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TESTAMENTARY REFUSAL IN THE ROMAN LAW: GENESIS AND RECEPTION

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Abstract

Many states of the continental system of law, including Russia, have assimilated the institution of legate, known to Roman law. For a deep understanding of the essence of this legal phenomenon, it is necessary to understand the origins of the testamentary refusal, the reasons for its appearance and significance. A study of the genesis of testamentary refusal will help to understand the essence of the current institution of legate, its place in the system of testamentary dispositions and determine the main prospects for the development of modern legal norms on testamentary refusal. The article discusses the main stages of development of the institution of legate in Roman private law and defines its role in ensuring freedom of will. The institution of legate served as a prerequisite for the appearance of an obligatory share in the inheritance, on the basis of which the theory of unilateral transactions was developed. In addition, the restrictions worked out by Roman law helped establish a balance of interests of heirs and legatees. Russian law accepted a testamentary refusal developed in private Roman law. However, not all guarantees of the rights of heirs and legatees have found their fixation in the current inheritance law in Russia. This allows us to argue that the development of the institution of legate reached the maximum depth among the Romans and it has not been surpassed to date.

Keywords: Fideicommissum, legate, singular succession, estamentary refusal

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1. Introduction

The main ideas and postulates of the inheritance law in Russia originate from Roman law (Rostovtseva, 2016). All researchers studying the history of Roman private law and its impact on modern law note that many institutions developed by Roman lawyers formed the basis of modern legislation of the countries of the continental legal system (Salogubova & Zenkov, 2018).

Inheritance as a universal succession, when the property of the deceased passed to his heirs as a whole, has been known since the time of the old ius civile. Along with universal succession in the event of death, Roman law was aware of a singular succession in the form of testamentary refusals, when the testator obliged the heir to give something to third parties who did not acquire the status of heirs of the deceased.

Testamentary refusals in Roman law existed in two forms: legate (legatum - a word formed from the verb *legere* “take, select, choose”, that is, “selection, choice”) and fideicomissum (fides, formed from the words “faith, trust” and comittere “fasten, charge”). Russian law only accepted a testamentary refusal in the form of legatum per damnationem, which indicates the testator’s limited ability to establish a testamentary refusal.

2. Problem Statement

The study of the legal phenomenon is impossible in isolation from the origins of its origin. The characteristics of the concrete historical era in which the institution of legate arose and then developed will make it possible to clarify the reasons for the appearance and purpose of this institution, to identify problems in the current Russian legislation, and to identify ways to improve it. In this regard, the objectives of the study are:

A study of the development of testamentary refusal at different periods of Roman private law.

Identification of the relationship and differences between inheritance as a universal succession and a singular succession in the form of failures (legates and fideicomissum).

Determination of the value of testamentary refusal for other institutions of inheritance law.

Correlation of the Roman institution of legate and modern Russian legislation on testamentary refusal.

3. Research Questions

This article proposes to answer the following research questions:

Identify the origins and causes of the testamentary refusal in Roman private law.

Consider the history of the development of testamentary refusal at different periods of Roman private law.

Determine the nature of testamentary refusal and its purpose as a legal institution in Roman law and modern Russian law.

Identify the shortcomings of the current legal regulation of testamentary refusal and formulate proposals for its improvement.

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4. Purpose of the Study

The purpose of the study is to identify the causes of testamentary refusal and its purpose in Roman private law, as well as to compare modern legal norms on testamentary refusal with the provisions developed by Roman lawyers

5. Research Methods

To achieve the goals and objectives it was used the dialectical method of cognition, analysis, synthesis, deduction and induction as general scientific methods, as well as historical, comparative legal, formal logical, system analysis method and other methods accepted in jurisprudence.

6. Findings

In Roman private law, along with inheritance as a universal succession, there was a singular succession represented with donation in case of death and testamentary refusal (Kopylov, 2016). One of the first historical forms of testamentary refusal was the legate, which was reflected in the Laws of the XII tables. Most researchers believe that the testator's desire to take care of the fate of loved ones who were excluded from the quiritarian heirs was the cause of the testamentary refusal.

In the early period of the formation of ius civile the institute of legate had a number of characteristic features. Legate was inseparable from the will and could be assigned only to the heir appointed in the will. The person in whose favor the legate was appointed was called legatarius (legatee), and the heir to whom the legate was assigned was called oneratus. As a legatee, there could be a person who at the time of opening the inheritance was alive or in conception (he was a postumus). Only the heir could oblige to issue a legate. Therefore, the refusal was declared invalid if it did not contain heir conditions, "the appointment of the heir is considered to be the most essential condition and the basis of the will" (Dozhdev, 2020, para 2.229.).

