

Reflections on the Successional Representation of the Unworthy Renunciant

Professor **Natalia Veronica STOICA**¹
PhD. student **Liviu Alexandru NARLĂ**²

Abstract

The efforts to adopt a new Civil Code, initiated in the period 1999-2004 and finalized in 2011, aimed to expand the scope of representation in succession cases, including cases involving unworthy heirs and renunciants. However, legislative stagnation partially prevailed, as the Law no. 287 of 2009 on the Civil Code, with amendments introduced by Law no. 71/2011 for its implementation, only regulated the possibility of representation for unworthy heirs and not for renunciants. The partial modernization of the rules on representation in succession raises new questions and the need for answers. In the current context of the regulation of representation in succession, we aim to address the legitimate question of whether an unworthy heir can renounce inheritance and, if so, whether a renunciant unworthy heir can be represented by their descendants. We note that in the legal doctrine associated with the Civil Code of 1864, no speculation was made regarding this legal situation, as an unworthy heir could not be represented in succession, and such a discussion would have been pointless. Therefore, we will present the historical and evolutionary journey of the institution of representation in succession, from Roman law to modern times, as well as the winding path of adopting a new Civil Code in this area. By doing so, we can reach a valid conclusion regarding the issues addressed in this material.

Keywords: representation; unworthiness; renouncer; inheritance.

JEL Classification: K15, K39

1. Introduction. The historical context of succession representation

Establishing general and fixed criteria for determining the order of preference between relatives to the deceased with a general vocation, respectively the class of heirs and the degree of kinship, imposed in the manner necessary, motivated by the unfairness of some practical situations as a result of legal devolution, of some exceptions from these general criteria. Thus, the jurists continuing the philosophy of Roman law³ appealed to the institution of civil law, which they called representation, which they considered to be a fiction of the law, it represents a derogation from the principle of proximity of the degree of kinship, as well as equality between relatives of the same degree.

The analysis of the historical course of this institution of civil law leads us to the conclusion that the purpose its foundation based on equity, to maintain equality between strains, has lasted for centuries, and the current civil regulation of succession representation, in the European space, is closer to at any time, of the initial version, introduced into Roman law through the institutions of Gaius⁴.

However, the application mechanism of this institution has undergone changes throughout history, in the meaning of the limitation of the hypotheses of application of the representation, the limitation deriving as a natural consequence of the ways of interpreting the old institution of Roman law in the medieval era and later in the modern era.

As noted in the specialized literature⁵, if in Romanian law it was considered that the descendants of his heirs, came to his *de cuius* inheritance instead of their ancestors, invoking rights own (*iure proprio*), in the Napoleonic code from 1804, for example, the descendants of the deceased who they came to inherit it by representing their ascendant, they reaped the inheritance in the name of the representative (*iure praedefuncti*), borrowing the latter's place and rank.

In order to answer the question that constitutes the working hypothesis of this article, it is

¹ Natalia Veronica Stoica - Faculty of Law, Bucharest University of Economic Studies, Romania, verostoica@yahoo.com.

² Liviu Alexandru Narlă - Doctoral School of Law, Bucharest University of Economic Studies, Romania, liviu.narla@gmail.com.

³ Jean Faure, jurisconsult from the 14th century.

⁴ Mircea Dan Bob, *Considerații asupra reglementării reprezentării succesoriale în Noul Cod civil*, „Revista Română de Drept Privat” no. 1/2011, p. 33-48.

⁵ Ștefan G. Longinescu, *Elemente de drept roman*, Vol II, Curierul Judiciar, Bucharest, 1929, p. 775.

necessary to present the legal regime of the civil law institution of succession representation and the interpretation provided by specialized literature throughout its application.

During the Roman period, the equivalent of succession representation, known as "*successio in locum*," was designed to maintain equality among different branches. The inheritance would pass to more distant descendants of the deceased in place of their ascendants by virtue of their own rights⁶. Through the reforms of the praetor Pomponius, the scope of application of "*successio in locum*" was expanded to include the case of the deceased's emancipated grandson. In this case, the deceased's son could be alive but renounce the inheritance.

Later, in the medieval and modern periods, "*successio in locum*", referred to by the jurists of the time as representation, allowed more distant descendants in relation to the deceased to inherit, borrowing the degree and position of the represented person. It was considered a legal fiction⁷.

Interpreting the institution of succession representation within a new paradigm of legal fiction led to several legal consequences. One of them was that living persons could not be represented, and at the same time, the representative could not take the place of the represented person if the latter renounced or was unworthy, as their position would not be useful in such cases. The result of this interpretation formed the basis for modern codifications, such as the Napoleonic Code of 1804, the Civil Code of Lower Canada in 1866, the Romanian Civil Code of 1864, the Spanish Civil Code of 1888, and others.

