THE LEGAL EVOLUTION OF THE DONATION IN FRENCH LAW BEFORE NAPOLEON'S CODE

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Abstract: When looking at the provisions regarding the donation contract in Napoleon's Civil Code, provisions which almost entirely remained unchanged in contemporary French Civil Code and were adopted by the majority of continental-European legal systems, including the Romanian Civil Code of 1865 and the one in force today, nothing suggests that where today is almost a geometrical order, there was once a multitude of sources of law that governed donations. The evolution of French law in the field of donations started from the Roman occupation, which imposed its refined legal system on the Gallic population, and continued with the Roman-inspired customs of the Middle Ages. The form that the donation contract has in Napoleon's Code is, however, inspired by the regulations provided in the first project of civil codification in French law, the 1731 Ordinance of Henri-François d'Aguesseau. In this article I will analyze the evolution of the provisions regarding donations in all these moments of French legal history, in order to show how the law in all those particular moments led to the manner in which the donation contract was codified in Napoleon's Code.

Keywords: Donation contract, custom, Roman law, Napoleon's Code, Ordinance of 1731.

I. Introduction

The influence of the Napoleonic Code on European legal systems is remarkable – the project of a national civil codification which would unify all the disparities among the local French customs was an ideal which natural law jurists have proposed long before Napoleon's political determination to see this project effective. The value of this codification is also due to the profound Roman influence of its institutions, especially in the field of donations. The fundamental legal elements of the donation as provided in the Napoleonic Code – the capacity of the contractual parties, the qualities of the object of the donation contract, the conditions for the consent of the parties and the cause – have their origin in the Roman law, which, through successive transformations from the Classical to the Post-classical period, led to the refined notion of a donation contract. The evolution of this notion in French law is, however, also owed to the French customs – *Lex Romana Burgundionum*, *Lex Gundobada*, *Lex Romana Visigothorum*, which tried to accommodate the Roman legal notion of *donatio*. The most important project of French civil law unification and the major source of inspiration for the 1804 Napoleonic Code in the field of donations was the 1731 Ordinance of Henri-François d'Aguesseau, which was the one that configured this legal institution in its modern form.

II. Donations in Gallic Antiquity

The history of French law starts with the Roman occupation of what is the contemporary territory of France, and the gradual imposition of the Roman law on the Gallic population. The Southern part of France, called Gallia Transalpina, or Gallia Narbonensis, became a Roman province in 121 B.C. and, after Caesar's conquests, the entire territory was

organized into several imperial or praetorian provinces – Gallia Aquitania, Gallia Belgica, Gallia Lugdunensis. During the Roman occupation, the Roman law was extensively adopted by the local population, at first mixed with local customary norms, but gradually replaced with the more complex Roman rules.[1]

The Roman law during the Roman occupation of nowadays France passed from the Classical Period to the Post-Classical one with a major transformation of its institutions. During the Classical Period, there was in force the fundamental legal principle that *ex nudo pacto actio non nascitur*[2], according to which the mere agreement of the parties, *consensus*, and the formal expression of the convention do not suffice for the valid transfer of the property, which had to respect a certain *modus*.[3] Before Justinian's reformation of the Roman law, the donation was not recognized a specific form, since *jus civile (jus Quiritium,* the ancient Roman law) required that all property transfers, gratuitous or onerous, of a *res private* from *cedens* to *accipiens*, must be done respecting the form of *mancipatio* or *in jure cession*. Therefore, regarding donations, if the cause of a transfer was the gratuitous deliverance of property, it had to be done either by *mancipatio* or by *in jure cessio*. The donations were also valid if they were done through *traditio*, which was an informal mode of acquiring property sanctioned by *jus praetorium*, or by certain modes of creating or ending obligations such as *sponsio* and *stipulatio*.

Mancipatio, which was a solemn mode of property transfer sanctioned by *jus civile*, was used only by capable Roman citizens, or by those who, although they were not citizens, enjoyed the right to conclude legal acts according to *jus comercii*.[4] The second mode of property transfer, *in jure cessio,* presupposed a transfer of the good in front of a magistrate, from *cedens* to *accipiens*.[5] *Traditio* was an informal mode of property transfer which presupposed the actual remission of the possession of a good by *tradens* to *accipiens*, without any of the formal requirements that *jus civile* imposed on such transfers.[6]

Sponsio and *stipulatio*, which were also used for the legal operation of the donation, were some of the oldest contracts in Roman law, belonging to the *verbis* category, since they presupposed certain verbal, solemn formulae in order to be valid.[7]

