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SEPARATIO BONORUM IN CONTEMPORARY LAW [1]

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Nataša Stojanović

Faculty of Law, University of Niš, Niš

Abstract. *In this paper, the author focuses on the institute of separatio bonorum, through the standpoint of legal solutions, judicial practice and legal theory in French, Austrian, Bulgarian, Slovenian, Croatian and our law. In the paper, the author proposes that the inadequacies of the current acts of the Republic of Serbia related to law of succession be removed through: the broadening of the number of authorized individuals who would have the right to separation of succession from the property of the successors; proportionality in the reimbursement of claims, in case a number of defunct's creditors (or creditors from some other category of entitled individuals) request separation, when the value of succession is insufficient to fully compensate for their claims; by prescribing conditions for undertaking this action in order to secure the claims and by extending the deadline within which separatio bonorum may be requested.*

Key words: *Separation participants, separation conditions, separation time, legal consequences of separation.*

INTRODUCTORY REMARKS

In our national law of succession, but also in numerous other legal systems, interests of the creditors of the deceased may be protected by the separation of succession from the property of successors (*separatio bonorum*).

This institute originally emerged from Roman Law. It was first introduced by praetors, and its purpose was to provide priority reimbursement to the creditors of the deceased and the legatees from his succession. During the reign of Justinian, the application of this legal remedy was limited to a five-year period, starting from the acquisition of succession.[2]

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[2] More detail in: И. Пухан, Римско право, Београд [I. Puhan, Roman Law, Belgrade], 1977, pp. 392; М. Хорват, Римско право, Загреб [M. Horvat, Roman Law, Zagreb], 1977, pp. 336–337; А. Ромац, Римско право, Загреб [A. Romac, Roman Law, Zagreb], 1981, pp. 389.

Should this measure for the protection of claims encompass some other legal persons, too, in Serbian law? How is one to regulate the relationship between a number of creditors of the deceased who request that the succession be separated from the property of the successors? Is the deadline within which separation may be requested, as defined in Serbian law, an acceptable solution for the creditors of the deceased? How much does the mechanism of this legal institute serve the purpose of efficient protection of the deceased's creditors?

In this paper, we try to find answers to these questions in order to shed more light on *separatio bonorum* in contemporary law and suggest possible solutions for the legal coverage of this institute in the national law.

1. PERSONS WHO HAVE THE RIGHT TO REQUEST *SEPARATIO BONORUM*

The range of application of *separatio bonorum* differs depending on the particular system of law of succession. While modern legislators agree that separation is possible only upon the initiative of entitled individuals, differences emerge in terms of the scope and number of persons with the right to this institute.

In French law[3] it is the creditors of the deceased, the creditors of debts from opened succession, and legatees of particular sums of money that have the authority to request separation.[4] In Austrian law[5] persons entitled to call upon this institute for the protection of claims include, apart from the creditors of the deceased, the legatees and statutory heirs.[6] [7] In Bulgarian law[8] these comprise the creditors and legatees of the deceased, regardless of the object of the legacy.[9] Slovenian,[10] Croatian[11] and Serbian law[12] allow that only creditors of the deceased request separation.[13]

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[3] For this paper, we used the *Code civil [Civil Code of France]*, along with its most recent changes and additions of 2006 (n◦ 2006-778 du 23 juin 2006). Quoted after: A. Delfosse – J-F. Peniguel, La réforme des successions et des libéralités, Paris, 2006, pp. 329–380.

[4] See: Art. 878, Par. 1, French Civil Code. More detail in: P. Malaurie – L. Aynès, Cours de droit civil, Les successions, Les libéralités, Paris, 1995, pp. 127; Y. Lequette, Droit civil, Les successions, Les libéralités, Paris, 1997, pp. 631.

[5] For this paper, we used the *Allgemeines bürgerliches Gesetzbuch [Civil Code of Austria]* 1811 (ABGB) idF. BGBI. 1996/759 und BGBI, 1997/6.

