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Dorota Miler

A. Introduction

When regulating succession law, every legislator has the difficult but important task of balancing a testator's freedom of testation against the protection of the testator's family members' property interest in inheriting a portion of the testator's estate. Balancing these concerns is a continuous process that entails responding to new developments. As a result, even succession law, which is considerably resistant to change, has been reformed and is bound to be further changed in the future.

Freedom of testation can be defined as an individual's freedom to – according to his[1] wishes – make dispositions of his property that will be effective on his death. It is limited in a number of ways. Hereinafter, consideration is given only to limitations of that freedom which influence the final disposition of an estate by way of providing a testator's close family members with a portion of the estate.[2] The purpose of these limitations is to protect the interests of the testator's close family members. Instruments meeting these requirements can be defined as forced succession.[3]

This paper has two aims: (1) to identify the current and foreseeable trends in reforming rules of forced succession in chosen civil law jurisdictions and (2) to estimate the future shape of these limitations. To achieve the first

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1 To improve readability and to avoid awkward constructions of "he or she" and "his or her", only masculine pronouns are used. When masculine pronouns are used, readers should assume a reference to the feminine gender, or to both genders, as appropriate.

2 Other instruments restricting the freedom of testation, such as formalities regarding the form, content or revocability of testamentary dispositions or the mental capacity of the testator will not be considered in this paper.

3 See *Friedman*, The Law of the Living, the Law of the Dead: Property, Succession and Society, (1966) 29 Wisconsin Law Review, p. 340 (366).

goal, three instruments (compulsory portion, reserved portion and family provisions) implemented by legislators from chosen European common and civil jurisdictions[4] are briefly introduced. This is followed by a discussion of recent reforms of forced succession, as illustrated with examples from chosen civil law jurisdictions. The discussion subsequently presents an analysis of the trends seen in current reform of the rules of reserved and compulsory portion. The paper concludes with an estimate on foreseeable developments in the reform of rules of forced succession.

B. Types of Forced Succession Rules

There is no developed legal system that provides unlimited freedom of testation.[5] In each jurisdiction there is always a claim or a right to a part of the testator's estate that is available to certain members of a testator's close family. The regulations and the forms of limitations vary between jurisdictions. Generally speaking, there are three types of limitations identifiable in European civil and common legal systems: reserved portions, compulsory portions and family provisions. The first two types of forced succession limitations can be found in civil law jurisdictions; the third one is characteristic of common law jurisdictions.

I. Reserved Portion

The first type of limitation, a reserved portion, originated in Roman law and is provided, for example, under French law (Arts. 913–917 Code civil), Italian law (Arts. 553 ff. Codice civile), Spanish law (Art. 806 Código civil)[6]

4 Succession law from Austria, England and Wales, France, Germany, Italy, Netherlands, Poland, Spain and Switzerland is considered for this purpose.

5 *De Waal*, Comparative Succession Law, in: Reimann/Zimmermann (eds), The Oxford Handbook of Comparative Law, 2008, p. 1071 (1080). Even in the USA, the freedom of testation has limitations, see *Scalise Rd.*, Freedom of Testation in United States, in: Zimmermann (ed), Freedom of Testation/Testierfreiheit, 2012, p. 143 (158 ff.).

6 In Spain certain territories, e.g. Catalonia or Aragón, maintain separate private law systems, including autonomous regulations on succession law. Hereinafter references are made only to the regulations included in the Código civil.

and Swiss law (Arts. 470 ff. Schweizerisches Zivilgesetzbuch). Under the laws of these countries, a certain part of the testator's estate is reserved for certain predefined relatives and cannot be effectively disposed of by a testator.[7] Therefore, the portion of the estate that a testator can dispose of, called the "disposable portion", is limited.[8] For instance, under French law a testator cannot dispose of more than ½ of his estate if he is survived by one child, more than ⅓ if he is survived by 2 children, more than ¼ if he is survived by 3 or more children (Art. 913 Code civil)[9] or more than ¾ of his estate if he has left no descendants but has a surviving spouse (Art. 916 Code civil). If a testator's testamentary dispositions exceed the disposable portion of his estate, the legacies the testator has made will, in most cases, be reduced (e.g. Art. 920 French Code civil, Art. 814 Spanish Código civil, Art. 486 Schweizerisches Zivilgesetzbuch). In most jurisdictions providing for a reserved portion, a person entitled to the portion is a testator's forced heir.[10]

II. Compulsory Portion

In jurisdictions that provide for the second type of limitation, a compulsory portion, a testator can dispose of his entire estate, but after his death, on a claim brought by a person entitled to this portion, the testator's heirs will have to pay the equivalent of a fraction of the inheritance that the person entitled to a compulsory portion would have received on intestacy (e.g. §§ 2303–2338 Bürgerliches Gesetzbuch, hereinafter BGB, §§ 756–792

7 E.g. Art. 912 French Code civil defines the reserved portion as "that part of the assets and rights of the succession whose devolution, free of charges, legislation assures to certain heirs, called forced heirs, if they are called to the succession and if they accept." An English translation of French Code civil is available at: http://lexinter.net/ENGLISH/civil_code.htm (visited 23.03.2017).

8 E.g. Art. 912 French Code civil defines the disposable portion as "that part of the assets and rights of the succession that is not reserved by legislation and of which the deceased can freely dispose by liberalities."

9 "Included under the name of children, as used in Article 913, are descendants in whatever degree, although they must be counted only for the child whose place they take in the succession of the disposing party." (Art. 913-1 Code civil).

10 E.g. in Swiss law, see *Hausheer/Aebi-Müller*, Familienerbrecht und Testierfreiheit in der Schweiz, in: Henrich/Schwab (eds), Familienerbrecht und Testierfreiheit im europäischen Vergleich, 2001, p. 213 (219).