The donation convention was not enforceable during the Classical Period of the Roman law, but, although the general rule *ex nudo pacto action non nascitur* was still applicable in the Post-classical period, three exceptions were introduced: the legitimate, the praetorian and the accessorial conventions. Regarding the donation contract, Emperor Theodosius II recognized the legitimate convention *dictio dotis*, and, later, Justinian recognized full legal effects to the conventions of donation. The latter was the agreement through which the donor irrevocably transferred a good to the donee, with the specific intention of the donor to give gratuitously, and this definition was kept even in the Napoleonic Codification – article 894 states that *The inter vivos donation is an act by which the donor impoverishes himself effectively of the good that he gives to the donee that accepts it*[8] . Unlike

[1] Kate Gilliver, *Essential histories. Caesar's Gallic Wars 58-50 BC*, Routledge, Taylor & Francis Group, New York, 2005, pp. 79-80;
[2] Domitius Ulpianus, *Libro IV, ad Edictum, Digestorum seu Pandectarum, apud.* Valerius M. Ciucă, *Lecții de drept roman,* Vol III, Polirom, Iași, 1999, p. 879;
[3] Valerius M. Ciucă, *Lecții de drept roman,* Vol. I, Polirom, Iași, 1998, pp. 259-260;
[4] Mihail Jakotă, *Drept roman, Partea I, Introducere în studiul societății și a instituțiunilor dreptului roman,* Editura Cugetarea, Iași, 2002, pp. 277-282;
[5] *Ibidem*, pp. 282-283;
[6] Valerius M. Ciucă, *Lecții de drept roman,* Vol. I, *op. cit.*, pp. 281-284;
[7] *Idem*, *Lecții de drept roman,* Vol. IV, Editura Polirom, Iași, 2001, pp. 804-806;
[8] Livre III, Des différentes manières dont on acquiert la propriété, Titre II, Des donations entre-vifs et des testamentes, art. 894: *La donation entre-vifs est un acte par lequel le donateur se dépouille actuellement et*

other gratuitous contracts such as *comodatus* or *mandatus*, the donation presupposed an impoverishment of the donor in the favor of the donee.[9]

Besides this regular form of the donation contract which gained full legal force during Justinian, several other types of donations were used in the Post-classical Period, and also by the Roman-Gallic population during the Roman occupation – the stipulation for another, the dowry and the *ante nuptias* donation, the donation between spouses and the remission of debt.

The stipulation for another was an exception to the *res inter alios acta, aliis nec prodesse, nec obese potest* general rule, which presupposed that one party promised to another a certain prestation in favor of a third party, who was not part of the contract between the first two.[10] The dowry was constituted in order to support the material needs of the marriage and it presupposed that the one who constituted the dowry promised to give the goods to the future husband when the marriage was concluded.[11] The *ante nuptias* donation appeared as an equivalent form of the dowry, and it was a mean for the future husband to assure the welfare of his future wife in the case of divorce or death.[12] A specific form of donation was the one between spouses, which was subjected to specific restrictions. It was possible only in the case of *sine manu* marriage, which, in contrast to *cum manu* marriage, presupposed a matrimonial separation of goods. The woman married *cum manu* didn't have her own goods and was unable to conclude any patrimonial transfers. However, the woman married *sine manu* was able to exert her property right over her own goods, including through donation contracts in favor of her husband.[13]

The remission of debt, as another type of donation, was made through different forms – through solemn acts, by which the creditor refused to use the procedural rights of the *nexum* or other solemn contracts, through *acceptilatio*, which was a fictive payment, or through *pactum de non petendo*, which didn't erase the debt, but made it impossible for the creditor to legally ask the payment from the debtor.[14] Since the creditor could have requested the execution of the obligation from his debtor, but intentionally refused to do so, this operation, since it presupposed a voluntary impoverishment of one party in favor of the other, was assimilated with a form of donation.

III. The donation in the French customs of *ancien régime*

Although the Roman occupation had the effect of legal unity, due to the extensive application of the Roman law throughout the occupied territories, which were transformed into provinces, the successive invasions led, among others, to the fragmentation of law through a personal and later territorial criterion.[15]

After the 476 fall of Rome, the Germanic tribes invaded the Roman Gaul, each population that established in the area following its own unwritten laws. Consequently, besides the Roman law, there were also applicable the customs of the Franks, Burgundians

irrévocablement de la chose donnée, en faveur du donataire qui l'accepte. în *Code Napoléon, édition originale et seule officielle.*, de l'Imprimerie Impériale, Paris, 1807;

