

Burial vs. Cremation in Romania – A Legal Perspective

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Abstract: - Burial practices touch the fundamental personal, cultural, religious and philosophical beliefs of each of us. In the light of the Romanian Cemeteries Act which was recently voted by the Romanian Parliament, since the current legal status of burial grounds and human cremation is somewhat unknown and given that death and any arrangement regarding this event is something most Romanian people try to postpone for as long as possible, this brief article attempts to offer a legal perspective on the deceased's right to a funeral religious service and a peaceful rest. We will argue that both burial and cremation have their advantages and their drawbacks in relation with the deceased's personal wishes and religious faith in the absence of a testamentary stipulation.

Key-Words: - Burial, cremation, exhumation, reburial, secular law, canon law.

1 Introduction

Burial practices touch the fundamental personal, cultural, religious and philosophical beliefs of each of us.

Since the founding of modern Romania in 1859, the rules and regulations regarding funerals were a concern for the Romanian legislator which issued the «Regulation on interments», sanctioned by the Decree No. 918/1860, and the «Law on interment», sanctioned by the Decree No. 339/1864 [2].

One and a half century later, on the 16th of November 2010 the Romanian Parliament adopted the «Law on cemeteries, human crematoriums and funeral services» and sent it for promulgation to the President of Romania which in turn demanded that the Parliament re-examines the law due to several reasons, one of them being the lack of correlation with other statutes. Although the Romanian Cemeteries Act returned to the Parliament, sooner or later it will become law. Therefore it is not without interest to examine some of its current provisions.

In the light of this future law and since the current legal status of burial grounds and human cremation is somewhat unknown, given that death is something most people try to postpone for as long as possible, this brief article attempts to offer a legal perspective on the deceased's right to a funeral religious service and a peaceful rest.

Perhaps to plan your own funeral might seem inappropriate for some, but by doing so we can

avoid one of the hardest tasks we can ever put a loved one through.

As statistically, Romanian religious faith is dominated by the Romanian Orthodox Church followed by the Roman Catholic Church, our analysis on the cremation will involve only these two religious denominations.

2 Secular Law

2.1 Overview of the Current Legislation

The laws currently in effect classify the human cemeteries in two categories: those belonging to the *religious denominations* and those belonging to the *local public administration*.

Thus, according to the annex of the «Law No. 213/1998 on public property and its juridical regime», published in the Official Journal of Romania, Part I, No. 448 of 24th of November 1998, the public domain of the territorial-administrative units also consists of the „communal and town cemeteries”.

Also, article 28 of the «Law No. 489/2006 on the Freedom of Religion and the General Status of Religious Denominations», published in the Official Journal of Romania, Part I, No. 11 of 8th of January 2007, stipulates that „Local denomination units can have and maintain, alone or in association with other denominations, *denomination graveyards* for their worshipers. Denomination graveyards shall be

managed according to the regulations of the denomination that owns them. The denomination identity of historic graveyards is protected by law. (2) In the locations that do not have a local public graveyard and certain denominations do not have their own graveyard, deceased persons who were members of those denominations can be buried according to that denomination's rites in the existing functional graveyards. (3) The stipulations in paragraph (2) do not apply to graveyards that belong to the Mosaic and Muslim denominations. (4) The authorities of the local public administration are under the obligation to establish local public graveyards in every village and town. (5) Village or town graveyards shall be organized of such manner as to include appropriate sections for every recognized denomination, if so requested by the denominations that operate in the respective village or town".

The legal status of burial grounds belonging to the *local public administration* is governed by rules and regulations adopted by each local council, such as the «Regulation on the administration and functioning of the cemeteries belonging to the Roman City Municipality», annex to the Local Council Decision No. 98/2007, in the historical province of Moldavia, the «Regulation on the organization and functioning of the Sibiu Municipal Cemetery», annex No. 1 to the Local Council Decision No. 437/2005, in the historical province of Transylvania, and the «Regulation on the organization and functioning of the cemeteries and the human crematoriums placed under the authority of the Bucharest City Council», annex to the Bucharest General Council Decision No. 303/2003, in the historical province of Wallachia.

As each province has its own particular burial traditions, we have selected regulations from the main Romanian historical provinces in order to illustrate this brief study.

