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LIMITATIONS ON TESTAMENTARY FREEDOM

Summary: *In this paper the authors not only provide an overview of historical development, but they also analyse the positive legal solutions of the local legislator that pertain to the will and limiting the testamentary freedom. They place an emphasis on the significance and role of restricting the testamentary freedom in inheritance law, stressing at the same time its importance in the very regulation of family relations. The authors explain the institution of non-disposable portion (Portio Legitima), which restricts the freedom of disposing of property causa mortis in the legislation of Bosnia and Herzegovina, a country of the European-Continental legal tradition. By way of comparing these solutions with those of legislators of the Anglo-American legal tradition, the authors point out that the absolute testamentary freedom as such does not exist in any legal system. By showing the solutions in the law of the United States of America, the authors explain the ways of overcoming strict formalism that can lead to disrespecting the last will of a testator. Testamentary freedom can be expanded in terms of exclusion or deprivation of a portion heirs have the right to, in accordance with imperative regulations only if there is a reason for this which is stipulated by the law. The aim of this paper is to indicate that legislators of the European-Continental as well as the Anglo-American tradition restrict the testamentary freedom in different ways, though they are both motivated by achieving the equilibrium between family solidarity and respecting the last will of a testator.*

Key words: *will, testamentary freedom, forced heirs*

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INTRODUCTION

Testamentary freedom represents the greatest breadth ever given to will, that is, whim of an individual (Morton 1894, 198). The dispositive principle, as a general principle of the civil law, sees its fullest expression in the possibility of every individual's freely disposing of everything that belongs to him or her in case of their death (Pichler 2019, 68). Of course, this principle is not of absolute nature. There are persons who stand in such close family relations with a testator that today's legal conception would not be able to accommodate full disinheritance of those persons, without having a justified reasons for such an act.

One of the fundamental postulates of inheritance law is encapsulated in providing a testator (dower, *de cuius*) with the possibility of expressing his will with respect to regulating the property relations on the goods he owns. Among other things, the subject will is manifested through a simple legal act - the will - which has *causa mortis* effect (Hašić et al. 2019, 113). Testamentary inheritance represents a correction of legal inheritance that is to be applied in case that a will has not been made at all, or should it fail to cover the complete property of the testator. On the other hand, a will, as a

form of freedom to dispose of property in case of death, respects the testator's will to the greatest extent possible if they have paid respect to the rights of forced heirs. With his or her last statement of will, an individual can freely determine which person or persons are to inherit them; for, after all, they know the circumstances in their social environment and family the best, thus directing the very inheritance towards the needs that survive them.

The question is whether an individual should have the right to dispose of his property absolutely freely *mortis causa*. In other words, should other persons have the right to dispute what is written in a will itself, provided that it is valid?

At the first glance, the answer to these questions would probably be that everyone has the right to do what they want with their own property. On the other hand, it is necessary to take into account the moral obligation to ensure persons who are in the closest biological and social relationship with the testator, especially since this moral obligation can become a public concern if dependent family members become dependent on state aid after the testator's death.

According to John Locke, the right to inherit emanates from natural law and should be recognised as such. (Golling-Sledge 2019, 143). The realization of this immanent human right is made possible by forced heirship, which guarantees to the closest members of a testator's family a part of his legacy.

Testamentary freedom is an institution that refers to individual right of a testator to dispose of his own property. The issue of testamentary freedom and its limitation in the form of a part of the property that must belong to the closest family members is an issue that has been regulated differently by legislation throughout history.

Forced heirship, however, should not be viewed solely as a restriction on the disposal of a will, but also as a right of forced heirs. The notion of a forced portion understood in this way can be defined as a legally determined value of the legacy that the closest members of the family will receive after a testator's death, despite the testator's different intention expressed through his will and kindness made during his life (Đurđević 2015, 208).

Throughout history, there has been a debate as to whether the absolute testamentary freedom should be allowed or the state should provide imperative norms to secure part of a testator's property to those closest to him.

The way in which Roman jurists sought to balance testamentary freedom and family solidarity was the basis for shaping the legal tradition of continental Europe, and to this end various concepts were developed, including the institution of a forced inheritance portion.

On the other hand, the countries of the Anglo-Saxon legal tradition have a different view of the freedom to dispose of a will, which has been almost unlimited throughout history.

1. HISTORICAL DEVELOPMENT OF WILL AND TESTAMENTARY FREEDOM

A will is an institute that has its roots in Roman law, specifically in the Laws of the Twelve Tables, where it appears in the form we know today, i.e. as a one-sided, personal, always revocable last statement of the will of a person having testamentary capacity, which distributes his legacy in case of death in a legally prescribed form (Stefanović and Počuča 2019, 518). By will, a testator exercised control over those who could benefit from his death, and such control could be passive and active. Passive control is provided by the secrecy of the document which can ensure good behaviour of potential heirs, but actively, a testator was always free to go further, to promise or threaten (Champlin 1989, 210).