[9] *Qui alienum fundum donationis causa excolit, nullam retentionem propter impensas faciet, quia domini res ab eo iniectas continuo efficit*. în *Digesta, Liber XXXIX, Titulus V, 14*;

[10] Valerius M. Ciucă, *Lecții de drept roman*, Vol. III, *op. cit.*, pp. 745-749;

[11] Vladimir Hanga, Mircea Dan Bob, *Curs de drept privat roman*, Ed. a IV-a, Universul Juridic, București, 2011, p. 136;

[12] *Ibidem*, p. 132;

[13] Valerius M. Ciucă, *Lecții de drept roman,* Vol. I, *op. cit.*, pp. 197-199;

[14] Valerius M. Ciucă, *Lecții de drept roman,* Vol. IV, *op. cit.*, p. 959;

[15] Philippe Malaurie, Patrick Morvan, Drept civil. Introducerea generală, trad. Diana Dănișor, Editura Wolters Kluwer, București, 2011, p. 63;

and Visigoths. The customary laws followed by these populations couldn't substitute the refined Roman legal institutions respected by the Roman Gallic population, therefore, until the ninth century, the medieval law was characterized by the personality of the laws, since the invaders were observing their own customs, and the Roman-Gallic population was still observing the Roman law.[16]

With some notable exceptions, the written customs before the ninth century didn't specifically refer to gifts or donations – for example, *Lex Salica*, the law of the Salian Franks, governed some criminal acts, such as theft (Title II-LVI), contained certain procedural dispositions (Title I), as well as some provisions governing the inheritance (Title LVII-LXII). A decade before *Lex Salica*, there was *Lex Romana Burgundionum*, fundamentally influenced by the Roman law, and applied from the fifth to the tenth century. It governed only the relations among the Roman-Gallic population, since the relations among Burgundians or between Burgundians and Roman-Gallic population were governed by *Lex Gundobada*.[17]

Lex Romana Burgundionum applied in southern France, and was a synthesis of Germanic customs and Roman legal institutions. It contained several dispositions regarding gratuitous acts in Title I, *On donations from the father or the mother or on the generosity of the masters*. The first and the second article indistinctively referred to *inter-vivos* and *mortis-causa* donations. There were, however, recognized certain legal elements regarding donations which are still in force in contemporary French law – the validity of the donations from the father or the mother in favor of their descendents through the agreement of the parties, the irrevocability of donations and the injuries towards the donor as a legitimate cause for the revocation of the donation.

Lex Gundobada (Liber constitutionum) was applied in the same time with *Lex Burgundionum*, but, just as the latter, it governed only the relations among Burgundians and between Burgundians and the Roman-Gallic population. The first title of the custom contains dispositions regarding donations and inheritances, and donations are subjected to restrictive conditions, since they are acts that diminish the wealth of the disposer which was to be transmitted through inheritance. For example, the first article refers to the father who can freely dispose of his wealth through donations, but from this general rule, the immovable goods which were to be passed to his descendents were excluded.

Lex Romana Visigothorum is a compilation adopted in 506, heavily influenced by the Roman law – it contains passages of *Codex Theodosianus, The Novels of Theodosianus II, Valentinian III, Marcian, Majorian and Libius Severus*, and also the *Institutes* of Gaius. It wasn't governing the relations among members of the Visigoth aristocracy, which were governed by their own laws, *Codex Euricianus*, adopted before 480, and which consisted primarily of Germanic customs.

Both codes, *Lex Romana Visigothorum* and *Codex Euricianus*, ceased to be in force when *Lex Visigothorum* was adopted in the seventh century, which governed all relations, regardless of the ethnicity or social origin of the subjects. In *Lex Visigothorum* there are several provisions regarding some types of donations, depending on the quality of the parties – the ones in which the Church was one of the parties, the ones in which one of the parties is the King, the ones between patrons and clients, the ones between spouses and regular donations.

[16] *Ibidem*, p. 64;
[17] Jean Gaudemet, *Les naissances du droit. Le temps, le pouvoir et la science au service du droit*, ed. a III-a, Montchrestien, Paris, 2001, p. 98;

