

**SUNICOP**



---

# **Working paper**

## **SUNICOP 11/2012**

**Presented in Osijek, Croatia**

**Contemporary legal challenges:  
EU – Hungary – Croatia**

**16-18 February 2012**

This working paper is the draft version of the paper presented in the Conference.

Suggested reference of the working paper:

Mónika Csöndes – Dubravka Klasiček: The legal nature of the forced share of inheritance under the Croatian and Hungarian law. Working paper, SUNICOP 11/2012,  
<http://sunicop.eunicop.eu/publications.html>

**Dr. Mónika Csöndes,**  
**Assistant Lecturer, Department of Civil Law**  
**Faculty of Law in Pecs**  
**Dubravka Klasiček, Ph.D.**  
**Senior Assistant, Department of Civil Law**  
**Faculty of Law in Osijek**

## **The legal nature of the forced share of inheritance under the Croatian and Hungarian law**

### **I. Introduction**

It is undisputed that inheritance law is contended to be the most constant part of civil law, and often preserves in its present-day status traditional elements from the 19<sup>th</sup> or the 20<sup>th</sup> centuries. At the same time, the law of succession is closely connected with property law and family law. The type of the properties and assets which can be subject of inheritance has gone through some significant alteration in the last century. Briefly, it is enough to refer to the continuous increase of the variety of non-tangible assets such as company shares, securities, intellectual property rights, etc. Also, in the last decades, due to the result of certain changes in family relations as well as in the demographic circumstances, the suitability and accuracy of the traditional legal institutions and rules of the inheritance law have been often called into question.<sup>1</sup> This paper does not aim at presenting this development and the main aspects of it, but the authors believe that these general theorems will be seen as reflected in this article in connection the forced share of inheritance and its legal nature.

According to the well-known definitions in both countries' legal literatures, the forced share of inheritance is an imperative minimum share of the closest relatives and the spouse (or such a partner whose legal status is the same or similar to the spouse) of the testator charged to his/her estate. Legal systems do regulate forced share of inheritance either as proprietary right or as money claim. In the former, the forced heir will have the legal status like all other heirs and will receive the same hereditary share as they or some part of it. This will hinder the testator to dispose those parts of his estate which is divided und upheld imperatively by the law for the forced heir. In the latter, even if the forced heir's right is infringed by the testamentary disposition or donations given inter vivos, the last will of the testator can not be avoided and contested, but the forced heir will be entitled to sue the legal heirs and ask for

---

<sup>1</sup> L. Vékás, *Magyar polgári jog. Öröklési jog* [Hungarian Civil Law. Inheritance law] (Budapest Eötvös József Kiadó 2002) pp.9-12., L. Vékás, 'Öröklési jog' [Inheritance law], in L. Vékás, ed., *Szakértői Javaslat az új Polgári Törvénykönyv Tervezetéhez* [Expert Proposal to the Draft of the new Civil Code] (Budapest Complex Kiadó 2008) pp. 1151-1152; E. Weiss, *Das Erbrecht als Teil der regionalen Rechtskultur und Identität* <http://www.notar.at/blueline/upload/weiss.pdf>. [1.8. 2008.] quoted by Z. Nemessányi, 'Die Entwicklung des ungarischen Erb- und Pflichtteilsrechts', in R. Welsch, ed., *Erbrechtsentwicklung in Zentral- und Osteuropa* (Vienna, Manzsche Verlags- und Universitätsbuchhandlung 2009) p. 87.

his/her forced share of inheritance as a money claim. The legal system of Croatia is an example for the former, and Hungarian law is an example for the latter.

It is worth to mention that in the present-day legal literature of more countries, the today's function of the forced share<sup>2</sup> of inheritance and its conformity with modern constitutional law<sup>3</sup> is often called into question. Namely, as far as constitutional law is concerned, there is a debate about whether the freedom of the testamentary disposition is restricted unnecessarily by the institution of the forced share of inheritance.<sup>4</sup>

This paper<sup>5</sup> brings a comparison between the Croatian and the Hungarian imperative inheritance law with the emphasis on the legal nature of the forced share of inheritance in the above said countries. Before we get to the issue of the legal nature of the forced share of inheritance, there has to be some mention of the main characteristics of the Croatian and Hungarian imperative inheritance. Therefore, this paper firstly provides for a basic overview of the main features of the imperative inheritance law in Croatia and Hungary, and secondly, deals with main differences between the two systems that is the legal nature of forced share of inheritance, its consequences and pro's and con's of each system.

## **II. The historical background of the forced share of inheritance in Croatia and in Hungary**

In brief, as introduction, some historical background should be mentioned about the forced share of inheritance.

According to some authors, the strongest type of the forced share appears in legal systems influenced by the Roman law where the forced share is a part of the law of inheritance. It can be said that in those systems, testator's wishes expressed in his/her testament and donations are not respected at all, since his/her forced heirs can ask for the reduction of the testamentary dispositions and the return of gifts. Furthermore, forced heirs are coerced to be testator's heirs if they decide to claim their forced share – and that is what the testator tried to avoid at all costs by making his/her will.<sup>6</sup>

---

<sup>2</sup> Concerning the function of the forced share of inheritance see: Z. Csehi, 'Észrevételek és javaslatok az új Polgári Törvénykönyv tervezetének köteleSRészi szabályaihoz' [Remarks and proposals to the rules of the forced share in the draft of the new Civil Code] 7-8 *Közjegyzők Közlönye* (2007) pp. 16-18.

