

PRIVATE LAW

Determining the Manner of the Funeral in the Romanian Civil Code: A Legal Transplant?*

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Abstract

*The Romanian Civil Code of 2009 provided *expressis verbis* for the first time the right to determine the manner of the funeral. It already appeared in the draft of the new Civil Code adopted by the Senate on 13 September 2004, but the preparatory works (if any) have not been made public. The only relevant document in circulation – prior to the bill's registration in Parliament in 2009 – contains the amendments made to the draft by the committee set up in 2006 by the Ministry of Justice and charged with revising the draft. Therefore, this study aims to highlight the origins of this provision from the Romanian Civil Code, thus contributing to its understanding and, implicitly, to the correct application of the rule. The main conclusion drawn from the analysis carried out is that the regulation is a legal import which, however, does not constitute an exact copy of the corresponding text from the Civil Code of Québec, but a transposition, the imported rule being adapted to the legislator's vision of national cultural identity and legal culture.*

Keywords: *determination of the manner of funeral, persons obliged to arrange the funeral, legal transplantation, transposition, comparative law.*

Preliminary Considerations

The determination of the manner of funeral was regulated *expressis verbis* for the first time in the draft of the new Civil Code adopted by the Senate on 13 September 2004¹. In Chapter II – *On the Respect for the human being and for the rights inherent therein* – from the title on natural persons, Article 49 (1) on the

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¹ The draft adopted by the Senate is available at <https://www.cdep.ro/proiecte/2004/500/30/7/se537.pdf>.

respect for the will of the deceased stated that “(a)ny person may determine the manner of his or her own funeral and may dispose of his or her body after death” and the following paragraph regulated the situation of the lack of an express wish of the deceased person.

As similar provisions can be found in the legislation of other countries², what interests the present study is the identification of the legal model used by the drafters of the 2009 Romanian Civil Code, since highlighting the origins of the new provision may contribute to its understanding and, implicitly, to the correct application of the rule.

The drafting of the new Civil Code went through roughly three stages: the first stage was completed on 13 September 2004 with the adoption by the Senate of the draft of the new Civil Code, a second stage culminating in the publication of the Civil Code in the Official Gazette No 511 of 24 July 2009 and a final stage of amendments and additions made to it by the implementing law³.

The only relevant document on the preparatory work on the Civil Code in circulation is the one containing the amendments to the draft (adopted by the Senate⁴) by the committee set up in 2006 by the Ministry of Justice and charged with its revision⁵, so the preparatory works of the first stage (if any) have not been made public.

From the 2004 Explanatory Memorandum⁶, it appears only that “(i)n the preparation of the draft, use was made of [...] new, modern regulations existing in other legislations, of which the most significant to be mentioned – in terms of the weight of their use as documentary material – are the French Civil Code, as amended in 2001, and the Civil Code of Québec of 1991, with subsequent amendments and additions (an improved version with common law influences of the French Code)”. These two codes, while making a significant contribution, were not the only sources used by the drafting committee.

² See, *exempli gratia*, Article 421-21 (3) of the Catalan Civil Code, Article 2 (3) of the Finnish Funeral Law No 457 of 6 June 2003, Article 2.25 (3) of the Lithuanian Civil Code, Article 1 (2) of the Hungarian Law XLIII of 1999 on Cemeteries and Burials and Article 3 of the French Law of 15 November 1887 on the Freedom of Funerals.

³ Law No 71 of 3 June 2011 implementing Law No 287/2009 on the Civil Code, published in the Official Gazette No 409 of 10 June 2011.

⁴ The document was available on the website of the Ministry of Justice at the time of publication of Law No 287 of 17 July 2009 on the Civil Code. See <https://www.avocatnet.ro/articles/download/0713952180d032006521100023444689>. This document states that “Article 50²⁷ takes over the provisions of Article 49 of the Draft Civil Code adopted by the Senate” and then refers to Article 42 of the Civil Code of the Province of Québec and Article 62 of the Civil Code of Carol II (republished in Official Gazette No 206 of 6 September 1940), the latter, however, concerning the protection of personality after death, not the determination of the manner of the funeral.

⁵ Marian Nicolae, Mircea-Dan Bob, *La refonte du Code civil roumain et le Code civil du Québec*, La Revue du Barreau canadien, Vol. 88, 2011, p. 452.

