Comparative aspects of testamentary freedom in legislation of Kosovo and Albania

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Abstract

The right to dispose of property by will is a right which is applied by most legislatures in the world. It has been recognized since the Roman law, but also it was recognized later by every applied law.
Even though the right to dispose of property by will is a strictly personal right of the *decujus* and is related to the will of *decujus*, this will is not entirely unlimited. There are legal provisions which set limits to the testator's will.
This research aims to analyze whether the testator has the right to dispose of property by will to persons of his own choice. Specifically, the aim of this paper is to present the limitations that a testator has on the right to dispose of property by his/her will. Do these provisions limit the purpose of the testament, not allowing a person to decide who they want their property to go to when they die? Are these limitations justified or do they violate the individual's personal right to determine the destination of his/her property? This research compares the testamentary freedom of *decujus* according to the legislation of Kosovo and Albania, but also analyzes the legal reserve and the compulsory parts an integral part of the respective systems.

Keywords: testamentary freedom, *decujus*, will, legal reserve, compulsory part.

Introduction

The foundation of ownership brought to life the subjects' right to determine the destiny of their property after their death. Death is a legal fact of the acquisition of the ownership by the act of *mortis causa*, the consequences of which occur after the death of the person. Different systems in the world were based on the Roman law when applying the testamentary succession. However, other legal systems such as the old legal system of Albania, Germany and Ottoman's law, did not apply the right of inheritance, restricting the decedent from his/her rights (Biçoku, 2011, 144). According to the Code of Lek Dukagjini, the will as a form of testamentary succession was not accepted, but disposition of property by will, would be allowed only if the property was donated to the church with the approval of the kin. This property would be donated to the church for "the spirit of the decedent" and it could be a farm, garden or vineyard.[1]
The right to dispose of property by will was also sanctioned in the Roman law. The Latin term for will was *Testamentum* and according to Ulpiani derives from the word Testator which means "making a solemn statement according to one's will".[2]

[1] Code of Lekë Dukagjinit, chapter 9, article 39. The article can be found on: http://agrbes.freehostia.com/KanuniiLekeDukagjinit.pdf
[2] https://www.enkeledaolldashi.com/wp-content/uploads/2019/02/12_trashegimia.pdf

There were many restrictions on testamentary freedom even in the Roman law. In order to dispose the property by will, the decedent had to have a right which was known as *testament factio actival* or the right to dispose of property by will, while the successors by will could be only those who had *testamenti factio passive* (Puhan, 1989, 408-409). Once these conditions were fulfilled, the subjects who have the right to dispose of property by will and those who can benefit by will, *decujus's* right was restricted by what was called imperative right or compulsory right, meaning that the legal heirs which were excluded from the right of inheritance by the decedent were called compulsory heirs (Puhan, 1989, 423). The will most of the time was declared as invalid because of the quota that the law guaranteed to the nearest relatives of *decujus* (Puhan, 1989, 424-425). The nearest heirs of the *decujus* had the right to claim at least ¼ of the property which would belong to them if the testament did not exist. The children of the decedent, their descendants, and sometimes the siblings of the decedent had the right to claim their compulsory part. The heirs' right to sue the decedent in order to benefit from the property was allowed only when they were excluded from the decedent's will by the *decujus* himself/herself and if there was no reason to consider them unworthy to inherit.[3]

Furthermore, the Civil Code of Zogu of the year 1929 has outlined the testamentary succession in Book II, chapter II with many restrictions regarding the testator's right to dispose of property by will. These restrictions included the legal reserve in case of legal heirs. According to the legal reserve, by will, the *decujus* cannot dispose more than half of the property if he has one child. Similarly, the decedent cannot dispose more than 1/3 of the property if he has two or more children.[4] If the decedent has no children, but only ascendants, he can dispose 2/3 of property by will[5]. If the testator has neither born children nor children conceived before the death of the decedent and born alive after his death, but only siblings, he/she can dispose ¾ of property by will.[6] In addition to the legal reserve, there were also many restrictions regarding the children born outside of wedlock: children born out of wedlock, which were not legally accepted, could not be part of the will, except for the right of alimony.[7]Furthermore, the remarried spouse cannot dispose more property to the new spouse than he has disposed to his children from the previous marriage.[8] There were also other legal restrictions regarding the usufruct which belonged to the decedent's spouse.

Disposition of property by will according to Albania's legislation

The legislation of Republic of Albania in the third part of the Code of 1994[9] outlines

[3] As justified reasons to exclude someone from the inheritance right were considered life threats, abandonment during times of spiritual illneses, injuries, abandonment of religion, insults, slavery, sexual relations with the wife of the decedent, criminal proesuction, slander etc.

[4] Civil Code of Zogu of the year 2029, Publisher Papirus, Book II, article 533, pg. 203.

[5] Ibid, article 534.

[6] Ibid, article 535.