<sup>3</sup> In connection to the former Hungarian Constitution of 1949, the Hungarian Constitutional Court declared that the forced share is constitutionally not protected specially by the Article 14 of the Constitution. (1383/B/1990 AB határozat). See also: 936/D/1997 AB határozat, and Nemessányi, op. cit. n. 1. at p.87

<sup>4</sup> L. Vékás, 'Die Grundzüge der Reform des ungarischen Erbrechts' in R. Welser, ed., *Erbrechtsentwicklung in Zentral- und Osteuropa* (Vienna, Manzsche Verlags- und Universitätsbuchhandlung 2009) p. 70.

<sup>5</sup> This paper is based on the PhD dissertation of Dubravka Klasiček (Imperative Inheritance – Limitation of Freedom of Testation) which was defended at the Faculty of Law in Zagreb in 2011

<sup>6</sup> R. Welser, *Die Reform des österreiches Erbrechts*, Verhandlungen des Siebzehnten Österreichischen Juristentages, Wien, 2009, p. 102, C. Castelein, *Introduction and Objectives, Imperative Inheritance law in a Late-Modern Society*, eds. Castelein, C., Foqué, R., Verbeke, A., Intersentia, 2009, p. 31, Foqué, R., Verbeke,

Under Croatian law, the forced share was always a proprietary right. For example, in Middle Ages, the freedom of a father to dispose of family property was in one way or another, limited, but he always had to leave certain members of his family (usually his sons) some parts of the inheritance. Those limitations were as follows: in some parts of Croatia, a father's testament would have been valid only if he at least mentioned one of his heirs (sons) and bequeathed him even the smallest part of the inheritance (father had rather large testamentary freedom); in some parts of Croatia, a father was free to dispose of only a part of family assets that corresponded to the part that any of his children had, while the rest of the assets had to be inherited by his children; in some parts of Croatia, children had a so called 'right to expect' certain parts of family assets, and in those parts, father's freedom of testation was limited the most. Since those days, some things have changed, but the basic characteristics of imperative inheritance law remained the same – there are still certain family members who have the right to ask for a forced share in case it is infringed; in case the forced heirs claim their forced share, they go against the wishes of a testator that were expressed in the testament and in donations; forced share is still a part of the inheritance.<sup>7</sup>

Under Hungarian law, the legal nature of the forced share was disputed before the promulgation of the Civil Code of 1959. According to the so called Provisional Judicial Rules from 1861, its nature was fundamentally of inheritance law. In the late 19<sup>th</sup> century, with the assistance of the historical analysis, a famous scholar, Grosschmid Béni argued that in Hungarian law the forced share of inheritance is not necessarily a proprietary right, but it can be considered as a money claim, as well. The draft specimen of the Civil Code from 1900 adopted the latter solution. The Civil Code of 1959 clearly regulated the forced share as a money claim.<sup>8</sup>

### **III. Imperative inheritance**

#### **1. The forced heirs**

The forced heirs shall be entitled to a forced share of inheritance if they are intestate heirs of the testator or would be in the absence of a testamentary disposition at the time of descent and distribution. The two legal systems show differences in who can be considered as forced heir.

In Croatian inheritance law forced heirs are divided into two main categories – absolute and relative forced heirs.<sup>9</sup> Croatian inheritance law is one of the few in Europe that makes this distinction. This division depends on whether forced heirs have to meet certain special

---

A., *Conclusions – Towards an Open and Flexible Imperative Inheritance Law, Imperative Inheritance law in a Late-Modern Society*, eds. Castelein, C., Foqué, R., Verbeke, A., Intersentia, 2009, p. 220. etc.

<sup>7</sup> See more in L. Medvidović, *Hrvatsko srednjovjekovno obiteljsko i nasljedno pravo* [Croatian Medieval Family Law and Inheritance Law], Narodne novine, Zagreb, 1996

<sup>8</sup> Vékás 2002, opt. cit. n. 1, at p. 108.

<sup>9</sup> N. Gavella, V. Belaj, *Nasljedno pravo* [Inheritance Law], 3. edition, Zagreb, Narodne novine, 2008, str. 220.

prerequisites in order to claim their forced share of inheritance. Absolute forced heirs do not have to meet any special prerequisites; they just have to be in a certain relationship with the testator (blood relation, marriage, cohabitation, adoption) in order to have the right to claim their forced share of inheritance. Persons who fall into this category are testators' descendants, his/her spouse or cohabitant and his/her adoptees and their descendants. It has to be noted that in Croatia only cohabitant couples that consist of a man and a woman are legally recognized, not same-sex couples, and their legal status is almost the same as married couples. The legal form of registered partnership is not accepted by the law. The forced share of inheritance of these forced heirs amounts to one half of their intestate share.<sup>10</sup> On the other hand, relative forced heirs are parents, adopters and other ascendants. They will have the right to claim their forced share of inheritance only if they would be intestate heirs in that specific case and only if they permanently lack earning capacity and they do not have necessary means for subsistence. Their forced share of inheritance is smaller than the forced share of inheritance of the absolute forced heirs and it amounts to one third of their intestate share.<sup>11</sup>

