Vergentis. Revista de Investigación de la Cátedra Internacional Conjunta Inocencio III
ISSN: 2445-2394
ISSN: 2605-3357
catedrainocencio@gmail.com
Universidad Católica San Antonio de Murcia
España

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Vergentis. Revista de Investigación de la Cátedra Internacional Conjunta Inocencio III, vol. 1, no. 8, 2019
Universidad Católica San Antonio de Murcia, España
Available in: https://www.redalyc.org/articulo.oa?id=564759679007

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Artículos científicos

TYPOLOGIES OF USUFRUCT IN THE VISIGOTHIC LAW ANALYSIS OF THE LEGAL CASUISTRY

LAS TIPOLOGÍAS DEL USUFRUCTO EN LA LEY VISIGODA. ANÁLISIS DE LA CASUÍSTICA LEGAL

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Abstract: This study will analyse the different typologies of usufruct and use included in the regulation of Visigothic Law and in particular with a view to the main legal bodies of the Goths. In them, we observe an evolution from the common point represented by Classic Roman Law until the Legislative texts of the Goths.

Keywords: Usufruct, use, enjoyment, legacy.

Sommario: Nel presente studio, procediamo ad analizzare le diverse tipologie di usufrutto e uso raccolte nel regolamento della legge dei visigoti e in particolare in vista dei principali codici giuridici dei popoli goti. In essi si osserva un'evoluzione dal punto comune rappresentato dal Diritto Romanistico classico fino ai testi legislativi dei goti.

Parole: Usufrutto, uso, godimento, eredità.

Vergentis. Revista de Investigación de la Cátedra Internacional Conjunta Inocencio III, vol. 1, no. 8, 2019

Universidad Católica San Antonio de Murcia, España

Received: 15 February 2019
Accepted: 15 April 2019

Redalyc: https://www.redalyc.org/articulo.oa?id=564759679007

1. INTRODUCTION. THE TYPOLOGIES OF THE INSTITUTION

One of the aims of the legislator is to seek the happiness of the People1, as stated in the first title of the Liber Iudiciorum2. He writes and approves different norms, guided by values of Justice and always considering the best interest of the community. The Visigothic People gives a great value to the collective meaning of society.

Various norms that he will issue on ius privatum will be based on the protection of family and of its members, since family is the nuclear element of the community and, in turn, it is the basic representation of the community in the society. The first relation that each person creates with the community is the one with his own family; it is the nucleus that accompanies the person during the rest of his life.

On the other hand, another institution that also has a strong importance is the one of the Roman pater familias, to which we can add the reverential respect towards the oldest generations of the family.

All these elements have contributed to the birth of a usufruct of the parents in relation to the goods inherited by the children, which is the result of the need to continue with the exploitation of the hereditary assets in order to avoid a reduction of its value or its disappearance.

Nevertheless, when the legislator concedes the usufruct to the widowed father or mother, he tries to give him/her an economic situation that allows him/her to survive with dignity.

Another reason that is linked to the previous one and that the legislator takes into consideration is the need to satisfy the common needs of the children and of the widowed spouse3, until they can look after themselves, without needing any parental help.

For all these reasons, the Visigothic legislator develops the usufruct of the widower on the personal goods of his spouse that were inherited by his children.

Obviously, once the wife is dead, her personal goods compose a patrimonial set with no owner, a thing that the Roman used to call hereditax iacens4. One of the tasks of Law is precisely to assign the inheritance to the legitimate heir or to the legitimate successors, in case there are various.

The Visigothic regulation accepts two types of succession: the testate and intestate succession. As it is suggested by their own names, they are put into practice by following the last wishes of the deceased expressed in the testament or, if the person didn't provide such document, through the general legal measures. We won't analyse with more details the Visigothic succession because this is not the subject of our study. Nevertheless, it is important to remember that the most common modality to create the usufruct is precisely succession, which can be testate or ab intestato.

