

Review Article

**POSITION OF FORCED HEIRS IN THE COUNTRIES
OF ROMAN LEGAL TRADITION***

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Abstract. *This paper analyses the mandatory intestacy (forced heirship) in the countries of Roman legal tradition, in particular, the law of France, as a typical representative of the countries of the Roman legal circle, as well as the laws of Belgium, Spain and Italy, which also belong to this legal circle. The subject of the research was the way of determining the circle of potential forced heirs, but also of potential intestate heirs in the laws of this group of countries, because of the interconnectedness of these issues, as well as given the fact that the position of legislation of every particular country regarding their regulation, significantly reveals the hereditary position of relatives, spouses and concubinage partners as forced heirs. The analysis particularly covers the specific legal position of each individual heir, belonging to the aforementioned circle, which depends on the regulation of a number of issues, the most important of which are those related to the amount of the forced share and the types of inheritance/hereditary rights/powers obtainable by each forced heir based on the forced share. In its conclusion, the author is trying to point out the influence that the facts of kinship, marriage and concubinage, as legally relevant facts, presently have in formulating the rules of inheritance in the countries of Roman legal tradition. The author is also trying to observe the extent of similarities of the legislative approach and that of legal theory among the said countries regarding this problematic.*

Key words: *intestate heirs/successors, forced heirs, forced share, descendants, ancestors, collateral relatives, spouse, concubinage / cohabitation partner.*

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INTRODUCTORY REMARKS

Intestacy is of dispositive character in modern laws of European countries, as it applies only when there is no testament as grounds to claim inheritance, or in some countries in the inheritance agreement, regarding the whole or a part of the inheritance. However, these rights are based on the notion of limited freedom of disposal by the deceased. The common form through which this limitation is achieved is an institution of forced share (*pflichtteil*, *La Reserve*)¹, being a part of the testator's legacy that regardless of the will of the decedent, and even against his will, must be inherited by certain people that always enter the circle of intestate heirs – forced heirs.

The facts of kinship and marriage, and in this day and age often that of concubinage, present the most important facts which determine intestate classes and forced heirship classes in the modern laws of Europe. Nevertheless, there are differences as to the application of each of these facts and their relationship within these specific legal orders. Related differences appear as a necessary consequence of divided and contradictory ideas or legislations of societies regarding the issue of how inheritance consequences of decedent should be regulated in a legally organized community. The theory justly states that establishment of a reasonable compromise or harmonious relation between the fact of kinship, on the one hand and marriage, and today concubinage as well, on the other hand, is one of the most difficult problems of inheritance law (Antić, Balinovac, 1996, p. 145). For this reason, it is important to compare legal regulations within certain legal systems, which are related to the question of relationship of kinship, marriage and concubinage in formulating rules of forced heirship. Forced share as an instrument of realization of restrictions of the freedom of disposal of legacy is recognized in the legal systems of almost all European countries, and the subject of this specific study refers to the state of legislation regarding this issue in the countries of Roman legal tradition, namely, the law of France, as a typical representative of the countries of Roman legal circle, as well as the laws of Belgium, Spain and Italy, which also belong to the said legal circle.

The subject of our study was the way of determining potential forced heirs, but also potential intestate successors in the laws of this group of countries, with reference to the relationship of the legally relevant facts in establishing the rules of intestacy,² because of interconnectedness of these issues, and also given the fact that the position of legislation of every particular country regarding their regulation, significantly reveals the hereditary position of relatives, spouses and concubinage partners as forced heirs. The analysis particularly covers the specific legal position of each individual heir, belonging to the aforementioned circle, which depends on the regulation of a number of issues, the most important of which are those related to the amount of forced share and the types of inheri-

¹ About freedom of legacy and its limitations through the institution of forced shares see: Antić, 1983.

² The relationship between kinship and marriage or concubinage, as legally relevant facts in establishing the rules of intestacy may be described as rendering subsidiary, exclusive or coordinating. We refer to the subsidiary rendering relationship when a spouse inherits the entire estate or part of it, but only when there are no relatives of the decedent who could and want to inherit. The exclusive relationship exists when a spouse can inherit the entire legacy and thus exclude from inheriting certain relatives of the decedent, who would otherwise be intestate heirs and who in this case would be called to succession in the absence of a surviving decedent's spouse, while we refer to the coordinating relationship when a spouse inherits simultaneously with some relatives of the decedent, receiving with them a part of the legacy. In this sense, see: Blagojević, 1964, p.72.

tance/hereditary rights/powers obtainable by each forced heir based on their forced share. In its conclusion, the paper also presents the influence that the facts of kinship, marriage and concubinage, as legally relevant facts, presently have in formulating the rules of inheritance in the countries of Roman legal tradition, as well as the similarities and differences of the legislative approach and that of legal theory among the said countries regarding this problematic.

1. THE CIRCLE OF POTENTIAL INTESTATE SUCCESSORS

In the countries of Roman legal tradition, which are the subject of our analyses, that is under the French Civil Code³, Belgium Civil Code⁴, Italian Civil Code⁵, as well as the Civil Code of Spain⁶, kinship and marriage are legally relevant facts in establishing the legal rules of inheritance.

When it comes to kinship, as a legally relevant fact for invoking intestate succession, a common characteristic of the analysed laws lies in accepting the system of the degrees of kinship –closeness (Antić, 1994, p. 300 and 302), which is based on dividing the relatives into groups, depending on whether they are the descendants, ancestors or collateral relatives, each of these categories being a separate intestate class.

Similarly, in the law of Spain the system of three classes is recognised and the absolute advantage in inheriting is given to the lineal relatives, and unlike the rest of the observed laws, there is never the possibility of simultaneous claim for succession by ancestors and collateral relatives of the decedent, regardless of the collateral relatives are concerned.⁷ Applying this system without exceptions, the decedent that is survived by no descendant is inherited by their ancestors, and finally, if the decedent was not survived by a single descendant or ancestor, it is the the decedent's heirs of third class until and including the fourth degree of collateral kinship, that are called to inherit.

