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Article

Subject: **The French *Projet de loi confortant les principes Républicaines –Le Prélèvement successoral* resurrected?**

Date: **22nd December, 2020**

Firstly what is or rather was the *prélèvement successoral*? It is not to be confused with the fiscal *prélèvements* currently being introduced for French residents and non-residents alike.

Before it being declared anti-constitutional by the French *Cour Constitutionnel* in august 2011, no 2011-159 QPC, (Mme Elke B.) a French national could claim their forced or reserved heirship claim over French assets situated within the French jurisdiction, to the extent that they were being excluded from these rights under a foreign law governing the succession of a French de cujus abroad.

The *prélèvement* has existed since the introduction of Article 2 of the *loi du 14 juillet 1819 relative à l'abolition du droit d'aubaine et de détraction* : « *Dans le cas de partage d'une même succession entre des cohéritiers étrangers et français, ceux-ci prélèveront sur les biens situés en France une portion égale à la valeur des biens situés en pays étranger dont ils seraient exclus, à quelque titre que ce soit, en vertu des lois et coutumes locales* ». A form of compensatory "top up" for perceived successoral depradations inflicted abroad on French and perhaps now EU residents and nationals, if the reader so wishes.

The French Republic contains some fundamental measures of a constitutional value which go beyond the mere principles *Liberté, Egalité et Fraternité* and implements those. The issue here is that the French

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The French *Projet de loi confortant les principes Républicaines –Le Prélèvement successoral resurrecté*?

8th December, 2020

Government is attempting to reintroduce the *prélèvement* within a general reassertion of Republican principles intended to curtail the increasing *Communautariste* tendency into factionalisation which has been shown to undermine these.

Whilst I applaud the political approach in general, the implications of the attempt to render French succession law independent of the EU Succession Regulation is flawed as there is little room for public policy derogations in that Regulation.

The *prélèvement* was declared unconstitutional as it infringed the principle of equality as between heirs. See Conseil Constitutionnel Décision n° 2011-159 QPC https://www.conseil-constitutionnel.fr/decision/2011/2011159QPC.htm :

« …

5. Considérant que la disposition contestée institue une règle matérielle dérogeant à la loi étrangère désignée par la règle de conflit de lois française ; que cette règle matérielle de droit français trouve à s'appliquer lorsqu'un cohéritier au moins est français et que la succession comprend des biens situés sur le territoire français ; que les critères ainsi retenus sont en rapport direct avec l'objet de la loi ; qu'ils ne méconnaissent pas, en eux-mêmes, le principe d'égalité ;

6. Considérant qu'afin de rétablir l'égalité entre les héritiers garantie par la loi française, le législateur pouvait fonder une différence de traitement sur la circonstance que la loi étrangère privilégie l'héritier étranger au détriment de l'héritier français ; que, toutefois, le droit de prélèvement sur la succession est réservé au seul héritier français ; que la disposition contestée établit ainsi une différence de traitement entre les héritiers venant également à la succession d'après la loi française et qui ne sont pas privilégiés par la loi étrangère ; que cette différence de traitement n'est pas en rapport direct avec l'objet de la loi qui tend, notamment, à protéger la réserve héréditaire et l'égalité entre héritiers garanties par la loi française ; que, par suite, elle méconnaît le principe d'égalité devant la loi ;… »

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8th December, 2020

Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 (The EU Succession Regulation) prescribes what is known as a unitary succession and does not in principle permit this type of schismatic *morcellement* of a succession between the laws of EU Member States or between a Member State and a foreign jurisdiction. That's the case whether that law is invoked by the choice of the testator -that of their nationality – or, by default, the law of the habitual residence of the deceased outside France. France should have moved from the duallist or schismatic approach which it shared with amongst other the United Kingdom to the unitary approach in 2014.

