



NATIONAL RESEARCH UNIVERSITY
HIGHER SCHOOL OF ECONOMICS

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BY RIGHT OF REPRESENTATION:
A COMPARATIVE ANALYSIS OF
CIVIL LAW IN RUSSIA AND
FRANCE**

BASIC RESEARCH PROGRAM

WORKING PAPERS

SERIES: LAW
WP BRP 91/LAW/2019

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THE CONCEPT OF INHERITANCE BY RIGHT OF REPRESENTATION: A COMPARATIVE ANALYSIS OF CIVIL LAW IN RUSSIA AND FRANCE²

This paper examines one of the most important concepts of intestate succession – inheritance by right of representation. The following analysis is based on civil law in Russia and France.

The paper provides an overview of the meaning and the role of the right of representation, determines those who can inherit by right of representation under the Russian and French civil codes as well as the grounds for succession; examines the limitations on inheritance by right of representation under civil law in both states; identifies the legal nature of the rights of the representing heirs. Specific attention is paid to the issue of representation of the parent who is the commorient of the decedent.

As a result of the comparative study, the author makes proposals on the improvement of the concept of inheritance by right of representation in Russia and France.

Keywords: inheritance by right of representation, intestate succession, the time of opening of an inheritance, commorientes, renunciation of inheritance.

JEL Classification: Z

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² The publication was prepared within the framework of the Academic Fund Program at the National Research University Higher School of Economics (HSE) in 2018-2019 (grant № 18-01-0072) and by the Russian Academic Excellence Project "5-100".

Introduction

An important concept in inheritance law in both Russian and French law is that of the “right of representation”. The rules on the right of representation govern situations where the natural order of life and death is violated: children predecease their parents. Nevertheless, this situation is legitimized: the right of representation enables more distant relatives of the decedent (e.g. grandchildren) to take the place of their ancestor (e.g. their father) who predeceased the decedent (the grandfather).

The right of representation changes the general principle of intestate succession whereby the nearest kin excludes the more distant ones from the inheritance. For instance, in a case where a decedent is survived by a son, a daughter and two grandchildren (the children of the son), it is the son and the daughter who inherit through intestacy rules, whereas the grandchildren get nothing since they are more distant relatives. However, should the son predecease the decedent, then the daughter and the grandchildren will inherit, the latter taking the place of their father, i.e. the decedent's son. The share of the son ($1/2$) will be distributed between his children, i.e. the decedent's grandchildren, each of whom has the right to expect one-fourth of the estate. In this case, the grandchildren inherit by right of representation.

Persons who inherit by right of representation will hereinafter be referred to as the *representing heirs* and those from whom they inherit as the *represented heirs*.

The concept of inheritance by right of representation will be examined from a comparative viewpoint of civil law in Russia and France.

The right of representation and heirs by right of representation

Russian law does not provide a definition of “inheritance by right of representation”, although the grounds and procedure thereof have been established. According to Article 1146 of the Civil Code of the Russian Federation (hereinafter – the Russian Civil Code), inheritance by right of representation occurs when an heir specified by law dies before or at the same time as the decedent. In this case, the share of the deceased heir passes to his or her descendants by right of representation and is divided between them in equal shares.

Inheritance by right of representation is possible within the first, second and third orders of heirs-at-law. The persons who may inherit by right of representation is established in the Russian Civil Code and includes the following: grandchildren of the decedent and their descendants as the heirs-at-law of the first order (Item 2 of Article 1142 of the Russian Civil Code); children of brothers and sisters of the decedent as the heirs-at-law of the second order (Item 2 of Article 1143 of the Russian Civil Code); cousins of the decedent as the heirs-at-law of the third order (Item 2 of Article 1144 of the Russian Civil Code). The persons concerned represent the heir who died before or at the same time as the decedent.

The classification of representing heirs into different degrees of kinship is no accident. For instance, should the decedent be survived by his grandson and sister (leaving no other heirs), then only the grandson may inherit, while the sister will get nothing, since the grandson is an heir-at-law of the first order, while the sister is of the second order.

