

International Editorial Board Members:

John Cerone (USA), Barbara Delcourt (Belgium)
Silvio Ferrari (Italy), Christa Jesel Holst
(Germany), Thomas Koenig (USA), Peter Koller
(Austria), Janez Kranjc (Slovenia), Werner
Krawietz (Germany), Ingeborg Maus (Germany),
Thomas Mertens (Holland), Slobodan Milačić
(France), Paul du Plessis (Scotland), Željko Šević
(England), Gerhard Thür (Austria) Ito Tomoyoshi
(Japan), Alan Watson (USA)

University of Belgrade Editorial Board Members:

Milenko Kreća, Dragan M. Mitrović, Boris
Begović, Milan Škulić, Miroslav Milošević,
Vladan Petrov, Vladimir Pavić, Tanasije
Marinković, Marija Karanikić

Editors-in-Chief:

Sima Avramović
Alan Watson

Guest Editor:

Thomas Simon

Co-editors and Reviewers

Acad. Lujo Margetić
Janez Kranjc
Žika Bujuklić

Managing Editors:

Marija Karanikić
Caroline Fally

Publisher:

University of Belgrade Faculty of Law
University of Vienna Faculty of Law

Layout Manager:

Jovan Đorđević

Cover Design, Type Setting and Layout:

Dosije studio, Belgrade

Printed by:

Dosije studio, Belgrade



ANNALS
OF THE FACULTY OF LAW IN BELGRADE
BELGRADE LAW REVIEW

АНАЛИ
ПРАВНОГ ФАКУЛТЕТА У БЕОГРАДУ

ЧАСОПИС ЗА ПРАВНЕ И ДРУШТВЕНЕ НАУКЕ

JOURNAL OF LEGAL AND SOCIAL SCIENCES
UNIVERSITY OF BELGRADE
UNIVERSITY OF VIENNA
YEAR LVIII, 2010, NO. 3

ISSN 0003-2565 : UDC 34/35

legal language, learn to comprehensively and precisely analyse legal texts, learn the historical and social dimensions of law, become familiar with the Latin legal terminology, the lingua franca of the learned lawyers, etc.

The teaching of Roman law went hand in hand with its research. As the presence of Roman law in the legal curricula has been considerably diminished during the last decades, so has the research thereof. It would be wrong, however, to abandon further research of Roman law. In some form, both teaching and research of Roman law are essential for the legal studies if we want to educate legal intellectuals and not mere legal technicians.

The research of Roman law in Slovenia can be divided into two periods, with the First World War representing the dividing line. Before the First World War, there was no Slovenian university and because of that no research of Roman law in the Slovenian language.

The paper presents some researchers in the field of Roman law of Slovenian origin who were active at foreign universities. The first among them was Martin Pegius (1508? –1592). He was a counsellor to the Bishop of Salzburg and published some important legal works reprinted several times, stretching all the way to the first half of the XVIII century. Jurij Wohinz (Bohinc 1618–1684) was a professor of Digest in Vienna, Janez Josip Dinzl (1666–1686) was a professor of law in Ingolstadt, Franc Ksaver Jelenc (1749–1805) was a professor in Innsbruck and in Freiburg i. Br., Tomaž Dolinar (1760–1839) was a professor of canon and Roman law in Vienna. Jurij Dolinar (1764–1858) was the first to teach Roman law in Ljubljana at the university founded by the French Provinces of Illyria in 1809. Janez Kopač (1793–1872) was probably the last professor of Roman law of Slovenian origin teaching abroad. He was a professor of Roman law in Innsbruck and in Graz.

The research of Roman law in Slovenian language and in the territory of the present-day Slovenia started with the foundation of the Slovenian university in 1919. The main researchers and professors of Roman law in Slovenia after the First World War were Anton Skumovič (1864–1952), Gregor Krek (1875–1942), Viktor Korošec (1899–1985) and Ciril Kržišnik (1909–1999). At present there are two professors and researchers in the field of Roman law in Slovenia: Marko Kambič and the author of this article.

Key words: Roman law. – Research of Roman law. – Teaching of Roman law. – Legal Culture

Dr. Mirela Krešić

Assistant Lecturer
University of Zagreb Faculty of Law
mkresic2002@yahoo.com

INTESTATE SUCCESSION OF FEMALE DESCENDANTS ACCORDING TO THE AUSTRIAN GENERAL CIVIL CODE IN THE CROATIAN-SLAVONIAN LEGAL AREA 1853–1946*

Development of the Croatian legal system based on the Austrian General Civil Code (GCC) in the period 1853–1946 made the GCC a watershed of legal tradition. Founded on liberal principles, and the principle of individuality, it had a significant impact on the society at the time of its introduction – it had brought the feudal social and legal system to an end, and facilitated the emergence of a modern civil society. However, the process of transformation was marked by numerous problems for which the reasons were found in the GCC, particularly in its provisions on intestate succession.

Introduction of the principle of equality of male and female descendants in the matters pertaining to inheritance was considered particularly controversial, especially concerning its application in the matters of land inheritance. Difficulties in the application of the principle of equality of inheritance were justified by the legal consciousness in some parts of Croatian society, which were opposed to the idea of gender equality in succession. Also, a belief prevailed that (further) partition of predominantly small lots of land into even smaller parts, following the disposal of the estate between male and female descendants, would lead to difficult economic circumstances and poverty.

