

Considerations on the Regulation of Succession by Representation in the New Civil Code

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Abstract: The succession by representation is a technique that has generated much criticism in the Romanian succession law. The current regulation contained in the civil code of 1864 is an *ad litteram* use of the Napoleonic texts of 1804. The latter are the result of the distortion, in the medieval legal science, of the *succession in locum* notion coming from the Roman law.

The new Romanian civil code, promulgated in the year 2009, abandons the medieval theory of fiction and, also taking into consideration the reforms of the civil codes in the Canadian province Québec (1994) and in France (2001 and 2006), allows the representation of both renouncing heir and unworthy heir.

This article intends to clarify the Roman meaning of *successio in locum* and the weight of its influence on the main modern European codifications. Once these matters are clarified, we shall examine the concept of succession by representation in the codification of modern times (19th century), with the criticism and reform proposals that followed. The third part of the analysis is designed to explain the decisions made by the Romanian lawmaker in the New Civil Code, in the general context of the European comparative succession law.

Key words: civil code; succession law; inheritance; succession by representation; law fiction; unworthiness; renunciation of inheritance.

1. Current status of the matter.

The proximity of the degree of kinship is one of the selection criteria for the descendants claiming the legal inheritance of the deceased [1]. The rule has an exception for the situations in which one of the descendants that are closest in kinship was already deceased on the date of opening the succession of the *de cuius*. For instance, son A of the deceased (1st degree) will not remove from inheritance the grandson N, child of the son B (2nd degree) deceased before the *de cuius*. The exception is known as **succession by representation**. In the current Romanian legislation, it is a law fiction (art. 664 Civil Code); its purpose is to restore equality between the targeted successors, consecutively to the premature death of one of the successors situated in the proximate degree of kinship with the deceased. Thus, a solution is found for an abnormal chronology of deaths, which would have unfairly

removed the descendants of a more distant degree of kinship with the *de cuius*.

The existent regulation of the representation was however criticized. The first paragraph of art. 668 of the Civil Code stipulates that „only deceased persons shall be represented”; consequently, if son B from the previous example was not deceased, but was either unworthy or renouncing inheritance, grandson N would not benefit from representation. Also, in the Romanian civil law, unworthiness is designed as a sanction of personal nature; why should the effects of B’s unworthiness also impact the innocent grandson N?

This is, in brief, the current status of the matter according to the current civil code. Completed in 1864 and effective as of 1 December 1865, it reproduces almost entirely the texts concerning the inheritances of the 1804 French civil code. A new civil code will enter soon into force (Statute nr. 287 of 2009 [2]) and its new fourth

Book “On inheritance and gifts” contains significant changes regarding the succession by representation. This new code is the result of the modernization efforts made after 1990, during 1999-2004 also benefiting from the assistance of specialists from the Canadian French-speaking province Québec [3].

We will try to examine the relevant texts of the new Romanian civil code, taking into consideration all the influences exercised on them: *de lege ferenda* proposals in the specialized literature (the commission used as reference Francisc Deak’s works), the Romanian civil code draft of 1971, the Civil Code of Québec of 1994, the French succession reforms of 2001 and 2006, as well as the amendments proposed in 2010 in the Draft law for implementing the civil code [4].

Also, in order to understand the reform operated by the new Romanian civil code, it is not enough to refer only to the criticism brought to the texts still effective: a prior insight in the history of law seems necessary. The rules prescribed by the code of 1864 have their origin in the Roman law, but depend on the actual manner in which its solutions were taken over by the Napoleonic code of 1804. Ignoring this issue has led to erroneous assessments of the current matter of representation in the Romanian legal literature. Thus, one of the Romanian authors said: “as regards the nature of the institution, whether it should be considered fiction or it should be considered a personal right, although the examined legislations do not definitely establish the existence of his own right”, they here imitate “the Roman law, which establishes the idea of fiction; however, we believe the Roman conception is obsolete [...]” [5]. The surprise was even bigger when we found another gross error, at leading authors of our civil law: „Representation was known to Romans only later; the civil law does not mention it. Although the praetorian law had no other purpose than to extend the too narrow circle of the civil law heirs, the institution of representation was established only by Justinian” [6]. We will show below how far from reality these conclusions [7] are and what are the consequences of ignoring the historical evolution of the issue in question.

2. The texts of the new civil code targeted by our analysis are the following:

ART. 965 – Notion

By the succession by representation, a legal heir of a more distant degree of kinship, called representative, takes over, under the law, the rights of his/her ascendant, called represented, in order to collect the share of the inheritance that would have been due to the same if he/she had not been unworthy toward the deceased or deceased at the date of opening inheritance.

ART. 967 – Conditions

(1) A person lacking the capacity to inherit can be represented, as well as an unworthy person, even if he/she is alive on the date of opening the inheritance and even if he/she renounces the inheritance.