We consider that the usufruct, as an independent and autonomous right, is created as an institution that protects the inheritance5 and the succession in order to avoid the neglect and the abandonment of the widowed spouse. After one of the spouses dies, his/her patrimony inevitably becomes a property of the legitimate heirs; therefore, the surviving spouse can find herself/himself in a difficult situation from the patrimonial point of view. In fact, this bond between usufruct, inheritance and succession will not cease for a long time6, and it will continue until the usufruct obtains the legal independence, becoming an autonomous legal institution different from the rest of the traditional ones, and included in the legislation separately and with its own legal definition.

Therefore, and in order to avoid the neglect of the widower or of the widow, or that he/she must face all the needs of the family by relying exclusively on his/her goods (because the goods of the dead spouse remain unused), the usufruct is foreseen as an institution that gives him/her some goods that he/she can use during the rest of his/her life, therefore having a patrimonial security that can be used when needed. Therefore, the usufruct was created, like many other institutions, because of a frequent and common situation that received an atypical answer through the legatum or donatio post mortem7, until the legislator decided to include it in Law as a new institution.

We don't know, in the Visigothic regulation, proper types of usufruct apart from the ones linked to the fathers, mothers, grandfathers, grandmothers or sisters that, in case of widowhood or unmarried state

(in the last case), can enjoy the right of usufruct on the goods of the dead spouse or parents, whose bare owners are the children, grandchildren or other siblings, depending on the case.

The Visigothic legislative texts only regulate these specific cases. This doesn't mean that the constitution of the right of usufruct was prohibited in favour of other persons, in compliance with the freedom of the pact to which we referred before. In spite of this, we don't need a norm on this topic, especially considering the mentality of the Visigothic legislator that leads him to adopt various measures whose exclusive aim consists in avoiding that the patrimony leaves the family.

For this reason, we have decided not to focus on elucubrations on the legal possibilities, and to analyse, in the following points, the typologies of usufruct included in the Positive Law that are still preserved today, which are the following: usufruct of the widower, usufruct of the widow, usufruct of the grandparent, usufruct of the brother or of the sister.

2. THE USUFRUCT OF THE WIDOWER

It is not something new that the Visigothic Law has a strong patriarchal nature: therefore, it should not come as a surprise that some references to the usufruct of the widower haven been included in almost all the existing legislative bodies. However, it is quite surprising to see that the usufruct of the widow is reflected in all of them with no exception, as we will see in the following point.

The usufruct of the widower is intended, by the Visigothic legislator, as a way to keep under the administration of the father the goods of the dead wife in order to, on the one hand, avoid their misuse and, on the other hand, make them produce goods that will meet the family costs, as we have said.

This explanation is evident due to clear sociological data, such as the high mortality rate that existed in that historical era and the low life expectancy. Most certainly, in case the spouse died, she would die young, leaving young children unable to adequately administrate the inherited goods, therefore the goods would remain various years inert. In order to avoid this, the legislator gives the possibility to constitute, according to the law, a right of usufruct on the goods inherited by the children from the deceased spouse.

Another argument that supports our thesis is that the father is constituted as the holder of this right on the totality of the goods of the dead wife, if the children fulfil certain requirements of age and are not married. This allows him to enjoy the goods, to own and to use their fruits, as we have already pointed out in section 5 of this work.

It is precisely the Code of Euric the one that allows the father to be the holder of the right to which we referred in the previous paragraphs, in Law 321 section 1, which literally says:

"Si marito supérstite uxor forsitan moriatur, filii qui sunt eodem coniugio procreati in patris potestate consistant, et res eorum, si novercam non superduxerit, ea conditione possideat, ut nihil exinde aut

vendere, aut evertere aut quocumque pacto alienare praesumat, sed omnia filiis suis integra et intemerata conservet".

This norm, that we have already mentioned in other occasions, is the one that allows the father to be the owner of the goods of his spouse; and although it says that he is the owner of such patrimony, we must deduce that he has the usufruct, since the only limitations established have to do with the authorities of the bare owner, that is, the law prohibits to sell, transfer or misuse the goods, and it obliges him to preserve the totality of the goods for his children. The owner can only use the goods, but he is not entitled to do anything else.

