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SIMILARITIES AND DIFFERENCES BETWEEN THE ALBANIAN AND ITALIAN SUCCESSION LAW

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Summary: In 1994, Albania codified the current civil code, harmonizing the national legislation with the democratic values of the Western European Countries. This paper fills the gap in the national and international scientific literature since there is no scientific contribution that examines the Albanian law of succession showing the similarities and differences between the Albanian and the Italian civil codes. This is fundamental because according to Article 33 Albanian Private International Law (Albanian Law no. 10 428 of June 2011), which governs cross-border succession law, in the case of

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immovable goods, the rule of *lex rei sitae* has been codified. Thus, in the case of immovable goods, the Albanian succession law will be applied to them. In the conclusion, this research demonstrates that the Albanian Law of Succession of 1994 is different in many ways from the rules established in the Italian Civil Code of 1942.

Keywords Book II of the Italian Civil Code, Book III of the Albanian Civil Code, Jurisprudence, Right to Dispose, Succession Law.

1 Introduction

Succession is one of the manners of ownership transfer. Different from other cases of ownership transfer, succession deals with death. There are two types of succession: intestate succession (succession *ab intestato*) and testamentary succession (succession *ex testamento*). In the case of intestate succession, the national law establishes the row and the shares, while in the case of testamentary succession, the testator within the limits established by the law (i.e. legal reserve) decides the shares and testamentary heirs. Additionally, in the case of testamentary succession, the national legislature has also codified the institution of legacy.

The rules of succession *ab intestato* will be applied in the case of partial or full absence of a will (*testamentum*), partial or full invalidation of the *testamentum* (Article 317 Albanian Civil Code (CC) and Article 457 Italian CC), or when the testamentary beneficiaries are considered unworthy (Article 322 Albanian CC or Article 463 Italian CC), as well as when the testamentary beneficiaries renounce to the inheritance (Article 335 Albanian CC or interpretation of Article 480 Italian CC). Therefore, according to the law, succession *ex testamento* has priority compared to the succession *ab intestato* since the right to dispose of the property is one of the three rights (in addition to the rights to use and enjoy the property).

This paper gives an overview of the Albanian and Italian succession laws. It focuses on the competence to disposal by *testamentum* as well as it analyzes the various forms of wills and the nomination of a legatee. The paper considers the competence to disposal (and not the medical concept of capacity) because the competence to dispose of the property by will is so important that, in addition to the rules established in the General Part (Book I), Book II of the Italian Civil Code or Book III Albanian Civil Code includes other specific rules. Through the application of the third rule of interpretation *lex specialis derogat generali*, in the case of competence to disposal by will, if there is a conflict between Book I and Book II of the Italian Civil Code or Book III Albanian Civil Code, the rules codified in Book II of the Italian Civil Code or Book III Albanian Civil Code will be applied. Moreover, the various forms of wills are investigated. Additionally, the paper also examines the difference between heir (*titulo universali*) and legatee (*tituto singulari*) by looking at the differences between the Albanian and Italian succession laws in the case of legatees.

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This research reviews the integral parts of the Albanian succession law by comparing it to the Italian succession law. The Italian model was chosen for two main reasons. First, the impact that the Italian Civil Code of 1942 had on the current Albanian Civil Code has been scientifically proven; in particular, Albanian property law has been shown to be similar to Italian property law.[1] Indeed, succession is one method of property acquisition (Article 165 Albanian CC). Second, in Roman Times, the law of succession was considered part of the property law.[2] Indeed, in the Albanian Communist Code of 1982 (Articles 94–119), succession was governed through a few articles within the methods of property acquisition. Thus, the current civil code is based on the Italian Civil Code of 1942 and succession is one of the methods of property acquisition. This paper considers the similarities and differences between these two countries.

The investigation of the characteristics of the Albanian succession law is fundamental since, in the case of immovable goods, the Albanian succession law will be applied (Article 33 Albanian Private International Law (PIL), Albanian Law no. 10 428 of June 2011). In other words, in Albania, Article 33 PIL distinguishes between movable and immovable goods. For movable goods, it applies the concept of habitual residence, while in the case of immovable goods, the rule of *lex rei sitae* has been codified. However, citizens may apply a choice of law: a person may choose which law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. However, this option is limited to foreign citizens living in Albania or Albanian citizens with a habitual residence in a foreign country. Nevertheless, the Albanian PIL limits the choice of law under the condition that the legal reserve established in Article 379 Albanian CC is not affected. In addition, Article 80(1)(dh)(ii) of the Albanian PIL establishes that the Albanian courts have international jurisdiction in cases where the hereditary estate or most of it is located in the Republic of Albania. This rule is also stated in Article 46(2) of the Albanian Civil Procedure Code.

