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Miloš VUKOTIĆ, PhD*

A COMPARATIVE PERSPECTIVE ON THE LIABILITY OF HEIRS

Settlement of deceased's debts is one of the fundamental questions of succession. The liability of heirs for these debts is very difficult to regulate because of the need to balance several conflicting interests: the interests of heirs, the interests of estate creditors and the interests of heirs' personal creditors. Legal systems may attempt a simple, but rigid approach to heirs' liability or provide detailed and flexible, but complex rules on different scopes of liability in different situations. This article discusses the main approaches to liability of heirs for estate debts and provides a critical analysis of their advantages and disadvantages. The author concludes that complex and flexible rules on liability of heirs may ultimately lead to more just distribution of estate assets.

Key words: *Liability of heirs. – Succession law. – Estate settlement. – Estate insolvency. – Probate*.

* Assistant Professor, University of Belgrade Faculty of Law, Serbia, *vukotic@ius.bg.ac.rs*.

1. INTRODUCTION

Succession to the estate of a deceased person is often seen primarily as an economic advantage and even as an undeserved windfall. Inheritance is one of the most significant methods of acquiring property and it enables accumulation of great private wealth. But it is often overlooked, or at least relegated to the background, that succession also relates to debts of the estate. Succession law is very closely related to bankruptcy and liquidation law because the main issue at stake is the same: one legal subject has ceased to exist and the law must decide on the fate of its rights and obligations. However, unlike a company faced with bankruptcy, an individual may die regardless of his wealth and success. It is to be expected that most people leave this world with a positive balance, yet it also often happens (maybe ever more often) that a man leaves behind an indebted estate. Settlement of estate debts (debts of the decedent and debts arising in connection with his death) is therefore equally important as the just distribution of remaining property.

Providing adequate rules for settlement of estate debts is no easy task. It is an issue involving many conflicting interests. The law has to take into account the interests of estate creditors, heirs and their personal creditors. In principle, no one should be put into a worse position by the death of the decedent, but if the debts of the estate cannot be met out of its assets, or if the personal debts of the heir cannot be met out of his personal property, the law must make sure that the economic loss is justly distributed. Creditors of the estate should not suffer loss due to personal debts of the heir and the heir should not suffer loss due to debts incurred by the decedent. Just distribution of liability is also important from an *ex ante* perspective because the fate of a man's successors will usually influence the decisions he makes in his lifetime. It should be presumed that reasonable men want to avoid the situation in which their debts overly burden their heirs. Therefore, an inadequate system of liability for estate debts, which does not provide sufficient protection to heirs, will discourage people from taking on debt, even if it would be a prudent decision for business or personal finances (Đurđević 2015, 145–146).

The issue of liability for estate debts is inseparably linked to the way in which heirs succeed to the position of the decedent, i.e. to rules on devolution of the estate (the method of transferring the rights and obligations of the decedent to his heirs). National legal rules on acquisition of inheritance can be divided into two or three groups according to whether the acquisition is direct or through an intermediary and whether it is immediate upon death or delayed until acceptance or an official act which transfers the estate to

the heirs (Kroppenburg 2012). The biggest difference is apparent between civil law and common law legal systems because of different conception of the basic idea of devolution (transfer of the estate from decedent to his heirs). In common law systems the estate of the decedent is not transferred directly to his heirs, but first to a personal representative – a person who is charged with settlement of the estate (Sawyer, Spero 2015, 223 ff.). The representative must administer the estate: pay all the debts of the estate and then distribute the remaining property among the heirs (Sawyer, Spero 2015, 256 ff.). The heirs acquire their inheritance only through the representative and on the basis of *inter vivos* transactions with him. The personal representative acquires the estate, but only as a trustee of the heirs and his liability for estate debts is limited to assets belonging to the estate (Sawyer, Spero 2015, 258). The heirs are fully protected from the negative side of succession – they cannot be made liable for decedent's debts. This approach also has the important advantage of avoiding the complexities which arise in case of direct devolution to multiple persons (which gives rise to the complex relationship of co-heirship). Civil law systems, on the other hand, start from the principle of direct devolution. Rights and obligations of the decedent are transferred directly to his heirs, be it at the moment of death (immediately) or after acceptance of the inheritance. Systems which subject devolution to acceptance by the heir create a period of uncertainty in which the estate belongs to no-one (*hereditas iacens*), but it is usually placed under court or private guardianship (Kroppenburg 2012). It must be stressed, however, that direct devolution does not mean that the estate cannot be separated from the property of the heir and placed under guardianship in difficult situations, especially when the assets of the estate are insufficient to meet its obligations. Civil law systems start from direct devolution and give all power over the estate to the heirs, but they also, usually, leave the possibility of *separatio bonorum* and official guardianship over the estate.

Each regime of succession has its advantages and disadvantages with regard to settlement of estate debts and none of them is completely adequate for all individual cases of succession. When the estate is not insolvent and if heirs behave responsibly, direct devolution and immediate entitlement of heirs is the best solution because it is simple, it avoids any legal vacuum in ownership of the estate and it avoids the trouble and costs of separate administration of the estate. This is the reason why the drafters of the German Civil Code opted for unlimited liability of heirs (who acquire the estate *ipso iure* at the moment of death), but provided for ways of limiting liability through official administration, insolvency administration, convocation of creditors and also by providing a time limit after which creditors cannot enforce claims against the heirs. The regime of German law is certainly quite complex, but it aims to provide flexible solutions which can be adapted to the

