with a Member State other than their own. Thanks to the possibilities of mobilization, a broader dimension has opened up for building up human relations and ties, as a result of which the number of marriages between persons of different nationalities has automatically increased. It follows from the natural flow of things, that these multicultural ties can be causally linked to more complex succession relations. In addition to this, the assets and, where appropriate, the location of this property that can be acquired in a state other than the country of origin should also be mentioned, as an important factor. Namely, these assets will one day due to the eventual death of the owner (deceased) become the subject of the inheritance estate.

[1] With the exception of the United Kingdom, (former member of the EU – until 31 December 2020) Ireland and Denmark, because these EU countries decided to opt out.

[2] That was the first part of the fifth enlargement of the European Union. In 2004 Cyprus, the Czech Republic, Estonia, Poland, Latvia, Lithuania, Hungary, Malta, Slovakia and Slovenia joined. As a result of the newly acceding countries, the number of European citizens has increased significantly, to approximately 450 million.

[3] On January 1, 2007, Bulgaria and Romania, having signed the Accession Treaty on April 25, 2005, became full members of the European Union (fifth enlargement, second part).

[4] Croatia's accession on 1 July 2013 makes it the second country of the former Yugoslavia to join the European Union.

The reasons mentioned above are a good illustration of the fact that the opportunities for people living in European countries have definitively necessitated a solution based on legal unification that is able to harmonize, as far as possible, matters of succession within the European Union.

2. The regulatory concept of the European Succession Regulation and the harmonization of PIL rules through a universal connecting factor in succession matters within the EU

Inheritance law has gained increasing importance from a European perspective. The laws that were previously considered stable are now met with the requirements of modern times and are no longer sufficient. Increasing population migration and foreign property holdings as well as multinational businesses are the features of today's modern European society. Unfortunately, in the event of death and the subsequent cross-border inheritance proceedings the situation is highly complicated due to the various applicable inheritance laws (Załucki, 2018. p. 2317). National rules on succession vary considerably between Member States (as to, for example, who inherits, what the portions and reserved shares are, how wide the testamentary freedom is, how the estate is to be administered, how wide the heirs' liability of debts is, etc.). The harmonization of the substantive succession regulations of various states has in the course of time due to their diversity and differences been classified as an impossible undertaking. A comparison of the different states' succession laws is quite often seen as not fruitful in the light of the differing underlying social, cultural, economic and religious aspects. (Tőkey, 2019. p. 37). It is generally understood to be a senseless exercise (Van Erp, 2007. p. 2).According to the cultural differences in the various states' substantive succession norms, the unification of rules of the EU member states would not be possible at all (Navrátilová, 2008, p. 415). Consequently, there is no other choice, than using the instruments of the conflict of laws, and unify the rules concerning jurisdiction and applicable law. In this manner a connecting factor is also needed. In cross-border inheritance cases, at first and most important thing is to determine which court has jurisdiction to deal with the case and which law shall be applicable to the given case. Practically, only when these two questions are determined, can the succession case be considered as opened. The European Succession Regulation lays down the uniform basic principles of succession matters for the member states, and in this way ensures a fundamentally functional approach at Union level.

A major step in facilitating cross-border succession issues was the adoption of the new Union rules designed to make it easier for citizens to handle the legal aspects of an international succession: the 650/2012/EU Succession Regulation. These new rules apply to the succession of those who die on or after 17 August 2015 (Art. 83. Succession Regulation). The concept of the regulation is an outstanding work and an excellent example of bringing the upper mentioned fundamentally different legal traditions together (Németh, 2015. p. 109).

The differences in substantive succession law are found in the background of the unification of the European conflict of laws rules. The aim of the Succession Regulation is to create unity by harmonizing international private law rules and by ensuring the *international harmony of decision-making* (Vékás, 2019. p. 22).

One of the most important features of the European Succession Regulation is, ensuring that a cross-border succession is treated coherently, according to one single law and by one single authority. In accordance with the main rule, the competent authority of the Member State in which the legator had his/her last habitual residence will have jurisdiction to deal with the succession case (Art. 4. Succession Regulation) and the law of this Member State will be applicable (Art. 21. Succession Regulation). In this way the Regulation defines the same connecting factor for both international jurisdiction and applicable law, which encourages the proceeding authority to apply its own substantive law. According to this the synchronization of *forum* and *ius* is also being realized. The application of a single law by a single authority to a cross-border succession avoids parallel proceedings with possibly conflicting judicial decisions. The EU legislature was guided by the desire to ensure a smooth proceeding of cross-border cases; therefore, the Regulation also ensures that decisions made in one Member State are recognized throughout the Union without the need for any special additional procedure.