[6] After French *réservataire*, heirs who cannot be totally disinherited (translator's remark).

[7] See: Par. 812 of the Austrian Civil Code.

[8] For this paper, we used *Закон за наследството [Inheritance Act]*, with its most recent changes and additions, dating from the year 2000 (ДВ. no. 22/49, ДВ. no. 41/49, ДВ. no. 275/50, ДВ. no. 41/85, ДВ. no. 60/92, ДВ. no. 21/96, ДВ. no. 104/96, ДВ. no. 117/97, Дв. no. 96/99, ДВ. no. 34/00, from the web site:www.lex.bg).

[9] See: Art. 67, Par. 1, of the Inheritance Act of the Republic of Bulgaria.

[10] For this paper, we used *Zakon o dedovanju [Inheritance Act]*, with its most recent changes and additions, "Official Bulletin SRS", No. 15/76, 23/78; "Official Bulletin RS", no. 17/91, 13/94, 40/94, 82/94, 117/00, 67/01, 83/01, 74/04). Quoted after: K. Zupančič, Dedovanje [Succession], Ljubljana, 2005.

[11] For this paper, we used *Zakon o nasledjivanju [Inheritance Act],* with its most recent changes and aditions ("N. novine", No. 48/03, 163/03). Quoted after: J. Crnić– A-M. Končić, Zakon o nasljeđivanju [Inheritance act], second changed and appended edition, Zagreb, 2004.

[12] For the purposes of this paper, we used *Закон о наслеђивању [Inheritance Act]* ("Official Bulletin of the Republic of Serbia", No. 46/95, 101/03).

[13] See: Art. 143, Par. 1 of the Inheritance Act of the Republic of Slovenia, Art. 140, Par. 1 of the Inheritance Act of the Republic of Croatia and Art. 227 of the Inheritance Act of the Republic of Serbia.

In these legal systems, all creditors of the deceased, regardless of the height of the claims, are allowed to request this measure. Those creditors of the deceased whose claim has been duly secured, may request separation only on the condition that the pledge is not sufficient to cover the entire value of the claim.[14]

Contrary to Austrian, Bulgarian, Slovenian, Croatian, and Serbian law, where separate creditors address the competent court with the request for the separation of the succession from the property of successors,[15] in French law, authorized persons may claim this benefit by any act aimed at one or more creditors, where their intention for separation is clearly presented.[16]

Creditors of successors are never allowed the right to request the separation of the succession from the property of the successors. The French legislator has made an exception, as in the latest changes of and additions to the Civil Code, it is prescribed that creditors of successors may request that the successor's property be separated from inherited goods.[17]

In terms of the scope of individuals entitled to request separation, the solution by our national legislator mostly protects the interests of the creditors of the deceased, since they have no competition in the initiative to undertake this measure for the protection of claims. By not mentioning the creditors of the opened succession, statutory heirs whose title to the compulsory portion of the inheritance is obligational in nature, and the legatees, as persons who might be authorized to request separation, the Serbian legislator in practice favours the interests of the successors's creditors in their effort to reimburse their claims from the succession of the deceased, although this is not accorded with the specific nature of debts from the opened inheritance, and does not comply with the assumed will of the defunct. For this reason, we hold that these persons, too, should be among individuals entitled to request separation. Although all of them would be given the right to this privilege, primarily for the purpose of reimbursing their claims, advantage in the conduction of this measure would be given to creditors of debts from the opened inheritance, followed by the creditors of the deceased, then statutory successors, and, finally, legatees.

Should our national law allow that the creditors of the successors separate the property from the succession of the deceased? We hold the opinion that the interests of the successors' creditors are sufficiently protected by the successors' responsibility for the debts of the deceased *pro viribus hereditatis* and by the *actio Pauliana* institute, so that the application of *separatio bonorum* in favour of the successors' creditors is unnecessary.