circumstances of the particular case. Many continental legal systems opt for unlimited liability of heirs with the possibility of accepting the inheritance subject to inventory (*beneficium inventarii*) whereby liability is limited to the value of assets listed in the inventory (liability *pro viribus hereditatis*). This solution is similar to the German regime, but slightly simpler and less flexible. Leaving the settlement of the estate to the heirs themselves is usually the most sensible solution, however, if complications arise, all interested parties should have the right to request a special administration of the estate. If it is unclear whether the assets of the estate will be insufficient to meet the debts, or if ascertainment of debts is difficult for other reasons, the heir should be able to request *separatio bonorum* and special administration of the estate, provided, of course, that the estate is valuable enough to cover the costs of such administration. Creditors of the estate should also have this right if the heir is insolvent and his personal creditors strive to satisfy their claims out of the inheritance. Finally, if the estate is insolvent, the rights of estate creditors should be protected in a special insolvency proceedings. Put simply, the settlement of the estate should depend on the circumstances of the case. If no problems arise, settlement should be left to the heirs. If problems arise, depending on the type of problem, parties whose rights are endangered should be able to request an inventory, a convocation of creditors or even separate administration of the estate. The only problem with such flexible regime is that it is very complex and requires detailed and well aligned rules for all contingencies that might arise. In light of this, it might be said that the common law approach offers maximal clarity and certainty. Its only major drawbacks are complexity and cost. But these pains of estate settlement are sometimes inevitable and no regime of devolution, administration and liability is capable of avoiding the pains of settling large, complex and indebted estates. The main characteristic of the common law approach is mandatory administration of the estate by a personal representative of the deceased and distribution of estate property to the heirs only after all issues have been resolved. This is generally the most secure way of estate settlement, but it can be inadequate for unchallenging cases. On the basis of this general overview several tools for ascertaining and limiting the liability of heirs can be singled out as very important: inventory of the estate, convocation of creditors, separate administration of the estate (*separatio bonorum*), and insolvency proceedings over the estate. The heirs could also be protected by special time bars, independently of the rules on prescription. It should also be mentioned that all legal systems allow an heir to renounce his position and thereby exclude his liability, but this does not solve the question of liability in general because orderly settlement of an estate requires that someone should take up administration of the estate be

it only in favour of settling its debts. This position is usually reserved for the state and subject to special rules on liability which offer a counterbalance for the fact that the state cannot refuse the inheritance.

It is very interesting that some legal systems attempt to make a shortcut to limited liability of the heirs by providing that liability should be limited *ex lege*. Serbian law offers one such example, the other being Portuguese law. It seems that this solution rests on a paternalistic approach to succession – heirs are protected as a matter of principle, they do not have to earn the limitation of liability by making or requesting an inventory or special administration of the estate. Such general limitation of liability seems to offer full protection from economic loss that might be caused by accepting an indebted inheritance, but in reality the protection is much less certain than it seems at first glance. Limitation of liability depends on the value of the estate at a certain point in time (Serbian law opts for the moment of devolution), which might be difficult to ascertain or subject to change, therefore leading to financial loss for the heirs or insufficient protection for the creditors of the estate. Most importantly, however, such a rule cannot protect the interests of estate creditors when the heir is insolvent. *Separatio bonorum* remains the only adequate solution for such cases. It is also the only solution for insolvent estates because general rules on liability of heirs offer no guarantees that insufficient assets of the estate will be justly and proportionately divided among the estate creditors. Legal systems that provide no rules on insolvency proceedings for insolvent estates rudely infringe upon creditors' rights by leaving them to race for enforcement in line with the principle of *prior tempore potior iure*.

A comparative analysis of rules relating to heirs' liability is not only an interesting academic exercise, but a step towards harmonization of succession law in line with most practical solutions. It is very often stated that succession law, together with family law, derives its shape from cultural norms of a certain society and that harmonization of succession laws between different national states would be misguided and difficult. This is very far from the truth. The influence of social, cultural and economic circumstances on the law of succession cannot be denied, but this influence is not strictly national or parochial – it usually reflects much wider historical developments, such as emancipation of women, equality of extra-marital and adopted children and acceptance of same-sex relationships. Same tendencies of development can be observed in all Western legal systems (Zimmermann 2018, 11–15; Verbeke, Leleu 2011, 465–468), which means that cultural influence operates above national borders and provides no barrier to change and harmonization of succession laws. Therefore, the significant cultural influence on succession law should be regarded as nothing other but the

influence of a common European legal tradition, which not only allows, but also requires a critical re-evaluation of national rules and reform of rules which have proven less than satisfactory (Zimmermann 2018, 25–26). If comparative analysis, reception and harmonization represent viable paths to reform of basic rules of succession, such as intestate rules of succession, they are even more so in relation to more technical rules, such as the question of liability of the heirs. That heirs should be liable for decedent's debts is generally acknowledged in the European legal tradition, but there is much disparity in the details. National succession laws limit the liability of heirs in different ways and under different procedures, which makes it possible and necessary to analyse these different approaches in order to determine their strengths and weaknesses and come up with a restatement of best solutions for specific situations.

It is also important to note that the development of the common European or Western culture primarily influences material rules of succession, such as the question of the position of the surviving spouse or the equal treatment of children born outside marriage, while more technical rules remain within the confines of their national legal tradition (Verbeke, Leleu 2011, 475). Spontaneous or organic development of the rules of succession in certain areas should be complemented by a deliberate and well-argued reform of technical rules. This approach has already been applied in the domain of testamentary formalities in the Washington convention of 1973 which provided uniform rules on testamentary form (international will).[1] The limited impact of this convention (national testamentary forms remain the most popular) should not be taken as a sign that harmonization of succession law is impossible or disadvantageous, but rather a symptom of the inadequacies of the rules provided in the convention (they represent an overly complex compromise between different testamentary traditions).

2. HISTORICAL INTRODUCTION

Direct succession to the estate of the deceased in civil law legal systems stems from the rules of Roman law, which provided direct and immediate succession to closest members of the decedent's family (*sui heredes*) and direct succession after acceptance for persons who were considered more distant members of the family (*extranei heredes*) – one of these regimes remains at the heart of succession law in most European states

[1] Convention providing a Uniform Law on the Form of an International Will (Washington D.C, 1973).