Allgemeines bürgerliches Gesetzbuch, hereinafter ABGB, Arts. 991–1011 Polish civil code).

Under German law a testator's spouse (or registered partner), descendants and parents are, if they outlive the testator,[11] entitled to a compulsory portion equaling ½ of what would have been their intestate portion in cases where they are excluded from inheriting from the testator in his testamentary dispositions and there are assets in the estate (§ 2303 BGB).[12] The abstract right to the portion exists already during the deceased's life, but the portion itself can be demanded only after the testator's death.

III. Family Provisions

Also in common law jurisdictions, a testator's freedom is limited. The limitation, which usually falls under the heading of family provisions, prevails in common law jurisdictions, e.g. in Australian states and territories, in Canadian common law provinces and territories and in England and Wales.[13] Pursuant to the law of these jurisdictions, a testator can dispose of his entire estate through his testamentary provisions, but a court can vary these provisions subsequent to his death if it decides that the testator did not make reasonable provision for his family.[14] Therefore, unlike the limitations binding in civil law jurisdictions, the entitlement that a member of a testator's family may receive is not automatic, and receiving provision out of the testator's estate will depend on the case circumstances. Specific statutes regu-

11 *Heisel*, in: Dauner-Lieb/Grziwotz/Hohmann-Dennhardt, Pflichtteilsrecht. Bürgerliches Recht/Prozessrecht/Wirtschaftsrecht. Handkommentar, § 2303, para. 26. Exception: nasciturus, if born alive, see e.g. *Otte*, in: von Staudingers, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Vol. V, § 2303, paras. 2, 7.

12 For brief comparison of the size of compulsory portions in different jurisdictions see *Pintens*, Tendencies in European Succession Law, in: Frantzen (ed), Inheritance Law – Challenges and Reform. A Norwegian-German Research Seminar, 2013, p. 9 (14–21).

13 Only the law of England and Wales will be further considered. For a brief summary of the history of the introduction of family provisions in England and Wales see *Meston*, Familienerbrecht und Testierfreiheit in Schottland und England, in: Henrich/Schwab (eds), Familienerbrecht und Testierfreiheit im europäischen Vergleich, 2001, p. 73 (81–82).

14 Inheritance (Provision for Family and Dependants) Act 1975, sec. 2.

late who can apply for provision and what circumstances should be considered by a court.[15]

If a court decides that reasonable financial provisions were not made for the applicant in a testator's will, or did not result on intestacy,[16] the court can depending on the applicable law order periodic payments or a lump sum payment out of any relevant property or order a transfer of the relevant property.[17]

IV. Conclusions

All three limitations serve the same purpose, i.e. they limit a testator's freedom of testation by influencing the final disposition of his assets in order to protect the interests of his close family members by providing them with a portion of the testator's estate. However, the limitations fulfill this task in substantially different ways.

The reserved and compulsory portions balance a testator's freedom of testation and the interests of his family members in the most time and cost efficient way possible, an approach that is suitable especially for large populations. They provide an actual right to receive either a part of the testator's estate or its monetary equivalent. The strict rules allow almost complete elimination of the court's involvement in determining the size and form of the provision that is due. The predictability in calculating the size of the portion is traditionally based on the rejection of any subjective factors, such as the conduct of the person entitled to the portion, his wealth or financial needs, or the quality and length of his relationship with the testator. Therefore, the extent to which a testator's freedom is limited is almost always entirely predictable. As a result, a testator's will remains unvaried and at least a part of the value of the testator's estate is disposed of in accordance with this will. Nevertheless, the solutions adopted in civil law jurisdictions can be criticized for their rigidness and inflexibility.

Under family provisions, persons listed in the relevant Act have only a claim to receive a portion of a testator's estate. A court decides whether any person who has made a claim is to receive any additional provision. In

15 Ibid., sec. 1 (1) determines who can apply under the Act. Section 3 (1) of the Act determines the circumstances a court should consider.

16 Ibid., sec. 1 (1).

17 Ibid., sec. 6 (2).

order to provide the most just outcome, a court adjusts the division of the estate on the basis of all the (subjective and objective) case circumstances that it finds relevant. If any provision is ordered, the court decides on its form and on the method of its transfer. Thus, family provisions provide flexibility, but they also create (a risk of) inconsistent outcomes from one case to the next due to strong reliance on particular case circumstances and their case-dependent evaluation. Therefore, the effectiveness of this limitation is comparably lower because it is time and resource consuming. Nevertheless, it can be appropriate for small populations. Further, due to the unlimited discretion of courts and the lack of clear, unambiguous rules, its adoption in a legal system depends on the confidence one has in the court system. The protection of testator's freedom also seems limited, if at all existent. There is, namely, no portion of a testator's estate that is safe from redistribution by a court and that will always be distributed according to the testator's will binding at the time of his death.[18] Also, there is no portion of the testator's will that cannot be rewritten in a court's order.

18 Extreme examples of the extent to which a court may exercise its discretion in imposing family provisions by varying a testator's will can be found in, for example, the case law of British Columbia. In some cases, to "make adequate provision for the proper maintenance and support of the will-maker's spouse or children", British Columbia courts have entirely changed testator's wills, ordering provision out of the testator's estate that they thought were "adequate, just and equitable in the circumstances" (Wills, Estates and Succession Act, SBC 2009, Chapter 13, sec. 60). Courts in other Canadian provinces and territories do not have such a wide discretion (see Wills, Estates and Succession: A Modern Legal Framework, (2007–2008) 27 Estates, Trusts and Pensions Journal, p. 5 (8–9) and *Miler*, Dependants' Relief Legislation and Compulsory Portion. Limitations of Freedom of Testation in British Columbia and Germany in Comparative Perspective, 2017).