Therefore, it became usual to use a dowry as an instrument to avoid using the principle of equality of male and female descendants. According to the GCC, dowry

* The paper is an elaborated version of the short communication discussed at the Conference *Internationale Rechtswissenschaftliche Tagung, Forschungen zur Rechtsgeschichte in Südosteuropa*, held in Vienna on 9-11 October, 2008. This paper was written as a part of the research project *Croatian Legal Culture in European Context: Tradition and Modernization*, led by Professor Dalibor Čepulo, and supported by the Ministry of Science, Education and Sports of the Republic of Croatia.

was included into the legal portion of inheritance to which the female descendants were entitled. But in practice, dowry became an equivalent to female descendant's legal portion of inheritance. Namely, getting a dowry was, for daughters, the only way of being settled from the parent's estate. Despite disapproval, social and legislative progress eventually led to the adjustment to the principle of equality of male and female descendants as an integral part of Croatian inheritance system.

Key words: Austrian General Civil Code. – Intestate succession. – Female descendants. – Principle of equality of male and female descendants. – Dowry.

1. INTRODUCTION

The Austrian General Civil Code (GCC) of 1811¹ was introduced in the Kingdom of Croatia and Slavonia by the Imperial Patent in 1852, and entered into force on May 1, 1853. Development of the Croatian legal system based on the GCC continued over the next hundred years, making it an important part of the Croatian legal tradition. Despite the fact that the development of the Croatian state and its legal system was influenced by three different states context (Habsburg/Austro-Hungarian Monarchy, the Kingdom of Serbs, Croats and Slovenes/Yugoslavia, and duality of government during the World War II) the system of the civil law remained unchanged. The enforcement of the GCC, after the abolishment of feudal rule in 1848, had a significant impact to the economy and the society as it was at the time of the enforcement. It had facilitated a break with feudal social and legal system, and fuelled the modernization of both the civil society, and the legal system, and largely contributed to the process of modernization of Croatia as a whole. The social transformation was overshadowed by many problems, the origin of which was sought in the GCC, allegedly holding no regard for the particularities of the Croatian social and economic circumstances. Rules of inheritance

¹ The General Civil Code constituted a codification of civil law, decreed by the Imperial Patent in 1811 in the Austrian hereditary lands of the Habsburg Monarchy. It was gradually introduced in other parts of the Monarchy, and in the period between 1812–1820 enforced on the territory of the Military Frontier, Istria and Dalmatia. In 1852, the GCC entered into force in the Kingdom of Hungary, Croatia and Slavonia, in the Serb Vojvodina, and Tamiš Banat. With the abolishment of the Bach's absolutism (1859) and the introduction of the October Diploma (1860) the enforcement of the GCC continued, evolving into a Croatian Civil Code in its own right, independent of the Austrian model. Following the secession of Croatia from the Monarchy in 1918, the GCC remained in force, and the attempts to replace it with the Preliminary Principles of the Yugoslav Civil Code (1934) and the Principles of the Civil Code for the Independent State of Croatia (1943) were not successful. The GCC remained part of the Croatian legal system until the passing of the Law on Invalidity of Legal Acts Passed Prior to 6 April 1941 and During the Occupation (1946), whereupon single legal rules could be applied subject to legally prescribed provisions.

came under particular criticism, having been considered inappropriate in the context of the Croatian tradition, and one of the causes of slow economic growth.²

There is no doubt that intestate succession, due to its link with ownership rights and family relationships, has a strong bearing on the fundamental rights and economic and social features of any society. Due to the fact that provisions on succession were based, among other provisions, on the existence of private property and the principle of equality of male and female heirs, solutions comprised in the GCC regarding the rules of succession, meant inevitable conflict with the traditional way of life, centered around communal joint family and joint ownership, and rejection of equality of male and female heirs. Difficulties associated with the implementation of the rules of succession in matters concerning cooperatives resulted in the issue of the Order of the Austrian Minister of Justice dated in April 7, 1857, pronouncing the succession provisions of the GCC and related provisions of Non-contentious proceedings (1854) null and void. Prior to the final regulation of the issue of cooperatives, probate proceedings adhering to the GCC provisions could only be conducted in cases concerning the protection of orphans and minors.³ The issue of cooperatives and cooperative property was regulated by separate legislation.⁴

Eventually, the significance of the GCC became indisputable, and after much perturbation and with numerous modifications, the principle of equality of successors regardless of gender was more or less accepted.

² M. Derenčin, *Tumač k obćemu austrijskom građanskom zakoniku* [Commentary on the Austrian General Civil Code], I, Zagreb 1880, 30.

³ The main difficulties with the application of the GCC to the cooperatives lay in the fact that, according to the GCC, joint ownership with unlimited share in ownership by individuals did not exist, but co-ownership with limited individual share. The Ban's Court in Zagreb issued warnings regarding the matter, stating that probate proceedings which include a decedent – member of the cooperatives could not be carried out without a clear position on the distribution of the estate, whether it should be executed *per capita* or *per stirpes*. This position was in accordance with the opinion of the Ban's Court that the property of a cooperative was inalienable, common, undivided and, in fact, joint and several, and as such had no common traits with the co-ownership according to the GCC. At the same time, the Supreme Court in Vienna took the position of granting the application of the provisions on co-ownership to cooperatives. Not going into further detail on the question of cooperative ownership, suffice it to say that the Minister of Justice Krauss, endorsed the position of the Ban's Court, and brought the said Order of suspension of further probate proceedings. For further details see M. Gross, *Počeci moderne Hrvatske* [The Beginnings of Modern Croatia], Zagreb 1985, 213–217.

⁴ The first Law on cooperatives was passed in 1870, and the last one in 1889, significant because it was in force on the entire territory of the Kingdom of Croatia and Slavonia, including the area of demilitarized, acceded Military Frontier.