Therefore, the limitations of the father are the ones that are typical of the usufructuary, not of the owner. If we analyse the words of the norm, the usufructuary can use the fruits and keep them for himself or he can make repairs in order to integrally preserve the goods for his children. Considering these reasons, we cannot actually think that the legislator has the owner in his mind, but he was rather thinking about the usufructuary.

In line with this, if we add to these arguments a systematic interpretation of such section of the law, with the following order, which allows the father to take the fruits and to use them as if they were his together with his children, we conclude that the law refers to usufruct.

We can't ignore this norm without any further comment. The fact that it allows to take the fruits and use them tacitly implies a permission, granted by the legislator, not only to own, but also to administrate the good, to enjoy it and, lastly, to receive its fruits and use them.

Nevertheless, it is not permitted, for the husband, to take the usufruct of all the goods of his children. Law 321 of the Code of Euric, in section 4, limits the share of the goods to half if the son/daughter has reached the age of 20 8 , with the understanding that the son/daughter already has his/her own necessities in order to create his/her own family.

In such situation, the father can take the usufruct of half of the goods inherited from the mother, and he can continue being the holder, as usufructuary, of that share until his own death if no partial or total cause that ends the right concurs.

Nevertheless, this is not the only norm that regulates a case that limits the usufructuary share. The previous section of the same law9 includes a part that is far more restrictive in case of constituting the usufruct and if such law is applicable. This section describes the case in which the son or daughter, who is the bare owner, is already married or is going to be married soon. In case that happens, the widower can only become the holder of the right of usufruct of a third part of the goods inherited by the son or daughter, while the rest must be free from any burden.

In this norm, the legislator foresees that the son or daughter, when he/she creates a new family, will need the biggest part of his/her patrimony to satisfy his/her own needs, and the ones of his/her spouse and children; therefore, this is not compatible with the preservation of the usufruct of the widower on the totality of the goods of the son/daughter, since this would put him/her in an undesirable and precarious condition.

If, on the contrary, the widower had the right of usufruct on the totality of the goods before the son or daughter got married or reached 20 years of age, he will have to cede the share that according to the law corresponds to the son or daughter concerned, referring, regarding this point, to the following section of the extinction, which deals with these subjects.

3. THE USUFRUCT OF THE WIDOWED WIFE

Another type of institution we find in the Visigothic regulations is precisely our right, the widowed wife being the holder of this right. Unlike the previous case, this type of usufruct is reflected in all known Visigothic norms, although most of the time in relation to its extinction. But it is obvious that if the legislation extinguishes it, it is because in the mens legislatoris the existence of this institution is conceived.

But there are not only extinguishing norms. We can find other norms that precisely establish the possibility that the widow takes in usufruct part of the property of the deceased husband.

Specifically, we refer to Law 322.1 of the Code of Euric, which regulates the constitution of the usufruct in favour of the widowed wife who remains in such civil status over a part of the property of the children inherited from the spouse and father respectively. The specific law reads as follows:

"Mater si in viduitate permansit, aequalem inter filios, id est qualem unus ex filius, usufructuariam habeat portionem; qua(m) usque ad tempus vitae suae usufructuario iure posideat, ceterum nec donare nec vindere nec uni ex filiis [...] e conferre praesumat".

The legislator in this rule sets aside a share of the property of the deceased husband for the survival of the widow. This rule highlights again the unequal treatment of the wife compared to the husband, and the clear patriarchal character of the Visigothic legislation. The wife receives in usufruct a part of the property of the husband10 as if she was just another daughter11, given that "maritus [...]; sed vir, qui uxorem suam secundum Sanctam Scriptura (m) in potestate habet"12.

While the husband in the case previously analysed of the Law 321.1 of the Code of Euric has the right to the usufruct over the totality of the property of the wife, only one share is reserved for the wife13.

This differentiation can benefit or be prejudicial to the widow. In other words, if the couple had only one child, she would obtain in usufruct half of the property of the deceased husband; if two had been born, she would obtain one third. However, if more than two had been born, the widow would represent one more share with respect to the children.