(2) In order to benefit by succession by representation from the deceased’s inheritance, the representative must meet all the general requirements to inherit the deceased.

(3) Representation operates even if the representative is unworthy toward the represented or renounced the inheritance left by the latter or was disinherited by the same.

3. Roman law [8].

The Institutes of Gaius present the possibility recognized for the descendants of *sui heredes* [9] to come **in the place** (*in locum*) of their predeceased descendants:

*Cum filius filiae et ex altero filio nepos neptisve extant, pariter ad hereditatem vocantur, nec qui gradu proximior est ulteriorem excludit: aequum enim esse videtur, nepotes neptesque in patris sui locum succedere. Pari ratione et si nepos neptisque sit ex filio et ex nepote pronepos proneptisque, simul vocantur. Et quia placuit, nepotes neptesque, item pronepotes proneptesque **in parentis sui locum succedere**, conveniens esse visum est, **non in capita, sed in stirpes hereditatem dividi [...]**. [10]*

Already known in the old *ius civile*, this rule has had a constant application. It has gone through centuries of Roman legal experience

without fundamental changes [11]. The heirs will collect the goods **in the place** [12] of their ascendants [13].

Successio in locum was designed to preserve equality between the different lines of descent. The inheritance goes to more distant descendants *in locum parentis praedefuncti* in virtue of their own right (*iure proprio*), not in virtue of the rights of their predeceased (*iure praedefuncti*). This explains why the juriconsult Pomponius affords to make a particular application of the solution:

Si filius emancipatus non petierit bonorum possessionem, ita integra sunt omnia nepotibus, atque si filius non fuisset, ut quod filius habiturus esse petita bonorum possessione, hoc nepotibus ex eo solis, non etiam reliquis ad crescat [14].

In this text we see how the emancipated son, as a blood relative of the deceased, will be able to request the praetor *bonorum possessio* (the possession of the succession goods) [15]. If he fails to do that, his gesture has the value of a tacit renunciation; Pomponius finds that this does not prevent one of his descendants of a more distant degree of kinship with his deceased to come claim his share. Therefore, the grandson from the son will be able to succeed not only in the place of the predeceased son, but also in case his father, who is alive, does not claim inheritance.

Two aspects drawn our attention here: (I) the purpose of the Roman *successio in locum* was to preserve equality between the different lines of descent, and (II) the beneficiaries were not benefiting from the rights of the ascendant whose place they were taking, but they were claiming inheritance invoking their own rights. Thus, we can see how erroneous the considerations of our above-mentioned Romanian civil law authors are. Issued in the interwar period, unfortunately, their conclusions influenced the authors after 1948. This has led in the current Romanian civil law to hesitations in understanding the foundations of the succession by representation and in solving the inconveniences generated by the practical application of the texts of the 1865 code.

4. The old French law [16].

The so called *Ancien droit* is interesting for us, taking into consideration that the relevant texts of the 1865 code are – as we specified – the reproduction of the Napoleonic texts.

Successio in locum had the same faith as the Roman law after the fall of the Western Empire. The reduced life expectancy probably also contributed to its fall into oblivion. In 596, King Childebert II tries to reintroduce it in Austrasia in the category of descendants. However, the practice ignores the royal edict. It uses other procedures, among which the most frequent was the recall to succession (*rappel à la succession*). The given technique was successful in the customary law regions (the Northern half of current France), being favoured by the weakening of the principle of the exclusion of children who received dowry.

Upon the reception of the Roman law in France, *successio in locum* returns to the scene [17], but with important changes of legal status. The postglossators and their continuators until the 14th century called it **representation** and considered it a fiction of law. For instance, Jean Faure (jurist from the 14th century) noted on Inst. III.1.7.1: *Filius representat personam patris*, taking into consideration here a sort of tacit mandate given by the father to his son [18].

Derogation from the principle of proximity was thus explained by resorting to the idea of fiction. We notice how the medieval reviewers complicated the partition by lines of descent uselessly. **The more distant descendants are no longer called as independent members coming from the same line of descent as their predeceased predecessor; they come simply because they borrow his rank, his position.** This is the origin of the rule *viventis nulla representation* [19] (art. 668 parag. 1 Civil Code).

Afterwards, a new fiction complicated the situation even more: **it was presumed that the son had survived until the death of *de cuius*; according to whether he inherited him or not, his representation was possible or not.** The vices accompanying the title to inheritance of the predeceased were therefore also affecting the title to inheritance of his representatives.

From this theoretical basis, a royal ordinance of 1556 requested the customs to admit representation. The Paris Custom admits it with difficulty, in two successive stages: the reforms of 1510 and 1580. Representation is also accepted to

infinity, in direct line, as well as in collateral line, by the customs in Western France.

The intermediary law (art. 2, Decree of 8-15 April 1791) admits unlimited representation for descendants and collaterals, applying the partition per.