The Law of Twelve Tables allowed absolute testamentary freedom that could lead to abuse, and this later caused the introduction of forced heirship.

At the time of enactment of the Twelve Tables Law, a will could be drawn up in two ways. The *testamentum calatis comitiis* was composed before the curate assembly session, which was held twice a year, where a testator would state to whom he wished to transfer his property. The second

form of will in ancient Roman law referred to soldiers - *testamentum in procinctu* (Počuča and Stefanović 2019, 522).

Roman jurists restricted the absolute testamentary freedom set out in the Laws of Twelve Tables using Roman popular beliefs. The testator could disinherit any of his relatives without being obliged to state the reasons for such conduct. A son had to be disinherited individually by stating his name or trait, while general formulation applied to other family members (Doods 1992, 916). This created forced heirship, because a certain instrument in the form of a compulsory statement was required for the validity of inheritance or the appointment of heirs (Vidaković 2019, 208). If a will did not name a son as the heir, or if he was not disinherited by name, the will was completely invalid and there would be intestate succession.

In the classical period, the praetorian testament was an autonomous form of testament as opposed to that composed according to the rules of *ius civile*, that is, a testament per *aes et libram*. Validity of a praetorian testament does not require the fulfilment of the form of a testament per *aes et libram*, and most of those who drafted such testament did not even intend it to be valid for civilians. Praetorian law requires that a will be made in writing and stamped by seven witnesses (Aličić 2007, 356).

Praetorian activity extended the principles of the forced heirship right to all those who belonged to the first hereditary line of succession under praetorian law, i.e. to *liberos*. Under praetorian law, all male *liberos* had to be disinherited by name, thus extending the formality of disinheritance to grandchildren and others entering the *libero*. Neither civil law nor praetorian law has succeeded in properly restricting the abuse of absolute testamentary freedom, which stems from the fact that a testator could unreasonably disinherit *sui heredes and liberos* (Vidaković 2019, 209).

Substantive forced heirship has developed in the practice of the centaur court. It is a set of legal rules that determine the circle of persons to whom a testator is obliged to leave a certain part of his property (*legitima portio*). Forced heirs must receive a certain part called a forced portion, and that is the part which forced heirs would have received as legal heirs had there been no will. Ascendants, descendants, brothers, sisters, and half-brothers and half-sisters (if an unworthy person was appointed heir) belonged to the circle of forced heirs.

If these persons, without a justified reason, would not receive even a quarter of forced inheritance, they could use the legal remedy - *querella inofficiosi testamenti* and seek rebuttal of the will. This legal action could only be initiated against testamentary heirs provided that no other legal remedy was available for the forced heir to exercise his right. Centumviral court would, at its discretion, decide on justification of disinheritance, while a forced heir had to prove that it was an unjustified inheritance.

The Justinian's Novel 115 exhaustively lists the motives for exclusion, and this system of disinheritance required that one of the reasons overlooked in the Novel be explicitly stated in a will. This Novel merges the principles of formal and material forced right, which results in the requirement that forced heirs must be named heirs in a will (Vidaković 2019, 211).

A forced heir could use two legal remedies. In case a testator had left him at least something, he could use *actio ad supplendam legitimam* and ask for a supplement up to the amount of forced heirship. A forced heir who was absolutely excluded from inheritance could use the *querella inofficiosi testamenti* (Gagliardi 2015, 2). Only descendants were considered forced heirs while ascendants were considered forced heirs if there were no descendants of the deceased.

In Roman law, a will was drastically modified in accordance with the notions of law of a certain historical period. During the period of development, a conclusion was reached that a certain part of a deceased's property should be reserved for his family. This legitimate varied from one quarter to one half of the property after payment of debts (Radin 1925, 226).

According to an older doctrine, the Romans feared dying without a will. This argument is justified by the fact that a person who dies without a will is called intestate, and the negative form of this word implies an exception. Also, the statement of Cato the Elder is referred to, where he said that

the thing he regretted most in his life was that he lived a day without a will (Crook 1973, 38). On the other hand, contemporary authors counter the stated position, stating that drawing-up a will was an exception, not a rule (Stern 2000, 413).

The fact is that many solutions of the legislators of the European-continental legal system are based on Roman law, but over time legislators have distanced from the Roman template and created regulations that reflect their national customs and needs (Załućki 2018, 2322).

2. REQUIREMENTS FOR A VALID WILL

Viewed through the lens of property, the power of a will is seen as a natural extension of the right to dispose of property *inter vivos* (Croucher 2012, 11).

A testator must meet the appropriate requirements regulated by the legislator in order for the will, and thus the distribution of his *mortis causa* property, to have legal effect after his death. The legislation of the Republic of Srpska (hereinafter: RS legislation) and the legislation of the Federation of Bosnia and Herzegovina (hereinafter: FBiH legislation) regulate these requirements equally.