The surviving wife receives one share from the death of the husband and the sharing out of the Hereditax Iacens (it would not be correct to speak of the liquidation and distribution of the inheritance, since these institutions did not exist in Visigothic Law), while the husband, from the moment of the death of the wife receives the usufruct of all her property.

If the wife does not respect the widowhood and gets married or commits adultery to the memory of the dead husband, her right shall be extinguished, as it is developed in section 8 of this work, to which we refer.

But not only in this norm the existence of the usufruct in favour of the widowed wife is stated. The entire Law 322 of the Code of Euric contains cases of extinction of the usufruct constituted in favour of the mother over the property of the children inherited from their father and her husband. However, we will not dwell on it since, as we say in the previous paragraph, we devote a later point to it.

Also in the Breviary of Alaric II we find mentions to usufructum uxori.

Specifically, in book III, title IX, whose only norm reads as follows:

"Aperta definitione signamus, longe aliud esse, quod de rebus ante nuptias a nostra mansuetudine constitutum est, aliud, quod de iis, quae ex patrimonio proprio vir suo arbitrio ad usuinfructum uxori dereliquit. Nam in eo usufructu, quera vir extremam constituens voluntatem de rebus propriis uxori dimiserit, slatim post secundas nuptias mulieri volumus imminere iacturam, secundum eam legem, quae de hoc arliculo non dubitatur emissa: de usufructn vero reriim ante nuptias donatarum ea servari, quae saluberrima lex anterior plena definitione decrevit".

This rule also extinguishes the usufruct of the widow if she remarries. But first it recognises that the husband can leave her a share of his goods in usufruct.

A totally contrary rule is the Lex Romana Burgundionum14, in which the Burgundian legislator states that if the widow mourned her deceased husband for one year and remarried, she will keep the usufruct of her former husband.

Finally, the Liber Iudiciorum also recognises the existence of the usufruct of the widow in many of its laws. An example of this can be found in Law V of title II of book V. The legislator defends in it the maintenance of what has been given in usufruct if the widow does not incur in adultery.

Another example of the Liber Iudiciorum is the previous Law, that is, Law IV of the same title, which is an ancient law which literally reads as follows:

"Si mulier a marito extra dotem de quibuscumque rebús, quacumque donatione vel progligatione conquisitis aut illi debitis, quoquo tempore quodcumque donatum acceperit, si filii de eodem coniugio fuerint procreati, mulier usque ad diem obitus sui secura possideat et de quinta tantumdem parte earum rerum faciendi quod voluerit potestatem obtineat; post obitum vero suum reliqua integra et intemerata filiis ex ipso viro procreatis derelinquat, et nulla occasione exinde, excepto, ut dictum et, quintam parten quidquam aliut mulier alienare presumat. Quod si ex ipso coniugio filii non fuerint procreati, quidquid mulier de rebús sibi donatis facere elegerit, liberam habeat potestatem. Ceterum si intestata discesserit, ad maritum eirus, si suprestis extiterit, donatio revertatur. Sin autem maritus non fuerit, ad heredes mariti, qui donationem fecit, eadem donatio pertinebit. Simili ratione et de viris precipimus custodiri de his, que ab uxoribus tempore quocumque donata perceperint".

This rule, although it refers to limited donation, is truly a usufruct, since it speaks of the possession of what has been given and in turn describes the faculties involved in the position of the usufructuary. On the other hand, the legislator understands that once it is extinct it must pass to the legitimate heirs of the person who made the donation as if he/she were the bare owner. Although it is true, he previously demands the restitution to the husband as donor, although he can be the bare owner and demand the restitution of the faculties that compose the right of usufruct. One of the arguments that supports our thesis in addition to the reference to the possession is when the legislator says that the woman may obtain the fruits and do what she likes with the good.

Another reference that indicates that this is our contract is the legal provision that requires that once the usufructuary wife is deceased, the goods must pass to the children. In case of donation, the widow could leave them as inheritance or legacy to whomever she freely decided, something that is not allowed in this law.