2. INTESTATE SUCCESSION AT THE CROATIAN-SLAVONIAN TERRITORY PRIOR TO THE IMPLEMENTATION OF THE AUSTRIAN GENERAL CIVIL CODE

Prior to the implementation of the GCC, various rules of succession existed within the Croatian-Slavonian territory regarding the type of property inherited. Also, different rules of succession existed for individuals of different estates of the realm. Such state of affairs was the consequence of the estate differentiation existing in the society, of the differentiation of the object of succession regarding the means of its acquisition, as well as the distribution of such assets according to a range of various criteria. It was relevant for the process of succession whether the property inherited was hereditary property (*bona hereditaria*) or acquired property (*bona acquisitia*); whether it was immovable, or movable property, and finally, whether the nobility, citizens or tenant peasants were concerned. The rules of succession for the nobility and the tenant peasants were mostly comprised in the *Tripartitum*,⁵ while the rules of succession for the citizens were regulated by separate legislation.⁶

2.1. Female descendants and intestate succession

Inheritance law was regulated in accordance with the ground provisions of the Hungarian-Croatian law, observing the distinction between hereditary and acquired, movable and immovable property. To win the entitlement to succession, the question of the gender of a potential heir was also significant, particularly with the families of the nobility. There

⁵ *The Tripartitum (Tripartitum opus iuris consuetudinarii inclyti regni Hungariae, 1517)* by Stephen Werbőczy, is the most important source for the study of the Hungarian-Croatian law, depicting vividly the laws and legal customs at the beginning of the 16th century. The Croatian translation of *The Tripartitum* was edited by Ivan Pergošić in 1574, and was in force until the implementation of the GCC. However, it should be noted that certain differences existed between the legal systems of Hungary and the Croatian territories, which is also underlined by Werbőczy: "Because we see that the long-established laws and customs of the aforesaid kingdoms of Dalmatia, Croatia, Slavonia, and [of] Transylvania vary in certain terms and articles from the laws of our country, namely this kingdom of Hungary..." (Trip. III, 2). J. M. Bak, P. Banyó, M. Rady (eds.), *Stephen Werbőczy: The Customary Law of the Renowned Kingdom of Hungary: A Work in Three Parts Rendered by Stephen Werbőczy (The "Tripartitum")*, Idyllwild CA – Budapest 2005, 377.

⁶ The royal free cities of Croatia and Slavonia had a special status because they were granted the royal charter. Granting of the royal charter to the cities and their inhabitants meant better economic, social and legal status, and the confirmation of their influence on the political affairs came when they acquired the status of the fourth estate of the realm in the Hungarian-Croatian state union. The most prominent royal charters were those granted to the cities of Varaždin (1209) Vukovar (1231) Virovitica (1234) Petrinja (1240) Samobor (1242) Križevci (1252) and Zagreb (1242).

was a distinction between the principle of equality of entitlement (*aequalitas iuris*), the entitlement to equal succession of both the male and female line, and the principle of inequality of entitlement (*inaequalitas iuris*) denying entitlement to the female line. Thus, the general rule applied in the matters concerning the inheritance of movable property was equality of entitlement, whereas immovable property was inherited subject to the principle of inequality of entitlement. However, certain modifications of the general rules existed, subject to the origin of the property of the nobility. Property acquired by the charter of enfeoffment was inherited as stipulated by the charter, generally, according to an unequal entitlement status, unless the charter contained a clause granting succession to the female line, such as *clausula heredibus et posteritatibus utriusque sexus universis* – the clause regulating equal right of succession of both the male and female lines,⁷ or the *clausula heredibus et posteritatibus masculini, ac post horum defectum foemini etiam sexus universis* – the clause granting transfer of entitlement to succession to the female line upon the extinction of the male line. Property for which the inheritance right was granted to the male line only, the female line had the so-called special inheritance rights, such as the filial quarter (*quarta puellaris*). A very important legal instrument was prefection (*praefectio*) stipulating that in case of the extinction of the male line, the estate of a nobleman, inherited through the male line, could be adapted via royal privilege to grant the inheritance rights to the successors of the female line and their male descendants. Royal privilege could be requested by the last male holder over the estate, to the benefit of a daughter (or sister) or by an interested female party. Even if a contractual or testamentary charge of the estate existed to the benefit of a female party, subsequent grant could be requested from the king. A daughter to which such provisions applied, inherited under the same terms as a male successor (because she was "promoted" to a son), and subsequent order of succession followed the previously established model, whereby the daughter was succeeded by her male descendants. Property not acquired by means of a charter of enfeoffment but through purchase was inherited according to the princi-

⁷ Cases were not rare where the original charter granting succession exclusively to the male line (*heredibus et posteritatibus masculini sexus*) was replaced by the charter granting equal succession to the female line, i.e. to both lines (*heredibus et posteritatibus utriusque sexus universis*). An example is evident in the case of the Susedgrad-Stubica nobility, granting succession to male heirs only as late as mid 15th century. Subsequently, the last male member of the family, Ivan Tot of Susedgrad, was granted a new royal charter by King Albrecht von Habsburg in 1439, allowing the heirs of the female line to inherit the estate, in this particular case, his daughter Dorothea and her heirs. J. Adamček, *Agrarni odnosi u Hrvatskoj od sredine XV do kraja XVII stoljeća* [Agrarian relationships in Croatia from the middle XV century until the end of the XVII century], Zagreb 1980, 430–432.

ple of equality of entitlement, although the female line could be excluded even under these circumstances, subject to the first acquiring party's discretion.⁸

Unlike the daughters of the nobility, citizens' daughters had a better legal status regarding inheritance, as the descendants of the deceased had equal inheritance rights regardless of gender. Each family member (including the surviving spouse) was entitled to an equal share of movable and immovable property, and, as a rule, no distinction was made between the hereditary and the acquired property. However, if a married daughter participated in the disposal of the estate, unmarried children received a portion of the estate equal to that received by the daughter upon her marriage, with subsequent distribution of the remaining share of the estate.⁹