Active testamentary capacity is the ability of a testator to make a valid will or to revoke it, and it represents a special type of business capacity (Đurđević 2015, 122). The RS legislator, in Article 64 of the Law on Inheritance of the Republic of Srpska (Law on Inheritance of the Republic of Srpska-ZON RS, "Official Gazette of the Republic of Srpska", No. 1/2009, 55/2009 - correction and 91/2016 28 / 2019- decision of the Constitutional Court and 82/2019) and the FBiH legislator, in Article 62 of the Law on Inheritance of the Federation of Bosnia and Herzegovina (Law on Inheritance of the Federation of Bosnia and Herzegovina - FBiH ZON, "Official Gazette of FBiH", No. 80/2014 and 32/2019 - Constitutional Court Decision) state that a will can be made by any person who is sane and capable of judgment, who turned 15 years old. The institute of active testamentary capacity is extremely important for the reason that it enables a will to be composed exclusively by a person who possesses legally relevant will power.

The essence of the formalistic notion of testamentary capacity is to emphasize that testamentary capacity means a person's legal and mental ability to make a will as a formal legal act. The notion of testamentary capacity understood in this way finds its roots in Classical Roman Law, which did not recognise the institution of representation, but a will had to be composed by uttering a certain formula (Marković 1974, 160).

A testator was not capable of reasoning if at that time he was not able to understand the meaning of his manifestation and its consequences, or he was not able to rule his will enough to act in accordance with that knowledge (Krišto Mađura and Melada and Drmić 2016, 158).

When we talk about the relationship between business and testamentary capacity, it is necessary to mention that literature provides different points of view thereof.

In most countries, testamentary capacity overlaps business capacity and/or the right to independently dispose of business activities *inter vivos*, given that it is not possible to apply the institution of representation when making a will. This concept is applied in English, Israeli, United States law and the like. (Marković 1974, 166).

The second position seeks to strike a balance between the requirement to preserve the principle of a will being a strictly personal business and the need to enable persons not able to independently dispose of property *inter vivos*, i.e. minors, to make a will. For this reason, certain legislations provide minors with the opportunity to dispose of only a certain part of their property, usually one half. This limited testamentary capacity was introduced by the French Civil Code. On the other hand, some legislations allow minors to make only public forms of wills, which is found in the Hungarian Civil Code (Marković 1974, 168).

Our legislation has accepted the third position, which considers testamentary capacity broader than business capacity, i.e. it envisages a lower age limit for acquiring testamentary capacity in relation

to business capacity. Determining the age limit ensures a protective function. Namely, young people do not have adequate knowledge and experience, and these circumstances could be abused if they were allowed to do business *inter vivos* before they reach a certain age. Such a danger does not exist in the case of legal affairs *mortis causa*, because their conclusion is motivated precisely because a person dies. For these reasons, the age of 15 is required for drawing up a will, and not coming of age as in the case of acquiring full legal capacity. Also, the will excludes the possibility of representation, while setting too high an age limit would jeopardize the constitutionally guaranteed right to inherit.

A person completely deprived of legal capacity may not make a valid will. This legal transaction shall not be valid even if at the time of drawing up a will, a testator, otherwise deprived of legal capacity, was in a state of temporary capacity for reasoning (Đurđević 2015, 122). A different view is held by authors who believe that a will made in bright moments will be valid, the burden of proving the validity of the will lies on the person who claims that there were bright moments (Harder and Kroppenbergs 2002, 48).

Article 64 of ZON RS, i.e. Article 62 of ZON FBiH stipulate that a loss of ability to reason after making a will does not affect the validity of the will, thus trying to keep as many wills in force as possible.

Regarding the nullity of a will, Article 65 of ZON RS stipulates that a will is null and void if a testator was incapable of reasoning, was not 15 years old, was forced by threat or coercion to make a will or decided to make a will because he was deceived or misled. Also, the nullity of a will occurs when a threat, coercion or fraud originates from a third party. The same provision is contained in Article 63 of ZON FBiH.

A will is null and void due to coercion if a testator made it because some evil had been inflicted on him or another person, and he was left in the hope that the evil would cease if he made the will the way he did. Nullity also occurs in the case a testator made a will because someone threatened him, i.e. caused him a justified fear that he or a close person would be harmed. A delusion causes the nullity of a will if a testator disposed of a will the way he did because he or she was either in a material business misconception or motive fallacy. If a testator disposed of his will the way he did because he was mistaken about some important fact, such disposition is null and void. Important facts are the facts that would have caused different contents of a will or led a testator not to make a will, had the testator had correct notion thereof (Gavella 1986, 159).

A will is a legal document as indicated by relevant legislation in Article 67 of ZON RS and/or Article 65 of ZON FBiH, which determine that a valid will shall be the will construed in the form specified by the law and made under the conditions provided by law. Only a will made in accordance with the framework set by the legislator for this legal instrument can cause the legal actions desired by a testator. Any contradiction in setting forth the last will with the provisions of the law shall therefore generally result in the will invalidity (Začucki 2020, 145). Meeting the required formalities in shaping a testator's last will has a protective function. Formalism allows a deeper understanding of a will itself and its contents, which is extremely important bearing in mind that a will produces legal effect only after the death of a testator. Also, formalism should prevent forgery of wills (Đurđević 2015, 128).

