

# THE CONFLUENCE BETWEEN CANON AND SECULAR LAWS ON BURIAL AND CREMATION IN BRAŞOV

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**Abstract:** *Since every human being owes a death, each of us should be capable to plan his own funeral in order to secure his right to a peaceful rest. That's why this article attempts, on one hand, to highlight certain aspects of the legal status of burial plots and, on the other hand, to examine the relation between the cremation and the right to a funeral religious service. In our view, all burial plots concessions should be granted only in perpetuity upon the signing of a concession contract which should mandatorily include a reasonable charge for the perpetual care of the burial site, avoiding in such way the inconveniences of dying without thoughtful heirs.*

**Key words:** *burial, cremation, canon law, secular law.*

## 1. Introduction

«It's not that we are afraid to die, but we prefer to take all precautions for something like that not to happen to us» – this is how might sound the declaration of protection in the face of death [15]. Since every human being owes a death, despite the fact that most people try to postpone it for as long as possible, and given that apparently there are no exceptions, we should at least be competent to make the necessary arrangements for this unfortunate event while we are still alive in order to secure our right to a peaceful rest.

In view of the fact that the current legal status of burial plots in Braşov is somewhat unknown and that the churches' position on cremation is something that most people ignore, this article attempts to offer a legal perspective on the deceased's right to a funeral religious service and a

peaceful rest undisturbed by an unwanted exhumation due to an unforeseen cessation of the burial concession.

As the religious faith in Braşov is dominated by the Romanian Orthodox Church followed by the Roman Catholic Church and the Greek Catholic Church, our analysis of the relation between the right to a funeral religious service and the cremation will involve only these three religious denominations.

Furthermore, since we had access only to the rules and regulations governing three cemeteries located in Braşov, in what follows we will examine just the legal status of the burial plots situated in the cemeteries owned and maintained by the Orthodox parishes, the Reformed Cemetery and the Municipal Cemetery.

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## 2. Canon Law on Cremation

The canon law, which is mostly statutory, is a set of norms which intends to bring order into the life of the ecclesial community and which is articulated and promulgated by those who are entrusted with the community's care, and its purpose is to serve the common good [9].

In view of the fact 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 relation between cremation and the right to a funeral religious service in the light of the Romanian Orthodox, Roman Catholic and Greek Catholic canon laws applied in Romania and implicitly also in Braşov.

### 2.1. Romanian Orthodox Canon Law

As a reaction to the implementation of a human crematorium in Romania, the Holy Synod of the Romanian Orthodox Church issued on the 15<sup>th</sup> of June 1928 a decision which stipulated that the priests must warn their parishioners that the Romanian Orthodox Church will deny them any religious assistance if they choose the cremation of their bodies [6]. 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 stressed that the Romanian Orthodox Church will refuse any religious service, prior and/or after death, to those who will choose cremation instead of burial. This decision was endorsed by another decision of the Holy Synod issued on the 22<sup>nd</sup> of February 1933.

The Romanian 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 [20].

The above mentioned decisions are still in force today and subsequently no Romanian orthodox parishioner who chooses to be cremated after death can have a funeral mass or a memorial service, nor any religious service prior to death.

### 2.2. Roman Catholic Canon Law

Initially, as a reaction against the anti-clerical freemasons [8], The Holy Roman and Universal Inquisition, later called the Holy Office and now the Congregation of the Doctrine of the Faith, issued a *Decree on the Cremations of the Corpses* which stated: «they [the priests] should take care of instructing the faithful in Christ about the detestable impious custom of cremating human bodies, so that they might deter the flock assigned to them with all their strength from practicing such custom» [16].

This rigid position, based on a subjective assumption of anti-religiosity in the choice of cremation was officially emphasized in the *1917 Code of Canon Law*. Canons 1203 §1 and 1240 §1 stipulated 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» [14].

Thus, the 1917 Code of Canon Law restated that the burial of the body was the norm and sanctioned those who chose cremation with the deprivation of an ecclesiastical funeral.

In an *Instruction on the Cremation of the Corpses* issued on the 19<sup>th</sup> of June 1926, the Roman Catholic Church moderated its position and the Supreme Sacred Congregation of the Holy Office admitted for the first time that cremation, of itself, was not wrong, nor in conflict with any dogma [19]. Therefore cremation was permitted, if it proved necessary in order, for instance, to prevent the spread of the plague.

Later, on the 8<sup>th</sup> of May 1963, the Supreme Sacred Congregation of the Holy Office issued another *Instruction on the Cremation of the Corpses* which stated that: «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» [18].

This Instruction lifted the penalties that had previously been attached to the cremation, while reiterating the Roman Catholic Church's traditional position: «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» [18].

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 [7], 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 1969 this line of thinking was confirmed by the *Ordo Exsequiarum* which contained the new funeral rites established after the Second Vatican Council [1]. The *Order of Christian Funerals* stipulates that that the burial rite is to take place either at the grave site or at a crematorium and the requiem mass is to be celebrated in the presence of the body with cremation occurring afterwards [8].

