A DIFFERENT APPROACH TO THE STUDY OF "FORCED SHARES" OR "LEGITIMAS", BASED ON A COMPARATIVE STUDY OF SPANISH AND PHILIPPINE SUCCESSION LAW[1]

Un análisis alternativo sobre las legítimas a partir del estudio comparado del Derecho de sucesiones español y filipino

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Abstract

This paper is divided into two different parts. In the first one, a comparative study between the Spanish and Philippine succession law is made. Our basic assumption is that both regulations are parallel, and we focus our analyses on the most relevant differences.

First we will study the current Succession Law in the Philippines and in Spain from a positivist perspective, then we will carry out a deeper analysis from another perspective. This is not going to be a traditional study focused on the conflicts between the rights of the forced heirs "legitimarios", and the liberty of the testator.

[1] This paper was presented in the 5th International Scientific Congress Five Centuries Sailing the Legal World, that took place in the University of Deusto, Bilbao, Spain on 17-18-19 June of 2019.

[2] This small piece of work is offered as a tribute to Prof. Ruben F. Balane, guideline and model for generations of jurists.

We offer here a wider perspective based on a philosophic approach. In fact, we would like to contribute something new to the traditional academic debate. Therefore, we will dive deeper into the philosophical arguments to try to find reasons to maintain or reduce or remove the forced shares from our Civil Codes. This research is connected with the need of the Law to act as a tool to achieve certain purposes. In fact, Civil Law could be only a mechanism to solve conflicts and to apply the "*ius suum quique tribuendi*" principle. However, the lawmaker should also establish the framework in which a society may evolve. This study seeks to identify this framework in the sphere of succession law.

Keywords

Spanish and Philippine Succession Law, Civil Code, forced shares, inheritance, evolution of law, illegitimate children, usufruct of the widowed spouse, justification of forced shares, welfare state model.

Resumen

Este artículo se divide en dos partes bien diferenciadas. En la primera realizamos un estudio comparativo del derecho de sucesiones tanto en el Código Civil español como en el filipino. Se trata de dos ordenamientos muy similares, por lo que centramos nuestro estudio en las más relevantes diferencias entre ambos.

En la segunda parte se realiza un análisis distinto al tradicional. No se trata de evaluar los conflictos entre los distintos legitimarios, entre la libertad de testar y el límite que suponen las legítimas; un estudio basado en el individualismo y en los intereses de cada individuo. Por el contrario nuestra perspectiva es filosófica y sociológica. De hecho estudiamos la conveniencia de mantener, reducir o suprimir el sistema de legítimas, atendiendo a razones que trascienden el mero positivismo. Se trata de construir nuestra crítica o propuesta a partir de cimientos fundados en argumentos filosóficos. Es cierto que el Derecho Civil está ideado como un mecanismo para resolver conflictos entre individuos, en el que rige el "*ius suum cuique tribuere*". Sin embargo, no debe obviarse ni la función social de la propiedad, ni el hecho de que el legislador debería tener como deber la creación de un marco normativo suficiente para que la sociedad pueda evolucionar, coadyuvando a su mejora: sobre ese marco es este estudio.

Palabras clave

Derecho de sucesiones español y filipino, Código civil, legítimas, herencia, evolución del derecho, hijos ilegítimos, usufructo del cónyuge viudo, justificación de las legítimas, Estado de bienestar.

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I. INTRODUCTION

Spanish and Philippine Succession Law are based on the same concepts, traditions and Civil Code. In fact, the Civil Code of the Philippines of 1950 tries to improve the Spanish Civil one, which was up until then in force in the archipelago. Therefore, the current Philippine Civil Code is based on the Spanish version. In fact, most of the articles in the Philippine Civil Code are cross referenced to the original article in the Spanish Civil Code. In fact, the most significant Philippine Civil Law professor, José B.L. Reyes, wrote in 1975: "the Code Commission had not substantially altered the defective structure of the Spanish Civil Code of 1889, but merely grafted or superimposed thereon the amendments that it saw fit to introduce… Its skeleton is substantially that of its Spanish predecessor, already sharply criticized by Felipe Sánchez Román."[3]

[3] Reyes, J.B.L. "Reflections on the Reform of Hereditary Succession", *Phil. L.J.* Vol.50, 1975, (277-292) p.277.

One of the sections of the Philippine Civil Code that has maintained a close connection with that of its Spanish roots is Succession Law. In fact, Philippine law on succession is mostly Spanish Law. Out of a total of 332 articles, only 29 originate from North American Law[4]. In this article we seek to analyse the similarities and differences between both succession laws, in order to be able to propose different possibilities for a future evolution of both twin systems, especially in matters of inheritance forced shares.

In brief, law of Succession, is defined in both legal systems as a mode of acquiring ownership. In fact, art 712 of the Philippine Civil Code[5] (PCC) repeats the content of art. 609 of the Spanish Civil Code (SCC); as well as art. 777 PCC[6] repeats art. 657 SCC when referring to when the succession takes place.

Therefore, we can affirm that the regulation of Succession Law in both codes is parallel, however there are important differences that we should take into account: Perhaps the most important one is that the Spanish Law

[4] We begin this paper with the words of the eminent Philippine jurist, Justice José Benedictino Luis Reyes, who describes the Philippine succession system as following: "It is generally adverted that our rules of succession *mortis causa* proceed from an imperfect blending of three systems with contrasting philosophies. (1) The Germanic concept of the universal heir who, upon the death of the predecessor, directly and immediately steps into his shoes and at one single occasion (*uno ictus);* without any formalities whatsoever, acquires en bloc the universality of all his surviving or transmissible rights and obligations, in an automatic subjective notation therein, unless the heir should repudiate and reject the inheritance (2) the Franco-Spanish system, where like in the German, there is an acquisition of the estate by universal title but only upon acceptance by the heir, who may do so when the chooses, (with retrospective effect) unless required to decide earlier by the creditors or the Court; and (3) the Anglo-American (Common Law) system that, upon the death of the predecessor, the estate must first be liquidated, the assets marshalled and the debts paid or settled under judicial supervision, by an intervening trustee or personal representative (administrator or executor) before the net residue is taken over the successor. The second seems to be the system of the (Philippine) Civil Code, and under it, the universality of property rights, and obligations of the decedent are transmitted to the heir in bloc, as an entire mass, form the moment of death. As interpreted by the Supreme Court the hereditary rights of the successors become automatically vested in them from and after the death of their predecessor even before judicial recognition of their heirship." Balane, Ruben F., *Jottings and Jurisprudence in Civil Law*. Succession, Central Book Supply INC, Quezon City, 2016,p.3-4

[5] Art. 712 PCC: "Ownership is acquired by occupation and by intellectual creation. Ownership and other real rights over property are acquired and transmitted by law, by donation, by testate and intestate succession, and in consequence of certain contracts, by tradition. They may also be acquired by means of prescription".

[6] Art. 777 PCC: "The rights to the succession are transmitted from the moment of the death of the decedent".

abolished the distinction between legitimate and illegitimate children in 1981[7], while the Philippine law keeps it.

The second important difference is that the 1950[8] Philippine lawmaker decided to abolish the "mejoras" or betterments in favour of children or descendants. It was said that the betterments could not be accepted by a society accustomed to not discriminating between children. Therefore, keeping the betterment would subvert the essence of the Philippine family relationship. What it has not, however, been an obstacle in the PCC to maintain the legal distinction between legitimate and illegitimate children.

The third important distinction is that while the widowed spouse reserve ruled by arts 834-839 SCC was abolished in the PCC, the so called "*reserva troncal*" of art. 811 SCC was recovered in the Philippines by the legislator of 1950, after being forbidden during the American rule[9]. It is curios to compare the Philippine Civil Code with the other current Spanish Civil Code model from Puerto Rico, that chooses just the reverse option. This is to keep the widowed spouse reserve, but to abolish the lineal one.

The fourth difference has been the abolition of two types of substitutions the so called "*pupilar*" substitution ruled by art. 775 SCC and the "*ejemplar*" substitution of art. 776 SCC. However, the other two types, the simple or vulgar, and the "*fideicomisaria*" substitutions, have been maintained in the Philippine Code (arts 857-870).

The fifth difference refers to the share of the legitimates rights, that had been changed in the PCC, that includes an extended list of combinations taking into account the distinction between legitimate and illegitimate children.

The form of testaments is also different in both countries, being substituted the Spanish notarial last will by the so called attested one in the PCC (arts.84-819). The only other type of testament in the Philippine Code is the handwritten one *(ológrafo*), therefore the closed testament and the special ones were abolished by the Code of 1950. The PCC also provides for greater powers to prove the existence of last wills. In fact, it now allows *ante mortem* probate of wills, during the lifetime of the testator.

Moreover, the PCC applies art 739, that rules on the cases of prohibited donations, to the law on succession. In accordance with this article the

[7] Ley 11/1981, de 13 de mayo, de modificación del Código Civil en materia de filiación, patria potestad y régimen económico del matrimonio. BOE 19th May 1981.

[8] Civil Code of the Philippines . Republic Act. No.386.

[9] Art. 891 PCC: "The ascendant who inherits from his descendant any property which the latter may have acquired by gratuitous title from another ascendant, or a brother or sister, is obliged to reserve such property as he may have acquired by operation of law for the benefit of relatives who are within the third degree and who belong to the line from which said property came".

following are void donations: a. those made between persons who are guilty of adultery' or concubinage at the time of the donation. b. Those made between persons found guilty of the same criminal offence, in consideration thereof. c. Those made to a public officer, or his wife, descendants or ascendants, by reason of his office. Therefore, we find that sometimes the PCC and the Philippine Criminal Code maintain criteria from the nineteenth century.

Finally, there is also a difference in the list of intestate succession combinations as a result of the distinction between legitimate and illegitimate children. For the rest, both systems, maintain the same rules on Succession Law.

II. MOST RELEVANT DIFFERENCES BETWEEN BOTH SYSTEMS

Having introduced the broad differences between Spanish and Philippine successions Law, I would now like to focus on some significant points in both testate and intestate succession.

1. *Testate succession*

1.1. Form of testaments

A) Attested last will

In the Philippines there are only two types of testaments. In each case the last will must be in writing and executed in a language or dialect known to the testator. In fact, the attested last will is the common one. It is ruled by art. 805 PCC[10] and it must be signed at the end thereof by the testator himself or the testator's name is written by some other person in his presence, and by his express direction, and attested and signed by three or more credible witnesses in the presence of the testator and the other one. The testator or the person requested by him to write his name and the instrumental witnesses of the last

[10] Art. 805 PCC: "Every will, other than holographic will, must be subscribed at the end thereof by the testator himself or by the testator's name written by some other person in this presence, and by his express direction, and attested and subscribed by three or more credible witnesses in the presence of the testator and of one another. The testator or the person requested by him to write his name and the instrumental witnesses of the will, shall also sign, as aforesaid, each and every page thereof, except the last on the left margin, and all the pages shall be numbered correlatively in letters placed on the upper part of each page. The attestation shall state the number of pages used upon the will is written, and the fact that the testator signed the will and every page thereof, or caused some other person to write his name, under his express direction in the presence of the instrumental witnesses, and that the latter witnessed and signed the will and all the pages thereof in the presence of testator and of one other".

will, shall also sign on the left side of each page except the last one, and all the pages shall be numbered consecutively in letters placed on the upper part of each one. It is interesting to underline that the origin of this type of testament was the Spanish notarial one, in fact the form of the draft of the attested last will reminds us of the notarial Spanish model. It is important to remark that due to the American influence, the notarial system has been changed in the Philippines which has adopted the American style. Therefore, the so called "Notary" in the Philippines is only a special type of witness.

On the Spanish side, the last will is called an open one whenever the testator executes his last will in the presence of the persons who must authorize the act, who are made aware of the dispositions made therein. This type of testament is referred to in art.679 SCC. Moreover, the art. 695 CC explains the process to make it. This article states that the testator shall express, orally or in writing, his last will to the Notary Public. The Notary drafts the last will in accordance with such statements, and stating the place, year, month, day and time of its execution. After advising the testator of his right to read it by himself, the Notary Public shall read it out loud for the testator to declare if it conforms to his intentions.

In addition, in Spanish Law there exists another type of notarial testament, the so called closed one, which has been abolished in the current Philippine Civil Code[11].