In the other observed laws (France, Belgium and Italy), there is the possibility of forming mixed succession classes. In fact, by accepting the underlying grouping of the descendants, ancestors and collateral relatives, these laws provide for a separate and distinct group of relatives - privileged ancestors and privileged collateral relatives. This group includes the decedent's parents from the group of ancestors, and the decedent's brothers and sisters and their descendants, from the group of collateral relatives. The relationship between certain groups of relatives as intestate heirs in the aforementioned laws is such that the decedent's parents as his privileged ancestors and brothers and sisters and their descendants as privileged collateral relatives of the decedent have the advantage of inheriting. There is also the possibility of parallel claims by these kinship groups, that is applying for their inheritance at the same time, and in some of these laws, such as the law of Italy, there is the possibility of

³ French Civil Code from 1804, see: <http://www.droit.org/codes/CCIVILL0.html> articleLEGIARTI00000 6431238.

⁴ In Belgian law the text of the original French Civil Code from 1804. applied at first, with a slight evolution of Belgium Civil Code in time and a departure to some extent away from the French Civil Code. For Text of the Code, see: <http://www.droitbelge.be/codes.asp#civ>.

⁵ The Italian Civil Code was enacted in 1942, see: http://www.jus.unitn.it/cardoza/Obiter_Dictum/codciv/Codciv.htm.

⁶ Spanish Civil Code was enacted in 1889, see: <http://civil.udg.es/normacivil/estatal/CC/indexcc.htm>.

⁷ Of the above analysed system of intestacy, with its roots in the ancient Roman law, see: Neumayer K. H., 1981. p. 15-19.

simultaneous claim for inheritance by decedent's siblings and the other decedent's ancestors. The relationship between the relatives of other categories, such as further ancestors and other collateral relatives (underprivileged ancestors and underprivileged collateral relatives), in exercising intestacy rights is, as a rule, such that the advantage is given to the fact of kinship in the straight ascending line = ascending lineal relatives over the fact of collateral kinship, and pursuant to the above, no other collateral relatives may claim inheritance as long as there is at least one ancestor of the decedent as his potential intestate successor. In the law of France and Italy, collateral relatives can not claim inheritance if they are relatives of the degree farther than the sixth degree of collateral line, and in the Belgian law, if they are farther from the fourth degree of collateral kinship.

As regards marriage as legally relevant fact when invoking intestate succession, in certain laws of this group of countries, such as Spain and Belgium laws, there is a possibility to inherit based on this fact not only when it comes to marriage between persons of different sexes, but when it comes to marriage between persons of the same sex. In fact, in Spain the amendments of the Civil Code of 2005, allowed marriage for persons of the same sex, with all the same rights and obligations, regardless of what is their composition and thus the effects of marriage are unique in all areas, including the field of intestacy rights, regardless of the sex of the spouses.⁸ In Belgium, the law, which came into force on January 30, 2003⁹ and which is incorporated into the Belgian Civil Code, legalises marriage between two persons of the same sex. In this way spouses of the same sex have gained the right to inherit each other in the same way as inheritance is realised by different-sex spouses in this country.

Concubinage is not grounds to claim inheritance in any of the observed laws, with exception of the law of Belgium. Namely, on January 01, 2000 the Act of Statutory Cohabitation of 1998¹⁰ entered into force allowing for the application of provisions regulating the marital home for couples of the same sex who had signed a written statement of cohabitation with the appropriate local authorities. This statement also implies the application of the obligations of sharing costs and debts related to mutual household and children, but does not provide for the possibility of mutual inheritance. However, the amendment that came into force on 18 May 2007 in the Belgian law and which have been incorporated in the Civil Code of Belgium, recognises the right of usufruct to the surviving partner of registered cohabitation over the immovable property which presented a mutual residence of the cohabitation partners as well as over the furniture this property is equipped with.

France too enacted the Law no. 99-994 in 1999, which regulates cohabitation of heterosexual and the same-sex partners, amending the Civil Code, in the first book, chapter XII of France (Art. 515-1 to 515-8) entitled *Du pacte civil de solidarité et du concubinage* - PACS (Civil Solidarity and concubinage Agreement). Concubinage is defined as the union of two persons of the same or opposite sexes who live together as a couple and whose community is characterized by stability and durability.¹¹ Although the effects of

⁸ Act of 13/2005 from July 1, 2005. Amending the Civil Code of Spain in the area of 1889. the right to marry, State Official Gazette no. 157, 11364, with an explanation.

⁹ See: the legal text at <http://www.psy-desir.com/leg/spip.php?article707>.

¹⁰ See: the legal text at http://www.juridat.be/cgi_loi/loi_a.pl?language=fr&caller=list&cn=1998112335&la=f&fromtab=loi&sql=dt='loi'&tri=dd+as+rank&rech=1&numero=1.

¹¹ See: art. 515-8 of the French Civil Code.

concubinage in this country are similar to those of marriage, unmarried heterosexual and the same-sex partners are not recognised the right of mutual intestate succession, except for the temporary housing, introduced by amendments to the Civil Code of France in 2006.

2. CIRCLE OF POTENTIAL FORCED HEIRS

From the perspective of eligibility to claim forced share in most of the countries of the studied group, such as the laws of Spain, Italy and Belgium, the circle of potential forced heirs is determined in a broad way, considering that all of them recognise the right to forced share of the descendants, ancestors and spouse of the decedent (and in Belgian law the right of concubinage partner of the decedent). This circle of compulsory heirs existed in the law of France until the amendments of 2006, when the circle was reduced, so that today it applies only to the descendants and the spouse of the decedent.

Therefore, from the aspect of potential eligibility to claim forced share, the fact of kinship in all the observed laws is equated with the fact marriage (and in Belgian law with the fact of concubinage), relating to a straight line, both descending and ascending, except in the law of France, where the fact of kinship is equated with the fact marriage, but only when it comes to the straight descending line. In all the observed laws, greater importance is attached to the fact of marriage than to the fact of collateral kinship whatever the degree, given that none of these laws includes collateral relatives in the circle of forced heirs, with the difference that the law of France, as already mentioned above, gives greater importance to the fact marriage than that of kinship in the straight ascending line in terms of inheritance.