Whenever law makes the effectiveness of a legal transaction conditional on the fulfilment of formal requirements, problems inevitably arise with transactions that could have produced legal effect if the required formalities had been met (Orth 2008, 73).

When the court is asked to carry out a testator's intention, a testator will inevitably be dead at that moment and will not be able to clarify or confirm his statements, given years or even decades before. For this reason, formalities have the function of ensuring that a testator's property is indeed distributed in accordance with his intention (Langbein 1982, 492). On the other hand, excessive formalism can lead to a testator's last will not being fulfilled, if he has made even the slightest formal mistake. In accordance with this paragraph, a case may be cited in the case law of the United

States of America (hereinafter: USA) in which the court refused to comply with the will of a testator. Namely, after noticing that the testator had signed the will, the witnesses moved to the next room in the law office in order to sign the will. In this case, the formality that a testator must attend the signing of the will by witnesses was not complied with. The purpose of this formality is to guarantee that there will be no fraud or falsification of a will, but it cannot be claimed that this purpose was not respected just because the witnesses moved to another room (Johnson 2012, 111). Given this and similar cases, USA Legislation seeks to find various solutions to overcome the issue of excessive formalism.

USA legislation applies two ways to overcome this problem. The first one is to reduce the number and complexity of formalities required by law, and the second is to apply the doctrine of *harmless error* (Langbein 1987, 5).

The doctrine of *harmless error* was introduced by John Langbein in 1975. According to this doctrine, failure to comply with any statutory formality testament entails an investigation into whether a will expresses a testator's intent and whether the form of the will is sufficiently close to legal formalities.

In Langbein's view, the law should provide for a rebuttable presumption of invalidity that may be overcome by proving a testator's intent and satisfaction of the purpose of the law. A will must be made in writing and signed by a testator in order to meet the minimum requirements for its validity (Crawford 2019, 277). The fear that the application of this doctrine could lead to falsification of a will is not justified. As stated, the doctrine of harmless error allows courts to confirm a letter that is not construed in accordance with legal formalities, if there is a clear and convincing evidence that the testator intended the letter to be his last will. It seems unlikely that a forger would create a false will, as that will would have to be subject to thorough court proceedings (Weisbord and Horton 2020, 896).

3. THE INSTITUTION OF FORCED HEIRSHIP

A forced portion is the portion of a legacy that a testator may not dispose of. The other portion of the legacy is called a disposable/discretionary portion/free estate and a testator may freely dispose of it. A forced portion is the sum of individual forced portions of forced heirs or collective forced portion which is reserved for all forced heirs. In our law, the forced portion also means the part of inheritance that belongs to each forced heir, i.e. individual forced portion.

Article 6 of RS ZON prescribes that a testator may dispose of his property in a will in the manner and within the limits determined by law. In the same article, FBiH ZON stipulates that a testator, in addition to a will, may dispose of his property in the form of an agreement of inheritance. There are two consequences of the provision formulated in this way. First, this provision does not only apply to disposal of a will or agreement of inheritance, but also to the disposal of legal transactions *inter vivos* (gifts). Secondly, when a legal regulation speaks about limits, there is a possibility that such limits do not exist in case a testator does not have forced heirs, or he has them, but they are incompetent or unworthy, or may not or will not inherit, or they are excluded from inheritance and/or forced portion. In the absence of forced heirs, testamentary freedom is unlimited (Hašić et al 2019, 83).

3.1 The circle of forced heirs

Members of a testator's family are legally entitled to inherit the testator's property, which is a consequence of archaic conceptions of inseparability of an individual and the family. With the development of society, individualism of an individual develops and comes to the fore, and such powers of family members and the circle of heirs decreased.

The circle of potential forced heirs is narrower than the circle of legal successors. Legislation in Bosnia and Herzegovina differently determines the circle of persons who can be considered forced heirs. We distinguish between absolute and relative forced heirs.

Pursuant to Article 30 of RS ZON, absolute forced heirs are children of the deceased, his adoptees from incomplete adoption and his spouse. According to FBiH ZON, absolute forced heirs are: children of the deceased, which includes a child from full adoption, as well as the spouse (Article 28 of FBiH ZON). It is absolutely unnecessary to list children from full adoption as forced heirs, because a relationship equal to blood relationship is already established pursuant to Article 4 of FBiH ZON. Certain differences are observed between these two laws. Article 9 of FBiH ZON states that under the law, a testator is also inherited by his extramarital partner, who is equal to the spouse in the right of succession. However, in determining the circle of absolute forced heirs, the FBiH legislator explicitly states the spouse, which may cause ambiguity as to whether the extramarital partner also enters the circle of necessary heirs. We are of the opinion that in the next amendments to the law, the wording marital or extramarital partner should be introduced in order to clarify the mentioned provision. According to the RS legislation, an extramarital partner cannot be a legal successor, and therefore not a forced heir. Second, an adoptee from incomplete adoption is an absolute forced heir in RS, but there is no such position in the FBiH, where these persons appear as relative forced heirs. The decision of the legislator in RS appears to be a more logical solution because an adopter, when establishing incomplete adoption, had the opportunity to exclude an adoptee from the inheritance right or to limit the right (Krešić 2017, 669).