For example, without underlining the obvious fact that succession representation is a legal fiction, Article 739 of the Napoleonic Code, which was also adopted in Romanian jurisdiction as Article 664 of the Civil Code, stated that "*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*", meaning "Representation is a fiction of the law, the effect of which is to place the representatives in the position, degree, and rights of the represented person."

In specialized literature, criticisms have been raised regarding the regulation of succession representation, particularly concerning its scope of application. These criticisms have been attributed to the fictional nature of this institution. It has been reproached that this institution does not allow the representation of unworthy individuals, even if they are alive at the time of the deceased's succession opening, as well as renouncers of the deceased's inheritance⁸. Although these criticisms were justified, we believe that they were not solely the result of interpreting succession representation as a legal fiction, as other authors have pointed out⁹, but rather represented a critique of the legislative approach chosen by lawmakers in different European countries. In fact, even based on the medieval concept of succession representation as a legal fiction, some civil codes have chosen to allow the representation of living persons, the unworthy, renouncers, and the exheredated. Examples include the Swiss Civil Code (Articles 457-459), the Spanish Civil Code (Articles 924-929), and the German Civil Code (Articles 2344, 1953).

Furthermore, in the context of regulating universally applicable criteria for determining the order of preference among the deceased's relatives with general succession rights, exceptions to these rules can only be considered legal fictions. Without attempting to provide a definition of legal fiction, as stated in the specialized literature¹⁰, it is a method used in legal methodology where the legislator adopts a contradictory attitude towards objective realities. In other words, the legislator deliberately establishes legal rules contrary to objective reality, ignoring or distorting general concepts, deviating from logical requirements, in order to innovate or adapt legal norms according to social imperatives and produce specific legal consequences.¹¹

Therefore, although succession per stirpes in Roman law was not labeled as a legal fiction, it essentially fulfilled all the characteristics to be considered a legal fiction. On the one hand, it

⁶ Vladimir Hanga, Mircea Dan Bob, *Curs de drept privat roman*, 4th edition revised and added, Ed. Universul Juridic, Bucharest, 2011, p. 205.

⁷ Jean Bart, *Histoire du droit prive*, Montchrestien, 1998, pp. 82, 83.

⁸ Bogdan Dumitrache, Marian Nicolae, *Discuții privitoare la reprezentarea succesorală* (II), „Dreptul” no. 4/1999, p. 35.

⁹ Mircea Dan Bob, *op. cit.*, 2011, p. 37.

¹⁰ Apud Gh. Mateuț, A. Mihăilă, *Logica juridică*, Ed. Lumina Lex, Bucharest, 1998, p. 238.

¹¹ I. Deleanu, *Ficțiunile juridice*, Ed. All Beck, Bucharest, 2005, p. 55.

disregarded the principle of proximity of degree of relationship (a principle derived from objective reality) by allowing descendants of a more distant degree to inherit in place of their ancestor, who was a closer relative to the deceased. Similarly, succession per stirpes deliberately established legal rules contrary to objective reality since more distant descendants competed for the inheritance of the deceased with descendants who were closer relatives by degree of relationship to the deceased. The purpose of establishing this legal fiction was to maintain equality among lineages.¹²

Therefore, we believe that the criticisms regarding the impossibility of representation of the unworthy or renouncing heirs, who are alive at the time of the opening of the succession, cannot be attributed to the consequences of interpreting representation in succession as a legal fiction. In fact, the very nature of legal fiction could foresee the possibility of representation for the mentioned categories of successors. The essence of a legal fiction lies in regulating hypotheses that are distorted in relation to reality or logical requirements, so the possibility of representation of the unworthy or renouncing heirs does not contradict the nature of legal fiction. An additional argument for this conclusion is the fact that in some legislations, while maintaining the legal fiction character of representation in succession, the hypotheses of its application encompassed both the deceased and the unworthy and renouncing heirs, and in some cases even the disinherited individual.

In fact, the criticisms expressed in the specialized literature, particularly in France, Canada (Quebec), and Romania¹³, prior to the modifications of the civil codes inspired by Napoleonic law, were limited to the restricted application of representation in succession only concerning predeceased descendants of the deceased, and not regarding the unworthy or renouncing descendants. However, this regulation represented the choice of the legislator of that respective era, who considered that limiting representation only to predeceased descendants better suited the social and political context of that period.