(Kroppenberg 2012). Persons who were in power of the deceased at the time of death acquired the inheritance directly, immediately and without the possibility to refuse it – they were *sui heredes*, "their own heirs"; other entitled persons received the inheritance directly, but not immediately, they had the right to refuse the inheritance and until they decided on whether to accept it the inheritance belonged to no one (*hereditas iacens*) (Buckland 1968, 305–306). Since it is unjust to force someone to become an heir (this was not even possible in classical Roman law due to praetor's intervention in granting *ius abstinendi*), contemporary continental legal systems provide for immediate succession with right of refusal, or delayed succession, which leaves a period of uncertainty during which the estate belongs to no one.

Liability of heirs for decedent's debts is deeply rooted in legal history. In classical Roman law, heirs were liable for contractual debts of the *defunctus*, but not for his private delicts. Claims based in delict were pursued by way of *actiones poenales*, which primarily served to effect vengeance against the wrongdoer, and were, therefore, tied to the person of the wrongdoer – they were passively intransmissible (Zimmermann 1996, 914–916).[2] Roman law never made a clear distinction between punishment and compensation in the context of delictual liability: even if amounts claimed were calculated on the basis of pecuniary loss, as in the case of *actio legis Aquiliae*, the claim remained penal and primarily meant to exact revenge (Milošević 2014, 394–396). Liability for wrongful acts of the deceased was limited to the amount by which the heir has been enriched by such acts,[3] unless the deceased died after *litis contestatio*, in which case the heir was liable for the full amount of the delictual claim (Dondorp 2018, 81–82).

In classical Roman law, the liability of the heir for decedent's debts was unlimited and this difficult position was later improved by Justinian who provided for the *beneficium inventarii*: if the heir made an inventory of the estate within a certain period, his liability was limited to the assets of the estate and creditors who claimed first could secure an advantage over those who came later (Buckland 1968, 316–317). Roman law did not privilege creditors with solidary liability of heirs: if there was more than one heir, each was liable only in proportion to his share of the estate (Buckland 1968, 317). Creditors could, however, request *separatio bonorum* from the praetor if their interests were endangered by insolvency of the heir, but it was disputed whether *separatio bonorum* limits liability (so that creditors may satisfy their claims only out of assets belonging to the inheritance)

2 Inst. 4. 12. 1.

3 D. 50. 17. 38.

or whether liability of the heir remains unlimited (so that creditors may satisfy their claims out of personal property of the heir if the assets of the inheritance are insufficient) (Buckland 1968, 317–318).

Mediaeval jurists considered heirs liable in all contractual claims, but delictual claims could only be brought against them for the amount of their enrichment. Such restrictive approach could not be justified with regard to claims relating to compensation for loss. A decisive change came about through the work of canonists, who considered it a question of Christian moral duty of the heirs to make amends for sins committed by the deceased. They explained passive transmissibility of delictual claims by converting them into contractual claims – the promise of the wrongdoer that he will atone for his sins, made to his confessor on his deathbed, was construed as a contract in favour of third parties i.e. the victims of the wrongdoing (Dondorp 2018, 94–102; Zimmermann 1996, 1020–1021). Canonists thus made the first important step towards unlimited passive transmissibility of delictual claims aimed at compensation for loss.

In contemporary legal systems it goes without saying that heirs are liable for all private law obligations of the deceased, including those arising out of wrongdoing. Heirs are protected only against penal sanctions imposed against the deceased under public law as they aim at personal retribution against the wrongdoer. Private law obligations may also be bound to the person of the debtor, by their personal nature or agreement of the parties who created the obligations, but for the vast majority of debts this is not the case. It is generally presumed that claims and debts arising under the law of obligations are transferrable upon death.

3. BENEFICIUM INVENTARII

In most European legal systems the main tool for limiting the liability of heirs is a conditional acceptance of the inheritance – acceptance subject to inventory, which either limits liability to assets belonging to the estate (liability *cum viribus hereditatis*)[4] or limits liability to the value of the assets beloning to the estate, but the heir remains liable with his personal property up to the value of the inheritance (liability *pro viribus hereditatis*)[5] (Kroppenburg 2012). Taking inventory of the estate plays two important

[4] This is the case, *inter alia*, in Italy (Art. 490 *Codice civile*), Spain (Art. 1023 *Código Civil*) and Portugal (Art. 2071 (1) *Código civil português*).

[5] This is the case, *inter alia*, in France (Art. 791 (3) *Code civil*).

roles: it enables an overview of assets belonging to the estate (with their estimated value), which makes it easier to distinguish them from assets belonging to the heir's personal property; it also has the legal consequence, if all rules relating to taking of inventory have been respected, of limiting the liability of the heir (by value or by assets). In German law, however, the primary role of the inventory is to provide clarity with regard to the composition of the estate, because it does not lead to any limitation of the liability of the heir. Taking of inventory can only have negative consequences for the position of the heir if he failed to prepare the inventory in time[6] or knowingly provided false information[7] – he then loses the right to limit his liability by requesting special administration of the estate. Under Austrian law, liability of an heir depends on whether he accepted the inheritance unconditionally, which leads to his unrestricted personal liability, or subject to inventory, in which case his liability is limited to the value of the estate at the time when the court order transferring the estate was made (Welser 2019, 232). In Spain, an heir may accept the inheritance *cum beneficio inventarii* (this is possible even within a short time after simple acceptance) which leads to liability which is limited to assets of the estate and entails administration of the estate as a separate entity, but administration may be left in the hands of the heir (Cantero *et al*. 2012, 292–294).