The purpose of the legate was to provide the legate with property benefits. Researchers note that the legate established to punish the heir by depriving him of his inheritance in whole or in part (legatum poenae nomine (cause)) was null and void (Dozhdev, 1997). It was believed that the legate was carried out more as an objective burden on the inheritance than as an encumbrance on a particular person (Garcia Garrido, 2005). The refusals under the pretext of punishment were also invalid (Dozhdev, 2020, para 2.235.).

The subject of the legate could be ownership of a thing, a choice between two or more things of the testator (legatum optionis), other property law, obligation, forgiveness of debt (legatum liberationis), share of inheritance (legatum partitionis), allocation of alimony and others (Sanfilippo, 2007) So, Gai Pliny Cecilius Secundus reports: "I had a chance to get a modest legate, but it is more pleasant to me than the largest ... I was rewarded not only with a good conscience, but also with good fame. This same Kurian left me a legate, and my deed was marked by an honorable definition, as worthy of ancient times "(Pliny. Letters. Book V. 1. 10 -11).

Legates were divided into four types depending on the form and content.

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1. Legatum per vindicationem. Through this form, the testator provided the legatee the right of ownership or easement to his thing. The legatee became the owner of the thing or the owner of the easement as soon as the legate entered into force. To acquire a refused item, it was not necessary to transfer it to the heir. To establish such a legate, the words “do lego” were used, for example, “Lucio Titio hominem Stichum do lego” - I refuse and give Lucius Titius the slave of the Verse (Dozhdev, 2020, para 2.13).

Legatee enjoyed protection from any unauthorized persons and the heir through a suit of lawsuit (vindicatio), from where the legate itself received its name as vindicatory.

2. Legatum per damnationem - damnationem legate. When establishing it, the formula “dara damnas esto” was used. Damnationem testamentary refusal granted the legatee the right to demand from the heir the execution in his favor of the actions provided for in the will. Damnationem legate was considered the most successful form, because it allowed to refuse a thing both belonging to the testator and to a third party, establish an easement, free the legatee from debt or provide other property benefits. When establishing a damnationem legate legatee received a personal claim against the heir.

3. Legatum per praeceptionem consisted in the preliminary allocation of an item from the inheritance. When a share in the inheritance was distributed between the heirs, the thing denied to the legatee was not taken into account.

4. Legatum sinendi modo. The subject of this legate was the passive behavior of the heir, who was obliged not to interfere, but also to allow the legatee to take the thing he was denied. The subject of this legate could also be the forgiveness of the duty of the legatee.

The harsh formalism to which the legates obeyed led to the invalidity of the legate in violation of the rules for its establishment, which did not meet the interests of the legatee and made it impossible to fulfill the dead man’s last will. For example, if legatum per vindicationem was left in the will in relation to a thing that did not belong to the testator, then such a refusal was considered void. Therefore, changes were needed that softened the rules for compiling the legate. So, Senatusconsultum Neronianum (I century A.D.) established that in case of an error in choosing the form of the legate, legatum per damnationem will be valid. In the scientific literature, it is noted that legatum per damnationem acquires a universal character (Khvostov, 1919). Further, the Laws of Constance 339 year and Theodosius 439 year abolished the verbal formulations in the preparation of a will and the establishment of refusal.

The weakening of formalism and the absence of any kind of restrictions made the legate popular. The testator often handed out all his property with establishing legates, leaving only the empty name “heir” (Dozhdev, 2020, para 2.224.). The heirs, for the most part, refused to accept the inheritance, and the will, with all orders, was losing force.

Initially, the Lex Furia testamentaria law was adopted to limit the testator’s freedom when establishing refusals. He prescribed that no one, except the close relatives of the testator, can receive more than 1000 asses in the form of a legate. If any of the legatees received more than 1000 asses, then the heirs had the right to recover from him the fourth cost of excessively received. However, this law did not eliminate the abuse. Testators began to appoint refusals in the amount of less than 1000 asses, but their number was such that the hereditary property was completely exhausted and there was nothing left for the heir.

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The second act aimed at restricting the testator in the freedom of legates was Lex Voconia 169 BC. It established a restriction prohibiting the legatee from receiving more than what the heir would get. However, the restriction introduced was ineffective. The testator installed many legates, the size of each of which did not exceed the share of the heir, which was so small that he lost interest in accepting the inheritance.