The French Government's explanatory document for the proposed change can be found here and the reasoning is as follows:

La loi comporte en outre des dispositions destinées à préserver la dignité de la personne humaine, et notamment à:

- *Lutter contre des pratiques qui dégradent la dignité de la femme, en pénalisant la délivrance de certificats de virginité;*
- *Renforcer les pouvoirs des officiers d'état civil pour prévenir les mariages forcés ;*
- *Mettre fin à l'application de règles successorales étrangères sur notre territoire qui lèsent les femmes ;*
- *S'assurer qu'aucun avantage ne puisse être tiré d'une situation de polygamie.*

The reasoning behind the drafting is thus "clarified". However, a little like ghee, it has in fact caused the constitutional temperature to be turned up.

Under the foreign laws which can be rendered applicable by the European Succession Regulation, an increasing number of French resident women and girls of foreign extraction are finding their succession rights subject to foreign laws, which may discriminate against French women in succession matters. For example, a foreign law permitting polygamy might require a polygamous deceased

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husband's assets to be shared equally between their wives, thus reducing the French resident woman's rights to below those to which she would be entitled under French law. One might argue that if the foreign law enables that, then that is what the applicable law is. The effect is also the same for daughters who under certain foreign religious laws have a lower entitlement to their brothers. Whilst that can be explained by a correlated duty of aliments and financial support by the male progeny to their surviving mother is not taken into consideration in that analysis as each child, irrespective of gender (and indirectly their spouses), in France can have be summoned to pay alimony to their parents.

There is therefore an element of positive discrimination in the proposal seeking to rebalance what is perceived to be an injustice on French residents over the sharing out of French situs assets under a foreign maw which to which French republican principles are irrelevant.

Whether the political reasoning is clear or not is not relevant, the question is what exactly is proposed to be enacted - which is actually very different.

Commentators in France immediately seized upon the issue of a breach of the European Succession Regulation whose articles 21-23 otherwise appear to finalise the issue against this intrusion. If the law of the State governing the succession is that of a Third State (including the United Kingdom which did not sign up to the Regulation), which can be that of a shari'ah or other state permitting polygamous or unequal shares or that of a State which has no reserved heirship rights and testamentary freedom, then that Third State's laws as to polygamous entitlement and the cutting out of received shares applies, in principle.

However, that analysis does not take into account the potential effects of article 10 of that Regulation which reads as follows:

Article 10

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Subsidiary jurisdiction

1. Where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on the succession as a whole in so far as:

(a) the deceased had the nationality of that Member State at the time of death; or, failing that,

(b) the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed.

2. Where no court in a Member State has jurisdiction pursuant to paragraph 1, the courts of the Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on those assets.

Generally speaking until now article 10 has always been read as requiring a Member State taking a "subsidiary jurisdiction" to rule using the law laid down required under articles 21-23 and not to substitute its own rules such as a reserved heirship or a *prélèvement* of the type proposed in article 13 of the draft law. Might it have been the intention of the French legislator to slip a *misericord* between the armour plates of the Regulation as applied by foreigners in France, or to require a notary to do so in their place?

It might therefore come a surprise to find that the introduction of article 13 of the proposed law "comforting Republican principles" which the French Government proposed to the Conseil des Ministers on 6th December, 2020, and which has now been proposed to Parliament reads as follows (my lay translation):

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> *Chapter III sets out provisions destined to protect the dignity of the human person. Article 13 aim so reinforce the protection of reserved heirs. Article 913 Code civil is completed by ensuring that every child which is a legal heir takes their rights without any distinction being made on discriminatory criteria. A new type, of right to a compensatory prélèvement (legitime) is proposed which will allow every child omitted by the deceased to recover the equivalent of their reserved rights from the assets situated in France once the foreign law allows their disinheritance from the succession. This prélèvement right will apply where the deceased or one of their children is a national of a Member State of the European Union, or is habitually resident there at the date of death. A new paragraph is also inserted into article 921 of the same code to ensure that the reserved heirs are made aware of their right to initiate an action en réduction. These provisions also require the notary to clearly and precisely inform each of the heirs whose interests are potentially subject to being harmed by liberalities given by the deceased. It lays down an obligation on the notary to inform fully with eth aim of ensuring that the heir makes a free and informed choice at the moment of exercising or not exercising the right to reduction.*