Serbian law belongs to a small group of legal systems which have opted for automatic, *ex lege*, limitation of liability for estate debts. This regime was first introduced in 1955 after significant social, political and legal changes. The system of private law which existed before the Second World War was completely abolished in order to be replaced by new socialist legislation. The shift towards automatically limited liability should surely be seen as a reflection of a generally more paternalistic approach to civil law under socialism. The intention was to simplify succession by limiting liability of heirs even if they took no steps to determine the indebtedness of the estate. This new regime replaced rules which corresponded with the dominant approach in European law – limitation of heir's liability by an acceptance subject to inventory. Civil law in the Kingdom of Yugoslavia was highly fragmented, but the most important legal sources were the Austrian Civil Code and the Serbian Civil Code of 1844[8] and their solutions were generally aligned – which is no wonder since the Serbian Code was drafted on the basis of the Austrian Code. This legal tradition should play a part when time comes for a reform of the current rules of Serbian succession law. One of its biggest failures is the fact that heirs are left

6 § 1994 (1) BGB.

7 § 2005 (1) BGB.

8 *Beneficium inventarii* is provided in §§ 485 and 488 of the Serbian Civil Code.

with no possibility of restricting their liability to the assets of the estate, which is the only solution when limitation by value leads to uncertainties. Having in mind that a system like the one in German law would probably seem too complex for Serbian legislation and judicial practice, it seems appropriate to suggest a new rule according to which the taking of inventory of the estate would lead to liability being restricted to the assets of the estate (*cum viribus hereditatis*). Such a rule would fully protect the interests of the heirs as well as the interests of the creditors (they would not be in a worse position compared with the situation that would have obtained if their debtor had not died). It would also be appropriate to assign more significant legal consequences to the inventory because its drawing up is placed in the hands of highly trained legal professionals with public authority – public notaries.[9] *De lege lata*, taking of inventory, even if it is placed in the hands of public authorities and regulated with fairly detailed rules, produces no immediate legal effects for the liability of heirs. The main purpose of the inventory is to provide clarity as to which assets belong to the estate, which is indispensable in case of *separatio bonorum*, but also extremely useful for determining the scope of heir's liability. Serbian law does not make the limitation of liability to the value of the estate conditional on the inventory, which means that the value of the estate can be determined on the basis of other evidence, but taking of official inventory is certainly the most reliable way. It should be mentioned that Serbian law requires debts of the decedent to be "noted" in the inventory.[10] The scope of this provision is not entirely clear. It seems that the public notary has to take into account decedent's debts on the basis of information he acquires in the process of taking inventory of the assets. No special procedure for convocation of decedent's creditors is provided for, which means that an inventory could easily be incomplete with regard to decedent's debts and there are no rules on registration of claims which would limit liability towards creditors who fail to register their debts in good time.

4. CONVOCATION OF CREDITORS

According to the dominant solution in European legal systems, a procedure for convocation of creditors is provided in which each creditor of the decedent has to register his claim under pain of losing it or being disadvantaged

[9] Art. 96 of the Law on Non-contentious Proceedings (*Zakon o vanparničnom postupku*).

[10] Art. 97 (2) of the Law on Non-contentious Proceedings (*Zakon o vanparničnom postupku*).

in relation to creditors who duly registered their claims. Procedure for convocation of creditors is an important tool for ascertaining the value of the estate and deciding on appropriate steps for its settlement. It is a counterbalance to the duty of heirs to take inventory. Just like the heirs (with the help of authorities) have to provide an account of assets belonging to the inheritance, so too must the creditors of the decedent make an application to inform the heirs of their claims. The need for a convocation of creditors naturally stems from the fact that heirs are not required to know of all the legal relationships of the decedent and they have an interest in quick and reliable clarification of debts in order to decide on whether they will accept the inheritance and how they will proceed to distribute it. It should also be kept in mind that convocation also serves the needs of estate creditors who may be unaware of the succession. It also gives them a guarantee that their claims will not be disregarded during settlement of the estate.

Protection which convocation gives to creditors is a natural counterbalance of the restricted liability of heirs. It is in this light that Austrian legal theory underlines that conditional acceptance of inheritance (subject to inventory) provides full protection to heirs only in connection with a convocation of creditors (Welser 2019, 233). This is so important that the Austrian Law on Non-contentious Proceedings provided that a convocation should be ordered *ex officio* in cases of conditional acceptance of inheritance,[11] even if the Austrian Civil Code provided for convocation only upon request of the heirs. Convocation consists in the publication of an official notice by the probate court addressed to any and all creditors (*Edikt*), calling them to register their claims within a stated deadline.[12] It must include a warning that creditors who fail to register their claims will be satisfied only after all registered claims have been met. If the estate is insolvent, failure to convoke creditors or preferential treatment of certain creditors to the detriment of others may lead to unrestricted personal liability of heirs towards disadvantaged creditors for the amount they would have received had the estate been properly settled.[13] Without convocation, an heir will escape unrestricted personal liability only if he manages to distribute assets of the estate in line with rules on estate insolvency proceedings (Sauper 2013, 87–88). Convocation is, therefore, a procedure which safeguards both the interests of the heirs as well as the interests of the creditors. It provides a basis for a just distribution of estate assets. This is a very important point to keep in mind when discussing rules of Serbian law. We have seen

11 § 165 Abs. 2 AußStrG.

12 § 813 ABGB.

13 § 815 ABGB.

that liability of heirs is automatically limited to the value of the estate, but there are no special provisions which protect estate creditors against unconscionable behaviour of the heirs. Preferential treatment of one creditor may lead to his liability towards disadvantaged creditors on the basis of general rules of *actio Pauliana*[14] or on the basis of general rules of liability in tort,[15] provided, of course, that he acted unconscionably. Unconscionable heirs would likewise be liable in tort and their liability would be personal and unrestricted since the claims of disadvantaged creditors arose on the basis of the activity of the heir – they are not claims against the estate, but against the heir personally. However, even if the law provides general rules as a safety net for wronged creditors, it would be advantageous to provide a special procedure for registering estate debts because such a procedure would provide transparency and discourage heirs from acting irresponsibly towards estate creditors.

