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GIFT IN CONTEMPLATION OF DEATH AS A SUBISTITUTE FOR INHERITANCE CONTRACT?

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Abstract:*Gift in case of death is a permitted, but unnamed legal business in Serbian law, which legal nature is difficult to determine: whether it is more similar to legacy or to the inter vivos gift, stressing their diverse legal purposes and key features. On one hand, we have personally, unilaterally revocable disposition in the case of death, and on the other, two-sided inter vivos legal business unilaterally irrevocable. Hence, through the analysis of the diverse concepts of gift in case of death, we can identify the key points of approximation as well as differentiation between contractual and testamentray disposition, and different legal effects that they provide therefore. The question of determining the legal nature of the gift in case of death is of particular importance having in mind actual contractualisation of inheretance law, esepecially in those legal systems that does not recognise contractual disposoition in case of death, as it is the case in our law. Through specification of legal nature of this treaty it would be more clear whether or not it would be possible to consider the gift in case of death as a supstitute for inheritance contract (in a functional sense), since this agreement incorporates both, obligatory and hereditary features. The significance of this issue is more relevant since the specific concept of this insitute is proscribed in the draft of the Civil Code of the RS, that additionally blurs the legal nature of this institute, making more difficult to determine its legal nature and legal purpose to be provided for.*

Key words: *Gift in case of death, Legacy, Gift contract, Inheritance contract, Inter vivos disposition, Mortis causa disposition.*

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Introduction

The gift in contemplation of death is a specific legal institute that has attracted the attention of the legal public since its inception, and is considered to be one among complex issues in legal doctrine with regard to inheritance law. Its legal nature has been defined diversely through its historical development, varying from a gratuitous and unilaterally revocable disposition with a view of death, to a *sui generis* modality of the gift contract (*donatio post mortem*) as it is now being prevailingly approached to in the domestic legal doctrine. This legal institute has its long tradition in Serbian Civil Law, drawing its roots from the Saint Sava's *Nomocanon*, through the Serbian Civil Code of 1844, to the contemporary days.

In the post-war period (after the Second World War), a legal vacuum was created regarding the regulation of this institute, since it hasn't been legally stipulated, neither by the inheritance law, nor by the rules of law of obligations, although there were proposals and initiatives for its reaffirmation in legal doctrine.[1] The initiative for its introduction into Serbian law was stipulated in the Draft of Civil Code of the Republic of Serbia, proposing the legal concept of this contract that substantially reflects the impact of Roman law.

The significance of the relationship between the inheritance agreement and the gift in the in contemplation of death reflects in the fact that the latter is the predecessor of the inheritance agreement in the legal genesis. [2] Even today, in some contemporary legal systems, it has been qualified as a type of inheritance contract, and the rules of contractual inheritance apply to it. [3] For our legal system, the relation of these institutes gain more importance due to the fact that the inheritance contract is not permitted under our substantive law. Therefore arises the question whether the contract in contemplation of death could be considered as the legal substitute for inheritance contract. in the sense of its legal function?

In order for the relationship of these institutes to be thoroughly analyzed, it is necessary to give a brief historical and legal overview of their development and to point out the basic characteristics that were specific in certain stage of the development of society. A more thorough analysis of this relationship requires a comparative overview of the basic features of these institutes, as

[1] M. Konstantinović, *Obligacije i ugovori: skica za zakonik o obligacijama i ugovorima* (Beograd: Službeni list SRJ, 1969), str. 157.

[2] T. Đurđić-Milošević, „Razgraničenje ugovora o nasleđivanju od drugih pravnih poslova", *Pravni život*, 10 (2014), str. 522; M. Stanković, *Ugovorno nasleđivanje između supružnika – doktorska disertacija* (Beograd: Pravni fakultet u Beogradu, 2015), str. 35.