B) Handwritten last will

The other Philippine type of testament is the handwritten one, that the PCC calls holographic and it is equivalent to the Spanish "*testamento ológrafo*". The Philippine Code (arts. 810-811) states that a holographic last will must be entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of the Philippines, and need not be witnessed. In addition, it shall be necessary that at least one witness who knows the handwriting and signature of the testator explicitly declares that the last will and the signature are in the handwriting of the testator. If the last will is contested, at least three of such witnesses

[11] In accordance with art. 680 SCC a testament shall be closed when the testator, without revealing his last will, declares that it is contained in the document presented to the persons who are authorized to act. It must be done before a competent Notary and the latter or the testator can request the presence of two witnesses. It must be in a sealed envelope and authorized by the Notary by means of a certificate. After authorization of the closed testament, the Notary Public shall deliver it to the testator, after including an authorized copy of the deed of execution in his ordinary official files. The testator may keep in his possession the closed testament, or entrust it to the care of a trusted person, or consign it in the possession of the authorizing Notary Public, to be kept in his files.

shall be required. In the absence of any competent witness referred to in the preceding paragraph, and if the court deems it necessary, expert testimony may be resorted to.

On the Spanish Side, the so called "*testamento ológrafo*" is ruled by arts. 678 and 688 SCC. A last will shall be called "*ológrafo*" when the testator writes it by himself. The handwritten will may only be made by persons who are of legal age. However, the Spanish notarial testament can be made by a 14 years old testator. The handwritten testament, in order to be valid, must be written out in full and signed by the testator, stating the year, month and day on which it is made. If it contains words which have been crossed out, amended or written between the lines, such changes will have to be initialed by the testator in order to be valid.

C) Special last wills

Finally, the Philippine Civil Code has abolished all the special testaments which are contained in the Spanish one: the military testament[12], the maritime testament[13], the testament granted by a Spanish person in a foreign country[14], the testament made when there is a risk of death[15] and the testament made during an epidemic[16].

1.2. Forced heirs

A) Most important differences between both legal systems

In both legal systems the law imposes on the testator the obligation to make certain patrimonial attributions to his forced heirs to satisfy their "*legitima portio*" or legitime (the part of the inheritance to be transferred to them by law). The title by which these attributions are made (adjudication of forced shares or legitimates) remains at the will of the testator: appointment of the heir, legacy or donation *inter vivos* (which works as advance payment).

The most important differences between the PCC and the SCC relating to the matter of forced heirs are the following: Distinction between legitimate and illegitimate children in PCC, however, the latter grants succession rights to spurious children, which are those of parents who are disqualified from

[12] The military testament is ruled by art. 716 SCC

[13] The maritime testament is ruled by art. 722 SCC

[14] The testament granted by a Spanish person in a foreign country is ruled by arts. 732, 734 SCC

[15] The testament made in risk of death is ruled by art. 700 SCC

[16] The testament made during an epidemic is ruled by art. 701 SCC

marrying each other' or incapacitated. Previously, only legitimate children had successional rights.

Furthermore, the PCC[17] improves the succession position of the surviving spouse. Previously, the surviving spouse had only a usufructuary right. He/she had no share in ownership in any case. Now he/she is given full ownership and is a compulsory heir.

The abolition of "*mejora*" or betterment. Which is the right of a parent to give a child more than the other. Philippine academics state that since this concept has never been understood in the Philippines, it was deleted form the PCC. As a result of the abolition of the betterment, there is an increase in the free share.

B) Forced heirs in Spanish Law

Since 1981 the compulsory or forced heirs of the testator as referred to in art. 807 SCC are (1) First, children and descendants. (2) In the absence of children or descendants, the parents or ascendants of the testator (3) In any case, the widower or widow, succeeds the testator in the manner and to the extent established by the Civil Code. Therefore, there is no longer any discrimination between children due to their origin, and the live-in partner is not a forced heir. Moreover, the widowed spouse is only appointed on a usufruct share, and not the ownership of a share[18].

In respect to the forced share of the children and descendants art 808 SCC states that it consists of two-thirds of the hereditary estate of the parent. Nevertheless, the latter may dispose of one of the two thirds forming the "legítima" in order to apply it as a betterment "*mejora*" to their children or descendants. Finally, in the case that there are no children or descendants, the forced share ("legitima") of parents or ascendants consists of one-half of the hereditary estate of their children and descendants, except in cases in which they coincide with the widowed spouse of the testator, in which case it shall be one third of the inheritance (art 809 SCC).

[17] The Philippine Civil Code rules the "legitimes" in Title IV, Chapter 2, Section 5, Book III, (arts. 886-914).

[18] In fact, the widower or widow who, on the death of his or her spouse, who is not judicially or *de facto* separated, is entitled, if children or descendants survive the testator, to the usufruct of the betterment or "*mejora*" (art. 834 CC). However, by the *Cautela Socini* the strict forced share (*legítima estricta*) can be charged in favour of the widowed spouse by a usufruct. If the testator leaves no descendants but does leave ascendants, the surviving spouse shall be entitled to one half of the estate in usufruct. Finally, if the testator should leave no ascendants or descendants, the surviving spouse shall be entitled to the two thirds of the estate in usufruct.

C) Forced heirs in Philippine Law

C.1. Introduction

On the Philippine side, the regulation of the forced or compulsory heirs is really more extensive, and offers a large number of possible combinations. The forced or compulsory heirs in accordance with the art. 887 PCC are (1) Legitimate children and descendants, with respect to their legitimate parents and ascendants; (2) In default of the foregoing, legitimate parents and ascendants, with respect to their legitimate children and descendants; (3) The widow or widower; (4) Acknowledged natural children, and natural children by legal fiction; (5) Other illegitimate children referred to in article 287. Compulsory heirs mentioned in numbers 3, 4, and 5 are not excluded by those in numbers 1 and 2; neither do they exclude one another. In all cases of illegitimate children, their filiation must be duly proved.

C.2. Combinations affecting legitimate children

The possible combinations are as following: In case of being legitimate children alone, the forced share will be a half of the estate divided equally (art.888 PCC)[19]; if there is a surviving spouse with the legitimate children, the latter are entitled to half of the estate divided equally; and the widowed spouse to a share equal to that of one child (art. 892 part 2 PCC)[20]. In case that there is only one legitimate child and the widowed spouse, the former is entitled to a half of the state, and the latter to a quarter. (art. 892 part 1 PCC)[21].

C.3. Combinations affecting illegitimate children

However, if there are legitimate and illegitimate children, the former are entitled to half of the estate divided equally, and the latter to a share equal to half of the share to that of a legitimate child (art. 176 Family Code). In case that there is also a surviving spouse together with the legitimate and illegitimate children, the children will be entitled to the same forced shares as before, and the widowed spouse to a share equal to that of one legitimate child. In case that is only one legitimate child with illegitimate children and a surviving spouse, the legitimate child is entitled to half of the estate, and the illegitimate children to a share equal to half of the legitimate child; and the widowed spouse to a quarter of the estate. Take into account that in accordance with art. 895 PCC[22] the surviving spouse's share is preferred over those of the illegitimate children which shall be reduced if necessary.

[19] This article is based in the original version of article 808 of the SCC of 1889.
[20] This article is based in the original version of article 834 of the SCC of 1889.
[21] This article is based in the original version of article 834 of the SCC of 1889.
[22] This article is based in the original version of article 840 of the SCC of 1889.

C.4. Combinations affecting legitimate parents

If the only forced heirs are the legitimate parents, they will be entitled to a half of the estate (art. 889 PCC)[23]. In case of there being legitimate children, the parents are not forced heirs, as in Spanish Law. However, if the children are illegitimate, the parents will be forced heirs, and the following rules will be applied: If there are surviving legitimate parents and the deceased leaves illegitimate children, the former will receive half of the estate, and the latter will be entitled to a quarter of the inheritance (art.896 PCC)[24]. If there are no children and the legitimate parents coincide with the surviving spouse of the deceased, the former will receive half of the estate, and the latter a quarter. (art. 893 PCC)[25]. If there are legitimate parents, illegitimate children and a surviving spouse of the deceased, the former will receive half of the estate, the second a quarter, and the widowed spouse one eighth share of the estate. (art. 899 PCC).

C.5. Combinations affecting the surviving spouse

If the surviving spouse in the only forced heir, he/she will be entitled to half of the estate, unless he/she has married in danger of death or "*articulo mortis* marriage", in that case the forced share will be only one third of the estate (art. 900 PCC). In the case of a widowed spouse with illegitimate children, the former is entitled to one third of the estate, and the latter to one third of the estate (art. 902 PCC)[26]. In the case of a surviving spouse with illegitimate parents, the former will receive a quarter of the estate, and the latter a quarter (art. 903 PCC). Take into account that if there is a surviving spouse with legitimate children the rules abovementioned will be applied.

C.6. Residual rules

Finally, if there are only illegitimate children, the forced share will be half of the estate[27], and their rights on the forced share will be transmitted to their descendants[28].

[23] This article is based in the original version of article 809 of the SCC of 1889.

[24] This article is based in the original version of article 841 of the SCC of 1889.

[25] This article is based in the original version of article 836 of the SCC of 1889.

[26] This article is based in the original version of article 843 of the SCC of 1889.

[27] Art. 901 PCC: "When the testator dies leaving illegitimate children and no other compulsory heir, such illegitimate children shall have a right to one-half of the hereditary estate of the deceased. The other half shall be at the free disposal of the testator". This article is based in the original version of article 842 of the SCC of 1889.

[28] Art. 902 PCC: "The rights of illegitimate children set forth in the preceding articles are transmitted upon their death to their descendants, whether legitimate or illegitimate". This article is based in the original version of article 843 of the SCC of 1889.

2. *Intestate succession.*

2.1. Shared general rules

Intestate succession is regulated by the same rules in both legal systems. Rule of Relationship: the heirs must be related to the deceased; Rule of Preference of Lines: descending, ascending and collateral. Take into account that the descending excludes the ascending and collateral; and the ascending excludes the collateral. Rule of Proximity of Degree: the closest excludes the more remote without prejudice to the representation right. Rule of Equality among relatives of the same degree. Therefore, those of equal degree inherit in equal shares. In both systems there is the same distinction between full-blood and half-blood brother/sister, nephews/nieces, and rules the right of representation[29].

2.2. Spanish classification of legal heirs

The Spanish Civil Code rules this type of succession in a really simple way. In fact, the SCC states that the legitimate or legal heirs are the relatives of the deceased, the widow or widower and the State. The preferential call in intestate succession is in favor of the direct descending line: Children and descendants succeed the parents and other ascendants, without distinction of sex or age, even though they originate from different marriages (art. 931 SCC)[30]. The children of the deceased shall always inherit from him in their own right, dividing the inheritance in equal shares (art. 932 SCC)[31]. In the absence of children and descendants of the deceased, his ascendants shall inherit from him (art. 935 SCC[32]). The parents shall inherit in equal shares, and should only one of them survive, he or she shall succeed the entire estate of the child (arts. 936[33] and 937 SCC[34]). In default of a parent, the ascendants closest in degree shall inherit (art. 938 SCC)[35]. The grandchildren and other descendants shall inherit by right of representation, and if any one of them has died, leaving several heirs, the portion pertaining to him shall be divided among the latter in equal portions (art. 933 SCC)[36]. The right of

[29] The legal or intestate succession is ruled by chapter 3, Title IV, Book III PCC (arts.960-1014).

[30] This article corresponds to art. 979 PCC.

[31] This article corresponds to art. 980 PCC.

[32] This article corresponds to art. 985 PCC.

[33] This article corresponds to art. 986 PCC.

[34] This article corresponds to art. 987 PCC.

[35] This article corresponds to art. 987 PCC.

[36] This article corresponds to art. 982 PCC.

representation shall always take place in the direct descending line, but never in the ascending one (art. 925.1 SCC[37]). In the absence of descendants and ascendants, and before collateral relatives, the surviving spouse shall inherit (art. 944 SCC)[38]. In the absence of descendants, ascendants or a spouse, the Law calls the collateral relatives until the fourth degree. Brothers or sisters and children of brothers or sisters shall succeed preferentially to that of other collaterals (art. 946 SCC)[39]. In default of persons entitled to succeed in accordance with the abovementioned provisions, the State shall inherit the whole estate after liquidating it (art. 956 SCC)[40].

2.3. Philippine classification of legal heirs

On the Philippine side, this regulation is a little more complicated, as far as in spite of the fact of keeping the same principles as the Spanish law, however it offers a total of 25 possible combinations, in accordance with the interpretation of Prof. Ruben Balane[41]. We can summarize these combinations stating that they follow the basic rules applied to the forced or compulsory heirs, abovementioned. In addition, the intestate succession of collaterals has been reduced from the sixth degree that was established in the original version of the SCC in 1889 to the fifth degree of kinship, while the Spanish one to the fourth degree, and finally, if the only existing relatives are beyond the fifth degree, the heir will be the State.

