

Imperative part of the Law on Kosovo Inheritance (Comparative view)

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Abstract

Making a testament seems to be one of the available freedoms, and most significant of the law subjects. Testament, as final declaration of the testator's will, is considered to be one of the most significant freedoms of the same, since by declaring his will, determines the fate of his/her property heritage, earned with lots of efforts throughout life.

Freedom of compiling the testament, in the Constitution of the Republic of Kosovo is guaranteed by the Law on Inheritance in Kosovo but also by the international Conventions. However, every subjective right has its limits. Such limitation comes as a result of the care toward subjective rights of other persons, sometimes the best of the society, but the purpose of limiting such freedom in terms of inheritance, comes as result of common marital life, as a result of the care toward children and parents. Quota of the obligatory part is part of heritage that shall not be deprived, since it is guaranteed with imperative norms.

This inheritance quota is presented as object for analyses and study in relation to testamentary freedom, always in a comparative view in the region and broader.

Key words: Testament, Testamentary right, Testamentary free limitation; Obligatory inheritance; Obligatory Heir.

1. Testamentary freedom

Transfer of subjective rights from one person to another is enabled by legal instruments. (Aliu, 2013) Contract is the legal instrument enabling transfer of the right while a person is alive. Nevertheless, transfer of the right is eligible not only while a person is alive, but those values need to be inherited throughout generations. Testament is considered an extraordinary legal tool for transfer of subjective rights, especially the right on property.

Testament presents final declaration of the testator, statement of adult natural person¹, by which the testator assigns the heirs, the inherited property and orders, burden and conditions to be fulfilled by the heir in order to gain such heritage (Ibrahimi, 2011, page 163). Nonetheless, how the Testament is regulated in the Law on Kosovo Inheritance and does the same have the legal ground to be created, for this we will try to provide an interpretation in compliance with the applicable Law. ``Legacy is earned by Law or a Testament (see Article 8 of the Law on Kosovo Inheritance) ``². Based on this law, Kosovo citizen is granted the legal guaranty, of having the right on property values through the Testament and by Law. From this it can be interpreted also the right of the natural person to compile a Testament. Testament means expression of last will given in a form that is foreseen by law, by which the Testator orders how it should be acted with his property after his death (see Article 69. 1 of the LKI).³ Testament enables the Testator, that at a certain moment, to stop and think how to determine the fate of heritage property. The fate of heritage property means that the content of the testament is broad; therefore the Testator may determine provisions of personal nature, property nature, orders, conditions and time limits (Podvorica, page 102).

Writer of Testament enjoys the right to compile a Testament. With all this freedom on defining the content of the testament, until 2012 the testament was not a frequent practice amongst the Albanians. Worth mentioning that in this occasion the old Roman saying ``that it is a tragedy to die without living a testament.`` lacking practice of compiling testaments is natural knowing that this gives space to initiation of court procedures for review of property inheritance, in this case this issue is subject of strict legal provisions on assigning legitimate heirs, determined by legal circles. As consequence of this there are delayed court cases on heritage by Kosovo Courts.⁴ The Content of the

¹ Adulthood person is determined as natural person of age 18 fit psychically to establish testament provision and emancipated natural person, that is married based on Court decision. For further details, see Article 70 of the Law on Inheritance in Kosovo. Law no. 2004/ 26

² Law no. 2004/ 26, Law on Inheritance in Kosovo

³ Law no. 2004/ 26, Law on Inheritance in Kosovo; hereinafter LIK.

⁴ Legal Inheritance is questioned only in cases when the Testator left no testament, or when the testament is partially or entirely not valid. For this, in more details, see: Podvorica Hamdi,

testament also is determined by the Testator, by defining such content freely, impartially and by eliminating all factors that make the testament null and void. Provisions of personal nature have to do with determining the heirs, legatees, implementers of the testament, and provisions of order and conditions. Provisions of property nature, present the provisions of determining the inheritance measure, inheritance parts that are inherited by legatees. From the content of these testamentary provisions, we notice the generous nature of creating the testament, since the Testament always presents a generous act, i.e. an act of charity by which the heir earns the inheritance measure, freely, without pressures and the heir is responsible for the legacy debts to the extent which does exceed the amount earned by the testament (Law on Inheritance in Kosovo, Articles 87, 88 and 89).⁵

The freedom to draft a testament is guaranteed also with Civil Code of the Republic of Albania, in this regard ``Testament presents an unilateral juridical act carried out by the Testator in person, by which the heir will own his wealth after his death`` (Civil Code of the Republic of Albania, see Article 372).