Hungarian law does not distinguish between absolute and relative forced heirs. According to the Article 661 of the Civil Code of 1959, the forced heirs are the descendants, the spouse<sup>12</sup> or the registered partner<sup>13</sup>, and the parents of the decedent. But, here, some special rules should be mentioned, because of the two characteristic legal institutions of the Hungarian inheritance law. The one is the so called lineal inheritance<sup>14</sup>. The parents and other ancestors will become legal heirs and therefore entitled to forced share not only when there are no descendants and spouse (or registered partner) or when they are disqualified from the inheritance, but also when there is a property in the estate which is subject to lineal inheritance, and there are no descendants<sup>15</sup>. As far as the spouse (or registered partner) is concerned, the spouse (or registered partner) as legal heir will either become the owner of the properties of the estate or be entitled to get the right of the so called widow's enjoyment. In the latter, the spouse (or registered partner) will inherit beneficial interest in all of the properties not otherwise inherited by him/her [Article 615(1) of the Civil Code of 1959]. Thus, the right to ask for forced share can be awarded on different legal basis. If there are descendants, the spouse (or registered partner) will inherit the beneficial interest of all of the properties which will be inherited by the descendants. In this case, the forced share is adjudged from the widow's enjoyment. If there are no descendants, the estate consists of two parts. The one is subject to lineal inheritance; the other is not. In the case of the former, the lineal heirs (ancestors) will be

---

<sup>10</sup> Art 70 / 3 Inheritance Act (IA), National Gazette No. 48/03, 163/03, 35/05

<sup>11</sup> Art 69/2 IA

<sup>12</sup> The new Civil Code will bring about some changes concerning the inheritance status of the cohabitants.

<sup>13</sup> Registered partner are a couple who belong to the same gender. The rule and legal effect of the marriage shall be applicable to their relationship. See: XXIX Act of 2009 about registered partnership

<sup>14</sup> Article 611(1)-(2) of the Civil Code of 1959 says „(1) If the legal heir is not a descendant of the decedent, any property that has come down to the decedent from an ancestor by inheritance or gratuitous bequest shall be subject to lineal inheritance. (2) Property inherited or gratuitously acquired from a brother or sister or his descendant shall also be subject to lineal inheritance if the property had been inherited or gratuitously received by the brother or sister or their descendant from their and the decedent's common ancestor.“

<sup>15</sup> Article 661 of the Civil Code of 1959, see L. Söth, 'The forced share of inheritance' in Gy. Gellért, ed., *A Polgári Törvénykönyv Magyarázata* [The Commentary on the Civil Code] (Budapest, Complex Kiadó 2007) p. 2525.

the owners of these properties, and the spouse (or registered partner) will inherit widow's enjoyment thereon. The spouse (or registered partner) will be the heir as owner of the properties which are not subject to lineal inheritance. Therefore, the forced share of the spouse (or registered partner) will be based either on his/her property rights as owner concerning the properties which are not subject to lineal inheritance, or his/her widow's enjoyment concerning the properties which are subject to lineal inheritance.<sup>16</sup>

To highlight and sum up an important difference; the following has to be mentioned concerning the inheritance status of the spouse. In Croatia, the spouse has the same status as the children in the line of the intestate inheritance. So, the spouse gets the same proportion from the estate as the children. Under Hungarian law, the spouse or registered partner as legal heir will be the proprietor of the estate only if there are no descendants. If there are, according to Article 615 (1) the spouse (the registered partner) of a decedent will inherit beneficial interest in all property not otherwise inherited by him (the right of the widow's enjoyment).<sup>17</sup>

## **2. The basis of the forced share of inheritance and its calculation**

Here, the rules of the Croatian law and Hungarian law are, by and large, the same. If a forced share of inheritance is infringed in total or partially by testator's will or his/her *inter vivos* or *mortis causa* donations, the forced heir has the right to claim his/her forced share of inheritance.<sup>18</sup> If there was an infringement of forced share of inheritance, the estate value has to be established. The estate value represents the basis for calculating the value of the forced share of inheritance. At first, the value of the entire estate left by the deceased at the moment of his/her death is calculated, together with the deceased's testamentary disposition and claims (even those against his/her heirs).<sup>19</sup> After that value is calculated, it is diminished by estate liabilities (for example: devisor's debts, expenses of the inventory and evaluation of estate, usual funeral expenses).<sup>20</sup> The remainder obtained in such a way is called the 'estate net-value'. After calculating the estate net-value, the estate value of account has to be calculated. It is done after the value of some gifts given by testator to certain parties, is added to estate net-value.

Under Croatian law, the gifts taken into account are all testator's gifts given to his/her intestate heirs, regardless of when they were made, and gifts given by testator to third parties, other than his/her intestate heirs, during the last year of testator's life.<sup>21</sup> According to Article 89 IA, when calculating the value of a share of inheritance that a certain intestate heir will inherit,

---

<sup>16</sup> Article 615 of the Civil Code of 1959, see S th, op. cit. n. 15, at p. 2526.

<sup>17</sup> Article 615 (2) of the Civil Code of 1959 says „If a spouse or registered partner remarries or enters into another registered partnership, his beneficial interest shall cease to exist.“

<sup>18</sup> Gavella, Belaj, op. cit. n. 9, p. 229, See Article 661, 665 of the Civil Code of 1959, and see S th, op. cit. n. 14, at p. 2517

<sup>19</sup> Art 71/1 IA, Article 666 of the Civil Code of 1959

<sup>20</sup> Art 71/2 IA, Art. 677 of the Civil Code of 1959

<sup>21</sup> Art 71/ 3 and 4 IA,

everything he/she has received from the testator as a gift or as a legacy<sup>22</sup>, has to be incorporated in that share. The reason for this is a fair distribution of assets between heirs – if a certain heir was given a gift by the testator while he/she was alive; it is fair that the share of the inheritance he/she will inherit shall be reduced by the value of that gift. This is applied to forced heirs and their forced shares of inheritance, as well.<sup>23</sup>

In Hungarian Civil Code of 1959, Article 666(1) only determines that “the basis of a forced share of inheritance is the net value of an estate, and the net value, at the time of donation, of the donations granted by the testator *inter vivos*”. It contains an additional rule in (2) according to which if the calculation of a donation at its net value at the time it is given is seriously unjust to any person concerned; the court shall determine the value of the donation in the light of all of the circumstances. It is worth to mention that Hungarian law does not distinguish between donations given to the intestate heirs and third parties. The expression “any person” means the forced heirs, as well<sup>24</sup>.