If there is inheritance by right of representation, the estate is divided *per stirpes*. This means that the share of the heir who died before or at the same time as the decedent is distributed among his descendants. Let us say, the decedent is survived by a brother and three nephews (children of his daughter, who predeceased the decedent). The inheritance will be divided into two branches: that of the brother and that of the daughter. The brother will get one half of the estate, while the remaining half of the estate due to the sister will be divided among the children of her branch (i.e. each of the decedent's nephews will get one-sixth of the estate).

Let us now turn to the provisions of French law.

The French Civil Code uses the term “representation” instead of the right of representation. According to Article 751 of the French Civil Code “Representation is a legal fiction which has the effect of calling upon the representing heirs to inherit the rights of the represented” (“La représentation est une fiction juridique qui a pour effet d’appeler à la succession aux droits les représentants du représenté”).

In France, representing heirs are relatives of the decedent in the direct descending line without any limitations, i.e. grandchildren, great-grandchildren, great-great-grandchildren, etc. (Article 752 of the French Civil Code) being heirs-at-law of the first order. Here you can see similarities with the Russian Civil Code.

As for collateral relatives, representation is possible not only for children of the decedent's brothers or sisters but also for their descendants (Article 752-2 of the French Civil Code) who are all heirs-at-law of the second order. The peculiarity of Russian law manifests itself in the fact that the descendants of the decedent's brothers or sisters may not inherit by right of representation. Unlike in Russian law, the decedent's cousins are not entitled to represent their parent under the French Civil Code.

In France, as in Russia, representing heirs inherit per generation (*par souche*) and not per capita (*par tête*) as provided by Article 753 of the French Civil Code: “In all cases where representation is permitted, the distribution shall be effected by generation, as if the represented one came to inheritance... Within the generation..., the estate is distributed per capita” (“Dans tous les cas où la représentation est admise, le partage s'opère par souche, comme si le représenté venait à la succession; s'il y a lieu, il s'opère par subdivision de souche. A l'intérieur d'une souche ou d'une subdivision de souche, le partage se fait par tête”).

Limitations on inheritance by right of representation

Russian and French law contain some limitations on inheritance by right of representation. A common limitation shared by Russian and French law impeding inheritance by right of representation is the identity of the representing heir. Should the heir by right of representation be deemed unworthy, such an heir may not be called upon to inherit, including by right of representation. This conclusion is based upon the general provisions governing inheritance contained in the civil codes of Russia and France.

The Russian Civil Code also stipulates the following: the descendants of an unworthy heir shall not inherit by right of representation (Item 3 of Article 1146 of the Russian Civil Code) as well as the descendants of an heir who has been deprived of the inheritance by the decedent (Item 2 of Article 1146 of the Russian Civil Code). For instance, a grandson may not inherit by right of representation if his parent is deemed an unworthy heir. Likewise, in the case where the decedent deprives his son of an inheritance in the will (so that, for example, his daughter inherits the entire estate). Should the son predecease the decedent (or die simultaneously) and leave children, they may not inherit by right of representation.

The French Civil Code remains silent on the possibility of representing the person deprived of the inheritance by the decedent in the will. In this regard, one should refer to case law where the courts clarify that such a person may not be represented in a given case³.

As for the representation of an unworthy heir, the French Civil Code has now adopted a solution diametrically opposed to that of the Russian Civil Code, as it allows for representation of an unworthy heir (Article 755 of the French Civil Code). Such representation is possible even if an unworthy heir is alive at the time of the opening of the inheritance⁴.

It should be noted that the French Civil Code as originally drafted excluded representation of an unworthy heir (Article 730 of the French Civil Code as amended in 1804). There has been a lot of criticism on the former wording of Article 730 of the French Civil Code from French civil law scholars. In particular, Morales pointed out that the punishment of the heir should be strictly personal, concerning only the person to whom it is addressed; the unworthiness of the heir should not extend to his or her relatives⁵. Mathieu-Izorche was of a similar view: “the children of an unworthy heir have made no mistake that would justify them being deprived of an inheritance”⁶.