III. JUSTIFICATION OF THE FORCED SHARES OR "LEGITIMAS" IN THE CURRENT SPANISH AND PHILIPPINE SUCCESSION LAWS

In the remaining articles both systems maintain the same rules on Succession Law. This resemblance allows us to make a joint study in order to analyse their adaptation to the new demands of the real society in accordance with the specific peculiarities of each community. Undoubtedly, the issue regularly discussed by the academics is whether maintaining the forced shares established in the traditional Succession Law is justified. This is the big issue in vogue. In fact, we find very diver opinions between a wide range of professors. There are supporters of the current system such as Garrido

[37] This article corresponds to art. 972 PCC.
[38] This article corresponds to art. 993 PCC.
[39] This article corresponds to art. 995 PCC.
[40] This article corresponds to art. 1010 PCC.
[41] Balane, Rubén F., *Jottings and Jurisprudence in Civil Law*. Succession, Central Book Supply INC, Quezon City, 2016.

Palma[42], as well as professors that would prefer to reduce them significantly, like Arroyo i Amayuelas[43], or others that directly seek their abolition, and refer to the forced shares as "relics"[44]. On the Philippine side, Flerida Romero estates that when the Civil Code of 1950 came into effect, the system of legitimes was preserved, taking into consideration the customs and traditions of the Filipino people and for the sake of family solidarity. She adds that this legislative option was made to follow the Latin humanist tradition[45].

Now, we would like to consider the alleged reasons for this debate, in order to analyse what could be an optimal proposal for a future amendment of the regulation in the case of the Spanish and of the Philippine Succession Laws.

It is alleged that the current succession law implies a truly limiting system of the autonomy of the testator. In most of the cases the law delimits his capacity to only dispose of a limited share of the estate. In the Spanish model, the testator can only freely dispose of a third share of the estate if there are children or descendants; as well as his or her liberty to testate is also considerably limited if there are no descendants, but ascendants.

1. *Historic background*

1.1. Historic sources

The reason for the current Spanish system of "legítimas" or forced shares is our legal tradition. It is an inheritance of *Las Partidas* and the *Fuero Real*

[42] Garrido de Palma, Víctor Manuel, "Soluciones prácticas en materia de legítimas", in *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuteres. Cizur Menor, Navarra, 2019, p.139.

[43] Arroyo i Amayuelas, Esther, "Pflichtteilsrecht in Spanien", en *Reformfragen des Pflichteilsrecht*, Colonia, 2007, p.270 y ss.

[44] Sonnekus, "The New Dutch Code on Succession as Evaluated Through the Eyes of a Hybrid Legal System", *Zeitschrift für Europäisches Privatrecht*, 2005, pp. 71, 84.

[45] Romero, Flerida Ruth P., "Latin humanism in the Legal System of the Philippines, *Phil.L.J.* Vol.73, 1999. (pp.643-661), pp.652-657. In fact, the Roxas Code Commission justified the adoption of provisions and precepts of the Philippine Civil Code approved in 1949, on those grounds: "The Philippines, by its contact with Western culture for the last four centuries,is a rightful beneficiary of the Roman Law, which is a common heritage of civilization. For many generations that legal system as developed in Spain has been the chief regulator of the juridical relations among Filipinos. It is but natural and fitting, therefore, that when the young Republich of the Philippines frames its new Civil Code, the main inspiration should be Roman Law as unfolded and adapted in Spain, France, Argentina, Germany and other civil Law countries…" Rivera, Juan F., *The Father of the First Brown Race Civil Code*, Quezon City, 1978, pp. 35-36.

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that in turn were very influenced by the succession system established by Visigothic and Roman Law[46]. The Germanic people considered that belonging to the tribe, described as "sippe", implied that each member was a co-owner of any goods, that is to say, it was a universal co-ownership property system[47]. Therefore, when a member of the "sippe" died, the goods

[46] In Rom, the testament had to appoint a heir, if not it was null and void. In the primitive Lex XII Tabulas V,1 gives an absolute power to the *pater familias* in order to decide how to distribute the estate. However, the evolution of Roman Law determined the existence of certain portions *"portio debita"* in favour of the so called force heirs.

[47] García de Valdeavellano, Luis, *Curso de Historia de las Instituciones españolas: de los orígenes al final de la Edad Media*, Ed. Revista de Occidente, Madrid, 1968, pp. 168 y ss. and Lacruz Berdejo, José Luis, *Elementos de Derecho Civil*, Tomo V, Sucesiones, Madrid, 2007, pp. 312 and ff. In the old Germanic Law it was not possible to make a testament as far as "Solus Deus heredem facere potest, non homo".

[I]f fact the Code of Euric (470 A.D.) ruled Succession Law in chapters 220 to 336. This Code allowed the donation "mortis causa" that could be revoked in case of ingratitude. Daza Martinez, Jesús "Portio debita y comunidad familiar en cuanto claves interpretativas de una síntesis histórico-comparada en materia de liberalidades mortis causa", in *Actas del IV Congreso Iberoamericano de Derecho Romano*, Orense, 1998.

[M]oreover, the Breviary of Alarico also named Codex of Anianus also ruled on this matter. This Code based on Roman Law was adopted just a quarter of a century before the Justinian's Corpus were drafted in 530-533 A.D.

[F]inally, the *Liber Iudiciorum* o Fuero Juzgo, made between 640 and 701 A.D., and that contained a law for all the citizens of the kingdom. This vast Code ruled in deep the Succession Law, being the reserve portion large: 4/5 of the estate, with a portion allowed as betterment or "mejora" of 1/3 share, and a preferential order of heirs. These specific succession rules were introduced by the *Lex Dum Inlicita* of Chidasvinto, circa 643-644. From this moment the "legitime" in favour of children was 4/5 of the whole estate, and it was introduced a betterment or "mejora" of 1/3 of the estate. These were fixed portions irrespective of the number of children, and there were no other forced heirs: "Tomo omne libre é toda mujer libre que non an filos, ni nietos, ni bisnietos Fagan de sus cosas lo que quisieren", Fuero Juzgo 4.2.21. González López, Rodrigo, *Precedentes romanos de la regulación de las legítimas en el Código Civil español y en la vigente Compilación de Derecho civil de Galicia*, doctoral thesis directed by Luis Rodríguez Ennes y Guillermo Suárez Blázquez, Universidad de Vigo, p.332; and . Sánchez Román, Felipe, *Estudios de Derecho Civil*, Vol.1 Madrid, 1899 p.188.

[I]n addition, we can refer to the practice of *mayorazgo*, that from the Middle Age until its abolition in 1820 frequently left the oldest son as sole heir. In the *Fuero Real* of Alfonso X, the portion reserved for descendants was fixed at 4/5 of the estate. However, 1/3 of the total estate was disposable as betterment or "mejora". There were no provision granting legitimes to ascendants. This model was drastically changed in *Las Partidas*, adopted in 1255. The legitimes of descendants were reduced to either ½ or 1/3, depending on the number of children. In addition, legitime were granted to ascendants. In the Leyes de Toro of 1502, all kinds of illegitimate children were excluded by legitimate descendants from the succession of the mother, but in the absence of legitimate descendants, these illegitimates, whether natural or spurious, succeded to the mother's estate to the exclusion of

simply ceased to belong to him and continued to belong to the rest of the tribe, vice versa when a new member was born he became a new co-owner of the common goods. This system would give rise to the "reserves" of the Visigothic legislation. Completely different from the Roman system founded on individualism.

In Rome, there was initially no legitime and the testator was able to distribute his assets according to his will. In a later period, the legitimate was limited to a quarter of assets (*Quarta Falcidia*, Nov. 18, Cap.1), excluding debts, and at the time of Justinian was subsequently expanded to one-third if the legitimate heirs were four or less, and half if more. (Nov. 18, Cap.1). It is interesting to explain the reason why these shares of legitime were established in Justinian Law, the eighteenth novel of the year 536 AD points out that it was in order to protect the children because of the injustice that would imply that, regardless of the number of these, a quarter of the inheritance would have to be shared and the other three quarters of the inheritance may be acquired by "non-family third parties "[48]. An important difference was that the Visigothic "legítima" where fixed irrespective of the number of children, and the Justinian one flexible.

The Fuero Real from 1252[49] inherited the rules of the *Liber Iudiciorum*, (forced shares of 4/5 of the estate in favour of children, with a portion allowed as betterment or "mejora" of 1/3). However, in the "Siete Partidas"[50] the betterment or "mejora" that came from the *Lex Dum Inlicita* of Chidiasvinto was abolished, as far as this new regulation followed the Roman model. In fact, González López[51] considers that the Partidas returned to the *Quarta Falcidia*, therefore, if the relatives of the testator would receive one quarter of the estate, it was not possible to challenge any gift of legacy.

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legitimate ascendants. It also rules the betterments or "mejoras" and establishes that it can be given either by last will or by contract. See Balane, Rubén F., *The Spanish Antecedents of the Philippine Civil Code*, Quezón City, 1979, pp. 13-41.

[48] Nov. 18, Prefacio.

[49] The Fuero Real was made between 1252 and 1255 at the behest of King Alfonso X. In respect to the "legítima" the Fuero Real 3,5,9 says: *"Ningún omne que ouiere fiios o nietos o dent a Ayuso que ayan derecho de heredar, non pueda darn in mandar a su muerte más de la quinta part de sus bienes; pero si quisiere meiorar a alguno de los fiios o de los nietos, puédalos meiorar en la tercera parte de sus bienes, sin la quinta sobredich que pueda dar por su alma en otra part do quisiere e non ellos".*

[50] The greatest Middle Age legal corpus, that was initiated on 23 of June of 1256 at the behest of King Alfonso X: "*este libro fue comenzado a componer víspera de San Juan Bautista, a cuatro años e veinte y tres días andados del camino de nuestro reinado*".

[51] González López, Rodrigo in *Precedentes romanos*... p.382.: Part.VI, Title XI: "Cómo se puede menguar la manda e hasta que cuantía que dicen en latín, falcidia o debitenum ronorum subsoidum o trebelliánica".

Consequently, in respect to the forced shares or "legítimas" there was a contradiction between the "Fuero Real" and the "Siete Partidas" as far as both regulations were in force at the same time. This contradiction was solved by the Ordenamiento de Alcalá and the Leyes de Toro[52], that established the priority of the "Fuero Real" over the "Siete Partidas", when there was a conflict between both regulations. In fact the Ley XVIII of Toro maintained the third share of betterment or "mejora", and the Ley XXVIII reduced the free disposal share of the testator to a fifth of the estate. In addition, the Ley XVIII of Toro allowed the testator to give the betterment or "mejora" to any of his/her descendants and not necessary the children. Finally, these regulations on "legítimas" were incorporated in the Novísima Recopilación (Nov. Rec. X,6)[53].

The Project of SCC of 1851 called the "García Goyena Project" introduced a system of flexible forced shares in favour of the children. Being more than one, the forced share would be 3/5 of the estate; but being only one child, the forced share was reduced to 2/3 of the estate. In the absence of children, the forced heirs would be the ascendants.

Finally in 1889 the SCC applied the 2/3 forced share to all the children and descendants, in such a case only 1/3 as a free disposal share depending on the will of the testator[54]. The betterment or "mejora" was kept as 1/3 following a tradition initiated in the year 643 A.D. In the absence of children, the forced heirs would be the ascendants, and the widowed spouse received an usufruct over a variable share of the estate when it coincided with descendants and ascendants.

1.2. Forced share or "Legítima" in Spanish territories with their own Civil Law

In the Spanish historical territories with their own Civil Law, the legitime has been regulated in a more open manner. In fact, there is a territory where the the will of the testator is absolutely respected: It is Navarre[55] where the legitime is formal, but not material, although it maintains the so-called "legal usufruct

[52] The 83 leyes de Toro were enacted on March 7th 1505.

[53] Novísima Recopilación de las Leyes de España enacted on July 15th 1805.

[54] Curiously, González López, Rodrigo in *Precedentes romanos*… p.345 quotes Maurice Gaudefroy-Demombynes, *Mahoma*, Madrid, 1990, to explain that in the Koranic regulations the legitima or "faraid" is really difficult to calculate, but the general rule is that a share of the two shares of the estate is reserved for certain forced heirs, and only one third is leave to the free will of the testator.

