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Legal effects arising from the declaration of a person dead by the Albanian legislation and the Spanish legislation

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Abstract

The declaration of a person missing or dead is a frequent phenomenon that occurs throughout the world. This unfortunately comes as a result of natural disasters or military actions. The declaration of a person missing or dead is one of the oldest institutes, which deals with the regulation and protection of the rights and obligations of persons declared missing or dead, and protects the interests of relatives and persons who have been in legal relationships with that person. This paper will clarify the concept of the declaration of a person dead by the Albanian legislation and the Spanish legislation, in extraordinary occasions recognized by law, emphasizing the legal effects of this institute, in particular the material legal effects and personal legal effects that arise as a result of the declaration of a person dead. Through a comparative analysis of the institute of declaration of a person dead will be highlighted commonalities and differences of the Albanian legislation and the Spanish legislation.

Keywords: declaration of death, law, legal effects, extraordinary occasions

1. INTRODUCTION

With the development of the society the relations that arise between people require a detailed regulation by legislation and the protection of their rights. The law is the main tool that through its institutes guarantees the respect for human rights and gives the necessary guarantees through its mechanisms.

The aim of the Institute of declaring a person missing and the declaration of a person dead stays on the protection of the rights of persons to whom relationships where they were party are terminated.

The institute of declaring a person dead is provided in all civil legislations and generally preceded by the institute of declaring a person missing. The prediction of this two phases is important not only to increase the safety on the presumed fact, but at the same time through setting the time limits it allows the creation of legal security on the possibility of the reappearance of the person and therefore also on the legal effects.

In cases of uncertainty, when it is impossible to find the location of a person for a certain time, interested persons can address their request to the public bodies in order to declare the person missing or dead and to solve so the legal relations which have had existed before.

The procedure of the declaration of the person missing or dead person will be analyzed in this paper. Special attention will be paid to the legal effects which arise as a result of declaring a person missing or dead. A comparative analysis between the Albania and Spanish legislation would be the main method used to concrete better the differences between the two legislations,

By declaring a person missing or dead a number of legal effects arises. Some of them are similar in Spanish and Albanian legislation, but others differ in the mode of their regulation. Although this two legislations are part of the same family of law (civil law system), the regulation of the legal effects that arises after declaring the person missing /dead or even in the cases of reappearance of the persons have their own particularity. This analysis of the two legislations that faces each other is important for our legislation as serves as a reference in order to understand the importance of procedures and the consequences of these institutes.

2. THE JURIDICAL EFFECTS OF DECLARING A PERSON MISSING

All human beings are born free and equal in terms of dignity and rights. (Universal Declaration on Human Rights, 1948) The fundamental rights and freedoms are indivisible, inalienable and inviolable and stand at the basis of the entire juridical order (Art 15 The Constitution of the Republic of Albania). In order to earn and to exercise these right persons must have legal capacity. The legal capacity has its commencements and termination limits. Legal capacity begins with the birth of the person alive and ends with his death or the declaration of death. The full capacity to act of a person is gained when he reaches eighteen years old and he can gains civil rights and holds civil obligations. (C.C of Albania, art 6) The full capacity to act gives the possibility to a person to be part of civil relationships.

Sometimes in some situations a person may be missing for a long time in the relationships where he is part and there is no news on the recent residency of the person. Despite the researches made by family and friends still the situation remains uncertain. In order to avoid this uncertainty created by this situation the law has provided a range of legal norms which are materialized in the declaration of missing institute. Different authors give different opinions on the disappearance of the person, which determine this legal situation (Cibulenko, 1998). There are other authors who think that this institution can not affect the legal status because during this period (the missing period), no new legal relationships are born. But the absence of the person from his domicile for a long period might leads to some obstacles for persons who are in relationship with him (labor contracts, marriage etc). Reasoning so, it can be said that the declaration of a person missing, brings changes, termination of the legal status of the person (Suhonova, 1994). The legal status of a person is a set of rights and obligations that every person enjoys. According to Espinoza the absence of the person is seen more as a presumption rather than a fact. This presumption is due to the collection of evidence by the court, which is definitely not an absolute truth but they are obliged to accept this facts until the reality brings out the reappearance of the missing person or until it is proved otherwise that the missing person lives or he has died in a different day (Espinoza Espinoza J, 2001).