2. Representation in succession in modern codifications

Initially, in the Napoleonic Code of 1804, the Romanian Civil Code of 1864, and the Lower Canada Civil Code of 1866, there was no provision for the representation of unworthy or renouncing descendants, only for individuals lacking succession capacity. Subsequently, as a result of legislative reforms, the Civil Code of Quebec, which came into effect in 1994 and constituted a true recodification of existing legislation, codified solutions from judicial practice and allowed for the representation of the simultaneous death of parties or unworthy heirs, but not renouncing heirs¹⁴. On the other hand, the French Civil Code was modified in two stages, in 2001 and 2006, expanding the hypotheses of the application of representation to include unworthy heirs and later renouncing heirs.¹⁵

Under the old Civil Code, finalized in 1864 and coming into effect on December 1, 1865, which reproduced almost entirely the provisions on succession from Napoleon's Code of 1804, representation in succession only allowed for the representation of individuals lacking succession capacity, explicitly stating that renouncing heirs could never be represented¹⁶. Additionally, in the jurisprudence shaped by the application of the provisions of the 1864 Civil Code and in legal doctrine, it was appreciated that simultaneous death cases, where it was impossible to establish the

¹² Ș.G. Longinescu, *op. cit.*, p. 775.

¹³ Mircea Dan Bob, *Probleme de moșteniri în vechiul și în noul Cod civil*, Ed. Universul Juridic, Bucharest, 2012, p. 59; Dan Chirică, *Tratat de drept civil, succesiunile și liberalitățile*, Ed. C.H. Beck, Bucharest, 2014, p. 43.

¹⁴ <https://www.legisquebec.gouv.qc.ca/en/document/cs/ccq-1991/20140501#se:660>, art. 660: 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, art. 664: No person who has renounced a succession may be represented, but a person whose succession has been renounced may be represented. https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070721/LEGISCTA000006165516?init=true&page=1&query=on+ne+represente+les+renoncants&searchField=ALL&tab_selection=code&anchor=LEGISCTA000006165516#LEGISCTA000006165516, art. 754 C.fr. On représente les prédécédés, on ne représente les renonçants que dans les successions dévolues en ligne directe ou collatérale.

¹⁵ Art. 698 C. civ.: The relinquishing heir can never be represented. If the renouncer be alone in his degree, or if all his coheirs renounce, their children come to the succession by virtue of their own right, for equal shares.

¹⁶ Art. 698 C. civ.

order of deaths, could also be subject to representation.¹⁷

Descendants of unworthy heirs could not inherit the deceased's estate through representation but only based on their own rights. This conclusion was derived from the provisions of Article 658 of the 1864 Civil Code. This circumstance worked against the descendants of unworthy heirs, who, although not guilty of any condemnable acts towards the deceased, suffered the detrimental consequences of the effects of unworthiness in succession. In the specialized literature, the opinion has been expressed that the impossibility of representing the unworthy heir, even if deceased at the time of the opening of the succession, is unjust because the sanction of unworthiness should only affect the author of the act and not their innocent children.¹⁸

As a result of the impossibility of representing the unworthy descendant, in particular situations, the principle of proximity of degree of relationship was fully applicable, leading to inequalities among the different branches of the deceased. For example, if the deceased had two children who, in turn, had descendants, and one of the deceased's children was unworthy in relation to the deceased, even if deceased at the time of the opening of the succession, the unworthy child's descendant would be excluded from inheriting the deceased's estate if the other child of the deceased comes to inherit. In such a situation, the fundamental purpose of instituting *successio in locum*, later known as representation, was not achieved, as equality among branches was not ensured. Similarly, unworthiness could also affect the division of the inheritance in cases of multiple unworthy heirs, as the descendants of unworthy heirs would inherit in their own right, and the division of the estate would follow the common rules, specifically the principle of equality among relatives of the same class and degree.

The scope of application of representation in succession, as derived from the combined provisions of Articles 665, 666, 672 of the 1864 Civil Code, allowed for the representation of descendants of the deceased's children and descendants of the deceased's siblings, in the latter case up to the fourth degree of relationship.¹⁹

Against the backdrop of imperfect and incomplete provisions of the Civil Code of 1864 regarding the representation in succession, unjust solutions were emerging in the devolution of inheritance in cases where there was an unworthy or renouncing descendant, different regulations in legally related states such as France and Romania allowed for the representation of the unworthy and the renouncing party, continuous criticism from legal scholars²⁰ gave rise to the increasingly strong idea of modifying these legal provisions by extending the cases of succession representation for both the unworthy and the renouncing party.