C. Examples of Recent Reforms of Rules on Forced Succession in Chosen European Countries

Succession law has always been considered to be very stable and resistant to change.[19] This opinion might once have been true, but it can no longer be used to describe the current stage of reforms of succession law.[20]

As succession law does not have to address rapid business and economic changes, there is no apparent driving force for very quick or frequent reform of this area of law.[21] Rather, succession law must respond to the complex and varied societal transformations.[22] Therefore, although this law is undergoing constant development, because it takes place "usually in long waves and step by step, … [the] profound change may only be established after long periods when the little steps have led to something really new."[23] Two such developments, adopted over the span of the twentieth century in European countries, are the equalization of succession rights of legitimate and illegitimate children (children born out of wedlock) and the increase in the intestate inheritance rights of a deceased's surviving spouse.[24]

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19 *Zimmermann*, The Present State of European Private Law, (2009) 57 No 2 American Journal of Comparative Law, p. 479 (504).

20 As early as 1984 Langbein observed that "[o]ver the course of the twentieth century, persistent tides of change have been lapping at the once-quiet shores of the law of succession." *Langbein*, The Nonprobate Revolution and the Future of the Law of Succession, (1984) 97 Harvard Law Review, p. 1108 (1108).

21 *Spellenberg*, Recent Developments in Succession Law, in: Blanpain (ed), Law in Motion, 1997, p. 711 (713).

22 *De Waal*, The social and economic foundations of the law of succession, (1997) Stellenbosch Law Review, p. 162 (165); *Beckert*, Familiäre Solidarität und die Pluralität moderner Lebensformen, in: Röthel (ed), Reformfragen des Pflichtteilsrechts, 2007, p. 1 (2); *van Erp*, New Developments in Succession Law, (December 2007) 11.3. Electronic Journal of Comparative Law (hereinafter EJCL), p. 1 (7).

23 *Spellenberg*, in: Blanpain, p. 711 (713); see also *Langbein*, (1984) 97 Harvard Law Review, p. 1108 (1108).

24 *Pintens*, Die Europäisierung des Erbrechts, Zeitschrift für Europäisches Privatrecht (hereinafter ZEuP) 2001, p. 628 (629); *Spellenberg*, in: Blanpain, p. 711 (720, 728–737); *Leipold*, Europa und das Erbrecht, in: Europas universale rechtsordungspolitische Aufgabe im Recht des dritten Jahrtausends: Festschriften für Alfred Söllner zum 70. Geburtstag (hereinafter FS Söllner), 2000, p. 647 (658).

Some authors take the position that succession law varies in different jurisdictions as it is "influenced by socio-cultural, socio-economic and, sometimes, religious factors."[25] It is possible that these differences are caused by the diverse legal origins of particular legal systems and rejection (or acceptance) of certain legal concepts during their development and evolution. Nevertheless, even if it cannot be denied that succession law is regulated to a greater or lesser degree in different ways in various jurisdictions,[26] some developments are common to jurisdictions of similar cultural, economic and social background, such as Austria, France, Germany, Italy, Netherlands and Spain. Identifying recent reforms made to rules of forced succession in these countries suggests potential future trends in other countries having a comparable background.

I. Reforms of the Reserved and Compulsory Portion

As a result of reforms of the reserved portion under French law, which came into force in July 2002 and on January 1, 2007, the group of people entitled to a reserved portion has changed. Since 2002, a testator's surviving spouse has become a forced heir for the first time since the enactment of the French Civil Code in 1804 (Art. 914-1 Code civil);[27] since 2007, a testator's parents are no longer entitled to a portion. Therefore, under currently binding French law, a testator is obligated to leave a certain part of his estate only to his descendants and to his spouse (Art. 916 Code civil). Further, since January 2007, a child that rejects the reserved portion is generally not counted as a forced heir (Art. 913 Code civil).[28] In that case, the disposable portion of the estate increases.

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25 E.g. *van Erp*, (December 2007) 11.3. EJCL, p. 1 (1). Against: *Leipold*, in: FS Söllner, p. 647 (650–651).

26 Ibid., p. 647 (653).

27 However, the reform not only provided a surviving spouse with the reserved portion but also increased his rights to succession in intestacy, see Arts. 756–767 Code civil.

28 *Gresser*, Pflichtteilsrecht in Frankreich, in: Röthel (ed), Reformfragen des Pflichtteilsrechts, 2007, p. 227 (229). Exceptions: "A child who renounces the succession is counted among the number of children left by the deceased only if he is represented or if he is bound to collate a liberality by application of the dispositions of Article 845." (Art. 913 Code civil).

Similarly, the group of persons entitled to a reserved portion has been modified also in other jurisdictions that provide for a reserved portion. In Italy, since 1975, a reserved portion has been guaranteed for a testator's surviving spouse.[29] In Spain, a spouse is not entitled to a portion but "to the usufruct of a portion of the deceased's property" (Art. 834 Código civil).[30] In Switzerland, since January 1, 1988, reform modification has increased the disposable portion of the estate and deprived testator's siblings of a right to the portion.[31]

In some jurisdictions the form of the reserved portion was restructured. To increase legal certainty and prevent restitution of gifts,[32] under some circumstances French law provides forced heirs with a monetary claim against beneficiaries of a testator's *inter vivos* gifts (Arts. 866–867, 924 Code civil). In Spain, since 1981 and under certain situations, the forced share can be paid in cash rather than involve the transfer of property belonging to the estate of the deceased (Arts. 808, 841–847 Código civil). Moreover, under Spanish law a testator can since the reform of 2003 protect the unity of his company in the interest of his family by ordering that the company is to be inherited by a certain person and that other heirs are to receive payment of the reserved portion, which, in the case of insufficient cash, can be delayed up to five years after the testator's death (Art. 1056 Código civil).[33]