It should be known that emotions play a key role and the most important role during compilation of the testament.

It is natural and necessary that the testator of subjective rights carries such rights to the heirs are considered by the same to be the most dignified to fulfil his/her last wish. Generating wealth in life is not easy, especially during the time and trend we are living. Testament enables to the citizen a clear vision also for the time period when the Testator will not be alive, knowing how his heritage will be divided and utilised. Not by chance proclamation of will Autonomy gives the right and initiative to a citizen to establish various bilateral, as well as unilateral provisions, which in some occasions are effective while the Testator is alive but also after Testator's death. Therefore, the act of testament prevails over legal provisions and empowers the declaration of the Testator's will.⁶

If we analyze in comparative aspect, European spirit requires implementation of these four principles of inheritance, in order to achieve the imperative goal of inheritance norms. In order to achieve during the inheritance procedures the following: Private Inheritance Principle; Universal Inheritance Principle; Testamentary Freedom Principle; and Compulsory Inheritance Principle.

Legal Inheritance in the Republic of Kosovo, ILIRIA, International Review, Prishtina, 2011/1, page 144

⁵ Law no. 2004/ 26, Law on Inheritance in Kosovo; hereinafter LIK.

⁶ Legacy in the testament. For this, in more details, see: Ibrahim Shpresa, Institute of legacy in the testament, ILIRIA International Review, Prishtina, 2011/1, pages 163 - 164.

If we analyze German Civil Code we can notice that the freedom of compiling the testament presents one of the constitutional guaranties and is the basic principle of the Law on Inheritance. Based on this Code the citizen has the liberty to compile a Testament, but is obliged to treat all the Heirs equally. Also in the region, including Kosovo, where Testament presents primary base for inheritance and the Testator is obliged to treat all the Heirs equally. This liberty is limited in regard to the inheritance quota, in which case even in German law, despite intentions of Academy to diminish at least the number of obligatory heirs, it still could not be appropriate since in 2005 the Court found that Testamentary freedom Principle has no priority, compare to the legal reservation of obligatory heirs. Compulsory heirs are considered children, parents and spouse of the testator. It is important to note that in the German law the right to pledge legacy is a personal right that can be achieved based on the rules of the Law on Relationship and Liabilities. Whereas in some other laws such as the Greek Law, it is considered that this institution is fully inheritable. (Werneburg, 2007).

British Law gives right and protection to the testamentary liberty. Therefore, the testator is free in determining the inheritance quota. However the Court may interfere in favour of family provisions aiming to fulfil moral and legal obligation of their financial support. While French canon law recognized legal reservation but on movable items (Werneburg, 2007).

1.2 . Definition of Testamentary freedom

Basis for a call on inheritance, compete in accordance with the LIK.⁷ As a strong base on inheritance is the Testament, or in its absence, or being inadmissible, as basis for inheritance is considered the law. Each subjective right is considered valid until it causes harm to another person. But when and in which cases it may be harmed by testament provisions, it is defined by imperative norms of LIK.

Even though the testators enjoy the right to compile a testament, this right is not absolute. The same is limited for the sake of fulfilling, first of all, the obligation of support and care of the spouse, children and parents. Provisions that violate this part and these heirs violate also the inadmissible value of the liberty to make a Testament. Even though the Testator during his life, has the right to own wealth, however provisions effective after testator's death, determine that such rights are not absolute and unlimited, therefore Testator's right is limited with imperative norms so called compulsory inheritance

⁷ For further details see Article 1.2. `` inheritance is transfer by law or based on the Testament on wealth of the deceased (Testator) to one or more persons (heirs or legatees), according to the rules stipulated by this Law. Law no. 2004/ 26, Law on Inheritance in Kosovo.``