In both legislations, these persons should meet general requirements for legal heirs, i.e. they should be alive at the time of opening the inheritance, be capable of inheritance and that there is a legal basis for inheritance (Gavella 1986, 85). Also, the requirement is that they are not disinherited or deprived of the forced portion.

According to the RS legislation, relative forced heirs are descendants of the deceased, his parents and his siblings if, in addition to general conditions, they cumulatively meet two special requirements: they are permanently incapable of work and do not have the necessary means of subsistence. Relative forced heirs in FBiH ZON are: other descendants of the deceased, his adoptees from incomplete adoption and their descendants, his parents and his siblings. Also, this circle of persons can be considered forced heirs if they are permanently incapable of work and do not have the necessary means of subsistence. The inability to work of a relative forced heir who has the means to live (personal property, pension, disability benefits, etc.) also excludes him from the right to forced portion (Krešić 2017, 670). Relative and absolute forced heirs exercise the right to a forced portion of inheritance only when they are called to inherit according to legal degree of inheritance.

3.2. The amount of the forced heirship portion

There are two concepts in comparative law referring to determination of the amount of a forced portion of forced heirs and the way in which the forced portion is calculated. In the system of collective necessity, the size of the necessity is determined in relation to the whole legacy. According to this system, a forced portion is given collectively, as a collective forced portion which a testator is not allowed to dispose of (Krešić 2017, 670). The second concept is the system of individual forced portion, where the amount of a forced portion is determined as a percentage of the regular forced portion. According to this system, it is necessary to calculate a forced portion for each forced heir, taking into account all increases or decreases of a forced portion, and thus reduce the determined basis by a certain percentage. For each category of forced heirs, the percentage by which their forced portion is reduced is determined.

In the inheritance law of FBiH and RS, the system of individual forced portion is accepted. The forced portion of absolute forced heirs is one half, and the forced portion of other heirs, i.e. heirs

who are relative forced heirs is one third of the part that would belong to each of them individually according to the legal order of inheritance (Article 9 ZON FBIH, i.e. Article 31 ZON RS).

3.3. Legal nature and violation of the right to a forced portion

A forced portion is an individual right of every forced heir. A forced heir is guaranteed a certain value of a testator's property, and the way in which he will realize that value depends on the legal nature of the right to a forced portion. Legislations of the European-continental legal system recognize the inheritable-legal and contract law character of the right to a forced portion.

Legislations that were strongly influenced by Roman law as well as Eastern European countries recognize a forced portion as an inheritance right, while the countries of the German legal tradition consider the right to a forced portion as mandatory attribution (Huseinspahić and Mušinović 2017, 74).

The system of inheritable-legal character of the right to a forced portion recognizes a forced/reserved and a free/disposable portion of inheritance. The disposable portion can be disposed freely by a testator through a will. In case of violation of the forced portion, a forced heir acquires the right to an aliquot portion of a legacy. In this system, a forced heir is a universal successor in the legal sense of the term. He is not limited to demanding the monetary equivalent of his portion, but he has the right to demand handing over of items from the legacy *in natura* from testamentary heirs and legatees (Đurđević 2015, 217).

The obligatory-legal nature of a forced portion causes a forced heir to become a creditor who acquires a claim for the monetary equivalent of the forced portion from all testamentary heirs and legatees, in proportion to the part of estate they received. Forced heirs have the right to monetary value, and not to the real part of the inheritance, as is the case in systems of inheritable-legal nature of a forced portion. The obligatory nature of a forced portion can lead to an unenviable position of forced heirs. Namely, the amount of money determined by a final court judgment can be reduced several times when enforcement proceedings occur under high inflation, if the interest is not revalued.

Legislations in Bosnia and Herzegovina explicitly regulated the right to a forced portion as inheritable right, which derives from the formulation that a forced heir is entitled to a certain part of all the things and rights that make up the inheritance (Article 32 ZON RS and Article 30 ZON FBiH). Also, the second part of the mentioned articles indicates that a testator is given the opportunity to change the legal nature of a forced portion by determining that a forced heir receives his portion in certain things, rights or money. With this decision, the legislator applied the position, known since Pandit Law, that determining the legal nature of a forced portion falls within the domain of a testator's testamentary freedom. In essence, all contemporary legislations, whether applying the first or second determination of the legal nature of the right to a forced portion, allow a testator to determine the manner of settling his forced heirs (Huseinspahić and Mušinović 2017, 74).