This research applies a case-law method of study since case-law systems aim at increasing the value of the evolving legal tradition.[3] The importance of case-law is also investigated and underlined in France,[4] which is the country where

1 VENDITTI, Carlo, PICARO, Raffaele, VESHI, Denard. *Introduction of Albanian property law*. Naples: Edizioni Scientifiche Italiane, 2021. VENDITTI, Carlo, VESHI, Denard, KOKA, Enkelejda. The Transformation of Right to Property in the Post-Communist Period in Albania. The Impact of the Italian Civil Code in the Ways of Acquisition of Ownership in the Albanian Civil Code of 1994. *Osservatorio del Diritto Civile e Commerciale*, 2020, vol.9. no.1, pp.329–352.

2 MOUSOURAKIS, George. *Fundamentals of Roman Private Law*. Berlin: Springer Science & Business Media, 2012.

3 PONZETTO, AM, Giacomo, FERNANDEZ, A, Patricio. Case Law Versus Statute Law. An Evolutionary Comparison. *The Journal of Legal Studies*, 2008, vol.37, no. 2, pp.379–430.

4 ANCEL, Marc. Case Law in France. *Journal of Comparative Legislation and International Law,* 1934, vol. 16, no. 1, pp. 1–17.

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the tradition established by Montesquieu of "le juge est la bouche de la loi" ("the judge is the mouth of the law")[5] started. This paper has the following structure: Section II gives an overview of the Italian succession law. To facilitate the reading of the Italian legislation, three important premises should be underlined: first, without going into the details of the doctrinal discussion,[6] the Italian legislation recognizes only the unilateral act and the contract while the Albanian legislation has codified the most abstract legal notion: the *negotium* (legal transaction). Thus, the unilateral act in Italy is similar to the unilateral legal translation in Albania, while the contract is comparable to the Albanian bilateral legal transaction. This is important because the *testamentum* is considered a unilateral act in Italy yet a unilateral legal transaction in Albania. Second, and more importantly, the Albanian succession law is based on the acquisition principle (Article 318 Albanian CC),[7] while the Italian succession law is based on the acceptance principle, although the acceptance has a retroactive effect from the moment of opening the succession (Article 459 Italian CC). Third, the Italian legislature has codified two types of acceptance (Article 470 Italian CC): the acceptance of inheritance can be simple or with *beneficium inventarii*. However, the Albanian lawmaker has applied a protective approach to heirs by recognizing only one type of acceptance and by limiting the liability up to the value of the estate they have inherited (Article 341 Albanian CC). Thus, it seems that the Albanian legislation has considered only the *beneficium inventarii*. Section III analyzes the particularities of the Albanian succession law by also considering the differences with the Italian legislation. In particular, it shows the limitation of the right to disposal by *testamentum* as well as the case of establishing only the *legatum per damnationem* (Article 384(1) Albanian CC). In the conclusion, this contribution uncovers the similarities and differences between the Albanian and Italian succession laws.

2 Introduction to the Italian Succession Law: the competence to disposal, the forms of wills, and the legacy

This Section gives a brief overview of the Italian succession law by applying a case-law study and legal comparison with the Albanian legislation. It focuses on the competence to disposal and the forms of *testamentum*. In addition, the Section investigates the legal institution of legacy.

The succession is the transfer of ownership due to death. Death is the cause of it. According to Article 457 Italian CC, inheritance can be by law (intestate

5 MERLINO, Antonio. Montesquieu e la Scienza Giuridica Italiana (Montesquieu and Italian Legal Science). *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper*, 2017–13.

6 PERGOLESI, Ferruccio. I Negozi Giuridici Come Fonti Normative. *Il Foro Italiano*, 1937, pp.247–248.

7 NUNI, Adrian, HASNEZIRI, Luan. E drejta Civile III: Trashigimia (Civil Rights III: Inheritance), 2010.

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succession) or by will (testamentary succession). The intestate succession will be applied only when there is not a *testamentum* for parts or the entirety of the inheritance (Article 457(1) Italian CC). Nevertheless, due to the importance of family and the legal reserve established for the *legitime* (forced heirs) (Articles 536–564 Italian CC), intestate succession is more common than testamentary succession.[8]

The Italian jurisprudence has stated that the quality of heir is a quality that is *erga omnes* and it is conserved forever.[9] In addition, there are only two types of inheritances; all types of *post mortem negotium* (succession agreement) are null (Article 458 Italian CC) and they cannot be converted into valid contract through the application of Article 1424 Italian CC.[10] In Italy, the creditors of the *de cuius* shall demonstrate not only the quality of the heir but also the fact that the heir has accepted the inheritance.[11] Thus, there is the need by the heir to accept the inheritance,[12] although there is also the possibility of presumption of acceptance (Article 485 Italian CC)[13] which happens at the moment the heir possesses the goods with the will to become the owner.[14] In the absence of heirs, the judge *ex officio* can ascertain the quality of the heir.[15]

In addition, the Italian jurisprudence has uncovered the fact that testamentary succession can coexist with intestate succession.[16] This might be the case where the *testamentum* does not cover all the estate of the *de cuius*, or when the *testamentum* includes only the nomination of one or more legatees,[17] or even when the *testamentum* nominates one of the *legitime* as legatee.[18] However, heirs can also make a written agreement *ad substantiam* between each other when they share their shares.[19] This agreement shall be registered, if the estate also includes immovable goods.[20]