[3] This is the case in Swiss law. Opširnije vidi M. Đurđević, „Ugovor o poklonu za slučaj smrti", *Zbornik Pravnog fakulteta u Novom Sadu*, 1 (2011), str. 246.

well, with special referring to their legal nature, which further defines other points of their matching and delineation. Particular significance in this regard has the feature of revocability, which has been observed in its dual effect, as a matching point, or a point of differentiation in relation to the inheritance agreement, which depends on the model of the gift in contemplation of death that was taken as predominant. Finally, this doctrinal analysis has been also grounded on the normative interpretation of comparative law, with a brief look at the proposals of the Draft of Civil Code of the Republic of Serbia.

I. Historical Development of the Gift in Contemplation of Death and Inheritance Contract

If the evolution of gift in contemplation of death as legal institute has been observed, it can be concluded it has always been a frontier institution between the law of obligation and the inheritance law. Even thought the different approaches to its legal nature could be met in legal theory, its hereditary aspect always prevailed, in the end.

The gift in contemplation of death (*donatio mortis causa*) appeared in the beginning of the development of classical law, [4] when two forms of real gift were distinguished: one, with immediate transfer of property, and the other in which the transfer of property was postponed tby the fulfillment of the suspensive condition, which was the earlier death of the donor (before the donee). In the first case, the donation was made upon the condition that the donor does not outlive the death threat (termination), [5] in which case this contract had full legal effect. After the death of donor, the donee became the final owner of the donated assets being previously positioned as a "temporary" owner of transferred property. Therefore, the motive of the donor for conclusion of this contract was not to increase immediately the donee's property for free, because the donor did not want the ownership on the donated assets to be transferred permanently on the donee, except in the case of his death.

The basic motive of the donor for making this legal transaction was the fear from a particular mortal danger - the *periculum imminent*. Therefore, he made donations because of the risk from the occurrence of his own death in which case he wants his property to belong to the donee and not to the legal heirs. This means that the full legal effect of *donation mortis causa* depended on the fulfillment of the condition that the donee outlives the donor. On the other hand, in the model of *donation mortise causa* with immediate

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[4] I. Puhan, *Rimsko pravo* (Beograd: Naučna knjiga, 1974), str. 399.

[5] C. Zoltan, „The Law of Succession in Hungary", *The Law of succession: Testamentary Freedom, European Pesrspectives*, Miriam Anderson, Esther Arroyo i Amayelas (eds), Barcelona, 2011, str. 189.

delivery of the subjected assets to the donee, the revocation of the contract was conditioned by the fact that donor himself outlived a particular danger or the donee. If this condition was not fulfilled, [6] the contract could be canceled and the donor could claim a refund of the donated assets. [7]

As fahr as the second modality of the *donatio mortis causa* is consirned, it had been conditioned by the fact of donor's death as a suspensive condition, and was generally revocable. [8]

In its developmental, the death in contemplation of death was consider to be a frontier institute between the legacy and the contract. Afterword, it was approaching to the legacy more and more in the classical period, and finally, during the time of Justinian, it was completely equated with the legacy. Justinian's concept of the treaty exerted a significant influence on contemporary civil law and was transposed as such into the Serbian Civil Code of 1844 (Art. 568 SGZ).

II. Term and legal nature of the gift in contemplation of death

The conceptual definition of a gift in contemplation of death is determined by the legal nature of this institute, which has been diversified throughout history, due to a different social circumstances and the different legal and political purpose of its proscription, defined. The basic dilemma in legal theory concerns its legal nature that further determines its other characteristics. Therefore, the main question was whether this contract is an institute of law of obligation, i.e, the modality of gifts *inter vivos*, or an institute of inheritance law with a *mortis causa* effect; or finally, it is a legal hybrid between contract and legacy, which incorporates elements inherent to legal institutes of both inheritance and contract law character?

a. The gift in contemplation of death as *mortis causa* disposition

The gift in contemplation of death recognized in Roman law, was gratuitous and unilaterally revocable disposition with a view of death, created with the will consent of the donor and donee. [9] The fact of the donor's death had a constitutive meaning for the full legal effect of this contract, whether it was about the threat of immediate donor's death, or anticipation of a natural death of the donor. In order for the gift in contemplation of death to be legally

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[6] D. Pantić, *Donatio mortis causa – rimsko pravo i srpsko pravo - dotorska disertacija* (Kragujevac: Pravni fakultet u Kragujevcu, 2014), str. 51, 52.