3. SPECIFICITIES OF THE LEGAL POSITION OF FORCED HEIRS

In the countries of Roman legal tradition concrete legal effects of kinship and marriage relationships in terms of realising forced succession rights depend of the way the dispositive statutory rules of inheritance are formulated, but only in terms of those related to the order in which successors are called for inheritance, while in none of the observed laws these effects do not depend on norms of dispositive intestacy regarding the size of the forced share of the specific intestate successor. This is due to the fact that in any one of the laws, forced share is not determined by the percentage reduction provided by law of the potential intestacy share of the specific successor. In fact, in all of these laws a collective method for determining forced shares is adopted, which means that the size of a forced share is determined according to the whole intestacy and depends on the type and number of forced heirs.¹²

3.1. Position of descendants as forced heirs

In all the laws that are the subject of our analysis, the right to forced share can be realised by above all the heirs of the decedent who belong to the straight descending line. In France,

¹² Unlike the countries of Roman legal circle, in most other modern European laws a method of determining an individual's forced share is adopted, and it means, first of all, determining intestate shares of each forced heir as a base, which is then divided by a certain fraction which represents the percentage of reduction.

Belgium and Italy,¹³ the size of the collective - common forced share of children (that is, further descendants by right of representation), depends on the number of such offspring, and according to the above, the forced share of one child (or more offspring of that child, as the principle of representation is applied in terms of the general rules) is 1/2 of the inheritance, the common forced share of two children (in the law of France and Belgium), or two or more children (Italian law) 2/3 of inheritance, while the collective forced share of three or more children (laws of France and Belgium) is 3/4 of inheritance.¹⁴ According to the law of Spain¹⁵, children and further descendants of the decedent's whatever their number are entitled to a total of 2/3 of the inheritance, in terms of forced share. However, one of the two thirds of the inheritance must always be shared in equal parts between the decedent's children, while regarding the other third of inheritance, the testator is free to dispose in its entirety to the benefit of only one of his children, or any of their offspring (*mejora*),¹⁶ therefore the decedent has the right to freely decide on the proportion and how the third share will be divided. If a testator fails to do so, or if there is no *mejora*, then the mentioned third part of the inheritance will be divided in equal parts between the decedent's children, or their descendants, according to the principle of representation.¹⁷

3.2. Position of a spouse (concubinage partner) as a forced heir in competition with descendants as forced heirs

Analysis of the legal position of a spouse (and in Belgian law of concubinage partner) in competition with the descendants of the decedent, in terms of obtaining forced hereditary rights, indicates that their position in most of the observed laws, such as the laws of France, Belgium and Spain, it is not equated with the position of offspring as forced heirs, as well as that in the filed of mandatory intestacy, as is the case with dispositive intestacy, the fact of kinship in straight descending line is usually given more importance compared to the fact of marriage.¹⁸

¹³ For a particular method of distribution of legacy among the descendants as intestate heirs in the said law see: art. 734-735. and art. 752 of the French Civil Code, art. 745 and art. 740 (1) of the Belgian Civil Code, art. 566 (1). and art. 468-469 of the Italian Civil Code.

¹⁴ See: art. 913 of the French Civil Code, art. 913 of the Belgian Civil Code and art. 537 (1) and (2) of the Italian Civil Code.

¹⁵ For a particular method of distribution of the legacy among the descendants intestate heirs in the law of Spain see: art. 930-934., and art. 925 of the Civil Code of Spain.

¹⁶ The legacy left to children or descendants of the testator shall not be considered as *mejora*, unless the testator has expressly stated that it was his will. *Mejora* can be left over some thing, but if the value of this thing exceeds 1/3 designated as *mejora*, as well as a forced share belonging to a forced heir, then he must pay the difference in value to the other heirs. See: art. 828-829 of the Civil Code of Spain.

¹⁷ See: art. 808 and 823 of the Civil Code of Spain.

¹⁸ Hence, when it comes to the rules of dispositive intestacy, in the law of Belgian hereditary powers of a spouse in competition with offspring are reflected in his right of usufruct on the entire legacy inherited by offspring. (article 745 bis § 1 (1) of the Belgian Civil Code). From 2007 concubinage partners also have the right of usufruct, but not on the whole legacy, but only over the real estate which presented their shared residence during mutual life, and over the furniture, which this property is equipped with (art. 745 octies § 1 of the Civil Code of Belgium). Of succession rights of spouses and relatives in law of Belgium, see: De Wulf Ch., 2001, p. 187-190. In Spanish law, as is the case in Belgian law, a spouse in the case there are offspring, also has the right of use for life, however not on the whole legacy, but over 1/3 of the legacy (art. 834 of the Civil Code of Spain). In French law, only in the case of children who are descendants of both spouses, assuming familiarity that in this case exists between the surviving spouse and the children and that they will succeed the surviving spouse as

Thus, in the law of France a spouse is entitled to 1/4 of inheritance on the grounds of forced share only in the absence of descendants of the decedent, therefore the decedent's disposal of property through inter vivos acts and testament is limited to 3/4 of the legacy.¹⁹ In the case if forced heirs are the offspring of both decedent and the surviving spouse, the spouse that had chose claim their right of usufruct can exercise this right over the forced share of such offspring, so in this case the usufruct of the spouses must coexist with the provisions of regular disposable part.²⁰ On the other hand, we must not neglect the fact that the available part of the inheritance, which is 1/2 in the case there is one child, 1/3 in the case there are two children, and 1/4 in the case of three or more children, the testator can bequest to the spouse (regular elective share). In order to protect the surviving child to whom the decedent's spouse is not the other parent, this child has the possibility to request that this disposal be replaced by the right of usufruct in favour of the spouse, over the part of the legacy that this child would acquire in the absence of the spouse.²¹ In addition, the legal position of spouses is determined by the rule according to which the decedent survived by descendants may bequest 1/4 of legacy to the spouse as property and 3/4 of the legacy as usufruct, or can decide to leave them the usufruct on the estate of (separate available share).²² If the decedent left the spouse by testament the right

in the end, the law allows some freedom to the spouses and they have the right to choose whether to benefit the usufruct of the whole estate or to inherit a quarter of the legacy, which means that in the first case, the entire hereditary property of the decedent belongs to descendants, while in the second case, 3/4 of the legacy is shared among descendants. In the case when there is one child or more children who do not have both spouses as parents, the surviving spouse is not entitled to this choice, and the same can inherit only a quarter of the property and remaining 3/4 are inherited by the descendants of the decedent (art. 757 of the Civil Code France).