In addition to the legal institution of an heir, the Italian legislature also recognizes the legal institution of legacy. In Italy, the testator can choose between

8 TORRENTE, Andrea, SCHLESINGER , Piero. *Manuale di Diritto Privato*. Milano: Giuffrè Editore, 2011.
9 Italian Cassation Court, no. 1850 of 17.06.1971.
10 Italian Cassation Court, no. 4827 of 14.07.1983.
11 Italian Cassation Court, no. 10525 of 30.04.2010; Italian Cassation Court, no. 6479 of 06.05.2002.
12 Italian Cassation Court, no. 10525, note 11; Italian Cassation Court, no. 6479, note 11; Italian Cassation Court, no. 3696 of 12.03.2003.
13 Italian Cassation Court, no. 7226 of 27.02.2006; Italian Cassation Court, no. 2663 of 22.03.1999.
14 Italian Cassation Court, no. 16507 of 19.07.2006.
15 Italian Cassation Court, no. 2276 of 27.02.1995.
16 Italian Cassation Court, no. 6190 of 28.10.1984.
17 Italian Cassation Court, no. 2968 of 27.04.1997.
18 Italian Cassation Court, no. 5918 of 15.06.1999.
19 Italian Cassation Court, no. 6414 of 28.11.1988.
20 Italian Cassation Court, no. 5666 of 18.10.1988.

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legatum per vindicationem (Article 649 Italian CC) or *legatum per damnationem* (Articles 651–653 Italian CC). In the case of *legatum per vindicationem*, the legatee becomes immediately the owner. However, in the case of *legatum per damnationem,* the legatee has the right to demand from the heir his goods. Thus, there is a difference between remedy *in rem* (*legatum per vindicationem*) and remedy *in personam* (*legatum per damnationem*).

The first requirement for writing a *testamentum* is the clarification of the persons that have the competence to disposal by will. Article 591 Italian CC establishes the case of competence to disposal by will. Although the competence is ruled in Book I of the Italian Civil code, in the case of competence to disposal by will, Article 591 Italian CC is to be applied since the interpreter will apply the rule *lex specialis derogat generali*. However, the Italian interpreter shall also consider Article 2(2) Italian CC (in the case of the minor who works that disposes of his goods through a will), Article 390 Italian CC (in the case of emancipated minors), Article 414 Italian CC (in the case of interdicts) or Article 415 Italian CC (in the case of a person declared incapacitated). Differently from German- and English-speaking countries as well as from the Albanian approach, the Italian legislature has chosen a "pluralistic" approach.[21] For instance, in Italy, in general, the competence of the person declared interdicted (*interdetto*) is lower than the case of a person declared incapacitated (*inabilitato*) (Article 427(2) Italian CC).

According to the Italian jurisprudence, competence is the rule. Thus, incompetence shall be demonstrated.[22] In other words, the person declared incapacitated (*inabilitato*) is considered able to write a *testamentum*.[23] Moreover, all the wills that are written before the decision of the court that declares the incompetence of the person are considered valid.[24] However, the interested party[25] can prove the natural incapacity of the testator[26] at the moment of redacting the *testamentum*;[27] conditions that shall be identical to the facts needed for the declaration of interdiction.[28] In the determination of the natural incapacity, the judge shall also consider the content of the *testamentum*[29] and the type of disease.[30]

21 VESHI, Denard, NEITZKE, Gerald. The Role of Legal Proxies in End-of-Life Decisions in Italy: A Comparison with Other Western European Countries. *Journal of Law and Medicine,* 2017, vol.24, no.4 , pp.959–969.

22 Italian Cassation Court, no. 4856 of 29.07.1981.

23 Italian Cassation Court, no. 130 of 19.01.1968.

24 Italian Cassation Court, no. 5248 of 30.07.1983.

25 It is considered an interested party, a person that from declaring the *testamentum* invalid is going to earn some economic advantage. Italian Cassation Court, no. 12291 of 04.12.1998.

26 Italian Cassation Court, no. 15480 of 06.12.2001.

27 Italian Cassation Court, no. 9081 of 15.04.2010.

28 Italian Cassation Court, no. 1444 of 30.01.2003.

29 Italian Cassation Court, no. 230 of 05.01.2011; Italian Cassation Court, no. 5620 of 22.05.1995.

30 Italian Cassation Court, no. 4939 of 18.08.1981.

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The determination of the natural incapacity shall be done by the judge of the first instance or by the Court of Appeal and cannot be done by the Court of Cassation.[31] The decision of the judge shall be based on proofs or on several logical and coherent indications.[32] The interested party shall prove that the testator was incapable at the moment of writing the will. Thus, the fact that he has proven that the testator was not capable in two different time frames that also include the period when the *testamentum* was written does not include *per se* that the testator was incapable;[33] except that the interested party proves that the incapacity comes from a disease that also impacts the brain.[34] Last, a court decision that has established fraud at the moment of writing of the *testamentum* is legally binding for the judge of the civil session to declare the *testamentum* invalid.[35]

Regarding the right to receive property by *testamentum*, citizens that have a conflict of interest with the testator; even in the case of interposed persons, are not capable to receive property by *testamentum* except if they have a blood relationship, or are the spouse (Article 599 Italian CC). These are the cases of tutors (Article 596 Italian CC), notaries, witnesses, or translators (Article 597 Italian CC), or people that have written or received the secret will (Article 598 Italian CC).