Note that the *prélèvement* proposed is to be applied where a "*deceased or one of their children is a national of a Member State of the European Union, or is habitually resident there at the date of death".* This is a very clumsy attempt to sidestep the issue raised in the *QPC Mme. Elke B.* referred to above. It is not by simply including other EU nationals and habitual residents within the EU, and discriminating against those outside it that any equality of treatment is engaged! There are other nations on the face of the planet.

This has precious little or even nothing to do with the opening description of the *raison d'être* for the amendments, as several EU Member State, for the moment including the United Kingdom (save Scotland's legitime), do not have any equivalent or forced or reserved heirship régimes and allow complete testamentary freedom. I will come back to the Inheritance (Provision for Family and Dependents) Act 1975 which does not extend to Scotland or Northern Ireland in a later article.

Were I to be sceptical, I might add that it appears to be aimed, not at polygamous marriages or at shari'ah type gender discrimination, but at precisely the type of Succession Regulation planning carried

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out in France by serially monogamist British residents and nationals with a view to excluding French reserved heirship rules under the Succession Regulation.

That has not escaped the attention of such as Professor Hélène Péroz of the University of Nantes who consider that the *prélèvement* in its proposed form resent for is simply unworkable. See here.

I summarise her queries as follows:

- Putting a *prélèvement* in place appears totally in contradiction with the EU Succession regulation. How can an EU Member State reduce or modify the scope of application of a European Regulation?

- What happens when the French Court is not competent to adjudicate over the Succession and has to apply the law of another Member State?

- How is the *morcellement* or schism between the unitary law imposed by the EU Regulation and what is effectively a duallist approach under the French *Code civil* to be managed when Considerant 37 or the Regulation expressly prohibits it?

- As the criteria of application are, firstly the presence of assets in France and secondly the residence in the EU of the heirs or the residence/nationality of the deceased, does the matter not fall as unconstitutional following the decision of the QPC on the prior *prélèvement?* How can a French Court apply the *prélèvement* equally when the deceased was not resident in the EU and only one of the heirs lives in France or the EU, and the others live outside it? Can the Court apply the right of *prélèvement* to all when only one actually fulfils the criteria for application of the *prélèvement*?

- The breach of the principle of equality between heirs where there are assets in France, but the deceased was neither resident within the EU or an EU national having "opted" for the law of his nationality to apply?

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- What happens where the foreign law has a reserved portion or an equivalent, but it is more restricted or of a lesser percentage than the French equivalent (*c.f.* Jersey restricts its legitim to movables and leaves immovables to devolve or be left under absolute testamentary freedom).

- What happens where there is no reserve under the foreign law otherwise governing the succession but the deceased has in fact gratified their children, but in lesser proportions to those envisaged under the *Code civil*?

- What happens where there is litigation pending elsewhere and also where there is incompatibility between foreign juridical decisions and the French *prélèvement* rights? Will *res judicata* apply?

- Whilst these are only initial reflections from a French *Agregée* University Professor of Law, it is clear that the proposal itself at article 13 of the *projet* does not square with the political statements justifying its implementation, and secondly that it flaunts French exceptionalism before the European Union as a whole.

I would add to that list :

- Is the new *Prélèvement* intended to be of *ordre public?* It will have to be to avoid it being evinced by a will or disposition. If it is to be so will it be of *ordre public international* or merely *national*? The draft does not make that clear.

These are not the only objections, but they are fundamental ones, and I would amplify and extend her concerns in relation to British nationals and residents who have used the Succession Regulation, prior to Brexit to organise their successions in France under the Regulation's protective and certain umbrella.