3. The evolutionary course of succession representation in modern codification and its current regulation

The spark of necessity for changing the Civil Code of 1864 was reignited, leading to several attempts in Romania to adopt a new civil code, namely the Carol II Civil Code of 1940 and the Draft Civil Code of 1971. There was a pressing need to adopt a new civil code that would conform to the new socio-economic realities. Although the implementation of the Carol II Civil Code and the adoption of the Civil Code of 1971 were interrupted by political and social events that transcended national boundaries, references to these codes are useful from a historical and teleological perspective as they are relevant to the issue at hand. In both legislative solutions, the legislator returned to the original purpose of regulating succession representation by granting the possibility of representation for both the unworthy and the renouncing party²¹ (in the Carol II Civil Code) or

¹⁷ There were also opinions to the effect that the commoner cannot be represented because he has no successional capacity in relation to the other and his place is not useful, D. Chirică, *Drept civil. Succesiuni și testamente*, Ed Rosetti, Bucharest, 2003, p. 44-45.

¹⁸ Francisc Deak, *Tratat de drept succesoral*, second edition updated and supplemented, Ed. Universul Juridic, Bucharest 2002, p. 68.

¹⁹ Ibid, p. 79.

²⁰ Francisc Deak, *op. cit.*, p. 66-67, Stoica Veronica, Pușcaș Nicolae, Trușcă Petrică, *Drept civil. Instituții de drept civil*, Ed. Universul Juridic, Bucharest, 2004, p 508; Kocsis József, Vasilescu Paul, *Drept civil. Succesiuni*. Ed. Hamangiu, Bucharest, 2016, p. 41.

²¹ Articles 820, 822 of the Charles II Civil Code.

for the unworthy party in the Draft Civil Code of 1971.²²

After 1989, with Romania's return to representative democracy, transition to a market economy, initiation of the Euro-Atlantic integration process, and Romania's accession to the European Union, a comprehensive reorganization of the legislative framework was necessary. Finally, the Civil Code²³ was adopted, based on Article 220(1) of Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, No. 409 on June 10, 2011, and entered into force on October 1, 2011.

The odyssey of adopting the new Civil Code began in the period 1999-2004, and it received support from specialists in the French-speaking province of Quebec in Canada. However, the adoption of the draft law faced rejection in the Chamber of Deputies on September 8, 2009.

In the content of the Bill submitted by the Romanian Government to Parliament, Article 724²⁴ stipulated that the heir who does not accept the inheritance due to predecease, disinheritance, renunciation, or unworthiness shall be replaced by representation through their descendants based on the proximity of the degree of kinship. It was explicitly specified that in all cases where representation was permitted, the division of inheritance would be made by branches. The version adopted by the Romanian Senate on September 13, 2004, eliminated the possibility of representing the renouncing party, and the text read as follows: "The heir who does not accept the inheritance due to predecease, disinheritance shall be replaced by representation through their descendants based on the proximity of the degree of kinship." Additionally, within the same article, it was provided that under the same conditions, the unworthy party could be represented.

Regarding the phrase "in the same conditions," the unworthy person can also be represented, with the premise being that of the predecessor or the simultaneous death with the descendant. We believe that this premise lacks clarity, as it can easily lead to the solution that only the deceased unworthy person or the simultaneous death with the descendant can be represented, not the unworthy person who is still alive. This conclusion is derived from the rule stipulated in Article 668 of the Civil Code of 1864, which states that only deceased persons are represented (*viventis nulla representatio*), a principle rooted in the interpretation of representation in the old French law. Furthermore, as we will observe, in the subsequent version of the Civil Code from 2009, it was explicitly stipulated that the unworthy person can be represented, even if they were alive at the time of the opening of the inheritance, leaving no doubt about the possibility of representing the unworthy person who is alive.

Subsequently, both in the original form proposed by the Romanian Government in 2009 for the Civil Code and in the enacted form, the text of the law regarding the persons who could be represented, specifically Article 967 paragraph 1, had the following content: "The person lacking the capacity to inherit and the unworthy person can be represented, even if they are alive at the time of the opening of the inheritance and even if they renounce the inheritance." However, even though the Civil Code was adopted by the Romanian Parliament through Government's assumption of responsibility under Law No. 287 of July 17, 2009, and republished with modifications on July 15, 2011, in the Official Gazette, Part I, No. 505-2011, through Law No. 71/2011 for the implementation of Law No. 287/2009 regarding the Civil Code, the text of Article 967 paragraph 1 was modified to the following: "The person lacking the capacity to inherit and the unworthy person can be represented, even if they are alive at the time of the opening of the inheritance."

As a result of the winding course, the final form of the provisions in Article 967 paragraph 1 of the Civil Code eliminates any reference to the possibility of representing renunciants, while at the same time providing clarity regarding the representation of unworthy persons.