[7] Ulpijan – D. 39, 6, 29, *Ibidem*, str. 55.

[8] C. Zoltan, *op.cit*., str. 189.

[9] D. Pantić, „Poklon za slučaj smrti u srpskom pravu de lege ferenda – doprinos profesora Mihaila Konstantinovića", *Branič*, 1-4 (2017), str. 26.

effective, it was necessary for the donor to outlive the donor.[10] If the death of donee occurs before the donor's death, the gift ceased to be valid, in the same way that with the occurrence of the legatee's death the legacy falls.

The motive for this kind of donor's disposition through *donatio mortis causa* was the same as of the testator while making testament or legacy, which was for his property not to belong to the legal heirs after his death, but to those persones who were determined as the donee, by the contract. The feature of revocation also characterized the *donatio mortis causa* of Roman law since it could be revoked by the free will of the donor, just as the legate could be revoked or altered by the free will of the testator. [11]

Besides the approximation of these institutes in classical law, and their formal equalization in the Justinian era, the similarity between classic gift and legacy is obvious in modern law, as well. It is reflected in the same legal nature that is of obligatory character. The similarity is also reflected in the legal purpose of dispositions, which is to increase burdensome the property of the donee, i.e. of the legatee (in the first case on the burden of the donor, and in the second on the burden of the onerate).[12] Both institutes are legal grounds for singular succession, and in the case that gift in contemplation o death is considered as a *donatio mortis causa* of Roman law, then both of them have in *mortis causa* legal effect. [13]

On the other hand, a gift in contemplation of death differs from a legacy in the fact that it is bilateral legal business, while the legacy is a unilateral formal declaration of the last will. [14] Therefore, the donor must have full legal capacity, while the testator, when leaving the legacy, must have the testamentary capacity. Also, the difference between these institutes is reflected in the subject of disposition, since it is broadly determined as far as legacy is concerned, and could be provided, for example, in certain sums of money, claims, debt forgiveness, etc. [15]

Due to the predominance of similarities and coincidences, the classic gift and the legacy are as such encompassed by the same higher gender concept, which is referred to in French law as *les liberals*, including the gift *inter vivos*,

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[10] D. Pantić, „Poklon za slučaj smrti u srpskom pravu de lge ferenda", *Pravni život*, 10 (2012), str. 813.

[11] Ibidem.

[12] See M. Đurđević, „Ugovor o poklonu za slučaj smrti", *Zbornik Pravnog fakulteta u Novom Sadu*, 1 (2011), str. 36.

[13] D. Pantić, Poklon za slučaj smrti u srpskom pravu de lege ferenda, *Pravni život*, br. 10/2012, str. 813.

[14] D. Pantić, „Poklon za slučaj smrti u srpskom pravu de lege ferenda – doprinos profesora Mihaila Konstantinovića", *Branič*, 1-4 (2017), str. 15.

[15] D. Đurđević, *Institucije naslednog prava* (Beograd: Službeni glasnik, 2011), str. 179.

and gratuity in general, as well as *mortis causa* gift and gratuity. [16]

The pre-war codification of the gift in contemplation with death in Serbian law confirms almost complete equation *donation mortis causa* with the legacy. Specifically, the Serbian Civil Code of 1884. provides that a gift in contemplation with death would be considered as legacy and be judged accordingly. [17] In favor of their equation speaks some doctrinal interpretation of the proposed solution regarding *donatio mortis causa* in the Draft of Civil Code of RS. [18] Specifically, due to the proscribed possibility of unilaterally termination of the gift contract by a free will of donor, it is considered to be more similar to the legacy. [19]