¹⁹ See: art. 914-1 of the French Civil Code.

²⁰ Thus, when the decedent is survived by their spouse and three children, who come from the spouse and decedent, where the decedent made a testament to the benefit of a third party, and the surviving spouse has chosen usufruct of the whole inheritance – forced shares of the children will make 3/4 of the existing legacy, worth 600 000 euros, which is 450 000 euros, while the elective share of the legacy is 150 000 euros. Usufruct of the spouse will apply to the existing property, exempt from the elective share of the legacy (600 000-150 000 = 450 000 euros). The sum of 450 000 euros, as bare property rights will go to the extent of their forced shares to children (each of 150 000 euros). Example taken from: Fo rgeard, Crone, Gelot, 2002, p. 28-29.

²¹ See: art. 1098 of Civil Code of France. Thus, if the decedent is survived by two children from a previous marriage and the spouse to whom the decedent bequeathed the elective share, therefore from 1/3 (2/6) legacy, the children will receive as their forced shares a total of 2/3 of the legacy (each of them 1/3 of the legacy). If one of the two children is to invoke the above-mentioned possibility, the spouse will be deprived of the right of ownership to 1/6 of the legacy, and will be entitled to the usufruct over 3/6 of the legacy (over the part that would go belong to a child if there were no spouse), over which this child will receive the right of bare property. The other child, who did not have this choice will receive 1/3 of the legacy of the property in the name of forced share, while the spouse receives the remaining 1/6 of the inheritance as property. An example taken from Maury, 2007, p. 207.

²² See: art. 1094-1. Civil Code of France. In theory, it is pointed out in several places that while legal-intestacy right of spouses to inherit when they are the other descendants of the decedent includes only his limited ability to decide between a quarter of the legacy in ownership or usufruct of the totality of the legacy and in the case when all the children are both spouses' offspring (art. 757, French Civil Code). Here the spouse who has received a gift is sure to receive a share that is at worst equal to their intestate share in the legacy, and sometimes even larger than this. Thus, in case of benevolent disposals by decedent to the benefit of the spouse in one of the above methods, the share of the spouse will be at least equal to what they would receive as an intestate heir (this is when he left the whole legacy of the usufruct or available when the full amount of 1/4 legacy, which is possible in the case of three or more children), and will often be greater than the parts, which he received as the legal heir (this is when they were bequeathed 1/4 legacy as the property and 3/4 of the legacy as usufruct or where a regular elective share is 1/2 or 1/3 of the legacy, which is possible when the decedent is survived by

to choose between these possibilities, then the spouse can completely customise the earnings from inheritance in accordance with his family and property-financial situation (for example, they could claim the usufruct over the whole estate when they are not the decedent's surviving children's parent).²³

In Belgian law, a surviving spouse in competition with descendants is entitled to forced share, except that the spouse may exercise this right only in the form of usufruct over ½ of legacy (abstract or quantitative forced share). In any case, a spouse as a forced heir is entitled to usufruct of real estate which are at the time of opening of the inheritance used as a family house, as well as the right of usufruct over the property with which the house is furnished (specific or qualitative forced share). Both of these rights are the minimum of legal inheritance right of a spouse as forced heir. Namely, a spouse will be entitled to the specific-concrete forced share, that is, the right to a forced share in the mentioned priority property, if this property amounts to 50% of whole legacy of the testator. However, if the priority property is estimated at less than 50% of the inheritance, the spouse will, in order to exercise his abstract right to forced share receive in addition the right of usufruct over the rest of the property.²⁴ If the right of usufruct was taken from the surviving spouse they may still be entitled to financial support from the legacy, if at the time of death of the decedent they were in a state of need (emergency).²⁵ According to the law of this country, the surviving concubinage partner in competition with the descendants of the deceased as forced heirs has on the grounds of his forced share the right of usufruct over the real estate which during their cohabitation presented common residence, as well as over the furniture of that property.²⁶

However, the relationship of kinship and marriage ties in this right may be quite different in the case of benevolent disposal by the decedent for the benefit of the spouse. Thus, in this way, the testator can greatly improve the legal position of their spouse, which will also alter the legal position of their offspring. The decedent may, by gift or bequest leave all of the available property to the spouse as their property. In this case, the benevolent disposals will not deprive the spouse of their right of usufruct in the remaining

one or two children). In this regard, see: Forgeard, Crone, Gelot, 2002, p. 57; Maury, 2007, p. 207 The differences in the hereditary position of the surviving spouse in the case of intestacy and Dys on, 2003, p. 274-282.

²³ About hereditary position of a surviving spouse in competition with descendants as forced heirs see: Schoenblum, 2007, p. 12-4 - 12-6.

²⁴ See: art. 915. *bis* § 1-§ 2 of the Belgian Civil Code.

²⁵ See: art. 205 *bis* § 1 of the Belgian Civil Code. In accordance with art. 915 *bis* § 3 of the Belgian Civil Code, testator may deprive spouse of an abstract forced share by bequest, that is, of their right of usufruct over one half of the inheritance, provided that at the day of the decedent's death the spouse and the decedent have lived separately for more than six months, and if before the decedent's death there was a court decision of separation, and finally, if after this decision the spouse did not begin living together again. If these requirements are met, the judge has no discretionary power and spouse is automatically deprived of inheriting. If these conditions are not met, the surviving spouse will receive the abstract forced share, but the specific forced share may still be lost in the event of actual separation. According to art. 915 *bis* § 2 (2) of the Second Belgian Civil Code, a spouse, as a rule, may exercise the right of usufruct of the house in which the spouses lived together, and over the things (furniture) which it is equipped with, but only on a condition that they did not leave the marital home, and, if they did leave, provided they prove that they did not leave voluntarily. In this case, the court has the discretion to decide whether it is fair to allow a spouse the right of usufruct over the preferential property (specific forced share).