According to the Spanish legislation "In any event, upon the disappearance of the person from his domicile or from his last place of residence, without having any further news of him, the Judge may, at the request of the interested party or of the Public Prosecutor, appoint a defender to protect and represent the disappeared person in court or in any business which does not admit delay without serious detriment". (Art. 181 C.C. of Spain)

Art 15 of the Albanian Civil Code provides that "The person who has disappeared from his residence or his last residing place and for whom there is no news for more than two years, then by the demand of any interested person he can be declared a disappeared person by the decision of the court". By interpreting the following articles the two legislations provide different time limits on declaring the person missing. The Spanish legislation makes a clear division of the time limits of the declaration of missing as it is provided in art 183 "after one year has elapsed from the last news of him, or, in the absence thereof, from his disappearance, if he should not have left an attorney with powers of administration over all his property. After three years have elapsed, if he should have empowered someone to the administration of all his property". (C.C of Spain, Art 183) Meanwhile the Albanian legislation provides only a two years time limit.

Another difference between these two legislations is in the group of legitimate people that can make a request to declare the person missing. The Albanian legislation provides that the request for declaring a person missing or dead can be filed in the court of the last domicile of the person, by anyone who have a legitimate interest and by the prosecutor. (C. P. C of Albania, art 375) The group of persons who are legitimated under the Spanish legislation is more detailed. The persons who are legitimated to request the declaration of the person missing are; the husband/wife of the person declared missed who is not divorced, the relatives who are related by blood until the fourth generation and the prosecutor. Also any person who has any right over the property of the person declared missing, has the right to file a request of the declaration of missing.

What legal effects bring the declaration of missing?

The Spanish legislation despite the Albanian one, provides in the Civil Code the effects that brings the declaration of missing. The representative of the person declared missing will be related to the obligations of the inventory of the movable and immovable property. The representative shall custody and protect the property of the person declared missing and they can preserve and defend the assets of the absentee and obtain from his property any normal returns of which it is capable. The representatives of the person declared missing shall enjoy the temporary possession of the assets of the absentee and shall be entitled to the liquid products thereof in the amount set forth by the Judge, taking into account the amount of any fruits, rents and benefits, the number of children of the absentee and the obligations to support them, the care and actions required by the representation, any earmarks which encumber the assets and other circumstances of the kind.

Temporary possessors of the property of the absentee may not sell, encumber, mortgage or pledge, save in the event of evident need or utility, acknowledged and declared by the Judge, who, in authorizing such acts, shall determine the destination to be given to the amount obtained there from. In the event of appearance of the absentee, his assets must be restored to him, but not the products received, save in the event of bad faith, in which case such restitution shall also

comprise any fruits received and those which ought to have been received counting from the date on which the absence took place, according to the judicial declaration. (C. C of Spain Art. 187C).

The Spanish legislation provides in a detail disposition who could be the representative of the person, who should enjoy the right to administrate his property and which are the rights and obligations of the representative. Our legislation just provides the duty of the court to appoint a custodian for the administration of the property. (C.C of Albania, Art. 16)

Except of the preservation of the property rights, the law tries to preserve and modify even some personal rights such as the parental responsibility. In cases of declaration of missing of one of the parents, the parental responsibility should be exercised by the other parent. (Art. 137 LEY 9/1998, 15 July, del Family Code) Such preservation is made also in the Albanian civil law.

Both legislations don't provide the emergence or changing of the legal effects that can come as a result of the declaration of the person missing, this as a result of the uncertainty and of the presumption of the situation which gives the belief that the situation can change again with the reappearance of the person.

3. THE JURIDICAL EFFECTS OF DECLARING A PERSON DEAD

Declaring a person dead is often equaled with the natural death. The declaration of death of the person differs from the natural death because of the procedure that need to be done and the fact that the civil death is a presumption death. Before a person is declared dead is necessary to declare him missing. Some authors think that the declaration of death of the person is a civil legal status because it "refers to the absence of the body of the person in the area where he has his activity and there are no news from his location or on his existence" and "which produces legal effects" (Ignacio Serrano y Serrano, 1943).

So, declaring the person missing is the last stage. After passing a relatively long time, the person will be declared dead and this equates the legal effects with the natural death only by a court decision.

The Spanish and Albanian legislation provide time limits for declaring a person dead. These time limits are longer than the time limits set for the declaration of a person missing. This is because it is seen as a presumptive situation, which has the same legal effects of the natural death.

According to the Albanian Civil law "The person who is declared missing, with the request of any interested person, can be declared dead by the decision of the court, when has passed four years without news from the date that he has been declared missing ". But if the time limits will be counted form the time of receiving the latest news then for declaring a person dead must be completed a time limits longer than 6 years.

In difference from the Albanian legislation, the Spanish legislation provides two time limits for declaring the person dead:

1. After ten years have elapsed since the last news of the absentee or, in the absence thereof, since his disappearance.

2. After five years have elapsed since the last news of him or, in the absence thereof, since his disappearance, if, upon expiration of such period, the absentee should have reached seventy five. (Ar. 193 C.C. of Spain)

The legal effects of declaring a person dead are also those that will determine the destiny of the marriage. The termination of a marriage may come as a result of the death of one of the spouses but also as a consequence of the declaration of death of the person. (Art. 85 C.C of Spain & Art. 123 C.C of Albania).