b. Gift in contemplation of death as a classic gift contract

Gift in the case of death has been predominantly considered in domestic legal doctrine as a modality of the *inter vivos* gift contract.[20] It is about „the contract created by consent of the donee and the donor, where the delivery of the object of the gift is postponed until the death of the donor." [21] The legal feature of a death gift contract that reflects its contractual legal nature is its bilateral character. Like any contract, it is created by the consent of the parties (the donor and the donee) as a contracting parties who are bounded by the contract from the moment of reaching the consent.[22] It is a gratuities, one-sided binding, formal legal work. The cause of this legal transaction as well as the gift contract is the *animus donandi*-intention of gratuitous giving.

The main difference from a classic gift contract, as an *inter vivos* legal job, is that the effect of the gift contract in the contemplation of death is postponed until the moment of the donor's death. [23] It is a special agreement which subject will be handed over to the donor after the donor's death.

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[16] M. Đurđević, *Ugovor o poklonu* (Beograd: Pravni fakultet Unioverziteta u Beogradu, 2012), str. 36, fusnota 100.

[17] § 568. Građanski zakonik za Kraljevinu Srbiju – Objašnjen odlukama kasacionog suda u Beogradu, ur. I. Peković (Beograd : 1939),

[18] Vidi čl. 818. *Nacrta Građanskog zakonika RS*, Vlada Republike Srbije, Komisija za izradu Građanskog zakonika, Beograd, 2015.

[19] D. Pantić, „Poklon za slučaj smrti u srpskom pravu de lege ferenda – doprinos profesora Mihaila Konstantinovića", *Branič*, 1-4 (2017), str. 17.

[20] M. Đurđević, „Ugovor o poklonu za slučaj smrti", *Zbornik Pravnog fakulteta u Novom Sadu*, 1 (2011), str. 249.

[21] D. Pantić, „Poklon za slučaj smrti u srpskom pravu de lege ferenda – doprinos profesora Mihaila Konstantinovića", *Branič*, 1-4 (2017), str. 26.

[22] M. Đurđević, *Ugovor o poklonu* (Beograd: Pravni fakultet Univerziteta u Beogradu, 2012), str. 44.

[23] Starting from the legal nature of the gift, the act of making the contract and the act of its execution are necessarily separated as fahr as this contract is concerned, Klarić, P., Verdiš, M., *Građansko pravo*, Narodne novine, Zagreb, 2009, str. 510.

Therefore, it is considered to be in domestic legal doctrine as a modality of the gift contract *inter vivos*, ie. *post-mortem* donatio. [24][25] Therefore, it is governed by the contractual rules applicable to the classic gift, including those applicable to the cancellation.[26] Therefore, the principles of the irrevocability of the contract generally applies, except in the cases where the classic gift can also be revoked due to the law (in the case of the own impoverishment and ingratitude of the donee).[27]

While by the conclusion of this contract the obligatory relationship between the donor and the donee has been constituted, the donor as a creditor has the right to claim under this contract after the death of the donor, not just a simple hope or expectation, as it is the case in a will or legacy.[28]As the fact of the donee's survival of the donor is not essential for the gift in contemplation of death understood as a post-mortem donation (as opposed to a *donation mortis causa* of Roman law), in the case of the death of the donee before the donor, the right to claim under the contract passes to the heirs of the donor. [29]

c. Gift in contemplation of death as inheritance agreement

There is an understanding that the gift in contemplation of death is a predecessor to the inheritance agreement between the spouses. Namely, when Roman civil law prohibited the making of ordinary gifts between spouses, the spouses began to conclude *donatio mortis causa* in the same way and under the same conditions as other persons, so the Romans began to consider the death gift as a mean of acquiring inheritance understood in a broad sense. [30] At the end of the last century in French legal doctrine was taken the view that in Roman law, in the absence of proper inheritance contracts, the objective of contractual inheritance could be achieved through *donatio mortis causa*, if

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[24] M. Đurđević, „Ugovor o poklonu za slučaj smrti", *Zbornik Pravnog fakulteta u Novom Sadu*, 1 (2011), str. 249.