Since the adoption of Law No. 2001-1135 of 3 December 2001 (entered into force on 1 July 2002), representation of an unworthy heir has been made possible. The new approach enshrined in French law certainly deserves support.

French lawmakers continued reforming the concept of inheritance by right of representation in Law No. 2006-728 of 23 June 2006 (entered into force on 1 January 2007) which amended the French Civil Code and recognized representation of a renouncing heir (Article 754 of the French Civil Code as amended). This legislative decision has made it possible to transfer the inherited estate skipping a generation and to avoid double taxation due to the transfer of ownership from the heir to his descendants.

Russian law does not recognize representation of a renouncing heir. After all, should an heir want to disclaim an inheritance, then he is alive at the time of opening the inheritance. Under the Russian Civil Code, representation of a surviving heir is not allowed: inheritance by right of representation occurs only if an heir died before or at the same time as the decedent. Nevertheless, the French experience may be helpful in improving provisions of the Russian Civil Code regarding the renunciation of inheritance.

³ See, Mathieu M.-L., Rostovtseva N.V. Le droit successoral en Russie et en France: étude comparative // *Revue internationale de droit comparé*. 2016. № 2. P.483.

⁴ Article 755 stipulates the following: “La représentation est admise en faveur des enfants et descendants de l'indigne, encore que celui-ci soit vivant à l'ouverture de la succession”.

⁵ Morales J. De l'indignité dans le projet de réforme des successions // *Petites affiches*. 18/04/1997. N 47. P.10-14.

⁶ See, Mathieu-Izorche M.-L. *Le raisonnement juridique*, PUF, Coll. Thémis, 2001, p. 72.

According to Article 1158 of the Russian Civil Code, an heir is entitled to disclaim an inheritance in favor of an heir-at-law of any order regardless of being called upon to inherit. However, there is an exception concerning the representing heir: in order to disclaim an inheritance in favor of such an heir, the latter should be called upon to inherit. In other words, the son of the decedent who is called upon to inherit as an heir-at-law of the first order may disclaim an inheritance in favor of a potential heir of any order (e.g. the seventh order) but may not do so in favor of his closest relative – his son, i.e. the grandson of the decedent, because the grandson may not inherit by right of representation while his father is still alive.

Stepchildren and stepparents of the decedent (heirs of the seventh order) have more rights than grandchildren, because it is possible to disclaim an inheritance in favor of a stepchild (or a stepparent) but not in favor of the heir's own child (the grandchild of the decedent who is a second-degree relative). It seems that such an approach creates an imbalance in the rights of potential heirs under Russian law, and thus should be reconsidered.

Representation of a commorient

Current Russian and French law recognize representation of a parent who died *at the same time as* the decedent. In other words, where the decedent and the heir are commorient. The former legislation (in Russia it is the RSFSR Civil Code of 1964, in force until 1 March 2002, in France it is the French Civil Code as amended before 1 July 2002) did not provide for such a possibility: it was only possible to represent an heir who died *before* the decedent.

The circle of persons deemed commorient differs in the civil codes of Russia and France. Item 2 of Article 1114 of the Russian Civil Code provides that the persons shall be deemed commorient if they die on the same day where “the time of death of each of those persons may not be established”. Commorient do not inherit from one another: the heirs of each of them are called upon to inherit. The wording of Item 2 came into effect on 1 September 2016.

Article 725-1 of the French Civil Code reads as follows: “If two persons, one of whom could have inherited from the other, die as a result of the same event, the sequence of death shall be established by all appropriate means. If this sequence may not be established, the inheritance from each of them occurs in a manner that the other person is not called upon thereto”. The same article provides that the descendants may represent the commorient: “If any of the deceased is survived by descending relatives, they may represent their decedent in inheritance from the other one, if the right of representation is allowed”. This wording of the French Civil Code has been applied since the enactment of Law No. 2001-1135 of 3 December 2001.

The rules on commorient established in Item 2 of Article 1114 of the Russian Civil Code are very similar to those of Article 725-1 of the French Civil Code. However, a closer reading of these provisions reveals the following differences.

The French Civil Code assumes that persons die within the same event, while it is not of essence under the Russian Civil Code (persons may die on the same day in different cities, and the time of death of each of them may not be established).