Violation of a forced portion exists if a testator has exceeded the disposable part by testamentary dispositions or gifts according to ZON RS, i.e. testamentary dispositions, agreements on inheritance or gifts according to ZON FBIH (Article 39 ZON RS, Article 37 ZON FBiH).

In case of violation, the testamentary dispositions are reduced first, and if that is not enough, then gifts are returned. Due to the fact that the FBIH legislation provides for an inheritance agreement, before returning a gift, there is a reduction in disposal through inheritance agreement. This solution is grounded in the fact that a forced portion is violated by the effect of the latest free legal transactions. Given that bequest is a legal business *mortis causa*, testamentary dispositions are always considered the last benevolent dispositions (Krstić 2012, 327). For these reasons, it is assumed that a forced portion was violated by this last disposition, and that by making gifts during his life, a testator acted within the limits of disposable part if his property.

Dispositions of wills are reduced in the same proportion, regardless of their nature and scope and regardless of whether they are in one or more testaments, unless otherwise stated in a will. Proportional reduction means that after settling forced heirs, the reduced quota of testamentary heirs must keep the proportion determined by a testator (Đurđević 2015, 235).

If a testator left several legacies and ordered that one legacy be paid before the others, that legacy will be reduced only if the value of other legacies does not reach the forced portion (Article 41 of RS ZON, i.e. Article 39 of FBiH ZON). A testamentary heir whose inheritance part had to be reduced in order to settle the forced portion, may request a proportional reduction of the legacy to be paid, unless otherwise follows from the will, and the same applies to the legatee (Art. 42 ZON RS) and/or a heir from an agreement of inheritance (Article 40 of FBiH ZON).

In case that reduction in testamentary disposal cannot settle a forced portion to a certain forced heir, then gifts are returned. If a reduction of testamentary dispositions cannot satisfy a forced portion of a certain forced heir, then the gifts are returned. Gifts are returned starting from the last gift and go on the reverse of the order in which the gifts were made (Article 43 of the ZON RS and Article 41 of the ZON FBiH). There may be a dispute about which gift was made earlier, i.e. later, and the persons in that case should resolve the dispute in a lawsuit.

Gifts made at the same time are returned proportionally, i.e. in proportion to the size of the gift, which contributes to settlement of unpaid forced portion (Hašić et al 2019, 103).

A gift recipient is considered a conscientious holder from the day of notice/information of request, and this issue is important for determination of responsibility for the loss of things and the right to gains from things.

In Article 45 of ZON RS, the legislator determined that only forced heirs can request a reduction of testamentary dispositions and return of gifts. On the other hand, the legislator in FBiH prescribed that the right to request a reduction of disposal of a testament, inheritance agreement and return of gifts is inheritable if a forced heir, while alive, filed a request for a forced portion (Article 43 of FBiH ZON). This difference indicates that a successor of a forced heir cannot exercise this right in RS even if the forced heir has filed a lawsuit to reduce the disposal of a will and return gifts, but dies in the course of court proceedings. (Krešić 2017, 668).

3.4. Disinheritance of forced heirs

A forced portion is the privilege of the closest members of a testator's family. Such a privilege can be opposed to a testator's testamentary freedom only if the forced heirs deserve such a privilege from a general social point of view and from the point of view of a testator (Đurđević 2015, 221). Unrestricted freedom of testamentary disposition would create the possibility that a testator, with his last declaration of will, would not leave even the smallest part of his property to the closest family members. Given the need to protect the closest family members, there are restrictions on this freedom in the form of the institute of forced inheritance. However, the compensation of such a restriction is ensured by the possibility for a testator to disinherit some forced heirs, for certain reasons and under certain conditions (Čolaković and Demirović 2020, 149). Disinheritance of forced heirs is realised in the form of exclusion or deprivation of the right to a forced portion. These two institutes differ from each other in the reasons that can lead to their application, as well as because of the purpose they should achieve.

Exclusion from inheritance is a denial to a forced heir of the right to a forced portion. Whether a testator will use this power depends on his will, but, if a testator decides to exclude a forced heir from inheritance, he must do so only for the reasons prescribed by law and in a designated form.

This civil law punishment can only affect a capable and worthy heir, because ability/capacity and dignity are preconditions for exclusion. In other words, inability and unworthiness to inherit are of stronger intensity than exclusion from a forced portion. This can be seen from the fact that in the

first two cases the law itself is excluded, while exclusion from inheritance is a dispositive act of a testator (Krešić 2017, 671).

Legislator in RS, Article 47 stipulates that a testator may exclude from inheritance an heir who is entitled to a forced portion if the heir has committed a serious sin against the testator by violating a legal or moral obligation, and then the article states what the breach of legal or moral obligation may consist of. Such violations may be insulting or rude treatment of a testator, intentionally committed criminal offense against a testator, his child, adopted child, spouse or parent, or indulgence in inactivity and dishonest life. On the other hand, the legislator in the FBiH regulates separate conditions for the exclusion from inheritance in Article 45 of FBiH ZON. The difference between the decisions of the legislators is reflected in the fact that the legislator in RS cites as a reason for exclusion an intentionally committed crime against an adoptee of a testator, which is not cited by the legislator in FBiH. Also, the exclusion for crimes against the integrity of Bosnia and Herzegovina or humanity and values protected by international law was not provided by the legislator in RS. In conclusion, the RS legislature has determined that a forced heir must cumulatively indulge in idleness or dishonest living, while the FBiH legislator provides for alternative to these conditions.