We observe that although the initial proposals to modify the provisions regarding succession representation expanded the scope of both unworthy persons and renunciants, legislative immobility

²² Art. 843 of the Draft Civil Code of 1971.

²³ Mircea Duțu, *Noul Cod civil, etapă importantă în dezvoltarea dreptului privat român*, „Revista Română de Jurisprudență” no. 5/2011.

²⁴ Art. 724 paragraph 1 The heir who does not come to the inheritance due to predecession, inheritance, renunciation or indignity is replaced, through the effect of representation, by his descendants depending on the proximity of the degree of kinship.

has partially won the battle, demonstrating that abrupt changes provoke a rejection reaction. We find the same type of immobility in other countries, such as France, where the French Civil Code was modified in two stages, in 2001 and 2006, extending the hypotheses for the application of representation to unworthy persons and then to renunciants. Paradoxically, although the possibility of representing renunciants was recognized as early as the period of Sextus Pomponius, who lived in the 2nd century AD, this change was considered too modern in the modern era.

The phrase that gave rise to the idea of addressing the issue under discussion, or rather the fact of its elimination from the final version of the Civil Code, is represented by the initially enacted form of the provisions in Article 967 paragraph 1 of the Civil Code, which stipulated the possibility of representing unworthy persons, even if they were alive at the time of the opening of the inheritance and even if they renounced the inheritance. The removal of the last clause from the content of Article 967 of the Civil Code, "and even if they renounce the inheritance," raises the question of whether, under the current regulation of the provisions in Article 967 paragraph 1 of the Civil Code, the representation of an unworthy renunciant is still possible.

4. The possibility of the unworthy person renouncing the inheritance

If prior to the entry into force of Law No. 287 of 2009 on the Civil Code, the question of whether the unworthy person can renounce the inheritance did not generate any real interest, as the provisions of Article 668 of the Civil Code of 1864 did not allow representation of the unworthy person. However, under the current legislative context, this question is legitimate. In fact, in the legal doctrine prior to the entry into force of the Civil Code of 2009, as far as we know, there was no speculation regarding this legal situation, considering a discussion on this aspect to be redundant. Justly, this discussion would have been unnecessary since representation of both the unworthy and the renouncer was not possible under the Romanian legislative framework, and the hypothesis of an unworthy renouncer within the scope of representation in succession was unimaginable.

In the form of the Civil Code of 2009, the provisions of Article 967 paragraph 1 stipulated the possibility of representing the unworthy person even if they renounced the inheritance, a phrase that was removed by Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code.

From this legislative attitude, a first aspect arises, namely the possibility of the unworthy person renouncing their inheritance. This conclusion is reinforced by the wording proposed in 2010 during the drafting of the Law for the implementation of the Civil Code, where the text of Article 967 paragraph 1 had the following form: "the person lacking the capacity to inherit, the renouncer, as well as the unworthy person, even if alive at the time of the opening of the inheritance, and even if renouncing the inheritance."²⁵

Thus, the phrase "even if renouncing the inheritance" was attributed to the unworthy heir and did not imply the possibility of representing a renouncing heir, as the representation of the renouncer was provided for in the first part of Article 967 paragraph 1, in the form proposed during the drafting of the Law for implementation.

While pertinent arguments were presented during the discussions in the Legal Committee of the Chamber of Deputies in 2010 for eliminating the possibility of representing the renouncer,²⁶ mainly based on practical realities in Romania regarding inheritances, no discussions were held regarding the removal of the phrase "even if renouncing the inheritance" (referring to the unworthy).

However, to answer the question of whether the unworthy person can renounce the inheritance, it is not sufficient to rely on the presumption suggested by the members of the drafting committee of the Civil Code and its implementing law. It is necessary to consider the effects of unworthiness in succession, on the one hand, and the effects of renouncing the inheritance, on the

²⁵ Mircea Dan Bob, *op. cit.*, p. 61.

²⁶ *Ibid.*

other hand.

The effects of unworthiness in succession. Analyzing the effects of unworthiness in succession generally involves considering them from the perspective of the unworthy person, their descendants, and third parties who have entered into legal relationships with the unworthy person. However, for the purpose we have set, it is sufficient to refer to the effects of unworthiness solely in relation to the unworthy person. The modification introduced by the Civil Code of 2009 regarding unworthiness, specifically the inclusion of judicial unworthiness cases in Chapter II, similar to the French Civil Code and the Province of Quebec, does not lead to distinct effects of judicial unworthiness compared to legal unworthiness. On the other hand, there are differences in the legal regime between the two types of unworthiness, with judicial unworthiness having a specific legal regime that is optional and must be determined by the court, unlike legal unworthiness, which is merely established by the court.