(Podvorica, 2006, page 63). What is the genesis of such limitation of the legacy freedom in favour of the heirs, beyond any doubt it can be found in analytic skills of establishment of core civil institutions of Roman lawyers. Roman law recognized the Testament as basis of the last will of the Testator, by which were assigned the heirs and the earning extent of the legacy.⁸ Making a testament became a habit amongst the Roman citizens, but the liberty to compile the same, made the jurisprudence of the priests to seek protection of lawful heirs, by having them become part of the testament or excluding the heirs from the same. Limitation of testamentary freedom in the Roman law was expressed by the following: limitation of transfer of ownership to those who are not able to get an heir or to impose a condition that was immoral, unlawful and impossible (Borowski Andrew and Plessis Du Paul, 2004, 316). Exclusion from inheritance was made in normative form, i.e. my child shall be excluded from inheritance. Whereas for females, it was sufficient to mention that "all other waived from the right on inheritance" (Mandrro, 2007, page 438). If the Testator does not exclude the heirs in imperative manner or does not define the same as compulsory heirs, the Testament was declared null and void.

This manner of defining compulsory heirs or their excluding is called "formal inheritance," since in formal way male-family member was granted the right to exclude from inheritance any heir (Mandrro, 2007, page 438). Later on this way of granting the compulsory inheritance, did not guaranty the heirs a minimum quota, by excluding even the right of the mother toward the child. Therefore through *Querela inofficiosi testamenti* it presents serious and preliminary effort of compulsory inheritance or legal reservation which is guaranteed also in Kosovo through the Law on Inheritance in Kosovo and this way moves from the formal protection into material one by imposing such right on testator's children, parents, brothers and sisters. Therefore through *Querela inofficiosi testamenti*, was given the right to the heir that within 5 years from getting the inheritance to seek his violated part of the inheritance, which was defined by Justinian as 1/3 of the lawful inheritance. In this way through this to request revocation of the gifts, since their part of the inheritance is violated. (Dhima, 2007, 778 - 782).

⁸ Manners of the call in legacy in Roman law were: Testament and Law. For further details see (Dhima Ken, E drejta Romake (Roman law), Tirana 2007, page 737. Testament presents most common form of earning the inheritance in Roman Law. Based on the Law of XII tables, the term Testament derives from etymologic word *testes*: Witness. For further details see (Mandrro Arta, E drejta Romake (Roman law), Tirana 2007, page 434 and Dhima Ken, E drejta Romake (Roman law), Tirana 2007, page 764).

2. Compulsory Inheritance

Death presents a tragedy for the family members, but its consequence may be a drama (Maillard, 2009, page 3), it may be presented also with an old saying, death may leave behind an apple of trouble amongst the heirs. In order to avoid this consequence, imperative norms guaranteed a circle of lawfully assigned heirs⁹ to whom a part of the legacy belongs, due to compassion, family continuation. It is exactly the violation of a share from the compulsory inheritance that limits the freedom of the Testators will. Compulsory legacy presents inherited wealth; which is not in disposal of the Testator and is called compulsory share. Such compulsory share is guaranteed for a certain category of persons, who are compulsory heirs. As it can be seen this will is not entirely unlimited in regard to the possession of the wealth after the Testator's death, this is so because the inheritance institution is in function of protecting the Testator's heirs, which are connected by blood and the need for their support and even the Testator in person was carrier of the values from his/her predecessor, therefore the generous spirit cannot exceed the values that are protected by norms.¹⁰

Compulsory share is also called legal reserved inheritance, arithmetic fraction which is presented in the value of 3/4 or 2/3 of the legacy which in this sense indicates the legacy scale of the Testators act of will. (Galvano, 2006, page 994). d reserved inheritance is determined also in the CCRA (see Article 379 of the Civil Code of the Republic of Albania). Legal reserve has no effects only on the Testament, but its guaranty is ensured also with the legal inheritance, and in case of violation of the same, shall be given back the entire gift given by the Testator during his life. Earlier it was mentioned that obligatory (compulsory) inheritance has the basis from Roman law, by interference of legal priests guarantying such legal reserved inheritance, which is determined also in modern Civil Codes. Marriage presents the base for establishment of family, and one of the social obligations is enforcing social protection of the spouse when the same has no working tools and has no possibility to work but also when the children, parents, grandparents have no possibility to make a living or earn for their existence. This has the legal ground from Article 5 and 7 of the

