Oñati International Institute for the Sociology of Law
Instituto Internacional de Sociología Jurídica de Oñati
Oñati Socio-Legal Series
ISSN: 2079-5971

Oñati Socio-Legal Series, v. 4, n. 2 (2014) – Wealth, Families and Death: Socio-Legal Perspectives on Wills and Inheritance
ISSN: 2079-5971

We Are Not Born Alone and We Do Not Die Alone: Protecting Intergenerational Solidarity and Refraining Cain-ism Through Forced Heirship

ALBERT LAMARCA I MARQUÈS*

Lamarca i Marquès, A., 2014. We Are Not Born Alone and We Do Not Die Alone: Protecting Intergenerational Solidarity and Refraining Cain-ism Through Forced Heirship. *Oñati Socio-legal Series* [online], 4 (2), 264-282. Available from: http://ssrn.com/abstract=2431053

Abstract

In the current academic debate on family and succession law, the abolition or reform of forced heirship is often advocated. It is argued that this institution does not respond to the expectations and needs of today's society. In the realm of freedom embodied by testate succession by will, the mandatory share is framed as a contradictory restriction on the individual right to decide freely. This paper contributes to the debate on the legal and social basis of forced heirship by offering a moderate defence of the institution. I argue that forced heirship actually protects individual choice while also respecting intergenerational ties. Moreover, the institution restrains competition and opportunistic behavior among siblings. It reflects the reality that we are alone in neither birth nor death and it reins in the Cain-like tendencies that threaten to tear apart families.

Key words

Forced heirship; wills; family; succession

Resumen

En el debate académico reciente sobre el Derecho de Familia y Sucesiones es un lugar común plantear la reforma o la abolición de la legítima. Se argumenta que esta institución no responde a las expectativas y necesidades de la sociedad actual. En un reino de libertad, como es el de la sucesión testada, la legítima supone una restricción contradictoria con el derecho de las personas a decidir libremente sobre una parte de su patrimonio. Este trabajo intenta contribuir al debate sobre los fundamentos jurídicos y sociales de la institución de la legítima, así como sobre su mantenimiento, con la discusión de algunos de los argumentos en su contra, ofreciendo una moderada defensa de la misma, sobre la base de considerar que todavía existen buenas razones para abogar en su favor. La legítima protege la

Article resulting from the paper presented at the workshop *Wealth, Families and Death: Socio-Legal Perspectives on Wills and Inheritance* held in the International Institute for the Sociology of Law, Oñati, Spain, 25 26 April 2013, and coordinated by **Daphna Hacker** (Tel Aviv University) and **Daniel Monk** (Birkbeck, University of London).

* Albert Lamarca i Marquès is a Professor at the Faculty of Law at the Universitat Pompeu Fabra in Barcelona, a specialist in Family and Succession Law and a member of the Catalan Codification Commission. Universitat Pompeu Fabra. Ramon Trias Fargas 21-25. 08005 Barcelona. Spain. albert.lamarca@upf.edu

libertad individual respetando a la vez los vínculos intergeneracionales, y previene las conductas oportunistas y la competencia entre hermanos, Este instituto refleja el hecho que no estamos solos al nacer ni tampoco cuando morimos, y puede ser útil para mitigar el cainismo que tanto amenaza la convivencia familiar.

Palabras clave

Legítima; testamento; familia; sucesiones

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1. Introduction

Forced heirship[1] is a frequent target of criticism in the current academic debate on family and succession law. Many have advocated abolition or reform of this institution on the ground that it does not respond to the expectations and needs of contemporary society. In a realm of freedom embodied by testate succession by will, restricting the individual right to decide freely about a portion of one's estates is portrayed as contradictory. The establishment by law of a duty in favor of some descendants—who may be autonomous adults—is framed, thus, as out of step with the times.[2] Although we accept certain mandates in the relationship between spouses, where the respective contribution to the common project has implications for the distribution of assets, or between parents and children before adulthood, where parents must ensure the subsistence of their children, it seems from the academic debate that the fate of the estate of a deceased person should be free from any condition on the basis of kinship.