Under Croatian law everything that a forced heir has received from the testator as a gift or as a legacy, has to be incorporated in that share. Hungarian law adopts the same solution. Article 666(3) of the Civil Code of 1959 regulates only that when calculating the net value of an estate, legacies and enjoiners shall not be considered as encumbrances. But, when calculating the value of the forced share for a forced heir, according to Article 668 (1) everything received by a beneficiary from an estate under any title – including legacies<sup>25</sup> – as well as any gratuitous donations he has received from the testator shall be applied to satisfy the forced share of inheritance, on condition that it shall be added to the basis of the forced share of inheritance. This is the so called inclusion rule.

In both legal systems, there are some donations given *inter vivos* which will not be taken into account when calculating the basis of the forced share of inheritance (to the net value of the estate).<sup>26</sup>

As far as the basis of the forced share of inheritance is concerned, it is worth to devote some attention to the question of some types of contracts. In both legal systems it is unlawful for the testator to leave his estate freely to certain person by contract. In Croatia, this type of contract

---

<sup>22</sup> Croatian law accepts a type of legacy that has a law of obligation nature. See: P. Klarić, M. Vedriš, *Gradansko pravo* [Civil Law], 9. edition, Narodne novine, Zagreb, 2006, p. 714.

<sup>23</sup> Art 89/4 IA, This principle prevails in Hungarian law, as well.

<sup>24</sup> See Sóth, op. cit. n. 15, at p. 2551., Supreme Court BH2000.354

<sup>25</sup> Under Hungarian law, not only the type of legacy that has a law of obligation nature can be found, but also those which have a proprietary nature.

<sup>26</sup> Article 667(1) of the Civil Code of 1959 rules that the following shall not pertain to the basis of a forced share of inheritance: a) the values of donations granted by the testator to anybody more than fifteen years prior to his death; b) the values of donations granted by the testator before the creation of a relationship conveying entitlement to a forced share of inheritance; c) the values of gifts not exceeding the common value; d) the value of support given to a spouse or registered partner and descendants who are in need of support; e) the value of support provided without consideration to other persons in need up to the extent necessary for subsistence. Under Croatian law the followings will not be considered as donation when calculating the basis: a) donations made for some public purposes, b) usual small gifts, c) products or interests that a person had from a gift, d) the maintenance and school expenses (only for a compulsory education, anything above or beyond that will be considered a gift). See: Klarić, Vedriš, op. cit. n. 22, p. 756.

is called inheritance contract.<sup>27</sup> But, there are valid legal forms in both legal systems for the testator to declare his/her last will in a form of a contract, but it is regulated strictly by law.

Under Croatian law, there are contracts concluded *inter vivos* which fall under the law of inheritance and the law of obligation, as well. One of them is the contract that is concluded between an ascendant and his descendant(s) by which an ascendant gives all or part of his existing assets to his descendants. In order for this contract to be valid, all of the ascendant's intestate heirs have to agree to that contract. If they don't, it converts into a donation.<sup>28</sup> This type of contract is not known in the Hungarian legal system.

Under Croatian law there are also two additional contracts that fall under the law of obligation that can influence the value of the forced share. First of them is the so called "ugovor o doživotnom uzdržavanju" (contract of maintenance for life). In this contract a person can commit to give maintenance to another person until he/she dies, and after the death of that person, he/she will obtain the assets of the deceased agreed in the contract as a "counter-performance" for the maintenance.<sup>29</sup> The other is the "ugovor o dosmrtnom uzdržavanju" (contract of maintenance until death) which is concluded between a person that is providing a maintenance and a person who is receiving that maintenance until his/her death, but the person providing maintenance does not have to wait for the counter-performance until the death of the other party, he/she receives the assets agreed in the contract right away, and is obliged to provide the maintenance until the death of the other contractual party.<sup>30</sup> One of the most important rules about these contracts is that they have to contain an element of uncertainty – the person providing the maintenance must not know for sure how long the other party will live.<sup>31</sup>

Under Hungarian law, the former is known as "öröklési szerződés" (inheritance contract). Article 655 (1)-(2) of the Civil Code of 1959 rules that „*Under a contract of inheritance the testator shall be obliged to assume the obligation to name the contracting party as his heir in exchange for support or a life-annuity. The testator shall be entitled to make any testamentary disposition in a contract of inheritance. Such contractual disposition in the contract of inheritance by the other party contracting with the testator shall be invalid.*“ Under Hungarian law, the latter contract is regulated in the form of the so called "tartási és életjáradéki szerződés" (support contract and the life-annuity contract). According to the Article 586 of the Civil Code of 1959 „*under a support contract one of the parties shall be obliged to provide proper support for another*“<sup>32</sup>. The obligation to provide support shall include general care, medical treatment, nursing, and burial. Contracts shall remain in force until the death of the dependent. Article 591(1) of the Civil Code of 1959 says that „*under a*

---

<sup>27</sup> Art 102 - 104, IA

<sup>28</sup> Art 105 - 115 IA

<sup>29</sup> Art 579 - 585 Civil Obligations Act, National Gazette, 35/05, 41/08

<sup>30</sup> Art 586 – 589 Civil Obligations Act

<sup>31</sup> N. Gavella, *Nasljedno pravo* [Inheritance Law], Informator, Zagreb, 1990, p. 369

<sup>32</sup> Even legal persons shall be entitled, as obligors, to conclude support contracts.

life-annuity contract one of the parties shall be obliged to provide a specific sum of money or a specific quantity of agricultural produce periodically<sup>33</sup>.