5. The old Romanian law.

Our laws concerning the representation prior to the date of 1 December 1865 are of a little importance here [20]. As already shown, the civil code of 1864 abandoned it totally, so its interest is limited to only two matters: (1) the succession by representation was known in the Romanian law and the use of the Napoleonic texts caused no shock related to an absolute innovation; (2) the above mentioned use subsequently proved itself (as we will see below) not to have been the happiest legislative solution, while the old Romanian law solutions based on the Roman law were closest to an adequate logic of the succession technique under discussion.

6. Modern codifications [21].

The Napoleonic Code of 1804 and, following its example, the Romanian Civil Code of 1864 and the Civil Code of Lower Canada of 1866 (C.civ.BC) established the medieval theory of representation. „Nous nous sommes rapprochés des dispositions du droit romain”, Treilhard said on the occasion of presenting the draft French civil code, but representation „n’est qu’une fiction qui donnait aux enfants la portion qu’aurait eue leur père s’il était encore vivant” [22].

Art. 739 Code Napoléon (art. 664 C.civ.; art. 613, 619 C.civ.BC): „La représentation est une fiction de la loi, dont l’effet est de faire entrer les représentants dans la place, dans le degré et dans les droits du représenté”.

Art. 744 parag. 1 Code Napoléon (art. 668 parag. 1 C.civ.; art. 624 C.civ.BC): „On ne représente pas les personnes vivantes, mais seulement celles qui sont mortes naturellement ou civilement” [23].

Art. 730 Code Napoléon (art. 658 C.civ.): „Les enfants de l’indigne, venant à la succession de leur chef, et sans le recours de la représentation, ne sont pas exclus pour la faute de leur père [...]”.

Consequently, the grandchild will no longer be able to climb in the place of his/her renouncing or unworthy father. Representation operates only if the place of the representative is useful: only if, ignoring his predecease, the representative would meet all the requirements to succeed.

The medieval concept of succession by representation did not limit its influence to the three above-mentioned countries. Some significant examples can help us in this respect. Art. 457 parag. 3, 458 parag. 3 and 459 parag. 3 of the Swiss Civil Code use the same phrase, just like the Italian civil code of 1942 (art. 467-468), following the predominantly French-inspired one of 1866, and just like the Spanish civil code of 1888 (art. 924-929), the German civil code (art. 1924-1929 BGB) and the new Catalan civil code of 2008 (art. 441-7). However, we should notice that, despite the use of the same name, the legal status in the listed systems is different from the French one. The Swiss succession law admits the representation of living persons: of the unworthy (art. 541 of the Swiss Civil Code), of the renouncing (572 parag. 1 of the Swiss Civil Code) and of the disinherited heir (art. 478 parag. 2 and 3); the Spanish civil code does not allow, as a principle, the representation of the living (art. 929), but it allows as exceptions the case of the unworthy (art. 761 of the Spanish civil code.) and of the disinherited (art. 857 of the Spanish civil code); under the old Italian civil code, art. 728 allowed the representation of the unworthy, and art. 467, parag. 1 of the Italian civil code established in 1942 a permissive regime similar to the Swiss code; taking into consideration that the unworthy and the renouncing are considered inexistent as heirs in the German law (art. 2344 and 1953 BGB), their representation is possible; finally, according to art. 441-7 of the Catalan civil code, the predeceased, the absent, the unworthy and the renouncing can be represented [24].

6.1. Criticism ...

Criticism in various degrees was generated by the regulations in the European codes of modern times.

In countries such as Spain [25], Italy [26], Germany and Switzerland [27], the name of “representation” was criticized, for the reason that the representative succeeds *iure proprio*, not *iure praedefuncti parentis*. Moreover, German jurists

replaced the word *Repräsentationsrecht* with *Eintrittsrecht* [28] („right of intervention” or „right of substitution”). The same terminological observation, also derived from the essence of the matter, appears in Switzerland as well, where the German language version of the code stipulates clearly: „*an die Stelle ... treten*” [29].

The unanimous criticism brought in France [30], in Romania [31] and in Québec [32] referred precisely to the consequences of classifying representation as a fiction of law.

As we can see, the unworthy and the renouncing heirs can no longer be represented, since their place is not considered „useful”. What remains then of the reason for preserving equality between the lines of descent, if we sacrifice it in favour of grounds for the rule operation? Fighting the chance of premature deaths cannot be acknowledged as a unique and essential substantiation [33].

Another important criticism refers to the personal nature of the punishment for unworthiness. This is unfairly reflected on the successors of the unworthy. The latter will not be able to climb into the place and rank of the unworthy, due to the fact that he is alive and his place is not useful.

The overview of the representation procedure allows us to identify here a distortion: its technique has become more important than its foundations; the representatives will succeed *iure praedefuncti*, not *in locum parentis praedefuncti* [34].

6.2. ... and reforms.