Three main arguments have been levelled against forced heirship. The first, drawing directly on these notions of freedom and autonomy, is simply that individual choices about transferring property should be unrestricted. The second argument is that duties of solidarity toward descendants are already fulfilled during the first years of a child's life and should not be imposed by law at the end of the parent's. The third argument is that, while forced heirship may once have been needed to preserve family estates and ensure that they were passed to relatives, such estates no longer exist in the same form, and there is no longer value in keeping them within the family. These arguments, often buttressed by comparative law analysis, are gaining acceptance among continental scholars and are reinforced by persuasive common law models that are the product of a very different historical tradition (Dutta 2011, p. 1829).

I believe this is a mistake. Notwithstanding the changed social reality, there are still good reasons to maintain forced heirship. I offer here a moderate defence of the institution based on the particularity of property transfer by death, the significance of intergenerational solidarity, the special nature of family relationships, and the importance of legal rules that are certain and universally applicable. In doing so, I contribute to the debate on the legal and social basis of forced heirship.

This is an area of the law in which experience and personal preferences play important roles. Discussing forced heirship means reflecting on values, and on social and legal culture. Although it is impossible to do this without drawing, to some extent, on one's own perspective and legal tradition, this paper does not limit its scope to a particular jurisdiction. The issues discussed are similar across jurisdictions and, although the starting points of different systems' forced heirship rules are often different, perhaps their end-points should be more similar.

2. Varieties of forced heirship: substantive rules across jurisdictions

Critics of forced heirship can be divided into two camps: abolitionists and reformists. The first camp views the issue in binary terms and advocates a total end to the institution on the ground that it is out of line with today's social context. Mandating the right to an inheritance share for children, according to this camp, is simply unreasonable.

[1] From a comparative point of view, in English we can refer to the institution under study regarding the right generally reserved to the children in the estate of their parents as *forced heirship*, *forced share*, *statutory share*, *compulsory share* or *compulsory portion*. When applied to spouses, this right is also sometimes called the *statutory* or *elective share*. While there may be technical differences in the choice of the different terminology, these are not relevant for purposes of this paper and all of these terms are treated as equivalent here. Note that the terminology in Romance languages is also not uniform (Foqué and Verbeke 2009, p. 210).

[2] Works representative of this debate include: Reinhard Zimmermann, ed. (2012), Miriam Anderson and Esther Arroyo i Amayuelas (eds.) (2011), Christoph Castelein *et al*. (eds.), (2009); Anne Röthel, ed. (2007).

The second camp, in contrast, looks to improve the way forced inheritance functions. This camp examines different models of forced inheritance in existing regulations with an eye to amendments. While the forced share exists in most continental legal systems, it takes different forms. Given this plasticity, and the potential for adapting forced inheritance rules to different social realities, the binary approach of the abolitionists appears too crude a response. Perhaps the best question is not whether forced heirship should exist, but, as the reformers argue, what kind of forced heirship we need and how large the share should be.[3] From this perspective, an understanding of existing forced share rules is necessary.

The first characteristic that differentiates forced inheritance rules across legal systems is the share of the estate at stake. The amount that must be passed mandatorily to the decedent's children is usually measured as a percentage or quota of the estate and it varies considerably depending on the country. Typical mandated shares include: a quarter (25%), a third (33%), half (50%), two thirds (66%), and even up to four fifths (80%) of the estate. The limitations on freedom of testation are, thus, very different.

The second relevant characteristic is the nature of the right over the forced share. The heirs can receive either a property right to part of the estate or simply a claim for a given value against the testate heir. Between the two extremes there are intermediate cases with many variations. The difference has important implications for the management of the succession process in relation to the testate heir's acquisition of the inheritance and exercise of his or her rights over the property (for example, the right to transfer it), as well as for the means available to the beneficiary of the forced share to realize his or her rights.

Apart from the size of the share and the nature of the right, another variable in forced heirship rules is the identity of the potential beneficiaries. The set of protected heirs may include descendants, ascendents and surviving spouses—a set that in some cases replicates the order of intestate heirs. As a corollary to the identify of beneficiaries, legal systems also vary in making the right individual or collective, and in determining whether the testator can fulfil his or her duty by choosing among potential intestate heirs.

Jurisdictions also differ in their methods for calculating the precise amount of the forced share. In some jurisdictions, this amount depends on the value of gifts made while the decedent was alive. Gifts (often with a time limit) may be counted as part of the estate in calculating the forced share. If these were gifts to the decedent's children, they may be considered advance payment of the forced share; or they may be revoked if the value of the estate is insufficient to pay the forced heirs. In addition, in some legal systems, the size of the share depends on the total number of forced heirs, and some systems place an overall cap on the forced share amount.

