THE ECONOMIC CRISIS AND ITS CHECKMATE TO OUR TRADITIONAL INHERITANCE SYSTEM: SHOULD WE NOT RESTART THE GAME?

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Abstract

This paper aims to criticize the outdated Spanish regulation that gives heirs unlimited responsibility for the debts of the deceased in case of inheritance acceptance. Only through the benefit of inventory, which has some difficult requirements and limited time, can the heir limit his liability up to the value of the estate. The economic crisis has increased the number of inheritances with unaffordable debts and, due to that, the number of inheritance repudiations has increased fourfold. But there is another problem: sometimes it is difficult to get to know the existence of debts, and our regulation does not provide any solution for this situation. That is why we consider it is time to promote a new regulation.

Keywords: economic crisis, effects, socioeconomic reality, succession law, reform.

Introduction

The financial crisis sweeping the world, and especially the southern European countries, has had a devastating effect on the socio-economic reality. In Spain, we have undertaken a long and hard struggle against recession, making our economy and society stagger before the astonished eyes of our European partners. The decline was not easy. It was long and difficult, and reached the lowest depths imaginable.

It is true that the macroeconomic rates have begun to give small droplets of optimism, but if you look back it is still easy to feel thirsty, the immediate past is really bleak. Everything that the economic recession has already destroyed seems difficult to restore. And what is worse, it has become difficult to continue with some of our archaic legal institutions, which do not go well with the current times. That is why the main objective of this communication is to show the need to renew our regulatory framework in many sectors, and especially where inheritance is concerned. This demand for change, actually responding to a social demand, is the basis of this study.

1. Impact of the economic crisis in Spain

As mentioned above, the impact of the financial crisis in Spain has been catastrophic. The statistics say so clearly. And the worst part is that this crisis has come to round to a kind of freefall chain reaction, as all economic sectors were affected. The financial crisis in Spain is not comparable to that suffered by other countries in the eurozone, as in our case, another economic condition has been brewing for some years: the housing bubble. When the crisis erupted, the economy contracted in a calamitous way.

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The effects of this combination of endemic problems were quickly seen, and those who suffered it most were the average citizen and small businesses. Thus we started to see mortgage defaults, closure of small businesses, and strong job losses. In recent years we have had to witness a shocking number of foreclosures. Reading the news was a real nightmare, as it was always the same: more families left without a roof over their heads. In fact, since the crisis began, in the 2007-2015 period[2], a whopping 672,624 foreclosures have been carried out. This gives us the sad average of 74,736 foreclosures a year, or 205 a day. To make things worse, and as the popular saying goes, it never rains but it pours, so the bad economic situation of some people led to a bad economic situation for other people. This malicious spiral led, as we say, to the viral spread of negative effects in all sectors of the economy.

These astronomical numbers led the Spanish legislator to propose many reforms in all sectors: labor, financial, legal, economic, etc. The Law 1/2013 of 14 May on measures to strengthen protection for mortgage holders, debt restructuring and social rent requires special mention. However, despite the timid improvement that could be seen with these reforms, the fact is that the Spanish economy is still deeply affected.

In the area of successions, which is what interests us here, the economic crisis also had a big impact. During the period 2007-2015, the number of repudiations of inheritances went from 11,047 in the year 2007 to 37,811 in 2015[3]. That is, they increased by 242%. This strong increase worried not only the legal field[4], but also the press[5], which continues to publish news about this unstoppable trend. People who write on this issue are clear: the cause of this increase in the repudiation of inheritance is the excessive presence of inherited debts. Not surprisingly, we can see this cause-consequence in the data about foreclosures, which are the direct cause of many of the repudiations that occur and to which we have referred.

2. The traditional continental system of succession

To understand the title of this communication, we should briefly explain how succession is regulated in the Spanish Civil Code[6]. The first point to note is that, unlike in common law systems –where the inheritance does not include debts, because the death of a person is considered to be the ideal timing for proceeding to pay debts- our system is traditionally Roman, so the inheritance includes all assets, rights and obligations of a person which are not extinguished by his death (Article 659 Civil Code). This implies, therefore, that the heirs acquire the estate of the deceased in its entirety, including all debts, and that they are going to be personally liable for those debts.