The Civil Code of Québec was amended accordingly, allowing the representation of the predeceased, the co-deceased and the unworthy [35], but not of the renouncing [36] as well. The French reform of 2001 [37] maintained the term of representation, continuing to consider it a fiction [38], which did not prevent it from allowing the access of an unworthy descendants to the technique under discussion [39].

The representation of the renouncing heir was allowed in France by a second reform, operated in the year 2006 [40]. Requested by the authors in order to complete the changes initiated in 2001 [41], the amendment was also considered necessary due to the legislative establishment of the possibility to make transgenerational gifts and of

the right acknowledged to any descendant to renounce in advance to the action in abatement (art. 929 parag. 1 French civil code) [42]. In Belgium, where the civil code is the complete transposition of the Napoleonic code, two amendment proposals were made that have not been adopted yet: a bill submitted on the date of 23 November 1995 regarding admission of the representation of the unworthy heir and a bill submitted to the Senate on the date of 31 July 2007, regarding the possibility to represent the renouncing heir. The first bill became null and void following the subsequent dissolution of the Parliament, and the second has received no resolution so far [43].

In the initial form of the book from the draft civil code regarding successions and gifts, which I completed in July 2003, I was proposing the following text:

“The share of the successor not claiming inheritance due to predecease, co-decease, renunciation or unworthiness shall be collected, by the effect of representation, by his/her descendants”.

Our intention was to ensure the representation of the renouncing, the unworthy and the co-deceased in the Romanian civil law as well. The gathering, in the person of the representative, of the required conditions in order to inherit was no longer necessary. Thus, we aimed at abandoning the conception of medieval origin of the “representation” and returned to the Roman conception of *successio in locum*. We justified the decision on the grounds of ensuring a validation as complete as possible of the foundation of the technique: preserving equality between the lines of descent. The return to the given solution has precedents in art. 820 and 822 of the Civil Code Charles II (1940) [44], respectively in art. 843 parag. 4 of the Draft Civil Code of 1971 [45].

The subsequent interventions on the text considered such a change was too modern, so the form approved by the Senate in 2004 mentioned only the representation of the predeceased and the co-deceased (art. 724 of the Draft). The commission that amended the Draft during 2006-2008 decided to reintroduce the representation of the unworthy, considering that the reason for representation was that of not creating arbitrary gaps between the descendants of the deceased’s children or between

the descendants of the deceased's brothers and sisters.

In 2010, when drafting the Law for implementation, it was concluded that the reform of representation must be completed. Thus, the representation of the renouncing was also acknowledged, just like it happened in France as well, where art. 29 §20 of the Law of 23 June 2006 returned to the 2001 reform and reformulated art. 751 and 754 of the French Civil Code [46]. Thus, the reasoning of succession by representation shall be fully satisfied, namely ensuring full equality between the lines of descent opened by the deceased's descendants [47]. The corresponding texts in the new civil code are proposed to have the same wording:

Art.965 – Notion

By the succession by representation, a legal heir of a more distant degree of kinship, called representative, takes over, under the law, the rights of his/her ascendant, called represented, in order to collect the share of the inheritance that would have been due to the same **if he/she had not renounced the deceased's inheritance** (s.ns. – MDB), if he/she had not been unworthy toward **the deceased** or deceased at the date of opening inheritance.

ART. 967 – Conditions

„(1) A person lacking the capacity to inherit can be represented, a **renouncing person** (s.ns. – MDB), as well as an unworthy person, even if he/she is alive on the date of opening the inheritance and even if he/she renounces the inheritance.

However, we can also note that there is no more reference to the possibility of representation of the co-deceased.

6.3. A special feature. Our attention was also drawn by art. 969 NCC, which, in the first paragraph, regulates a particular effect of the succession by representation:

„The children of the unworthy, conceived prior to opening the succession from which the unworthy was excluded, will bring back at the inheritance of the latter the goods they inherited by representation of the unworthy, if they come to

inheritance in competition with other children of the unworthy, conceived after opening the succession from which the unworthy was excluded. The report shall be made only in case and to the extent that the value of the goods received by representation of the unworthy exceeded the value of the liability of the succession that the representative had to incur following representation”.

The above text had its odyssey.

After we introduced the possibility of representation of the unworthy and the renouncing in 2003, we were drawn by the provisions of art. 755 parag. 2 of the French Civil Code, introduced by the 2001 reform (and then completed by the 2006 reform). The text I proposed in 2003 [48] was reformulated in the form submitted to the Senate in 2004 (art. 724 parag.2) [49]. The last one was declared unclear by the Amendment Commission established in 2006, so we returned to the form the undersigned proposed in 2003, plus an important addition: the final thesis of the text.

In essence, the French lawmaker aimed at restoring equality between the descendants of the unworthy, in case only one (some) of them benefited of representation, the others not being conceived yet on the date of opening the inheritance of the represented. For instance, at the death of A, his inheritance is collected in his own name by his son B and, by representation, by his grandson of son D, a child of the unworthy son C of the deceased. After opening the succession of A, E is conceived and born, the second child of C. At the death of the latter, his son D will have to report to the inheritance the goods collected by representation from the succession of his grandfather A, in order to restore equality with his brother E entitled to report [50].