Thus, currently Romania doesn't have a law that applies to all cemeteries. This will be achieved only when the new «Law on cemeteries, human crematoriums and funeral services» will come into force. Also, according to article 36 of the above mentioned law, within 90 days following the entry into force of the upcoming law, the detailed rules and regulations regarding the establishment, extension, closing, reopening of cemeteries, and those concerning the burial, cremation, exhumation and reburial will be established by Government Decision.

In what follows we are going to examine the current rules and regulations regarding the burials

and cremations in the light of the secular laws applied in Romania.

2.2 Burials

Acquiring a Burial Concession – The first step in order to acquire a burial plot is to apply for a license to reserve the exclusive use of a vacant and unlicensed lot.

The burial plots are usually classified in *temporary burial plots* and in *perpetuity burial plots*. Since the cemetery land is owned by the territorial-administrative units, the holder of the concession over an in perpetuity burial plot or the right to use a temporary burial plot has mainly two rights: *the right to exclusive use of the lot* designed in the license for the purpose only of interment (right of burial) and *the right to memorialize the burial site*, for instance to place a marker or a headstone or to construct a mausoleum on a number of contiguous vacant grave lots for use exclusively for the interment of the holder of the right to burial and his family members, according to the each cemetery regulations.

The temporary burial plots are granted for a period of 7 years (Roman City Municipality offers only such burial plots, but the holder of the right of interment is entitled to renew the right of burial by repaying the necessary fee every 7 years) or 25 years (such is the case in the Sibiu Municipal Cemetery and in the cemeteries placed under the authority of the Bucharest City Council - in both cases the holder of the right of interment can renew the right to burial; in addition in Bucharest the right to use a temporary burial plot can be transformed into an concession in perpetuity).

The in perpetuity burial plots offer rights of burial without time limit, as long as other requirements are met (for instance, the payment of the taxes charged for the maintenance of the burial grounds).

The future Romanian Cemeteries Act doesn't mention the period for which the burial plots will be granted. Probably this issue will be addressed in the detailed rules and regulations established by Government Decision.

Transfer of the Burial Concession – As a general rule an owner of a right of interment and memorial may dispose of his burial plot by last will and testament or donation inter vivos, and, if an owner dies intestate, its ownership of the rights of interment and memorial will descend to his or hers heirs according to the Romanian laws on intestate inheritance.

According to the «Regulation on the organization and functioning of the cemeteries and the human crematoriums placed under the authority of the Bucharest City Council», only the burial plots granted for a period of 25 years or in perpetuity can be transferred by donation or inheritance. In these graves can be buried the holder of the right of interment, his spouse, and their lineal descendents and lineal ancestors. Other persons can also be buried, with the concession holder's consent, if a burial place is reserved for the latter.

The «Regulation on the organization and functioning of the Sibiu Municipal Cemetery» stipulates that the concession holder's right can be transferred only at the request of his/hers legal heirs, up to the fourth degree, and at the request of the surviving spouse. Also, the right over the temporary burial plots granted for a period of 7 years can be renewed if one of the above mentioned persons request so.

The burial plots granted in the cemetery belonging to the Roman City Municipality cannot be transmitted or exchanged, except by intestate or testamentary inheritance and only to relatives up to the fourth degree.

Cessation of the Burial Concession – Among the most common reasons for the cessation of the right over a burial plot are: expiration of the period for which the license was issued (7 or 25 years); the burial plot is abandoned and neglected; the maintenance fee was not paid three consecutive years; the concession holder surrenders the lot without compensation.

In the future Romanian Cemeteries Act the burial concession ceases only in two cases: when a new burial place is given to the concession holder or the burial plot is abandoned and neglected.

Who can decide if someone is to be burned or buried – The current legislation does not address this issue in the absence of a will. Only the future Romanian Cemeteries Act contains such provisions.

Thus, the place and the time of the burial shall be compliant to the wished expressed during lifetime by the deceased. If the departed did not express any wishes on the subject of the place where and the manner in which the funeral shall be conducted, the following persons are required to decide concerning the necessary arrangements: the person who assumed by contract the obligation to manage the funeral; the person indicated in the deceased's will; in the absence of a will, the surviving spouse who lived in the same dwelling with the deceased during his final days; any other relative up to the fourth degree. In the absence of the above mentioned persons, the mayor of the local administrative unit

where the death occurred will have to decide, but he cannot decide the cremation of the corpse of an unidentified person.