Finally, legal systems differ in their rules on whether and when forced shares may be overridden, on the types of assets at stake, and on the type of ownership gained by the heirs. These differences include whether the right to a forced share can be renounced before the share has been received, whether agreements can be reached regarding the forced share before the succession is opened, and the length of the statute of limitations for claiming a forced share. They also include the testator's ability to unilaterally override the forced share: In some jurisdictions the right to a forced share is merely formal and the testator may deprive those entitled to it simply by mentioning them in the will without any bequest. Additional differences include whether forced share rules apply only to specific assets, and whether the forced share results in full ownership or merely usufruct.

[3] For a recent comprehensive presentation of the different models of forced heirship, *see* Walter Pintens (2011, p. 5); see also, Foqué and Verbeke (2009, p. 210). For more detail on the particularities of different regulations, see Antoni Vaquer Aloy (2007); and for the separate treatment of forced heirship in every jurisdiction, Rembert Süß (2008).

Apart from forced heirship, it is important to remember that other institutions within each jurisdiction's succession law may also restrict testators' freedom to choose heirs and may affect particular assets. Thus, understanding forced heirship often requires understanding the interaction among a wide set of rules regarding succession.

All of the above features of forced heirship, which combine both legal tradition and policy decisions, can be found in European continental legal systems. In Spain, the country's seven private law jurisdictions have different schemes for forced heirship combining all of the noted variables.[4] The common pattern in all Spanish jurisdictions is that a share on the parent's estate is awarded by mandate to their children, but the amount and the nature of the right vary.

3. Fixed rights or judicial discretion

The two constant characteristics of forced heirship across the main continental jurisdictions are that (1) it is awarded solely on the basis of family relationship, normally to the decedent's children, and (2) its amount is legally determined and operationalized with few arithmetic calculations. Apart from some exceptions, the existence of the right and the amount awarded generally do not depend on the particular circumstances of the heirs in question. As a result, there is usually a high degree of certainty and little to dispute in forced heirship cases. This is one of the main strengths of continental forced heirship law (Matthews 2009, p. 137), but it is also the source of much of its criticism: Certainty also means rigidity and the potential for undesirable outcomes.

An alternative to abolishing forced heirship, thus, could be altering these requirements such that the right and the amount in question would depend more on the specific circumstances of each case. The circumstances would be tailored to the underlying goals of each jurisdiction's forced heirship law but the basic features would be the same: The decedent's children would be entitled to some part of the inheritance, but this right and the amount to which they are entitled would depend on the establishment of the specific personal circumstances laid out in each jurisdiction's law—and on a large amount of judicial discretion. Thus, forced heirship would be determined on a case-by-case basis.

One appealing approach to the necessary circumstances would be to look to the children's economic dependence and the parents' duty of economic support. The forced heirship right could be triggered only if the child is economically dependent on the decedent, and the amount of the share could vary according to the level of dependency and the size of the estate. This is the approach followed by the English Inheritance (Provision for Family and Dependents) Act of 1975.[5]

The English rule is interesting because it came about not as a reform of the forced heirship institution but rather as a reaction against absolute freedom of testation. In other words, the rule did not represent the weakening of a prior, more rigid system of forced heirship, but rather the establishment of forced heirship on a blank slate. Outside of England, however, this rule has added to the forced heirship debate the example of a more flexible, case-by-case model as a possible alternative to rigid, automatic systems. In the English model, potential forced heirs must prove to a court that their specific circumstances fulfil the law's requirements. They do not have a right to a forced share before doing this, and the amount to which they are entitled varies with the facts. This approach protects the freedom to testate while also accounting for the needs of dependent offspring. The right to a forced

[4] For recent general overviews, *see* Antoni Vaquer Aloy (2012), Sergio Cámara Lapuente (2011, p. 271), see also Teodora F. Torres García (coord.) (2012); Esther Arroyo i Amayuelas (2007, p, 257).
[5] Previously, the Inheritance (Family Provision) Act of 1938.

share is not granted across the board, but only to those descendants in need and only to the extent of their needs.[6]