⁹ Legal inheritance presents transfer of property from a deceased person to one or more persons in accordance with rules determined by law. According to the law, legal heirs are: Testator's children, their adopted children and their descendants, marital and non marital spouses, grandparents and their descendants. For further details see: Podvorica Hamdi, Legal Inheritance in the Republic of Kosovo, ILIRIA, International Review, Prishtina, 2011/1; fq 160

¹⁰ Inheritance by Testament (Trashëgimia me testament) For further details see: Ibrahim Shpresa, Institute of legacy in the testament, ILIRIA, International Review, Prishtina, 2011/1, page 165

LIK, in which case "Social Community is taking care for elder persons in cases when the same are unable to ensure living conditions and when they have no other relatives who based on the law would be obliged to take care of them. For purposes of protection of rights in the family relationship, mother and children shall be provided special protection with funds from social welfare."¹¹ not by chance we mentioned the Articles that were interpreted above, because it is exactly in those that we find the inheritance support for the sake of the marriage, children, parents and grandparents shall be ensured their existence, with a quota that shall be stipulated through imperative norms. This way also spouses are have equal rights in inheritance, a principle that initially was proclaimed neither in reality nor in the Lekë Dukagjini Canon.¹² However the equality principle now is guaranteed also for the spouses, non marital and marital children, adopted children also by the Constitution of the Republic of Kosovo, LIK, and European Convention on Human Rights and Law on Gender Equality. (Law no. 2/2004, Law on Gender Equality).

Even the French law testamentary freedom is guaranteed. But this right can also be limited through a reserved part, recognizing it as unavailable quote. This right is recognized to the testator's descendants which is determined as 2/3 to the children and 1/4 to the spouse (Fuga, 1999, page 33). Even the Italian law is proclaimed one of the basic principles such as Testamentary freedom, but this freedom is limited by the legal reserved inheritance, which is recognized to the testator's descendants and the spouse. Also in this law such quota is assigned in proportion with total wealth in which case half of it goes to the spouse, children 1/2 or 1/3 of the total wealth, while the parents get 1/3 of the inherited wealth in absence of the parents (Fuga, 1999, page 61). Also Greek Inheritance Law recognizes the reserved inheritance, by recognizing this typical inheritance right to the heir, by giving the right to request such reserved inheritance, which belongs to the Testator's parents, spouse and descendants. Also Turkish Civil Code recognizes and guarantees testamentary freedom, however such freedom, same as by all legal system it limits with the reserved inheritance in favour of the Testator's parents, spouse and descendants, in which case the highest portion belongs to the closest descendants. Even Japanese law recognizes and guarantees testamentary inheritance as legal ground, enabling the subjects from age 15, freedom in defining inheritance. But

¹¹ Law No. 2004/32; Law on Family in Kosovo

¹² According to Lekë Dukagjini Canon, "female shall not inherit either from the parent or from the spouse." For further details see Xheqovi Shtefan, "Kanuni i Lekë Dukagjinit", Shkodër, 1933

such freedom is limited in favour of the reserved inheritance that belongs to Testator's parents, spouse and descendants.¹³

Different from continental system, United States of America, do not recognize compulsory inheritance, but in reality also in this legal system the right on testamentary mood is limited, especially by *main morte*.¹⁴ The purpose of imposing such limitation is the family favour but also for tax purposes, since this way circulation of Church money, would undergo taxation. This way American law, always pay attention to provisions that are in charity favour.