2.3 Cremations

Nowadays the only functional crematorium is situated in Bucharest and the «Regulation on the organization and functioning of the cemeteries and the human crematoriums placed under the authority of the Bucharest City Council» stipulated that the ashes resulted from the cremation of the body will be placed in the urns provided by the crematorium.

The urns are stored at the crematorium for 45 days, period during which the deceased's family must decide in what location the urn will be placed: either they'll take it home, or entomb it or place it in a columbarium niche. If the remains of a cremated body are not claimed within the 45 days period, the urns will placed in storage by the crematorium.

3 Canon Law

3.1 Introductory consideration

Given that the religious assistance prior to death and the funeral service held after one's passing away are key moments in the Orthodox and Catholic traditions, in what follows we are going to examine the current regulations regarding the cremations in the light of the Romanian Orthodox and Roman Catholic canon laws applied in Romania.

Also, we'll scrutinize some of the most relevant rules regarding the burials contained in the «Regulation on the organization and functioning of the parochial and monastery cemeteries of the Romanian Orthodox Church eparchies».

3.2 Roman Catholic Canon Law

3.2.1 Overview of the Past Legislation

Initially, in 1886, primarily as a reaction against the anti-clerical freemasons [5], the Roman Catholic Church banned the cremation and the 1917 «Corpus Juris Canonici» (the Code of Canon Law), canon 1203 and 1240, stated that „The bodies of the faithful must be buried, their cremation is forbidden. [...] Anyone who has requested that his body shall be cremated shall be deprived of ecclesiastical burial unless he has shown signs of repentance before death”.

Furthermore, in an Instruction dated June 19th 1926, the Holy Office (later called the Congregation for the Doctrine of the Faith) determined that the last sacraments were not to be given to a Catholic

who ordered the cremation of his own body or that of another. Also, the public masses for the repose of one's soul who asked for cremation were forbidden since canon 1241 prohibited any public masses for persons having been deprived of ecclesiastical burial. On the other hand, in the above mentioned Instruction, it was admitted for the first time that cremation, of itself, was not wrong, nor in conflict with any dogma [3]. Therefore cremation was permitted, if it would prove necessary in order, for instance, to prevent the spread of the plague.

3.2.2 Overview of the Current Legislation

In 1963, under Pope Paul VI, the Holy Office issued an Instruction on the cremation of the corpse (*De Cadaverum Crematione: piam et constantem*), which softened the Catholic canon law, lifting the penalties that had previously been attached to the practice and allowing cremation as long as this act was not motivated by reasons hostile to the Christian life: „The Christian funeral service is to be given to those who have chosen cremation of their own body, unless it is certain that in making such a choice they were motivated by reasons hostile to the Christian life”.

The above mentioned instruction also stipulated that: „Cremation does not affect the soul nor prevent God's omnipotence from restoring the body; neither then, does it in itself include an objective denial of dogma. The issue is not therefore an intrinsically evil act, opposed per se to the Christian religion”. [3]

In 1969 this line of thinking was enshrined in *Ordo Exsequiarum* containing the new funeral rites established after the Second Vatican Council, which stipulated that the interment rite was to take place either at the gravesite or at a crematorium. Also, the requiem mass was to be celebrated in the presence of the body with cremation occurring afterwards.

According to the new Code of Canon Law promulgated in 1983, canon 1176 §3 regarding the *ecclesiastical funerals* states that „The Church earnestly recommends that the pious custom of burying the bodies of the deceased be observed; nevertheless, the Church does not prohibit cremation unless it was chosen for reasons contrary to Christian doctrine”.

Moreover, in the 1994 Catechism of the Catholic Church (par. 2301), on the *respect for the dead*, the catholic faithful are instructed that „the Church permits cremation, provided that it does not demonstrate a denial of faith in the resurrection of the body”.