In jurisdictions providing a compulsory portion, the relevant laws have been made more flexible. Since 1969 a court in Germany has been permitted to order a delay of payment of the compulsory portion or a payment in installments. Since January 1, 2010, under the law that widened the scope of applicability of the relevant paragraph, the order can be made on a claim made by any heir (and, not as earlier, only on a claim made by an heir entitled to a compulsory portion) "if the immediate satisfaction of the entire [compulsory portion] claim would constitute an inequitable hardship for the

29 *Braun*, Testamentary Freedom and its Restrictions in French and Italian Law: Trends and Shifts, in: Zimmermann (ed), Freedom of Testation/Testierfreiheit, 2012, p. 57 (66 footnote 39).

30 *Vaquer*, Freedom of Testation in Spain and Catalonia, in: Zimmermann (ed), Freedom of Testation/Testierfreiheit, 2012, p. 85 (106–107).

31 *Hausheer/Aebi-Müller*, in: Henrich/Schwab, p. 213 (218).

32 *Gresser*, in: Röthel (ed), p. 227 (230).

33 *Arroyo i Amayuelas*, Pflichtteilsrecht in Spanien, in: Röthel (ed), Reformfragen des Pflichtteilsrechts, 2007, p. 257 (260).

heir" (§ 2331a BGB).[34] Under Austrian law, discretion to delay the payment of the compulsory portion is given not only to courts but also to testators. As of January 1, 2017, Austrian law provides that a testator can order in his will that a compulsory portion is to be paid in installments or that the payment should be delayed up to five years (§ 766 ABGB). However, after considering the circumstances of the heir and the person entitled to the compulsory portion, a court can change this disposition, if required, and order what is equitable under the circumstances.[35] Also, if a testator did not order the delay of payment, a court may order such delay for up to five years or, in special cases, up to ten years after the testator's death (§ 766 (3) ABGB).[36]

The grounds for completely disinheriting a person entitled to a compulsory portion have seen revisions as well. As of January 2017, a testator is able to deprive a person entitled to the compulsory portion of the portion under Austrian law if that person inflicted heavy emotional harm to the testator or grossly neglected his family obligations towards him (§ 770 No. 4).[37] The reform that came in force in 2010 in Germany revised the number of situations under which a testator is entitled to deprive a person of a portion. For instance, a testator can now disinherit a person for committing a crime against a broader circle of people, e.g. also a person not related but close to the testator (§ 2333 (1) point 1 BGB). Since January 1, 1991, in Austria a testator has the additional option of decreasing the size of the compulsory portion to be received by a person entitled to the portion on the grounds of distant family relations with this person.[38] Namely, he can deprive a person of ½ of the portion in his testamentary provisions. As of January 1, 2017, a testator is able to do that if a person entitled to the portion has failed to maintain a family relationship with the testator for

34 An English translation of the BGB is available at: https://www.gesetze-im-internet.de/englisch_bgb/ (visited 23.03.2017).

35 *Kerschbaum*, Österreich: Reform des Erbrechts, Zeitschrift für Erbrecht und Vermögensnachfolge (hereinafter ZEV) 2015, p. 575 (576).

36 *Steiner*, Reform des österreichischen Erbrechts und ihre Auswirkungen auf die deutsche kautelarjuristische Praxis, ZEV 2016, p. 131 (133).

37 Ibid., p. 131 (133).

38 Initially a testator could limit only the compulsory portion of his child, see Bundesgesetz: Erbrechtsänderungsgesetz 1989 – ErbRÄG 1989 (NR: GP XVII AB 1158 S. 125. BR: AB 3774 S. 523); *Edenfeld*, Europäische Entwicklungen im Erbrecht, ZEV 2001, p. 457 (460).

a long period of time (at least ten years)[39] (§ 776 (1), (3) ABGB) rather than, as it was introduced in 1991, for not maintaining a relationship with the testator at any time (§ 773a (1) ABGB).[40] Since 2001, a testator can exercise this right, not only with regard to his children but also with regard to any person entitled to a compulsory portion. The right is limited if the testator avoided contact with that person or if there is a justified ground for the lack of the relationship (§ 773a (2) ABGB; from January 1, 2017: § 776 (2) ABGB).[41] Reducing the compulsory portion increases the part of the value of the estate that can be freely disposed of by a testator.[42]

II. New Succession Law in Netherlands

A legal solution that could be seen as a bridge between, on one hand, reserved and compulsory portions and, on the other hand, family provisions was adopted in the Netherlands as a part of succession law in 2003. Even though the new succession law provides for a compulsory portion, it exhibits certain features of the limitation implemented in common law countries.

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39 *Steiner*, ZEV 2016, p. 131 (132).

40 This paragraph was partially in force as § 733a ABGB before the reform in 2016. However, a testator could decrease a compulsory portion of a person entitled thereto only if they did not have a traditional family relationship at any point.

41 *Ferrari*, Familienerbrecht und Testierfreiheit in Österreich, in: Henrich/Schwab (eds), Familienerbrecht und Testierfreiheit im europäischen Vergleich, 2001, p. 173 (183).

42 The difference between what a person entitled to a compulsory portion receives after the reduction and what he would have received otherwise does not pass to other persons entitled to compulsory portions (§ 767 (2) ABGB) and cannot be demanded by descendants of a person whose compulsory portion was reduced and who has predeceased the testator (§ 767 (2) ABGB), see Rummel-ABGB /*Welser*, 2000, § 767, para. 6; *Wirner*, Erbrechtsänderungsgesetz in Österreich, Mitteilungen des Bayerischen Notarvereins, der Notarkasse und der Landesnotarkammer Bayern 1991, p. 16 (16); *Paliege*, Neues im österreichen Erbrecht, 32 Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung 1991, p. 169 (180).