Another important issue to note is that, contrary to what happens in the Germanic systems -in which the heir acquires that status automatically at the moment of the deceased's death, with the option to repudiate-, our legal system is also traditionally Roman in this point. That is, a positive or negative act by the one who is called for the inheritances is needed, and if he does not do anything, he will not become an heir. This exigency of action gives the heir a double power: he can either accept the inheritance or repudiate it. Both acceptance and repudiation are characterized as being unilateral acts, not personal, indivisible, unconditional, irrevocable and not subject to term. However, although the repudiation always has to be expressed, acceptance may be expressed or tacit.

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[2] Official statistics can be found here: http://www.poderjudicial.es/portal/site/cgpj/menuitem.65d2c4456b6ddb628e635fc1dc432ea0/?vgnextoid=311600fe2aa03410VgnVCM1000006f48ac0aRCRD&vgnextchannel=a64e3da6cbe0a210VgnVCM100000cb34e20aRCRD&vgnextfmt=default

[3] http://www.notariado.org/liferay/web/cien/estadisticas-al-completo

[4] http://www.notariado.org/liferay/c/document_library/get_file?uuid=e3058c83-cab7-4302-ada4-85b17b1b915b&groupId=10218

[5] http://www.lavozdeg alicia.es/noticia/economia/2016/02/03/renuncia-herencias-bate-record-galicia-pese-mejora-economica/0003_201602G3P31991.htm;http://www.andaluciaendatos.es/las-renuncias-a-herencias-se-cuadriplican-en-andalucia-durante-la-crisis/;http://www.lavozdegalicia.es/noticia/galicia/2015/04/06/renuncia-herencias-multiplico-cuatro-inicio-crisis/0003_201504G6P4994.htm;http://www.larazon.es/economia/cuando-una-herencia-es-una-ruina-GI6921019#.Ttt1nk7PsSdjq3L

[6] We must clarify that the Spanish Civil Code establishes a regulatory framework that is binding for a large part of the Spanish territory, but not all, since there are autonomous regions with legislative powers in civil matters in which their own regulation is sometimes not only different, but completely opposite.

If we connect these two themes - inheritance as a concept that includes all assets and debts of the deceased, and the requirement of a positive or negation action - we will be in position to define the main focus of this communication, which is to study the responsibility of the heirs for debts. In this regard, we can say that the Spanish law states, according to the specific action of heirs, what could be called a general rule and an exception.

The general rule, which we consider detrimental, is that the heir who accepts the inheritance is liable for all debts of the estate, even with their personal assets if the assets of the estate are not enough to cover the debt. This is what is known as *ultra vires hereditatis* responsibility. With this "strategic" regulation, a mixture is produced between the inheritance and the personal assets of the heir[7]. The estate and personal assets of the heir form a common mass so that the heir becomes debtor of his creditors and the creditors of the deceased. There is no priority among the creditors: all have the same right to demand the payment of their debts.

As it is clear to see, this regulation is quite harmful: it harms the right of creditors to see their credits paid, especially if the heir is in trouble or in a precarious situation. It also harms the rights of the heir creditors, especially if the inheritance has more debts than assets. Ultimately, in either case it is harmful for the heir, as this *ultra vires hereditatis* responsibility could affect his own personal patrimony.

Another major flaw in this regulation is that there is not any debt liquidation procedure. Debts can be paid before or after the partition, with the problems that this lack of regulation involves. If the debt is paid once the partition has been arranged, creditors can demand the entire payment of their debts from one of the heirs who have accepted the inheritance without the benefit. And although the heir who has paid has some legal remedies to demand the other heirs pay their proportional part, it is not difficult to see the possibility that the heir who has paid all the debt will end up assuming the possible insolvency of others.