The French Civil Code does not require that the persons die within the same day, while the Russian Civil Code sets this condition as mandatory.

Under the French Civil Code, the persons are deemed commorient in cases where the sequence of death may not be established. Under the Russian Civil Code, commorient are the persons for whom the moment of death of each may not be established.

It would appear that there is no difference in the latter case. But let us imagine a situation where some Russian persons (heirs of one another) die on the same day, the *moment* of death of each of them may not be established, but the *sequence* of their death is established (it is known who died earlier). Following the letter of the Russian Civil Code, such persons should be deemed commorient. But logic suggests there may be another consequence implied in this case: the one who died later should be called upon to inherit from the one who died earlier.

The requirement to establish the sequence of death of persons laid down in Article 725-1 of the French Civil Code may have been taken into account by Russian lawmakers. It is noteworthy that such suggestions have already been made in Russian doctrine by both modern researchers⁷ and pre-revolutionary civil law scholars⁸.

The French Civil Code does not specify what rules should be applied when persons die not as a result of the same event, and it is impossible to establish the sequence of their death. As a possible solution, the French lawmakers would be well advised to adopt the approach enshrined in Item 2 of Article 1114 of the Russian Civil Code: where the persons are established to have died on the same day, they should be deemed commorients (provided that the sequence of their death may not be established).

The legal nature of the rights of representing heirs

As noted, Russian and French law proceed from the principle that commorients may not inherit from one another. The question then arises: why should the representation of commorients be allowed?

To answer this question, it is necessary to understand whether the rights of the represented pass to the representing heirs or whether the representing heirs inherit in their own right.

Having analyzed the provisions of the Russian Civil Code, it may be concluded that the rights of persons inheriting by right of representation are independent of the rights of those represented: persons who inherit by right of representation are not liable for the debts of the heir they represent; they are not entitled to a statutory share of the inheritance and finally, a descendant of a commorient is entitled to inherit by right of representation, although, as a general rule, commorients may not inherit from one another.

Both modern⁹ and pre-revolutionary Russian legal scholars¹⁰ have suggested that representing heirs inherit in their own right, thus exercising their own legal rights and not the rights of the represented, so the identity of the deceased heir should not affect his descendants. In this regard, the approach enshrined in Russian law which prohibits the representation of an unworthy heir (Item 3 of Article 1146 of the Russian Civil Code) and of an heir-at-law deprived of the inheritance by the testator (Item 2 of Article 1146 of the Russian Civil Code) is doubtful. In Russian legal literature, attention has repeatedly been drawn to the injustice of these provisions of the Russian Civil Code¹¹. The rules of Item 2 and Item 3 of Article 1146 of the Russian Civil Code provide that children (who are often minors) are held responsible for the sins of their parents. As noted previously, the French Civil Code has adopted a different, more humane approach, whereupon the identity of an unworthy heir does not affect his descendants. This approach should be adopted in the Russian Civil Code.

Let us now turn to the French Civil Code. As noted, under the French Civil Code, representation is regarded as a legal fiction. Therefore, unlike Russian law, French law assumes that by virtue of a legal fiction the rights of the represented heir *pass* to his representing descendants, i.e. the representing heirs exercise the rights of the represented. However, a number of provisions laid down in the French Civil Code are not consistent with this understanding of

⁷ See, for example, Barshchevsky M.Y. *Nasledstvennoe pravo: Uchebnoe posobie*. M., 1995. P. 10.

⁸ See, for example, Duvernois N.L. *Chteniia po grazhdanskomu pravu*. Tom I: Vvedenie i chast obshchaia: Vypusk 1; Vypusk 2: Litsa. Veshchi; Vypusk 3: Izmenenie iuridicheskikh otnoshenii. Uchenie o iuridicheskoi sdelke. SPb.: Tipografiia M. M. Stasiulevicha, 1902 – 1905. P. 316.