This transitional character of the Dutch succession law is a result of influences of legal solutions adopted under, for example, German, Austrian, Swiss, French, English and American law.[43]

According to the new law, only a testator's descendants may make a monetary claim to a portion of a testator's estate (Art. 4:63 (2) Dutch Civil Code, hereinafter BW). A testator can weaken this right by including in his will a clause, under which "the claim of a forced heir, as far as it has to be performed (satisfied) at the expense (for account) of the spouse, will only become due and demandable (exigible) after the death of that spouse" (Art. 4:82 BW).[44] Further, a claim for the portion is not demandable with regard to assets that are encumbered with a usufruct and, if the testator's spouse is liable for paying the portion, it can be claimed only as long as the spouse is alive or not bankrupt (Art. 4:81 (3–5) BW). Nevertheless, the outcome of the application of the succession law regulations may be corrected in "extreme circumstances" by the "overreaching principle of reasonableness and fairness." [45]

The testator's spouse is not provided with a right to a compulsory portion.[46] However, the spouse has, apart from the right to use the testator's home and household effects at the expense of the estate for the first six months after testator's death (Art. 4:28 BW),[47] a right of usufruct as to the residential space and its household effects as well as potentially having

43 *Reinhartz*, Recent Changes in the Law of Succession in the Netherlands: On the Road towards a European Law of Succession?, (May 2007) 11.1 Electronic Journal of Comparative Law (hereinafter EJCL), p. 1 (10–12).

44 The same case can be made for "a disposition in favour of another life companion of the testator, provided that this other life companion maintained a joint household with the testator and that he and the testator had entered into a cohabitation agreement that is documented in a notarial deed" (Art. 4:82 BW). An English translation of BW is available at: http://www.dutchcivillaw.com/civilcodebook044.htm (visited 23.03.2017).

45 *Milo*, Acquisition of Property by Succession in Dutch Law, Tradition between Autonomy and Solidarity in a Changing Society, in: Anderson/Arroyo i Amayuelas (eds), The Law of Succession: Testamentary Freedom, 2011, p. 203 (226).

46 A surviving spouse did not have a right to a reserved portion also under the earlier succession law, see *Fischer*, Reform des Erbrechts im Niederländischen "Burgerlijk Wetboek", 1976, p. 63–64.

47 All other "persons who lived in a joint household with the deceased up until his death" have the same right (Art. 4:28 (2) BW).

a usufruct right in other property "as far as the spouse, considering all circumstances, is in need of (the provision of) care and support"[48] (Arts. 4:29–4:30 BW). A testator's spouse is entitled thereto, as far as he requests it, if he does not "become the sole proprietor of a residential space in which that spouse, up until the death of the deceased, lived alone or together with the deceased, which residential space now belongs to the deceased's estate" (Art. 4:29 (1) BW). The same applies to the household effects (Art. 4:29 (1) BW). For the first six months, during which the testator's spouse may apply for establishing the usufructs, the testator's heirs' right to dispose of the estate is limited (Art. 4:29 (2) BW). Further, "[u]pon the request of the spouse of the deceased, the heirs must cooperate in establishing a usufruct on behalf of that spouse on other assets of the deceased's estate … , as far as the spouse, considering all circumstances, is in need of (the provision of) care and support" and if there are no other means available to him (Art. 4:30 (1) BW).[49] Dutch law does not limit this right to any part of testator's estate; thus, as a result, a usufruct can be ordered on the testator's entire estate.[50] Further, as decided in 2007 by the Dutch Supreme Court, all the relevant circumstances must be considered by a court when assessing the need for support.[51] A spouse is not afforded the rights provided in Arts. 4:29–4:30 BW only "when an application for a divorce or legal separation was lodged in court at least one year prior to the devolvement of the deceased's estate and the divorce or legal separation could not be effectuated as a result of the death of the deceased" (Art. 4:32 BW).[52]

Also, as far as it is necessary, a testator's child who is not yet eighteen years of age can apply for a lump sum that will cover expenses for his care

48 *Kolkman*, Freedom of Testation in the Netherlands, in: Zimmermann (ed), Freedom of Testation/Testierfreiheit, 2012, p. 25 (40–41). This right of the surviving spouse is seen as fairly problematic, see: *van Erp*, The New Dutch Law of Succession, in: Reid/de Waal/Zimmermann (eds), Exploring the Law of Succession: Studies National, Historical and Comparative, 2007, p. 193 (198–202).

49 *Milo*, in: Anderson/Arroyo i Amayuelas, p. 203 (225).

50 A testator's heirs are limited in their distribution of the estate during the time that the spouse may claim the right to usufructs (Art. 4:29 (2) BW).

51 Dutch Supreme Court 8.06.2007, LJN BA2507; See *Kolkman*, in: Zimmermann, p. 25 (41).

52 This holds unless "the [surviving] spouse is not mainly to blame for the circumstances which caused that the divorce or legal separation could not be effectuated within the applicable period prior to the devolvement of the deceased's estate" (Art. 4:32 BW).

and upbringing and, until he becomes twenty-one years of age, also for maintenance and education (Art. 4:35 (1) BW). As this provision is supposed to provide for a child only in financially necessitous circumstances, this right cannot be exercised by a child for whom a testator's heir or spouse is obligated to provide for (Art. 4:35 (2) BW). A testator's child may apply for compensation for long-term work performed for the testator that has economic value (Art. 4:36 BW).[53] The size of the lump sum in this case depends on what is fair in context of the family relationship.[54] Nevertheless, a maximum of ½ of the testator's estate can be disposed of to provide lump sums to his children (Art. 4:37 (4) BW).