According to the inheritance rules for the tenant peasants, their moveable and immovable, hereditary and acquired property was inherited by their children, sons and unmarried daughters, in equal portions. Married daughters of the tenant peasants had equal rights of entitlement to the hereditary property, both movable and immovable. However, married daughters were not entitled to a share of the estate classed as acquired property if, upon marriage, they received a certain share of that property as dowry from their father. This rules of inheritance comprised in the *Tripartitum* were applied, unless other legal customs existed and were expected to be observed, because "nevertheless, just as the conditions of tenant peasants are diverse, so are the legal customs that have to be kept according to the ancient usage of the place" (*Trip.* III, 30, 6).¹⁰ In accordance with the status of his authority, a landlord would create individual local customs, and they had undoubtedly been directed towards the limitation of tenant peasants' inheritance rights. Indirectly, the problem of the exercise of the broadly defined tenant peasants' inheritance rights, as stipulated by the *Tripartitum*, was prominent in the terriers regulating the size of a serf's land, and prohibiting its partition beyond the set minimum, with aim to equalize the size of serf's land, and enhance their economic exploitation. Another important fact should be underlined regarding the inheritance practice of tenant peasants: these inheritance rules, when and if applied, were only applied to tenant peasants not members of a cooperative. Namely, the institution of succession did not exist within communal households, particularly with regard to immovable property, which,

⁸ V. Graber, *Prava djece s osobitim obzirom na brak, obitelj i nasljedstvo* [Children's Rights considering marriage, family and succession], Zagreb 1893, 300–310; M. Lanović, *Privatno pravo Tripartita* [Private Law of *Tripartitum*], Zagreb 1929, 104–108, 119–120, 226–228.

⁹ L. Margetić, *Hrvatsko srednjovjekovno obiteljsko i nasljedno pravo* [The Croatian Medieval family and Succession Law], Zagreb 1996, 286–294; V. Graber, 322–323.

¹⁰ J. M. Bak, P. Banyó, M. Rady, 416.

as a rule, remained under joint ownership of the male members of the cooperative. Inheritance rules for the tenant peasants were revised by the Act VIII, 1840 "On the succession of subjects" (*De successione colnorum*) of the Hungarian-Croatian Diet, whereby the tenant peasants were to dispose of their movable and immovable property, by means of *inter vivos* and *mortis causa* provision, freely and without hindrance, while hereditary property was inherited by children born in marriage, regardless of gender, in equal share. The same principle of inheritance was applied to inheritance of acquired property if the decedent did not dispose of it *mortis causa*, however, assets given to descendants upon marriage or at a later time were included in their portion of inheritance.¹¹ Described legislation on intestate succession was in force on the territory of Croatia and Slavonia prior to 1853, when the GCC came into force.

3. BRIEFLY ON INTESTATE SUCCESSION ACCORDING TO THE AUSTRIAN GENERAL CIVIL CODE

The GCC made a distinction between succession by will, intestate succession, and inheritance contract (§533). Intestate succession included entire estate of the deceased person (*de cuius*) or a part of it: a) if the deceased did not leave a will; b) if he included only a portion of the estate in the will and c) if the testamentary heir could not or declined to endorse the inheritance (§727). Furthermore, the GCC provisions on succession, unlike previous regulations, did not recognize the distinction between inherited and acquired, movable and immovable property. Therefore, the entire estate was inherited in the same manner, defined as a set of rights and obligations of the deceased, provided the rights and obligations were not based on purely personal relationships (§531). The circle of potential heirs was broadly defined based on kinship and marriage, regardless of the gender of the heir, but with a distinction between legitimate and illegitimate children. Illegitimate children were granted inheritance rights exclusively through the maternal line, not through the paternal line or any other family line (§754). The surviving spouse, if the decedent had heirs, was entitled to right to use of the ¼ of the estate (§757). Through the GCC, a system of inheritance was adopted whereby the time of acceptance (*delatio*) and the time of administration (*acquisition*) of the estate were temporally divided. Therefore, the rights and obligations deceased person from the time of death until the time of acceptance by successors, were considered estate in abeyance, i.e. *hereditas iacens*, influenced by the Roman law tradition. The position of the estate as a separate legal

¹¹ L. Margetić, 335–336; V. Graber, 327–328

entity existed until the court decision was served to confer the estate to legitimate heirs.

3.1. Intestate inheritance of children

According to the GCC, potential legal heirs were individuals related to the *de cuius* through legitimate birth in a valid marriage (§730). Heirs were classed in six orders of succession, according to the proximity of kinship, whereby the existence of heirs of closer degree of kinship excluded other relations from succession (§731). Heirs of the first order of succession were the children of the deceased born in a valid marriage, regardless of the gender, born during his life, or after his death. Although, according to §42, the term children, as a rule, comprised all relations of the deceased line, one of the exceptions to such broad definition was comprised in the provisions on intestate succession, whereby the term children incorporated exclusively the sons and daughters sharing the estate *per capita* (§732). The grandchildren and grand-grandchildren of the deceased were not successors if their parents were alive. However, if the child of the *de cuius* died before he left heirs, the share to which the deceased child of the *de cuius* would have been entitled would be awarded to his descendant or descendants in equal shares. If a grandchild or grandchildren had died, leaving one or more descendants, the associated share of the estate would be distributed in equal parts (§733). The described manner of disposition of the estate, *per stirpes*, was applied in cases where the grandchildren shared the estate with the surviving children of the deceased, and in cases where the estate was shared between the grandchildren or grand-grandchildren descending from various heirs. Ultimately, the grandchildren or grand-grandchildren were not entitled to inherit a share greater than that their ancestors would have inherited as the direct descendants of the deceased (§734). If the *de cuius* had children from multiple marriages, they had equal inheritance rights. As the unborn child of the deceased was entitled to inheritance equally as a born child from the time of its conception, (§22) disposal of the estate followed upon the birth of the child, since the designation of respective shares of the estate could not be executed prior to the child's birth.