2.1 Compulsory Heirs

The question we would like to address is how does the compulsory heir earn the right on inheritance? Family is the core cell of the society, from where are created sublime values of the humanity. From the family derive marital and parental relations ... one of the basic principles of the family law is the institutional care in order to have social welfare and not to have the moment influence on the heir and his heritage to be inherited by other persons who are not legitimate heirs. Compulsory heirs are: ``Testator's descendents, persons adopted by the same and their descendants, parents and spouse. Testator's grandparents, sisters and brothers are compulsory heirs only they are fully disabled and have no means for living.``(LIK, Article 30). This present legitimate heir circle, which refers to inheritance, based on the legitimate inheritance circles. Based on this legal order, heirs are the Testator's children, both marital and non marital, under the condition that those were born from the at least 5 years non marital community. Marital spouse also is eligible on inheritance also from the non marital relationship under condition of having lived together at least 10 years. (Fuga, 2010, page 69). Also Testator's parents are eligible on inheritance based on objective right, due to blood connection. Moreover, in addition to objective conditions as compulsory heirs the LIK recognizes also grandparents of the Testator, who in addition to the blood connection need to fulfil also subjective condition of disability to work and lack of living means. (Podvorica, 2006, page 69). Spouse protection through provisions of compulsory inheritance share is also in compliance with almost all laws of European Union but even broader USA, Denmark etc. (Verbeke and Leleu (n 16) at 341)

¹³ For further details see Fuga, Juliana, Inheritance by Testament (Trashëgimia me Testament) (cooperative review), Tirana 1999 pages 55, 90, 19, 144, 172, 201

¹⁴ *Main morte*- presents Anglo- Normand origin where the Testator impaired the family, by giving the inheritance to the Church for purposes of saving his spirit after death. For further details see Fuga Juliana, Tirana 1999, page 144

Also according to the Civil Code of the Republic of Albania, regarding the reserved inheritance it is provided: "Testator shall not exclude from legitimate inheritance his juvenile children who inherit with substitution (article 361, paragraph 2), and his/her other heirs who are disabled for work if they are called on inheritance and nor to infringe by testament in any way, the share that belongs to these heirs based on legitimate inheritance, except when these are not eligible on inheritance (CCRA, Article 379). If we give a comparative view, we can notice same logic of determining, however modern tendencies are to narrow such circle. Therefore in the French Civil Code, as Reserved Inheritance Heirs are considered Testator's predecessors and descendants. In Danish Law as Reserved Inheritance Heirs are considered the Testator's spouse and living descendants, excluding in their absence, second and third circle heirs. In American law, the only ones who have the right to contest the testament on compulsory inheritance are Testator's parents. A characteristic in the American law is widow protection, with 1/3 of inheritance. This way in this right it is foreseen also the possibility to exclude children from reserved inheritance. (Fuga Juliana, 1999, pages: 54, 144, 201). Same as the Republic of Albania, even the Law on Inheritance in Macedonia defines basis for reference on inheritance, and these are the Law and Testament. Testamentary freedom is guaranteed but inheritance is ensured to Testator's children and parent with a quota of 1/3 of inheritance wealth. And same as in our law half belongs to heirs that fall under the first circle of inheritance, and 1/3 fall under the second circle of inheritance.

2.2 Inheritance Quota

Same as the inheritance circle is defined also is defined limitation of the freedom to possess inheritance quota. Also this quota is relative, depending on the country, and inheritance circle, therefore such quota is determined as: "Compulsory share of the descendants and spouse presents 1/2, whereas the compulsory share of other heirs comprises 1/3 of the part that would each of them as legitimate heir in compliance with provisions on inheritance circles." (LIK, Article 31.1). I consider that since this quota presents a limitation of the freedom on possession, the legal initiative for modification of the same is more than welcome, in the aspect of reducing the quota, which would serve granting freedom to individual to determine the destiny of the inheritance which also would be in compliance with European law. In the Danish law, reserved inheritance quota includes 1/3 to the descendants and 1/6 to the spouse. In Turkish law this quota for all descendants is 1/3 of the heritage, whereas for the mother and father half of the inheritance. Brother and sister have the quarter of the inheritance. According to the Japanese law 1/3 belongs

to the living spouse and 2/ 3 belong to the descendants. (Fuga, 1999, pages 90, 101, 109).

But what is considered as calculation value and what is considered as inheritance for compulsory heirs, it is determined in the LIK¹⁵ all this for purposes of equal treating of legitimate heirs. Initially shall be recorded the inheritance wealth owned by the Testator at the moment of his/her death, including debts of other persons, value available in the testament, gifts given by testator to the legitimate heirs and others, value available in the Testament and the gifts given by testator to the heirs who waived from the right on inheritance. (Podvorica, 2006, page 68). Based on these legal premises, the inheritance quota is determined, which belongs to compulsory heirs.