However, a study published by a famous author two years ago [51] confirmed an objection that one of our colleagues had raised during the works in the spring of 2003 and to which we, the other members of the commission, had not reflected enough: such a provision is contrary to the essential rule of the capacity to inherit, according to which the person not yet conceived on the date of opening the inheritance is irrelevant to the transmission of property by inheritance (art. 725 of the French Civil Code, art. 654 of the Civil Code and art. 957 parag.1 NCC). We can say today that the reception of the new French text was a rushed one.

Representation is meant to ensure equality among the lines of descent, providing their components that are capable and willing to inherit with the possibility to do it. However, the technique is exceptional (and it had to be maintained as such) only in relation to the principle of proximity of the degree of kinship, not to the rule of the capacity to inherit as well. In other words, the exceptional nature of representation in relation to the principle of proximity of the degree of kinship does not allow exceeding the rules of the capacity to inherit: only the existent members (born or conceived) of the line of descent will benefit from representation. As professor Grimaldi showed, „the application made here is related to solutions that nobody thinks about reconsidering: if a child dies, leaving his parents and one brother, his/her inheritance shall be *definitely* acquired by the latter, without the potential posthumous brother being able to claim anything” [52].

Finally, if the text is however maintained, it should have been supplemented with the hypothesis of the renouncing, as done for art. 965 and 967 NCC as well.

6.4. The conclusion

A conclusion must be drawn: the rules of succession by representation are modernized in art. 965 and 967 NCC, by taking into consideration the criticism brought to the current regulation and the recent developments in the comparative law of certain countries with which we are related in terms of legal systems. In fact, the modernization is part, as we have seen above, of a general European trend of abandoning the theory of fiction.

The Romanian lawmaker took an important step for improving this inheritance technique, abandoning the artificial and harmful concept of “fiction of law” (art. 664 Civil Code). Art. 965 NCC reformulated the notion, stipulating: „By succession by representation, a legal heir of a more distant degree of kinship, called representative, takes over, under the law, the rights of his/her ascendant [...]”. We should note that our lawmaker, just like the Canadian one [53], acted more consistently with the reforms it made than its French counterparts. The text of art. 751 of the French Civil Code (replacing the text of the former art. 739) was limited to replacing the words „fiction of law” with „legal fiction”. However, restoring the

possibility for representation of the unworthy and of the renouncing heir makes the coming to inheritance of the beneficiary a **reality**; this is done **in one’s own behalf**, as member of the line of descent to which he/she belongs, not by fictional representation of the predecessor closer to the deceased as degree of kinship. Consequently, both our lawmaker and the Canadian lawmaker should have abandoned (in order to end all doubt) even the confusing name of „representation”. However, this is not the first case when a legal institution earns a name that is inappropriate to its essence...

7. Final considerations

What is the general significance of the evolution we examined? It all started with the Roman law and can we say that, today, we are contemplating its restoration? If so, then is it a conscious, intentional restoration? I cannot afford to answer yes to any of the questions.

I believe the medieval jurists deformed *successio in locum* in a specific context: they were simply looking in Justinian’s Corpus for texts capable to justify an inheritance practice (re)discovered by the old French law (recall to succession) [54]. If we refer only to the inheritance systems closest to the Romanian civil law, the reforms brought to the provisions of Code Napoléon were not based on the research of law history, but exclusively on the reasons of contemporary practice. This is also the case for the Québec province.

In conclusion, returning to the Roman law solution (re)confirms, over centuries, how refined the legal spirit of the jurists who built the glory of the Eternal City was. It is an example (another one) of how the adequate knowledge of the Roman law and of the Law history, in general, would have relieved the task of our contemporaries.

References:

[1] In the Romanian civil law, representation operates both in the first order of successors (the descendants – art. 665 Civil Code), and in the category of privileged collaterals (brothers and sisters of the deceased, with their descendants until the fourth degree inclusive – art. 666 Civil Code). Consequently, the considerations in this paragraph

refer both to the descendants of the deceased's children, and to the descendants of his/her brothers and sisters, until the fourth degree of kinship.

[2] Published in M.of. nr. 511/24 iulie 2009.

[3] For details, see Marian Nicolae, Mircea Dan Bob, La refonte du code civil roumain et le code civil du Québec, *La revue du barreau canadien*, vol. 88 no. 2 (September 2010), p. 445-454, available online at: http://www.cba.org/cba_barreview/Recherche.aspx?VolDate=09%2f01%2f2010 and *id.*, La recodification du droit civil roumain en quête de modèle, in *Studia Universitatis Babeş-Bolyai, series Iurisprudentia*, vol. LIV, no. 2/2008, p. 115-121, available online at: <http://studia.law.ubbcluj.ro/articol.php?articollid=123>.