Both legislations stipulate that a testator must exclude an heir in an indubitable manner by a will (Article 48 of the RS ZON), or by a testament or inheritance agreement in the FBiH (Article 46 of the FBiH ZON). RS law stipulates that it is useful to state the reason for exclusion, while stating reasons in FBiH law is provided as a condition for the validity of exclusion. Also, both legislations stipulate that the consequences of exclusion lie in that an heir loses the inheritance right to the extent of the exclusion, while the rights of other persons who can inherit a testator are determined as if an excluded heir had died before the testator (Art. 49 ZON RS, i.e. Article 47 of FBiH ZON). Deprivation of forced heirs, in addition to punishing forced heirs for the way of life that endangers their own existence and that of their family members, has a protective character reflected in protecting the interests of minors or adults, but also for the affairs of incapacitated family members of a deprived forced heir (Stojanović 1996-1997, 175).

The basis of deprivation must exist at the moment of making a will, but also at the moment of opening the inheritance, because deprivation is done for the benefit of the descendants of a deprived heir because he is over-indebted or a wasteful person. Such a solution is logical, having in mind that the listed forced heir would most likely use the inherited property to settle his debts or would quickly spend it in vain. However, if at the time of opening of an inheritance a descendant is not over-indebted or a wasteful person, then there is no basis for deprivation (Krešić 2017, 675). RS legislation under the Article 50 of RS ZON and FBiH legislation under the Article 48 of FBiH ZON provide that a forced heir may be deprived in whole or in part of the forced portion if he is over-indebted or a wasteful person. Deprivation is done for the benefit of descendants who are minors, i.e. adults, but incapable of earning a living under RS law. On the other hand, in order for a forced heir to be deprived of a forced portion under FBiH law, he needs to have minor descendants or those who are of legal age, provided that they are cumulatively incapable of work and do not have the necessary means of subsistence. Also, in order for a deprivation to be valid, persons need to be alive at the moment of opening the inheritance.

For an heir who is completely excluded from succession, the fiction of death is valid, while for a deprived person this fiction is not valid. Descendants of a deprived heir do not have to meet the conditions otherwise required for forced heirs. A deprived descendant is an absolute forced heir and he inherits one-half of what he would inherit by law. Therefore, the forced portion of a deprived heir is first calculated as if he had been alive, and only then is that portion given to his descendants. This interpretation derives from the wording used by the legislator stating that a testator may deprive a forced heir in whole or in part of his forced portion in favour of his descendants (Krešić 2017, 677).

4. TESTAMENTARY FREEDOM IN ENGLAND AND THE UNITED STATES OF AMERICA

It is a common view that there are two completely different systems of testamentary freedom, namely the European-continental system, which mainly envisages the establishment of a forced portion as a testamentary freedom, and the Anglo-American one with absolute freedom.

English law is not based on codification, but the needs of practice have over time softened this approach. Namely, since 1832, in addition to the Common law system and the Rule of Equity, written law, i.e. the Statute Law have been developing ever more (Antić 1985, 321).

In the middle Ages, the English law was not in favour of absolute testamentary freedom. The only testamentary freedom that existed was limited to dispositive rights to movable property. If a man dies leaving a wife and child, his movables were divided according to a tripartite rule that required one-third to go to the spouse and one-third to children (Brook 2019, 19). Such a rule is essentially a forced portion, however, these rules have been pushed out of legal life over time by the expansion of testamentary freedom. There are several reasons for this diameter. First, a forced portion requires predetermined, precise rules that the English law shunned. Secondly, due to the increased emigration, a predetermined forced portion would significantly aggravate the position of those relatives who remained in England (Antić 1985, 322).

The Inheritance (Family Provision) Act of 1938 emphasizes the growing awareness of the English legislature that inheritance is a family matter and that testamentary freedom, no matter how desirable as a general principle, should not interfere with the interests of society requiring family care (Dainow 1940, 338). This regulation introduced the family provision rule, which allows disinherited family members to apply to court for a financial award out of the estate. (Hedlund 2021, 55). The court in England was empowered to change a testator's dispositions, if a testator unjustifiably deprived of inheritance his family members who were dependent on his support. The Inheritance (Provision for Family and Dependents) Act of 1975 empowers the submission of claims by spouses, civil partners, ex-spouses or civil partners, stepchildren and other persons whom the deceased supported immediately before death (Antić 1985, 323). In the event that the court concludes that the said persons did not receive the appropriate part of inheritance, taking into account all the circumstances, the court may determine the appropriate amount of money from the inheritance to the applicant. The final decision depends on the free conviction of the judge. Also, this regulation empowers the court to bring an order obliging the recipient to provide money or property benefits in order to meet the justified needs of the applicant, thus bringing the English law much closer to the institution of forced portion.