In both legal systems, if a property is already an object of a contract of maintenance for live or until death, support or life-annuity contract, it will not be taken into account while calculating the value of the forced share of inheritance. So, the forced share of inheritance can not be claimed from those whose right is based on these contracts.<sup>34</sup>

In both legal systems, these contract has to meet certain specific form and requirements.

As far as the extent of the forced share is concerned, under Croatian law, the forced share of inheritance of the absolute forced heirs (descendants, adoptees and their descendants, the spouse/cohabitant) amounts to one half of their intestate share.<sup>35</sup> The relative forced heirs will have the right to claim their forced share only if they would be intestate heirs in that specific case and only if they permanently lack earning capacity and they do not have necessary means for subsistence. Their forced share is smaller than the forced share of absolute forced heirs and it amounts to one third of their intestate share.<sup>36</sup> Under Hungarian law, Article 665 (1) of the Civil Code of 1959 determines that “descendants and parents shall be entitled to half of what is due to a legal heir as calculated on the basis of the forced share of inheritance. Here, a special rule should be mentioned, because one of the well known characteristic legal institutions of the Hungarian inheritance law. As far as the spouse (or registered partner) is concerned, as it was detailed above, the spouse (or registered partner) will inherit the *beneficial interest* in the form of the widow’s enjoyment of all of the properties which will be inherited by the descendants or by the lineal heirs on the properties in the estate which are subject to lineal inheritance. In this case, the forced share is adjudged from the widow’s enjoyment. According to Article 665(2) “If a spouse or registered partner is entitled to beneficial interest as a legal heir, his forced share of inheritance shall be *the limited degree of beneficial interest* that provides for his needs, in consideration of the property he has inherited, his own property, and the earnings from his labor. Otherwise, a spouse or registered partner shall be entitled to half of his legal share of inheritance as a forced share of inheritance.”

### **3. The protection of the forced share of inheritance in case of infringement**

Under Croatian law, in case, a forced share of inheritance is infringed, forced heirs have the right to ask for the reduction of testamentary dispositions and/or the return of donations made by the testator during his/her life.<sup>37</sup> In other words, they have the right to dispute testator's

---

<sup>33</sup> S (2) says that „the regulations governing support contracts shall be duly applied to life-annuity contracts“.

<sup>34</sup> For the Hungarian law see: The 89th Opinion of the Civil Division of the Supreme Court, point c); BH1990.60. For the Croatian law see: Gavella, op. cit. n. 31, p. 370

<sup>35</sup> Art 70 / 3 IA

<sup>36</sup> Art 69/2 IA

<sup>37</sup> Gavella, Belaj, op. cit. n. 9, p. 229-230

gratuitous dispositions. This is certainly one of the most important consequences of the so-called inheritance law nature of the forced share of inheritance. Testamentary dispositions will be reduced regardless of their nature and scope and in the same proportion in order to settle a forced share of inheritance that has been infringed by it.<sup>38</sup> To emphasize again, the reduction of testamentary dispositions will only happen as a result of forced heir's claim; the court will never award a forced heir his/her forced share of inheritance without him/her asking for it first.<sup>39</sup> After the claim, forced heir will not be able to influence the order of the reduction of testamentary dispositions. This order is set by Art 78 of Inheritance Act and it can not be changed by forced heir's dispositions. Statue of limitation for reduction of testamentary dispositions is three years since the proclamation of testator's will.<sup>40</sup> If the reduction of the testamentary dispositions is not enough to settle a forced share of inheritance that has been infringed, forced heir has the right to ask for the return of the gifts given to intestate heirs and to third parties by testator.<sup>41</sup> Not all gifts given by the testator will be considered for return. All gifts given to his/her intestate heirs will be considered for the return, regardless of when they were made. Gifts given to third parties will also be considered for the return, but only those made during the last year of testator's life.<sup>42</sup> In case, a gift does not have to be returned in whole, but only its ideal part, in order to settle a forced share of inheritance that has been infringed, the forced heir and the donee will become co-owners of that gift.<sup>43</sup> All gifts that have to be returned in order to settle forced share of inheritance will be returned in the opposite order than the one they were made in. The testator can never influence the order or the scope of the return of gifts by his/her dispositions.<sup>44</sup> Even it is a proprietary right; the statue of limitation for the return of gifts is three years since the death of the testator.<sup>45</sup>

Under Hungarian law, the testamentary disposition or the donation *inter vivos* made by the decedent will not be invalid, even if the forced heirs' right is infringed. But, as mentioned above, the forced heir will be entitled to sue the testamentary heirs and ask for his/her forced share of inheritance as money claim. Namely, the obligation based on the forced share of inheritance is an estate debt<sup>46</sup>. The forced heirs are entitled to enforce their rights in 5 years, which corresponds with the general limitation period. The limitation starts from the death of the decedent. With regard to the responsibility for the satisfaction of a forced share of inheritance, Article 669 says that "the dispensation, or completion, of forced shares of inheritance can be demanded in the following order: a) responsibility for satisfaction of a forced share of inheritance primarily falls on persons having a share of the estate; b) the donees receiving donations from a testator within fifteen years prior to his death shall be

---

<sup>38</sup> Art 79/1 IA

<sup>39</sup> Klarić, Vedriš, op. cit. n. 9, p. 752

<sup>40</sup> Gavella, Belaj, op.cit. n. 9, p. 233

<sup>41</sup> Cf. *ibid.*, p. 234.