An economic analysis of the compulsory share, results with the product that the legal reserved inheritance serves for family economic cooperation, it diminishes financial transaction costs and simplifies and preserves relations amongst family members. (Schöpflin, 2005).

3. Infringement of Compulsory Share

What happens if testamentary availability infringed the compulsory share?!, since the compulsory share presents an individual or group quota belonging to compulsory heirs, exceeding such quota determined by imperative norms, makes the testamentary availability null and void, by giving the right to the compulsory heirs to seek that this testament is declared null and void, to the extent where their rights are fulfilled. Through this they request to reduce availability in the testament, return of gifts and have the same be calculated to the legitimate heirs, the debts of the Testator up to the value when their legal right is fulfilled. ``When the compulsory share is violated, the availability in the testament shall be reduced, whereas the gifts shall be returned to the extent required to fulfil the compulsory share. The compulsory share is infringed when the total value available according to the Testament and the gifts exceeds the available part. This value includes gifts and availability in the Testament for which the Testator ordered not to be calculated to the compulsory heir as his part of the inheritance.`` (LIK, Article 38).

Initially the availability in the Testament shall be reduced, and then if from this part the compulsory share is not fulfilled, the gifts shall be returned.¹⁶ ``

¹⁵ For further details see Article 32 of the Law no. 2004/ 26, Law on Inheritance in Kosovo; hereinafter LIK.

¹⁶ Gift is considered waiver from a right, forgiving of a debt, any transfer of property in the interest of a heir on behalf of an inheritance wealth, or for establishing or expending family, skill training, and any other value free of charge. As Gifts as per LIK are not considered expenses for maintenance, education, children education and gifts of small value, that are given during

availability in the Testament shall be reduced to the same extent, regardless its nature and volume and regardless if those are part of one single Testament or more testaments, unless something else comes out from the Statement." (LIK, Article 40). Return of gifts should be done in the same state as those where on the moment when they were given. The right to seek return of gifts belongs to the compulsory heir, within preclusive time limit¹⁷ of three years, from the Testator's death. "when the compulsory share is infringed, firstly shall be reduced availabilities according to the Testament and if the compulsory part is not reached this way, then the gifts shall be returned. If the gift cannot be returned as item (in rem), the person who got the gift shall return its value according to the provisions on return in case of ungrounded enrichment." (LIK, Article 39). Gifts are returned according to the order determined by imperative norms: return of gifts is made starting from the last gift and proceeds toward the previous gifts. The gifts given at the same time shall be returned proportionally based on the value of the gift (LIK, Article 43). As mentioned, receivers of the gift shall calculate their gifts, for purposes of preserving the equality between the heirs. "To each legitimate heir is calculated the inheritance share obtained as a gift from the Testator by any form. A gift shall not be considered as such if the Testator declared during gift delivery of at a later stage or in the Testament it is stated that such gift shall not be calculated in the inheritance part or from the circumstances it may be concluded that this was the will of the Testator." (LIK, Article 47.1 and 47.3). Therefore based on the calculation the heirs get same value *in natura* or *in rem* and the remaining part shall be split between the heirs. In addition to the gifts the heir will get also the legacy,¹⁸ "calculation of gifts and legacy is calculated in such manner where other heirs take from the inherited wealth the respective value and what remains from the inherited wealth is split between all heirs." (LIK, Article 49).

Analysis of the provision infringing the compulsory part, is clear, and from this the purpose of Kosovo legislator in order to provide the compulsory heir

celebrations. For further details see Podvorica Hamdi, E drejta Trashëgimore (Inheritance Law), Prishtinë 2006, pages 81- 82.

¹⁷ *Preclusive timeframe* presents a time limit foreseen by law, which means that upon expiry of the time limit foreseen by law is lost the subjective civil right. For further details see Aliu Abulla, E drejta Civile (Civil Law), Prishtinë 2013, page 432

¹⁸ Legatee is the only individual holder in the inherited wealth, even when the part earned is higher than the one inherited by the universal heir, and as such the same inherits only wealth and is free from taxation and interests, which is not the case with the universal heir For further details see: Trashëgimtari Univerzal dhe Singular (Universal and Singular Heir). For further details see: Ibrahim Shpresa, Institute of legacy in the testament, ILIRIA, International Review, Prishtina, 2011/1, pages: 165- 169.

the juridical means for protection of his right on inheritance and this way ensuring that all heirs are equal before the heritage quota.