The United States takes as its starting point the autonomy of the will of an individual, which is characterized by the doctrine of testamentary freedom. Absolute testamentary freedom can be justified by the view that an individual should be allowed to freely dispose of his property *mortis causa*, because individuals then have an incentive to invest and save throughout their lives, not just consume. Otherwise, if freedom of disposal were significantly restricted, this incentive would disappear because the use of property by individuals determined by a testator would also disappear (Glover 2017, 291). A deeper insight into the USA law and practice shows that testators are subject to restrictions that result in far greater protection of family members than the rhetoric of testamentary freedom suggests (Madoff 2014, 334). It could be said that absolute testamentary freedom, once a feature of American law, shares the fate of other major freedoms and is declining (Laufer 1955, 277).

In most laws of the United States, there are legal provisions that prohibit testamentary dispositions of certain agricultural land that must be inherited by family after a testator's death. This solution stems from the position of the American legislator that it is necessary to protect the family as a unit of society from unfavourable fate that can befall it (Bowker 1986, 523).

In practice, it often happens that a will by which children are deprived of their inheritance is contested. Disputing is most often done by invoking an undue influence on a will of a testator or by claiming that a testator was in delusion, all in order to achieve results that are more in line with the family paradigm (Foster 2001, 210).

When a testator disposes of all property and does not explicitly exclude children from the right to inherit, it is assumed that he did not want to deprive them of inheritance, and a testator's children receive a forced portion of inheritance. A specific restriction of a testator's freedom is the principle that a testator who explicitly deprives a child of inheritance must give that portion to another person, otherwise the deprivation will not be valid. Also, if a testator left his entire property to his spouse, such a disposition will be valid, because it is based on the assumption that a surviving spouse will take care of the interests of their children (Antić 1985, 325).

CONCLUSION

The role of the family and the position of its members has changed throughout history, but the family has always been the foundation on which society itself rests. By the development of individualism, the power of an individual to determine the fate of his property *mortis causa* has come to the forth, while an individual is free in his choice. In order for such situations to lead to the fact that the closest members of a family who were supported by a testator while alive do not fall into an unfavourable position, there was a need to limit the testamentary freedom. Limitation of testamentary freedom is reflected in the institution of a forced portion, which guarantees certain persons a part of legacy. However, if potential forced heirs have exhibited inappropriate conduct prescribed by law, a testator is given greater freedom to dispose of will.

Considering the historical development of testamentary freedom leads to the conclusion that Roman law developed forced inheritance in order to protect the closest family members. Justinian's reform of forced inheritance law made the greatest contribution to the development of the institution of forced portion as known in modern law of Bosnia and Herzegovina. The reform affected the institute of disinheritance, stipulating that it was obligatory to state the reason for disinheritance, while the impact is visible in terms of the very nature of forced portion.

The legislator prescribes that active testamentary capacity is a *condicio sine qua non* for the validity of a will. On the other hand, the same is provided for respecting the form, which naturally depends on the form of a will. The authors cited the case where even a slight deviation from the observance of formal conditions leads to invalidity of a will, and strict formalism takes precedence over respect for the last will of a testator. To avoid such situations, the solution can be found in the doctrine applied by ever more states in the United States. Naturally, the application of this doctrine, as well as all other institutes, should be adjusted to the spirit of specific national legislation and the legal tradition thereof.

The laws in Bosnia and Herzegovina have certain differences in terms of regulating the institution of a forced portion. ZON RS does not determine an extramarital spouse as a forced heir, while in ZON FBiH the adoptee from incomplete adoption is determined as a relative forced heir. The difference is also noticeable in the reasons for exclusion of forced heirs from inheritance, as well as in determining the requirements that an adult must meet in order for a forced heir to be deprived of his forced portion in the favour of that adult person. Also, there is an agreement on inheritance in the FBiH legislation, which is not the case with the RS legislation. Both laws equally determine the amount of forced inheritance portion and the legal nature of the right to a forced portion.

A comparative analysis of the European-Continental Institute of a forced portion and limitations of testamentary freedom applied in Anglo-American law shows that absolute testamentary freedom is not applied in any contemporary law. It could be said that the solutions in these two systems show more similarities than differences, which proves that basic civil law institutions, regardless of the spatial or time dimension, always include certain similarities.

Despite criticisms regarding the institution of a forced portion, which are mainly based on the fact that a forced portion is a limitation of individual freedom, it is important to mention the role this institute has in our legal system. Namely, the social-economic situation in Bosnia and Herzegovina does not provide adequate models for the protection of individuals who do not have their own property and resources to meet the basic needs, and the institution of a forced portion allows the care of immediate family members.

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