The form of wills, which is needed *ad substantiam*, is divided between ordinary forms and extraordinary forms. In the case of ordinary forms, the Italian legislation establishes two forms: the holographic will and the will written by a notary. In the second case, the *testametum* can be written by a notary in the presence of two witnesses (Article 603 Italian CC) or it is written by the testator (or third party if the testator is unable to write) and given to a notary in the presence of two witnesses (Article 605 Italian CC).

The holographic will is the most common *testamentum* since it is less expensive and involves neither a third party (the notary) nor witnesses.[36] However, the need for clarification by the Italian jurisprudence for the interpretation of the holographic is important since no third party with a legal background (the notary) or third parties proving the authenticity (witnesses) are not involved. The *testamentum* shall be readable.[37] If the will is written in several pages, the pages shall be connected technically[38] and also logically.[39] It is also possible to write the *testamentum* at various moments.[40] It shall be noted that the rules

31 Italian Cassation Court, no. 162 of 09.01.1981.
32 Italian Cassation Court, no. 2865 of 11.05.1995.
33 Italian Cassation Court, no. 3040 of 15.03.1987.
34 Italian Cassation Court, no. 892 of 30.01.1987.
35 Italian Cassation Court, note 24.
36 TORRENTE and SCHLESINGER, note 8.
37 Italian Cassation Court, no. 8899 of 28.10.1994.
38 Italian Cassation Court, no. 11703 of 18.09.2001.
39 Italian Cassation Court, no. 4329 of 20.07.1979.
40 Italian Cassation Court, no. 2074 of 22.03.1985.

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established in the law on notaries have special characteristics; thus, they apply only to the case of *testamentum* written with the help of a notary (public or secret wills).[41] If the will has all the requirements established by law, even if the third parties have slightly modified it, the *testamentum* is valid since it is applied the principle *utile per inutile non vitiator* (what is valid is not influenced by what is invalid).[42]

In addition, the *testamentum* shall be written entirely by the testator. Thus, the physical aid of a third party to guide the hand invalidates the will, despite a coherence between the wish of the testator and the written document.[43] However, if parts of the will are written by a third party, then only that part is invalid.[44] Moreover, the *testamentum* shall include a clear date (day, month, year);[45] which can be put at the beginning, or the last page.[46] The absence of a date invalidates the will.[47] Moreover, the signature (name, surname, and the signature), which can be signed at another time,[48] shall be placed at the end of the document. Thus, the *testamentum* is invalid if the signature is not at the end of the document, if there is sufficient space.[49]

In addition to the ordinary forms, the Civil Code of 1942 establishes other forms. First, in the case of public health security, the will can be received by the mayor or priest in the presence of two witnesses who are over 16 years old (Article 609 Italian CC). However, this *testamentum* is valid for only three months from the moment that the pandemic situation has finished. Second, in the case of passengers on an Italian ship or airplane, the will may be certified by the captain of the ship or airplane (Articles 611 and 616 Italian CC). Again, due to the exceptional situation, this *testamentum* is valid only three months from the moment that the testator can make a will in the ordinary forms. Third, *testamenta militis* allows a soldier to express his last will (Article 617 Italian CC). Again, this *testamentum* is valid only three months from the moment that the testator can make a will through ordinary means. So, in general, citizens can also have the right to disposal by *testamentum* when it is not possible to use the ordinary forms. However, these wills are valid only three months from the moment that the extraordinary condition ends.

To sum up, this Section considered the right to disposal by *testamentum* and the various forms of *testamentum* through a case-law study since the Italian jurisprudence has decided several cases of inheritance.

41 Italian Cassation Court, no. 1112 of 14.02.1980.
42 Italian Cassation Court, no. 12458 of 07.07.2004.
43 Italian Cassation Court, no. 3163 of 17.03.1993.
44 Italian Cassation Court, no. 1239 of 27.01.2012.
45 Italian Cassation Court, no. 12124 of 14.05.2008.
46 Italian Cassation Court, no. 11703 of 18.09.2001.
47 Italian Cassation Court, no. 6682 of 09.12.1988.
48 Italian Cassation Court, no. 25845 of 27.10.2008.
49 Italian Cassation Court, no. 16186 of 28.10.2003.

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3 Introduction to the Albanian Succession Law: the competence to disposal, the forms of wills, and the legacy

This Section offers an overview of the Albanian succession law by focusing on the competence to dispose of property and the forms of wills. After defining the two types of succession, the testamentary succession, and the intestate succession, this Section examines the right to disposal as well as the various forms of *testamentum*. Furthermore, this Section investigates the institution of legacy.