[55] Ruled by the Ley 1/1973 de 1 de marzo that enacted the Compilación del Derecho Civil Foral de Navarra.

of fidelity" (art.254 FN). In the Basque Country, the 2015[56] reform extended the civil citizenship to all the citizens of the Basque territory including the city of Bilbao, however same differences are kept in specific territories (like the so called "*reserva de bienes troncales*"). A general forced share reduced to one-third of the patrimony of the hereditary estate has been established. This collective "legítima" is in favor of children and descendants and the testator can decide which forced heir receives it and which does not. The reform has also eliminated parents from the list of forced heirs. If the testator leaves descendants, the legitime of the surviving spouse and of the common law partner consists of one-half of the estate in usufruct, and if not, of two-thirds. The Aragon law[57], although it replicates what is established by this point by the Civil Code, allows the testator to distribute the legitime among the forced heirs, being a collective legitime. That is to say, the testator can distribute it among the children and descendants in an unequal manner according to his own criteria provided that he grants the descendants the portion determined by law.

In the Balearic Islands[58] and for the islands of Mallorca and Menorca, the civil regulation provides that the legitime is a part of the property, maintaining the Justinian rule. If there are four children or less, the legitime shall amount to one-third, and if they are more, half of the hereditary estate. However, on the islands of Ibiza and Formentera, the legitime is a credit, and not a part of the goods of the hereditary estate, maintaining the Justinian rule. If there are four children or less, the legitime shall amount to one-third, and if they are more, half of the hereditary estate, but the adopted children are not considered forced heirs, unless the natural children of one spouse were adopted by the other. Another difference is that while in Mallorca and Menorca the spouse is considered a forced heir, in Ibiza and Formentera they are not.

In Catalonia and Galicia[59] the legitime consists of a right of credit -*pars valoris*- that the forced heir holds against the heir. In Catalonia the forced share of descendants is one quarter, and in the absence of descendants, the forced heirs are the parents -not the rest of the ascendants. However, in Galicia only the descendants are forced heirs. In Catalonia[60], if the surviving spouse has no economic resources, he/she is entitled to obtain a maximum of

[56] Ley 5/2015 de 25 de junio del Derecho Civil Vasco.

[57] Title VI of the Book III of the "Decreto Legislativo 1/2011, de 22 de marzo, del Gobierno de Aragón, that enacted the "Texto Refundido de las Leyes civiles aragonesas".

[58] Decreto Legislativo 79/1990, of 6th of September, that enacted the "Texto Refundido de la Compilación del Derecho Civil de las Islas Baleares" and the Ley 3/2009, of 27th April that modifies this Compilation.

[59] Ley 2/2006, of 14th June that rules the Civil Law Galicia.

[60] Ley 10/2008 of 10th July, on Succession Law, that regulates the book IV, Title V, of the Catalan Civil Code; and Ley 25/2010, of 29th July, that rules the Book II on Person and Family.

a quarter of the liquidated hereditary assets. We must stress that the new Catalan legislation limits the possibility of considering donations as inofficious and purchases and sales made by simulation during the ten years prior to the opening of the inheritance.

1.3. The forced shares in accordance with the Spanish Constitutional principles

The phenomenon of inheritance responds to the need to maintain certain legal relationships of the deceased after his death. Therefore, it is necessary to attribute a specific destination to the rights and goods which arise by these relationships when he dies. This implies the recognition of a minimum field of action for the individual in the private sphere, and the idea of the transferability of legal relations, but not all of them because the personal ones normally are extinguished when the person dies

In fact, the hereditary phenomenon has been admitted by all civilizations. The lawmaker may decide to provide, without hindrance or restrictions, the transmissibility, or he can refuse the power of the deceased to transfer rights and assets (abolition of the inheritance), or finally, he can opt for an intermediate system

The Spanish Constitution of 1978 expressly enshrines in its text the right to inheritance with the right of private property (art. 33.1 CE). However, given the imprecision of the constitutional mandate, it is the laws that develop this right and determine its scope. In principle, art. 33.2 EC only refers that the social function must guide these rights (property and inheritance). In fact, the Spanish Constitution does not establish who must be the inheritor. Therefore, it is an open formula that would allow different options.

1.4. Legitimate in other European territories

While traditionally there was complete liberty to make a will in England and Wales, after the 1938 reform, this liberty is not absolute. As a result of this reform the "family provision" was introduced and it gave the judge a great liberty to decide whether despite not having provided in the testamentary dispositions any part in favour of the family, in which they are entitled to receive part of the value of the estate[61]. A subsequent reform of the Act was made in 1975[62]. In accordance with this reform the decision of the judge

[61] Vaquer Aloy, Antoni, "Reflexiones sobre una eventual reforma de la legítima", *InDret,* Barcelona, julio, 2007, pp.3-6. Family Provision Act of 1938.

[62] Inheritance -Provision for Family and Dependants- Act of 1975 into force in England and Walles from April 1st 1976. In any case, the liberty of the testator may be limited by the "propietary estoppel" doctrine as in Suggit v. Suggit (2012) WTLR. 1607.

depends on different variables such as the resources and needs of the relative, the obligations and liabilities of the deceased, the amount and composition of the estate, the disability of the relative, the behaviour of the relative, the reasons of the deceased to exclude the relative from the estate, and the state of mind of the deceased. The only persons who can request this "family provision" are the spouse, the ex-spouse who has not remarried, the live-in partner, the children of the deceased and other persons whom the deceased had treated as his own children, as well as the dependents of the deceased. The reform does not intend to replace the maintenance duties, although it is largely determined as a consequence of the relative's needs, not being this the only observable criterion. In addition, the "surviving spouse standard" and the "maintenance standard" were introduce in 1975. Therefore, this system does not attribute forced shares in favour of specific types of relatives; however, it implies a duty to be reasonable with close relatives when distributing the estate.

A close option is what we see in other legal systems in which fixed shares are included. We refer to the cases in which the forced heirs can claim a fixed share if they are in a situation of necessity, as provided in Poland[63], Estonia[64], Slovenia[65] or Lithuania[66].

However, most European countries follow systems similar to the Spanish one, in which there are forced shares in favour of certain relatives. These relatives are normally the descendants, and frequently the spouse and ascendants. The amount of the share can vary according with the number of relatives with a right to forced shares, and when granted for children, usually equally distributed[67].

The "legitima" or forced share can be configured as a part of the goods of the estate or as a part of a value or a credit against the heirs or the representatives of the inheritance. The different European legal systems opt for one or another possibility, although it is noted that the most recent regulations choose the second possibility[68].

[63] Arts. 991 to 1011 of the Polish Civil Code, that consider forced heirs only to the underage descendants or the descendants, ascendants or widowed spouse incapacitated to work (art. 911).

[64] Ruled in the art. 104 of the Regulation of the Law of Succession of Estonia, reserves a share of the estate to the children, parents or spouse that were depending on the deceased when he/she died.

[65] Ruled in the arts. 25 and 26 of the Regulation of the Law of Succession of Slovenia.

[66] Art. 5.20 of the Civil Code of Lithuania, that reserves an half of the estate in favour of children, parents or spouse that were depending on the deceased when he/she died.

[67] We can include in this group most of European countries.

[68] For example, Germany and Austria, where is possible that the testator contract with the forced heir the renouncement of his right to the forced share. The Succession

2. *The controversial doctrinal debate about the justification of the forced shares*

Once we have studied the current Succession Law in the Philippines and in Spain from a positivist perspective, we propose now to carry out a deeper analysis from another perspective. This is not going to be a traditional study focused on the conflicts between the rights of the forced heirs "legitimarios", and the liberty of the testator. We offer here a wider perspective based on a philosophic approach. In fact, we would like to contribute something new to the traditional academic debate. Therefore, we will dive deeper into the philosophical arguments to try to find reasons to maintain or reduce or remove the forced shares from our Civil Codes. This research is connected with the need of the Law to act as a tool to achieve certain purposes. In fact, Civil Law could be only a mechanism to solve conflicts and to apply the "*ius suum quique tribuendi*" principle. However, the lawmaker should also establish the framework in which a society may evolve. This study seeks to identify this framework in the sphere of succession law.

2.1. Doctrinal positions that limit or abolish the forced shares

As aforementioned, it is clear that the system of legitimes in the Spanish Civil Code does not respond to a Constitutional mandate. Article 33 of the Spanish Constitution guarantees the right to inherit, but is not among the fundamental rights and therefore it does not benefit from the guarantees granted to the rights and freedoms covered by article 14 and those mentioned in the first section of the second chapter, title one, of the Spanish Constitution.

Having said that, could the system of legitimes in Spain or in the Philippines be suppressed or limited? Germany has been the only legal system that has brought this matter to the Constitutional Court, in which the ruling of April 19, 2005 held that the legitimes should be maintained although they could be widely restricted. The German Constitutional Court concluded that there was no mandate that would obliged the granting of equal treatment to children in an inheritance, although the constitutional protection of the right to private property includes a minimal participation of the children in an

Law of Austria has been reformed in 2017, as a consequence the testator can impose more encumbrances, conditions and substitutions on the forced shares, the ascendants are no longer forced heirs. See Chrustandl, Gregor, "La legítima y la libertad de testar en Alemania y Austria: tendencias actuals" in *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuteres. Cizur Menor, Navarra, 2019, p.220.

inheritance[69]. However, because of the reasons stated above, we do not share these arguments which in any case do not apply to Spain where, in fact, we have a territory that excludes material legitime (Navarre).

A) Forced share of descendants

Part of the doctrine alleges that the system of legitimes established by the Civil Code in 1889 responded only to a principle of cross-generational solidarity. If we accept this position, it is easy to conclude that the social reality then in force is not our current reality. In fact, in 1889 the average life expectancy was around forty-five years; and there was no welfare State that protected minors and elders. The absence of any social protection implied that once the parents died, usually when their children were still minors, the latter could be left homeless and without access to any kind of resources. That is why the system of legitimes provided in 1889 was justified, in part, to ease this situation by allocating at least two-thirds of the hereditary estate to the descendants. It was a matter of prioritizing these vulnerable family members against the arbitrariness of a testator who could try to ignore them and transfer his assets to a non-family member. From this perspective, these legal legitimes could be interpreted as an extension of the duties imposed by parental responsabilithy and support of the elderly.

Following this perspective, it is said that the social reality has undergone a Copernican turn. Currently the average life expectancy is around eighty years and the State guarantees the social protection of citizens. In the case of minors article 49 of the Constitution describes as an "integral protection". Consequently, from the perspective of the authors that maintain this opinion, the premises in force in the nineteenth century that justified the adoption of a system of legitimes in which the disposal capacity of the deceased was quite limited, today no longer exists. In addition, it is stated that in our European countries we do not find cases similar to ours in which margins have been kept so narrow for the free disposal of the testator. Consequently, their conclusion is that it is mandatory to modify the current system of legitimes.

B) Forced share of ascendants

Some doctrines indicate that in the case of agreeing with the principle of the forced share of the ascendants, it should be limited to the parents. Others on the contrary are against any legitime in favor of parents. The reason is that the situation of need in which parents could be found is already sufficiently covered by different legal procedures. First, due to the fact that a welfare State provides the protection of all citizens through an integral system. But also, the

[69] BVerfG NJW 2005, 1651

Civil Code itself in its articles 142-153 SCC regulates the right to support that includes ascendants. It is stated that in practice there is a generation around 40 to 60 years old that is financing the coverage of their elders through the taxes, but that they are also being required to cover their needs directly through the so-called "kinship support". From this perspective, this generation is paying twice for the same coverage. It is argued that it should be a duty of the welfare State, or of the relatives, but not of both. Paying taxes to the State to provide pensions, health care and so on to parents and being able to be legally obliged to pay for support with respect to them could be considered abusive because they put excessive financial pressure on the children who comprise this intermediate generation. Following the doctrines that defend this position, the needs of parents are covered by one way or another, or rather both, and it should not be necessary forced inheritance right in their favour.

In light of this, parents should only be forced heirs when there are no other legal means already provided to cover their needs. This seems excessive. In addition, when parents reach retirement age, they are not only protected by a public pension system, and in a large number of cases by a private one. This is another reason alleged for suppressing or limiting the legitime of the parent.

C) Forced share of the widowed spouse

Without a doubt, another situation that deserves more reflection is the legitime of the widowed spouse. Should he/she inherit before the descendants and descendants of the deceased? Should he/she be in the same position as the children? What should be the amount of the share of the widowed spouse? It should it be a usufruct right or an ownership one? In any case, it does not seem appropriate to assimilate it to a right to support to be decided by the judge according to circumstances for the unpredictability that it would cause, such as it occurs under English Law when there is a divorce or a dissolution of a marriage.