⁶ See <https://www.cdep.ro/proiecte/2004/500/30/7/em537.pdf>, p. 1-2.

Two members of the first commission, Prof. Marian Nicolae (Bucharest) and Prof. Mircea-Dan Bob (Cluj-Napoca), provide us with a clarification of the source. In a study dedicated to the recodification of Romanian civil law, they recall that the texts on *personality rights*⁷ were inspired by the Code of Québec⁸.

Determining the Manner of Funeral in the Civil Code of Québec

The source of inspiration is found in Book One: *Persons*, Title two: *Certain Personality Rights*, Chapter IV: *Respect of the Body after Death*, Article 42 of which provides that “A person of full age *may determine the nature of his funeral and the disposal of his body* [our emphasis]; a minor may also do so with the written consent of the person having parental authority or his tutor. In the absence of wishes expressed by the deceased, the wishes of the heirs or successors prevail. In both cases, the heirs or successors are bound to act; the expenses are charged to the succession.”⁹ This is the text that the drafting committee must have had in mind and on the basis of which the corresponding provision in the Romanian Civil Code was drafted.

However, it would be a mistake to think that the provision in question appeared in Québec legislation with the 1991 Civil Code (CCQ). The determination of the nature of funeral was originally regulated when the previous code – the Civil Code of Lower Canada (1866) – was amended and supplemented by an Act of 1971¹⁰, when the first title of the first book of the code was comprehensively revised and new provisions under the heading 'Of the Enjoyment of Civil Rights' were introduced in place of provisions which had become obsolete.

The 1971 Act begins by declaring that *every human being possesses juridical personality* and has the full enjoyment of civil rights, except as otherwise expressly provided by law (Article 18 of the Civil Code of Lower Canada). With regard to the recognition of the legal personality of any individual, Justice Minister Jérôme Choquette stressed during the legislative debates the importance of recognising

⁷ For the qualification of the notion, see Călina Jugastru, *Drepturile personalității – promisiuni onorate, perspective neconvenționale*, Revista română de drept privat No 3-4/2021, p. 121-128.

⁸ Marian Nicolae, Mircea Dan Bob, *La recodification du droit civil roumain en quête de modele*, Studia Universitatis Babes Bolyai – Iurisprudentia No 2/2008, p. 120. See also *supra* note 5.

⁹ In French: „Le majeur peut régler ses funérailles [the nature of his funeral – our note] et le mode de disposition de son corps [the disposal of his body – our note] le mineur le peut également avec le consentement écrit du titulaire de l'autorité parentale ou de son tuteur. À défaut de volontés exprimées par le défunt, on s'en remet à la volonté des héritiers ou des successibles. Dans l'un et l'autre cas, les héritiers ou les successibles sont tenus d'agir; les frais sont à la charge de la succession”. According to Article 7 (3) of the Charter of the French Language, the French and English versions of the regulations and other similar acts are equally authoritative.

¹⁰ See *An Act to again amend the Civil Code and to amend the Act to abolish civil death* [Sanctioned on 1 December 1971], Statutes of the Province of Québec, 1971, chapter 84: https://www.bibliotheque.assnat.qc.ca/DepotNumerique_v2/AffichageFichier.aspx?id=103149.

the juridical personality of any individual, namely that any person, whether a citizen or a foreigner, has “rights inherent to the legal personality”¹¹.

On the principle of “legal personality that belongs to every individual” (and also on the principle that follows from this, namely the inviolability of the human person) the Québec legislator based the right to the alienation between living persons of human organs (art. 20 of the Civil Code of Lower Canada), which is regulated by the same law¹². In application of this principle, the law further provided that “A person of full age may, in writing, determine the nature of his funeral and the disposal of his remains. [...] In the absence of instructions by the deceased, usage is followed”¹³ (Article 21 of the Civil Code of Lower Canada). This is the original regulation in the legislation of the province of Québec concerning the determination of the manner of the funeral, which was later incorporated with amendments in Article 42 of the 1991 Civil Code.