3.1.1. On the intestate succession of female heirs

Following the described regulation of the inheritance rights of the potential heirs of the first line of succession, the equality of both male and female descendants as successors was introduced. Adoption of gender equality regarding succession is a product of the development of the society as a whole, with the equality of men and women continuously improving. However, it should be noted that even the GCC contained provisions which perpetuated gender inequality. This was particularly

evident in the regulation of the legal status of women, who were, for instance, denied the right to serve as witnesses of the will, or become custodians of their own children upon the death of a husband.

In practice, inheritance rights of female heirs to an equal portion of the estate caused a great stir, particularly among some classes of the society, as this practice was considered unjustified, and a cause of great adversity. Or perhaps it was easier to justify these issues, particularly economical ones, by the right of female heirs to an equal share of inheritance. Difficulties with the application of this principle, however, should be defined even more narrowly. The general lack of support for the entitlement of female heirs to a share of the estate was not at the heart of the dispute. It was, in fact, the reluctance of the *de cuius*, but also of other (male) members of the family, to consign to the daughters (family) property, thus preventing the transfer of immovable property outside the family. This was particularly the case where land was concerned.¹² Therefore, the question remains to what degree had female descendants managed to exercise their inheritance rights in practice.

Provisions of the GCC removed the distinction between movable and immovable property. However, in practice, previous understanding of their distinction remained, and consequently, and so did their influence on the rules of inheritance. Inheritance of movable property, or equal disposal of the estate after death of the *de cuius*, regardless of the gender of the successor, was not contested. On the other hand, female descendants had difficulties in exercising their right to an equal share of immovable property, particularly land. Still, not all cases of land inheritance by female descendants were contentious. If the decedent only had female children,¹³ the entire estate, including land, was disposed of in equal shares, unless

¹² The dispute over succession of the land and its distribution among all heirs, regardless of the gender, was not an issue particular to Croatia. In the western parts of the Habsburg Monarchy, prior to the introduction of the GCC, the system of impartible inheritance prevailed in the hereditary laws, according to which a peasant's lot would be left to one heir, usually male – the oldest, or the youngest son. As the GCC, §761 left the option of modification of the hereditary rules for the peasants, for the Austrian part of the Monarchy the existing rules did not change until 1868, when an Act was passed on the 27 June introducing the equality of succession regardless of gender. The standard procedure regarding inheritance practiced previously could not be easily removed, or ignored, so in 1889 countries represented in the Imperial Diet were granted the right to regulate independently matters of succession for medium size farms, which was subsequently effected. Tirol (1900), Carinthia (1903) and Bohemia (1908), introducing the so called *Anerbenrecht*. For further details on the implementation of the *Anerbenrecht* in Tirol, see M. Lanzinger: "Toward Predominant Primogeniture: Changes in Inheritance Practices in In-nichen/San Candido, 1730 to 1930.", P. Heady, H. Grandits, (eds.) *Distinct Inheritances*, Münster 2003, 125–144.

¹³ According to some estimates, cca. 20% of European families has exclusively female children, whereby the issue of the equality of inheritance does not arise regarding the gender. J. Goody, "Inheritance, property and women: some comparative considera-

otherwise specified. Disputes did not occur if the *de cuius* was the mother, and the land in question was her property. The GCC did not make a distinction whether the land was the property of the mother or the father. However, a custom remained from the previous legal period, whereby all children, regardless of gender, were entitled to mother's property, whereas father's property, as a rule, was bequeathed to the sons. Mother's immovable property served as a guarantee of a daughter's share in the disposal of immovable property without family disputes. Finally, if the deceased was survived by minor descendants, the courts would execute a probate proceeding with no regard to gender distinction. Namely, according to the GCC, independent action of a potential heir was prohibited regarding the matter of "appropriation" of the estate (§797) with the probate proceedings commencing *ex offio*, and the courts observing the principle of equality. The application of this principle could be avoided by the disposition *inter vivos* or *mortis causa*. *Mortis causa* manner of disposal of the estate enabled the deceased, subject to compliance with the provision on compulsory portion, to avoid equal disposal of the estate, particularly land.¹⁴ Furthermore, the principle of equality could also be eschewed by means of a waiver of inheritance rights by female descendants to the benefit of the male descendants (brother or brothers) as well as disclaiming her entitlement in the estate. In all these cases, female descendants were assuaged by dowry to which they were entitled by law and customs. According to the general opinion at the time, a daughter was no longer entitled to participate in the disposal of the parental estate upon marriage and departure from the family home, and upon receipt of dowry.

3.1.2. Accounting of the assets into the inheritance portion

A very important inheritance instrument aiming to put to equal footing different successors was accounting of all the assets acquired by the deceased during his life into their inheritance portion (hotchpot). It comprised: a) daughter's or granddaughter's dowry, b) son's or grandson's assets, c) funds obtained upon the taking of an office or initiation of an undertaking, and d) assets granted to children of age for the settlement of debt (§788). Furthermore, into the portion of the estate to which grandchildren were entitled, included were not only the assets they were granted, but also those granted to their parents which they acquired from

tions", J. Goody, J. Thirsk, E.P. Thompson (eds.) *Family and inheritance: Rural Society in Western Europe 1200–1800*, Cambridge 1976, 10.