[25] Special contractual bargain that the thing or rights transferred to the donor at the moment of the donor's death has the character of a suspensive term of indefinite duration; vidi S. Mihajlović, „Darovanje za slučaj smrti", *Glasnik advokatske komore Vojvodine*, 7-8 (1977), str. 44; Isto tako: M. Đurđević, „Ugovor o poklonu za slučaj smrti", *Zbornik Pravnog fakulteta u Novom Sadu*, 1 (2011), str. 250; According to others, this bargain has the character of a suspensive condition (D. Pantić, *Donatio mortis causa – rimsko pravo i srpsko pravo - dotorska disertacija* (Kragujevac: Pravni fakultet u Kragujevcu, 2014), str.313.

[26] M. Đurđević, *Ugovor o poklonu* (Beograd: Pravni fakultet Unioverziteta u Beogradu, 2012), str. 45.

27 Ibidem.

[28] M. Đurđević, „Ugovor o poklonu za slučaj smrti", *Zbornik Pravnog fakulteta u Novom Sadu*, 1 (2011), str. 249.

[29] B. Vizner, *Građansko pravo [u teoriji i praksi]* (Beograd: Službeni list, 1962), str.1109.

[30] M. Stanković, *Ugovorno nasleđivanje između supružnika – doktorska disertacija* (Beograd: Pravni fakultet u Beogradu, 2015), str. 35.

irrevocability of gifts was arranged. [31]

In case law may also find conflicting views on the relationship between the two institutes. Namely, every gift contract in contemplation of death is in substance a contract of disposition with the property that would represent the donor's legacy at the moment of his death, so if the legal effect to this contract were recognized, then an imperative order of Art. 108 ZON. would be played out in each case." [32] Interpreted as such as the gift in contemplation of death approximates to the inheritance agreement. The opposite view can be found in the case law according to which the gift in contemplation of death may not be equated with the contract of inheritance as a legal business *mortis causa*, since it represents a legal business *inter vivos* whose legal effect is postponed until the moment of the death of the donor, that is permitted institute in our law. [33]

In certain legal systems in modern law, in those systems where the contractual estate planning is permitted and in those where it is prohibited, the gift in contemplation of death is considered as *mortis causa* contract. Thus, in Swiss law, where contractual *mortis causa* disposition is allowed the rules governing the contract of inheritance apply to the gift in contemplation of death. [34] On the other hand, in French law, the gift in contemplation of death is not permitted, since it is considered to be an inheritance contract that falls under the prohibition on the consensual disposal of future inheritance proclaimed in French law.

What is certain is that the substantive assumption of the creation of a gift in contemplation of death are common with those proscribed with the validity of the inheritance agreement, since these are the basic assumptions of the validity of a classic contract, in general. As a basic substantive legal assumption when concluding these contracts, the legal capacity of the parties is foreseen. There are also similarities in terms of form, since both contracts are made in the form of a public deed. [35]

What is crucial in comparative overview of these institutes is the significance of the fact of death for these legal businesses , which determines both their legal nature and legal effects (*inter vivos or mortis causa*). [36] If

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[31] M. Peter, *Etude sur le pacte successoral - these de doctorat* (Geneve: Universite de Geneve, 1897), str. 14, fn 2.

[32] Zbornik sudske prakse, 1971, br. 2-3, str. 121, navedeno prema Pantić... str. 333.

[33] Vrhovni sud Hrvatske Gž.br. 281/67, Zbirka sudskih odluka, knjiga 12, sveska 1, br. 17., str. 38, (navedeno prema D. Pantić, *Donatio mortis causa – rimsko pravo i srpsko pravo - dotorska disertacija* (Kragujevac: Pravni fakultet u Kragujevcu, 2014), str. 334).

[34] M. Đurđević, „Ugovor o poklonu za slučaj smrti", *Zbornik Pravnog fakulteta u Novom Sadu*, 1 (2011), str. 42.