²⁶ See: art. 745. *octies* § 1 of the Belgian Civil Code.

legacy.²⁷ This finally means that if the testator has a child, their spouse may be granted half of the inheritance as property, and the right of usufruct over $\frac{1}{2}$ of the legacy that belongs to the child as their forced share, if the testator has two children, the spouse may be granted $\frac{1}{3}$ of the legacy as their property and the right of usufruct over $\frac{2}{3}$ of the legacy which belong to the children as their forced share. Finally, if the decedent had three or more children, the spouse may be granted $\frac{1}{4}$ of the inheritance as their property, and the right of usufruct over $\frac{3}{4}$ of the legacy which belong to the children as their forced share. In order to protect the decedent's children who are not the children of both the surviving spouse or concubinage partner and the decedent, there is a rule that these children have the right to adequate support from the spouse or concubinage partner of the decedent, within the limits of the legacy that the spouse acquired from the testator (and a concubinage partner within the limits of what he acquired based on the right of usufruct of the real estate, which during their cohabitation served as their joint residence as well as the furnishings of this property) and the limits designated by the benefits of the decedent's spouse or concubinage partner made through the gifts or bequeathed in their favour, and which is necessary for upbringing and education of these children.²⁸

In Spanish law, usufruct which was established in favour of spouse in the case of surviving descendants (or ancestors) as intestate heirs, comprises their forced share as well.²⁹ Therefore, if there are descendants of the decedent's, the spouse receives a lifetime usufruct based on their forced share, with the exception that this right can not be acquired over the whole collective forced share of offspring that is $\frac{2}{3}$ of the legacy, but only over $\frac{1}{3}$ of the legacy that makes this collective forced share, and that the decedent disposed in favour of any one or more of their offspring according to his own free will.³⁰ Therefore, these descendants who received this part of the legacy as their forced share can not dispose of the same until the death of the surviving spouse.³¹ There is an exception to this situation when at the request of the descendant whose share is burdened with the right of usufruct, and with the consent of the spouse, or in the case of absence of such a consent by a court decision, the burden of the estate by usufruct may be terminated by payment to the spouse or by establishing the annual sum to the benefit of the spouse.³² In any case, in a situation where offspring or both offspring and spouse compete as forced successors, the elective part of legacy is $\frac{1}{3}$ and the testator can freely distribute it.³³

In contrast to all the above-mentioned legislations, where the legal position of spouse as forced heir is usually less advantageous than that of descendants as forced heirs, this is not the case in Italian law where in the field of imperative intestacy, as well as with dispositive intestacy, the fact of straight lineal kinship is not given greater importance than the fact of marriage.³⁴ According to the succession laws of this country, the part of the legacy

²⁷ See: art. 1094 (1) of the Belgian Civil Code.

²⁸ See: art. 203. § 2., as well as art. 1477. § 5 of the Belgian Civil Code.

²⁹ See: Loeb, 2004, p. 169-170.

³⁰ See: art. 834. of the Spanish Civil Code.

³¹ Of the mentioned spouse's right see: Davey, 2004, pp. 150-151.

³² See: art. 839 (1) of the Spanish Civil Code.

³³ See: art. 808 (4) of the Spanish Civil Code.

³⁴ Specifically, in Italian law, spouse, regardless of who they are competing with in inheritance, still inherits as property the corresponding part of the legacy. Since the quantity of their legal rights depends on the number of first degree descendants who compete with them for inheritance, their legal position in the first inheritance

that belongs to the spouse as their necessary share, corresponds to the part of the legacy that based on the forced share belongs to one descendant of the first degree (or his descendants, according to the principle of representation) whenever there are no more than two offspring of the first degree that appear as forced heirs. This follows from the principle according to which, in the case when there is a surviving spouse, both the forced share of one first degree descendant and the forced share of the spouse amount to 1/3 of a legacy, and the rules according to which, in the case of a greater number of such offspring, spouse's forced share amounts to 1/4 of the legacy, while the collective forced share of offspring, regardless of their number, amounts to 1/2 of the inheritance. Thus, in the case of two surviving first degree offspring, 1/4 of the legacy belongs to each of them as forced share, therefore, the same amount of legacy that a spouse will receive as their forced share, while in the case of a larger number of first degree offspring, the forced share of the spouse is always larger than that of one first degree offspring.³⁵ In addition, the spouse always receives (regardless of who he competes with regarding the forced share) the right to reside in the family home, and the right to use the furniture which the house is furnished with as well, if the latter represented a part of the property of the decedent or both spouses.³⁶

3.3. Position of ancestors as forced heirs

Where there are no descendants, the right to forced share may be obtained by heirs of the straight ascending line of kinship with the decedent, whose collective forced share in the laws of Belgium and Spain is 1/2 is, and in Italian law 1/3 of the legacy.³⁷

The laws of Spain and Italy³⁸, first decedent's parents will be summoned to receive inheritance as forced heirs, between whom the legacy is divided into equal parts or the whole estate is transferred to the single surviving parent. If neither parent has survived the decedent, their collective forced share is divided according to the rules determining dispositive intestacy in the mentioned laws.³⁹ In the law of Belgium⁴⁰, a collective forced

class is most favourable when they competes with only one child of the decedent. In this case, their intestate share is 1/2 of the legacy. The legal position of spouses is less favourable when they compete with two or more of the decedent's children, when they shall be entitled to 1/3 of the legacy, and in the descendants to a total of 2/3 of the legacy, which is shared between them in the equal parts (art 581 of the Civil Code of Italy). Succession rights of spouses and offspring in Italian law see: Salerno Cardillo, 2004, p. 159-160.

³⁵ See: art. 542 of the Italian Civil Code.

³⁶ See: art. 540 (2). Italian Civil Code. The aforementioned rights of spouses as forced heirs, shall not apply to the spouse who is to blame for divorce by legally binding court ruling, who can receive as forced share the right to annuity, if at the time of opening the inheritance were supported by the deceased spouse. This amount is determined in accordance with the value of the inheritance, and the status and number of forced heirs, but it can never exceed the amount of support that the spouse previously enjoyed. The same provision applies in the case of a divorce attributed to the guilt of both spouses. See: art. 548 (2) Italian Civil Code.

³⁷ See: art. 915 (1) of the Belgian Civil Code, art. 809 of the Civil Code of Spain, as well as art. 538 (1) of the Italian Civil Code.

³⁸ On this particular method of distribution between the legacy of ancestors and other relatives as well as the intestate successor in the laws of these countries see: art. 811-812., art. 921 (1), art. 925 (2), art. 927, art. 935 – 941, art. 943, art. 946-951. and art. 954-955. Civil Code of Spain, as well as art. 468(1), art. 568 - 569(1-2), art. 570(2), art. 571(1), art. 571(3) in conjunction with art. 569-570. and art. 572 Italian Civil Code.