The provision as laid before the *Assemblée Nationale* reads as follows:

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Article 13 original draft	Article 13 English lay translation
Le code civil est ainsi modifié : I. – L'article 913 est complété par un alinéa ainsi rédigé : « Lorsque le défunt ou au moins l'un de ses enfants est, au moment du décès, ressortissant d'un État membre de l'Union européenne ou y réside habituellement, et lorsque la loi étrangère applicable à la succession ne connait aucun mécanisme réservataire protecteur des enfants, chaque enfant ou ses héritiers ou ses ayants cause peuvent effectuer un prélèvement compensatoire sur les biens existants, situés en France au jour du décès, de façon à être rétablis dans les droits réservataires que leur octroie la loi française, dans la limite de ceux-ci. » II. – L'article 921 est complété par un alinéa ainsi rédigé : « Lorsque le notaire constate après le décès que les droits réservataires d'un héritier sont susceptibles d'être atteints par les libéralités effectuées par le défunt, il informe chaque héritier concerné,	The code civil is modified as follows: I. – Article 913 is completed by a paragraph drafted as follows: « when the deceased or at least one of their children is, at the moment of their death, a national of a Member State of the European Union or resides there habitually, and when the foreign law applicable to the succession provides no reserve mechanism protecting children, each child or heir or their representatives can deduct a compensatory prélèvement on existing assets, situated in France on the day of the death, so as to be re-established in their reserved rights granted by French law, with in their limits.» II. – Article 921 is completed by a paragraph drafted as follows:: « when the Notary concludes after the decease that the reserved rights of an heir are potentially affected by liberalities carried out by the deceased, the notary informs each heir concerned,

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individuellement, et le cas échéant, avant tout partage, de son droit de demander la réduction des libéralités qui excèdent la quotité disponible. »	individually and, where appropriate, before any administration, of their right to require the reduction of such liberalities which exceed the free portion. »
III. – Les dispositions du présent article entrent en vigueur le premier jour du troisième mois suivant la publication de la présente loi au Journal officiel de la République française. Elles s'appliquent aux successions ouvertes à compter de leur entrée en vigueur, y compris si des libéralités ont été consenties par le défunt antérieurement à cette entrée en vigueur.	III. – The provisions of the present article come into force on the first day of the third month following the publication of the present in the *Journal officiel de la République française*. They apply to successions opened from their coming into force, including where liberalities have been granted by the deceased prior to the date of their coming into force.
	n.b. Liberalities means gifts and other gratuitous dispositions and transfers, it does not include entering into a matrimonial property régime, as that is not a gratuity. However it is arguable that a disposition into trust is not a gratuity to the extent that French law appears to be following the error of its Tax legislation in leaning towards such a disposition being treated as a form of fiduciary mandate, therefore a matter of contract.

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My main concern is specifically for British residents and nationals, including "Channel Islanders" who have based their succession planning in France on what is in fact a solid foundation, that is the Succession Regulation. It is clear that whatever your patrimonial situation in France you will need advice on these potential changes which the majority of English advisors may well be unable to address without recourse to a specialist.

The draft is not good legislative practice. It is presented under what are palpably false pretences and takes on a legally binding piece of European legislation within the European legal area in a very amateurish manner. Whilst legislation has been presented under dubious if not false pretences in the past, this does take on a different amplitude, when the Succession regulation is concerned.

It could be described as not addressing what it was stated to do, and merely renders the lives and deaths of Europeans and also those from Third States who are not *communautariste* even more complex and worse uncertain than before.

It is also unclear to what extent any surviving spouse's rights can be considered as those of a *réservataire* in the case of a second marriage with children from prior unions. The recent changes in spousal rights indicate that they may now be.

These are comments and not advice. There is no legal relationship created by this document with those who read it. If anyone wishes to obtain specific advice on their position, please contact Peter Harris on + 44 1534 625879, or by e-mail to peter.harris@overseaschambers.com.

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