4. Exclusion of obligatory heirs from obligatory inheritance

In elaborating of obligatory part, we would raise a question as to why testamentary freedom would be limited while the owner of a property during his lifetime gains such property through his work and while he lives, he is free to transfer it the way he wants, so, why such a right for a freewill transfer shall be limited after his death? In compliance with the present Law on Inheritance and based on following it is more appropriate to have a inheritance quota: a testator, at the moment of providing a testament, may be influenced by a number of factors, such as: Love, respect, sympathy, charity; all those factors that may influence exclusion of obligatory heirs such as: children, parents, spouses and grandparents, are subjective factors. These factors reflect human emotional bond being of the same genus of kinship and of marriage and protection of such category of persons is a human obligation.

In my opinion, I also support the fact that obligatory heirs not always shall inherit; this depends on their manners in relation to the testator and his family members. So, persons who conducted following, cannot inherit: "In his testament, the testator can exclude a heir from obligatory inheritance:

- a) If he gravely violated the testator by violating any legal or moral obligations;
- b) If intentionally committed any serious criminal offence against the testator, spouse, children or his parent(s);
- c) If he is a dissipated, refuses to work, dissolute." (LIK, article 114).

In conformity with present law, the testator may announce totally or partially unworthy of inheritance above mentioned heirs. This shall always be done based on a punishment verdict of a Criminal or Civil (pre-judiciary cases) Court. The reasons for inheritance exclusion are precisely listed. The testator, at the moment of inheritance exclusion shall clearly state reasons for such exclusion and testify about it. Reasons for inheritance exclusion must be presented at the time of drafting of a testament. "By inheritance exclusion, the heir loses inheritance rights to the extent of such exclusion while rights of other persons that may inherit from the testator are determined thereof as if the excluded has died before the testator." (LIK article 117). Except for this exclusion from obligatory inheritance, the testator can exclude an obligatory heir from

inheritance if he is dissipated.¹⁹ By this provision the inheritance of the obligatory heir is excluded for the benefit of other heirs because his behaviours and actions are such that cannot increase passive value into active value of the property. Following legal conditions shall be met in order for this provision is implemented: "If obligatory heir has lots of debts or his is a dissipater, the testator may entirely or partially exclude him from his obligatory part for the benefit of his other heirs. This exclusion can be lawful only if when at the moment of opening of inheritance, the excluded has a minor child or nephew from e child died before or has a an adult successor or nephew from a dead child that are unable to work." (LIK- article 118).

The institute of exclusion from inheritance is not equal to privation from an obligatory part in favour of heirs, because both these institutes differ initially by the time and their effect; the earlier excludes the heir at the time of opening of the testament whereas privation for the benefit of minor heirs and work disabled heirs should exists at the moment of drafting of the will. Another difference is that privation from an obligatory part for the benefit of heirs will not be executed if at the moment of death of testator, the inheritor deprived of inheritance has no young or disabled adult children. All that interposition is for impeding or limiting of the effect of imperative norms related to obligatory parts, always empowering the will of testator in determination of the fate of his inheritance property. So, it limits this particular effect because even if they are legal heirs, civil law system enables them with rights and freedoms of citizens from the aspect of rights on testamentary possessions, although it should be implemented in compliance with public policies. In this case unworthy heirs cannot inherit but persons will special needs shall be protected (Podvorica, 2006, page 75).

The analysis of the institute of obligatory inheritance presents ensures obligatory heirs in one side, their certain part form inheritance wealth and protection of general interest in other side by providing guarantees to minor

19 Dissipated is considered a person who unreasonably spends his wealth and exceeds his incomes, for example, buys unnecessary luxury items and by doing this behaviour and actions violated family necessities and jeopardize to penury. In the case of decision on the notion dissipated, the Court shall have an active role to interpret that what is to be considered, indecent, dissipating behaviour. For more details see, Podvorica Hamdi, *The Inheritance Rights*, Prishtina, 2006, pg. 74 -76.

and disabled persons that they will enjoy support by inherited property. (Biçoku, Tirana, 1984, page: 111).