During the legislative debates in 1991, Justice Minister Gil Rémillard¹⁴ stated that “(a) *person’s right to dignity continues even after death* [our emphasis]. His or her body must be the object of special care. The laws relating to cemeteries, burials and exhumations, as well as those relating to the investigation of causes of death, lay down a number of rules to ensure *respect for the body after death* [our emphasis]. But the fourth chapter of the title on *personality rights* [our emphasis], unlike the Civil Code of Lower Canada, lays down the main rules. They concern *funerals, body or organ donation, organ harvesting, autopsy, embalming, burial, cremation and exhumation* [our emphasis].”¹⁵

Of all these rules provided for in the Civil Code of Québec, only that concerning the determination of the funeral and the freedom to dispose of the body after

¹¹ „Finalement, M. le Président, le projet de loi apporte certaines dispositions au point de vue de la reconnaissance de la personnalité juridique de tout individu. Je crois qu'il s'agit là d'un principe important et qu'il fallait énoncer ce principe au code civil, puisqu'il ne s'y trouvait pas, c'est-à-dire que toute personne, quelle qu'elle soit, quel que soit son état, comporte *les droits inhérents à la personnalité juridique* [our emphasis].” – in *Projet de loi no 89 - Loi modifiant de nouveau le code civil et modifiant la Loi abolissant la mort civile. Deuxième lecture*, Québec. Assemblée nationale, „Journal des débats”. Le mardi 30 novembre 1971, Vol. 11 – N° 96, p. 4546, col. 1, https://www.bibliotheque.assnat.qc.ca/DepotNumerique_v2/AffichageFichier.aspx?idf=74646.

¹² *Ibidem*.

¹³ In French: „Le majeur peut par écrit régler les conditions de ses funérailles [the nature of his funeral – our note] et le mode de disposition de son cadavre [the disposal of his remains – our note]. [...] À défaut de directives du défunt, on s'en remet à l'usage”.

¹⁴ *Étude détaillée du projet de loi n° 125 - Code civil du Québec*, Assemblée nationale du Québec, „Journal des débats de la Sous-commission des institutions”, Le jeudi 29 août 1991, Vol. 31 N° 5, p. SCI-113, https://www.assnat.qc.ca/Media/Process.aspx?MediaId=ANQ.Vigie.Bll.DocumentGenerique_66395&process=Original&token=ZyMoxNwUn8ikQ+TRKYwPCjWrKwg+vIv9rjj7p3xLGTZDmLVSmJLoqe/vG7/YWzz.

¹⁵ See Articles 43 (body donation for medical or scientific purposes), 46 și 47 (autopsy), 48 (embalming, burial and cremation) și 49 (disinterment) CCQ.

death has been taken over in the 2004 Draft Romanian Civil Code, without including provisions on the donation of the body for medical or scientific purposes, autopsy, embalming, burial, cremation and exhumation.

The use of cadavers for teaching and scientific purposes is regulated by Article 23 of Law No 104 of 27 March 2003 on the handling of human cadavers and the removal of organs and tissues from cadavers for transplantation¹⁶. Rules on the performance of autopsies can be found both in Article 10 of Law No 104 of 27 March 2003 (pathological autopsy) and in Article 185 of the Code of Criminal Procedure¹⁷ (forensic autopsy), while burial, cremation and exhumation are regulated mainly under law No 102 of 8 July 2014 on cemeteries, human crematoria and funeral services¹⁸.

What is important to note, however, is that the regulation of all these aspects contributes to the protection of the dignity of the person after death, so that the determination of the type of funeral and especially the possibility of disposing of the body after death must be analysed in a broader context, the framework of the present study being limited to highlighting the origins of Article 80 of the Romanian Civil Code.

During the same legislative debate, Justice Minister Gil Rémillard also stated that “the first two titles of the book on Persons deal with principles governing the enjoyment and exercise of the civil rights of individuals and *certain fundamental rights linked to their personality* [our emphasis]”¹⁹.

Basically, Gil Rémillard reiterated his ministry's comments on the draft Civil Code²⁰, in which it is also stated that Article 42 *essentially* repeats the content of Article 21 of the Civil Code of Lower Canada and Article 18 proposed by the Civil Code Revision Office²¹, but does not retain the written formalism and *adds* that,

¹⁶ Republished in the Official Gazette No 213 of 25 March 2014.

¹⁷ Law No 135 of 1 July 2010 on the Code of Criminal Procedure, published in the Official Gazette No 486 of 15 July 2010.

¹⁸ Published in Official Gazette No 520 of 11 July 2014.