All these Roman-inspired codes will gradually lose their legal force during the ninth to twelfth centuries, allowing local customs to take their place.[18] Although the Roman law didn't disappear entirely, the custom became the most important source of law. In this epoch, the French law transitioned from the personality of the legal norms applied to individuals depending on their origin, to the territoriality of the customs.[19] The reason for this fragmentation is a social and political one – the decline of the royal sovereignty through the division of Charlemagne's kingdom among his three heirs, which opened the way for feudal fragmentation, with the consequence of allowing each nobleman to impose on his domain his own custom. The castle, the center of the social, economic and political life, was almost entirely an autarchic universe. These specific conditions affected the law of that time, which also became fragmented – there were different customs applied to each domain. These customs were gathered and written starting from the thirteenth century. Later, King Charles the VII ordered, through Montils-lès-Tours ordinance, that all customs be written. The following kings had the same policy regarding the unwritten customs, which had the effect of the famous sixteenth century written collections of customs – *The 1509 Orléans Custom, The 1510 Paris Custom, The 1539 Bretania Custom, The 1583 Normandy Custom.*[20]

The regulation of donation contracts in the Paris Custom constituted a legal reference for the later Napoleonic Code. The regulations refer to the capacity of the parties to give and to receive donations, the goods which can constitute the object of donations, the formalities necessary for the validity of the contract and specific provisions regarding the donations with charges and the revocation of donations.[21]

The donors enjoyed a quasi-total freedom of disposing gratuitously of their own wealth through inter-vivos acts. The radical reaction against donations during the 1789 French Revolution had its cause in these acts of grand generosity, *pia causa*, that the Custom permitted, but that led to the impoverishment of the donor's descendents.[22]

Regarding the capacity to dispose through donations, article 272 of the Custom provides that any person with full exercise capacity may dispose of his entire wealth through inter-vivos donations, with the exception of those who, being under the age of 25, could only dispose of a part of their wealth.[23] This disposition is similar to the one in article 902 of the Napoleonic Code, which states that all persons may dispose through donations or receive donations, with the exception of those declared incapable by law.[24] All donations which were made by ill persons on the death-bed were considered by the Custom *mortis-causa* donations, and in this way the Custom established the incapacity of those persons to donate in those specific circumstances, in order to protect their wealth and the interest of their heirs. Regarding the capacity required for the donee, article 276 states that several donations are forbidden, such as the ones made for tutors, curators, teachers or administrators or their children, by the minors or those who are under their protection.[25] The same prohibitions were

[18] *Idem*, *Survivances romaines dans le droit de la monarchie franque du Ve au Xe siècle*, *Tijdschrift voor Rechts-geschiedenis*, 23, Haarlem-Bruxelles, 1955, pp. 149-206;
[19] Jean Imbert, *Les références au droit romain sous les Carolingiens*, *Revue Historique de Droit français et étranger*, 2, 1995, pp. 163-174;
[20] Philippe Malaurie, Patrick Morvan, *op. cit.*, pp. 66-67;
[21] François Bourjon, *Droit commun de la France, et la Coutume de Paris*, Vol. II, Grange, Imprimeur-Libraire, au Cabinet Littéraire, Pont Notre-Dame, près la Pompe, Cellot, Impreimeur-Libraire, rue Dauphine, & à l'Ecu de France, Grand'Salle du Palais, 1770, p. 75;
[22] Richard Hyland, *Gifts. A Study in Comparative Law*, Oxford University Press, New York, 2009, p. 5;
[23] François Bourjon, *op. cit.*, p. 76;
[24] *Toutes personnes peuvent disposer et recevoir, soit par donation entre-vifs, soit par testament, excepté celles que la loi en déclare incapables*
[25] Robert-Joseph Pothier, *Lés traits du droit français, Tome VII,* Bechet ainé Libraire, Paris, 1825, p. 437;

included in the Napoleonic Code, in order to protect those whose consent may have been influenced by the ones who were legally required to protect them.

The category of donations between spouses was subjected to a restricted status – article 282 forbade such donations, and article 283 also forbade indirect donations among spouses. An indirect donation, according to the Paris Custom, is the one made for the spouse's children from a previous marriage, which the Custom presumes is actually done in favor of the spouse, and not the children.[26]

IV. The first major written law regarding donations - *L'ordonnance sur les donations* of 1731

Although since the tenth century the Roman law found itself in a phase of decline[27], starting with the eleventh century it reappeared through the Italian rediscovery of the Justinian's codification, *Corpus juris civilis*, by the Glossators School of Bologna.[28] The effect of this discovery divided France along this frontier: in the south there were *states of written law* (*pays de droit écrit)*, where Roman law was applied, and in the north there were *states of custom (pays du coutume)*, were customary law was applied. This division overlapped the previous historical, linguistic and social ones. However, even in the northern states, where customary norms were in force, the Roman law was used as a reference, widely used, since all jurists of the time were educated following the Glossators' method.[29]

Almost a century of academic upsurge due to the Roman law reception ends with the Super Specula of Philippe-Auguste, which prohibits the teaching of Roman law and compels all French universities to teach the law of ordinances and customs.[30] This prohibition was lifted in 1679, leaving a free way for Domat and Pothier to elaborate their remarkable doctrinal works, fundamental sources for the later Napoleonic Code.