Although the English rule strikes a good balance in this regard, it suffers a number of serious drawbacks. First, as a matter of principle, inheritance should depend not only on necessity, but also on other factors arising from the next-in-kin relationship. The English forced share fails to reflect the existence of non-quantifiable intergenerational solidarity, operating instead as a kind of quantified postmortem child support. Second, in practice, a significant asymmetry between descendants according to their dependency is created. The rule favors those who are still depending on the deceased person, and punishes those who are autonomous and can provide for themselves. Finally, and most troubling, the English model requires a judicial procedure, and the exercise of judicial discretion to determine the existence of the right and the amount of the award. British practitioners complain that the resulting uncertainty has constrained freedom of testation in practice, and that testators tend to favor their close relatives in their wills in order to avoid the possibility of forced heirship litigation after their deaths (Matthews 2009, p. 1834).

This growth of litigation between relatives due to uncertainty in the law constitutes a particularly strong reason to avoid reforming forced heirship laws to make them more flexible. Death happens constantly and rules on inheritance should be simple and should provide legal certainty, preventing disputes through clear, fixed rights. A scheme that draws distinctions between children according to their personal circumstances and forces them to file suit in order to obtain a forced share would lead to the type of negotiations based on broad, open-ended standards that occur between spouses in divorce cases. The disadvantages and limitations inherent to such negotiations are well-known. Every death should not result in a lawsuit. Whatever social benefits inure from flexible 'forced' heirship rules like those of the English, they are outweighed by the costs of uncertainty and litigation.

My defence of forced heirship is, thus, not of the type of watered-down model that many have advocated in their calls for reform, but rather a defence of the existing continental model in which the right and the amount of the forced share are clear and fixed by law at the outset.[7] As explained further below, the main change I would recommend in some systems it to adopt best-practices with regard to the amount of the share and the nature of the right awarded.

4. Criticism and rejection of forced heirship: freedom and property

One of the main arguments against forced heirship is based, as noted above, on the perceive gap between the institution and current social mores. If the gap is such, it is argued that maybe the institution should be abolished or should be substituted by a model contingent on the specific needs of each case, like that of the English system.[8]

First, forced heirship is said to run afoul of freedom of testation. Its existence means that in many European systems, parents cannot choose the beneficiaries of their entire estate because a portion of that estate is mandatorily transferred to the children. Although the result is what many parents would do in practice anyway, it is a legally mandated result and, thus, a limitation on the freedom that generally governs relationships among family members who have reached the age of majority. This is not well-regarded by some scholars, who assert, that parents should be free to decide what to do with their estates.

[6] On this system, see Gillian Douglas (2014), Roger Kerridge (2009, p. 164, 2011, p. 131).
[7] See also the critiques of the discretionary, as opposed to fixed, forced heirship systems in Kerridge (2001, p. 152).
[8] For a list of the different arguments for and against the forced heirship, see Martin Jan A. van Mourik (2009, p. 110); Cámara Lapuente (2011, p. 284).

The argument based on freedom is hard to refute. If the father or mother owns the estate and has no debts or liabilities, it is argued that individual freedom of choice is the best criterion for guiding inheritance law. People should be free in their private law relations, particularly in family law, and, thus, they should be able to do whatever they want regarding the succession on their estates. There should be no restrictions on freedom of testation based on kinship and inheritance should only be based on the free will of the testator, without any legal conditions. In these terms, the only principle that could offset freedom would be the principle of necessity. That is, freedom of testation might be limited if there are circumstances that make forced heirship a necessity, but not otherwise (Vaquer Aloy 2007, Ferrer Riba 2011, p. 337).

Beyond the principle of freedom, arguments against forced inheritance are economic, in relation to both the nature of the inheritance assets and the duties inherent to the relationship between parents and children. It is argued that the law should affirm the exclusivity of the estate of the parent rather than treating it as a communal or family estate to be preserved for future generations. If the decedent is the sole owner, he or she should have power to decide its fate. In addition, property acquired during a person's life is not attributable to the contribution of the children; and if it were, such children's contribution would be offset by the support the parent has given to his or her children while alive. Regarding family duties, the main argument against the forced share is that some children receiving it may not actually need it. In the past, the forced share offered a way for children to become independent and leave the parental home. Today this is generally not the case because increased life expectancy means that children receive their forced share payments at older ages, when they have already left the parental home and achieved independence. This undermines the equity value of forced heirship: If children are already self-sufficient, there is no reason to limit their parents' will.[9]

