

REGULATION 650/2012 AND MIGRATION FROM ISLAMIC COUNTRIES and.... BRAZIL...

André Dias PEREIRA

Professor of Civil Law
University of Coimbra

andrediaspereira@hotmail.com

The content of this document represents the views of the Author only and it is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains

This Project is implemented by Coordinator



UNIVERSITÀ
DEGLI STUDI
FIRENZE
DSG
DIPARTIMENTO DI
SCIENZE GIURIDICHE

Partners



ELTE LAW
FACULTY OF LAW



Centro de
Direito da
Família



Rule on jurisdiction and applicable law

The Regulation will apply to any person, of any nationality including of a non EU state, who dies resident in Europe or owns property there.

The **jurisdiction** and the **law applicable** to succession shall be that of the country where the deceased had his **habitual residence at the time of death**_(arts. 4 and 22)

...(Ex. If a Portuguese was habitually resident in Italy at the time of death, as a general rule, Italian succession law is applicable)



Law applicable to the succession

1. ... **General Rule: law of the State of habitual residence at the time of death (art. 21.1.)**
2. **Exception:** *manifestly more closely connection* of the decedent with another State.

It should not be resorted to as a subsidiary connecting factor for the determination of the habitual residence of the decedent at the time of death

3. Choice of law

- Right to organize a succession in advance **by choosing the law of his/her nationality** : - at the time of making the choice or - at the time of death
- In case of multiple nationalities: any of them
- **This choice must be expressly declared in the form of a disposition of property upon death or shall be demonstrated by the terms of it**
 - It is subject to modification or revocation

Immigrants from outside the European Union in Portugal

Total= 480.300

- **Brazil - biggest community in Portugal**
 - 1/5 foreigners is from Brazil:
 - **105.423 citizens.**
- **African countries speaking Portuguese (Angola **(18.000)**, Cabo Verde **(34.500)**, Guiné-Bissau **(16.000)** (with a relevant Muslim community)**
- **Growing:**
 - **Nepal**
 - **Bangladesh**
- **Ukraine – 29.000**



GOVERNING INHERITANCE STATUTES
AFTER THE ENTRY INTO FORCE
OF EU SUCCESSION REGULATION

GoInEU



This Project is funded
by the European Union's
Justice Programme 2014-2020

Immigrants from the European Union

United Kingdom – **26.500**

“inheritance law: “different rules...”

- forced heirs in Portugal: spouse, descendants, ascendants

France - **19.771**

Italy - **18.862**

No relevant discussions of “ordre public”

No significant differences... Italy – very similar law



GOVERNING INHERITANCE STATUTES
AFTER THE ENTRY INTO FORCE
OF EU SUCCESSION REGULATION



This Project is funded
by the European Union's
Justice Programme 2014-2020

Immigrants from Muslim countries

A Bengali residing in Portugal

Rubel married Farhan in 2009.

They moved to Portugal in 2014.

They had 2 daughters: Anuva and Jenifer

Rubel and Maria (a German woman) had a love affair (adultery relationship that lasted 4 years). From that relationship, a boy – **Ronaldo** – was born outside the wedlock.

Rubel died on 2nd September and left €200 million

Rubel had a will declaring the application of Bangladesh law, in his case, Sharia law.

Sharia law does not consider heirs, children born outside the wedlock.

Ronaldo claims he has the right to be considered *heir*... Quid juris?



GOVERNING INHERITANCE STATUTES
AFTER THE ENTRY INTO FORCE
OF EU SUCCESSION REGULATION



This Project is funded
by the European Union's
Justice Programme 2014-2020

Sharia law and Portuguese ordre public

Discrimination of children born outside the marriage...

Can we accept?

No – Portuguese Constitution!!!

Art. 36 (4)

4. Children born outside wedlock may not be the object of any discrimination for that reason, and neither the law, nor official departments or services may employ discriminatory terms in relation to filiation.

Ronaldo shall be heir, together with **Farhan, Anuva and Jenifer**.
And Maria? NO!

Farhan accepted in a will the law of residence... Portugal

- Portuguese law applies...
- Apart from his legal part, the will offered the disposable quota (1/3 of the assets = of 60 million Euro) to Ronaldo, his beloved male son....
- Can the wife and the daughters claim the will is against ordre public... Because he is favouring the male son?
 - In my opinion... within the freedom of will/ testament....

Brazil and “poliamor”

Marriage + De facto union

2 widows?

Protection of the vulnerable?

Polygamy?

... the (intense) debate in Brazil

... Would Portuguese law accept such solutions?



GOVERNING INHERITANCE STATUTES
AFTER THE ENTRY INTO FORCE
OF EU SUCCESSION REGULATION



This Project is funded
by the European Union's
Justice Programme 2014-2020

De facto union = right as heir?

- **Wanderlei**, Brazilian man, resident in Portugal, lives with **Ewa**, a Polish woman. during 3 years. Together they have one daughter, Rose
- He drafted a will **opting for Brazilian law**.
- **Has the companion the right to inheritance?**
- **Romário** and the (formal) wife **Vera**, Wanderlei's son claims that violates Brazilian and Portuguese law.
- May 2017, no julgamento do Recurso Extraordinário N° 878.694, o Supremo Tribunal Federal (STF)
- Article 1.790 do Código Civil, distinguishes Spouse and Companion...
 - **Case Law** – STF – declared unconstitutional the difference between de facto union and marriage as provided in 2002 Brazilian Civil Code.
 - <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=8493791>



GOVERNING INHERITANCE STATUTES
AFTER THE ENTRY INTO FORCE
OF EU SUCCESSION REGULATION



This Project is funded
by the European Union's
Justice Programme 2014-2020

Sources of law?