Finally, with the adoption of the Lex Falcidia Act in 40 BC, the heir appointed in the will remained legacy free, 1/4 of the inheritance (quarta Falcidia). If the cost of all refusals at the time of opening the inheritance exceeded 3/4, then their size was accordingly reduced.

The quarter of Falcidy was a limitation of testamentary refusals in order to protect the interests of the heirs. To protect the interests of the immediate relatives of the testator, when establishing a testamentary refusal, a law on the mandatory share was passed, according to which part of the inheritance should remain free from burdens and received in full to the closest legal heirs of the testator.

Another type of testamentary refusal was a fideicommissum, which received its recognition at the beginning of the imperial period. It is believed that during the republic there were various informal requests that were not binding: the testator, requesting to perform something after death, could rely only on the conscience of the heirs. Such orders were called fideicommissa - appeal to the honor of another and, like the legates, allowed the transfer of property to those persons who were neither heirs nor legataries due to their lack of legacy.

Since the time of Emperor Augustus fideicommissa gain legal significance. August ensured the execution of fideicommissa, instructing the consuls and subsequently special praetores fideicommissarii to force the heirs to execute them.

The heir to whom such an obligation was assigned was called fiduciaries, and the person who should have issued the fideicommissum was fideicommissarius.

Fideicommissa were established using the following formulas: peto, rogo, volo, fideicommito (I demand, I ask, I want, I trust) (Dozhdev, 2020, para 2.249.). For a person who was denied something by means of a fideicommissum, the right arose not to a common civil lawsuit (as in the case of the legate), but to an extraordinary complaint - fideicommissi persecutio (Pokrovsky, 2004). However, subsequently, with the establishment of an extraordinary process, the civil lawsuit and the complaint ceased to be anything different from each other.

The legate and fideicommissum had a common goal - to provide property benefits to a person who cannot be an heir. However, there were differences. So, the fideicommissum could oblige both the heir by will and the heir by law; fideicommissum could be established before the will was drawn up, and later in the form of additions to it (Dozhdev, 1997). The form of compiling fideicommissum was also different. Fideicommissum could be established with a simple nod of the head, but usually fideicommissum was in the form of a letter addressed to the heir - codicillus. Thanks to these differences fideicommissa became widespread.

As for the subject of fideicommissum, its content was quite diverse. It seems interesting that through fideicommissum it was possible to refuse the entire inheritance completely. This fideicommissum was called universal - fideicommissum hereditatis and the universal fideicommissarius was the successor, as well as the heir. Therefore, to execute the fideicommissum, it was not enough to simply transmit hereditary

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things. In addition to them, the debts of the testator were subject to transfer. For these purposes, the fiduciary, as it were, sold the inheritance to the fideicommissarius for an imaginary price, and thus transferred to him all the inheritance rights and obligations of the testator that might arise over time (Dozhdev, 2020, para 2.252.). Then, these persons gave each other stipulations: the fiduciary committed to transfer to the fideicommissarius all the inheritance rights that would be opened later, and the fideicommissarius promised in return that he would satisfy the requirements of all hereditary creditors.

The complex process did not meet the interests of the testator's creditors and did not ensure their rights. Therefore, the Senate decree (senatusconsultum Trebellianum) simplified the procedure for executing the fideicommissum, determining that if the inheritance is to be transferred by trust, then from the moment the fiduciary declares restitutio (restitution), the fideicommissarius becomes the owner of the inheritance things and the creditor for hereditary debts, and only the heir remains. Claims that, according to civil law, belonged to the heir or could be brought against him, passed to the fideicommissarius on the basis of the fideicommissum (Dozhdev, 2020, para 2.253.). Over time, the universal fideicommissum acquired the value of hereditary succession.

However, the Senate decree did not solve the main problem. The execution of the fideicommissum still depended on the will of the heir, who could not accept the inheritance and thereby deprive the fideicommissarius of his right. In order to encourage the heir to accept the inheritance, the Pegasian Senate decree (senatusconsultum Pegasianium) established that the heir "in any case has the right to a Falcidian quarter if he voluntarily accepts the inheritance." On the contrary, the adoption of the inheritance by forced heir excluded his right to the Falcidian quarter. Subsequently, Justinian combined these decisions and established that the heir in all cases has the right to quarta Falcidia and that he may be forced to accept the inheritance.

Both the legate and the fideicommissum have pursued common goals, so over time these institutions unite. By his Decree (529), Justinian established that any legate and fideicommissum give the persons in whose favor they are established the obligation of claim to the heirs. And if the object of the testator was the object of the refusal, then the legatee or the fideicommissarius have a property right and a right of vindication to it. In addition, the Decree of 531 finally confirmed the complete similarity of legates and fideicommissum, combining them into one institution (Pokrovsky, 2004).