[7] Civil Code of Zogu of the year 2029, Publisher Papirus, Book II, article 500, pg 191.

[8] Civil Code of Zogu of the year 2029, Publlsher Papirus, Book II, article 503.

[9] Civil Code of Zogu of the year 1994 was adopted with the Law no. 7850, on 29.7.1994, amended with the laws no. 8536, on 18.10.1999, no. 8781, on 3.5.2001, no. 17/2012, on 16.2.2012, no.121/2013, on 18.4.2013,

provisions regarding the inheritance law. This Code is the continuation of the Civil Code of 1928, which was influenced by French and Italian systems. Similar to the previous Code, the right to dispose of property by will is also regulated. According to this Code, testamentary succession is applied as a general rule, while inheritance by law will be applied only if the testament is not applied. This conclusion is based on the article 317 of this Code, which provides that "*Inheritance by law applies when the testator has not made a will or has made one only for a part of his estate or when the will is entirely or partially invalid.*" Regarding the definition of the will, the Code defines it as "*The will is a one sided legal act performed by the person leaving the inheritance himself, by means of which he disposes of his property for the time after his death."* Hence, it is a personal act of a decedent to determine the disposition of his property upon death. Even though it is a very personal legal act, the freedom of the *decujus* is limited.
There are many legal restrictions which can make a testament partially or entirely invalid. Thus, the first restriction sanctioned in the article 374 outlines that persons who are incapable to inherit by law cannot benefit by the testament.[10] From the interpretation of this article, we notice that a juridical or natural person, who is not part of the legal heirs, cannot become a beneficiary of the property by will. In other words, the decedent cannot dispose of his/her property by will to people who are not part of his kin. However, this article creates ambiguity because it contrasts another article which states that *"The person leaving an inheritance that does not have persons born after him or before him, or brothers or sisters, has the right to dispose of his property by will in favor of any natural or juridical person"*.[11]According to Nazmi Biçoku, this provisions should be understood in s way that if the decedent has no heirs in the first three ranks, he can dispose of his property to whoever he wants. But, he cannot dispose of his property to a person who does not benefit from inheritance by law if the decedent has children, descendants, parents, persons unable to work, siblings, or grandparents. Only when there are no heirs in the first three ranks, the decedent can dispose of his property to the heirs of the other ranks and even to the people outside the circle of legal heirs. If these heirs are not present, the decedent can dispose of his property to any juridical or natural person (Biçoku, 2011, 164-165). Nevertheless, the decedent is not obliged to respect the hierarchy of the inheritance by law, and he can dispose of his property to any heir of the first three ranks; but he must respect the legal reserve.

Legal reserve

Legal reserve is a restriction on the testator's right to freely dispose of the property by will. There are some persons who are protected by the legal reserve:
1. Minor children of the decedent
2. Other minor heirs who inherit by substitution
3. Other heirs unable to work, who are in charge of the decedent[12]

no. 113/2016, on 3.11.2016).

[10] Civil Code of Republic of Albania of the year 1994, in article 374 outlines"Persons are incapable of gaining by will who are incapable to inherit by law except thenon-indirect children of a determined person and alive at the time of the death of thetestator even if those children were not yet conceived."

[11] Civil Code of Republic of Albania of the year 1994, article 377.

[12] Civil Code of Republic of Albania of the year 1994, article 379, "The person leaving an inheritance can

These persons cannot be excluded from inheritance by will, unless they are considered unworthy to inherit. It is understandable that the legally defined reserve protects the vulnerable situation of minors and persons unable to work. If the decedent does not respect the legal reserve and has minor children, other minor heirs who inherit by substitution, or persons unable to work, that part of the testament will be considered invalid and the aforementioned subjects will receive what it belongs to them by inheritance by law, similarly as if the testament does not exist.

Disposition of property by will according to Kosovo's legislation

In Kosovo, there's a law on inheritance, Law No. 2004 / 26 Law on Inheritance in Kosovo, adopted in 2004 and amended later with the Law 06/L-008 on Amending and Supplementing the Inheritance Law No. 2004/26. This law recognizes both inheritance by law and inheritance by will. According to this law, "*Inheritance is a transfer of a person's property based on the law or based on a will (inheritance) from a dead person (decedent) to one person or several persons (heirs or legatees), according to the provisions set out in the present Law.*"[13]

Similar to the Code of Albania, Law on Inheritance in Kosovo is based on the principle that legal succession will be applied if there is no testament; hence, the testament is the general principle, while legal succession is the exception.[14] Regarding the testamentary freedom, we can conclude that the law does not clearly define which are the restrictions set up by law for the testator; can he dispose of his property to whoever he wants if there are no heirs from the first three ranks? Law, as a restriction on the decedent's will has defined only the compulsory part. Compulsory part is defined as the boundary between the decedent's right to dispose of property by will and the legal heirs. Neither he can dispose of the compulsory part, nor can he change the legal ranks of the inheritance based on law (Podvorica, 2010, 63). People who benefit from the compulsory part are called compulsory heirs. They enjoy special protection by law because of special relations such as blood relation, wedlock, family relation, and other close relations with the decedent, relations which put them in special legal positions (Latifi & Buçaj, 2010). The law has divided compulsory heirs in two categories.[15]