<sup>42</sup> Only donations that are taken into account while calculating value of account can be considered for return (Art 71 / 3 IA).

<sup>43</sup> Gavella, Belaj, op.cit. n. 9, p. 236, according to Art 78 IA.

<sup>44</sup> O. B. Antić, *Sloboda zaveštanja i nužni deo* – doktorska disertacija [Freedom of testation and forced share – Ph.D. dissertation], Beograd, 1983, p. 335

<sup>45</sup> Art 84 IA

<sup>46</sup> See Article 677(1) of the Civil Code of 1959

responsible for that part of the forced share of inheritance that cannot be satisfied from the estate, irrespective of the temporal order in which the donations were received.” Article 672 (1) rules that a forced heir shall be entitled to demand that his share be dispensed in money. It should be noted that this order does not prevail exclusively. A forced share of inheritance is due in kind if it was the decedent's intention declared *inter vivos* or by a testamentary disposition. Furthermore, if the dispensation of a forced share of inheritance in money is injurious either to the beneficiary or to the obligor, the court shall, in light of all of the circumstances, be entitled to order the forced share of inheritance to be dispensed wholly or partly in kind.<sup>47</sup> This occurs often in case of real estates, when the dispensation of the forced share in money would be inequitable to the person who lives in the real estate<sup>48</sup>. The court also opt this solution when the dispensation of the forced share in money would be more onerous for the defendant, than for the plaintiffs if they would get the sum of money equivalent to their forced share only after the dissolution of the co-ownership<sup>49</sup>. But, the Supreme Court in a given case highlighted that the maintenance of the co-ownership is not a practical solution when a personal property is concerned in the dispensation of the forced share. Therefore, it is more adequate if the forced heir will be the sole owner of the personal property, and will be obliged to equate the difference in money to the others.<sup>50</sup>

According to Article 671 (1) of the Civil Code of 1959, the forced share of inheritance shall be dispensed without any encumbrance or limitation. If, however, a forced share of inheritance is dispensed and the remaining property is insufficient to ensure the spouse's or registered partner's limited right of the widow's enjoyment, the part of the forced share of inheritance ensuring limited enjoyment can only be dispensed after enjoyment is terminated. The case law admits the right to request the redemption<sup>51</sup> of the widow's enjoyment based on forced share of inheritance, as well.<sup>52</sup> Here, it is clear that the interest of the forced heirs and the widow's rights are able to be in conflict. Namely, it is common that though the heirs get the title of the property, they are not entitled to use it, because of the right of the widow's enjoyment.

#### **4. The disinheritance of the forced heirs**

According to Croatian Inheritance Act, there are certain conditions under which a forced heir can lose the right to claim his/her forced share of inheritance. There are two main ways to disinherit a forced heir – exclusion and deprivation.

---

<sup>47</sup> See Article 671(2)-(3) of the Civil Code of 1959

<sup>48</sup> Supreme Court, Pfv. II. 21498/1999. see: S th, op. cit. n. 15, at p. 2586.

<sup>49</sup> Supreme Court BH 2001./5. sz. 226. see: S th, op. cit. n. 15, at p. 2586.

<sup>50</sup> Supreme Court Pfv. V.21162/1998. S th, op. cit. n. 15, at p. 2586.

<sup>51</sup> According to Article 616 (3) of the Civil Code of 1959, both spouses and registered partners, and the descendants shall be entitled to request the redemption of the right of survivorship of spouses or registered partners. Redemption of the right of tenancy or the furnishings and household accessories of the dwelling in which the spouse or registered partner lives cannot be requested.

<sup>52</sup> Supreme Court BH 1992/1. sz. 27, see V k s 2002, opt. cit. n. 1, at p. 119.

Grounds for exclusion (Art 85 IA) are a) if an heir has gravely aggrieved the devisor by violating some legal or moral obligation, b) if the forced heir has committed with intent a major criminal offence against the devisor or his/her spouse, child or parent, c) if the forced heir has committed a criminal offence against Republic of Croatia or values protected by international law, d) if he/she has taken to idling and dishonest life. As a matter of fact, exclusion is a punishment for an unaccepted behavior of the forced heir and if a forced heir is excluded, the testator can freely dispose of his/her forced share of inheritance.<sup>53</sup>

Grounds for deprivation (Art 88 IA) are a devisor can deprive of the right of forced share of inheritance only his/her descendant who is a forced heir, if he/she is heavily encumbered with debts or is a prodigal. Such deprivation will be valid only if that forced heir has descendants – a minor child or a grandchild from the previously deceased child, or a full age child and/or a full age grandchild from the previously deceased child, who is unable of earning. Those descendants of the deprived forced heir will inherit his/her forced share of inheritance. Deprivation is a way of preserving a forced share of inheritance from a forced heir who will lose it right away because of his/her lifestyle and giving it to his/her descendants who need it for their maintenance, education etc. The testator can not freely dispose of the deprived forced share of inheritance, he can only ‘skip a generation’ (his son or daughter) and transfer that forced share of inheritance to his/her grandchildren or grand-grandchildren.<sup>54</sup>

Under Hungarian law, disinheritance is valid only if it based on the one of the grounds regulated in the Article 663(1)<sup>55</sup> of the Civil Code of 1959 and if it executed in the testament of the decedent. The deprivation is not known in the Hungarian legal system.