[4] The Draft law for implementing the civil code was published on the Ministry website: http://www.just.ro/Sections/PrimaPagina_MeniuDr_eapta/Proiectulnoulicodcivil/proiectuldeLegepentrupunereainaplicareaLeg/tabid/1452/Default.aspx. It was approved in December 2010 by the Senate, and currently it is to be submitted to the Juridical Commission in the Chamber of Deputies.

[5] Alexandru Otetelişanu, *Curs de drept civil comparat, cu aplicații la dreptul provinciilor alipite – Succesiuni*, Cultura poporului, 1937, p. 460-461.

[6] Ion Rosetti Bălănescu, Alexandru Băicoianu, *Drept civil român, vol. III Regimuri matrimoniale. Donațiuni. Succesiuni. Testamente*, Socec, 1948, p. 235 no. 549.

[7] For more details on Roman law matters and the history of law, please see my study *La représentation successorale – le retour d'une règle romaine?*, *Revue internationale des droits de l'antiquité*, vol. L (2003), p. 37-46, also available online at <http://www2.ulg.ac.be/vinitor/rida/2003/Bocsan.pdf>.

[8] Ștefan G. Longinescu, *Elemente de drept roman*, vol. II, Curierul judiciar, 1929, pp. 775 sqq.; Raymond Monier, *Manuel élémentaire de droit romain*, vol. I, Domat-Montchrestien, 1947; Max Kaser, *Das römische Privatrecht*, vol. I – p. 164, vol. II – pp. 501, 506, Beck, 1971-1975; Vladimir Hanga, *Drept privat roman. Tratat*, EDP, 1978, pp. 315 and 318-319; Antonio Guarino, *Diritto privato romano*, ed. a 12-a, Jovene, 2001, p. 443; M. Biret, *Applications au code civil des Institutes de*

Justinien et des cinquante livres du Digeste, avec la traduction en regard, vol. I, 1824, p. 310.

[9] *Sui heredes* refers to the first class of heirs, in compliance with *ius civile* (the old Roman law, which had its origin in the Law of the XII Tables): the descendants and the wife in the power of *de cuius* at the date of opening succession (for details, see Vladimir Hanga, Mircea Dan Bob, *Curs de drept privat roman*³, Universul juridic, 2009, p. 224-225).

[10] G III.7-8; v. aussi G III.2.

[11] Ulpianus Reg. XXVI.2: *Si defuncti sit filius et ex altero filio iam mortuo nepos unus vel etiam plures, ad omnes hereditas pertinet, non ut in capita dividatur, sed in stirpes, id est ut filius solus mediam partem habeat et nepotes, quotquot sunt, alteram dimidiam: aequum est enim nepotes in patris sui locum succedere et eam partem habere, quam pater eorum, si viveret, habiturus esset*; *id.*, Dig. XXXVIII.16.1.4-6; Paulus, *Sent.* IV.8.8; Inst. III.1.2b et 1.6 (which only reiterate the texts previously quoted from Gaius); Nov. CXVIII.3 and CXXVII.1.

[12] Another example of the praetorian succession: Celsus, Dig. XXXVII.6.7: *Si nepotes in locum filii successerunt, una portio is conferre debet, uti bonorum possessionem unam partem habent: sed et ipsi ita conferre debent, quasi omnes unus essent*.

[13] In order to be accurate: *successio in stirpes* has its origin in *ius civile* and refers to the successors of the same degree. *Successio in locum* is a praetorian creation and refers to the descendants of different degrees, who compete in case of death or emancipation of a son. Justinian limits to establishing their confusion operated prior his time and borrowing Ulpian's idea – Reg. XXVI.2, on the fair foundation of representation.

[14] Pomponius, Dig. XXXVIII.6.5.2.

[15] The praetor gradually tried to offer succession rights to those who were not under the power of *de cuius* as well, in order to emphasize the kinship of blood as a criterion for establishing the call to inheritance. This is the case of the emancipated son, such as the one to which the text of Pomponius refers to.

[16] See foremost: Paul Viollet, *Histoire du droit civil français*, 1893; Ernest Roguin, *Traité de droit civil comparé*, vol. III *Les successions I. Généralités – La succession ab intestat*, LGDJ, 1908, p. 255-262; Jean Bart, *Histoire du droit privé*,

Montchrestien, 1998, pp. 82-83, 355; Jean-Philippe Lévi, André Castaldo, *Histoire du droit civil*, Dalloz, 2002, pp. 1091-1092, 1104-1105, 1121-1122, 1166, 1176 and the detailed study on the situation in the old French law, drafted by Quentin Epron, La représentation successorale. Réalité coutumière, fiction savante, *Droits* nr. 31 (2000), p. 127-158.

[17] The first mention: 1224, in Normandy.

[18] Johannes Faber, in *Comentarius ad Instituta*.