However, it is not the only reference to the usufruct of the widow in this legal corpus. In Book IV, Title 2, Law 13, this norm is included as an old law in the Code of Euric that allows the widow to take in usufruct a share of the property of the deceased husband15.

4. THE USUFRUCT OF THE GRANDPARENT OF THE BARE OWNER

A question that arises is whether it would be possible outside the cases of the parents the construction of the usufruct in other persons. We understand that it is possible, although the norms on this point are almost non-existent and obscure.

Regarding the second ascending generation concerning bare owners, that is, the grandparents, its existence is conceived by the legislator, since we have found a unique norm on this, that is, Law 321.6 of the Code of Euric, which simply states the following: "Eadem quoque de nepotibus forma servetur".

With such a brief rule we understand that the legislator conceived the existence of the usufruct of the grandparent with regard to the property of the grandchildren. We know nothing else about the regime of the usufruct, about whether the goods to which the usufruct would be extended would be those of the grandmother or of the grandfather respectively, or whether it would also include those of their son or daughter, in turn parent of their grandchildren. We assume that if the grandparent holds the right of usufruct it is because his/her son or daughter has died, and therefore the grandparent holds the right of usufruct as an immediate ascendant who can exercise parental authority over the grandchildren16.

This norm only establishes that the provisions relating to the extinctions of the usufruct of the father over the goods of the son or daughter shall apply to the cases of usufructuary grandparents and

bare-owner grandchildren, without having any other type of additional information.

We conclude that the mens legislatoris conceives the existence of the usufruct in favour of the grandparents, constituting them as usufructuaries, and being applicable the regulations foreseen for the father in the case of the grandfather and the regulations foreseen for the mother in the case of the grandmother.

5. THE USUFRUCT OF THE BROTHER OR SISTER OF THE BARE OWNER

In addition to the case foreseen above, we have managed to find another case in which the usufruct of another relative would be allowed. It would be the case of the sister or brother. This is foreseen in Law 322.3 of the Code of Euric, which deals with the transmission of the usufruct of the mother to any of her children without any gender difference.

The Law literally says: "Nam usumfructu(m) quem ipsa fuerat perceptura dare cui voluerit, filio vel filiae, non vetetur".

This norm does not authorise the constitution of the usufruct directly in favour of any of the children, but it rather authorises that they become usufructuaries by transmission from the mother. Although nothing suggests that it cannot be constituted directly in favour of the children of the widow or widower and siblings of the bare owner.

But this is not the only case of usufruct of the sister that we find in this regulation. In Law 320.5 of the Code of Euric: "Quod si parentes sic transierint ut nullum fuerit testamentum, ea puella inter fratres aequalem in ómnibus habeat portionem, quam usque ad tempus vitae suae usufructuari iure possideat, post obitum vero suum terras suis heredibus relinquat; de reliqua facultate faciendi quod voluerit in ei us potestate consistat".

This norm grants the usufruct in favour of the unmarried sister over a share of the assets of the inheritance of the deceased parents. The share shall be equal to that of her siblings, as stated in section 3 of the same law. When she dies, this share shall be returned to the siblings as heirs.

The law must refer to bare owners rather than heirs, so it is logic that when the sister dies, the assets are returned to the bare owners, regardless of the fate of the rest of personal property.

But all these sections of Law 320 that we have mentioned come into clear conflict with the first of them, which says the following: "Si parentes testati decesserint [...] de ea [...] eas ad facultates [...] sórores [...] accipient [...]cum fratribus suis in terris vel in aliis rebus aequalem habeant portionem".

The legislator establishes that if the parents drew up their will before they died, the daughters shall receive as successors one more share "in terris vel in aliis rebus", that is to say, in inheritance, like their brothers. There is no difference between the married or unmarried daughter, which will be made later.

That is precisely why we do not understand why in this section the daughter is given one more share in inheritance, while in the following sections she is given only one share in usufruct.