Marriage as a social institution must be a legal cohabitation, which is based on the moral and legal equality of spouses, in love, respect and mutual understanding, as the basis of unity of the family. For a marriage to be valid the spouses must have legal personality. The termination of the legal personality comes as a result of a natural or civil death. With the termination of the marriage because of the natural or civil death of the person, the surviving spouse regains “*status liberum*” immediately. The surviving spouse has the right to have a new marriage. If the person declared dead will reappear, the termination of marriage with declaring the person dead becomes valid again, accept the other spouse has related a new marriage (Art. 124 Family Code of Albania).

Beside the marriage the Spanish legislation provides other rights that the person declared dead regain in cases of reappearance. Art 197 of the C.C of Spain provides the property rights in cases of reappearance: " If, after the declaration of death, the absentee should appear or his existence should be proved, he shall recover his property in its current condition, and shall be entitled to the price of any properties sold, or to any properties acquired with such price, but may not claim from his successors any rents, fruits or products obtained from the properties of his estate, until the day of his presence or of the declaration of not having died". The Spanish legislator follows the same system as the German, which provides that "if a person declared dead will reappear, the new marriage related by the surviving spouse is valid, accept the case when it is related in bad faith"(Leonardo Pérez Gallardo, 2009).

Legislators in both cases have tried to protect the rights of the surviving spouse and providing the opportunity of the one to have a second marriage as a guaranteed right.

"Parental responsibility" includes a set of rights and obligations aimed at assuring the emotional, social and material well being of the child, taking care of him/her, maintaining personal relations with him/her, assuring him/her nurture, education, edification, legal representation and administration of his/her wealth. The parental responsibility should be exercised by both legal parents of the child, but if one of the parent is declared missing, or for objective reasons he cannot exercise parental responsibility, the parental responsibility should be exercised by the other legal parent. (Family Code of Albania, Art. 215)

In the cases of declaring missing one of the parents, parental responsibility to the child should be exercised by the other parent. If one of the parents was declared dead, for him has finished the legal capacity and as a result he could not exercise the rights and obligations derives from parental responsibility (Family Code of Albania, Art. 225).

With his reappearance the person shall regain all his rights, including the parental responsibility if the conditions for its exercise are still present.

The Spanish legislation considers the parental responsibility like an authority that the law gives to the parents on the children. Patria potestas shall be exercised always for the benefit of the children, according to their personality, and respecting their physical and psychological integrity; feed them, educate them and provide them with a comprehensive upbringing (C.C of Spain, Art. 154). As the Albanian legislation the Spanish legislation also provides that the parental authority shall end by the death or declaration of death of the parents or the child. (C.C.of Spain, Art. 169)

4. CONCLUSIONS

The purpose of this paper is to analyze the institute of declaring a person missing or dead according to the Albanian and Spanish legislation. During the analysis of this two legislations a number of changes have been identified though both are part of the same civil law family.

It is of a main interest the detailed provision of the Spanish legislator on the persons who are entailed to be representatives of the person declared missing. The persons who can be administrators of the property of the person declared missing are provided in a very detailed way and so are even their rights and duties. Such a detailed provision serves as a guarantee not only for the person who is declared missing by conserving his rights and duties, but even for the administrator as it gives to him the possibility to know the limits of his actions. The Albanian civil law does not make such detailed provision leading so to the court the appointment the administrator. The rights and obligations of the administrator are generally defined and for each specific action he should be accountable to the court. According to this definition it seems like the administrator appointed by the court has a greater freedom to act, but actually in the majority of his actions he is obliged to give account for the administrative actions before the court. This makes his actions uncertain and it conditions the administrator to make just a simple administration of property.

Both legislations have the same approach to the conservation not only of the property rights but also to the personal rights of the person declared missing. For how long this is an uncertain situation such rights cannot be completed and the winners of them cannot be left in an uncertain situation. The same approach have these legislations regarding the effects of the declaration of dead as well as the possibility of restoration of the rights and obligations in case of reappearance.

The institutes of declaration of a person missing and dead are of a great importance as they are connected in a direct way with legal relationships in which the persons take part, the continuation or termination of their rights and obligations. The declaration of the person missing is simply legitimizing a transitional period after which it will be decided whether the person will be presumed to be dead or his return will make him to benefit his rights again. Given the importance that these institutions it is important that the provisions regarding their application should be detailed and clear, by helping so not only the judge who will apply them but even the persons which are affected by their application in their rights and duties.

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