If the separation of the succession from the property of the successors is requested by one or a number of the deceased's creditors, is it done in favour of other creditors of the deceased?

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[14] See, for instance.: Х. Тасев, Българско наследствено право, нова редакция, [H. Tasev, Bulgraian Law of Succession] Г. Петканов – С. Тасев [G. Petkanov – S. Tasev], Sofia, 1993, pp. 179; О. Антић – З. Балиновац, Коментар Закона о наслеђивању [O Antić – Z. Balinovac, A Commentary of the Inheritance Act], Belgrade, 1996, pp. 594; F. Terré – Y. Lequette, op. cit., pp. 631.

[15] See: Par. 812 of the Austrian Civil Code, Art. 67 of the Inheritance Act of the Republic of Bulgaria, Art. 143 of the Inheritance Act of the Republic of Slovenia, Art. 140 of the Inheritance Act of the Republic of Croatia and Art. 227 of the Inheritance Act of the Republic of Serbia.

[16] More detail in: F. Terré – Y. Lequette, op. cit., pp. 632–633; J. Maury, Successions et libéralités, Paris, 2007, pp. 95.

[17] See: Art. 878, Par. 2 of the French Civil Code. More detail on this problem in: J. Maury, op. cit., pp. 96.

In French and Austrian law, separation is conducted in favour of all creditors of the deceased, irrespective of who has requested this measure for the protection of claims.[18] In Bulgarian law, advantage is given to those creditors that have requested that their claims be reimbursed, as opposed to those who have not pledged this claim.[19] Slovenian, Croatian, and Serbian law define that only those creditors of the deceased who have requested separation are privileged with regard to the creditors of the successors.[20] We hold that, regardless of whether or not they have asked for separation, the creditors must be given advantage in compensating for their claims as opposed to the successors' creditors, and also that the creditors of the deceased who have requested the separation of succession from the property of the successors must be given priority in reimbursing their claims with regard to those creditors of the deceased who have failed to meet the separation deadline, who have not requested separation, or whose request for separation has not been acknowledged.

How shall one distribute the inherited goods, if a number of creditors of the deceased (or other entitled persons) have requested that the succession be separated from the property of successors, where the value of the succession is not sufficient for full reimbursement of all claims? Should one follow the path of successive payment of claims or should one rather reimburse the claims proportional to their value?

In such situations, French[21], Austrian[22] and Bulgarian law[23] insist on the proportionality in the payment of claims. The silence of the Serbian legislator on this matter may result in different actions of courts in identical legal situations, which is why this segment of separation should be normatively covered, too. Solutions from the French legal practice, and also those found in the Austrian and Bulgarian theory of law may serve as a model to the Serbian legislator in this domain.

2. CONDITIONS WHICH MUST BE MET IN ORDER FOR *SEPARATIO BONORUM* TO APPLY

Individuals entitled to request that the succession be separated from the property of successors may satisfy their plea only if conditions for this are met, as defined by the law. Some systems of law of succession insist that the creditor must only make probable, and not necessarily prove, that he has a claim and that there is a danger that the claim will not be reimbursed, unless this measure is taken.[24]

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[18] See: F. Terré – Y. Lequette, op. cit., pp. 635; B. Eccher, Bürgerliches Recht, VI, Erbrecht, Wien, 2002, pp. 95.
[19] See: Art. 67, Par. 3, of The Inheritance Act of the Republic of Bulgaria.
[20] See: Art. 143, Par. 1 of the Inheritance Act of the Republic of Slovenia, Art. 140, Par. 2 of the Inheritance Act of the Republic of Croatia and Art. 226 of the Inheritance Act of the Republic of Serbia.
[21] See: Req. 4 déc 1871: DP 1871.1.249, concl. Reverchon. Quoted after: G. Goubeaux – Ph. Bihr – X. Henry, Code civil, Paris, 1995/1996, pp. 637.
[22] B. Eccher, op. cit., pp. 95.
[23] А. Цонов, Коментар по Закона за наследството, София [A. Conov, Commentary of the Inheritance Act, Sofia], 1993, pp. 162.
[24] In that respect, see: Par. 812 of Austrian Civil Code and Art. 140, Par. 1 of the Inheritance Act of the Republic of Croatia.