Therefore, we are faced with two totally opposite norms, given that the later ones deprive the unmarried sister of a possible inheritance by the mere fact of not being married, leaving her the share as usufruct and not as property as successor. Obviously, the first section of the Law is much more beneficial to her than the rest.

Notes

1 This has already been mentioned in: «Artifex legis in the Liber iudiciorum: una antigua teoría con total vigencia», en Estudios actuales en Derecho y Ciencia Política, Santiago de Compostela 2013, pp. 43-55.

2 ÁLVAREZ CORA, E., «Qualis erit lex: la naturaleza jurídica de la ley visigótica», en Anuario de historia del derecho español 66 (1996), p. 16.

3 C.E. 321.2.

4 D'ORS, A., Elementos de Derecho Privado Romano, Pamplona 1975, p. 139. D'Ors defines the inheritance as "el conjunto patrimonial transmisible", because "el heredero sucede al difunto porque continúa su personalidad en todas aquellas situaciones que son transmisibles". The inheritance, as long as it has not been transmitted nor allocated to anyone, and as long as it is a patrimonial set with no owner, is called hereditas iacens, because from the point of view of ownership it remains inert, waiting for its liquidation and allocation in favour of the heir or of the heirs.

5 DE COVARRUBIAS, D., Opera omnia, vol. II, Génova, Cramer, Perachon and Cramer filii, 1723, p. 150 ff.

6 The usufruct has been studied for centuries by the doctrine as an institution annexed to inheritances, and, according to some authors, the usufruct inheritance constitutes a specific typology inside the types of inheritances described by law. This situation is not surprising, and not without reason it continued until the XVII century, when some authors decided to give a dogmatic independence to this institution. This development strengthened throughout the XVIII century to this day, in which we normally accept the fact that the usufruct is an institution independent and autonomous from any other one, with its own regulation.

7 The donation between the spouses, in Roman Law, was null, unless it was confirmed at the death of the donor. On this matter we analyse the extinction of the usufruct, referring in this point to the referred section of this study.

8 C.E. 321, 4: "Pater autem tam filio quam filiae, cum XX annos aetatis impleverit, media ex eadem quam unumquemque contigit de reus maternis restituat portionem, etiam si nullis fuerint nuptiis copulati; medietatem vero dum advixerit pater sibi vindicet filiis post obitum reliquendam".

9 C.E. 321, 3: "Cum vero filius duxerit uxorem aut filia maritum acceperit, statim a patre de rebús maternis suam recipiat portionem, ita ut usufructuari patri tertia derelinquatur".

10 C. E. 322, 1.

11 GIBERT, R., Historia general del Derecho Español, Madrid 1974, p. 10. Professor Gibert reminds us that "a Teodorico II (453-466) [...] se debe justamente una ley sobre el senadoconsulto Tertuliano, que en la herencia equipara la madre a la hermana [...]".

12 C. E. 323, 1: "Maritus si cum servis uxoris vel suis in expeditione aliquid lucri fuerit consecutus, nihil uxor a viro suo praesumat repetere, nec ipso vivente nec post eius obitum; sed vir, qui uxorem suam secundum Sanctam Scriptura (m) in potestate habet, similiter et in servis eius potestatem habebit, et omnia

quae cum servis uzoris vel suis in expeditionem adquisivit in sua potestate permaneant; pro eadem scilicet ratione quia si servi, dum cum domino suo in expeditione conversabantur, aliquid admisissent forte damnosum, ille qui eos secum duxerat ipse pro eis daturus esset conpositionem, ut sicut lucrum ita et damnum ad se dominas noverit pertinendum".

13 I understand that the treatment is like that of another daughter, given that C. E. 320 states: "Si parentes testati decesserint de ea [...] eas ad facultates [...]sórores ciipient cumm fratribus suis in terris vel in aliis rebús aequalem habeant portionem".

14 L. R. B., t. 16, single Law.

15 L. I. p. 182.

16 It should be noted that in the case of succession, the Code of Euric, when it comes to establishing the inheritance order, has preference of the grandparents of the father over the grandparents of the mother, although it says nothing about guardianship. Vid. C.E. 328.1.