According to Article 316 Albanian CC, succession is the transfer of ownership due to *mortis causa*. The premise of the succession is that the *de cuius* has left rights and obligations since the goal of the succession is their transfer. The inheritance is the sum of all the rights, *iure in re aliena* (except personal servitudes),[50] as well as all contracts, if the *de cuius* organized his activities into entrepreneurship.[51] The succession is available at the place of the last residence.[52] The succession can be by will (testamentary succession) or law (intestate succession). In Albania, family is fundamental.[53] Thus, testamentary succession is, in practice, less common than intestate succession. In addition, the *testamentum* cannot infringe several rights recognized by the law to the *legitime*.

In Albania, wills can establish the heirs or the legacy. In the first case, the citizen is a successor under a universal title (*titulo universali*), while in the second case, the citizen becomes the owner of a specific good under a special title (*tituto singulari*). In addition, in the first case, the successor meant that he succeeded all the patrimonial rights and liabilities of the deceased. In the second case, the beneficiaries will become the owner only of that particular object. Therefore, a successor under a universal title will acquire the rights and obligations after the redaction of the will.[54] However, the Albanian civil code limits the testator's right to disposal. First, there is the interpretation of Article 377 Albanian CC. According to its literal interpretation, the testator can dispose of property by *testamentum* only if there are neither ascendants nor descendants nor siblings (Article 377 Albanian CC) and without violating any legal reserve (Article 379 Albanian CC). However, a constitutional interpretation of this Article that also examines the free right to disposal leads to the interpretation that the testator can dispose of property through a will in the case that he has ascendants or descendants under the condition that they (the spouse, the ascendants, descendants, or siblings) are the testamentary heirs.

In other words, the *testamentum* is a legal transaction where the testator expresses his wishes regarding the right to disposal *mortis causa.* Thus, the inter-

50 Albanian High Court, United Sessions, No. 23 of 01.04.2002.
51 VENDITTI, *et al.* 2021, note 1.
52 Albanian High Court, No. 60 of 24.01.2013
53 VENDITTI, *et al.* 2021, note 1.
54 Albanian High Court, no. 328 of 19.06.2012; Albanian High Court, United Sessions, No. 1 of 24.03.2005

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pretation of the *testamentum* is individual and shall consider the personal wishes of the testator.[55] However, this right is limited by the legal reserve[56] since the legislature aims to protect members of the family or persons unable to work from the abusive acts of the testator.[57] If the *testamentum* will affect it, the *testamentum* will be invalid; null, or annullable, depending on the type of infringement.[58] So, the goal of the *testamentum* is to choose between the first three rows (the spouse, the ascendant, or descendant, siblings) without considering the chronological rows and without affecting the legal reserve.[59]

Regarding the legal reserve, the Albanian jurisprudence has established several principles. First, adopted children and natural children are equal.[60] Second, minor children are protected if they are called into inheritance not only if they are children of the *de cuius*, but also if they are grandchildren. Thus, if the testator has disinherited his child, the child is unworthy, the child has renounced, or the child is dead,[61] the minor grandchildren will inherit since they will be protected. Third, the violation of the legal reserve can be of two types: explicit, when the testator directly excludes the forced heirs, or implicit, when indirectly the testator excludes the forced heirs.[62]

In addition, according to the literal interpretation of the Albanian Civil Code, testamentary heirs (Article 374 Albanian CC), their substitutes (Article 381 Albanian CC), as well as the legatee (Article 384 Albanian CC) can only be persons within the category of persons that can acquire property by inheritance by law. Simply, individuals not related to the testator by blood or marriage cannot be heirs either by intestate succession or by will, unless the person is unable to work and was living for the last year with the testator, as established in Article 371 CC. This is the only exception allowed by the Albanian legislature. This approach makes it quite impossible to concretely apply a will in Albanian society. To consider the right to disposal, the position of the Albanian jurisprudence is different from the literal interpretation of these rules. According to the Albanian case-law, in cases where there are no ascendants, descendants, siblings (Article 377 Albanian CC) or a spouse, the testator can decide to dispose of the property by *testamentum* to members not connected to him through blood or marriage.[63]

55 Albanian High Court, no. 455 of 20.10.2011.

56 Albanian High Court, no. 490 of 19.09.2013.

57 Albanian High Court, no. 111 of 05.10.2017.

58 Albanian High Court, no. 49 of 07.06.2018. According to the Albanian jurisprudence the violation of Articles 403-408 Albanian CC is a case of absolute invalidation (null), while the violation of Articles 409-4010 Albanian CC is a case of relative invalidation (annullable). Albanian High Court no. 18 of 01.03.2018.

59 Albanian High Court no. 49, note 58; Albanian High Court no. 18, note 58.

60 Albanian High Court no. 224 of 20.05.2014.

61 Albanian High Court, note 57; Albanian High Court no. 216 of 23.04.2015; Albanian High Court, United Session, no.1 of 19.02.2014.

