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THE SUCCESSFUL HARMONIZATION IN EUROPE OF PROHIBITIONS OF SUCCESSIVE PACT

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FONDAZIONE DE GASPERI

Map of content

1. The Italian succession system characterized by protectionism and autarky
2. The triplicity of the prohibition: substantial rationes
3. Diachronic analysis in Roman law
4. Comparative survey and reflections
5. The Italian succession system
6. Comparison of the italian “pact of family” with the German system
7. Comparison with the French system
8. Comparison with other Regulations
9. The hoped-for reform in Italy
10. Conclusions

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The Italian succession system characterized by protectionism and autarky

- Article 458 of the Italian Civil Code clearly states the prohibition of successor agreements, which, as a first approximation, can be defined as those “contracts that attribute or deny rights to a succession not yet opened”.
- The configurability of a real succession contract appears inevitably impeded by this prohibition.

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The Italian succession system characterized by protectionism and autarky

- Since the Recommendation of 7 December 1994 n. 94/1069 and the Communication of 28 March 1998 n. 98 / C 93/02, the Community institutions have expressed the hope that the Member States, in which the prohibition de quo remains, can remove this limitation of private autonomy, considered a useless complication, contrasting with the need for a sound asset management
- The need for a hermeneutical analysis to proceed with the hoped-for reform.

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The triplicity of the prohibition: substantial rationes

- Founding
- Disposing
- Renunciationing
- It is necessary to check whether the relative rationes are still current

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Diachronic analysis in Roman law

- General non-existence of the ban
- Presence of various figures that can be placed in the "succession agreement", some of which are lawful, others instead considered in the progress of the juridical experience as "immoral" and therefore forbidden.
- From the imperial age the first "institutive" bans are met:
- *ambulatoria est enim voluntas defuncti usque ad vitae supremum exitum*

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Diachronic analysis in Roman law

- After that we meet the first «**dispositivi**» prohibitions:
- *votum captande mortis (pactum corvinum)*

- Regarding the renunciation agreements, they were considered contrary to the public order and were sanctioned with the nullity

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Diachronic analysis in Roman law

- **Il dato più significativo dell'assetto romanistico si traduce nella convivenza tra il testamento ed altri negozi volti a realizzare una trasmissione concordata del patrimonio del *de cuius***
- The most significant datum of the Romanistic law system is the coexistence between the will and other contracts aimed at carrying out an agreed transmission of the patrimony of the deceased

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Comparative survey and reflections

- The comparative investigation, and in particular the synchronic excursus related to the German and French experience, offers the interpreter fruitful tools to establish a hermeneutical parallelism with the Italian order, in order to highlight the different approach that the national legislator has shown in dealing with problems common to other legal systems.
- And indeed, the need to elaborate a reform of inheritance law that can bridge the gap, which is now all too obvious, is presented as an issue shared with other continental experiences, as in the Civil law system, which makes the comparison between the various solutions devised

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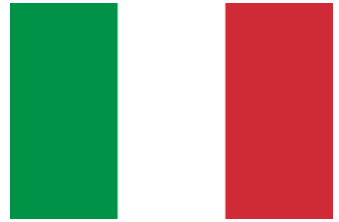
The Italian succession system



- Few reforms.
- Based on the unity of the succession and mainly oriented to the real estate property, neglecting the movable and financial assets.
- *The only reform worthy of mention is that of the Family Pact (Law 55 of 2006)*
- *Very specific legislation and in fact scarcely used - unsuitable for achieving the harmonization required by Reg. 650/2012 UE*
- *«Una occasione persa»* - "A missed opportunity"

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Comparison of the pact of Italian family with the German system

- *German Erbvertrag :*
- In our legal system the effects of the family pact are produced immediately, in the German system there is the possibility of a subordinated realization at the time of the death of the author of the deed device.
- Unlimited content (§ 2278 BGB), while in Italy it operates only on company assets.

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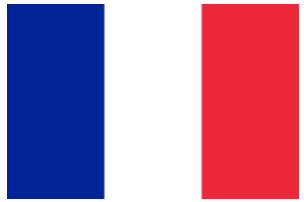

Comparison with the French system

- In spite of the persistence of a general prohibition of agreements relating to a future succession, the French legislator has re-formulated the applicative scope, expressly providing for affirming the lawfulness of certain negotiation operations, deemed useful in order to ensure the agreed transmission of the family assets.
- In particular, the choice of introducing the dogmatic category of the “liberalités” appears emblematic, with which there is a significant step forward in the process of bringing succession to the contractual one, establishing or redesigning negotiation schemes aimed at regulating succession events with greater flexibility .

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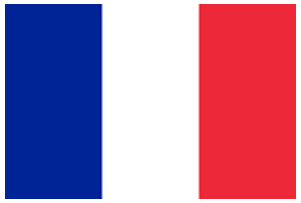

Comparison with the French system

- Reforms of December 3, 2001 and June 23, 2006 (among other things, reform Article 724 with the institute of "saisine", that is the immediate transmission of the hereditary heritage to the nearest heir without mediation or administrative, judicial, or necessity of acceptance).
- Although critical accents were not lacking in French doctrine, which, in commenting on the 2006 reform, identified a possible distortion of the autochthonous inheritance law, it cannot fail to observe that the transalpine system has sensibly harmonized with others legal systems, in which there is a regulatory framework that is more respectful of the contractual autonomy in the succession area.

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Comparison with other States

- In Spain the ban exists but with exceptions to the level of the Autonomies
- For a complete exposition we specify that the prohibition of founding successor agreements is still envisaged in France, Belgium and Luxembourg (article 1130 paragraph 2 of the civil code), as well as in the Netherlands (article 4.4, paragraph 2 of the NBW), in Portugal (art. 2028 paragraph 2 of the Civil Code), in Greece (368 cc)

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The hoped-for reform in Italy

- Evolution of the concept of "public order"
- Principle of reasonableness
- Balancing of the most deserving concrete interests
- **Article 458 of the civil code it is not an expression of mandatory constitutional principles.**
- **EU Reg. 650/2012 art. 25** which recognizes the validity and effectiveness of a succession agreement in Italy, provided it is governed by the law applicable to the settlor's succession at the time of its conclusion

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In conclusion

- The legislative intervention, on the one hand, should take on the task of outlining a legal paradigm of a valid succession agreement, which acts as a typical alternative to the will and which allows, at the same time, to prepare all the necessary precautions to remedy the inconveniences caused by the introduction of this further form of voluntary devolution; on the other hand, it should intervene on further profiles, with particular regard to the reduction action and the reserve.

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