The first category includes:

1. His children and their descendents without limit
2. His adoptees and their descendents
3. Spouse
4. Parents

Regarding this category, the heirs of the first two ranks, have the right to the compulsory

neither exclude from legal inheritance his minor children or other minor heirs who inherit by substitution (article 363, second paragraph),as well as his other heirs unable to work if they are called in inheritance nor affect by will in whatever manner the part which belongs to those heirs on basis of legal inheritance, except when they have become unworthy to inherit".

[13] Law No. 2004 / 26, Law on Inheritance in Kosovo, article 1, paragraph 1.2.

[14] Article 10 of the Law.

[15] Law No. 2004 / 26, Law on Inheritance in Kosovo, article 30, paragraph 1 defines that se Compulsory heirs are: the decedent's descendants, adoptees, their descendants, his parents, and spouse.

part without fulfilling any condition, having fulfilled the objective condition of being heirs at law. In this case, the inheritance rules shall be applied: Heirs of a prior rank shall exclude persons of further ranks from inheritance.[16]
The second category includes:
1. Grandparents of the decedent
2. Siblings
This category can benefit from the compulsory part only if it fulfills the subjective criterion, i.e. only if they are completely unable to work and do not have the necessary means for living. The Law does not define specifically when a person is considered incapable of work or that doesn't have the necessary means for living, but this shall be defined by court on a case-by-case basis. From the linguistic interpretation of the legal provision, we understand that these two conditions must be fulfilled cumulatively.
Regarding the calculations of the compulsory part, the law clearly states that ½ of property of what would be inherited by law, is guaranteed to the spouse and his descendents. On the other hand, other heirs, such as parents, grandparents and siblings, are entitled to 1/3 of the compulsory part from what they would inherit by law.
Apart from the fact that many people are included in the compulsory part, the calculation of the legal reserve is complicated. Article 32, paragraph 2 of the Law, outlines: "First, all the assets the decedent had at the moment of his death shall be inventoried and evaluated, including all testamentary dispositions, and all debts owed to the decedent, even those owed by one of the heirs, except those debts obviously irrecoverable." Next, article 32, paragraph 3 states: "The decedent's liabilities, the cost of inventorying and evaluating the inheritance, and the expenses for the decedent's funeral, shall then be subtracted from the value of the decedent's assets so determined." In order to eliminate any inequality between the heirs, the value of all the gifts made by the decedent to any of the heirs will be considered, including those that the decedent has expressively declined to be included. The value of these gifts will be added to the compulsory part.[17] Furthermore, the gifts that the decedent has made to persons who are not heirs shall be considered, if they were given during the last years of his life (with the exception of ordinary gifts).[18] We think that this provision creates legal ambiguity for the third person, who actually is not a heir of *decujus*.

Conclusions

At the end of this paper, we can conclude that testamentary freedom of the decedent is restricted in both legislations. The first restriction in Albania's legislation is that the decedent cannot dispose of his property to anyone outside of the circle of the heirs at law, if there are heirs on the first three ranks. The legal reserve, which according

[16] Law No. 2004 / 26, Law on Inheritance in Kosovo, article 11, paragraph 11.4.
[17] Article 32.4 of the Law, "To the remainder so determined shall be added the value of all gifts made by the decedent in any manner to a heir at law, including gifts made to heirs who have renounced to their inheritance, and those gifts that the decedent ordered not to count towards the heir's inheritance share."
[18] Article 32.5 of the Law states, "To this sum shall be added the value of gifts that the decedent made to persons who are not heirs at law during the last year of his life, with the exception of ordinary gifts."

to the Kosovo's legislation is called compulsory part, is another limitation of the testamentary freedom. There are major differences regarding this restriction that the law entitles to some persons inside the circle of heirs. According to the law, in the compulsory part are included minor children of the decedent, other minor heirs who inherit by substitution, and other heirs who unable to work. Thus, in Kosovo, this circle is bigger and includes almost all heirs by law. Children of the decedent and their descendents, spouse, and parents are entitled to claim the compulsory part based on the objective criterion and if they are heirs by law. Furthermore, siblings and grandparents of the decedent can be included in the compulsory part if they fulfill the subjective criterion, i.e. if they are unable to work and lack the means for living. Legislation of Kosovo protects the family and family property by making sure that the property is disposed of within the decedent's family and aims to guarantee equality in the calculations of the distribution of the hereditary share. Legal provisions limit the free will of the decedent not only regarding the expression of free will by testament, but also regarding the disposition of property during his life.

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