62 Albanian High Court no. 216, note 61; Albanian High Court, note 56.

63 Albanian High Court no. 49, note 58; Albanian High Court no. 18, note 58.

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As stated in the previous Section, since Roman times, the testator could also gift items to third parties without making them heirs. The typical case of this is considered the oldest type of a limited gift: the case of a bequest (*legatum*).[64] This type of gift could be left only through *testamentum* and not by intestate succession. The testator could choose between *legatum per vindicationem* or *legatum per damnationem*. In the first case, no transfer to the legatee was necessary since the beneficiary had a *rei vindicatio* to recover possession of the property by an heir or other third parties.[65] On the contrary, in the second case, the beneficiary had only a claim against the heir without becoming the direct owner of the good.[66] Thus, the main distinction lay in the remedy. In the case of *legatum per vindicationem*, the beneficiary had a remedy *in rem*, while in the case of *legatum per damnationem*, he possessed only a remedy *in personam*. Therefore, in the second case, there exists an *inter vivos* legal transaction.[67] The position of the legatee by vindication is much stronger than that of a legatee by damnation since in the first case the legatee acquires the ownership from the moment of the testator's death without waiting for any fulfillment of any obligation by the heir. The current Albanian Code of 1994, differently from the Italian legal system, recognizes only the *legatum per damnationem* (Article 384(1) Albanian CC) since the heir has an obligation to execute the clauses of the *testamentum* according to the guidelines of the testator.[68]

The first requirement for writing a *testamentum* is the clarification of the persons that have the capacity to act and dispose of property by will. Competence to disposal by will is understood as the mental ability or state of mind that a person should possess to prepare a valid will. In other words, competence concerns the mental capacity of an individual to participate in legal proceedings or transactions. It shall be underlined that Article 373 Albanian CC (right to disposal by will) shall be interpreted in correlation not only with Article 6-11 Albanian CC (competence of the natural person) but also with the rules of the Labor Code (Articles 98–101) dealing with the right to work concerning minors and Article 7 Family Code dealing with the emancipation of men.

According to the Albanian Civil Code, competence is the capacity of a person above the age of eighteen, or emancipated, to gain rights and assumes obligations by his actions. Only natural persons voluntarily and in accordance with the law have the competence to dispose of a will. Natural persons from the age of fourteen until the age of eighteen can dispose by will only the wealth earned by their work. In addition, competence is presumed at the age of eighteen, unless there

64 GROSSO, Giuseppe. *I Legati nel Diritto Romano. Parte Generale*. Torino: Giappichelli, 1962.

65 The Institutes of Gaius 2, 204.

66 The Institutes of Gaius 2, 204.

67 SOLOMON, Dennis. The Boundaries of the Law Applicable to Succession. Anali Pravnog Fakulteta Univerziteta u Zenici, 2016, vol. 9, no. 18, pp.193–220.

68 Albanian High Court, note 55 (minority opinion).

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is a court decision that has declared the person incompetent. In Albania, differently from the Italian legal system, there is only one concept of incompetence.[69] Lastly, capacity and competence are two different concepts. While capacity is a medical concept, competence is a legal concept.[70]

Therefore, in case there of incapable adults, the national parliaments may apply either the "monistic" approach such as in German- and English-speaking countries, or the "pluralistic" one such as in Romance-speaking countries.[71] According to the "monist" model, there is the need to specify in concrete the legal transactions that incapable adults can conclude. However, in the "pluralistic" model, the legal notion applied to a person can already offer a general idea of valid acts that incapable adults can conclude. For instance, in Italy, in general, the competence of the person declared interdicted (*interdetto*) is lower than the case of a person declared incapitated (*inabilitato*) (Article 427(2) CC). The Albanian legislature, differently from the Italian legal system, has applied a "monist" system (Article 10 CC and Articles 382–387 Code of Procedure) following a similar approach as in German- and English-speaking countries.

In addition, Article 374 Albanian CC regulates the cases of persons capable of acquiring property by will. Given that this rule is abstract, it is understood mostly by interpreting it as well as by considering Article 320 Albanian CC. Article 320 Albanian CC raises the problem: it does not define whether it is referring to inheritance by law orby will. However, by analyzing both Articles 320 and 374 Albanian CC, as a general rule, a person alive when the inheritance becomes available, or the person conceived when testator was alive and has been born alive are capable to acquire property by will. In addition to them, children of the children of the testator are capable to acquire by will even though they may not have been conceived yet.

Furthermore, all of the legal guardians of the testator are not capable to acquire inheritance unless they have a close blood relationship (parent, child, or sibling) or marriage relationship with the testator. All of the testator's estate given to their legal guardians are null, even in the case of a remuneration contract or under the name of interposed persons (interpretation of Articles 92/a, 374, 376 Albanian CC). "Through a remuneration contract" is intended to mean for example a sales contract, an exchange contract, etc. "Interposed persons" are intended to signify parents, descendants, and the spouse of a person with no capacity to act. Thus, the Albanian jurisprudence has underlined that these rules are imperative[72] in addition to be interpreted systematically.[73]

69 VESHI, NEITZKE, note 21.

70 VESHI, Denard, NEITZKE, Gerald. Living Wills in Italy. Ethical and Comparative Law Approaches. *European Journal of Health Law,* 2015, vol.22, no.1, pp. 38–60.