Despite the formal changes to the institution of unworthiness in succession through the Civil Code of 2009, the effects of its establishment or determination by the court²⁷ remain the same as those inferred by legal doctrine and judicial practice from the provisions of Articles 655-658 of the Civil Code of 1864.

The main effect of unworthiness in succession is the exclusion of the unworthy person from both legal and testamentary inheritance, with no possibility of receiving the reserved portion of the inheritance. The unworthy person is considered to have never been an heir, regardless of the timing of the establishment or declaration of unworthiness in succession²⁸. From the analysis of cases of succession unworthiness provided in Articles 958-959 of the Civil Code, it follows that the legal acts that give rise to the unworthiness of the potential heir can be committed both before and after the opening of the inheritance, and the establishment or declaration of unworthiness can only occur after the opening of the inheritance. However, the effects of unworthiness retroactively extend to the moment of the opening of the inheritance, i.e., the death of the deceased. Unworthiness will not affect the hereditary entitlement of the unworthy person, which is based on the kinship relationship between the unworthy person and the deceased, but it will only affect the unworthy person's right to receive the inheritance benefit.²⁹ We will limit ourselves to presenting only these effects of unworthiness, which are sufficient for our purpose.

The effects of renouncing an inheritance. According to Article 1121 of the Civil Code, a person who renounces an inheritance is considered to have never been an heir. As noted in legal doctrine, renunciation annuls *ex tunc* both the status and title of the heir, operating retroactively to the moment of the opening of the succession.³⁰ The destructive effect of renunciation extends to the entire succession situation of the person who exercised their right of succession in this form. It has been argued that renouncing the inheritance retroactively extinguishes the hereditary entitlement of the renouncer, making them a stranger to the inheritance³¹. Similar to the analysis of the effects of unworthiness, we will only focus on presenting these legal effects of renunciation, emphasizing that unlike unworthiness, renunciation is a legal act.

A common feature of the effects of succession unworthiness and renunciation is their retroactive nature, operating until the moment of the opening of the succession, which occurs at the time of death, as stated in Article 954 of the Civil Code. Another similarity is that both institutions can only come into effect after the opening of the inheritance, with retroactive effect. According to Article 956 of the Civil Code, renunciation of inheritance cannot occur before the opening of the succession, and any premature renunciation is null and void. Similarly, the establishment or

²⁷ Buzău Court, 2nd section, no. 271 of July 8, 1924, in „Dreptul”, no. 31/1924, Supreme Court of Justice, civil section, dec. no. 1526/1990 in „Dreptul”, no. 2-3/1991, p. 72; Ploiesti Regional Court, dec. no. 3215/1956, in „Legalitatea populară” no. 8/1957, p. 1006.

²⁸ Francisc Deak, Romeo Popescu, *Tratat de drept succesoral*, Vol I, Ed. Universul Juridic, Bucharest, 2019, p. 117; Veronica Stoica, Laurențiu Dragu, *Moștenirea Legală*, Ed. Universul Juridic, Bucharest, 2022, p. 77; Kocsis József, Vasilescu Paul, *op. cit.*, 2016, p. 25; Anthony Murphy, *Nedemnitatea succesorală și dezmoștenirea*, Ed. Universul Juridic, Bucharest, 2022, p. 110.

²⁹ *Ibid.*

³⁰ Kocsis József, Vasilescu Paul, *op. cit.*, p. 287.

³¹ Francisc Deak, Romeo Popescu, *Tratat de drept succesoral*, Vol III, Ed. Universul Juridic, Bucharest, 2019, p. 112.

declaration of succession unworthiness cannot occur before the opening of the succession. Any request made in this regard would lack procedural interest, and until the opening of the succession, the deceased has the possibility of pardoning the unworthy person, thereby nullifying the effects of unworthiness.

However, a key difference between the effects of these two institutions lies in the fact that while in the case of unworthiness, the unworthy person retains their hereditary entitlement in relation to the deceased, which is a necessary prerequisite for the operation of succession representation, in the case of renunciation, the renouncer, through a legal fiction, loses their hereditary entitlement to the deceased.³² This conclusion is evident from the wording of Article 1121 of the Civil Code: "considered to have never been an heir".

Considering the legal context, the loss of the renouncer's hereditary entitlement to the deceased, as a result of exercising the right of succession through renunciation, we believe that in cases where a legal fact that falls under the scope of unworthiness occurs after the opening of the succession but before renunciation, the former potential heir cannot be both a renouncer and unworthy at the same time. In these particular situations, only the effects of renunciation will apply retroactively, and the renouncer will be considered a stranger to the inheritance without hereditary entitlement. It is not possible to cumulate the status of renouncer and unworthy in this context, as the latter status requires the existence of hereditary entitlement.