Perhaps a solution is to legally envisage a lifetime usufruct over the conjugal home, in order to give a legal response to the problem that usually occurs when the only hereditary estate is a share of said family dwelling and we must resort to the "*cautela socini*" solution. If the right to use the family dwelling is safeguarded, the said lifetime usufruct could be extended up to a percentage of the inheritance. This percentage could range between 30 and 50 per cent of the inheritance, provided that the widowed spouse can enjoy the family dwelling the rest of his life. If not, the usufruct could excess the aforementioned percentages[70].

[70] About the Cautela socini clause you can see: De Torres Perea, José Manuel, *Spanish Succession Law through Forty Significant Judgements,* ed. Aranzadi Thomson Reuters, Cizur Menor, 2019. Chapter 6, I-1 "Cautela Socini clause."

3. *Rethinking this new doctrinal approach about the system of forced shares in our Succession Laws*

3.1. Current approach

We can summarize the current approach by referring to three different focuses to this matter. On the Spanish side, an advocate for the majority one, Vaquer Aloy[71], suggests a reduction in the number of forced heirs, should apply only to children, or their descendants in case of representation and the spouse. Moreover, he considers that children should only be forced heirs when they are minors, or economically dependent. Therefore, he advocates the extension of the right of children to be forced heirs up to the age of 25 as a general rule. The only exception being when they have been declared incapacitated when the inheritance was opened or in the following few years (5-10). Finally, he considers as appropriate to convert the forced shared rights into a simple credit right and establish the pecuniary payment of forced shares.

In this way the Spanish Civil Law Professors Association has made a proposal to modify the SCC[72]. In this proposal the forced share of children is reduced to one half of the inheritance, and the betterment or "mejora" to a quarter; unless there is only one child, in which case the shared force would be only one third of the estate. The forced shares of ascendants is reduced to one third of the inheritance, with the exception of there being only one ascendant, or coinciding with the spouse, in which case it would be reduced to one quarter. The proposal also includes the limitation to reduce "inofficious" donations made by the deceased to third parties to those that had been done during the last 20 years prior to the opening of the inheritance. In this case, it is not considered to be available option to convert the forced shares into simple rights of credit. In contrast the situation of the widowed spouse is kept as it is currently established in the SCC, being the only exception the possibility to extend the usufruct to the whole estate, what is in fact a currently common notarial practice through the "cautela socini"[73].

[71] Vaquer Aloy, Antoni, "Reflexiones sobre una eventual reforma de la legítima", *InDret,* julio, 2007 pp.14 y ss.

[72] This version was approved in Aranjuez in the 19th meeting of the Association on 20th May 2017.García Aipurura, Gorka, "En torno a la revisión de las legítimas: casos vasco y estatal", *InDret,* octubre 2017, p.17

[73] As Parra Lucán, María Ángeles refers, it is an attempt to widen the liberty of the testator, without breaking with the current system. "Las legítimas en la propuesta de Código Civil elaborada por la Asociación de Profesores de Derecho Civil", in en *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson

On the Philippine side, John Boomsri Sy Rodolfo[74] proposes also to reduce the forced shares or ·"legitimas". He adds that the different combinations provided by law in the sharing of the hereditary estate can lead to absurdity, especially when the portions are arbitrary provided for and simply based on the rough estimation of the actual need of the recipient compulsory heir…"

The second approach which is defended by another doctrinal sector, is the one suggested by Sonnekus, that directly lobbies for their abolition, and refers to forced shares as "relics"[75]. As part of this approach it has been said that the statistics do not confirm that the families of the Spanish territories subjected to a system of forced shares are better structured that the families living in territories where there is absolute liberty to dispose of the estate. In addition it is said that it cannot be proved that in the territories where there are not forced shares people are more individualist[76]. My opinion is that this argument is out of focus. The matter is not to analyse the statistic consequences of a specific succession system, but the capacity of this system to protect legitimate interests, and the capacity to serve as a last resort when the social protection is in risk of decline. Galicia Aizpurua even affirms that in the debate about the reform of the forced shares we can find an atavistic element "algo atávico", connected with an instinctive attachment to one´s own system. A atatement, that he himself qualifies as "empirically undemostrable"[77].

Reuteres. Cizur Menor, Navarra, 2019, p.193. In this sector we can include Cañizares Laso, Ana, who proposes the removal of forced shares of ascendants when they coincide with the widowed spouse or the reduction of the descendants forced share. "Legítimas y libertad de testar" in *Estudio de Derecho de Sucesiones. Liber Amicorum T.F. Torres García,* Directors: Andrés Dominguez Luelmo and María Paz García Rubio, Coord. Margarita Herrero Oviedo, ed. La Ley, Madrid, 2014, pp.268-269.

[74] Rodolfo, John Boomsri Sy, "Freedom in Death: Expanding the Disposing Power of the Decedent and Providing for a More Rational Sharing of Legitimes" Ateneo Law Journal, Vol.51, pp.584-585 and 594.

[75] Sonnekus, J.C. "The New Dutch Code on Succession as Evaluated Through the Eyes of a Hybrid Legal System", *Zeitschrift für Europäisches Privatrecht*, 2005, pp. 71, 84. Part of the Spanish doctrine defends the removal of forced shares: Maragiños Blanco, Victorio, "La libertad de testar" *Revista de Derecho Privado*, 2005, pp. 27 and ff , Calatayud Sierra, Adolfo, "Consideraciones acerca de la libertad de testar" Academia Sevillana del Notariado, Tomo IX, Ed. Edersa, Madrid, 1996, p. 259 and ff., and de la Esperanza Rodríguez, Pablo, "Perspectiva de la legítima. Notas para una possible revision", *Libro Homenajea D. Ildefonso Sánchez Mera*, Tomo I, Ed. Colegios Notariales de España – Colegio de Notarios de A Coruña, Madrid 2002, pp.1097 y ss

[76] Galicia Aizpurua, Gorka, "En torno a la revisión de las legítimas: casos vasco y estatal", *InDret*, octubre, 2017, p.5.

[77] Galicia Aizpurua, Gorka, "En torno…" p.6. In fact, he defends that the reform of the Basque Succession Law in 2015 is only a transitory measure. A provisional sit-

In any case, if the option is to eliminate the forced shares in favour of relatives, in order to protect individualism and freedom and overcome the family model as the social core, we could also defend the removal from the list of intestate heirs the relatives and leave only the State[78].

Furthermore, we do not agree that eliminating forced shares would be an acceptable option. Moreover, even in the Common Law systems in which there does not exist forced heirs, and the will of the testator is absolute, some limitations can still apply.

Finally, the third doctrinal position as mooted by Bermejo Pumar[79], Garrido Palma[80], Espejo Lerdo de Tejada[81] and others[82], is the proposal of a calm reflection before giving opinion in this heated doctrinal debate. The Law should face this dilemma between liberty to make wills and the system of forced shares. In fact, they support that this doctrinal debate should only be solved with solid arguments, after a deep study of the whole succession law, until then the best option would be to leave things as they are. Also, Padilla refers that the established system of the legitime and its legal safeguards

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uation between the previous system mainly based on the "forced shares" of the Spanish Civil Code, and the future one, that it would lead to the absolute removal of shares portions currently existing in the "tierra de Ayala" to the whole Basque Country. (p.15).

[78] In fact Manuel Espejo Lerdo de Tejada defends the fact that the forced shares are applicable not only to the testate but also to the intestate succession, being a primary right of the successor. The infringement of the forced shares rules does not imply the automatic opening of the intestate succession. *La legítima en la sucesión intestada,* Doctoral thesis, Seville, 1994. pp.598, 606. See, Espejo Lerdo de Tejada, Manuel, Código Civil Comentado, Coord. Valpuesta Fernández, R., Dirs. Cañizares Laso, A., de Pablo Contreras, P., Orduña Moreno, F.J. Vol. 2, 2011. Arts. 808-810, pp.789-801.

[79] Bermejo Pumar, María Mercedes, "Legítima crediticia" in en *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuteres. Cizur Menor, Navarra, 2019, pp.117-118.

[80] Garrido de Palma, Víctor Manuel, "Soluciones prácticas en materia de legítimas", in *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuters. Cizur Menor, Navarra, 2019, p.139.

[81] Espejo Lerdo de Tejada, Manuel, *Las legítimas y la libertad de testar: Perfiles críticos y comparados…* , pp.23-25.

[82] Other authors are in a middle position, for example, Torres García, Teodora Felipa, en "Legítima, legitimarios y libertad de testar (síntesis de un sistema", en *Derecho de Sucesiones*. *Presente y futuro*. APDC, Murcia, 2006. p. 227. She takes in principle a favourable view towards the current *status quo* of the forced share of descendants in SCC, but not necessary towards the forced share of ascendants.

follows an underlying philosophy in rewarding family cohesion and unity with the consequent protection of the rights of children[83].

It deserves special attention the opinion of Miquel Gonzalez, who is one of the most relevant current civil law professors in Spain. He states that previously to any attempt to reform the system of forced shares or "legítimas" it would be necessary a deep knowledge of the current Law. The reason is that the rules of succession law are interconnected. Therefore, any amendment of one norm may cause discrepancies. In addition, he considers that "*de lege ferenda*" is necessary to take into account not only the opinion of academics, but mainly the social convictions. There is a large number of Spanish notaries that hold a dissenting opinion on the current legal system of forced shares ruled by the SCC. However, Miquel states that these opinions should have not a decision-making authority. In respect to the notaries, it is normal that they contemplate the forced shares as a brake when explaining rights to the testators as a limiting factor; but these opinions are not the only one to take into consideration. In respect to the testators, that sometimes also dissent from the current system, it is normal that they complain of not being free when making the testament, but again, their opinion is not the only one to take into consideration. Miquel considers that the doctrine currently interprets the SCC against the forced share, what is in fact an interpretation against the equality and the current law. He adds that the English system of the Family Provision Act implies higher costs than that of the Spanish system of forced shares or "legítimas", because the latter is simpler and cheaper. In fact it is more cost effective[84].

[83] Padilla, Ambrosio, "A Study of Some Salient Conflicting Opinions of Two Great Civil Law Commentators, Manresa and Maura." *Phil.L.J.* Vol,14, 1934, (pp.51-83), p.82.

[84] Miquel González, José María, "Reflexiones sobre la legítima", in *Estudio de Derecho de Sucesiones. Liber Amicorum T.F. Torres García,* Directors: Andrés Dominguez Luelmo and María Paz García Rubio, Coord. Margarita Herrero Oviedo, ed. La Ley, Madrid, 2014, pp.985-987. He adds other arguments: First, that Montesquieu defended the freedom of the testator in order to apply the Law Sálica, to prevent the concentration of all the estate in favour of the first-born male. Second, that the forced shares were introduced in the Roman law as a form of compassion (*officium pietatis*) against the iniquity of some parents who neglected their duties to their children. Third, that even in English Law it has been necessary to introduce the provisions of the *Family Provision Act*. Fourth, that the forced shares (*reserve*) were a useful tool in France against the aristocracy and the accumulation of wealth. It was considered as a guarantee to ensure the equality between the children. Fifth, that the German lawmaker introduced the forced shares in the BGB deliberately, in order to copy from France a fairer distribution system of wealth. Sixth, the forced shares or "legitimas" may be considered a system to incentivize the economic collaboration between family members, and avoid external costs as mentioned by Schoepflin. "Economic Aspects of the Right to a Compulsory Portion in French and German Law of succession", in *German Working Papers in Law and Economics,* 2006, paper 34, p.4 (quoted by Miquel).

3.2. Constructive criticism

A) Analysis of the three traditional arguments in favour of the removal of forced shares

Given this brief outline of the different doctrinal positions, we realize that those advocating to abolish forced shares are focused in three central ideas: First, that forced shares are against liberty of individuals. Second, that the forced shares have lost their sociological justification and lack of "*opinio iuris*" or public favourable opinion. Third, that statistics reflect that when a person dies, the list of persons who were dependent on him has been reduced in the last decades. This last consequence should be due to two different factors: First, that lifespans are continuing to increase, this means that currently when parents die their children are no longer dependent upon them. Second: that the welfare state guarantees support to the older members of society which are no longer dependent on the family solidarity[85].

We can pose serious questions to these opinions. Is really forced shares against the liberty of individuals? We agree with Bermejo Pumar that the function of the forced share is not to limit the liberty of the testator. This is only a consequence of an institution that complies with its own functions. On the contrary the forced shares or "legítimas" are an expression of the constitutional right to inherit. The referred professor affirms that we cannot base the right to property and to inherit in their social function, because this is equivalent to deny them. As she says pure liberty does not exist, and it is conditioned by circumstances. Liberty is only a basic personal condition, and this basic personal condition is the one that must be protected[86]. Moreover, even if the forced shares should imply a limit to the liberty of the testator, so what? It is not an argument against their admission, the Constitution protects liberty, inheritance and property.