[19] Dumoulin expresses it latter in the same manner: *Rursus nota quod representatio nunquam est de persona vivente, sed tantum de parente mortuo naturaliter aut civiliter* (quoted by Chabot, in *Recueil complet des discours prononcés lors de la presentation du Code civil*, vol. I *Discours*, 1838, p. 346).

[20] For more details, see La représentation successorale – le retour d’une règle romaine?, *cit.supra*.

[21] See in particular François Terré, Yves Lequette, *Droit civil. Les successions. Les libéralités*, Dalloz, 1997, p. 79-91; Francisc Deak, *Tratat de drept succesoral*, Actami, 1999, p. 86-104; H., L. and J. Mazeaud, *Leçons de droit civil*, tom IV vol. 2 *Successions – Libéralités*⁵, de Laurent and Sabine Leveneur, Montchrestien, 1999, pp. 73-76; Michel Grimaldi, *Droit civil. Successions*⁶, Litec, 2001, p. 133-145; Germain Brière, *Droit des successions*³, revised and updated by Jacques Beaulne, Wilson & Lafleur, 2002, p. 124-134; Dan Chirică, *Drept civil. Succesiuni și testamente*, Rosetti, 2003, p. 68-82.

[22] „We resumed the provisions of the Roman law”, but representation „is only a fiction that gave to children the share their father would have received if still alive” (Speech given during the meeting of 19 7th month year XI, in *Recueil ...*, *cit.supra*, p. 335).

[23] The Romanian lawmaker of 1865 did not acknowledge civil death.

[24] See Pedro del Pozo Carrascosa, Antoni Vaquer Aloy, Esteve Bosch Capdevila, *Derecho civil de Cataluña. Derecho de sucesiones*, Marcial Pons, 2009, p. 363-364.

[25] See Luis Díez-Picazo, Antonio Gullón, *Instituciones de derecho civil*², vol. II/2 *Derecho de familia. Derecho de sucesiones*, Tecnos, 1998, p. 231.

[26] Antonio Palazzo, *Le successioni. Introduzione al diritto successorio. Istituti comuni alle categorie successorie. Successione legale*², Giuffrè, 2000, p. 229.

[27] Virgile Rossel, F.-H. Mentha, *Manuel de droit civil Suisse*², vol. II, *Des successions - Des droits reels: Ire partie (De la propriété)*, Payot, 1922, p. 11.

[28] Theodor Kipp, Helmut Coing, *Erbrecht*¹⁴, J.C.B. Mohr, Tübingen, 1990, p. 23 note 10; Hans Brox, *Erbrecht*¹⁸, Carl Heymanns Verlag, 2000, p. 36.

[29] Paul-Henri Steinauer, *Le droit des successions*, Stämpfli Editions SA, 2006, p. 71.

[30] Their synthesis at Sophie Gaudemet, La représentation successorale au lendemain la loi du 23 juin 2006, *Defrénois* 18/2006, p. 1366. Also see Stéphane Piedelièvre, Réflexions sur la réforme des successions, *Gazette du palais* no. 96/2002, § 58.

[31] „The rule of division by lines of descent is based on justice and it would have been good for the lawmaker to have generalized it, also extending it to the hypotheses in which the successors of a more distant degree of kinship are called to inherit by excluding the closer successors, either following their renunciation, or due to their unworthiness” (Rosetti Bălănescu, Băicoianu, *op.cit.*, p. 236 no. 554, with the practical applications taken from the French authors – see p. 237 no. 555).

[32] Brière, *op.cit.*, sources quoted at p. 130 note 87.

[33] Answering to an objection regarding the extent of representation in collateral line, „Portalis observe que la représentation n’est qu’une fiction de la loi. [...] Ce ne sont pas en effet des vues d’humanité qui ont fait rétablir la représentation; ce sont des vues d’ordre réglées sur les affections présumées du défunt” (answer given during the meeting of 25 frimaire year XI, in Jean-Étienne-Marie Portalis, *Discours, rapports et travaux inédits sur le Code civil*, published by Frédéric Portalis, Joubert, 1844, p. 370). This is the reason why a French author wrote quite recently: “[...] le devoir de famille comme l’affection la plus naturelle s’apprécie, non pas envers les enfants ou les frères ou sœurs *considérés isolément*, mais envers les souches que ceux-ci forment *avec leurs descendances respectives*. Ainsi comprise, l’égalité des devoirs ou des affections appelle une *égalité des souches*. [...] En résumé, si le législateur a institué

la représentation, c'est certes pour neutraliser le hazard, mais pour le neutraliser en vue de sauvegarder l'égalité des souches" (Michel Grimaldi, *op.cit.*, p. 136). The Romanian juridical literature adopts the same reasoning: Bogdan Dumitrache, Marian Nicolae, Discuții privitoare la reprezentarea succesorală (II), *Dreptul* nr. 4/1999, p. 35.