Additionally, a court has the power to order that "assets which were subservient to the professional practice or business of the deceased" be transferred "for a reasonable and fair price to that child or stepchild or to the spouse of this child or stepchild because ... [a testator's] child or stepchild or ... spouse shall continue the professional practice or business of the deceased" (Art. 4:38 (1) BW). The proprietor of the estate cannot be "harmed seriously as a result" of this transfer (Art. 4:38 (1) BW).[55]

Even though the succession law adopted in 2003 creates a significant contrast with other succession law regulations in European continental jurisdictions, some solutions are not new to Dutch succession law. For example, children were already considered forced heirs under the legislation adopted in 1838, and in the 1960s legislators developed the solution that gave the grounds for limiting a testator's children rights to a testator's estate

53 *Kolkman*, in: Zimmermann, p. 25 (47–48).

54 Ibid., p. 25 (48).

55 "The ... paragraph applies accordingly to stocks and shares in a limited liability corporation (*'Naamloze Vennootschap'*) or in a private limited company (*'Besloten Vennootschap'*) of which the deceased was the director and in which he, alone or together with the other directors, held the majority of the shares, provided that the child or stepchild or the spouse of this child or stepchild, at the time of death of the deceased, already was a director of that corporation or company or that this child or stepchild or this spouse takes over the deceased's position of director in that corporation or company" (Art. 4:38 (2) BW).

until the testator's surviving spouse's death, bankruptcy or remarriage.[56] A testator's parents were forced heirs only until 1996.[57]

III. Conclusions

Recent reforms regarding rules of forced succession in chosen European civil law jurisdictions show that there is a tendency to adopt laws that change the original character of the limitations. In the case of a reserved portion, some of the features traditionally associated with this limitation, e.g. the weak position of a surviving spouse or the inadmissibility of monetary equivalents for the reserved portion under any circumstances, are not as strong as they used to be. In jurisdictions providing for a compulsory portion, the rigidness of this portion was weakened by introducing exceptions, under which, for instance, a court or even a testator may postpone the payment of the portion.

Seen from a long-term perspective, it is possible that the number of differences between the different limitations will further decrease. The recent reforms of the reserved portion show that the portion has a growing number of similarities with the compulsory portion. This holds true, for instance, in the case of providing a monetary equivalent of the reserved portion.

As legislators from civil law jurisdictions adopt solutions well-known in common law jurisdictions, the differences in how a testator's freedom of testation is limited – by means of forced succession – are becoming noticeably less pronounced as between civil and common law jurisdictions. Dutch succession law supplies the highest number of examples of regulations that seem to be borrowed from common law jurisdictions, allowing, for instance, a court to interfere with strict succession law regulations on the basis of the general clause of 'reasonableness and fairness'. But also in other civil law jurisdictions, we can identify new laws that increase the testator's freedom of testation and the courts' discretion in ordering a portion, as well as

56 *Milo*, in: Anderson/Arroyo i Amayuelas, p. 203 (212–213); *Reinhartz*, (May 2007) 11.1 EJCL, p. 1 (2–3); *Breemhaar*, Familiäre Bindung und Testierfreiheit im neuen niederländischen Erbrecht, in: Henrich/Schwab (eds), Familienerbrecht und Testierfreiheit im europäischen Vergleich, 2001, p. 147 (168 footnote 29).

57 *Reinhartz*, (May 2007) 11.1 EJCL, p. 1 (9); *Pintens*, Pflichtteilsrecht in Belgien und in den Niederlanden, in: Röthel (ed), Reformfragen des Pflichtteilsrechts, 2007, p. 215 (219).

laws decreasing the rights of a testator's children. Nevertheless, the limitations adopted in common law jurisdictions and in civil law jurisdictions are still essentially different.

D. Specific Trends in the Reform of the Reserved and Compulsory Portion

I. Increasing the Testator's Freedom of Testation

The recent reforms of rules of forced succession in chosen European civil law jurisdictions have increased a testator's freedom of testation in a number of ways.[58]

The freedom of testation is increased by limiting the number of groups of people who can apply for a reserved or compulsory portion.[59] French as well as Dutch law no longer prescribes a portion for the testator's parents. In none of the discussed jurisdictions are a testator's siblings provided with a right to a portion. This trend benefits the testator because, in a growing number of jurisdictions, if he is not survived by a child or spouse, he is free to decide on the disposition of his entire estate.

The latest reform of the Austrian succession law provides a solution that grants a testator limited discretion to decide when and how a compulsory portion should be paid. Similarly, a testator under Dutch law can delay the payment of a compulsory portion until the death of his surviving spouse. Historically, this was regulated exclusively by law, or, under very specific and limited circumstances, it could be decided by a court. Providing a testator with this new power increases the control he has over the final distribution of his estate and, most of all, allows him to better protect his surviving spouse from claims of persons entitled to a portion.

Also, increasing the number of situations under which a testator can disinherit a person entitled to a portion increases the testator's testamentary

58 Some scholars claim that even though the freedom of testation is increasing in civil law jurisdiction, an opposite trend can be identified in common law jurisdictions, see *Spellenberg*, in: Blanpain, p. 711 (737–738).

59 See also *Pintens*, Grundgedanken und Perspektiven einer Europäisierung des Familien- und Erbrechts – Teil 2, Zeitschrift für das gesamte Familienrecht (hereinafter FamRZ) 2003, p. 417 (418).

freedom.[60] Allowing a testator under Austrian law to decrease the compulsory portion to half of its value, in the event a person entitled to the portion did not maintain a family relationship with the testator for a long period of time, is a novelty in civil law jurisdictions. The most popular solutions, adopted for example under German and Austrian law, amount to expanding the list of circumstances under which a person can be completely deprived of the compulsory portion. Every additional circumstance that allows a testator to deprive a person of the portion enlarges the testator's freedom by giving him another chance to escape the rigid regulations of the compulsory or reserved portion.