In respect to the second criticism, Rubio Garrido himself, after affirming that the forced shares or "legítimas" have lost their sociological justification,

[85] Galicia Aizpurua, Gorka, "En torno…", p.15, refers that "la existencia de sistema de previsión pública (pensiones de jubilación) y privada (fondos y planes de pensiones)", would allow the removal of the forced shares of ascendants. Vaquer Aloy, A., adds that in the case of children, forced shares should be reduced to the ones in favour of minors and incapacitated ones. (p. 17). Finally, the suppression of any forced share would be based on being unnecessary due to the State social protection system.

[86] Bermejo Pumar, María Mercedes, "Legítima crediticia" in en *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuteres. Cizur Menor, Navarra, 2019, pp.117-118.

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adds that in many territories their elimination would imply a sociologic chaos, with unforeseeable consequences in respect to the social and family cohesion[87]. In any case this is not a consistent argument as far that it is not based on a statistical study, therefore, it is not supported by facts and it must be considered as a mere opinion[88]. In addition to being inconsistent, this argument could be considered malicious. We should not make a legislative decision dependent on a choice determined by the favourable opinion of the public. If so, the elimination of taxes would probably.

The third criticism is a crucial one, therefore we expand further in it. As aforementioned it is said that statistics reflect that when a person dies, the list of persons who were dependent on him has been reduced in the last decades, and in addition, welfare state guarantees support to the older members of society which are no longer depending on family solidarity. However, we consider that this argument can be significant in current Western countries but not in the current Philippine society. Furthermore, we should seriously consider if the current version of the European welfare state model will exist in the near future. It may be that this welfare state, as such as we know today, is unsustainable. On the other hand, the *laissez faire* ideology is overtaking the positions that defend the social function of property and the welfare state not only in the US, but also in the emerging new global order[89]. Finally, we should take into account conclusions of Garrido de Palma when he faces the arguments of the defenders of the removal of the forced shares of children. Garrido affirms that in a Spanish society where the unemployment rate is really high, where the young generation is called "mileuristas" (twixters) due to their lower salaries, family is necessary, particularly in times of crisis[90]. In

[87] Rubio Garrido, Tomás, "Problemas actuales en materia de protección cualitativa y cuantitativa de la legítima" in *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuteres. Cizur Menor, Navarra, 2019, pp.142-143.

[88] López Beltrán de Heredia, C., in *Derecho Civil,* V, Derecho de Sucesiones, Coord. A.M. López, V. Montes and E. Roca, Ed. Tirant lo Blanch, Valencia, 1999, pp. 305 and ff., says that the removal of forced shares in the SCC would attack the social conscience, this is that the descendants cannot be excluded from the inheritance without a reasonable reason.

[89] Statistics inform us that in two of the countries where the welfare state mode has reached its ceiling, like Finland or Japan, the suicide rate is among the highest in the world. Moreover, populism is flourishing in Europe rapidly. In fact, the mass-man of Ortega y Gasset is far from happy with this social model. Something is wrong with this idyllic society. See Ortega y Gasset, José, *La rebelión de las masas*, 1930, editor Domingo Hernández Sánchez, 3ª ed. Tecnos. Madrid. pp.30-33

[90] Garrido de Palma, Víctor Manuel, "Soluciones prácticas en materia de legítimas", in *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francis-

fact, in current Spain, in many cases the only way to access the property ladder is by inheriting it from parents.

Nowadays the fact of having stable employment does not imply an access to a dignified life even in Western countries. Millions of people live in crowed cities subjected under a subsistence economy. This situation coincides with the loss of values in Western societies in this current time[91]. Nowadays the pension system is running at a continuous deficit, and serious questions have been raised about its sustainability in the future. In fact, it is possible that for many people the only possibility to enjoy a dignified retirement in old-age in the near future will be to inheritate the dwelling of their parents. Therefore, it may make sense to be a forced heir "legitimario" even when a person is retired. Therefore, the argument that bases the reduction or removal of forced shares in the existence of a welfare state model and a longer lifespan can be questioned.

We can conclude that the three traditional arguments to claim for the removal or limitation of forced shares are not so strong as it might be thought. Those who want to abolish them, should choose new arguments or reformulate the old ones.

B) Is there a duty to provide a dignified life to close relatives?

Finally, the philosophical question to be answered is if it is reasonable to argue that any person has a duty to provide a dignified life to his close relatives, in fact this is the Gordian knot of this matter. The easy answer in a society that it is dominated by an individualist culture is to deny this obligation

co Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuteres. Cizur Menor, Navarra, 2019, p.139.

[91] Ortega y Gasset, José, in *La rebelión de las masas*…p.32 wrote that "Europe is left without moral". Today this statement is even more true. Currently Riemen writes that "Reason can describe, it can inform us about facts, but it cannot tell us what the moral significance of those facts is, because it does not know what good is or what evil is…. For us only facts count; we have fallen in love with data and information, and because we can no longer know true meaning, the only value we still recognize is economic value… And so everything has to be useful, instrumental, we have to be able to do something with it, because otherwise it's not use to us". He concludes that the important is not the material quantity, but the quality of life. Riemen, Rob, *To Fight Against this Age. On Fascism and Humanism*, W.W.Norton & Company, New York/ London, 2018, p.38. He adds that the paradox is that "he who remains a slave to his desires and does not know how to use his intellect cannot be free. This current European situation take us back in the words of Kierkegaard, Søren, "Our age reminds one very much of the disintegration of the Greek state; everything continues and yet, there is no one who believes in it". *Either/Or. A Fragment of Life.* Part II, edited and translated by Howard V. Hong and Edna H. Hong, Princeton University Press, New Jersey, 1987, p.19.

as a general principle, and only contemplate the parental responsibility duties. However, from a philosophical perspective things are not as simple as they look. The final problem is to determine the height were to set the bar, and what is the reasonable level of dignity to be claimed by any person on the rest of society and especially on his/her close relatives.

Dignity is the clue to answer this question. However, this is not an easy concept. Until the time of Locke any person should be respected on the basis of having a soul and being a son of God. After Kant, the dignity of the human being is based on the fact that human beings are rational beings, this capacity to act autonomously is what gives human life its special dignity[92]. The question is if the link between being rational and having dignity is a really solid one, or only a simple rebuttable presumption[93]. It looks like Kant is the summit in the Western philosophy, and the whole construction of human dignity and human rights is based on this "rebuttable" presumption. Different philosophers deny the Kantian base of human dignity and even claim for basing fundamental rights in another foundation, but not in dignity. In fact, the concept of human dignity is called into question, and new proposals have been submitted.

One of the more interesting contributions to seek a new content for the concept of human dignity, is the one by Amartya Sen. This Nobel prize author develops in *The Idea of Justice*[94] a philosophical approach based on the capabilities of individuals. He refers to the capability that each person has

[92] Immanuel Kant, *Groundwork for the Metaphysics of Morals*, 1785, translated by H.J. Paton, New York, Harper Torchbooks, 1964, p.442. The fact of being a rational being is the basis, and not the soul, to distinguish between humans and animals, and this is the basis for human rights and dignity. Therefore, Kant opens a new approach for this matter, in which human beings are not a means but an end in theirselves. Happiness cannot be the goal of a philosophical construction because it would imply to impose the values of some individuals to others as far as the concept of happiness is a subjective one. Being the individual an end in himself, human dignity could justify the redistribution of wealth.

[93] Harari, Yuval Noah and other different positions, like most of animal activists, deny it as far as humans should not have different rights to that of other evolved animals. Harari says: "Do humans have some magical spark, in addition to higher intelligence and greater power, which distinguishes them from pigs, chickens, chimpanzees and computer programs alike? If yes, where did that spark come from, and why are we certain that an AI could never acquire it? If there is no such spark, would there be any reason to continue assigning special value to human life?" in *Homo Deus, A Brief History of Tomorrow*, Penguin Random House, London, 2015, p.99. He adds that: "Like money, limited liability companies and human rights, nations and tribes are inter-subjective realities. They exist only in our collective imagination… It's imagination", in *Sapiens. A Brief History of Humank*ind, Vintage Books, London, 2011, p.406. In any case, for utilitarianism or libertarian or even emerging populism the safeguard of human dignity is not a major concern.

[94] Amartya Sen, *The Idea of Justice,* Ed. Penguin, London, 2010.

to turn wishes into real liberties. For example, the fact of having a right to vote has not real content if it is not accompanied by the necessary circumstances to make this right a reality. It is not enough to not interfere; it is also necessary a positive liberty or real capability to exercise the right. This approach has been developed by Martha C. Nussbaum[95], who considers that these capabilities are substantial liberties that implies the possibility of developing the personality. In fact, she states that real poverty is the lack of these capabilities. This is an approach to reach human welfare based on the real capability to choose an option between different ones[96]. Therefore, in order to achieve a full and flourishing life any person needs to be in a situation in which he/she is able to enjoy these capabilities, especially the first one: be able to live a life that is worth living[97]. She says that without the opportunity to develop and exercise these human basic capabilities, life would lack dignity. Therefore, it is a priority to create the necessary conditions to make possible those capabilities in order that each human being can enjoy a full and flourishing life[98]. This new and evolving concept of dignity has received wide recognition, and it should be the cornerstone to answer the question posed regarding about the existence of a duty to provide a dignified life to close relatives.

In fact, today it is accepted that there are different types of dignity, and that even animals have dignity[99]. This animal dignity would imply that the animals could enjoy the capabilities to develop a full and flourishing life in accordance with the characteristics of their species[100]. In addition, it is said that the human being is in debt with his remote cousins, the other animals. In order to allow them to develop these capabilities, which would avoid having

[95] Martha C. Nussbaum, *Inequality reexamined*, Haward University Press, Cambridge, Mass. 1992; *Women, culture and Development: A study of human Capabilities*, Clarendom Press, Oxford, 1995; *Development as freedom*, Anchor Books, New York, 2000,

[96] For example, a person may choose to be hungry in case of being Buddhist. So the fact of being hungry in this case does not imply a lack of dignity. On the contrary, if a person has not the option to access food, hunger means lack of dignity.

[97] This approach has been applied not only to define human dignity but also the animal one. The latter would be the right of an animal to have a flourishing life in accordance with the characteristics of its species. Martha C. Nussbaum and Cass R. Sunstein, *Animal Rights: Current Debates and New Directions*, ed. Both and the University of Chicago, 2005.

[98] It is said that the mistake would be to reduce the number of capabilities that give rise to human dignity to only one: reasoning ability. If it were true, human beings without this ability would have not human dignity.

[99] N. Rao, "Three Concepts of Dignity in Constitutional Law", *Notre Dame Law Review,* 86 (1), pp.183-272.

[100] M. Nussbaum*, Women and Human Development: The Capabilities Approach*. Cambridge University Press, 2000. pp. 11-12.

them being subjected to needless pain and suffering. This duty is especially strong in consideration with livestock and pets, that have lost their capacity to live in the wild, being dependant on humans. This is the basis of the changes that have been recently initiated in the politics and law of the European Union on animal welfare. If this is a duty to animals, is it not a duty to other humans? Especially between family members?

If we put together this aforementioned concept of human dignity, that establishes the duty to make effective the capabilities of each human being to live a life that is worth living, with the current social situation in which the fact of having stable employment does not imply an access to a dignified life even in Western countries, we can come to certain conclusions. The first one is that from a philosophical approach, this concept of dignity may imply that close relatives have a mutual obligation to provide each other with a dignified life, in accordance with their possibilities[101].

The second one, is that in the current situation, this access to a dignified life may be very difficult without family support. Even with regards to the acquisition of a dwelling, this is usually subjected to a loan and mortgage conditions that a regular wage earner cannot access without external support. In addition, the rental market in many European cities is out of reach for a large number of people. Access to a dwelling is a basic need in order to enjoy a full life, however, in many cases it is only possible to get it by inheritance.

[101] We can find support for this argument reading Riemen, Rob, in *To Fight against this Age…* pp.58, 68, who is perhaps one of the last humanist philosophers. He proposes following to Ortega y Gasset that in order to achieve a really democratic society it should be necessary a society soul. This soul would be necessary to substitute mass-human beings by the others with universal values. A society based on human relations between people full of compassion. This compassion as Latin equivalent to the classic Greek "*συμπάθεια*", *sympathia*, that means suffering with another, that implies not only to understand another's feelings, but also the desire to alleviate another's suffering as a fair and just act. This concept is different from *empatheia* or *empathia*, that means the capacity to understand another person's point of view. Postmodernist philosophers would answer him that it is not possible to prove the existence of these universal values. Therefore, they defend the moral relativity and lack of absolute meaning and truth. Consequently, there is not an option for a draw, it is enough for postmodernism to deny the existence of universal values to defeat the humanist philosopher.