Just like the French, Bulgarian, and Slovenian ones, the Serbian legislator does not provide any explicit statements. In our national literature in law there is a singular position that the creditors of the deceased must show that their claim is probable, not insisting therein on the justification that there might be a danger that the claim is not reimbursed, due to the fact the succession and the property of the successors may be blended.[25]

Since, as we have already pointed out, separation is but one of the measures for securing claims, we hold that, if it is to be undertaken, both conditions[26] must be met, for which the Executive Procedure Act of the Republic of Serbia[27] requires temporary measures which, according to their legal volume, are almost identical to separation.[28]

3. Deadline within Which *Separatio Bonorum* May Be Requested

The right of entitled individuals to request separation is provided within a limited time framework, which is defined differently depending on the particular system of law of succession.

In French law, when the succession consists solely of movable goods, separation is possible within two years from the opening of the succession.[29] In terms of immovable property, separation is possible practically as long as the property is owned by the successors. However, in order for separation to be fully efficient, regarding all goods, this measure must be written into the public register, within four months from the day of the death of the deceased.[30] By the separation of the succession from the property of the successors, the entitled person is given priority in the reimbursement of claims from immovable property, followed by the ius ad sequelam and priority.[31] Contrary to this, there is no ius ad sequelam over movable goods. However, separate creditors shall withhold the priority right to the price of goods that have been alienated, as long as this price remains individualized.[32] In case this deadline is not met, the right to the separation of the succession from the property of the successors is transformed into ordinary mortgage: this means that, if mortgage creditors of the successor have enlisted their claim after the expiry of this deadline, and before separate creditors, they shall have the priority right. Contrary to this, there is no request for enlistment in terms of the unsecured creditors of the successor.[33]

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[25] See for instance.: О. Антић – З. Балиновац [O. Antić – Z. Balinovac], op. cit., pp. 594–595; В. Ђорђевић, Наследно право, Ниш [B. Djordjević, Law of Succession, Niš] 1997, pp. 344.

[26] Also in: Ј. Црнић – М. Дика – Б. Хрватин – О. Јелчић – Т. Јосиповић – Ј. Матко Ружњак – З. Кохарић, Ново насљедноправно уређење, Загреб, [J. Crnić et al, New Organization of Law of Succession, Zagreb], 2003, pp. 16.

[27] "Official Bulletin of the Republic of Serbia", No. 125/04.

[28] See: Art. 299 and Art. 302 of the Executive Procedure Act of the Republic of Serbia.

[29] See: Art. 881, Par. 1 of French Civil Code. Earlier Art. 880, Par. 1 of French Civil Code prescribed a three-year deadline.

[30] See: Art. 881, Par. 2 in relation to Art. 2111 of French Civil Code.

[31] More detail in: A. Delfosse – J-F. Peniguel, op. cit., pp. 119.

[32] More detail in: F. Terré – Y. Lequette, op. cit., pp. 636–637.

[33] Ibidem, p. 633–635.

In Austrian law, this measure for the protection of claims may be requested by the moment in which the succession is handed over to successors.[34]

In Bulgarian law, the deadline for requesting separation is three months, starting from the moment of receipt of the succession.[35]

In Slovenian, Croatian, and Serbian law the deadline within which one may request that the succession be separated from the property of the successors is also three months, however it starts upon the moment of opening the succession.[36] In its legal nature, the deadline is strictly limited.[37]