Therefore, nowadays the Roman Catholic Church allows the cremation as long as this personal choice doesn't question the faith in the resurrection

of the body. That's why the Code of Canon Law, canon 1184 §1, still prohibits Christian burials for the deceased who for anti-Christian reasons choose the cremation of their bodies, unless they show some indication of remorse before their passing away: „Unless they gave some signs of repentance before death, the following must be deprived of ecclesiastical funerals: [...] 2° those who chose the cremation of their bodies for reasons contrary to Christian faith”.

Given that specific details about the resurrection are sparse in Scripture and the exact process by which God will physically resurrect the decomposed and scattered bodies of the faithful is not fully explained [4], it's no wonder that the Roman Catholic Church finally accepted the cremation as a second choice for the interment procedure of a corpse.

In conclusion, the Roman Catholic Church priests are required to celebrate the church funeral rites for their deceased parishioners, but, while the Church prefers that the bodies of the deceased faithful be buried, in view of the fact that it manifests Christian faith in the resurrection and the dignity of the body, the burial is not required [1]. The faithful is entitled to prefer cremation, with one exception: when done for reasons contrary to the Christian faith.

3.3 Orthodox Canon Law

3.3.1 Overview of the Current Legislation

The «Statute for the Organization and Functioning of the Romanian Orthodox Church», approved by the Government Decision No. 53 of 16th of January 2008 and published in the Official Journal of Romania, Part I, No. 50 of 22nd of January 2008, contains provisions regarding the parochial and monastic cemeteries. Article 186 stipulates that „every parish and monastery is entitled to possess or set up at least one cemetery, for burying the deceased faithful, which is the property of the parish or of the monastery”. Also, according to the above mentioned article, „the parochial and monastic cemetery, as sacred goods designed exclusively and directly to the rite, cannot be sued, are imprescriptible and cannot be alienated, changed, entailed or sequestered”.

In addition, article 187 of the above mentioned statute stipulates that „The cemetery is managed by the Parochial Council, the monastic or deanery cemetery, under the periodic control of the Eparchial Centre. (2) At the parish, the cemetery is supervised by the parish priest, by the trustee and by

the Parochial Council, while at the monastery, by the abbot (abbess), who must take care of its enclosure and maintaining. (3) The grave granted remains in the property of the parish or monastery, while the right of granting cannot be sold by the titular, as it can be transmitted only by succession to the spouse or relatives up to the 4th degree. (4) The places of burial can be also granted for temporary or free usage by the decree of the parochial and monastic bodies. [...] (6) It is forbidden to condition the celebration of the funeral service to payment of any fee established by the priest or by the Parochial Council”.

The provisions of the above mentioned law are to be complemented by the stipulations of the «Regulation on the organization and functioning of the parochial and monastery cemeteries of the Romanian Orthodox Church eparchies», published in the Official Bulletin of the Romanian Patriarchate, No. 1-2, 1982, after being voted by the Holy Synod (23 of December 1977) and the National Church Assembly (11 of December 1977).

3.3.2 Burials

Acquiring a Burial Concession – The first condition to enjoy a peaceful rest in a religious cemetery owned and maintained by an Orthodox parish or a monastery is to be of Orthodox faith. As seen above, the first step in order to acquire a burial plot is to apply for a license to reserve the exclusive use of a vacant and unlicensed lot.

In Orthodox graveyards, the burial plots are classified in *temporary burial plots*, granted for a period of 7 years, which can be renewed only in exceptional cases if the cemetery has sufficient vacant graves, and *in perpetuity burial plots*, granted without time limit, as long as all other requirements are met (for instance, the payment of the taxes charged for the maintenance of the burial grounds).

Since the cemetery land is owned either by the parish or the monastery, the holder of the concession over an in perpetuity burial plot or the right to use a temporary burial plot has mainly two rights: *the right to exclusive use of the lot* designed in the license for the purpose only of interment (right of burial) and *the right to memorialize the burial site* only in the limits allowed by the Regulation on the organization and functioning of the parochial and monastery cemeteries of the Romanian Orthodox Church eparchies.

Transfer of the Burial Concession – Only the in perpetuity burial plots can be transferred either by donation inter vivos (between husband and wife or

to the relatives up to the fourth degree) or by inheritance (intestate or testamentary).

Cessation of the Burial Concession – The right over a temporary burial plot located in a cemetery owned and maintained by an Orthodox parish or a monastery expires latest 7 years after the last burial.