The problem is that postmodernism represents a culture of technology that cannot distinguish between the good and the bad, and can only lead to isolation. Perhaps postmodernist philosophers can accept and agree that a goal to be achieved by our society is the suppression of suffering. Consequently, any act that will lead to this aim would be necessarily moral. In fact, it would be achieved by seeking truth, justice, compassion and dignity. Values that can only be transferred by human groups, being the familiar ones the most important (traditional and modern types), as far as during a long period of time have proved to be efficient.

Finally, the third conclusion is that the positive law should contribute to the construction of a just and dignified society; and the maintenance of forced shares could be an effective tool for the family solidarity in order to make effective this duty to provide a dignified life between family members, especially in moments of economic crisis. From my humble point of view, the best tool to achieve this is to strengthen human affects and human relationships. An efficient way to achieve this would be by the enhancement of what has been the core element of society during hundreds of thousands of years, the family. Not only the traditional one, but any family group where people can develop their personality. In this context, Succession Law and forced shares may have an important meaning.

IV. CONCLUSIONS

1. *What could be a reasonable legal positioning of the lawmaker nowadays?*

In this article after making a comparative study between Spanish and Philippine Succession Law, we focus on one of the most debatable matters in both countries: to maintain or not forced shares or "legitimas". The study of the two mentioned twin regulations, allows as to observe the matter from a global perspective, which allows us to move beyond local perspectives.

We have tried to offer valid arguments to question the general trend in favour of the liberty to dispose freely of one's own estate by testament and against the maintenance of forced shares or "legítimas". Therefore, we have delved deeper into the alleged reasons to limit or remove them. In the first place it must be said that all these arguments against forced shares look to the past, but not to the future.

After setting out different arguments for discussion, we have focused on the most significant ones. These are that the heir is no longer a minor when the succession is opened, and that the ascendants do not need this protection as long as they are protected by sufficient resources provided by the welfare state. Our conclusion is that the general arguments used to deny the need of forced shares can be questioned. In the current social evolution, it is not possible to assure that the European welfare state model will be eternal and global. On the contrary, different indicators inform us that a return to the cold war times is possible, with the end of the multilateralism, and global growth. In this context, it seems that an extremely technological and individualist society could leave the human being left to his/her own devises. Therefore, perhaps an intelligent way to protect human beings in this context could be the legal strengthening of family relationships.

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Anyway, by now, with this potential scenario, it is reasonable to keep things as they are, to wait for the political evolution, and to think about what type of society we would like to achieve. We do not believe that the option may be to consider the family as a "zombi" category, dead and alive at the same time, and that the post-family society is the future. A future in which each person is "agent of his own identity and organization"[102]. An absolute individualist world which leads to the human affective isolation, where there is no privacy, and where technology culture replaces human culture should not be a goal.

In any case, the current system offers enough tools to control situations in which the legal imposition of forced shares could be unfair, for example providing disinheritance causes. This tool has been recently strengthened by the decision of the Spanish Supreme Court that has included psychological abuse as a cause of disinheritance[103]. Moreover, the forced shares system provides legal certainty, and avoids certain scenarios prone to the manipulation of the will of the testator by third parties. The current English system, where the judge has a discretionary capacity to decide when the testator was fair with his relatives, cannot be a good model due to the lack of legal certainty. On the other hand, the judicial interpretation has adapted the current legal system to the social reality, for example the extension of the usufruct on the whole family dwelling in favour of the widowed spouse through the *cautela socini*, betterment of grandchildren, equality of children…[104]

2. De lege ferenda *proposals*

Finally, we only consider essential the following legal reforms on the Succession Law regulations. On the Spanish side, firstly, the strengthening of the widowed spouse inheritance rights in order that he/she will always be able to legally receive a real right to possess the whole family dwelling. Further, in any case, when the widowed spouse coincides with descendants or ascendants, the law should guarantee his/her right to enjoy a lifespan usufruct over the whole family dwelling[105].

[102] Gomá Lanzón, Ignacio, "¿Tienen sentido las legítimas en el siglo XXI?", in *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuteres. Cizur Menor, Navarra, 2019, p.73.

[103] Judgements of the Spanish Supreme Court 258/2014, 3rd of June and 59/2016, 30th on January.

[104] In this sense, Garrido de Palma, Víctor Manuel, "Soluciones prácticas…" p. 139.

[105] Reyes, Jose B.L. in "Reflections…" p.290 says that the justice of preference of the widowed spouse in relation with the collateral relatives is indisputable: "The spouse who

Secondly, we should consider the introduction of the formal live-in partner as a forced heir[106]. It is a real fact that almost half of Spanish couples are not married. Therefore, even though a married couple and a live-in couple are different, we think that the law should reflect this new social reality in the Spanish Civil Code and consider live-in couples as forced heirs, as far as both types of family are protected by the Spanish Constitution. In fact, live-in couples are already regulated by some Spanish autonomic regions provided for in their respective civil law regulatory competence[107].

On the Philippine side the elimination of the discriminatory distinction between legitimate and illegitimate children should be made compulsory. As Sandra M. T. Magalang says discrimination against non-marital children touches on their basic civil rights: "Consigning a significant portion of the population to living this second class way of life, purely because of an accident of birth, is no different from discriminating on the basis of colour, race,

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has lived with and cared for the decedent from youth to old age, shared his successes and defeats… is morally entitled to preferential succession over even brothers and sisters." We agree and add that this moral preference should be established even in relation with the ascendants with regards to the possession of the family dwelling.

[106] See, Gete-Alonso y Calera, Mª del Carmen; Ysàs Solanes, María; Navas Navarro, Susana and Solé Resina, Judith, "Sucesión por causa de muerte y relaciones de convivencia" *Derecho de Sucesiones. Presente y futuro*. APDC. Murcia, 2006.pp.347 and 394. These professors state that the surviving live-in partner must be equated with the widowed spouse in order to receive the forced share, as far as what the law takes into consideration is the fact of the coexistence.

[107] However, the Spanish Constitutional Court in Judgement of 23 of April of 2013 opts for an absolute contrary option. The Court establishes that the respect to the right not to get married and the scope of the principle of free development of personality enshrined in art. 10.1 of the Spanish Constitution determines that the lawmaker cannot impose rules of marriage to live-in partners. Martin Casals, Miquel criticizes this decision in the commentary published in *InDret* 7/2013. He states that the Constitutional Court may have created with this decision a new fundamental right to "living together as a couple outside the regulation", which would proclaim: the right of the parties to be governed only by the rules agreed upon in the exercise of their self-determination. And more specifically, their right not to be bound by any legal norm unless they accept expressly and jointly its application. This means that if the lawmaker does not respect this right, and tries to impose on the live-in couple a specific regulation, this regulation would be deemed unconstitutional. "El derecho a la convivencia anómica en pareja: ¿Un Nuevo derecho fundamental? Comentario general a la STC de 23 de abril de 2013 (RTC 2013\93)" *InDret,* n.3, 2013. In this point I agree with Martin Casals. We must take into consideration that the new family models deserve the same constitutional protection as the old ones, and this type of distinction has only a formal justification. See De Torres Perea, José Manuel, *Spanish Succesion Law through Forty Significant Judgements,* ed. Aranzadi Thomson Reuters, Cizur Menor, 2019. Chapter 1, I-3 "Rights of live-in partners."

social status, or nobility – all forms of discrimination recognised by civilized nations as contrary to human rights."[108]

It is true that the affect between parents and children may be different depending on circumstances, but the solution is not to perpetuate a distinction that victimizes the innocent[109]. We agree with Rodolfo[110] that "the simplification of the Philippine sharing system will lead to a more efficient settlement of estates and eradicate historical prejudices against certain groups of compulsory heirs". However, we disagree that the solution should be the reductions of the forced shares or "legitimas". Simplification is not necessarily linked to the reduction of the total amount of the estate reserved for the forced shares, but to the reduction of the number of possible combinations.

A reasonable solution could be to recover the old betterments (*mejoras*) which were in force in the Philippines until 1950. Remember that until that date the betterment in the Philippines was extended over two thirds of the estate, one third to be distributed in equal parts between all the children, and one third to be distributed freely by the testator between his descendants. This would give the testator room to manoeuvre in order to distinguish between children without discriminating them for reason of their origin[111],

[108] Magalang, Sandra M.T. "Legitimizing Illegitimacy: Revisiting Illegitimacy in the Philippines and Arguing for Declassification of Illegitimate Children as a Statutory", *Phil. L.J.* Vol.88, 2014, (pp.467-538), pp. 528-529.

[109] The Spanish Constitution of 1978 declared that all children were equal irrespective of their origin. Therefore, the Spanish Civil Code was amended in 1981 to remove any discrimination between children. They have the same right to the forced shares irrespective of being born in or out of wedlock. However, some discrimination is still possible when the testator had died before the entry into force of the Spanish Constitution as far as the Spanish Supreme Court does not apply this regulation with retrospective effects. See De Torres Perea, José Manuel, *Spanish Succesion Law through Forty Significant Judgements,* ed. Aranzadi Thomson Reuters, Cizur Menor, 2019. Chapter 1, I-1. "The case of illegitimate children."

[110] Rodolfo, John Boomsri Sy, "Freedom in Death: Expanding the Disposing Power of the Decedent and Providing for a More Rational Sharing of Legitimes" *Ateneo Law Journal,* Vol.51, pp.594.

[111] In fact, the remarkable Philippine Jurist Justice José Benedictino Luis Reyes was opposed to the elimination of the betterments in the Philippine Civil Code of 1950, in order to give a certain autonomy of will to the testator. Conversation with Professor Rubén F. Balane, in Deusto, June 2019.

Florencio García Goyena wrote to justify the Project of SCC of 185: "The Law 18 of Toro is kept due to strong reasons of equity: A gentle and solicitous grandparent must have any tool to provide support to his/her grandchildren when unfortunately they depend on a careless and prodigal father". *Concordancias, motivos y comentarios del Código Civil Español,* Madrid, 1852, pp.102 y ss.

and even the possibility to include grandchildren in the share of "betterment"[112].

As Professor Ruben Balane says "it is suggested that our law on preterition (and, by extension Law on Succession) has largely become an anachronism, founded still on concepts and principles that have long gone the way of all things human, relics of ancient, discarded Roman or Spanish theories of succession. Fortunately, there has been a move of late to get together a group of persons learned in the civil law tradition to propose changes in the Civil Code of the Philippines – to recodify Philippine civil law, if necessary. This is therefore a good time to give these things a good, long, hard second look."[113] In fact, both Spanish and Philippine Succession Law are the daughters of a tradition based on two thousand years old, whose rules operate with almost mathematical precision. However, this law is still, to this day, vibrant, alive, and unceasingly evolving, through new judicial approaches to its interpretation and application[114].

3. *Pro portio legitima*

As Professor Miquel Gonzalez says, the forced shares or "legítimas" were considered during the French Revolution as a guarantee of equality between children, in fact the more reactionary sectors fought against their introduction in the French Civil Code. Moreover, García Goyena[115] wrote in his Project of Civil Code of 1851 that the removal of the inheritance forced shares could revive the "mayorazgos" or primogeniture inheritate institution. Today, again it looks like the most ultraliberal individualist would try to discredit the forced shares system, in order to promote the accumulation of wealth[116].

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[112] This was a possibility accepted by the Philippine Supreme Court in Estorque v. Estorque, G.R. No.19573, June 30, 1970 (The testator had died on May 27, 1949). By this way it is possible to make the protection of relatives compatible with the interests of the testator. See Baviera, Araceli, "Civil Law – Part Two; Property, Succession and Special Contracts", Vol. 46, *Phil. L.J.* 73, 1971. p. 75.

[113] Balane, Rubén F. "Preterition – Provenance, Problems, and Proposals", Vol. 50 *Phil. L. J.* 1975 (pp.577-623), pp. 620-621.

[114] See De Torres Perea, José Manuel, *Spanish Succesion Law through Forty Significant Judgements,* ed. Aranzadi Thomson Reuters, Cizur Menor, 2019.

[115] García Goyena, Florencio, *Concordancias, motivos y comentarios del Código Civil Español,* Madrid, 1852.

[116] Miquel González, José María, "Reflexiones sobre la legítima", in *Estudio de Derecho de Sucesiones. Liber Amicorum T.F. Torres García*, Directors: Andrés Dominguez Luelmo and María Paz García Rubio, Coord. Margarita Herrero Oviedo, ed. La Ley, Madrid, 2014, p.986.