The importance of convocation is even greater under German law since it does not provide for limited liability of heirs in normal circumstances. Liability is limited to the assets of the estate only if the estate is subjected to special guardianship or if insolvency proceedings are opened. In order to decide on whether to request guardianship or insolvency, the heir may request a convocation of creditors (*Aufgebotsverfahren*).[16] Apart from providing information on the indebtedness of the estate, convocation limits the liability of heirs to assets belonging to the estate with regard to creditors who have failed to register their claims (Joachim 2018, 215–216).[17] The procedure is similar to the one in Austrian law: the convocation is made by the probate court, it contains a warning of consequences for creditors who fail to register their claims, but unlike Austrian law, it cannot be ordered *ex officio*, but only upon request of an heir or guardian of the estate (Joachim 2018, 216–223).

In both Austria and Germany a convocation of creditors has no direct effect on the existence of claims. If assets belonging to the estate appear, which were unknown at the time of convocation, creditors will be able to satisfy their claims out of these assets even if they omitted registration (Welser 2019, 234; Joachim 2018, 224).

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14 Art. 280 sqq. Law on Obligations (*Zakon o obligacionim odnosima*).

15 Art. 154 sqq. Law on Obligations (*Zakon o obligacionim odnosima*).

16 § 1970 BGB.

17 § 1973 BGB.

Common law systems also provide protection against debts which were unknown to the personal representative during his administration. He is required to make an advertisement to creditors to come forward with their claims and if they fail to do so within a specified period, they are barred from enforcing their claims and the distributions made by the personal representative remain undisturbed (Sawyer, Spero 2015, 258–259).[18] This may apply

5. SEPARATIO BONORUM

Ideally, creditors of the deceased should suffer no loss nor gain as a result of the death of their debtor. Their claims should primarily be focused on the estate of the deceased and not on the property of his heirs. The fact that many legal systems provide for personal liability of heirs stems from the principle of direct devolution of the estate – the heir acquires the inheritance directly, without intermediaries, which leads to merger of the inheritance with the heir's personal property (*confusio bonorum*). Personal liability of the heirs provides a balance in favour of decedent's creditors because *confusio bonorum* makes it impossible to distinguish between personal and inherited assets and to determine the ultimate fate of the inheritance. When the estate dissolves into the property of the successor, the liability of the heir can only be limited in value, but it cannot be limited to assets of the estate, since the estate no longer exists independently of the heir's property.

Personal liability of an heir may prove to be insufficient protection for creditors in cases when they cannot rely on the heir's business proficiency or on his solvency (Đurđević 2015, 146–147). If the heir is incapable of administering the estate with the same success as the deceased, or if the heir's personal creditors seek to satisfy their claims out of inherited property, the creditors of the deceased have an interest to request separation of the estate from heir's personal estate and its special administration by a court appointed guardian – *separatio bonorum*. This possibility is especially important when difficulties arise either because of complicated legal relationships, indebtedness of the heir or insolvency of the estate. *Separatio bonorum* should not be seen as a rule which is exclusively aimed at protection of estate creditors: it also protects the interest of the heir to fully limit his liability for estate debts to assets belonging to the estate. Heirs should be able to request *separatio bonorum* if they feel unprepared or incapable of

[18] S. 27 Trustee Act 1925.

settling the estate and do not wish to risk being personally liable for estate debts. Insolvency of the estate should not be the only reason for heirs to request *separatio bonorum*, but if the estate is insolvent a special insolvency proceedings should be available and it should be mandatory. Creditors of an insolvent estate should not have to race each other for individual enforcement of their claims – their claims should be satisfied proportionally, in line with the insolvency principle of *par condicio creditorum*.

It should be noted that *separatio bonorum* cannot protect estate creditors against dishonesty of the heirs. Đurđević mentions that a dishonest heir may easily make misrepresentations with regard to estate assets and thereby damage the interests of estate creditors (Đurđević 2015, 146–147). Such behaviour certainly gives rise to heir's liability in delict, but separation of estate and its placement under special administration provides no additional direct protection against unconscionable dispositions or misrepresentations with regard to estate property. If an heir is determined to defraud estate creditors he may attempt to do this regardless of *separatio bonorum*, which provides protection only after assets have been determined as belonging to the estate of the deceased.

Separatio bonorum entails administration of the estate by a specially appointed guardian. It is his role (his private duty) to settle the estate: to ascertain the composition and value of the estate, to ascertain the debts of the estate, to settle the debts of the estate and pay out legacies and then, finally, to distribute the remaining assets among the heirs. The guardian of the estate is entitled to remuneration and compensation for expenses, which is the main drawback of all estate settlement regimes which involve special administration. Because of these administrative costs, *separatio bonorum* is not recommended when it is not overly difficult to settle the estate and it is not possible when the estate is of such small value that it would not cover even these costs of administration.