³⁹ See: art. 810 of the Civil Code of Spain, as well as art. 538 (2) in conjunction with art. 568-569. of the Italian Civil Code.

⁴⁰ On this particular method of distribution between the legacy of ancestors and other relatives as legal heirs in the law of this country see: art. 733(1), art. 742, art. 746-748, art. 750 (1), and art. 751-755 of the Belgian Civil Code.

share of ancestors, which typically amounts to half the inheritance, is split in a manner whereby each lineage (paternal and maternal) is entitled to 1/4 of the legacy, with an independent right to forced share by each lineage, in which case the ancestors realise this reserved right to forced share in the order in which they are called to receive inheritance by law. In cases when decedent is survived by ancestors from one line only, the elective share is 3/4 of the inheritance.⁴¹

3.4. Position of a spouse (cohabitation partner) as a forced heir in competition with ancestors as forced heirs

The main feature of marriage and the fact of kinship in the straight ascending line in the field of forced inheritance in some of the laws of the observed group of countries, such as the law of Italy, lies in the greater legal importance that is given to the first mentioned fact, i.e. in a more favourable hereditary position of the spouse to that of ancestors. Similarly, in Italian law, this is the case when it comes to dispositive intestacy.⁴² A better legal position of spouse as forced heir, in relation to ancestors as forced heirs, is evident from the fact that 1/2 of the legacy goes to the spouse as forced share (as much as they will receive in the absence of ancestors, and when they appear alone as appear as the forced heir). On the other hand, the collective forced share of ancestors is 1/4 of the legacy, which means that the part of the legacy that belongs to spouse as their necessary share is twice as large as the legacy obtained by decedent's ancestors as forced share. At the same time, we should not neglect spouse's right to live in the family house as well as the right to use furniture that the house is equipped with, if the same property was in the decedent property or was a joint ownership of spouses.⁴³

In French law, one can not speak of the existence of competition among ancestors⁴⁴ and spouses in claiming forced hereditary rights, given that this law as of 2006 no longer includes ancestors in the circle of forced heirs,⁴⁵ except that some of the ancestors, as for instance the

⁴¹ See: art. 915 (1) of the Civil Code of Belgium.

⁴² The relationship between the fact of kinship and marriage is coordinating in the Italian law, whenever it is related to kinship in the straight ascending line, and when it is related to the lateral line, this ratio can be both coordinating and excluding, depending on the collateral relatives in question. Thus, the relationship between the facts of kinship and marriage is coordinating only when brothers and sisters and their descendants compete for inheritance, and on the other hand this relationship is excluding if any other collateral relatives who enter the circle of potential intestate heirs in the law of this country appear as intestate heirs, which practically means that the relationship between these facts is exclusive if the other collateral relatives of the decedent until the sixth degree appear as intestate heirs. Although the circle of relatives that a spouse can exclude from inheritance is relatively narrow in the law of this country, the scope of the legal powers of a spouse speaks for their favorable position in comparison to positions of the competing relatives, bearing in mind that the inheritance of a spouse is always 2/3 of the legacy, whether it is only ancestors (more precisely, those of them who are in this case claiming inheritance), or only the mentioned collateral relatives who compete with the spouse or if both ancestors and collateral relatives compete simultaneously with them. See: art. 582-583 of the Italian Civil Code.

⁴³ See: art. 544 (1), art. 540 (1), art. 548(2) of the Italian Civil Code. The hereditary position of spouses as forced heirs, see: Salerno Cardillo, 2004, p. 361

⁴⁴ On this particular method of distribution of the legacy between ancestors and other relatives as intestate heirs in the law of this country see: art. 736 - 737th, art. 738 (1-2), art. 738-1 in conjunction with art. 747-748, art. 739-740, art. 745, art. 747-750, and art. 752-2 of the Civil Code of France.

⁴⁵ Note that prior to the amendments of 2006, the surviving spouse was entitled to forced share only if the decedent did not leave behind any descendants or ancestors. See: art. 914-1 of the French Civil Code (Text of the Code prior to the reforms of 2006.).

parents of the decedent, under certain circumstances and within a certain legal framework, are entitled to a refund of the goods that they themselves gave to the decedent. This restriction is of legal character and presents a restriction of disposal of legacy.⁴⁶ By omitting to designate ancestors as forced heirs in this law, the legal position of spouses as forced heirs significantly improved, which is one of the main characteristics of his legal position as an intestate heir in case when there are also ancestors and collateral relatives as intestate heirs.⁴⁷

In the other observed laws the hereditary position of the surviving spouse as forced heir in competition with the ancestors as forced heirs, is less favourable.

This is the case in the Belgian law, in which there is the principle of attributing greater legal importance to kinship in the ascending straight line than to marriage, that is cohabitation in dispositive intestacy,⁴⁸ in imperative intestacy. In fact, while ancestors receive ownership over 1/2 of the legacy as forced share, the spouse as forced heir has the right of usufruct over immovable property which at the time of opening of the inheritance serves as a family house and over the furnishings of that house, except when these priority assets are estimated at less than 50% of the legacy, in which case they receive the usufruct over this property as well as the usufruct over the rest of the property. Concubinage partner of the decedent, in the law of this country, when competing with the ancestors, as forced heirs, receives as their forced share the right of usufruct over the real estate, which was a mutual residence during the mutual life of spouses, and over the furniture, which the property is equipped with.⁴⁹ It is important to note that the relationship between the fact of kinship in a

⁴⁶ In this regard see: Maury, 2007, p. 70

⁴⁷ In French law, the decedent's spouse has a much more favorable position to that of ancestors and collateral relatives of the deceased, bearing in mind that the relationship between the fact of kinship in the straight ascending or collateral line and the fact the marriage is coordinating in the law of this country, only in the first degree of the straight ascending line, while this relationship is exclusive when it is related to any further degrees of the straight ascending line or to any degree of collateral relatives. In addition, a particularly favorable position of the spouses, is evident from the size of their intestate shares, which in competition with parents is 1/2 of the legacy, and can go up to 3/4 of the legacy, based on the rules under which the share of the deceased parent is not added to that of the surviving parent, but goes to a spouse. See: art. 757-1. and art. 757-2 of the Civil Code of France.