[34] This is the fictional nature of succession by representation. Rapporteur Chabot showed during a meeting of 26th month year XI: „Cette représentation admise par la loi, n'est qu'une fiction; mais elle est une image réelle de la vérité, et sans elle la loi serait presque toujours en opposition avec les affections du défunt [...]” (*Recueil...*, p. 344), and tribune Siméon said during the meeting of 29th month year XI: „C'est une fiction dont l'effet est de considérer le représentant comme le représenté, de le faire entrer dans la place, le degré et les droits de celui qu'il représente” (*Recueil...*, p. 365). La fiction détermine alors un mécanisme par lequel les représentants recueillent pour le prédécédé; selon la conception romaine, ils montaient à la place du prédécédé à cause des droits offerts par l'appartenance à la souche visée.

[35] Art. 660 CCQ: „Representation is a favour granted by law by which a relative is called to a succession which his ascendant, who is a closer relative of the deceased, would have taken but is unable to take himself, having died previously or at the same time or being unworthy”.

[36] Art. 664 CCQ: „No person who has renounced a succession may be represented [...]”.

[37] For details, Marie-Cécile Forgeard, Richard Crône, Bertrand Gelot, *Le nouveau droit des successions et des libéralités. Loi du 23 juin 2006, commentaries et formules, Defrénois*, 2007, p. 16-17.

[38] Art. 751 French Civil Code (*L. 2001-1135 de 3 déc. 2001): „La représentation est une fiction de la loi, dont l'effet est de faire entrer le représentants dans les droits du représenté”.

[39] Art. 755 &1 French Civil Code (*L. 2001-1135 de 3 déc. 2001): „La représentation est admise en faveur de enfants et descendants de l'indigne, encore que celui-ci soit vivant à l'ouverture de la succession”. Also see art. 729-1 French Civil Code.

[40] Art. 754 &1 French Civil Code (*L. 2001-1135 de 3 déc. 2001) stipulated „On représente les prédécédés, on ne représente pas les renonçants”. Following the amendments operated by the Law of

23 June 2006, the text enacts: „On ne représente les renonçants que dans les successions en ligne directe ou collatérale”. See for details: Gaudemet, *cit.supra*, p. 1366; Christophe Blanchard, Présentation de la réforme des successions et des libéralités, *Droit & patrimoine* no. 153 of November 2006, p. 26; Axel Depondt, De quelques aspects pratiques et fiscaux de la loi du 23 juin 2006, *Revue Lamy Droit civil*, Supplement to issue 35 of February 2007, p. 74-75.

[41] V. Piedelièvre, *loc.cit.supra*.

[42] Forgeard, Crône, Gelot, *loc.cit.supra*.

[43] Jessica Fillenbaum, in ****Précis du droit des successions et des libéralités* (coord. Alain-Charles Van Gysel), Bruylant, 2008, p. 46-48.

[44] “The heir not claiming inheritance due to **predecease, renunciation or unworthiness** shall be replaced, by the effect of representation, by his/her descendants, according to the closeness of the degree of kinship”.

[45] „Representation shall also occur in case the person to be represented is alive when opening succession, but is removed therefrom by unworthiness or disinheritance”.

[46] For criticism of art. 660 CCQ, which did not admit the representation of the renouncing, see Brière, *op.cit.*, p. 131 no. 221.

[47] As a French author showed, „longtemps, pourtant, la représentation n'a que partiellement permis d'assurer une égalité des souches. Ce n'est qu'avec les réformes de 2001 et de 2006 que, de façon empirique, le législateur a établi une pleine égalité entre les souches” (Gaudemet, *loc.cit.supra*).

[48] “The children of the unworthy, respectively of the renouncing, conceived prior to opening the succession from which he/she was excluded, will report at his/her succession the goods they had inherited in his/her place, if they come in competition with other children, conceived after opening the first succession”.

[49] „The goods inherited by the descendants of the unworthy or the renouncing when opening the succession from which he/she had been excluded shall be reported at the succession of the unworthy or the renouncing, if they come in competition with other descendants of the same, conceived after opening the succession in which the unworthiness operated”.

[50] According to the final thesis, the report shall be made only if he had any benefit from a solvent succession of the predecessor inherited by representation.

[51] Michel Grimaldi, La représentation de l'héritier renonçant, *Defrénois* 1/2008 nr. 38698 § 8.

[52] *Id., loc.cit.*

[53] Art. 660 CCQ: "Representation is a favour granted by law [...]"

[54] Esmein shows how jurists like Jean Faure were distinguished mainly by "le caractère

vivant et pratique de leurs écrits. Ils s'efforcèrent constamment de féconder par les principes du droit romain les institutions coutumières et politiques de leur époque, et d'en établir la théorie" (Adhémar ESMEIN, *Cours élémentaire d'histoire du droit français*¹⁵, Sirey, 1925, p. 732).