As a corollary, it is argued that if the basis for the rule is the child's needs, then forced heirship should be made contingent on the existence of such needs, as is done in the English model. The problems with that system, however, have already been laid out above. Although one might try to avoid the problem of uncertainty and litigation by somehow making the child-need determination more categorical—for example, by assuming its existence for minor or disabled children—the trade-off would be a loss of the rule's ability to respond to actual necessity. A categorical rule like this would create unjustifiable distinctions among children, potentially harming relationships and dynamics between siblings. For example, a 17-year-old child who has already received a large patrimony from another relative and become independent might end up with a forced share while his or her 23-year-old sibling ends up with nothing.[10]

If the forced share is linked to a child support duty, then abolishing the former also requires amending the latter, since death extinguishes the duties of support between relatives. The introduction of full freedom of testation for parents should be accompanied by changes in child support. To take an extreme case, not very likely, two young parents could decide not to mention a minor child in their will or to award this child only a very small amount. If the parents pass away while this child is still a minor, the child will not receive any assets from the estate and they have no right to claim child support from the heirs. Thus, a reform of the system of parental responsibilities including a postmortem child support would be necessary.

5. Forced share as a protection of freedom of testation

As configured in most legal systems, forced heirship is viewed as limiting freedom of testation. In one way or another, it removes a part of the estate from the

[9] For example, Esther Arroyo i Amayuelas and Miriam Anderson (2011, p. 69) and Dutta (2011, p. 1830).
[10] On this topic, see Albert Lamarca i Marquès (2009, p. 263).

testator's control in exercising his or her right to make a will. Forced heirship predetermines the beneficiaries of this part of the inheritance, leaving the testator with power to decide over only the remainder of the estate. Of course, this is relevant only when the testator actually exercises the right to make a will; if the right is not exercised, the inheritance is subject to the rules of intestate succession, which generally distribute the estate according to the preferences of the average person (i.e., to the closer relatives).

Freedom is one of the basic arguments against forced heirship: Parents should be able to decide freely as to the disposition of their estates.[11] But as we have already noted, absolute freedom of testation, without correctives, can have absurd consequences, such as like leaving orphans without any economic protection after the death of their parents. Therefore, even those legal systems without forced heirship, like most of the jurisdictions in the United States, include rules that bring them closer to the civil law's pretermission of heirs. If the longest surviving parent's will dates from before the birth of the children and, therefore, does not include them, the law allows the children to claim an inheritance close to that which would have passed to them had the succession been intestate. It is so rare that parents do not transfer anything to their children that the law assumes such omissions are involuntary. The rules on "omitted children" show that law takes transfer of assets to children as the most common scheme of successions.[12]

Most parents pass all or part of their inheritance to their children, although the precise assignment obviously varies. A surviving spouse may end up being an heir, assets may be unevenly distributed among children, and other family members or people outside the family may be included in the inheritance, but the general, natural tendency within families clear: Children inherit. If absolute freedom of testation rules, then the decision of the testator to exclude all or some of the children must be legally protected. If parents have not followed the natural inclination, "disinheriting" their children, diverging thus from *id quod plerumque accidit*, it must be because they have good reasons to do so and the legal system should back such decisions.

Indeed, it is under this logic that a will changes the default intestate succession rules about the fate of an estate. Here, the legal system protects the testator's deviation from the preferences of the average person. The will normally conforms to the particularities of each situation.[13] What is clear is that the exercise of freedom of testation presupposes the full capacity of the testator and that the decision was taken without any undue influence.

Forced heirship, however, need not also be suppressed in order to protect freedom of testation. On the contrary, the forced share can operate as a means to protect freedom of testation. The common scenario is one in which parents' wills benefit

[11] The other basic argument, discussed below, is lack of economic foundation—i.e., that children do not really need the forced share.

[12] Cfr. Section 2-302 of the Uniform Probate Code: "This section provides for both the case where a child was born or adopted after the execution of the will and not foreseen at the time and thus not provided for in the will, and the rare case where a testator omits one of his or her children because of the mistaken belief that the child is dead." In these cases, the omitted child may claim a share in the estate, with the size varying according to the circumstances. For an updated version of the UPC, see http://www.uniformlaws.org/shared/docs/probate%20code/upc%202010.pdf.