⁴⁸ In Belgian law, taking into account the entirety of inheritance regulations, spouse's hereditary position is not more favorable than the position of ancestors, that is collateral relatives of the decedent, or at least is not always. Namely, if according to the law of the country a regime of separation of property of the spouses applied, the surviving spouse in a case like this, in competition with any of the ancestors, as well as any collateral relatives, who enter the circle of potential intestate heirs, inherits only the right to lifelong usufruct over the whole estate. This means that in the case of this regime, the relationship between the right of kinship in the straight ascending side line and the fact the marriage is subsidiary rendering, given the fact that the decedent's spouse could inherit the entire legacy of the property only when the decedent was not survived by any of his relatives entering the circle of potential intestate heirs. Legal position of a spouse, generally observing is better if common property applied as the legal property regime, in which case the relationship between the facts of kinship in the straight ascending or collateral line and the fact the marriage is coordinating, given the fact that the relatives of the decedent in this case inherit the separate property of the testator, and the testator's spouse inherits the decedent's share in the joint property, together with their usufruct on the separate property of the decedent. See: art. 745th bis § 1 (2-3) and art. 745th quater § 2 (1) of the Belgian Civil Code. On the other hand, concubinage partners of the decedent's in the law of this can not inherit any part of the legacy as property, neither in competition with relatives of the straight ascending or collateral line, nor in competition with relatives the straight descending line, but just the lifelong right of usufruct, however not over the whole legacy, but only over the real estate which was the shared residence during their common life and over the furniture, which this property is equipped with. See: art. 745 octies § 1 of the Belgian Civil Code.

⁴⁹ See: art. 745 octies § 1 of the Belgian Civil Code.

straight ascending line and marriage is entirely different when the spouse appears as a testate successor and ancestors consequently as potential forced heirs. In this case there is no possibility for ancestors to claim the right to forced share. Neither will this possibility exist for ancestors when the decedent left behind a testament in favour of their concubinage partner, considering that the amendments of 2007, expanded the application of this provision to distribution by testament in favour of the partner.⁵⁰ In order to protect the ancestors, in this case, there is a rule that they have the right to seek financial support from the legacy if they need it (if they are in a state of necessity) at the time of the decedent's death, the amount of support not exceeding the amount of the share they were deprived of as a result of decedent's benevolent disposals for the benefit of the spouse or concubinage partner.⁵¹

Surviving spouse as forced heir in competition with ancestors as forced heirs, from the aspect of the quality and scope of their inheritance legal powers, has a similar position in the law of Spain. In this case, the ancestors as forced heirs are entitled to 1/3 of the legacy, therefore, a smaller part of the legacy than when claiming inheritance alone, while the spouse as forced heir is entitled to a lifelong usufruct over 1/2 of the legacy when they are in competition with these relatives in case of dispositive intestacy.⁵² Spouses forced share is the largest when in the absence of ancestors as potential forced heirs, in which case the spouse is entitled to a lifelong usufruct over 2/3 of the legacy.⁵³ At the request of the heir whose share is burdened with usufruct, and with the consent of the spouse at the same time or in the absence of such agreement, by court decision, it may end usufruct, through the payment of a sum of money or the establishment of an annuity to spouse's benefit.⁵⁴

CONCLUDING REMARKS

Legal regulations of forced inheritance in the countries of Roman legal tradition, allowed us to observe the circle of the relevant legal facts in establishing the rules of this kind of intestacy, the legal effect on inheritance of each of them individually, as well as the differences, but also common solutions and general legal principles, which this group of laws is governed by when regulating the above mentioned issues.

Given that kinship and marriage are basic facts which intestate classes are based on in the countries of Roman legal circle, they also present the key facts which forced inheritance classes are based on. In terms of the scope of kinship, that is the scope of relatives as potential forced heirs, the generally accepted characteristic of the observed European legislations is that the right to the forced share is recognised to all relatives in the straight descending line, and that it is not recognised to any collateral relatives. On the other hand,

⁵⁰ See: art. 915 (2) of the Belgian Civil Code.

⁵¹ See: art. 205 bis § 2 and art. 1477 § 6 of the Belgian Civil Code.

⁵² Observing on the whole, the legal norms of dispositive intestacy in Spain render the legal position of the surviving spouse in competition with the relatives of the decedent, unfavorable. Although in the law of this country, the relationship of kinship and marriage exclusive, when any collateral relatives of the deceased appear as legal heirs, the significance of this fact is largely reduced by the fact that they can not exclude any ancestor of the decedent from inheritance, in competition with whom which a spouse may be granted the exclusive right to lifelong usufruct to 1/2 of the inheritance on behalf of his inheritance rights powers. See: art. 837 and art. 944 of the Civil Code of Spain.

⁵³ See: art. 809 and art. 837-838. Civil Code of Spain.

⁵⁴ See: art. 839 (1) of the Civil Code of Spain.

although there are differences among the observed laws in terms of determining a circle of relatives in the straight ascending line as forced heirs, certain tendencies can be observed. Therefore, only the French adopted a solution according to which none of the ancestors are included in the circle of the decedent's potential forced heirs, while in all other observed jurisdictions (Belgium, Italy and Spain) the opposite solution is accepted according to which all the decedent's ancestors are included in this circle. In certain laws that were a subject of our research, as that of Spain and Belgium, intestacy, and even forced inheritance, based on the fact of marriage, is possible not only when it comes to marriage between persons of different sexes, as is the case in other analysed law, but also when it comes to marriage between persons of the same sex. Concubinage in any of the observed law is not a basis to claim intestacy and therefore forced succession, which is not the case only in the law of Belgium.

In view of the above, it can be concluded that from the aspect of potential eligibility to claim forced share, in all the laws the fact of kinship in the straight descending line is equated with the fact of marriage. Consequently, in most of these laws, the fact of kinship in straight ascending line is also equated with the fact of marriage, regardless of the degree of kinship, which is the case in the law of Belgium, Italy and Spain, while only in the law of France, the fact of marriage is given greater importance than that of kinship of any degree in a straight ascending line. In all the countries of Roman legal tradition, observing from the aspect of potential eligibility for a forced share, the fact of marriage is given greater importance regarding inheritance to the fact of collateral kinship whatever degree. Finally, in the law of Belgium, where concubinage too presents a legally relevant fact when establishing the rules regarding forced share, the legal significance of this fact, viewed in terms of potential eligibility for forced share, is the same to that given to the fact marriage.