[35] See Nataša Stojanović, „Zašto je ugovor o nasleđivanju zabranjen u našem pravu", *Pravni život*, 10 (2003), str. 167, 168.

[36] C. Zoltan, „The Law of Succession in Hungary", in *The Law of succession: Testamentary*

starting point would have been that the fact of the donor's death in *donatio mortis causa* has a constitutive significance for its legal effect (thus, *donatio mortis causa* of Roman law), then overlapping with the inheritance agreement will be certain, since in both cases it is about contracts that produce their legal effects at the moment of death (of contractual testator or donor). Namely, in both cases a disposee disposes because of death (in one case the death of the donor, in the other contractual testator). Therefore, the purpose of disposal or the cause is the distribution of property in case of death. [37]

In order for the *donatio mortis causa* to provide a legal effect, it is necessary for the donee to outlive the donor. In inheritance contract, the contracting heir acquires the rights under this agreement at the moment of the death of the contracting testator. The difference, however, between these two contracts reflects in the fact that the moment of death forms the ground of universal succession, while *donatio mortis causa* constitute the basis not for universal, but for singular succession, so in this sense it is more similar to the contractual legacy than to the contract of inheritance. [38]

Both institutes are bilateral legal businesses, but *donatio mortis causa* is always of gratuitous nature, while the contract of inheritance can be concluded as a onerous legal business, as well. It can a be unilaterally binded, as *donatio mortis causa* , but also bilaterally binding legal business.

The subject of a *donatio mortis causa*, as in the case of a succession contract, besides the existing assets may be the future assets as well, i. e. the assets whose formation is expected at the moment of fulfillment of the contractual obligation. [39] As fahr as inheritance contract is concerned, the subject of disposition are the rights and assets (both existing and the future one), that are going to be found in the property of contractual testator at the moment of his death constituting the legacy. In this respect, the correlation with the subject of the inheritance agreement is obvious. The difference is that the subject of the gift, and a gift in contemplation of death, may only be one or more specific assets and rights from the donor's property, but not the property as a whole, as it is the case with inheritance agreement. [40] Therefore,

Freedom, European Pesrspectives, ed. by Esther Arroyo and Miriam Anderson (Barcelona, 2011), p. 189.

[37] About mortis causa legal busines see: B Vizner, *Građansko pravo u teoriji i praksi - knj. I* (Osijek: 1966), str. 177.

[38] Oposite: C. Zoltan, „The Law of Succession in Hungary", in *The Law of succession: Testamentary Freedom, European Pesrspectives*, ed. by Esther Arroyo and Miriam Anderson (Barcelona: 2011), str. 189.

[39] M. Konstantinović, *Obligaciono pravo - Posebni deo, prema beleškama sa predavanja* (Beograd: Savez studenata Pravnog fakulteta, 1959), str.3.

[40] M. Đurđević, *Ugovor o poklonu* (Beograd: Pravni fakultet Univerziteta u Beogradu, 2012), str. 38.

the matching of the the gift in contemplation of death with the contractual legacy is more evident, since the object of contractual legacy may only be precisely specified rights from the assets.

III. Cancellation as a criterion in determining the legal nature of contract in contemplation of death

Revocation is the main point of demarcation between the gift *mortis causa,* and the gift *inter vivos*, and was considered as the point of distinction between these institutes even in post-classical Roman law. [41] Namely, irrevocability was considered as a basic feature of the gift contract, which was also proscribed by the Serbian Civil Code (Article 566). [42] and this analogy also applied to the gift in contemplation of death. On the other hand, *donatio mortis causa* of Roman law was a revocable legal business, in accordance with its *mortis causa* effect and with the purpose for which it was proscribed, that is to dispose of property in the case of mortal danger. Although later in post-war law, this legal business was referred to in the doctrine more to contract law, according to Professor Konstantinovic it retained the feature of revocability, thus departing from the basic rules of contract law regarding the revocation of contracts. [43] By this approach the specificity of this institute was emphasized, that reflects in combination of both components of hereditary and obligatory nature, which makes this contract more similar to the inheritance agreement.