#### **IV. The legal nature of the forced share of inheritance**

The Inheritance Act of Croatia accepts the system of so-called inheritance law nature of the forced share of inheritance (sometimes called property law nature).<sup>56</sup> The forced heirs, like testamentary or intestate heirs, become heirs at the time of testator's death, *ipso iure*, if all other prerequisites are fulfilled at that moment. Forced heir has the right to his/her forced

---

<sup>53</sup> Jakelić, D., *Neka pitanja o isključenju iz nasljedstva nasljednika s pravima na nužni dio* [Some Questions Concerning the Exclusion of Heirs Entitled to Compulsory Part From Legacy], *Hrvatska pravna revija*, 2-2006, p. 22

<sup>54</sup> Gavella, Belaj, op. cit. n. 9, p. 227 – 228

<sup>55</sup> (1) Disinheritance can take place if a person entitled to a forced share of inheritance

- a) is undeserving of inheritance from the testator;
- b) has committed a serious crime to the injury of the testator;
- c) has attempted to take the life of the testator's spouse, registered partner or his next of kin or has committed another serious crime to their injury;
- d) has seriously violated his legal obligation to support the testator;
- e) lives by immoral standards;
- f) has been sentenced to five years of imprisonment or longer by final verdict.

(2) A testator can also disinherit his spouse or registered partner because of a conduct seriously violating matrimonial duties or the duties of unmarried couples.

<sup>56</sup> Gavella, Belaj, op. cit. n. 9, p. 217

share of inheritance which is a part of the inheritance.<sup>57</sup> He/she inherits in the same way other types of heirs inherit. A potential forced heir will be an heir regardless of whether he/she already claimed his/her forced share of inheritance. This claim is merely a consequence of the fact that forced heir became an heir at the time of testator's death.<sup>58</sup> There are a lot of consequences of this type of forced share of inheritance. One of the main consequences is the fact that the rules of inheritance law are exclusively applicable to this type of imperative inheritance. This means, for example, that potential forced heirs are divided into lines like intestate heirs. All the same principles of inheritance law that are applicable to intestate heirs are applicable to forced heirs also (especially the principle of representation and exclusivity).<sup>59</sup> The forced heir can not claim his/her forced share of inheritance if he/she is not an intestate heir in a specific case. For example, if testator had children and grandchildren, his/her forced heirs will be his/her children, because they would have been intestate heirs in case that testator did not make a will. Only in case testator's children died before him/her, or are unworthy to inherit, will testator's grandchildren be forced heirs, because only then will they be intestate heirs as well.<sup>60</sup>

Potential forced heirs do not only have to be alive at the time of testator's death and be his/her intestate heirs, but they have to be worthy to inherit, like all other heirs. Also, since all the same rules that are applicable to intestacy apply to imperative inheritance, even *nasciturus* can be a forced heir, under certain prerequisites. The same rules are applicable under Hungarian law. Forced heir can renounce his/her right to claim his/her forced share of inheritance and can give all other statements that other types of heirs can give. Forced heir is responsible for testator's debts (although there are certain particularities concerning their responsibility for those debts).<sup>61</sup> Certainly one of the most important consequence of this type of forced share of inheritance (at least for this paper) is the fact that forced heir can challenge testator's will and donations and can become a co-owner of inheritance together with testamentary heirs and sometimes even with donees, if his/her forced share of inheritance was infringed by testator's donations.<sup>62</sup>

Under Hungarian law, forced heirs are not heirs. As it was detailed several times above, the forced heirs are only entitled to ask their forced share of inheritance as money claim. Because of the law of obligation nature of the forced share of inheritance, the rules of inheritance law and the law of obligation are applicable combined to imperative inheritance. The forced heir can not claim his/her forced share of inheritance if he/she is not an intestate heir in a specific case.<sup>63</sup> As a general rule, the dispensation of the forced share will be ordered in money. But, it can occur that it will be due wholly or party in kind, and in this case, if it is reasonable and

---

<sup>57</sup> Cf. *ibid*, p. 218

<sup>58</sup> N. Gavella, *Nesklad između pravnog i faktičnog položaja nasljednika* – doktorska disertacija [Dissention between the Legal and Factual Position of Heirs – Ph.D. dissertation], Zagreb, 1981, p. 43

<sup>59</sup> Gavella, Belaj, *op. cit.* n. 9, p. 218

<sup>60</sup> Art 10 IA

<sup>61</sup> For more see Gavella, Belaj, *op. cit.* n. 9, p. 376.

<sup>62</sup> B. T., Blagojević, *Nasledno pravo u Jugoslaviji, Prava republika i pokrajina* [Inheritance Law in Yugoslavia, Laws of Republics and Regions], Beograd, 1988, p. 206 – 207

<sup>63</sup> Söth, *op. cit.* n. 15, at p. 2587.

justified, co-ownership can also come into existence. But, this is the exception and not the general rule.

## **V. Problems with so called inheritance law type of the forced share of inheritance**

There are some major problems with this type of forced share of inheritance and most of them have to do with the fact that this type of forced share is one of the most severe ways of limiting the freedom of testamentary disposition.

1. The fact that testator's forced heirs have the right to dispute testator's gratuitous dispositions is probably the most severe consequence of inheritance nature of forced share of inheritance. In legal systems that have this type of forced share of inheritance, forced heirs' claims go directly against testator's wishes expressed in his/her testament and/or donations. If forced heirs claim their forced share of inheritance, testator's wishes are, in part or wholly, ignored. Legal systems that have forced share of inheritance in "kind" or in "nature" (inheritance law nature of forced share) fall into a category of so called "strong reserve type" – systems with the strongest limitation of freedom of testamentary disposition. On the other hand, legal systems that have forced share of law of contract nature fall into a category of so called "hollowed out reserve" which is represented by much more open and flexible system of limitation of freedom of testamentary disposition.<sup>64</sup> In those legal systems forced heirs are creditors that have the right to claim a certain sum of money as their forced share of inheritance.<sup>65</sup> They do not inherit any part of testator's inheritance, they do not dispute his/her gratuitous dispositions and, therefore, testator's wishes expressed in his/her will and/or donations remain intact.