Thus, the existence of a trend to increase a testator's freedom of testation is generally recognized.[61] It is even argued that there has been a shift and that a testator's estate is no longer seen as a family estate.[62]

II. Weakening the Position of Persons Entitled to a Portion

Allowing a testator or a court to delay the payment of a compulsory portion or to change the payment of a lump sum to payment in installments has weakened the rights of persons entitled to compulsory portion. The trend to reduce the strength of the position of persons entitled to a portion can also be identified in jurisdictions providing for a reserved portion. In these jurisdictions, as it has been acknowledged in academic literature, there is a tendency to replace a right to a share in goods belonging to the estate with a claim for a monetary payment.[63] And in the Netherlands, introducing a compulsory portion in place of a reserved portion has aimed at weakening the position of persons entitled to the portion.[64] This idea was grounded in the thought that testators usually have good reasons for not leaving a portion of their estate to a specific person and, therefore, their decision should be

60 See also ibid., p. 417 (424).

61 E.g. *Braun*, in: Zimmermann, p. 57 (83); *Vaquer*, in: Zimmermann, p. 85 (121).

62 E.g. *Spellenberg*, in: Blanpain, p. 711 (726).

63 *Van Erp*, (December 2007) 11.3 EJCL, p. 1 (12); *Pintens*, FamRZ 2003, p. 417 (423); *Pintens*, ZEuP 2001, p. 628 (642); *Pintens*, Need and Opportunity of Convergence in European Succession Laws, in: Anderson/Arroyo i Amayuelas (eds), The Law of Succession: Testamentary Freedom, 2011, p. 3 (16); *Leipold*, in: FS Söllner, p. 647 (659).

64 *Breemhaar*, in: Henrich/Schwab, p. 147 (168).

respected.[65] But a compulsory portion is provided under the new Dutch law, because there was a fear that eliminating the portion completely could lead to the unequal treatment of children by a testator.[66]

III. Strengthening the Position of a Testator's Spouse

The most significant improvement of the legal position of a testator's surviving spouse (or civil or registered partner) has been adopted in civil law jurisdictions providing for reserved portion.[67] In these jurisdictions, the most recent reforms have guaranteed the surviving spouse a right to a portion or to the usufruct of a portion of a testator's estate. Also in jurisdictions that grant a compulsory portion, the testator's surviving spouse has a strong position. For example, under Dutch law, not only is a surviving spouse provided with a claim to usufruct that can be established even on the testator's entire estate, but the payment of the compulsory portion can also be postponed until his death. Such extensive rights provide a safety net for the spouse and aim, for example, at allowing the testator's surviving spouse to enjoy the same living standard he had during the testator's life.[68] It is possible that in the case of small estates, the entire estate can be depleted during the surviving spouse's life and, therefore, the right of the testator's children to a compulsory portion might be purely theoretical. The tendency to favour the surviving spouse over the children of the deceased is commonly agreed

65 *Pintens*, in: Röthel, p. 215 (216–217).

66 *Breemhaar*, in: Henrich/Schwab, p. 147 (169).

67 The slow increase in the succession rights held by surviving cohabitants has been discussed e.g. by *Kroppenberg*, Should the Surviving Cohabitant Be Given Hereditary Rights to the Estate of the Deceased? A European quest, in: Frantzen (ed), Inheritance Law – Challenges and Reform. A Norwegian-German Research Seminar, 2013, p. 73 (76–81).

68 *Breemhaar*, in: Henrich/Schwab, p. 147 (167); *Mincke*, Einführung in das niederländische Recht, 2002, p. 170.

upon.[69] Some scholars explain this development by arguing that the testator's spouse is no longer seen as a stranger to the testator's family but as a contributor to the growth of the family's assets.[70]

IV. Increasing Courts' Discretion in Determining a Portion

The tendency to provide courts with wider discretion with regard to the time and form of payment of a portion is identifiable in jurisdictions providing a compulsory portion. Under specific circumstances, e.g. in Austria and Germany, courts can modify the outcome of the application of the statutory provisions if the situation of a testator's heir requires it. This discretion is not as far reaching as the discretion of courts in common law jurisdictions, but it allows courts to, at least to some extent, make the rigid rules more flexible.

E. Foreseeable Developments in the Reform of Rules of Forced Succession

I. New Limitation

On the basis of trends that can be deduced from recent reforms that have taken place in civil law jurisdictions, a new type of rules of forced succession can be predicted.

Recent reforms in civil law jurisdictions allow for the prediction that it is likely that the classic division of the estate, between the part that is always disposed of according to the testator's will and the part that can be demanded by the testator's family members in nature or in the form of a monetary equivalent, will gradually be rejected. It will be replaced by a tripartite division of the testator's estate. The first part will be comparable to the present compulsory portion or, alternatively, a reserved portion, but which at

69 *Pintens*, ZEuP 2001, p. 628 (629, 642); *de Waal*, in: Reimann/Zimmermann, p. 1071 (1078); *Pintens*, in: Anderson/Arroyo i Amayuelas, p. 3 (16); *van Erp*, (December 2007) 11.3 EJCL, p. 1 (7, 11).