The decision in the RS Civil Code also confirms the bivalent legal nature of the death gift contract inherent in *donatio mortis causa* of Roman law, anticipating the cancellation of this legal work and moving it away from the basic contractual concept of gift inter vivos.

Revocation is the key point of demarcation between the gift in contemplation of death understood as *donatio mortis causa* of Roman law and the contract of succession, i.e. the contractual legacy. [44] Namely, the *donatio mortis cause* as such is typically revocable legal transaction, while the contractual legacy is, in principle, irrevocable, except in cases provided by law, and unless otherwise provided by the contracting parties. Although it is

[41] V. Radovčić, Razvitak i pravna problematika darovanja - doktorska disertacija (Zagreb: Pravni fakultet, 1979), str. 150.

[42] „ Whoever makes a gift can no longer take it back except for special cases”

[43] “The donor may terminate the gift in contemplation of death on his own will, and the disposal of the object of the gift subsequently before the legal or the death legal transaction, was also considered termination of the contract.”čl. 522 st. 2 Skice za zakonik o obligacijama i ugovorima (Mihailo Konstantinović*, Obligacije i ugovori: skica za zakonik o obligacijama i ugovorima* (Beograd: Službeni list SRJ, 1969).

[44] T. Đurđić Milošević, *Ograničenje slobode zaveštajnih raspolaganja - doktorska disertacija* (Kragujevac: Pravni fakultet Univerziteta u Kragujevcu, 2018), str. 358, 359.

about the disposition in contemplation of death which hereditary character is primary, it is irrevocable as such due to its concurrent contractual nature. As fahr as gift in contempltion of death is consirned, revocation is its key feature, even though it is of contractual nature as well. Overall conclusion is that these legal businesses that combine both hereditary and obligatory elements are *sui generis*.[45]

Conclusion

The legal significance of the fact of death and the revocation feature are key determinants in qualifying a contract as an inheritance contract. With this regard, it is possible to determine through the legal analyze of a gift in contemplation of death whether and to which extent it is inherent to the contract of inheritance? This issue is of particular importance in those legal systems that do not allow the inheritance contract, as is the case with our law.

What undoubtedly derives from the name of this legal transaction is that it is a contractual disposition, which presupposes the consent of the will of the two parties and the legal capacity for valid conclusion of this contract. Thus, in this segment its' obligatory legal nature cannot be disputed. If the concept of the irrevocability of this contract predominates, than the obligatory character of this contract would be upheld, and by its nature it would represent the modality of the *inter vivos* gift contract. On the other hand, if it is assumed that the revocability is its fundamental element, this contract would be directly opposed to the principle of irrevocability of the gifts, which would call into question its qualification as a contract of obligation and the demarcation line between *inter vivos* legal business and *mortisa causa* dispositions, as well.

However, the following question arises: how much (ir)rrivocability of a legal transaction could be taken as a criterion for classifying a contract as obligatory or hereditary, since new modalities of property disposition combining both hereditary and obligatory components, arise.

Proposed solutions of *donatio mortis causa* in the Draft of Civil Code of Republic of Serbia, just confirms its bivalent legal nature, whether this provision is interpreted in a way that this contract is revocable in general, or just in the case when donor survives the donee (since this provision is not clearly formulated).

What is crucial in opting for a specific legal solution in proscribing gift in contemplation of death *de lege ferenda* is the legal purpose and the legal and political goal that the legislator seeks to achieve, thereby. Therefore, the it should be pricisly determined wether this contract would be similar to *donatio*

[45] For inheritance contract see: D. Leipold, *Erbrecht* (Tübingen :2002), str. 178.

mortis causa of Roman law, or *donatio post mortem*, as a modality of *inter vivos* gift whose effect has been postponed until the moment of the death of the donor? The answer to this question would further determine whether the gift in contemplation of death could be considered as a substitute for a succession contract, i. e. contractual legacy.