Thus, in Roman private law, the institution of testamentary refusal received legal recognition, and the developed legal mechanism took into account the interests of all persons involved in it: heirs, legatees and creditors of the testator, which cannot be said about the legal status of the creditor in modern Russian legislation (Frolovich & Lyubimova, 2013; Komissarova & Permyakov, 2016).

In modern Russian law, a testamentary refusal was adopted, which in Roman private law was developed in the form of Legatum per damnationem. The requirement - “The duty of a universal successor is to execute a testamentary refusal in full for the benefit of individuals” - “Onus est ut solidum singulis legatum praestaret” (D. XXX. 26. 2.)- remains valid in Russian civil law. The hereditary legislation of Russia allows the testator to assign both testamentary heirs and heirs under the law a property obligation in favor of third parties - legatees (Article 1137 of the Civil Code of the Russian Federation). As a result of testamentary refusal, a legal relationship arises in which the legatee has the right to demand the execution of the order of the testator by the heir who accepted the inheritance. In contrast to Roman law, where when

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a thing was refused, the legatee acquired the property right to the refused thing and could have brought it to justice, the Russian law and order does not allow the right to be claimed by the receiver. If a testamentary refusal provides for the transfer of the thing to the legatee, then he only has the right to demand its provision. Russian law does not know a singular succession in the form of testamentary refusal. Relations arising from a testamentary denial are not hereditary, but are referred to as concomitant with the hereditary relationship (Kazantseva, 2018).

As noted earlier, the damnationem testamentary refusal in Roman private law was the most common, since it allowed providing any property benefit to the legatee, including that not belonging to the testator. In Russia, there are also no restrictions on the subject of testamentary refusal, the main thing is that it should be of a property nature and its execution should not violate the public law and order. For example, the subject of a testamentary refusal may be the provision of a thing into ownership or use, property right, payment of periodic payments, performance of work, provision of services, etc. The most common testamentary refusal stipulating the obligation of the heir to provide the recipient the right to live in the testator's living quarters. The right to use the premises by testamentary refusal is a personal right; the legatee cannot transfer it by inheritance or dispose of it in any other way. The issue of the nature of the right to use the premises of a legatee in the Russian doctrine is debatable. We agree with the opinion of Strogonova (2018), who classifies it as a property right and proposes to include it in civil law.

As in Roman law, in the law of the Russian Federation, the execution of a testamentary refusal depends entirely on the acceptance of the inheritance by the heir. But if Roman law contains rules that encourage the heir to adopt (Falcidian quarter), in Russian law there are no provisions guaranteeing the heir the right to share the inheritance after the execution of a testamentary refusal. Therefore, the possibility of establishing a testamentary refusal, the subject of which is the obligation of the heir to transfer to the legatee all the inheritance property, which is consistent with the broad content of the principle of free will in Russian law is not excluded (Kirillova, 2012).

The institution of legate in Russia has, first, a social purpose, since, as in Roman law, it is called upon to ensure the interests of persons close to the testator who are especially in need of care after his death.

7. Conclusion

The institute of legate is one of the oldest legal institutes, which was already known to the ancient civil law, having gone through all the stages in its development, in Justinian's legislation, and appeared in the form of a maximally developed institution that optimally meets the needs of that time.

On the basis of the institution of legate, the theory of unilateral legal transactions was developed, which, coupled with probate inheritance, ensured the freedom of the testator to dispose of the estate.

The popularity of testamentary refusal among the Romans led to the development of inheritance standards: a mandatory share was established, restrictions were introduced to balance the interests of heirs, beneficiaries (legatees and fideomissaries) and the testator's creditors.

Unlike Roman law, where the institution of legate is represented with various types, Russian law only assimilated the damnationem legate, which is the basis for the creation of a mandatory legal relationship in which the legatee acquires the right to claim the heir, regardless of what is the subject of the refusal. Therefore, Russian legislation entirely and completely makes a testamentary refusal dependent on

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the will of the heir, which, in our opinion, does not meet the interests of the borrower. Perceiving the institution of legate developed in private Roman law, not all guarantees that make it attractive to all involved persons are fixed in the inheritance law of Russia.

The doctrine of the Romans on refusal was assimilated by many subsequent laws of foreign countries (Babajanyan et al., 2014), not excluding Russia. This once again emphasizes that the development of the institution of legate reached the Romans maximum depth and has not been surpassed to date. Modern law still refers to the experience of Roman private law in solving fundamental problems.

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