¹⁹ „(L)es deux premiers titres du livre Des personnes traitaient de principes régissant la jouissance et l'exercice des droits civils des personnes et de certains droits fondamentaux liés à leur personnalité” - *Étude détaillée du projet de loi n° 125 - Code civil du Québec*, Assemblée nationale du Québec, „Journal des débats de la Sous-commission des institutions”, Le jeudi 29 août 1991, Vol. 31 N° 5, p. SCI-115.

²⁰ See Gouvernement du Québec, Ministère de la Justice, *Projet de loi 125 Code civil du Québec. Commentaires détaillés sur les dispositions du projet. Disposition préliminaire et Livre I: Des personnes*, août 1991, p. 67-69, available at https://www.bibliotheque.assnat.qc.ca/DepotNumerique_v2/AffichageFichier.aspx?idf=187317.

²¹ „A person of major age may decide in writing as to the nature of his funeral and the disposal of his remains [...]” - Civil Code Revision Office, *Report on the Civil Code*, Volume I: Draft Civil Code, Québec: Editeur officiel du Québec, 1977, p. 7. See also Civil Code Revision Office, *Report on the Quebec Civil Code*, Volume II: Commentaires, Tome 1: Books 1 to 4, Québec: Editeur officiel du Québec, 1977, p. 27. At this stage the *determination of funerals* was included in Chapter I: *General Provisions* of Title Two: *Human Persons*.

in cases where the deceased has not expressed a will, the will of the heirs or successors shall be used and the expenses shall be borne by the estate. The absence of formalism made it possible to recognize the will expressed verbally by the deceased and the introduction of the rule on expenses was aimed at avoiding certain conflicts between the heirs or between the person paying the expenses and the heirs.

Also, since in Québec it was found that it *regularly* happens that the heirs and successors are not interested in disposing of the body of the deceased, to remedy this situation Article 42 provided for the *obligation* of the heirs and successors *to dispose of the body of the deceased* both in the event that the deceased expressed his will and in the opposite case²².

Determining the Manner of Funeral in the Romanian Civil Code

In the second stage of drafting, which culminated in the publication of the Civil Code in the Official Gazette No 511 of 24 July 2009, the committee set up in 2006 by the Ministry of Justice and charged with revising the 2004 draft, in view of the need for precision and clarity of the provisions²³, reworded the text in part to the effect that, in the event that no one takes care of the person's funeral, it will not be decided by the "city hall", but the "mayor's order" will be followed²⁴. Thus, at the time of its publication, Article 80 (2) of the Civil Code provided that "(i)n the absence of the express wish of the deceased, it shall be respected in order the will of the spouse²⁵, parents, descendants, collateral relatives up to and including the fourth degree, universal or universally entitled legatees or the order of the mayor of the commune, town, municipality or district of Bucharest in whose territorial area the death occurred".

Subsequently, by Article 20, point 10 of *Law No 71 of 3 June 2011 on the implementation of Law No 287/2009 on the Civil Code*, Article 80 (2) underwent a formal amendment and was completed in the sense that "absence of the express wish of the deceased" became "lack of express choice of the deceased" and at the

²² Gouvernement du Québec, Ministère de la Justice, *Projet de loi 125 Code civil du Québec. Commentaires détaillés sur les dispositions du projet. Disposition préliminaire et Livre I: Des personnes*, août 1991, p. 69.

²³ See Article 8 (4) of *Law No 24 of 27 March 2000* on the rules of legislative technique for the drafting of normative acts, republished in the Official Gazette No 260 of 21 April 2010.

²⁴ A much more rigorous legal solution and fully in line with the provisions of Article 62 (1) and Article 77 of *Law No 215 of 23 April 2001* on local public administration [now repealed], according to which *the mayor* represents the administrative-territorial unit, not *the town hall*, which is a mere "functional structure". For the current regulation, see Article 5 (hh) and Article 154 (6) of the Administrative Code (Government Emergency Ordinance No. 57 of 3 July 2019), published in the Official Gazette No 555 of 5 July 2019.

²⁵ On the notion of *spouse* in the context of funerals, see Silviu-Dorin Șchiopu, *Family Relations in the Light of Romanian Funeral Laws*, *Law Review* Vol. XI, Issue 2/2021, p. 71-74.

end of the paragraph was added the provision that "In all cases the confessional affiliation of the deceased shall be taken into account".