German law offers an interesting example among continental legal systems because it uses *separatio bonorum* not only in favour of concerned creditors, but also as the main tool for limiting liability of the heirs. German succession law provides a very detailed and highly complex set of rules on the liability of heirs: in principle, liability is personal and unlimited, but there are various methods for limiting liability, either provisionally or finally, towards all or towards certain creditors of the estate; furthermore, special rules are provided for liability of co-heirs (Schlüter, Röthel 2015, 260 ff. and 339 ff). There are two main methods of conclusively limiting liability towards all creditors: separate administration of the estate in order to settle the debts (*Nachlassverwaltung*) and estate insolvency proceedings (*Nachlassinsolvenzverfahren*). Both of these procedures involve special

administration of the estate and its separation from the personal property of the heir. As a result, the heir must give up his right to administer the estate and satisfy himself with any property that remains after all debts of the estate have been settled. Administration of the estate is transferred to a special guardian or insolvency trustee by court order and this person has a private duty to take care of the estate, primarily in the interest of estate creditors. Since it is generally not possible for heirs to limit their liability while remaining in control of the estate, it is said that German law shows a high degree of suspicion towards heirs and that it is not very far from the conception prevailing in common law legal systems (Schlüter, Röthel 2015, 296). Furthermore, German law does not allow for private administration of the estate or private taking of inventory, but provides for mandatory participation of probate court or other public officials (Schlüter, Röthel 2015, 296). The only case in which an heir may finally limit his liability towards all creditors without special administration of the estate under German law is the case of an estate of meagre value. If the value of the estate is insufficient to cover the costs of special estate administration or insolvency proceedings, the heir can raise an objection which limits his liability to the assets of the estate. However, this should not even be possible without *separatio bonorum*. How can liability be limited to an estate which no longer exists, which has dissolved itself into the personal property of the heir? German law provides the answer in the form of a fictitious *separatio bonorum*: the heir is deemed to be in the position of trustee of the estate creditors, he is liable to them to administer the assets which belonged to the estate (before it merged with his property) in their favour and to distribute these assets in line with statutory priority rules (Schlüter, Röthel 2015, 291–293).[19] The objection of meagre value also leads to revival of claims which have been extinguished through succession, but only for the purposes of the relationship between the heir and estate creditors.[20]

Separatio bonorum is unthinkable under the common law conception of succession through a personal representative of the deceased. The estate remains a separate entity until it is finally settled and heirs receive only the assets which remain after all debts have been paid. If the estate is insolvent, a special insolvency proceedings may be initiated and the estate placed under administration of an insolvency trustee (Sawyer, Spero, 261–262). Insolvency proceedings entail settlement of debts according to the statutory order which cannot be varied by the deceased's will.

19 § 1991 BGB.

20 § 1991 Abs. 2 BGB.

6. LIABILITY OF CO-HEIRS

Direct devolution also means that several persons may succeed the deceased, which significantly complicates all aspects of succession, including the question of liability. In order to protect the creditors of the deceased and of the estate, some legal systems provide for solidary liability of the heirs. However, many systems uphold, at least formally, the Roman law solution of divided liability. It is important to note, however, that in those systems, the creditors have a right to influence the distribution of the estate (Helms 2012). Division of liability between the heirs puts creditors at a disadvantage and gives them an incentive to obtain satisfaction before the estate is divided. This may be taken as another example of how debts stand in the way of direct devolution and limit the rights of heirs to dispose of inherited property. It shows that a practical approach to succession requires settlement of estate debts prior to distribution of the estate among heirs. Thus, under Spanish law, if an estate is distributed before all debts have been paid, assets need to be reserved for his purpose (Cantero *et al*. 2012, 298). Furthermore, even in legal systems which provide for solidary liability of heirs, the creditors of the estate have an incentive to prevent or reverse *confusio bonorum* when personal liability of the heirs offers little confidence that debts will be fully satisfied.

In addition to the question of the scope of liability (whether liability of co-heirs is solidary or divided), the question of the object of liability must also be answered: are co-heirs liable with their personal property (including their share of the estate) or only with assets belonging to the estate? This question arises because the existence of multiple heirs prevents immediate merger of the estate with the personal property of the heirs. Legal systems which recognize direct devolution have to distinguish between two very different legal situations. One regime exists from the moment of devolution until distribution of the estate and during this time the estate belongs to all co-heirs as their common property, which means that it remains distinct from their personal property (as in the case of *separatio bonorum*). After distribution of the estate, the estate no longer exists and whatever each heir received from the inheritance becomes part of his personal property and, thus, the legal situation becomes much simpler.

Under German law, co-heirs are solidary debtors,[21] which means that an estate creditor can sue any co-heir for the full amount of his claim. However, German law grants co-heirs the possibility to limit their liability

[21] § 2058 BGB.

to their share in the estate so long as the estate remains undivided.[22] The explanation of this privilege lies in the fact that an undivided estate is subject to common administration of all co-heirs and is thus separated from their personal estates (Schlüter, Röthel 2015, 342). This means that a creditor who obtains judgement against one co-heir will only be able to enforce it through attachment of his share in the inheritance (if objection of undivided estate is raised, *Teilungseinrede*). A creditor who wishes to enforce his claim in the assets of the estate has to sue all co-heirs jointly and obtain judgment against all of them (*Gesamthandsklage*) (Schlüter, Röthel 2015, 340–341). Co-heirs are also privileged by divided liability (in proportion of their shares in the estate) in case they did all in their power to determine and settle estate debts prior to distribution of estate assets between them: if they requested convocation of creditors prior to distribution and if creditors failed to register their claims they will only be able to rely on divided liability of heirs and the same applies to claims raised five years after devolution and claims made after insolvency proceedings have been closed (Schlüter, Röthel 2015, 344–345).[23] These rules clearly show that in case of co-heirs settlement of estate debts prior to distribution of the estate is the preferable solution. It is also in line with the general idea that the estate is the primary object of liability for estate creditors as long as it is separated from the estate of the heirs.