70 Ibid., p. 1 (7); *Dutta*, The Legal Protection of the Surviving Spouse – German Law in Comparative Perspective, in: Frantzen (ed), Inheritance Law – Challenges and Reform. A Norwegian-German Research Seminar, 2013, p. 35 (35, 38–41).

least under certain circumstances will be paid in cash (this development is already present in jurisdictions providing for a reserved portion). The second part will be a portion on which a court will be able to establish usufructs or to distribute so as to provide additional support for members of the testator's family in need of extra provisions from the testator's estate. That can be deduced not only on the basis of the law applicable in Netherlands but also, for instance, in view of the law allowing a German court to delay payment of the compulsory portion or to make payment in installments on account of an heir's financial circumstances. The third part will be, as is the case now, disposed of according to the testator's will.

It is not possible to predict how large each part will be. It is likely that the size of both the part disposable freely by the testator and the part guaranteed to members of his family in the form of a compulsory or reserved portion will be affected as a result of establishing the part distributed by a court to testator's family members in need. However, it cannot be excluded that, as can happen under the current Dutch succession law, the entire part of the testator's estate that would normally be disposed of according to the testator's will, will at least temporarily be used to provide for the needs of his family member(s). Determining the size of this portion could be more predictable if it were correlated with the relevant family provisions regulating spousal and / or child support. However, the size of the portion could further increase due to the fact that, unlike in the case of divorce, a testator does not need any of his assets after his death.

Considering the legislation adopted in the Netherlands and the reforms depriving a testator's parents or siblings of the right to a fixed share, one can assume that the extra provision will be extended to persons belonging to testator's close family (his spouse and children) that might be in need at the time of his death. At least at this stage, the making of additional provisions by a court to benefit persons who deserve to be rewarded for their behavior towards the testator cannot be predicted.

It is probable that an increase in a court's discretion over the division of the estate would go along with increasing the number of circumstances under which a testator can foreclose members of his family from inheriting from him. That can be assumed on the basis of the recent reforms extending the grounds for depriving a person of a compulsory portion in civil law jurisdictions.

Replacing a reserved or compulsory portion by pure safety net provisions is rather unlikely in the foreseeable future. The right to a certain portion of the testator's estate is based on the legal relation between the testator and

his spouse or children. The testator's solidarity with the members of his close family requires him to provide for them and to continue to care for them after his death, even though it is often argued that this is no longer necessary due to the enhancement of life expectancy.[71] There is a long tradition of leaving at least part of the testator's assets to his family by providing a fixed portion of the testator's estate to certain members of the testator's close family.[72] Equal distribution of the compulsory or reserved portion between testator's descendants guarantees equal treatment of the children at least to some extent.[73]

Adopting the proposed solution would limit the rigidness and inflexibility of the limitations imposed in civil law jurisdictions without completely depriving the final distribution of its predictability.

Even though there are no signs that legislators in common law jurisdictions intend to introduce a compulsory or reserved portion, the above-described solution could also be advisable in their jurisdictions. Implementing a solution that divides an estate into three parts in common law jurisdictions would provide a testator with a more limited freedom of testation, but it would also prevent courts from infringing upon his freedom and changing his decisions as to the disposable portion. At a minimum, consideration should be given to introducing a legislative guarantee that would provide a testator with a certain significant part of his estate (e.g. ½ thereof) that could not be redistributed by a court.

II. Gradual Unification of Rules of Forced Succession

Further reforms of the rules of forced succession are to be expected. As there is a clear tendency to adopt legal solutions borrowed from other jurisdictions,[74] more comparative research and legal transplants in this area of succession law are also to be expected. It is also likely that jurisdictions will continue to adopt and take advantage of solutions reached by other jurisdic-

71 See *Pintens*, in: Anderson/Arroyo i Amayuelas, p. 3 (12–13).
72 See ibid., p. 3 (12–16).
73 *Edenfeld*, ZEV 2001, p. 457 (460).
74 *Pintens*, Grundgedanken und Perspektiven einer Europäisierung des Familien- und Erbrechts – Teil 1, FamRZ 2003, p. 329 (331).

tions having comparable social and familial developments.[75] However, if a spontaneous complete convergence of the limitations of testator's freedom imposing forced succession is to ever take place, it will be a rather slow process.

It is highly unlikely that in the near future there will be a complete unification of the rules of forced succession in civil law jurisdictions or in civil and common law jurisdictions. The discrepancies between the different types of limitations are too significant to be overcome without a deliberate policy aiming to unify them. However, such a harmonization "from above" is also unlikely because countries have "sovereignty-based concerns and see the harmonization of this area as encroachment upon their sovereignty."[76] Even though it is an oversimplification to say that national succession law is grounded in "local rules, customs, moral values, and cultural conventions,"[77] succession law seems to be looked upon as belonging to "the legal 'lifeblood' of a national culture and does not easily lend itself to comparative study, let alone to legal harmonization or unification",[78] behaving as if it were "a part of a country's cultural heritage."[79]

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76 *Gray*, Identifying the Impetus behind the Europeanization of the Private International Law Rules on Family Matters and Succession, (2015) 17 European Journal of Law Reform, p. 341 (350).

77 *De Waal*, in: Reimann/Zimmermann, p. 1071 (1076); see also *Henrich*, Parteiautonomie, Privatautonomie und kulturelle Identität, in: Festschrift für Erik Jayme, 2004, p. 321 (321–322).

78 *Zimmermann*, (2009) 2 American Journal of Comparative Law, p. 479 (504–505); *Milo*, in: Anderson/Arroyo i Amayuelas, p. 203 (207).

79 *De Waal*, in: Reimann/Zimmermann, p. 1071 (1073). For a discussion of the possibility of unifying succession law in Europe see *Kuchinke*, Über die Notwendigkeit, ein gemeineuropäisches Familien- und Erbrecht zu schaffen, in: FS Söllner, p. 589. See also *Terner*, (2007) 2 MJ, p. 147 (160).

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