- Law
- Case law
- Supreme Federal Court
 - Declaration of unconstitutionality...
 - *Applicable Law in Portugal??*

Companion as heir? Is it acceptable?

Shall a Portuguese Notary/ Court accept this Law?

...Yes.

Equal inheritance rights to companion – violates ordre public?
NO!!!

PORTUGAL already protects de facto union and even admits some post-mortem effects:

- right to alimony and right of use of the family home/ right to impose a rent contract to the landlord...

However, in Portugal, the Civil Code does not allow inheritance *stricto sensu*..



GOVERNING INHERITANCE STATUTES
AFTER THE ENTRY INTO FORCE
OF EU SUCCESSION REGULATION



This Project is funded
by the European Union's
Justice Programme 2014-2020

1 marriage + 1 de facto union...?

...Marcello married with Elisa in Brazil since 2009,

but living with Sofia (italian) **in Lisbon**, since December 2017;

Sofia is pregnant...

Marcello died in Portugal on 7 September 2019.

He had written a will declaring that Brazilian law should apply
+ declaring that the car and the bank account he owned in Portugal should be
attributed to Sofia, **his companion**.

Marriage + De facto union?!

Shall Portuguese law accept a Will in favour of a person with whom the
deceased was committing adultery?

Family and Succession law in Brazil

- **Marriage/ Spouse – is heir**
 - Separation for more than 2 years – the spouse is no longer heir
 - They separated in December 2017 = thus the Spouse is still heir
 - In Portugal the spouse is always heir (even after a de facto separation)
- De facto union/ Companion **since December 2017** – is heir = In Brazil – does not need a specific time; the existence of children is important
 - However, de facto union under Portuguese law... Demands 2 years of cohabitation...



Spouse and companion = competing heirs?

- Competing heirs?!?! – some case law?
- Some decisions of higher courts accepted a splitting of a pension... (Labour courts)
- **Main Literature and case law – DO NOT ACCEPT competing marriage + de facto union**
 - <https://www.conjur.com.br/2018-mai-30/regina-beatriz-pensao-amantes-jurisprudencia-stf-stj>
- Should a Portuguese Notary/ Court accept such solution?
Or is it against ordre public?

“*Putative*” de facto union??

- **Civil Law – inheritance law** - 10^a Câmara Cível do Tribunal de Justiça do Rio de Janeiro (TJ-RJ), uphold the decision of 2^a Vara de Direito de Família de Niterói.
- **“Lover” has the right to inheritance?**
 - The widow was condemned to divide/ to split the assets of the husband, who had won the Lottery (12 million reais = 3 million Euro)
 - The lover did not know the deceased was married.... !!!! (public registry) = *bona fides companionship*?!

Draft-Law in Brazilian Congress

- **The Statute of the Families in the 21st Century**
 - *O Projeto de Lei nº 3.369/2015- “Estatuto das Famílias do Século XXI” autoria do Deputado Orlando Silva e relatado pelo Deputado Tulio Gadelha.*
 - Recognition as Family of any relationship between 2 or more people...
 - Polygamy?
 - Incest?
- Debate in Brazil...



GOVERNING INHERITANCE STATUTES
AFTER THE ENTRY INTO FORCE
OF EU SUCCESSION REGULATION



This Project is funded
by the European Union's
Justice Programme 2014-2020

Portuguese Law

- Companion (de facto union) – is not heir
- Donations and testaments in favour of a person with whom the de cujus committed adultery **are void**.... Art. 2196 Civil Code
- Protection of the FAMILY HOME
 - RENTED HOUSE.... RIGHT TO A NEW CONTRACT –
 - Right of use and habitation during 5 years – if ownership of the de cujus

- **No benefits in case of de facto union,**
- **if**
 - **The companion is married**
 - (exception, legal separation \neq de facto separation)

Ordre public?

- Polygamy?
- Bigamy
 - Is a felony – Criminal Code – Art. 247
 - *Prison up to 2 years – marrying another person, being married*

The case... The facts... Emotions... fairness

- **However...**

- Protection of vulnerable persons?
 - Fairness? Equity....
-
- This companion took care of the deceased during severe oncological illness that lead him to death...
 - If the will in favour of the companion does not exceed the free disposable “quota”?!...
 - The house and the farm in Brazil corresponds to more than 2/3 of the assets...



If she were just a friend...

- if the companion (SOFIA, the Italian woman) had no cohabitation of bed, table and roof – she would be entitled to receive ...!!!
- Why “discriminate” this woman...?
- Free development of personality;
- the right to build a family?
- Are we *morally* blaming her for living with a man still married in Brazil?

Questions?...DOUBTS...

- Bigamy...
 - Brazilian law... (jurisprudence)...
 - Concrete case... Protection of vulnerable persons...
 - “Ordre public”???

≠

- **Discrimination of children born out of the wedlock...**
- **“Ordre public” – INDEED!**

Coimbra - Portugal



• U •

FDUC FACULDADE DE DIREITO
UNIVERSIDADE DE COIMBRA



GOVERNING INHERITANCE STATUTES
AFTER THE ENTRY INTO FORCE
OF EU SUCCESSION REGULATION

andrediaspereira@hotmail.com

André Dias PEREIRA



This Project is funded
by the European Union's
Justice Programme 2014-2020