Difficulties arise in situations where legal acts that fall under the scope of unworthiness occur prior to a valid renunciation of inheritance by the potential heir.

Regarding this scenario, legal doctrine³³ has expressed the viewpoint that sometimes the unworthy person renounces the inheritance before being declared unworthy and that renunciation cannot be carried out by an unworthy person because it was made by someone who did not have the status of a potential heir and, consequently, not that of an heir since the effects of unworthiness are retroactive from the date of the opening of the inheritance, and from that moment, the unworthy person no longer fulfills the negative condition to inherit, namely not being unworthy.

Therefore, unlike the renouncer, the unworthy heir retains their general inheritance capacity but not the specific one. They are still considered a potential heir, as long as the condition of being unworthy is not met.

Contrary to the claims of the mentioned author, we believe that the renouncer does not need to have the status of the deceased's heir. It is sufficient to meet the other two conditions: inheritance capacity and inheritance vocation. Moreover, from a grammatical analysis of Article 1121 of the Civil Code, it can be inferred that being a potential heir (the potential heir who renounces...) is sufficient to renounce the inheritance. In support of the argument that the unworthy can renounce the deceased's inheritance, Article 1106 of the Civil Code is cited, which states that no one can be forced to accept an inheritance that is due to them.

Of course, it could be argued that the unworthy is not entitled to the inheritance. However, until the unworthiness is established or declared, the unworthy is presumed to be an heir, provided that the other conditions are met. Therefore, it would be inappropriate to restrict their right to freely exercise their option to inherit. Additionally, as mentioned earlier, the legislator felt the need, in the version of the Civil Code that was enacted and partially amended by the Law of Implementation, to emphasize that even if the unworthy renounces the inheritance, the representation of the succession should still take effect. This demonstrates that the legitimate possibility of the unworthy renouncing the inheritance was presumed. Specialized literature³⁴ unanimously agrees on this point, although it does not specifically refer to the unworthy, stating that a potential heir cannot be forced to accept the inheritance and cannot be compelled to justify the reasons for accepting or renouncing it.

In conclusion, we believe that the unworthy heir has the right to renounce the inheritance, and there is no valid argument to prevent the effects of unworthiness from impeding the exercise of

³² Mihail Eliescu, *Transmisiunea și împărțea moștenirii în dreptul Republicii Socialiste România*, Publishing House of the Socialist Republic of Romania, 1966, p. 134.

³³ F. Deak, R. Popescu, *op. cit.*, footnote 1, p. 158, specifying that the interpretation belongs to professor R. Popescu.

³⁴ F. Deak, *op. cit.*, p. 388-389, Veronica Stoica, *Dreptul la moștenire*, Ed. Universul Juridic, Bucharest, 2007, p. 272.

the right to renounce the inheritance. Furthermore, it would be unnatural for a potential heir who has acted reprehensibly towards the deceased, by committing acts that fall within the scope of unworthiness, to be condemned to accept the inheritance (which, however, the unworthy will not receive, but rather their descendants through representation) and not be able to renounce the deceased's inheritance, perhaps due to regret for the unlawful acts committed.

5. Representing the unworthy renouncer

As mentioned earlier, the removal of the phrase that provided for the representation of the unworthy, even in the case of renunciation, through Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code, raises the question of whether the unworthy can renounce the inheritance and, if so, whether the unworthy renouncer can be represented.

The same author who argued that the unworthy cannot renounce the inheritance stated that even in the case of an unworthy renouncer, representation of the succession takes effect because the unworthy status is sufficient for them to be represented. This means that the unworthy can be represented even if they renounce the inheritance.³⁵

In jurisdictions where representation of the renouncer is permitted, this question becomes irrelevant because regardless of whether the renouncer's right to renounce the inheritance is recognized or not, representation of the succession will apply. In jurisdictions where only representation of persons lacking inheritance capacity and the unworthy is allowed, the solution to this issue is relevant both legally and practically. Thus, if it is considered that the unworthy cannot renounce the inheritance, their descendants will inherit through representation, benefiting from the closer degree of kinship to the deceased than the unworthy.

On the other hand, if the legal freedom of the unworthy to renounce the inheritance is accepted, the descendants of the unworthy will be interested in inheriting through representation, especially in the scenario where there is a closer degree of kinship between the deceased and another descendant. Therefore, the solution regarding the possibility of representation or lack thereof for the unworthy renouncer is not indifferent to their descendants.