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However, this negative vision of the *portio legitima* that seems to have spread in a multitude of legal fora may not have solid foundations. In this article we have explained different arguments that question these negative positions. In addition, we would like to finish by referring to some other contributions that could lead to reflection. Professor Espejo[117] refers to the fact that the emergence of forced shares in Roman Law were produced in a moment in which the family was in real crisis, and there was an existence of numerous children that could be harmed in case of remarriage. In fact, the legitime was introduced as an instrument to strengthen the family, what is witnessed by Gaius in D.5.2.4., and in the Novela 18, chapter 3 of Justinian. This phenomenon has been repeated recently. This could be the reason why in spite of the fact that in traditional English Law there was complete liberty to make a last will, now, after reforms, this liberty has been restricted. On the contrary, now there is a duty in English Law to be reasonable with close relatives when distributing the estate, duty that is controlled by a judge[118].

Finally, as jurists we should act humbly and recognize that this is a matter in which we need to be accompanied by other experts. We also need to take into account not only the legal aspect, but also the social, economic and political ones. All too often, certain authors offer their opinions as oracles; however, we cannot forget that mere opinions should not deserve decision-making authority. It is really important to know the reason behind the opinion of each jurist, but as Ambrosio Padilla says "for he the knowest not the reason of the law, knowest not the law."[119]

LITERATURE

Amartya Sen, *The Idea of Justice,* Ed. Penguin, London, 2010.

[117] Espejo Lerdo de Tejada, Manuel, *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuters. Cizur Menor, Navarra, 2019, pp.23-25.

[118] In fact, there is an underlying ethical obligation that due to reasons of justice is obliged to be taken into account. Also very relevant is the opinion of the significant Philippine professor José B. L. Reyes, who, in his article "Reflections on the Reform of Hereditary Succession", does not write a single line against the maintenance of the legitimes. On the contrary, he defends the idea that different controversial issues that merge from this matter should be solved taking into account that "the legitime (to all illegitimate children, without discriminations) is conferred as an act of simple justice." "Reflections…" p.288.

[119] Padilla, Ambrosio, "A Study of Some Salient Conflicting Opinions of Two Great Civil Law Commentators, Manresa and Maura." *Phil.L.J.* Vol,14, 1934, (pp.51-83), p.83.

Arroyo i Amayuelas, Esther, "Pflichtteilsrecht in Spanien", in *Reformfragen des Pflichteilsrecht*, Colonia, 2007, p.270 and ff..

Balane, Rubén F. "Preterition – Provenance, Problems, and Proposals", Vol. 50 *Phil. L. J.* 1975 (pp.577-623). *The Spanish Antecedents of the Philippine Civil Code*, Quezón City, 1979. *Jottings and Jurisprudence in Civil Law*. Succession, Central Book Supply INC, Quezon City, 2016.

Baviera, Araceli, "Civil Law – Part Two; Property, Succession and Special Contracts", Vol. 46, *Phil. L.J.* 73, 1971. pp. 75 und ff.

Bermejo Pumar, María Mercedes, "Legítima crediticia" in en *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuteres. Cizur Menor, Navarra, 2019, pp.117 and ff.

Calatayud Sierra, Adolfo, "Consideraciones acerca de la libertad de testar" Academia Sevillana del Notariado, Tomo IX, Ed. Edersa, Madrid, 1996, p. 259 and ff.

Cañizares Laso, Ana, "Legítimas y libertad de testar", in *Estudio de Derecho de Sucesiones. Liber Amicorum T.F. Torres García,* Directors: Andrés Dominguez Luelmo and María Paz García Rubio, Coord. Margarita Herrero Oviedo, ed. La Ley, Madrid, 2014, pp.268 and ff.

Chrustandl, Gregor, "La legítima y la libertad de testar en Alemania y Austria: tendencias actuals", in en *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuteres. Cizur Menor, Navarra, 2019.

De la Esperanza Rodríguez, Pablo, "Perspectiva de la legítima. Notas para una possible revision", *Libro Homenajea D. Ildefonso Sánchez Mera*, Tomo I, Ed. Colegios Notariales de España – Colegio de Notarios de A Coruña, Madrid 2002, pp.1097 and ff.

De Torres Perea, José Manuel, *Spanish Succesion Law through Forty Significant Judgements,* ed. Aranzadi Thomson Reuters, Cizur Menor, 2019.

Espejo Lerdo de Tejada, Manuel, *La legítima en la sucesión intestada,* Doctoral thesis, Seville, 1994. *Código Civil Comentado,* Coord. Valpuesta Fernández, R., dirs. Cañizares Laso, A., de Pablo Contreras, P., Orduña Moreno, F.J. Vol. 2, 2011. Arts. 808-810, pp.789-801. Preface in *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuters. Cizur Menor, Navarra, 2019, pp.23-25.

Galicia Aizpurua, Gorka, "En torno a la revisión de las legítimas: casos vasco y estatal", *InDret*, octubre, 2017.

García de Valdeavellano, Luis, *Curso de Historia de las Instituciones españolas: de los orígenes al final de la Edad Media*, Ed. Revista de Occidente, Madrid, 1968.

García Goyena, Florencio, *Concordancias, motivos y comentarios del Código Civil Español,* Madrid, 1852.

GARRIDO DE PALMA, Víctor Manuel, "Soluciones prácticas en materia de legítimas", in *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuteres. Cizur Menor, Navarra, 2019, pp.139 and ff.

GETE-ALONSO Y CALERA, Mª del Carmen; YSÀS SOLANES, María; NAVAS NAVARRO, Susana and SOLÉ RESINA, Judith, "Sucesión por causa de muerte y relaciones de convivencia" *Derecho de Sucesiones. Presente y futuro*. APDC. Murcia, 2006. pp.347-394.

GOMÁ LANZÓN, Ignacio, "¿Tienen sentido las legítimas en el siglo XXI?", in *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuteres. Cizur Menor, Navarra, 2019, pp.73 and ff.

GONZÁLEZ LÓPEZ, Rodrigo in *Precedentes romanos de la regulación de las legítimas en el Código Civil español y en la vigente Compilación del Derecho de Galicia.* Doctoral thesis directed by Luis Rodríguez Ennes y Guillermo Suárez Blázquez, Universidad de Vigo, p.332*http://www.investigo.biblioteca.uvigo.es/xmlui/bitstream/handle/11093/451/Precedentes%20romanos%20de%20la%20regulación%20de%20las%20leg%C3%ADtimas.pdf?sequence=1*

HARARI, Yuval Noah *Sapiens. A Brief History of Humankind*, Vintage Books, London, 2011.

——, *Homo Deus, A Brief History of Tomorrow*, Penguin Random House, London, 2015.

IMMANUEL KANT, *Groundwork for the Metaphysics of Morals*, 1785, translated by H.J. Paton, New York, Harper Torchbooks, 1964.

KIERKEGAARD, Søren, *Either/Or. A Fragment of Life.* Part II, edited and translated by Howard V. Hong and Edna H. Hong, Princeton University Press, New Jersey, 1987.

LACRUZ BERDEJO, José Luis, *Elementos de Derecho Civil*, Tomo V, Sucesiones, Madrid, 2007.

LÓPEZ BELTRÁN DE HEREDIA, C., in *Derecho Civil,* V, Derecho de Sucesiones, Coord. A.M. López, V. Montes and E. Roca, Ed. Tirant lo Blanch, Valencia, 1999, pp. 305 and ff.,

M. NUSSBAUM*, Women and Human Development: The Capabilities Approach*. Cambridge University Press, 2000. pp. 11-12.

MAGALANG, Sandra M.T. "Legitimizing Illegitimacy: Revisiting Illegitimacy in the Philippines and Arguing for Declassification of Illegitimate Children as a Statutory", *Phil. L.J.* Vol.88, 2014, (pp.467-538).

MARAGIÑOS BLANCO, Victorio, "La libertad de testar" *Revista de Derecho Privado*, 2005, pp. 27 and ff.

Martha C. NUSSBAUM and Cass R. SUNSTEIN, *Animal Rights: Current Debates and New Directions*, ed. Both and the University of Chicago, 2005.

Martha C. Nussbaum, *Inequality reexamined*, Haward University Press, Cambridge, Mass. 1992; *Women, culture and Development: A study of human Capabilities*, Clarendom Press, Oxford, 1995; *Development as freedom*, Anchor Books, New York, 2000,

Martin Casals, Miquel "El derecho a la convivencia anómica en pareja: ¿Un Nuevo derecho fundamental? Comentario general a la STC de 23 de abril de 2013 (RTC 2013\93)" *InDret,* n.3, 2013.

Martinez, Jesús "Portio debita y comunidad familiar en cuanto claves interpretativas de una síntesis histórico-comparada en materia de liberalidades mortis causa", in *Actas del IV Congreso Iberoamericano de Derecho Romano*, Orense, 1998.

Miquel González, José María, "Reflexiones sobre la legítima", in *Estudio de Derecho de Sucesiones. Liber Amicorum T.F. Torres García*, Directors: Andrés Dominguez Luelmo and María Paz García Rubio, Coord. Margarita Herrero Oviedo, ed. La Ley, Madrid, 2014, pp. 986 and ff.

——, "Reflexiones sobre la legítima", in *Estudio de Derecho de Sucesiones. Liber Amicorum T.F. Torres García,* Directors: Andrés Dominguez Luelmo and María Paz García Rubio, Coord. Margarita Herrero Oviedo, ed. La Ley, Madrid, 2014, pp.985 and ff.

Ortega y Gasset, José, *La rebelión de las masas*, 1930, editor Domingo Hernández Sánchez, 3ª ed. Tecnos. Madrid.

Padilla, Ambrosio, "A Study of Some Salient Conflicting Opinions of Two Great Civil Law Commentators, Manresa and Maura." *Phil.L.J.* Vol,14, 1934, (pp.51-83).

Parra Lucán, María Ángeles, "Las legítimas en la propuesta de Código Civil elaborada por la Asociación de Profesores de Derecho Civil", in *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuteres. Cizur Menor, Navarra, 2019, pp.193 and ff.

Rao, Neomi "Three Concepts of Dignity in Constitutional Law", *Notre Dame Law Review,* 86 (1), pp.183-272.

Reyes, J.B.L. "Reflections on the Reform of Hereditary Succession", *Phil. L.J.* Vol.50, 1975, (277-292).

Riemen, Rob, *To Fight Against this Age. On Fascism and Humanism*, W.W.Norton & Company, New York/ London, 2018.

Rivera, Juan F., *The Father of the First Brown Race Civil Code*, Quezon City, 1978.

Rodolfo, John Boomsri Sy, "Freedom in Death: Expanding the Disposing Power of the Decedent and Providing for a More Rational Sharing of Legitimes" *Ateneo Law Journal,* Vol.51, pp.584 und ff.

Romero, Flerida Ruth P., "Latin humanism in the Legal System of the Philippines, *Phil.L.J.* Vol.73, 1999. (pp.643-661)

Rubio Garrido, Tomás, "Problemas actuales en materia de protección cualitativa y cuantitativa de la legítima" in *Las legítimas y la libertad de testar. Perfiles críticos y comparados*. Directors: Francisco Capilla Roncero, Manuel Espejo Lerdo de Tejada and Francisco José Aranguren Urriza. Coordinators: Juan Pablo Murga

Fernández and César Hornero Méndez., Ed. Aranzadi Thomson Reuteres. Cizur Menor, Navarra, 2019, pp.142 and ff.

SCHOEPFLIN. "Economic Aspects of the Right to a Compulsory Portion in French and German Law of succession", in *German Working Papers in Law and Economics,* 2006, paper 34.

SONNEKUS, "The New Dutch Code on Succession as Evaluated Through the Eyes of a Hybrid Legal System", *Zeitschrift für Europäisches Privatrecht*, 2005, pp. 71-84.

TORRES GARCÍA, Teodora Felipa, en "Legítima, legitimarios y libertad de testar (síntesis de un sistema", en *Derecho de Sucesiones*. *Presente y futuro*. APDC, Murcia, 2006. pp. 227 and ff.

VAQUER ALOY, Antoni, "Reflexiones sobre una eventual reforma de la legítima", *InDret,* Barcelona, julio, 2007.

A DIFFERENT APPROACH TO THE STUDY OF "FORCED SHARES" OR "LEGITIMAS", BASED ON A COMPARATIVE STUDY OF SPANISH AND PHILIPPINE SUCCESSION LAW[1]

Un análisis alternativo sobre las legítimas a partir del estudio comparado del Derecho de sucesiones español y filipino

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