71 VESHI, NEITZKE, note 21.

72 Albanian High Court no. 49, note 58; Albanian High Court no. 338 of 26.06.2012.

73 Albanian High Court no. 49, note 58.

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The form of *testamentum* is part of the content of the *testamentum* and to disregard it invalidates the will (written format *ad substantiam*). Thus, any *testamentum* that is not in a written format is not valid. Article 392 Albanian CC establishes two forms of how the will should be formulated: a notarial act or a holographic act. The holographic will is considered to be legal if it is written entirely by hand by the testator who will include in the will the date of its formulation and his signature (Article 393 Albanian CC). The writing of a holographic *testamentum* in order to be considered valid should be readable, clear, and understandable to an average person with average knowledge. However, the signature of the testator that misses a letter of spelling is not a reason for the invalidation of the *testamentum*.[74] In case of any doubt, an expert can certify the coherence of the signature of the *testamentum* with the writing of the testator.[75] But, if the *testamentum* was signed or redacted in front of a notary in the presence of a witness, the counterparty cannot prove the signature is fake through different various witnesses since the intervention of a third public party, the notary, is full proof.[76]

Due to the development of technology, a question that the doctrine should answer is: Is a *testamentum* valid that has been written on a personal computer and printed where the date and signature are clear? Given that society evolves faster than the law, then this *testamentum* could be considered valid. However, a literal interpretation of Article 393(1) Albanian CC leads to a negative answer since it is clearly stated that the *testamentum* is "entirely" written by hand. This is also the position of the Italian jurisprudence.[77] The Albanian jurisprudence has not yet faced this problem. However, the Albanian jurisprudence, through several decisions, has taken into account the position of other foreign courts.[78] This decision is based on the fact that although the legislature aim to maintain the validity of acts,[79] in the case of the *testamentum,* it is impossible to crystallize the wish of the testator.[80] Thus, any will not written entirely by hand will be considered invalid.

The Albanian legislature has also considered the case of people that cannot read or write. In these cases, they can express their wishes regarding inheritance only through a *testamentum* in front of a notary (Article 394 CC). In addition, specific rules have been established on the Law on Notaries (Law no. 110 of 20

74 Albanian High Court no. 18, note 58.

75 Albanian High Court no. 524 of 22.11.2011.

76 Albanian High Court no. 441 of 16.10.2012.

77 Italian Cassation Court, no. 5505 of 06.03.2017; Italian Cassation Court, no. 4492 of 25.02.2014; Italian Cassation Court, no. 22420 of 01.10.2013; Italian Cassation Court, no. 20703 of 10.09.2013; Italian Cassation Court, no. 8753 of 31.05.2012.

78 Albanian Constitutional Court V-56/16

79 MORTATI, Costantino. Appunti per Uno Studio Sui Rimedi Giurisdizionali Contro Comportamenti Omissivi del Legislatore. *Il Foro Italiano*, 1970, vol.93, no.9, pp.153–154.

80 CAPOZZI, Guido, FERRUCCI, Annamaria. *Successioni e Donazioni*. Torino: Giuffrè Editore, 2009.

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December 2018). Although the holographic will has the same legal value as the notarial will, citizens would prefer to give legal certainty[81] to their wishes. Thus, they would prefer the notarial will rather than the holographic will.

Before the redaction of the *testamentum,* the notary shall verify the competence of the testator. This means that the testator shall be competent (emancipated or older than 18 years old without being declared incompetent by the Tribunal) as he is in the condition to express his free will and he is not under the illegal influence of another individual. In the absence of competence, the notary shall refuse to redact the *testamentum* (Article 41 Law no. 110 of 20 December 2018). The decision of the notary shall be notified to the testator within five days, who has five days to appeal to the Tribunal of the first instance of the district where the notary office is located.

In addition to the ordinary forms, the Civil Code of 1994 establishes other forms. These forms are called extraordinary wills, which aim to cover all the cases where there is no possibility to write a *testamentum* under ordinary conditions. The rationale of the application of the extraordinary wills is to provide citizens with the right to dispose of his patrimony through a *mortis causa negotium* in the case of particular situations, where the application of ordinary wills is impossible[82] such as a natural disaster, war, or the immediate danger of death. The Albanian civil code establishes three cases of extraordinary wills. First, in places without a notary public, the *testamentum* is certified by the mayor. The absence of a notary service cannot be considered an exceptional case because each year the National Chamber of Notaries plans the need for new notaries for a period of three years (Article 6(1) Law 110/2018, Law on Notaries). Second, *testamenta militis* allows a soldier to express his last will. This form of extraordinary will dates back to Roman Times.[83] However, this type of will should be recognized only to soldiers while on active duty and its validity should be limited in time. These rules were established in Roman Law[84] and also exist in the national laws of Italy (Article 618 CC), France (Article 984 CC), and Spain (Article 719), but are missing in the current Albanian legislation. Third, in the case of passengers on an Albanian ship, the will may be certified by the captain of the ship. Again, due to the exceptional situation, this *testamentum* should be valid for a limited period of time as established in the national laws of Italy (Article 615 CC), France (Article 994 CC), and Spain (Article 729 CC). Thus, although the Civil Code of 1994 re-introduces the concept of extraordinary wills, differently from the Italian legal system, it fails to establish the details of these rules, due to the neglect of understanding their rationality.