A remarkable objective of the Regulation is to avoid for the heirs to be forced to open a succession proceeding in each Member State where the assets are located, so that the legal fate of the estate as a whole can be settled in a single proceeding. At the same time, the European Succession Regulation does not come between the national rules of succession law of the Member States. The form and content of the will, the persons who inherit after the testator, and the proportion of the intestate portion are still governed by the national rules. Therefore, the Regulation does not interfere with the states' substantive succession rules, it only provides an instrument to avoid the complications which are arising in a cross-border succession matters.

Before the habitual residence as a main connecting factor came into general use in the European regulations of the past two decades, there was an intense professional debate in private international law regarding the question of connecting factors. During the elaboration of the connecting factor system of the Succession Regulation, the nationality of the deceased, the deceased's last habitual residence, the deceased's last domicile and the law of the state where the majority of the estate is located were mentioned as potential connecting factors. Prior to the entry into force of the Regulation, the connecting factors applied in each Member State in international succession cases were different. During the negotiation period leading up to the Regulation (2009-2012), 14 out of the 27 Member States followed the principle of nationality.[5] In addition, some states relied on the principle of division of the estate, applying different connecting factors to movable and immovable property.[6] However, the new European codifications of the early 2000s are already firmly dominated by the principle of habitual residence.[7] There is a high degree of similarity between common law legal systems as regards the definition of the law applicable to the succession. To this day, Anglo-Saxon law follows the principle of division of the estate: in case of immovable property, the location of the property (*lex rei sitae*) and in the case of movable property, the last domicile of the testator (*personal law determined by residence*) is applicable. In that regard, it should be noted, for that reason in part, the United Kingdom is not a party to the regulation, regardless of Brexit (Vékás, 2020. pp. 3–4).

Due to the above-mentioned differences, the issue of the introduction of habitual residence, which can now be considered as a tradition in European legislature, was far from clear when the European Succession Regulation was drafted. The issue of the connecting factor has been the subject of much debate in the development of a European set of rules governing succession.

In the contest to choose the most suitable connecting principle, citizenship was undoubtedly the most likely, next to the last habitual residence. The fact that citizenship can be easily established without further steps and that citizenship is a solid, less modifiable link between a state and the citizen was

[5] Member States following the principle of nationality: Greece, Italy, Austria, Poland, Portugal, Sweden, Slovakia, Slovenia, Spain, Bulgaria, Germany, the Czech Republic, Hungary and, in the case of movable property, Romania.

[6] For example, France has ordered the application of the law of the testator's last place of residence in the case of movables and the law of the state where the assets are located in the case of immovable property.

[7] This is reflected e.g. in Belgium (2004), Bulgaria (2005), Poland (2011), the Czech Republic (2014), and Romania (2011).

in favor of maintaining citizenship as a connecting factor. In addition, the argument in favor of citizenship was that the application of the testator's own national law would best reflect his or her will, taking into consideration his or her cultural and religious beliefs. While citizenship constitutes a legal bond between a person and a state and, in addition, confers different rights on a citizen, the choice of an individual's habitual residence as the territory of a particular state does not necessarily create a legal bond or *ipso iure* rights in connection with the person residing in a given State (Páli, 2017, pp. 48–49). Accordingly, the habitual residence is easily changeable, therefore, an easily changeable connecting factor undermines legal certainty when planning the legal fate of the assets (Caravaca, Daví & Mansel, 2016, p. 315).

In 2009, when the draft regulation was published, there was still no complete agreement on the issue of the connecting factor (Rat der Europäischen Union. Dok. Nr. 11067/11, pp. 6–8). As Vienenkötter points out, the fixation of habitual residence as a connecting principle was finally the result of a compromise package (Vienenkötter, 2017, p. 265).

Despite consistent arguments in favor of citizenship, in the field of inheritance law, the choice of the last habitual residence in the competition of connecting factors ultimately fell. The fact that the residence principle is better aligned with integration and mobility policies played a major role in the decision. Furthermore, the principles of the freedom of movement and residence are being more represented by the habitual residence as connecting factor. The fact that residence is increasingly dominant in European regulations has also played a role, that is to say, the introduction of this connecting factor has been more in line with the EU's legislative trend (Balogh, 2020, p. 26).

3. The European Succession Regulation in relation to third countries

The recognition and implementation of decisions made within the European Union in the member states is now taking place quickly and without obstacles. The difficulties arising from the respective life situations can be basically solved thanks to the unified and consistent provisions of European succession norms.