The license over the in perpetuity burial plots ceases when the burial plot is abandoned and neglected; the concession holder surrenders by donation the lot to the parish or monastery; or when the concession holder dies without heirs.

The «Regulation on the organization and functioning of the parochial and monastery cemeteries of the Romanian Orthodox Church eparchies» explicitly mentions that concession right also ceases when the concession holder renounces his orthodox faith. In this case, in cemeteries owned by parishes, if possible, the apostate will receive another burial plot in the section reserved for the non-orthodox deceased.

The above mentioned regulation is the only one – compared with the studied secular regulations which illustrate this article – which also requires, according to the orthodox tradition, the disinterred human remains to be buried *in the same* burial plot from which they were disinterred. If the human remains were disinterred for the burial of another deceased, the reburial will have to take place simultaneously with the new interment.

3.3.3 Cremations

In the first half of the last century Romania was a pioneer of cremation in south-eastern Europe, due to the establishment in 1923 of the Romanian Cremation Society (called «Cenuşa», literally „ashes, cinders, mortal/earthly remains”), which at its own expense constructed in 1928 a crematorium in Bucharest [3] (the first operational crematorium before World War II in Eastern Europe, aside from the Soviet Union).

The implementation of a human crematorium in Romania was not without consequences. The Holy Synod of the Romanian Orthodox Church issued on the 15th of June 1928 a decision which stated that the priests must warn their parishioners that the Romanian Orthodox Church will deny them any religious assistance if they’ll choose the cremation of their bodies.

The priests were also required, prior to requiem mass, to question the deceased’s family on the cemetery where the departed will be buried. Furthermore, this decision also emphasized that Romanian Orthodox Church will refuse any religious service to those who were cremated or will be cremated, both prior to death and after death.

The Orthodox Church banned cremation as being contrary to its teachings, the Christian tradition regarding the death and the resurrection of the bodies and also contrary to the respect owed to the human being, including its body [5]. This decision was endorsed by another decision of the Holy Synod issued on the 22nd of February 1933.

The above mentioned decisions of the Holy Synod of the Romanian Orthodox Church, are still in force even today and consequently no Romanian orthodox parishioner who chooses to be cremated can have a funeral mass or a memorial service, unless those that remain behind misinform the priest.

4 Instead of a Conclusion

In the light of the legal status of the Romanian burial grounds the deceased's *right to a peaceful rest* and the concept of *eternal peace* becomes relative, since the eternal peace that a grave should provide depends on several factors as we have seen before.

In fact, only the «Regulation on the organization and functioning of the parochial and monastery cemeteries of the Romanian Orthodox Church eparchies» provides some hope for eternal burial peace.

The parishes and the monasteries are required to take care of the tombs belonging to the representative personalities and the soldiers who died in battle; the parishes and the monasteries are also required to take care and not to transfer the tombs of those who died without heirs, when these graves are adorned with important works of art or are made from materials of great value.

Thus, our first conclusion is that those who wish an eternal peaceful rest, undisturbed by an eventual disinterment due to the lack of heirs or unpaid maintenance fees, should acquire an in perpetuity burial concession located in a cemetery owned and administrated by an orthodox parish or monastery and *either* to construct a tomb out of precious materials *or* to place a well-known piece of art on the tomb.

The orthodox canon law opposes cremation and the Romanian Orthodox Church refuses any religious service to those who opt for cremation; the deceased's living relatives might consider easier not

to respect the wishes expressed by the departed, than to risk opposing the Church and face public disapproval. The reverse situation is also possible – to cremate someone against his will in the absence of a last will and testament.

Therefore, our second conclusion is that, in order to prevent an unwanted cremation or burial, those who have a clear view regarding the way their funeral must be carried on should make an authentic will (not that easy to suppress as a holograph will or a mystic testament) in which to clearly state if they want their body to be buried or cremated; if their family and friends should pay a tribute to their memory and receive the condolences of well-wishers with a open casket or with a closed casket; where the funeral mass and the memorial service should be conducted, etc.

In extremis, the above mentioned testamentary stipulations should be accompanied by the appointment of a testamentary executor and by the disinheritance of those who will fail to carry out the last wishes expressed by the testator.

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