Against this legal rigmarole, the Spanish Civil Code has included an action by which the heir can limit their liability for debts up to the limit of the value of the estate. This resource depends on the application for the benefit of inventory. If the heir uses this legal option, his liability for debts will be limited to the value of the assets of the estate. That is, the responsibility will become only *intra vires hereditatis*, so that his personal assets will always be safe. This does not mean that the heir will not become a debtor. The heir remains a debtor, but his responsibility will be limited.

It is possible to think, then, that this system is not advantageous for the deceased's creditors or that this system only benefits the heir and the heir's creditors. But this would be a fallacy. The real truth is that the benefit of inventory does not change the status of creditors. Before the death of the debtor, the creditors have the patrimonial guarantee of Article 1911 Spanish Civil Code that states that debtors respond to their debts with all their assets, present and future. Well, with this benefit, the guarantee remains unchanged. And indeed, this legal option offers more advantages than the limitation of liability, especially because a debt liquidation procedure is followed. The debt payment becomes the main priority, so if the heir wishes to benefit from this exception, he must ask the notary for the formation of a "true and correct" inventory of all assets of the estate, and the summons of creditors and legatees. This represents the first guarantee for creditors who may, on the one hand, ensure that their credits are taken into account in the inventory, and on the other hand, make sure that all the assets are correctly included in the inventory, so that they will be able to be paid with them.

We also must say that until all known creditors and legatees are paid, the Spanish Civil Code states that the inheritance is to remain in administration. The administrator, who may be the heir or a third party, will be responsible for making the payment of such debts and, in the case of remains, handing it over to the heirs, who will not have the full enjoyment of the assets of the estate so far. It is important to note, too, that the administrator must follow an order of priority established in the Spanish Civil Code: namely, the deceased's creditors have to be paid first, and then the legatees. In cases where there are preferential credits, the administrator must take measures to ensure the payment of these preferential credits.

In conclusion, this legal exception is triply advantageous: it is beneficial to the heir, who does not see his personal assets diminished, it is beneficial to the deceased's creditors as well, as long as they get to collect their credits preferentially and without the slightest option that the inheritance gets confused with the assets of

[7] There is an author, PEÑA BERNALDO DE QUIROS, who argues that there is no such patrimony mixture.

the heir, and it is also beneficial for the heir's creditors, who will enjoy the certainty that the assets of the debtor will not be confused with the harmful inheritance.

If this system is so advantageous, we can only ask: where is the problem then? Well, we have identified two problems essentially. The first problem is the configuration of this benefit as a legal exception, which many people are aware of[8]. The second problem is the reduced deadline. In effect, this benefit can only be requested within 30 days of acceptance, if there has been acceptance, or 30 days from the end of the period for which the possible heir has been compelled to accept or reject the former inheritance ex Article 1005 Spanish Civil Code. This deadline is unacceptable, as most citizens do not know about this option, or when they find out about its existence, it is too late.

It is also important to note that our Civil Code admits, as we have said above, that there can be a tacit acceptance. The tacit acceptance takes place when the heir performs acts that imply a willingness to accept. In these situations, where there is a tacit acceptance without legal advice, the heirs are particularly at risk of seeing their patrimony affected, especially if they do not apply for the benefit in time.

3. The possible existence of unknown debts

One might think that the average citizen is the one who must seek to know the net worth of inheritance and to take protective measures and insurance in case there are more debts than assets. However, this legal burden on the citizen does not seem fair, especially if we take into account that there are situations where it is very difficult or almost impossible to predict or get to know the real status of the estate. For example, it can happen that the deceased is declared responsible for extra-contractual liabilty once he is already dead. In this regard, the recent decision of the Supreme Court, 7 May 2014[9], stated that the liability of a doctor carrying out his duties was not a personal debt and therefore was transferable to his heirs, who were sentenced to pay that debt once the acceptance had taken place.