At the same time in those cases where the European regulation and the international regulations of a third country collide, there is not necessarily a solution that leads to a clear and practical result after weighing the legal norms of both sides equally. The norms of the Succession Regulation provide solutions for numerous problems that have arisen in the past and are difficult

to overcome, but there are some questions in connection with inheritance cases with cross-border implications which still await a clear solution. The Regulation deals withboth the issues of jurisdiction and applicable law universally; that is, the scope of this regime also extends to those inheritance cases where the facts are only linked to a third state and not to another EU member state. As far as conflict-of-laws rules are concerned, the 'Rome-type' regulations that were drafted years ago also provide universal regulation. However, the universal regulation of jurisdiction, i.e. to cover the situations related to third countries by supplementary jurisdictional rules, is a relatively new phenomenon in the EU legislative process itself (Szőcs, 2019, p. 46). Although Serbia is not a member state of the European Union, cross-border succession issues are identified quite often. While the scope of the EU Succession Regulation is not applicable in Serbia, it's the PIL rules that have an important role in the case of succession cases containing an international element. As in every conflict of laws case, the fundamental question is which court will have jurisdiction and what law shall be applied in such cases. According to Art 30. of the IPL law of Serbia on succession matters the law of the state of which the testator was a citizen at the time of death is applicable (Art 30. Act on Private International law of Serbia). According to this, the main connecting factor is different from the concept of the EU Succession Regulation because it is based on the citizenship in private international law matters, including the matters in connection with succession.

The background of the Serbian connecting factor can be traced back to the Serbian IPR legal history. Serbia inherited its private international law recently (2003) from the Federal Republic of Yugoslavia (Stanivuković, 2006, p. 122).

The living conditions at that time were very different from those of today, where a parallel life in several countries and the migration processes are a common occurrence. The fact that the Serbian legislator applies decades old legislation to this day and considers standards that do not cover current life situations to be adequate can be used as a base for criticism. At the time of the enactment of the Serbian PIL law, the legislator defined citizenship, as the most obvious link for determining the jurisdiction and applicable law. The circumstances of that time, the bond of citizenship had a different meaning than it does today. In general, a person had and could have only one nationality, as globalization and mobility did not play as large a role as they do today. On the other hand, dual citizenship was not as easily accessible as it is today, as in general a change of citizenship could only take placeif the previous citizenship was replaced by the new one.

On the other hand, at the time the law was enacted, it was considered that personal rights, family law relations and inheritance issues should depend primarily on the laws of the state in which the persons concerned live. In addition, they sought to provide enhanced protection from foreign courts for Yugoslavian citizens who lived abroad and did so under the exclusive jurisdiction of the court of their nationality. In the national laws of most states, a new vision for the acquisition of citizenship has emerged in recent decades, which is more permissive than the previous system. Current regulations no longer exclude the possibility of dual citizenship and most countries have now abolished the termination of the former citizenship as a condition for acquiring the new one. Dual citizenship is therefore now a fully accepted phenomenon and is even particularly supported by some countries (Stanivuković, 2006, pp. 125–128). The large number of international marriages also has a significant impact on dual nationals, with the consequence that spouses can retain their own nationality, consequently their child will automatically have two nationalities. Based on all this, it can be concluded that the Serbian Private International Law Act, despite the structural changes that have taken place in recent decades, has not adapted its perspective to the current situation and cannot keep pace with the changes resulting from current living conditions.

Citizenship is a legal category which changed its fundamental meaning in the past two decades. International norms on citizenship and the theoretical understanding of its nature have changed. Citizenship shares the fate of the nation state concept and the weakening of its sovereignty in the international community.

Although the current Serbian IPL law does not follow the dynamics of the current social developments, the elaboration of the new PIL code has nearly come to its end. The Serbian PIL draft of 2014comprises altogether 199 provisions, which is to the possible extent harmonized with the *acquis communautaire*[8] and takes into account not only the Rome I, II and III-regulations, but also the Succession regulation as well as the Brussels I (Recast) and Brussels IIa regulation (Jessel-Holst, 2016. p. 138). The draft of the new Serbian PIL code breaks with the citizenship principle as a connecting factor in international succession matters and introduces domicile or habitual residence as a main connecting factor. As it can be seen from the draft of the new Serbian IPL act, Serbian courts shall have jurisdiction to rule on the succession as a whole if the deceased had his/her domicile or habitual residence in Serbia (Art. 114.