81 CACCAVALE, C. Intervento del Notaio in Funzione di Controllo Preventivo della Legalità e Sicurezza dei Traffici Giuridici. *Spontaneità del mercato e regole giuridiche*, 2002.

82 Tribunal of Salerno of 01.03.2004

83 MOUSOURAKIS, note 2.

84 Inst 2. 11, 3, G 2, pp.109–111 & 114, D 29. 1, C 6, 21.

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To sum up, this Section briefly introduced Albanian succession law by focusing on the competence to write a *testamentum* as well as by uncovering the various types of forms of wills and the types of legatees.

4 Conclusions

This paper studied the right to disposal by *testamentum* and the succession *ab intestato* in the Italian and Albanian legal systems by applying a legal comparison as well as a case-law study. In concrete, the paper showed the similarities and differences between the two types of succession. While the succession *ab intestato* was very similar between the two countries, several differences were found in the case of succession *ex testamento.*

In the case of succession *ab intestate*, the main difference between the two countries rests on the role of the spouse and the codification of the notion of a person's ability to work under Article 371 Albanian CC. First, by comparing the Italian succession *ab intestate* with the Albanian legislation, it is clearly shown that the Italian Parliament has given priority to the protection of the spouse. In other words, in the case that the spouse will be the heir with only the ascendants, or with the siblings of the *de cuius*, the spouse will take only half of the estate in Albania (joint interpretation of Article 261(4) with Articles 363 or 364 Albanian CC) or 2/3 in Italy (Articles 582 Italian CC). But, in both countries, the absence of descendants, ascendants, and siblings of the *de cuius* means that the spouse will inherit everything (Article 261(5) Albanian CC and Article 583 Italian CC). Second, while the Italian legislature protects only citizens connected with the *de cuius* by blood relationship (ascendants or descendants) or marriage (spouse and with the introduction of the civil partnership, Law no. 76/2016 of 20 May 2016, civil partner), the Albanian legislature also includes the heirs unable to work as defined in Article 371 Albanian CC in addition to not recognize the civil partnership between same sex citizens.

In the case of succession *ex testamento,* several differences have been found. The comparison between these two countries demonstrated that the Albanian legislature almost does not recognize the right to property disposal by *testamentum* by limiting this right even in the case of the nomination of a legatee as well as the creation of problems regarding the application of an extraordinary will. Simply, if at the moment of death, the testator has ascendants, descendants, or siblings, he shall choose the testamentary heirs between them (Article 377 Albanian CC) and the spouse. In addition, in Albania, the testamentary heirs (Article 374 CC), their substitutes (Article 381 Albanian CC), as well as the legatee (Article Albanian 384 CC) can only be persons within the category of persons that can acquire property by inheritance by law. Thus, in Albania, according to the textual interpretation, independently from the succession *ab intestate* or succession *ex testamento*, heirs or legatee and their substitutes are citizens connected to the *de cuius* by blood, by marriage, or the heir is a person unable to work as defined in Article 371 Albanian

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CC. Nevertheless, the Albanian jurisprudence accepts the inheritance to other members that are not connected by blood or marriage, if ascendants, descendants, siblings (Article 377 Albanian CC), and the spouse are missing.[85] Second, regarding the case of nomination of a legatee, the Italian legislature has given to the testator the possibility to choose between *legatum per vindicationem* (Article 649 Italian CC) or *legatum per damnationem* (Articles 651–653 Italian CC), while the current Albanian Code of 1994 recognizes only the *legatum per damnationem* (Article 384(1) Albanian CC). The difference between these two types of legacies rests on the fact that only in the case of *legatum per vindicationem* does the legatee become immediately the owner since in the case of *legatum per damnationem* the legatee has the right to demand his goods from the heir. Lastly, the Albanian legislature does not establish a temporary validation of extraordinary wills. In other words, in Italy, these wills are valid for a limited period (three months) from the moment that the extraordinary conditions have finished. In Albania, these same types of wills are valid forever. Some practical problems might arise since the extraordinary conditions might affect the right to disposal by *testamentum* by thinking differently from other moments where the person is not under pressure due to these extraordinary events.

To conclude, while the succession *ab intestato* is very similar between the two countries, the Albanian succession *ex testamento* is very different from the Italian succession law for three main reasons. First, and most importantly, compared to the Italian succession law, the Albanian succession law limits the right to disposal by *testamentum*. Second, while in Italy, the testator can choose between the *legatum per vindicationem* or *legatum per damnationem,* in Albania, the testator can choose only the *legatum per damnationem.* Third, differently from the Italian succession law, the Albanian Parliament does not establish detailed rules for temporary validation of the extraordinary wills. The recognition of these differences is fundamental since – according to Article 33 Albanian PIL – in the case of case of immovable goods, the rule of *lex rei sitae* (Albanian succession law) will be applied.

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85 Albanian High Court, no. 49, note 58; Albanian High Court no. 18, note 58.

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