[13] The relative frequency of wills versus intestate successions varies by jurisdiction. In Catalonia, statistics show that approximately 75 percent of successions are testate and 25 percent are intestate (Lamarca i Marquès 2010, p. 1169). In contrast, the proportion of successions that are intestate in Spain overall is around the 55 percent (Delgado Echeverría 2006, p. 103) (also including information and data about other countries). For Germany, Dieter Leipold (2013, Rn. 61) refers to an average intestate succession rate of between 66 and 80 percent. For England and Wales, with around 500,000 deaths every year, it is possible to identify 280,000 "grants of representation", the formal document that authorizes the distribution of an estate, of which a third are intestate successions. See the Law Commission papers on "Intestacy and Family Provision Claims on Death" at http://lawcommission.justice.gov.uk/areas/intestacy-and-family-provision-claims-on-death.htm, especially *Consultation Paper No. 191* of 29.10.2009, p. 2, and the *Final Report* of 13.12.2011.

their children. We assume that a deviation from this distribution is grounded on extreme reasons or the result of accident or other circumstances that have obscured the true intent of the testator. Clearly, there are cases in which parents intentionally and voluntarily disinherit a child. The fact that these situations generate serious doubts about intent, however, cautions in favor of maintaining the forced share as a backstop precisely to safeguard the freedom of the testator. Given how difficult it is to analyze the complex, emotional reasons of the parent, an appropriate middle ground between intestate succession and absolute freedom of testation could be the imposition of the forced share limited to a moderate amount. In cases of family conflict, whim, animosity, or undue influence, this moderate forced share would remain to protect of the testator.

In this context, it is important to keep in mind that the transfer of assets as a result of death is a singular event and, thus, hard to compare to other modes of transfer. Unlike *inter vivos* transfers or donations, transfer by death cannot be prevented. That a transfer will take place is inevitable, and in this sense, it is not a voluntary act. What the testator's will determines is the set of beneficiaries to which this transfer will be directed, but not the fact of the transfer itself. Consequently, the beneficiaries of a testator cannot be evaluated under the same terms as parties to a market transaction or beneficiaries of a gift. Death and inheritance are full of feelings—of justice, of resentment, of compensation, of love, of reward, of forgiveness. To import into this unique realm criteria specific to the market simply makes no sense.

In terms of collective welfare and the probability of intended outcomes, forced heirship serves as a technical regulation that can better protect freedom of testation than can a regime in which the regulation is entirely suppressed. There is no doubt that the testator knows better than anyone what he or she wishes to do with the estate, but we lack means to ascertain these wishes with certainty once the testator has died. Given the probability that any apparent disinheritance of a testator's child is the result of mistake or undue influence, ensuring that a portion of the inheritance goes to the children may well be the best way to respect testators' wishes in the aggregate. Forced heirship provides an objective rule that applies to a wide variety of cases, and although it surely undermines the testator's intent in some cases, there are good reasons to think that it does just the opposite in the majority of cases. In these cases, the forced share is an appropriate correction.

6. Intergenerational solidarity, freedom and individualism

The defence of absolute freedom of testation is also linked to the notion that the forced share lacks an economic foundation. Since parents are not indebted to their children, it is argued, they should be free to decide whether to leave them anything in their wills. This argument takes special resonance given that parents today tend to die later in their children's lives than they did in the past, making it harder to justify forced heirship as a means of emancipating the children. In addition, whereas family estates were once acquired and transmitted across generations, today parents' assets are more frequently the result of their own work. Moreover, parents generally make significant contributions to the economic well-being and education of their children, both during childhood and after. All of these reasons make it harder to justify the forced share (Dutta 2011, p. 1832).

Leaving aside the question of parental intent, discussed above, these arguments can be addressed directly in terms of intergenerational solidarity. The parent-child relationship cannot be merely a computation of the net balance of what is paid and received. It is a relationship that transcends simple economic calculations. It embodies the idea that we are not alone in this world and that not everything is the product of individual achievement. Thus, although the forced share may be defended on the basis of individual choice (as above), it can also be defended on

the ground that within the realm of family, decisions cannot be made independently of others.