Solidary liability of heirs is a privilege for estate creditors and a protection against the unfavourable situation they would find themselves in if they had to claim against each heir individually for his share of liability. Estate creditors, in general, deserve such protection since they are not expected to keep track of their debtor's possible heirs and they should not be disadvantaged by the fact that many persons inherited their debtor. However, this protection is justifiable only to a certain extent and to a certain point in time. If creditors seek to enforce their claims after a long time has passed since devolution of the estate, their claims should be directed against the heirs individually and only for the amount corresponding to their part in the liability. Time limitation of the solidary liability of heirs is accepted in German law, as we have seen, and also in Swiss law. Under Swiss law, solidary liability of heirs exists for five years after distribution of the estate or five years after an obligation becomes payable, if this occurs after the distribution (Sandoz 2006, 212).

22 § 2059 BGB.

23 § 2060 BGB.

Serbian law provides for solidary liability of co-heirs, but this liability is automatically (*ex lege*) limited by the value of each co-heir's share in the estate. This does not mean that the liability of co-heirs is divided: a creditor may claim and enforce his claim in full against one co-heir as long as the value of that claim is less than the value of the co-heir's share in the estate and then the co-heir will be entitled to regress from other co-heirs in proportion to their shares in the estate. Even before distribution of the inheritance, the liability of co-heirs is not limited to their share in the estate, but also extends to their personal property.[24] As in the case of sole heir, the Serbian legislator deems the *ex lege* limitation of liability by value to be adequate protection for the interests of co-heirs.

However, decisions against one co-heir may only be enforced against his personal property or his share in the estate. If a creditor wishes satisfy his claim out of the assets of the estate, he will have to sue all co-heirs together and obtain judgment against them all. This stems from the fact that assets of the estate do not belong to any of the co-heirs individually, but they belong to all co-heirs jointly, as their undivided common property, which means that every co-heir is directly entitled only to his share in the estate, but not to particular assets of the estate. If judgment is obtained against one co-heir only, other co-heirs can object to enforcement in estate assets. This is regulated by rules of objections of third parties to enforcement (Jakšić 2021, 945–947). However, creditors of the estate are not precluded from suing each co-heir independently of the others if they intend to rely only on enforcement against their personal property. It is interesting to note that Serbian law prevents co-heirs from transferring their shares in the estate to persons who are not their co-heirs.[25] The aim of this rule is to motivate co-heirs to divide the estate and to prevent an expansion of the community of co-heirs which might make the relationship between them more complex. Serbian law tolerates co-heirship which results from the rules on direct devolution of the estate, but prevents co-heirs from complicating the relationship any further – they are incentivized to divide the estate in order to be free to dispose of inherited assets. In light of this rules it may be questionable whether creditors of the estate may request enforcement against a share in the undivided estate. This should not present a problem as long as enforcement against the share in the estate is effectuated by transfer of the share to one of the co-heirs, or through division of the estate.

[24] Art. 224 Serbian Law on Succession.

[25] Art. 231 (1) Serbian Law on Succession.

The common law approach to succession through a personal representative has a manifest advantage in situations with more than one heir. Since the estate passes first to the personal representative, who is charged with settlement of estate debts, the question of solidary or divided liability of the heirs cannot arise at all. Succession in common law systems never leads to personal liability of heirs and the relationship of co-heirship cannot arise. The system is simple in that one person (the deceased) is replaced by just one person (the representative) and succession remains undivided. The same idea exists in continental legal systems that provide for direct devolution, but in order to preserve singularity of succession, multiple heirs are considered as if they were just one person, which then leads to further questions.

7. TIME LIMITS ON CLAIMS AGAINST HEIRS

Unlike rights in immovable property, rights to demand performance of obligations are usually not made public in any way. It is therefore impossible to determine the exact scope and value of estate debts with certainty. Claims which were unknown at the time of settlement of the estate may be brought against heirs at a later date and put them under unforeseen financial pressure. This is especially problematic if heirs are protected only by a limitation in value, since they may dispose of inherited assets believing that all debts have been paid only to find out that this is not the case and that they are still liable. This risk can be mitigated, as we have seen, by a special procedure for convocation of creditors, but also by simple time limits after which estate creditors are precluded from demanding payment from heirs, or limited to assets of the estate.

Under German law, creditors who raise their claims more than five years after the moment of death are faced with an objection of "keeping silent" (*Verschweigungseinrede*): the heir can refuse to satisfy their claims if the assets of the estate have been exhausted in order to pay other estate debts.[26] The objection is, of course, not available if heirs were aware of the claim or if the claim was duly registered in the convocation procedure. This kind of protection is useful because it offers an important degree of legal certainty in cases in which heirs have no reason to request convocation of creditors or separate administration of the estate because they are completely unaware of certain debts. It would be manifestly unfair to hold heirs liable

[26] § 1974 BGB.

for claims which are raised after a long time has passed from the moment of succession. General rules on prescription provide limited protection in this context because periods of prescription are very long in some cases.[27]

It is interesting that the Serbian legislator, or Yugoslav legislator, to be more precise, decided not to include time bars on claims of estate creditors, even though legal theory supported such a solution. In his Theses for a Draft of the Law on Succession, Mihailo Konstantinović, one of the most influential jurists of the day, proposed that claims of estate creditors against heir should be time-barred after three years have passed from the death of the deceased (Konstantinović 1947, 332). Such a rule would greatly increase legal certainty and predictability for heirs and it should be considered *de lege ferenda* as a valuable addition to the general rules on liability for estate debts.