Comparing Article 80 of our current Code with the provisions of Article 42 of the Civil Code of Québec, we see that, although the wording differs, in terms of content the first paragraph is an import, all the more so since, as we have mentioned, the texts on the rights of personality were inspired by the Code of Québec²⁶.

With regard to the second paragraph, the drafting committee did not take over the legislative solution from Québec according to which, in the absence of wishes expressed by the deceased, recourse is to be had to the will of the heirs or successors, but established an order of priority for the persons who can replace the will of the deceased, with matrimonial ties taking precedence over blood ties, which in turn take precedence over the simple capacity of universal legatee or legatee by universal title²⁷. Nor does the wording "it shall be respected in order" imply any obligation such as that laid down in the Civil Code of Québec to the effect that the persons who can substitute for the will of the deceased are required to do so²⁸, i.e. that they would be under an obligation to dispose of the body of the deceased.

The drafters of our code, however, have established an obligation on anyone in charge of funerals to take into account the *confessional affiliation* of the deceased, an obligation similar to that which existed in the old Civil Code of Lower Canada after the 1971 revision and according to which, in the absence of instructions from the deceased, recourse was to be had to customs (usage) – a vague but flexible rule²⁹.

The majority of the Romanian population is Orthodox and the dominant church – the Romanian Orthodox Church – sanctions the choice of cremation by the deceased, as well as when cremation is done against the will or wishes of the deceased, with the refusal of any religious assistance, both at the funeral and at the memorial services for the dead after the funeral³⁰. Consequently, the choice of

²⁶ See *supra* note 8.

²⁷ Cristinel Murzea, *Ius Sepulcri – între tradiție și modernitate*, Revista de științe juridice Vol. 21, No 1/2012, p. 84, n. 5.

²⁸ This was achieved by Article 17 of *Law No 102 of 8 July 2014 on cemeteries, human crematoria and funeral services*, but *the list of persons whose wishes must be respected* in the absence of an express choice by the deceased provided for in the Civil Code is not identical to *the list of persons who are obliged to arrange the funeral*, i.e. to deal with it in terms of the actual organisation of the funeral, a matter which will be the subject of further research.

²⁹ See Albert Mayrand, *Problèmes de droit relatifs aux funérailles*, in Adrian Popovici (ed.), *Problèmes de droit contemporain*. Mélanges Louis Baudouin, Montréal: Presses de l'Université de Montréal, 1974, p. 134.

³⁰ *Decision No 4529 of 5 July 2012* of the Holy Synod of the Romanian Orthodox Church on the un-Christian practice of cremating the dead, which maintains in force a Decision of the Holy Synod of 15 June 1928, reconfirmed by the Decision of the Holy Synod of 20 February 1933, document available at

cremation by the person in charge of the funeral when the deceased was Orthodox would have the consequence that the funeral would be a secular one, not a religious one, which would be contrary to tradition.

Conclusions

It follows from the above that Article 80 of the Romanian Civil Code does not constitute a servile copy of the provisions of Article 49 of the Civil Code of Québec.

With regard to the first paragraph, it can be said that we are in the presence of a natural legal import reflecting the current state of Romanian society which admits, in principle, autonomy of will in funeral matters. In practice, our legislator has done no more than enshrine a custom in law, elevating it to the rank of written law, with the Civil Code of Quebec acting as a catalyst.

The legal transplant was not done *tale quale* as the second paragraph is obviously the expression of our *cultural identity*³¹, the rule being most likely intended to prevent the cremation of the Orthodox deceased in the absence of an express option of the latter. We believe that the primacy given to matrimonial and blood ties is also an expression of the national legal culture, at least in relation to the legislation of the province of Quebec.

https://patriarhia.ro/images/pdf/HotarariSinodale/2012/4529_Comunicare_practica_incinerarii.pdf. On the other hand, the archbishop or bishop of the respective diocese has the authority to grant a dispensation or not so that a religious service can be held, following a detailed study of each individual case.

³¹ On the concept of national (legal) identity, see Manuel Guțan, *Le droit civil roumain entre recodification „nationale” et uniformisation européenne*, Studia Universitatis Babes Bolyai – Iurisprudentia No 2/2008, p. 179-180.