Another common paradigm, especially now in times of economic crisis, is the surety contract. And, indeed, sometimes it is not the direct debts of the deceased that generate a harmful inheritance, but those derived from the provision of guarantees in favor of third parties, usually children or other relatives. In this regard, and as we have already said, the debtor is responsible for the payment of his debts with all his assets, present and future. However, this universal responsibility often becomes insufficient, so that it is normal to demand additional guarantees to ensure the collection of a debt. The problem arises, however, for the sureties, who are unaware that the obligation guaranteed will remain as a debt, even after his death.

If we consider that the Civil Code does not require any special form for the surety, we can see the seriousness of the situation. Indeed, the Civil Code does not even require that the surety contract be written. This lack of formality involves major setbacks in the *mortis causa* succession, as can happen, and does happen in reality, when the heirs are unaware of the obligations that the deceased have had guaranteed and they accept the apparently acquitted inheritance without any possibility of foreseeing the guarantee that will affect the inheritance and, maybe, their own patrimony.

These are the main problems that can be seen regarding the difficulty and sometimes impossibility of knowing all the deceased's debts. What is really disturbing is that the Spanish Civil Code does not provide any solution to these situations, unlike other European countries. Thus, in 2006, a year which can be considered the start of the European crisis, France introduced an amendment to the Article 786 of the French Civil Code

[8] In this regard, I have conducted an unofficial study to contrast this reality through Google Forms tool, in which 200 people from different backgrounds have participated. It is surprising that, while 76.2% of respondents admitted having a college education, 70.4% admitted that they had either never heard about the benefit of inventory (49%) or did not know what it was (21.4%).

[9] Aranzadi, RJ 2014/2477

according to which the heir can be relieved wholly or partly of a debt if he can prove he had no way of knowing about this debt, and this debt is of such a value that it might affect his personal assets[10].

In the Spanish Civil Code, as we say, there is no legal solution to these situations. The only feasible solution that comes to mind is to annul the acceptance because of mistaken consent. This is a quite controversial solution, as long as it has special requirements for its viability, namely, that the error falls on the object, is not attributable to the sufferer, and is excusable, that is, inevitably using an average diligence and the requirements of good faith.

Conclusions

The economic crisis, as we said at the beginning, has had important consequences in the field of succession. And, indeed, if the general system of succession is based on succession of debts, it is not surprising that the number of repudiations has increased. It is easy to see the large percentage of population that is now deeply in debt or bankrupt and to imagine the impact of all that on the field of successions.

At this point, the question we have to ask ourselves is whether the regulatory regime that exists today is adequate or not. That is, is it useful to have a system in which the general rule implies an acceptance that carries out the unlimited responsibility of the heir? Is it logical that the benefit of inventory, which is triply advantageous, as we said, is constituted as a legal exception? Besides that, it is an option that is largely unknown by the citizens.

In our opinion, the answer to these questions is clear: no, this general system is no longer useful. The crisis has highlighted its shortcomings and limitations, and it is necessary to promote a legislative reform as well as to establish the benefit of inventory as a general rule. Only then we will reduce the number of repudiations that presently occur. This question is not trivial at all, especially in economic terms, since an excessive period of time for an inheritance without an owner is not positive for the economy in the long run.

By promoting this new regulation we will also protect the heirs, who today seem to be constrained to be a kind of personal and atypical guarantee *post mortem*, which guarantees, with dubious legality, the debts of the deceased with their own personal assets.

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[10] Article 786 du Code Civil, modifié par Loi nº 2006-728 du 23 juin 2006.- L’heritier acceptant purement et simplement ne peut plus renoncer à la succession ni l’accepter à concurrence de l’actif net. Toutefois, il peut demander à être déchargé en tout ou partie de son obligation à une dette successorale qu’il avait des motifs légitimes d’ignorer au moment de l’acceptation, lorsque l’acquittement de cette dette aurait pour effet d’obérer gravement son patrimoine personnel. L’héritier doit introduire l’action dans les cinq mois du jour où il a eu connaissance de l´existence et de l’importance de la dette.