8. SHORTCOMINGS OF SERBIAN LAW

Liability of heirs is limited under Serbian law to the value of the inheritance (the value of the assets belonging to the estate of the deceased). The limitation of liability takes effect *ipso iure* and immediately upon succession. It may seem that this rule offers more than adequate protection to the heirs, but this is not the case. The problem lies primarily in the valuation of the estate, which is bound to the moment of devolution (moment of decedent's death), and in the fact that heirs have no means to further limit their liability to inherited property (Đurđević 2015, 148–149). *Separatio bonorum* may be requested only by creditors of the estate and not by the heirs themselves. Changes in the value of the estate after devolution may unjustly prejudice the interests of the heirs (if the value of the estate becomes significantly lower) or the interests of the creditors (if the value of the estate becomes significantly higher). Apart from this inflexible method of valuation, the heirs run the risk of not being able to prove the value of the estate and thus to limit their liability. One of the main shortcomings of the Serbian solution is the fact that liability is limited even if no valuation of the estate and of the debts has been carried out. It stands to reason that heirs must prove the value of the estate and the value of debts that they have satisfied in order to limit any further liability. Portuguese law offers a similar solution (limitation

[27] For instance, under Serbian law the general period of prescription is 10 years (Art. 371 Law on Obligations). In Austrian law it is 30 years (§ 1479 ABGB). Under German law the period of prescription for some claims is also 30 years (§ 197 BGB).

of liability *ex lege*) but it explicitly lays the burden of proof on the heirs.[28] Unlike Serbian law, Portuguese law retains the possibility of accepting an inheritance *cum beneficio inventarii*, which limits liability to property listed in the inventory.[29] Such a rule should be accepted in Serbian law as well in order to give heirs a stronger, i.e. more clearly defined, protection against estate debts.

Inadequate protection against liability for estate's debts influences not only the position of heirs, but also the decisions which the deceased made in his lifetime. Since death is certain, reasonable men, especially when they reach old age, start planning for their succession and reflecting on the position that their heirs will find themselves in. If a man knows that his heirs will have a hard time limiting their personal liability for estate debts, he will be inclined to settle all his debts before death and discouraged from taking on liabilities, even if it would have been a prudent decision. Đurđević gives an example of a 60 years old entrepreneur who decides not to take a loan which would enable him to develop his business in fear of his heirs becoming personally liable for it (Đurđević 2015, 145–146). This problem should be considered outside business context as well: a man who knows that his heirs will be fully protected against his debts only if they refuse the inheritance will be inclined to limit his debts and restrict his activity in order to spare his heirs from complication in estate settlement.

Heirs, of course, have the right to renounce their inheritance, which completely excludes their liability for deceased's debts, but this is a crude method of protection because it may lead to heirs giving up their position at first sign of trouble since it is impossible to determine with certainty whether an estate is over-indebted (Đurđević 2016, 174). It must also be kept in mind that the state as the final and mandatory heir cannot refuse the inheritance, which means that its liability must be adequately limited in order to protect public finances (Đurđević 2016, 174–175). Limitation of liability through inventory procedure or special administration of the estate is the only way of solving these problems. Heirs should be given the possibility to accept their inheritance conditionally, subject to limitation of their liability for estate debts.

Serbian law does not recognize individual insolvency and it does not provide for special insolvency proceedings for indebted estates – insolvency rules are strictly reserved for companies and creditors of individuals are referred to general enforcement proceedings. Priority of creditors depends

[28] Art. 2071 (2) Código civil português.

[29] Art. 2071 (1) Código civil português.

on the time when they acquired an enforceable title against the debtor (*prior tempore, potior iure*). This means that the position of creditors will largely depend on chance, rather than on a just and proportional distribution of available assets. Lack of individual insolvency proceedings and estate insolvency proceedings have long been criticized as a serious flaw in the Serbian legal system. There are no justifiable reasons for the omission of these procedures. Introduction of insolvency proceedings for indebted estates would allow equal treatment of estate creditors, better (more flexible) rules on sale of estate assets and full protection of heirs against personal liability (Đurđević 2012, 33–36).

9. CONCLUSION

The question of heirs' liability for debts of the deceased is one of the central and most difficult questions of the law of succession. It is an area of law which shows a convergence in general principles (transfer of liability to heirs, subject to limitations) and divergence in details which regulated the exact scope of heirs' liability in the individual case. A visible rift exists between common law and civil law approach to liability, which stems from different methods of estate devolution, with the common law approach providing more clarity and certainty, albeit at the price of increased costs and complex estate settlement. Civil law approach offers more flexibility, but also creates less legal certainty. Direct devolution of estate and personal liability of heirs must be counterbalanced by detailed and flexible rules which allow for modification of liability, primarily in order to safeguard the interests of the creditors and to protect heirs against economic loss due to indebtedness of the estate. Administration of these rules may be quite burdensome for probate courts and other officials involved with settlement of the estate (public notaries), but there is no other way to achieve a just distribution of estate assets. Legal systems which attempted to create a simple limitation to heirs' liability – like Serbian law – fail to provide adequate protection because the simple approach to heirs' liability lacks flexibility and cannot be adapted to different situations that heirs might find themselves in.

In order to achieve a just system of liability for estate debts, a legal system must provide protection to heirs against over-indebted estates and protection to estate creditors against over-indebted or less than competent heirs. In the interest of transparency, a special procedure for registering estate assets and estate debts should be provided, with significant legal consequences for parties who fail to take part in these proceedings. Special time bars should be enacted in order to protect heirs against claims which

are raised with undue delays and, most importantly, individual insolvency proceedings should be provided for insolvent estates in order to allow just distribution of assets among estate creditors and spare them the trouble and injustice of having to race each other to satisfy their claims in individual enforcement proceedings.

A balance between simplicity for easy cases and flexibility for difficult cases should lie at the heart of rules on heirs' liability for deceased's debts. Heirs should be able to take charge of inherited assets and they should be personally liable to estate creditors when there are no signs of difficulties on the horizon – when there are no insolvency issues. On the other hand, detailed rules should be provided for various complex situations that may arise, like insolvency of the estate or insolvency of the heirs. In any event, both sides (the heirs and the estate creditors) should have legal means at their disposal to request preventive protection through special proceedings for ascertainment of the composition and value of the estate. Since the administrative cost of such preventive measures is usually much lower than the cost of special administration over the estate, availability of preventive measures should not be subject to strict conditions.

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