Henri-François d'Aguesseau, chancellor of King Louis XV, highly influenced by Domat, proposes a century later the project of a French civil codification. In order to accomplish this goal, he adopted three ordinances, one regarding testaments, one regarding fideicommissary substitutions, and the 1731 ordinance specifically regarding the donations, which had a major role in this field for the Napoleonic Code.[31]

L'ordonance sur les donations (1731) stated for the first time in French civil law the solemnity of the donation contract – all such contracts had to be made in front of the notary, under the sanction of invalidity of the contract. This disposition influenced article 931 of the Napoleonic Code, which states in a similar manner that all donations have to be concluded in a solemn form.[32] Therefore, for the first time in French law, the form required for the validity

[26] T. K. Ramsay, *Notes sur la Coutume de Paris*, Imprimerie de la Minerve, Montreal, 1863, pp. 66-67;
[27] Jean-François Lemarignier, *Les actes de droit privé de Saint-Bertin au Haut Moyen Age. Survivances et déclin du droit romain dans les actes de la pratique*, *Mélanges Fernand de Visscher*, Bruxelles, 1950, pp. 35-72;
[28] Valerius M. Ciucă, *Euronomosofia*, Vol. I, *Prolegomene la o operă în eșafodaj*, Editura Fundației Academice AXIS, Iași, 2012, p. 107;
[29] Jean-Philippe Lévy, *La pénétration du droit romain dans le droit français de l'ancien régime*, în (ed.) Claude Bontems, *Nonagesimo anno. Mélanges en homage à Jean Gaudemet*, PUF, Paris, 1999;
[30] François Olivier-Martin, *Les professeurs royaux de droit français et l'unification du droit civil français*, Mélanges Sugiyama, 1939, pp. 262-264;
[31] Henri Regnault, Henri Capitant, *Les ordonnances civiles du Chancelier Daguesseau: Les donations et l'Ordonnance de 1731,* Paris, Recueil Sirey, pp. 50-57;
[32] *Tous actes portant donation entre-vifs seront passés devant notaires, dans la forme ordinaire des contrats; et il en restera minute, sous peine de nullité;*

of a donation contract was instituted through the 1731 Ordinance as an exception from the principle of consensual agreement which governed the field of contracts.[33]

Another new aspect introduced by the Ordinance was the abrogation of *mortis causa* donations (*donations à cause de mort*). This type of donations constituted a third kind of gratuitous dispositions, along with inter-vivos donations and testaments.[34] Their prohibition was related to two common situations at that time: the mortis-causa donations made by the father to his descendents and the ones made by the descendents to their father. The effect of the abrogation consisted, therefore, in the impossibility of the descendents to dispose of the goods which they would have gained only as inheritance, on one hand, and, on the other, in the impossibility of the fathers to gain the goods of the descendents without coming to succession by testament, or competing with the mother, brothers and sisters.[35]

The conditions required for the capacity of the parties in order to conclude a valid donation contract, the conditions for the object of the donation and the formalities required for the validity of the contract are the ones that constituted a major source of inspiration for Napoleon's codification in the field of donation contracts in those specific matters.

V. Conclusions

After analyzing the legal evolution of the donation in Roman law, we underlined the Roman forms of donations that later influenced the Middle Ages French customary laws regarding gratuitous transfers. The plurality of French customs, which imposed different rules governing gifts, ended with the first attempt to adopt a uniform legal instrument regarding donations. This legal unification in the field of donations, applicable on the entire French territory, regardless of the unwritten, customary law or written, Roman law traditions of some French states, was made through *L'ordonance sur les donations* of 1731. This particular codification, along with the Roman institutions and the customs influenced by Roman law, constituted the fundamental sources of the 1804 Napoleonic Civil Code in the field of the donation contract.

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[33] Marcel Planiol, *Traité élémentaire de droit civil, tome II,* éd. 9, Librairie Génerale de Droit & de Jurisprudence, Paris, 1923, p. 342;
[34] Jean Domat, *Les loix civiles dans leur ordre naturel. Tome I,* Nyon Libraire, Paris, 1777, pp. 172-173;
[35] François de Boutaric, *Explication de l'Ordonnance de Louis XV, du mois de Février, 1731, concernant les donations*, François Girard Imprimeur Libraire, Avignon, 1766, p. 12;

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