¹⁴ During the disposal of the will, as a rule, fathers as decedents bequeathed a major portion of the estate to the son who remained in the house, or on the land. Son(s) leaving the household received a smaller share, and the daughter received even less. S. Leček, "Dobila je kulike su roditelji davali, ni po zakonu!" ("She got as much as her parents gave her, and not according to the law"), *Povijesni prilozi* 21/2001, 233.

them through subsequent succession, pursuant to the application of the principle of representation. All goods and assets acquired by descendants from their parents, by means other than previously described, were considered a gift, and were not included into the share of the inheritance (§791). The accounting was carried out in the manner that each of the decedent's children, prior to the disposal of the estate, was entitled to an equal portion as the child discriminated in favour. The remaining shares of the estate could only be disposed of after the execution of this procedure. If, during the life of *de cuius*, children acquired unequal shares respectively, the largest acquired amount was used as a measure of accounting. However, if the estate was insufficient to satisfy each child's legitimate claim through accounting, the child discriminated in favour was not entitled to inheritance, however, he/she could not be forced to make a restitution of the assets previously acquired (§793). If the object of accounting was not cash, but movable or immovable property, their value was calculated in such manner as to estimate the value of the property at the time of its acquisition, and the value of an item of movable property at the time of inheritance (§794).¹⁵

3.1.3. Dowry and intestate succession

According to the GCC, dowry was included into the legal portion of inheritance to which the female descendants were entitled (§788). However, the payment of dowry was often used to avoid subsequent claims to inheritance by female descendants. The GCC stipulated that dowry included the assets given or promised to the husband by the wife or a third party, for the purpose of easier management of the cost of marriage (§1218). As a rule, estimable assets were involved, which provided opportunity for financial gain (§§1227–1228). Dowry also had to be appropriate (§1220). Although the term "appropriate dowry" was not legally defined, accepted notion was that it was a dowry befitting the class and property status of the parties obliged to provide it.¹⁶ Pursuant to the provi-

¹⁵ Regarding the issue of inclusion of movable and immovable property [in the distribution of the estate] the position prevailed in the Croatian legal practice whereby movable property was not included which, through no fault of the successors, came into disrepair or was destroyed. Also, the value an object acquired through processing or improvement performed to the cost of the successor during the period in which the object was in the successor's possession, because this would lead to unlawful gain by those successors. Furthermore, instead of an alienated object, purchase price gained was calculated. Where immovable property was concerned, if the decedent had designated the value of a piece of immovable property, such value was taken as relevant for inclusion, however, the successor was entitled to prove the decedent's excessive designation of value to the property, i.e. successors to whose benefit the inclusion was calculated were entitled to prove that the decedent had undervalued the property. A. Rušnov, S. Posilović, *Tumač obćemu građanskom zakoniku* [Commentary on the General Civil Code], II, Zagreb [1910?], 199.

¹⁶ A. Rušnov, S. Posilović, 562

sions of the GCC, items constituting bridal accoutrements, such as clothes, bedclothes and furniture, were not considered part of the dowry.¹⁷ In practice, however, dowry presented to the daughter consisted of those very items – clothes, bedclothes, furniture, various “lady’s tools”, such as kitchen utensils, looms, etc., while daughters from the wealthy families would be presented with a sewing machine. As part of the items presented to the daughters upon marriage, costs or part of the costs of the wedding were included, and, subject to the financial status, livestock and cash were also presented as part of the dowry, although rarely. If land was part of the dowry (more an exception than a rule) it was not extracted from the existing (family) property, but acquired specifically for this purpose.¹⁸ Considering the inclusion of dowry in the inheritance share, dowry was inventoried and evaluated. As dowry could be paid in cash, movable or immovable property, its value was determined, as previously stated: the value of immovable property was estimated at the time of receipt, and the value of movable property at the time of inheritance (§794). It would be of interest to see what the actual value of dowry was, and in what relation it stood against the daughter’s portion of inheritance. If the value of the dowry was lower than the portion of the estate the daughter was entitled to based on equal inheritance rights, did the value of the dowry at least cover the compulsory portion?

What were the cases in practice where dowry of the female descendants could be accepted as the exclusive portion of the estate based on the law? Primarily, those were the cases which could be classified as the ‘anticipated waiver of a potential successor’ category. This meant the waiver of entitlement to any future inheritance, during the decedent’s life (§551) and the person waiving the inheritance would lose the entitlement to inherit (§538). According to its content and volume, the waiver could be diverse – inheritance could be waived in full, or partially; unconditionally or conditionally; including or excluding compensation. There are strong indications that waivers subject to compensation were indeed largely covered by the amount received through dowry. However, it was not rare that, along with dowry, a certain amount in cash was paid, which was to compensate for the omission of inclusion of land in the estate, the family’s financial affairs permitting. Considering that the waiver was most frequently directed at the waiver of the right to inheritance of land, for male descendants this meant that the payment to sisters guaranteed their waiver of inheritance right, or that they would not dispute the male descendants’ entitlement to land.¹⁹ Pursuant to the GCC provisions, special form was not required for the waiver, and the Decision of the Su-

¹⁷ A. Rušnov, S. Posilović, 561, 570.

¹⁸ S. Leček, 230–232; S. Klopotan, “Miraz” [“Dowry”], *Etnološka tribina* 22, 29/1999, 90–91.

¹⁹ S. Leček, 234.

preme Court of Croatia and Slavonia, the Table of Seven, further emphasized that a waiver contract with a decedent was not required. However, since the waiver applied to the descendants of a potential heir submitting the waiver, the decedent was obliged to accept the waiver of inheritance in a valid form (§861). Therefore, unilateral waiver of inheritance, i.e. waiver not endorsed by the decedent, did not produce any legal consequences.²⁰

Thus, female children, upon entering marriage, often signed a nuptial agreement, containing the inventory of dowry and their waiver of inheritance rights to the property of their father, or both parents. Upon the introduction of the Law on Notary Public of the Kingdom of Yugoslavia (1930), waiver of inheritance was to be filed as a public notary document, or by means of a statement entered into a court register. Furthermore, dowry was accepted as a sole legal portion of the estate, in the context of the disclaiming the inheritance during the probate proceeding, where the female descendants did not want to accept the inheritance. By disclaiming the inheritance, female descendants’ claims were satisfied by previously received dowry, i.e. their potential share of the estate had already been settled out of the parental property, primarily that of the father. Once stated, the disclaim of inheritance was irrevocable (§806). The significance of the disclaim of inheritance lies in the fact that this act opened the inheritance to the nearest potential successor, and in this case that would be a male descendant of the decedent. Thus, by disclaiming the acceptance of her portion of the estate, a daughter would in fact disclaim her rights to the benefit of her brother/s. However, it is evident from the minutes of a probate proceeding that, as a rule, daughters of the decedents did file an accept to the inheritance, and then renounced her legal portion to the benefit of brothers. Although the direct link between the dowry received and the waiver/disclaiming of inheritance was not always unclear from the minutes, there is no reason to doubt that a link existed between the two.