If we see it from a retrospective point of view, the right on exclusion from inheritance was acknowledged in Roman law, also. But if we want to have a comparative observation of it, the Greek Law recognizes exclusion from inheritance; in this way it excludes from inheritance those heirs that are living an indecent and immoral life. But it also defines that if the immorality and indecency cause, at the moment of death of the testator does no longer exist, than in this case this exclusion becomes invalid. In other laws, the institute of Exclusion from Inheritance is acknowledged. (Fuga, 1999 page 72). This entire analysis on obligatory part is for the purpose of serving to establish this particular legal reservation, (although, I consider that its quota should be reviewed in the sense of decreasing of its amount); I say this responsibly that luckily Albanian and Kosovo Legislation with regard to inheritance matters serves the purpose by promulgation of the Law on Notary. Thereby, Kosovo Law on Notary ²⁰ and Civil Code of Albania ²¹ including amendments made recently, non-contentious competence is within their scope of authority. This contributes to particularly notary advices and warns the heir on obligatory part and in this way citizens will compile valid testaments that in one hand that will secure their testamentary rights and on the other hand the will secure execution of the rights of obligatory heirs for non-disposable testamentary part.

5. Conclusions and Recommendations

One of the most important rights of humans is the right of disposal of objective property rights. While these subjects live, these rights circulate in most freely manner possible, the question is: shall an individual be permitted with such right of circulating with these values after his death? The best answer we get from the Law on Inheritance in Kosovo when the testator receives the rights on free determination of heirs and the extent of inheritance to be inherited by heirs. In civil law system, subject of such rights have freedom and initiative in creating of legal possession acts wither while testators are alive or after their death but such acts of possession should be viewed from the point of

20 Functions of the Notary: Article 1.4 Processing of all inheritance non-disputable proceeding; Law no.03/L-010 on Notary.

21 Civil Code of Albania, Adopted therewith law no. 7850, on 29.7.1994 amended with the law no.8536, dated 18.10.1999; Law no. 8781, dated 03.05.2001 and Law no. 17/2012.

achieving of public policies. The public policy in the region and in Europe works goes in favour of protection of a category of persons such as: children, parents and spouse of testators. These persons are considered to be sublime values of a society and limiters of nobility of a testator. But it also goes in direction of protection of children being beings of vital importance; they enjoy a personal right addressed to the testator for inheritance of a certain inheritance quote.

As all other objective rights that has limitations, the Law on Inheritance in Kosovo sets out limitations in the rights of testator in testamentary possession. This limitation serves for the benefit of obligatory heirs. By comparing legal reserves provided by European Law we notice that there is no precedence as to the principle of legal initiative comparing with that of legal reserves. Therefore, I recommend that during harmonizing of inheritance within EU legislation related to inheritance matters it should pay attention to this quote and this inheritance be decreased in attempting to proximate it with big global systems such as Anglo-American that proclaim testamentary rights and civil laws. The grounds for this recommendation I find in that as long as subjects of such rights have unlimited liberty as to exchange of property rights while they live, this can be done the same by contracts on ceding and division of inheritance wealth (property), therefore why they should not have such right (not absolute) also during compilation of the testament.

Nevertheless, I consider Kosovo is also in compliance with EU regulations with regard to limitations of the rights as to obligatory part; also, by giving rights to the testator not to give inheritance to legal heirs if they are not worth of heritage or they are dissipated. If we recall an old Roman maxim, "it is a misfortune if you die without your testament," we believe in the institution of the Notary as competent authority for inheritance matters and Kosovo citizens' start compiling testaments as the Notary being in their service in the sense he informs them as to how to draft valid testaments with regard to obligatory part, in particular inform them on the rights of the spouse as equal and obligatory heir of inheritance wealth, that was for a long time excluded from inheritance wealth.

The definition of obligatory part, thus, is in compliance with Continental legislation and European Law in the sense that every subjective right should serve to the best of personal right of obligatory heirs not to leave them in poverty and in this manner enable applying of human principle that family presents the basic cell of a society and it is considered to be the most competent to inherit such values throughout generations.

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