When it comes to specific rules of intestacy, although in the countries of Roman legal tradition, the inheritance relationship of kinship, on the one hand and the fact of marriage, on the other hand, depends solely of those norms of dispositive intestate succession which are related to the order in which a specific intestate and thus forced heir is called to inherit, therefore, not on the legal norms of dispositive intestacy related to the size of a specific share of the forced heir (as a result of accepting a collective method for determining forced shares), on the basis of an overall analysis of the position of each forced heir. However, it can be concluded that in all of these countries, the facts of kinship and marriage (and in the law of Belgium the fact of concubinage), as legally relevant facts when formulating the rules of intestacy, as a rule, are given the same legal importance as when formulating rules of dispositive intestacy.

The Analysis of succession regulations of the countries that were the subject of our research has shown that qualitative equalizing of the impact of facts of marriage and kinship in the straight descending line in the field of forced succession is present only in Italian law, and that in the law of this country, taking into account the extent of the powers of a forced heir, the specific legal position of spouse as forced heir may be even more favourable than the descendant's as forced heir, which basically corresponds to the main characteristics of the legal position of the mentioned heirs in this law and even when they occur as intestate successors. In most of the other analysed laws, such as the laws of France, Spain and Belgium, the legal position of spouses (and in the last mentioned law that of concubinage partner) as forced heirs, is usually less favourable than the legal position of descendants as forced heirs, which is in the law these countries, as in the case when the

rules of dispositive intestacy apply, more prominent when observed from the perspective of the quality of the succession powers of the mentioned forced heirs, bearing in mind the fact that in these laws, their spouse (and in Belgium law the concubinage partner) as forced heir, and unlike the descendant as forced heir, has the right to a lifelong usufruct, as a rule being the only aspect of their succession powers.

Finally, the above analysis shows that in the countries of Roman legal tradition, the attitudes of legislatures regarding the specific legal impact of the facts of marriage (and in Belgian law, concubinage) and kinship in the straight ascending line (collateral relatives in any of the laws do not enter the circle of forced heirs, while in the law of France not even ancestors are included in this circle) on succession, as legally relevant facts when establishing the rules of inheritance are also divided. Hence, in some of the countries, as Italy for instance, the legal position of a spouse as forced heir is more favourable to that of ancestors as forced heirs, which in the law of this country also applies when it comes to dispositive intestacy. The above position of forced heirs in the said law stems from the equalised impact of the facts of marriage and kinship in the straight ascending line in creating the rules of forced inheritance, as well as from the scope of legal powers of spouses and ancestors as forced heirs. In the other laws, such as the laws of Spain and Belgium, hereditary position of spouse (and in the last mentioned law that of concubinage partner) as forced heir is less favourable to the position of ancestors as forced heirs, which in the law of this country also applies in the case of dispositive intestacy. This position of forced heirs stems from the quality of their legal powers in inheritance, given the fact that in the aforementioned laws, spouse (in Belgian law a concubinage partner as well) as forced heir, and unlike ancestors as forced heirs, may receive on behalf of their inheritance right only the right to a lifelong use.

In conclusion, it can be noted that despite the apparent diversity of legislative solutions, which is present regarding the concrete way of dealing with the relationship of kinship, marriage and concubinage in formulating the rules of forced inheritance, and which despite the same legal tradition and culture inevitably occurs as a result of the impact of specific historical, social, economic, cultural, moral, and political factors, the analysed laws still reveal a certain trends in the legal theoretical and legislative understanding of this issue. These are reflected in the fact that the legal position of the spouses and concubinage partners (in some of these laws) as forced successors, is less favourable in a situation where there are decedent's descendants as potential coheirs than in the case of decedent's relatives in the direct ascending line as coheirs. In addition, as we have seen, in some of the studied laws, the latter may not even appear as coheirs with a spouse in the field of forced inheritance. Such a general feature of the legal position of the mentioned persons as forced heirs, is also the essential feature of their legal position when they appear as intestacy successors, and it occurs as a direct consequence of the fact that forced inheritance is in fact a form of intestacy.

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POLOŽAJ NUŽNIH NASLEDNIKA U ZEMLJAMA ROMANSKE PRAVNE TRADICIJE

Jelena Vidić Trninić

U radu se analizira imperativno zakonsko (nužno) nasleđivanje u zemljama romanske pravne tradicije, konkretno, u pravu Francuske, kao karakterističnom predstavniku romanskog pravnog kruga zemalja, kao i u pravima Belgije, Španije i Italije, koja takođe pripadaju navedenom pravnom krugu. Predmet istraživanja usmeren je na način određivanja kruga potencijalnih nužnih naslednika, ali i potencijalnih zakonskih naslednika u pravima ove grupe zemalja, zbog međusobne povezanosti ovih pitanja, te imajući u vidu činjenicu da stav, koji je u svakom konkretnom pravu zauzet u pogledu načina njihovog regulisanja, u značajnoj meri govori o naslednopravnom položaju srodnika, supružnika i vanbračnog partnera kao nužnih naslednika. Analizom je posebno obuhvaćen konkretan naslednopravni položaj svakog pojedinog naslednika, koji ulazi u prethodno spomenuti krug, a koji zavisi od načina regulisanja određenog broja pitanja, od kojih se kao najvažnija, postavljaju pitanja veličine nužnog dela, kao i vrste naslednopravnih ovlašćenja koja na ime nužnog dela može pripasti svakom konkretnom nužnom nasledniku. U zaključku rada nastoji se ukazati na naslednopravni uticaj koji u današnje vreme u zemljama romanske pravne tradicije imaju činjenice srodstva, braka i vanbračne zajednice, kao pravno relevantne činjenice u formulisanju pravila nužnog nasleđivanja, te u kojoj meri je zakonski, ali i pravnoteorijski pristup sagledavanja ove problematike u njima sličan, a u kojoj meri se razlikuje.

Ključne reči: *zakonski naslednici, nužni naslednici, nužni deo, potomci, preci, pobočni srodnici, supružnik, vanbračni partner.*