Is the three-month period sufficient for the intervention of separate creditors in their effort to protect their claims? Our national judicial practice tends to extend this deadline, linking the separation to the finalization of the succession proceedings,[38] even though, by requesting that the succession be separated from the property of the successors, the creditors of the deceased practically start a separate extra-judicial proceedings, independent of whether or not the succession proceedings has started.[39] Though not justified, the link that is made between this measure for the protection of claims and the succession procedure in the national judiciary quite clearly suggests that the deadline should be extended. Even more so as our law, contrary to, for instance, Austrian or German law,[40] does not know of the institute of the conference of creditors, or, French or Russian compulsory submission of claims by the creditors of the succession.[41]

4. LEGAL CONSEQUENCES OF *SEPARATIO BONORUM*

By separating the succession from the property of the successors, the creditors of the deceased gain advantage in reimbursing their claims from the succession, as compared with the creditors of the successors. During this time, the successors' creditors may not reimburse their claims from the succession. In addition to this, separation protects credi-

[34] See: Art. 812 of Austrian Civil Code.

[35] See: Art. 67, Par. 1 of the Inheritance Act of the Republic of Bulgaria.

[36] See: Art. 143, Par. 1 of the Inheritance Act of the Republic of Slovenia, Art. 140, Par. 1 of the Inheritance Act of the Republic of Croatia, and Art. 225, Par. 1 of the Inheritance Act of the Republic of Serbia.

[37] In this respect, see: the resolution of the Higher Court in Celje, No. Cp 840/99 dated 18 November 1999. Quoted after: J. Šinkovec – B. Tratar, Veliki Komentar Zakona o dedovanju, sa sodno prakso [Grand Commentary of the Inheritance Act, along with the Judicial Practice], Ljubljana, 2005, pp. 405.

[38] See: the resolution of the Supreme Court of Serbia, Rev. 4114/03 dated 14 January 2004, Judicial Practice, No. 7/8, res. no. 36.

[39] This is the position of the Supreme Court of Serbia. See: resolution of this Court, no. Гж-178/61 dated 30 June 1961. године. Resolution quoted by: N. Gavella, Правни положај насљедника [Legal Position of the Heir], Zagreb, 1983, pp. 50, footnote no. 179.

[40] See: Par. 814 of Austrian Civil Code. Unlike the Austrian legislator, who does not specify the time limit within which creditors of the succession may apply for their claims, German Civil Code in its Par. 2061 defines a six-month terms, as of the date of publishing the last advertisement (for the purpose of this paper, we have used the text of Bürgerliches Gesetzbuch availble at: http://www.dejure.org/gesetze/BGB/html).

[41] In French law, see: Art. 729 of French Civil Code. In Russian law, see: art. 1175 of Civil Code of Russia (for this paper, we have used Гражданский кодекс Российской Федерации, часть III, СЗРФ Нº 49 от 03 December 2001). Quoted after: Group of authors, Коментарий Гражданскому кодексу Российской Федерации, Москва [Commentaries on the Civil Code of the Russian Federation, Moscow], 2004.

tors of the deceased from such activities of the successors which alienate or encumber the goods from the estate of the succession.

While in Austrian, Slovenian, Croatian and Serbian law the succession is, as a rule, conferred upon a trustee for protection and management,[42] in French law it remains in the hands of the successors. If creditors wish to prevent such management of goods which may jeopardize their interest, in French legal practice they are allowed the right to request certain measures: sealing, drawing an inventory, seizure of property from the succession, sequestration.[43] Apart from this, the ius ad sequelam of inherited immovable goods, among other things, prevents that they be alienated by the successor.[44]

A negative side effect of this measure protecting the interests of the creditors of the deceased is seen in the fact that it regularly results in the responsibility of successors for the debts of the deceased *cum viribus hereditatis*.[45] Yet, in French and Bulgarian law, when a successor is given the succession without the signature privilege, the separation does not limit his responsibility for the debts of the deceased. Rather, the successor is still responsible, *ultra vires hereditatis*.[46]

CONCLUDING REMARKS

Undoubtedly, the institute *separatio bonorum*, as covered in our legislation, singles out and efficiently protects the interests of the deceased's creditors, although, due to a similar legal position, this legal remedy should also encompass the creditors of debts from the opened succession, privileged as compared with the creditors of the deceased, followed by statutory heirs, whose title to the compulsory portion of the inheritance is obligational in nature, and the legatees.