[8] The accumulated legislation, legal acts and court decisions that constitute the body of European Union law.

of the draft of the new Act on Private International law of Serbia). In this same article the Serbian draft contains another very important provision, namely the principle of the unity of succession. This principle has great importance, mainly because the European Succession Regulation also follows the principle of unity of succession. Thismeans that the succession is governed as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member state or in a third State should be handled in one single procedure (Preamble Art. 37. of the European Succession Regulation). The principle of unity of assets aims firstly to avoid parallel procedures. Therefore, according to the European Succession Regulation, it is not possible to apply the principle of division of the estate, i.e. to determine the legal fate of movable and immovable property according to different states' rules. It is a welcome development that the draft of the new Act on PIL of Serbia also foresees the principle of unity of succession, and at this point is also conceptionally fully harmonized with the EU Succession Regulation.

In general, it must be pointed out, that the draft of the new Act on PIL of Serbia contains regulations which follow the European legislative trends and are up to date concerning the most significant social phenomena such as mobility, migration, and globalization. As a result, with the coming into force of the new PIL code, Serbia will be one step forward on the way to the European Union.

4. Conclusion

As a reaction to the migration processes which are being more than actual in current times, and have a major impact on succession issues, the European legislator has introduced an effective instrument, in order to avoid complications resulting from cross border succession cases. Since 17 August 2015, the European Succession Regulation has been applicable in every EU Member State with the exception of the United Kingdom, Ireland and Denmark. The Regulation contains provisions on succession cases with a transnational component. This EU Succession Regulation does not, however, affect the provisions of individual Member States in the areas of substantive inheritance law (e. g. the question of who is a legal heir) and inheritance tax law. One of the biggest improvements of the Regulation is the introduction of the last habitual residence of the deceased as a connecting factor. Accordingly, the jurisdiction and the applicable law governing the succession case is determined based on the last habitual residence of the deceased. This concept fits to the European

legislative trend and takes into consideration the process of globalization. Considering the harmonization level of Serbia with the EU succession rules, at the time being, the Serbian conflict of laws rules and connecting factor system is not in line with the EU Regulation. Nevertheless, the new draft of the Serbian act on PIL will increase the level of harmonization when it comes into force.

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PREKOGRANIČNI NASLEDNOPRAVNI SLUČAJEVI I POKUŠAJI HARMONIZACIJE SRPSKOG ZAKONODAVSTVA SA EVROPSKIM ZAKONODAVSTVOM U OBLASTI NASLEDNOG PRAVA

REZIME: Predmet studije jeste značaj harmonizacije prava u Evropskoj uniji sa posebnim osvrtom na naslednopravna pravila. U okviru ispitivanja harmonizacionih tokova posebna pažnja se posvećuje migraciji čija pojava u sadašnjem vremenu vrši jak uticaj na naslednopravne slučajeve. U ovom pogledu studija će prikazati na koji način se pravosudna saradnja realizuje u Evropskoj uniji kada su u pitanju slučajevi u vezi sa nasleđivanjem. Osim toga, studija razmatra odredbe Zakona o sukobu rešavanja zakona sa propisima drugih zemalja Republike Srbije, koje se odnose na naslednopravne slučajeve sa međunarodnim elementom, i koje u nekom pogledu imaju zastareli sistem pravila, što setiče kolizionihodredaba i tački vezivanja. Naime, trenutno važeća pravila nisu u skladu sa pravilima koja predviđa Evropska Uredba o nasleđivanju, što ukazuje na to, da sistem trenutno važećeg zakona o međunarodnom privatnom pravu Republike Srbije ne prati evropsko-pravne zakonodavne trendove. Štaviše, ne uzima u obzir značajne pojave današnjeg vremena poput migracije i globalizacije. Istovremeno, ističe se, da Srbija uporno radi na postizanju određenog nivoa harmonizacije sa zakonodavstvom Evropske unije. Izvestan dokaz za pokušaj usaglašavanja na srpskoj strani manifestuje se u nacrtu no-

vog zakona o međunarodnom privatnom pravu. Novi koncept kolizionih pravila i novi sistem tački vezivanja gotovo su u potpunosti identični sa evropskim zakonodavnim trendovima, a to se posebno može utvrditi i za oblast naslednog prava. U slučaju da nacrt novog zakona bude prihvaćen i usvojen, te stupanjem na snagu novog zakona Srbija će napraviti ogroman korak ka Evropskoj uniji.

Ključne reči: *Evropska Uredba o nasleđivanju, harmonizacija, mobilitet, državljanstvo, uobičajeno prebivalište, pravo koje se primenjuje, nadležnost.*

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