As a consequence of the viewpoint expressed regarding the freedom of the unworthy to renounce the inheritance, we believe that the unworthy renouncer cannot be subject to succession representation. In support of this conclusion, it should be noted that the adoption of the Civil Code in 2009 did not fully reintroduce the Roman law institution of "*successio in locum*," as the representation of the renouncer was eliminated. Thus, in our system, the renouncer cannot be represented. Additionally, considering the retroactive operation of unworthiness and renunciation of inheritance until the moment of the estate's opening, we can conclude that neither of these institutions is preferable over the other. Furthermore, in the case of renunciation of inheritance, the potential heir loses their inheritance vocation, whereas the unworthy does not lose this quality. Therefore, the effect of renunciation is more profound compared to that of unworthiness, as a person without inheritance vocation cannot be represented.

6. Conclusions

Finally, we point out that the similar effects of succession unworthiness and renunciation of inheritance, which complicate the provision of a definitive answer to the issues under discussion, must be considered in the context of the general conditions of the right to inherit. This is because the finding of non-fulfillment of any of these conditions can lead us to the final judgment of a syllogism.

Without aiming to exhaust all the arguments that can be offered in support of one solution or another regarding the succession possibility of the unworthy renouncer or the incidence of succession representation in the case of the unworthy renouncer, we observe that subtle legislative

³⁵ F. Deak, R. Popescu, *op. cit.*, footnote 1, p. 158.

changes can give rise to difficult questions for which there may not always be a definite conclusion. We also note that examining the legislative history of a law in the smallest details, as well as the evolutionary trajectory of a civil law institution, provides real support for a consistent interpretation of a legal text, with the historical and teleological methods making their presence felt.

Bibliography

1. Bart, Jean, *Histoire du droit prive*, Montchrestien, 1998, pp. 82, 83.
2. Bob, Mircea Dan, *Considerații asupra reglementării reprezentării succesoriale în Noul Cod civil*, „Revista Română de Drept Privat” no. 1/2011, p. 33-48.
3. Bob, Mircea Dan, *Probleme de moșteniri în vechiul și în noul Cod civil*, Ed. Universul Juridic, Bucharest, 2012.
4. Chirică, Dan, *Drept civil. Succesiuni și testamente*, Ed Rosetti, Bucharest, 2003.
5. Chirică, Dan, *Tratat de drept civil, succesiunile și liberalitățile*, Ed. C.H. Beck, Bucharest, 2014.
6. Deak, Francisc & Popescu, Romeo, *Tratat de drept succesoral*, Vol. I and III, Ed. Universul Juridic, Bucharest, 2019.
7. Deak, Francisc, *Tratat de drept succesoral*, second edition updated and supplemented, Ed. Universul Juridic, Bucharest 2002.
8. Deleanu, I., *Ficțiunile juridice*, Ed. All Beck, Bucharest, 2005.
9. Dumitrache, Bogdan & Nicolae, Marian, *Discuții privitoare la reprezentarea succesorală (II)*, „Dreptul” no. 4/1999.
10. Duțu, Mircea, *Noul Cod civil, etapă importantă în dezvoltarea dreptului privat român*, „Revista Română de Jurisprudență” no. 5/2011.
11. Eliescu, Mihail, *Transmisiunea și împărțea moștenirii în dreptul Republicii Socialiste România*, Publishing House of the Socialist Republic of Romania, 1966.
12. Hanga, Vladimir & Bob, Mircea Dan, *Curs de drept privat roman*, 4th edition revised and added, Ed. Universul Juridic, Bucharest, 2011.
13. Kocsis József, Vasilescu Paul, *Drept civil. Succesiuni*. Ed. Hamangiu, Bucharest, 2016.
14. Longinescu, Ștefan G., *Elemente de drept roman*, Vol II, Curierul Judiciar, Bucharest, 1929.
15. Mateuț, Gh. & Mihăilă, A., *Logica juridică*, Ed. Lumina Lex, Bucharest, 1998.
16. Murphy, Anthony, *Nedemnitatea succesorală și dezmoștenirea*, Ed. Universul Juridic, Bucharest, 2022.
17. Stoica Veronica, Pușcaș Nicolae, Trușcă Petrică, *Drept civil. Instituții de drept civil*, Ed. Universul Juridic, Bucharest, 2004.
18. Stoica, Veronica & Dragu, Laurențiu, *Moștenirea Legală*, Ed. Universul Juridic, Bucharest, 2022.
19. Stoica, Veronica, *Dreptul la moștenire*, Ed. Universul Juridic, Bucharest, 2007.