2. If a forced share is of a law of inheritance nature, testamentary heirs, and sometimes donees, will become co-owners of the inheritance and/or gifts with forced heirs after they inherit their forced share. This situation will almost certainly be a nuisance to all parties involved, at least until the division of co-ownership, because each party objects each other's rights and claims; each of their rights diminishes the rights of the others'. It can be said that they are adversaries and the more these two sides (forced heirs, on one side, and testamentary heirs and/or donees, on the other side) have to deal with each other, the more problems, stress and conflicts might occur.<sup>66</sup>

3. Forced share of inheritance law nature might often go against particular forced heir's wishes. Sometimes it might not be in the best interest of forced heir to inherit a part of the inheritance. This can happen especially if he/she is a minor, unemployed, sick, in debt etc. In

---

<sup>64</sup> See also C. Castelein, *Introduction and Objectives, Imperative Inheritance law in a Late-Modern Society*, eds. Castelein, C., Foqué, R., Verbeke, A., Intersentia, 2009, p. 31

<sup>65</sup> For example in Austria, Germany, Hungary, The Netherlands etc. For more see L. Garb, J. Wood, *International Succession* – 3. edition, Oxford University Press, New York, 2010.

<sup>66</sup> See also M. J. A. Van Mourik, *Persective 5, Comparative Law – The Netherlands, Imperative Inheritance Law in a Late-Modern Society* eds. Castelein, C., Foqué, R. and Verbeke, A., Intersentia, 2009, p. 109

those situations, forced heir will more likely need a certain sum of money to meet his/her needs. If a forced heir inherits a certain part of inheritance as his/her forced share, he/she will first have to divide co-ownership with testamentary heir (or heirs), then that forced heir will have to sell his/her part of the inheritance in order to receive the money needed for the life expenses.<sup>67</sup> This can sometimes take a lot of time. It would be much simpler if a forced heir was a creditor (instead of an heir) and if he/she received his/her forced share as a certain sum of money, like it happens in legal systems that have forced share of law of contract nature.

4. Forced share of inheritance law nature can lead to fragmentation of things that were left to testamentary heirs in testator's will and/or to donees. This could be prevented if a forced share was a claim for a certain sum of money (law of contract nature of forced share). The law of contract nature of forced share was first introduced in Prussian inheritance law in Middle Ages specifically for this reason: in order to prevent fragmentation of agricultural land and to preserve economic power of the land and its owners, forced share was shaped as a money claim, because these goals could not have been achieved with forced share of inheritance law nature that was formed in Roman law and up until then was the only form of forced share.<sup>68</sup>

## VI. Conclusion

Analysis of comparative law shows that most European countries lean toward more open and flexible imperative inheritance law.<sup>69</sup> This can be achieved by making certain changes, such as narrowing a circle of the potential forced heirs, taking into account some circumstances that can influence forced heirs' rights to claim their forced share and its value, but also by changing the legal nature of forced share from inheritance law to law of contract nature.

Concerning Croatian law, in her PhD dissertation Dubravka Klasiček agreed with those who believe that the time has come for more flexible and open imperative inheritance law.<sup>70</sup> As it was stated above, one of the ways to achieve this, at least in part, is by making a switch from a forced share as a part of the inheritance into a forced share as a money claim.

Some of the advantages of the forced share as a money claim are: testator's wishes expressed in his/her testament or donations is much more respected, while forced heirs still receive their forced share of the inheritance; the whole process of obtaining forced share is simplified and accelerated; there is less stress and altercations between all parties involved due to the fact that testamentary heirs and/or the donees do not have to share with forced heirs what they inherited from the testator or were given by the testator, if a forced heir decides to claim his

---

<sup>67</sup> See also R. Welser, *Die Reform des österreichischen Erbrechts*, Verhandlungen des Siebzehnten Österreichischen Juristentages, Wien, 2009, p. 102

<sup>68</sup> See also Antić, op. cit. n. 44, p. 273 – 274

<sup>69</sup> See C. Castelein, R. Foqué, A. Verbeke, *Introduction and Objectives, Imperative Inheritance law in a Late-Modern Society*, eds., Intersentia, 2009

<sup>70</sup> D. Klasiček, *Nužno nasljedno pravo kao ograničenje slobode oporučnog raspolaganja* [Imperative Inheritance – Limitation of Freedom of Testation], Faculty of Law, Zagreb, 2011.

forced share; forced heir claims a certain sum of money as his/her forced share which can be an advantage for those forced heirs that need that money in order to support him/herself; the division of some valuable parts of the inheritance of donations can be avoided (which is especially important when it comes to, for example, agricultural land). It has to be noted that in some legal systems (for example in Hungary) where the forced share is a money claim, the general rule is that the forced share will be dispensed in money, but sometimes under certain conditions it will be given in kind. In the latter situation, the result can be that the testamentary heirs and/or the donees have to share with forced heirs what they inherited from the testator or were given by the testator, but this is the exception.

Therefore, it seems that there is no doubt that Croatian inheritance law should switch from a forced share as a part of the inheritance to a forced share as a money claim. That way Croatia would join other European countries that already made this switch and are extremely pleased with this change. Also, a relevant literature shows that most authors that come from countries that have forced share of inheritance law nature, advocate its transfer to law of contract nature due to the same problems that are stated above, which is a fact that should not be ignored.