4. LEGAL PRACTICE – CASE

A case of a probate proceeding from 1918 shows the bulk of the traits common to the inheritance of female descendants discussed previously – dowry as a constituent or exclusive part of the inheritance, non-inheritance of family’s immovable property or purchase of a separate piece of immovable property, pay off of female descendants in order to prevent their further claims to parental property, all with aim to evade intestate succession of the female descendants, i.e. to evade the equality of entitlement to inheritance.

²⁰ Decision of the Table of Seven of 16 May 1923, No. 1199, *Mjesečnik* 1924, 127–128.

Upon the death of *de cuius* in 1918, a probate proceeding was initiated at the Royal District Court in Velika Gorica, with a “gift deed” submitted, composed in 1911, between deceased and his sons.²¹ Apart from his three sons, the *de cuius* also had two daughters. By means of the gift deed, the deceased bequeathed his entire movable and immovable property to his sons, divided into three equal portions, which they accepted with gratitude. Transfer of ownership of the bequeathed property could only be legally affected upon the death of *de cuius*, subject to enclosure of the gift deed, and of a copy of a death certificate. At the same time, the deceased obliged his sons to pay to J., their sister, the amount of 500 kuna in cash upon his death to the effect of “dowry and all-inclusive compensation and pay-off, using movable and immovable property bequeathed to them”. To B., the other sister, brothers were not obliged to effect any payment at all, as a piece of real-estate was purchased for her on the day of drafting of the gift deed, in the value of 900 kuna. The deceased had furthermore stipulated that sister B. was to pay her sister J. the amount of 200 kuna. Under these terms, each daughter received 700 kuna, with their father limiting them from any further claims to any part of his estate, or that bequeathed to the three brothers. The brothers, as the sole recipients of the father’s entire property, “took upon themselves to adhere to thereby stated terms”. According to the grant of probate, dated September 22, 1919, this was a case of testamentary disposition. Also, in the grant of probate the net value of the estate was established to be 21,400 kuna, divided among the three sons, each receiving a portion of the estate in the value of cca 7,000 kuna. This calculation indicates that the value of the portion of the estate received by each brother is ten times that of the amount received by the daughters of *de cuius*. Disproportion is evident in the disposal of the estate; therefore, there can be no talk of equality in succession of descendants regardless of gender. Not only had the daughters not received the portion of the estate they were legally entitled to, but what they had received was even significantly less than the statutory portion of the estate. Furthermore, such manner of disposal of the estate was an obvious instance of the lack of intent of the *de cuius* to designate items of the family immovable property to female heirs, with new property purchased and cash payment effected instead. Neither of the sisters contested such disposal of the estate.

5. CONCLUSION

The female heirs of the *de cuius* encountered various obstacles preventing them from exercising their inheritance rights, particularly con-

²¹ State Archive in Zagreb: HR – DAZg – 86, Royal District Court in Velika Gorica (1853–1918), probate series, reg. no. 598, Os-130/1918.

cerning the inheritance of land. Difficulties in the application of the principle of equality of inheritance were justified by the knowledge of law, which was opposed to the idea of gender equality in succession. Also, a belief prevailed that (further) partition of predominantly small lots of land into even smaller parts, following the disposal of the estate, would lead to difficult economic circumstances and poverty. It can hardly be denied that the idea of the position of women in the society at the time was not in compliance with the principle of equality. The mentality of “what will the village say if you take land from your brother” prevailed, and the intention of women to claim their portion of the parental estate was considered highly inappropriate. Regardless of this position, and the appeal to the opinion of the people, the principle of equality had to be accepted in practice, albeit with varying moderations. Furthermore, the problem of the reduction of the lots of land as a consequence of succession was not exclusively tied to the equality of inheritance regarding gender, but depended on the total number of successors within a family. Even two brothers as heirs of a parent’s estate meant partition of the estate. Therefore, the claim that female heirs were to be blamed for the reduction of farmland and poverty could not stand. On the contrary, female heirs brought dowry and/or inheritance and thus, in fact, augmented the property of their new families, and “in a sense women were more valuable as wives than they were as daughters, since in the latter capacity they had to share in the estate”.²² Although a daughter would take a portion of property through inheritance, as a daughter-in-law she was augmenting (her new family’s) assets, thus filling in the newly created property “gap”.

During the process of unification of civil law in the Kingdom of Serbs, Croats and Slovenes/Kingdom of Yugoslavia,²³ the issue of equality of male and female descendants in the matters of succession was a very hot and important issue. A large number of jurists and legal scholars were aware of its social importance and significance. However, in drafting the civil code (which was never adopted) of the then state, there were proposals for the regulation of intestate succession not granting equality of inheritance of immovable property to female descendants from rural families. Still, the idea of reinstating discrimination in the matters of succession did not take root. The principle of equality of male and female heirs remained in force in the Croatian legal territory, until the GCC ceased to be in force (1946), and was later incorporated in subsequent legislation.