In future versions of the Inheritance Act, the imprecision of the Serbian legislator must be corrected, so that the separation should serve the benefit of all entitled individuals from the particular group of succession creditors, irrespective of who has requested that the measure be undertaken, where only those who have requested that *separatio bonorum* be called upon may have priority in reimbursing their claims, as compared with the creditors who have missed the separation deadline, who have not requested that this measure be taken, or whose request has not been acknowledged. In case there should be a number of creditors of the deceased (or separate creditors from some other category of entitled persons), whose total value of claims cannot be fully reimbursed from the succes-

[42] See Par. 812 of Austrian Civil Code, Art. 143, Par. 3 of the Inheritance Act of the Republic of Slovenia, Art. 140, Par. 4 of the Inheritance Act of the Republic of Croatia, and Art. 227, Par. 2 of the Inheritance Act of the Republic of Serbia.

[43] See: Cass. civ., 16 août 1869, S. 1869.1.41, D.1869.1.463. Quoted after: F. Terré – Y. Lequette, op. cit., pp. 634.

[44] See: Cass. civ., 8 déc. 1924, D.P. 1925.1.64; 3 févr. 1931. S.1932.1.1; Cass, req., 28 juin 1933, JCP 1933.II.875. Resolutions quoted after: F. Terré – Y. Lequette, op. cit., pp. 636–637.

[45] See for instance.: Par. 812 of Austrian Civil Code and Art. 227, Par. 1 of the Inheritance Act of the Republic of Serbia.

[46] In this respect, in French law see: F. Terré – Y. Lequette, op. cit., pp. 634; J. Maury, op. cit., pp. 95. In Bulgarian law, see: Х. Тасев [H. Tasev], op. cit., pp. 179–180; Г. Господинов, Наследство и делбата му, София [G. Gospodinov, Inheritance and its Partition, Sofia], 1995, pp. 90.

sion, the model example should be that of French, Austrian, and Bulgarian law, where proportional payment of claims is defined.

Since separation is but one measure for securing claims, the Inheritance Act should list conditions under which it may be called upon, using as a role model the provisions of the Executive Procedure Act on defining temporary measures.

As our national law does not know of the conference of creditors institute, which exists in Austrian and German law, or of obligatory submission of claims by succession creditors, found in French and Russian law, it must be defined that, if the enlistment and assessment of the succession has been made, this measure may be requested until the claim expires, and, if the enlistment and assessment has not been made, within a period which may not be shorter than six months.

SEPARATIO BONORUM U SAVREMENOM PRAVU

Nataša Stojanović

Predmet pažnje autora u radu jeste institut separatio bonorum, sagledan kroz prizmu zakonskih rešenja, sudske prakse i teorije francuskog, austrijskog, bugarskog, slovenačkog, hrvatskog i domaćeg prava. Autor u radu predlaže da uočeni nedostaci u važećim nasledno-pravnim propisima Republike Srbije, u budućoj redakciji zakonskog teksta, budu otklonjeni: proširivanjem kruga ovlašćenih lica koji bi imali pravo na odvajanje zaostavštine od imovine naslednika; srazmernošću u isplati potraživanja, u slučaju da više ostaviočevih poverilaca (ili poverilaca iz neke druge kategorije ovlašćenih lica), zahtevaju separaciju, kada je vrednost zaostavštine nedovoljna za potpuno namirenje njihovih potraživanja; propisivanjem uslova za preduzimanjem ove mere za obezbeđenje potraživanja i produženjem roka u kome se može zahtevati separatio bonorum.

Ključne reči: *subjekti separacije, uslovi za separaciju, vreme separacije, pravne posledice separacije*