In the 1983 *Code of Canon Law*, canon 1176 §1-3 on the *ecclesiastical funerals* reiterated the Roman Catholic Church position on cremation and stated that: «§1 Deceased members of the Christian faithful must be given ecclesiastical funerals according to the norm of law; §2

Ecclesiastical funerals, by which the Church seeks spiritual support for the deceased, honours their bodies, and at the same time brings the solace of hope to the living, must be celebrated according to the norm of the liturgical laws; §3 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» [13].

Also, the catholic faithful are instructed, in the 1993 *Catechism of the Catholic Church*, paragraph 2301 on the *respect for the dead*, that «Ecclesia cremationem permittit nisi haec dubium fidei in corporum resurrectionem manifestet» [2] (The Church permits cremation, provided that it does not demonstrate a denial of faith in the resurrection of the body), hence elucidating the reasons that the Roman Catholic Church regards as contrary to the faith.

Furthermore, canon 1184 §1 concerning *those to whom ecclesiastical funerals must be granted or denied* stipulates that: «Unless they gave some signs of repentance before death, the following must be deprived of ecclesiastical funerals: 1. notorious apostates, heretics and schismatics; 2. *those who chose the cremation of their bodies for reasons contrary to Christian faith* [our italics]; 3. other manifest sinners who cannot be granted ecclesiastical funerals without public scandal of the faithful» [13].

Thus, the Catholic Code of Canon Law forbids Christian burials or any other form of prayer for the departed who, for anti-Christian reasons, chose that their bodies be cremated, unless they show some sign of repentance prior their death.

While canon 1184 refers to the deprivation of the official funeral rites of the Roman Catholic Church, which include the funeral Mass, canon 1185 adds that *any*

*funeral Mass is excluded.* Consequently, it isn't allowed to have a public Mass for someone who was deprived of a church funeral. Although a Mass celebrated later (such as on the anniversary of death) is not excluded, this must be done without publicity in order to preclude scandal and wonderment [5].

The dispersal of the ashes isn't encouraged, but the bishop, according to canon 87, has the authority to grant a dispensation if he considers that it will contribute to the spiritual good of the faithful. However, the cremated remains should be buried or entombed in a mausoleum or columbarium, where those that remain behind will be able to visit [8].

In conclusion, although cremation isn't prohibited anymore as long as it's chosen for any other reasons than an anti-religious function or as a rejection of the dogma tied to death, there is no encouragement for the believers to prefer this form of disposal.

Also, even though the Roman Catholic priests are required to celebrate the church funeral rites for their deceased parishioners, the burial is not required anymore, although it's favoured in view of the fact that it manifests Christian faith in the resurrection and the dignity of the body.

Not the least we must point out that the Government of Romania [4] acknowledged the *1983 Code of Canon Law* through the «Decision on the recognition of the Roman Catholic Church Code of Canon Law and the Code of Canons of Oriental Churches».

### **2.3. Greek Catholic Canon Law**

On the matter of cremation, canon 876 §3 of the *Code of Canons of Oriental Churches* stipulates that: «Those who choose cremation for their bodies, unless such a choice was made for reasons contrary to the conduct of Christian life, are to be granted an ecclesiastical funeral, provided that it does not obscure the

preference of the Church for the burial of bodies and that scandal is avoided» [12].

Furthermore, canon 877 states that: «Sinners are to be deprived of an ecclesiastical funeral that could not be granted it without public scandal to the Christian faithful unless prior to death they gave some signs of penance » [12].

Consequently the Eastern code differs from the Latin code in two respects: on one hand, in the case of those choosing cremation, instead of focusing on motives contrary to the faith, the *Code of Canons of Oriental Churches* states that a church funeral is not to be denied “provided that it does not obscure the preference of the Church for the burial of bodies and that scandal is avoided”, on the other hand, instead of the distinctions made in canon 1184 §1 (1 and 3) of the *1983 Code of Canon Law*, the *Code of Canons of Oriental Churches* demands only that sinners who didn't give any sign of repentance are to be deprived of a church funeral only *if there were public scandal* [our italics] [5].

## **3. Legal Status of Burial Plots**

### **3.1. Introductory considerations**

The annex of the «Law on public property and its juridical regime» [10] stipulates that the public domain of the territorial-administrative units also consists of the “communal and town cemeteries”.

According to article 28 of the «Law on the Freedom of Religion and the General Status of Religious Denominations» [11], “(1).Local denomination units can have and maintain, alone or in association with other denominations, denomination graveyards for their worshippers. Denomination graveyards shall be managed according to the regulations of the denomination that owns them. [...] (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”.

Thus 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.

### 3.2. Orthodox Cemeteries

The «Statute for the Organization and Functioning of the Romanian Orthodox Church» [3] 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 faithful deceased which is the property of the parish or of the monastery”.

Furthermore, article 187 of the above mentioned statute stipulates that „(3).The grave granted remains in the property of the parish or monastery, while the right of granting cannot be sold by the owner, as it can be transmitted only by succession to the spouse or relatives up to the 4<sup>th</sup> 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* [our italics] established by the priest or by the Parochial Council”.