²² J. Goody, 11.

²³ For more see M. Krešić, “Yugoslav Private Law between the Two World Wars”, T. Giaro (ed.), *Modernisierung durch Transfer zwischen den Weltkriegen*, Frankfurt am Main 2007, 151–168.

Univ.-Ass. Dr. Mirela Krešić

Juristische Fakultät der Universität Zagreb

DIE GESETZLICHE ERBFOLGE DER WEIBLICHEN
NACHKOMMEN NACH DEM ÖSTERREICHISCHEN
ALLGEMEINEN BÜRGERLICHEN GESETZBUCH AUF
KROATISCH-SLAWONISCHEM RECHTSGEBIET
1853–1946

Zusammenfassung

Die Ausgestaltung der kroatischen Rechtsordnung auf der Grundlage des österreichischen Allgemeinen bürgerlichen Gesetzbuches (ABGB) von 1853 macht das ABGB zu einem wichtigen Bestandteil der kroatischen Rechtstradition. Entstanden nach den Grundsätzen des Liberalismus und Individualismus hat es bedeutend auf die gesellschaftlichen Verhältnisse zur Zeit seiner Einführung eingewirkt. Es hat die Trennung der feudalen Gesellschaft und Rechtsordnung und somit den Entwicklungsbeginn einer modernen, bürgerlichen Gesellschaft ermöglicht. Allerdings hat der Verwandlungsprozess eine Vielzahl an Problemen nach sich gezogen, insbesondere die Bestimmungen der gesetzlichen Erbfolge, die auf das ABGB zurückzuführen sind.

Die Einführung des Prinzips der Gleichberechtigung zwischen den männlichen und weiblichen Erben galt als besonders problematisch, vor allem beim Erben von Liegenschaften. Das wurde durch das Rechtsbewusstsein des Volkes rechtgeferdigt, das gegen die Gleichberechtigung zwischen den männlichen und weiblichen Erben war. Außerdem war man der Auffassung, dass die Aufteilung kleiner Besitztümer zwischen den beiden Geschlechtern infolge von Erbschaft noch kleinere und wirtschaftlich nicht lebensfähige Betriebe, aber auch eine schlechte Wirtschaftslage und Armut mit sich bringt. Deswegen vermied man dieses Prinzip und verwendete stattdessen das Institut der Mitgift. Obwohl die Mitgift gemäß den Bestimmungen des ABGB in den gesetzlichen Erbteil der weiblichen Nachkommen eingerechnet wurde, wurde diese Mitgift in der Praxis mit ihrem gesetzlichen Erbteil gleichgesetzt. Für die weiblichen Nachkommen war die Mitgift demnach die einzige Vergütung aus dem Nachlass ihrer Eltern. Trotz vieler Widerstände führte die gesellschaftliche und rechtliche Entwicklung zur allmählichen Anpassung an das Prinzip der Gleichberechtigung zwischen den männlichen und weiblichen Erben, das ein Teil der kroatischen Erbrechtsordnung geblieben ist.

Schlüsselwörter: *Österreichisches Allgemeines Bürgerliches Gesetzbuch. – Gesetzliche Erbfolge. – Weibliche Nachkommen. – Prinzip der Gleichberechtigung zwischen den männlichen und weiblichen Erben. – Mitgift.*

Ao. Univ.-Prof. Dr. Zdravko Lučić

Juristische Fakultät der Universität Sarajevo
z.lucic@pfsa.unsa.ba

CICERO ALS JURIST UND THEORETIKER*

*Der Autor geht im folgenden der Frage nach, ob Cicero nur Rhetoriker oder auch Jurist gewesen ist. Dabei sucht er die spezifische Beziehung zwischen Rhetorik und Jurisprudenz zu klären. Besondere Beachtung schenkt er hierbei den rhetorischen Argumentationsformen. In diesem Zusammenhang wird auch die philosophisch-juristische Frage nach der erstmaligen Grundlage des römischen Rechts und dessen Bezug zum *ius gentium* aufgegriffen.*

Bei Cicero umfasst das römische Recht die Pluralität der damals gültigen Rechtssysteme. Die parallelen Wertauffassungen des griechischen und römischen Rechts werden hierbei vorausgesetzt. Ciceros spezifischen Beitrag zur Rechtspraxis sieht der Autor vor allem in dessen Definitionen einzelner rechtlicher Begriffe. Auch die Grundlagen einer ersten Systematisierung des Rechts lassen sich auf Cicero zurückführen. Trotz der Kontroversen Ciceros mit einzelnen römischen Rechtsgelehrten fanden seine Texte dann allmählich doch die Zustimmung gerade auch seiner Opponenten.

*Im Opus Ciceros wird die Tendenz sichtbar, Rechtsprobleme auch aus einer stärker theoretischen Sicht heraus anzugehen. In diesem Zusammenhang kommt dem terminologischen Problem einer Unterscheidung zwischen *ius naturale* und *ius gentium* besondere Bedeutung zu.*

Schlüsselwörter: *Rechtsphilosophie. – Cicero. – Iurisconsulti. – De re publica. – De legibus. – Ius naturale. – Recta ratio.*

Die Rechtsgeschichte kann ohne die Verbindung mit der Rechtsphilosophie und der Rechtsdogmatik nicht auf ihrer Wissenschaftlichkeit bestehen. Die Rechtsphilosophie stellt die Frage nach dem Wesen und der Herkunft des geltenden Rechts. Sie fragt, warum und unter welchen Umständen eine bestimmte Rechtsregel verpflichtet, und nach dem Verhältnis

* The paper is an elaborated version of the short communication discussed at the Conference *Internationale Rechtswissenschaftliche Tagung, Forschungen zur Rechtsgeschichte in Südosteuropa*, held in Vienna on 9-11 October, 2008.