⁹ See, for example, Shilokhvost O.Y. *Nasledovanie po zakonu v rossiiskom grazhdanskom prave*. M.: Norma, 2018. P. 85; *Grazhdanskoe parvo: uchebnik / pod red. A. P. Sergeeva*. M.: Prospekt, 2016. P. 671 (author of chapter 68 is Tereshchenko T A)

¹⁰ See, for example, Sinaiskii V.I. *Russkoe grazhdanskoe pravo*. Vypusk II: Obiazatelstvennoe, semeinoe i nasledstvennoe parvo. Kiev. Tipo-Litografiia "Progress". 1918. P. 253-254.

¹¹ See, for example, Shilokhvost O.Y. *Nasledovanie po zakonu v rossiiskom grazhdanskom prave*. M.: Norma, 2018. P. 128; Haskelberg B.L., Rovnyi V.V. *Osnovaniia vymorochnosti nasledstva // Nasledstvennoe parvo*. 2011. N 4. (Spravochno-pravoiaia sistema KonsultantPlus); Rabets A. M. *Problemy realizatsii prava nesovershennoletnego na dostoinuiu zhizn po deistvuiushchemu nasledstvennomu zakonodatelstvu RF // Nasledstvennoe pravo*. 2019. N 1. P.16-19.

representation as a fiction. Thus, the French Civil Code recognizes the representation of an unworthy heir as well as of a renouncing heir. This may only be possible when the representing heirs are called upon to inherit in their own right, i.e. when they exercise their own rights and not those of the represented. It is no coincidence that French legal scholars note that the representing heirs are called upon to inherit from the deceased person they represent within the order of the latter but under their own name and with their capacity to inherit¹².

To reconcile the existing contradiction, the term “fiction” should be excluded from Article 751 of the French Civil Code, as many distinguished French legal scholars have concluded. For instance, Berry-Bertin believes that admitting descendants of an unworthy or a renouncing heir to inherit by right of representation should lead to a discontinuing consideration of representation as a fiction¹³. Grimaldi is of the view that the term “representation” may be waived by specifying in Article 753 of the French Civil Code that among the descending heirs the estate should be divided per generation (*par souche*) and among the heirs of the same generation the estate should be divided per capita (*par tête*)¹⁴.

Conclusion

As a result of the comparative analysis of the concept of inheritance by right of representation in Russia and France, the following conclusions and suggestions for further consideration are made.

1. Persons called upon to inherit by right of representation in Russia and France inherit in their own right, exercising their own rights and not the rights of the represented heir.

2. Some provisions of the French Civil Code may be adopted by Russian lawmakers.

2.1. The provision of Item 3 of Article 1146 of the Russian Civil Code should be revised to allow the descendants of an unworthy heir to inherit by right of representation.

2.2. Article 1158 of the Russian Civil Code should be amended to give an heir the right to disclaim an inheritance in favor of potential heirs by right of representation, i.e. regardless of whether they have been called upon to inherit.

2.3. The wording of Item 2 of Article 1114 of the Russian Civil Code should be amended to read: “Persons who die on the same day shall be deemed to have died at the same time for the purposes of hereditary succession and shall not inherit from one another, if the sequence of death of such persons may not be established. In so doing, the heirs of each of them shall be called upon to inherit”.

3. Some provisions of the French Civil Code need to be clarified.

3.1. The word “fiction” should be excluded from the definition of representation in Article 751 of the French Civil Code.

3.2. Article 725-1 of the French Civil Code should be complemented by rules concerning the case when persons, one of whom may inherit from the other, die within a short period of time but not as a result of the same event and the sequence of their death may not be established.

In this instance French lawmakers are suggested to adopt the following approach enshrined in Item 2 of Article 1114 of the Russian Civil Code: if such persons are established to have died on the same day, they should be deemed commorients (provided that the sequence of their death may not be established).

¹² Leroyer A.-M. Droit des successions. Dalloz, 2009. P. 55

¹³ Berry-Bertin E. La représentation du renonçant: quelle représentation et quelle renonciation? (Part I) // Revue Lamy Droit civil. 2006. N 33.

¹⁴ Grimaldi M. La représentation de l'héritier renonçant // Defrénois. 2008. N 1. P. 25-35.

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