The above mentioned law is to be complemented by the provisions of the «Regulation on the organization and functioning of the parochial and monastery cemeteries of the Romanian Orthodox Church eparchies» [17].

*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 (art. 5). 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 (art. 9), as long as all other requirements are met (such as 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 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 (art. 29-33).

*Transfer of the Burial Concession* – Only the in perpetuity burial plots can be transferred (art. 15) 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 during the latest 7 years after the last burial (art. 37).

The license over the in perpetuity burial plots ceases when the burial plot is abandoned and neglected, when the concession holder surrenders by donation the lot to the parish or monastery or when the concession holder dies without heirs (art. 35).

The 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, if such section exists (art. 40).

The above mentioned regulation also requires, according to the orthodox tradition, the disinterred human remains to be buried in the same burial plot from which they were disinterred (art. 28). If the human remains were disinterred for the burial of another deceased, the reburial will have to take place simultaneously with the new interment.

The parishes are required to take care of the tombs belonging to the representative personalities and the soldiers who died in battle (art. 41) 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 (art. 42).

Thus, in cemeteries owned and maintained by the Orthodox parishes, only the representative personalities, the soldiers who died in battle and those who adorned their tombs with important works of art or made them out of materials of great value can hope to really enjoy a peaceful rest undisturbed by an unwanted exhumation due to a cessation of the burial concession. For the others the eternal peace lasts only till the cessation of the burial concession, at the earliest, 7 years after the entombment (art. 34 and 37). A weak consolation might be the fact that the disinterred human remains are to be buried in the same burial plot from which they were disinterred.

### 3.3. Reformed Cemetery

Although the Reformed Parish of Braşov is currently in the process of updating their rules and regulations applied to their cemetery, they have graciously given us permission to use the *draft of their model concession contract* as research material.

According to the *model concession contract* only the holder of the right of interment, his/hers lawful spouse and their

children together with their lawful spouses have burial rights.

The burial concession ceases 7 years after the death of the last person with burial rights, unless the cemetery maintenance fee is not paid 6 consecutive years, in which case the contract is considered as temporarily terminated and, if the taxes charged for the maintenance of the burial grounds are not paid within 90 days, the termination of the contract becomes definitive.

Thus, in the Reformed Cemetery the eternal peace of the dearly departed also depends on the presence of at least one heir willing to become holder of the right of interment and to pay the annual cemetery maintenance fee. Otherwise, the peaceful rest of the last buried person lasts, as seen in the Orthodox cemeteries, at most 7 years after his/hers funeral.

### 3.4. Municipal Cemetery

Since the legal status of burial grounds belonging to the local public administration is governed by regulations adopted by each local council, our Municipal Cemetery is governed by the «Regulation on the cemeteries' administration», annex to the Local Council Decision No. 97/2002.

*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. There are no *in perpetuity burial plots* available (unless one inherits such an already granted plot) and the *temporary burial plots* are granted for a period of 7, 15, 25 or 25 years (art. 7), concession which the holder of the right of interment is entitled to renew by repaying the necessary fees. The Mayor can grant free of charge temporary burial plots for a period of 7 years for the paupers (art. 10).

*Transfer of the Burial Concession* – The owner of a right of interment and memorial may dispose of his burial plot by last will

and testament 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 (art. 11).

*Cessation of the Burial Concession* – The rights over a burial plot ceases with the expiration of the period for which the license was issued, 6 months after the death of the concession holder if the concession holder was interred elsewhere and has no heirs or when the burial plot is abandoned and neglected for a period of time longer than 2 years (art. 12).

As in the case of the Orthodox cemeteries, the disinterred human remains (according to article 23 the exhumation can be done at the earliest 7 years after the interment) are to be buried in the same burial plot from which they were disinterred (art. 7), even if the plot was re-concessed to a new concession holder.

Thus, once again the peaceful rest of the deceased lasts at most 7 years after the interment in the absence of at least one heir willing to become a concession holder and pay the annual cemetery maintenance fees.

Not the last we must mention that, according to article 4 of the «Regulation on the cemeteries' administration», all interments and reburials in Braşov can be done *only* in cemeteries administrated by the Braşov Municipality or in cemeteries belonging to the religious denominations.

#### 4. Instead of a Conclusion

As we have seen, currently Romania doesn't have a law that applies to all cemeteries. On the 16<sup>th</sup> of November 2010 the Parliament of Romania 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 the lack of correlation with other statutes.

Since the Romanian legislator must re-examine the law, we wish to advance a proposal *de lege ferenda* regarding the future legal status of burial grounds.

Therefore, in our view, all burial plots concessions should be granted *only in perpetuity* upon the signing of a concession contract which should *obligatory* include a reasonable charge for the *perpetual care* and maintenance of the burial site, avoiding in such way the inconveniences of dying without thoughtful heirs.

If the above mentioned proposal will not become law, the Romanian Orthodox Church should rethink its position on cremation as long as even in the cemeteries owned and administrated by the orthodox parishes or monasteries the dearly departed can count on no more than 7 years of peaceful rest without an eventual disinterment in the absence of heirs, unless the deceased was a representative personality, a soldier who died in battle or an owner of a grave adorned with important works of art.

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