As the title of this paper suggests, we do not arrive in this world alone and we do not pass away alone. Apart from unfortunate exceptions, we start and end our lives together with other people—most importantly, our ascendents and descendants—and the continuity between generations should be reflected in succession law. The benefits of collective family life, and of the generations of relatives who have helped one another, should be reflected in the distribution of inheritance in a way that cannot be reduced to a simple computation.[14]

Of course, it would be bold to speak of a permanent, unconstrained duty between parents and children. But this defence of the forced share is not rooted in the responsibility to care for children's needs. Instead, the idea is to give children a right in the parent's estate simply based on the parent-child relationship. The parent passes away and leaves all his or her estate and he or she receives nothing in exchange. It is necessarily a forced transfer, and all the parent can do is to determine the beneficiaries. Arguments about the fulfilment of child support duties, the needs of the child, or the lack of reciprocation fail to account for the peculiar institution of inheritance transfer. And the children who benefit today from an inheritance may one day pass an estate to their own children through this same peculiar institution.

Moreover, children give a huge range of quantifiable and unquantifiable benefits to their parents. They contribute to their own patrimony and, thus, have a right to the forced share. At the least, children have likely lived until adulthood with their parents. Thus, during a long period of potential asset accumulation, the children have been part of the family household. Even if they have not contributed materially through labor, their existence has likely influenced their parents' professional activities and family life. In the relationship between parent and child, transfers are generally bi-directional, and include non-market, intangible benefits, that cannot easily be measured in economic terms or reduced to a spreadsheet of pluses and minuses.

Finally, it is important to remember that it is through the parents' choices that children enter the world to begin with. The decision to bring children into the world entails a commitment and duties that last beyond childhood. I am referring, here, not to the parable of the prodigal son, but to the complex web of material and emotional well-being that is spun within the family over time. Just as parents take care of their children as they develop, those children go on to take care of their parents as they age. Although there are obviously exceptions, children are not born alone, and they go on to stand by their parents and deliver non-market benefits throughout their parents' last years of life. Thus, the parents also do not die alone.

It is hard to believe a better society can be created by promoting individualism in family issues, by advocating that we owe each other nothing and that everything we have results from our own efforts, or by abolishing the forced share based on the idea that we must be absolutely free to decide about our inheritance. Forced heirship reflects the reality of collective family life and signals the importance of maintaining this rich, complex set of relationships. Family plays a vital role in personal development, and there is a close relationship between family structure and individual welfare. Although we need not go so far as to claim that the absence of forced heirship produces family disintegration and failure, it is hard not to see how the institution ensures that the positive values of a family are reflected at the death of one of its members.

[14] This notion is reflected, for instance, the German Constitutional Court decision of 19 April 2005, which noted the constitutional guarantee of forced share as an expression of family solidarity based on the constitutional protection of the family (Article 6.1 GG) and freedom of testation (Art. 14.1.1 GG) (Badura 2007, p. 151, Pintens and Seyns 2009, p. 167); see also Ángel M. López y López (1994, p. 29).

Although family forms have changed profoundly over time, and households have generally been reduced, intergenerational solidarity remains important. Of course, cultural differences exist, and my view of the forced heirship is influenced by my own experiences and other anecdotal evidence concerning both families and the implementation of the forced share in Catalan Law. Family solidarity, however, is universal and the normative value of the arguments presented here can be applied across a wide range of countries.

For the above reasons, it is unrealistic to focus the forced heirship debate on pure economic arguments about the lack of contribution by children to the parent's estate or the limits of child support duties. Inheritance can be very controversial and cause significant emotional conflicts if one child or spouse has not been mentioned in the will. The principle in this field should not be "if you want to benefit from the estate, you must earn it."[15] It is not beneficial to bring a competitive market model to family relationships to abolish the minimum participation that forced heirship implies. It is not a good idea to promote a system in which some children can be excluded while others are not. Making family relations somehow contingent on the future estate to be distributed is damaging to everyone. There must be a minimum that it is sheltered from opportunistic behavior, and this minimum should be a fixed amount that is the same for all. In these terms, forced heirship contributes to the legitimate order, peace and stability in family relationships.[16]

7. Cain-ism and forced heirship

In this debate, the focus thus far has been on vertical family relationships—that is, the personal and economic relationships between ascendents and descendants. In order to evaluate the role of forced heirship in our society, however, it is important to consider also the horizontal relationships between siblings with respect to the succession of their parents. From this perspective, forced heirship can serve as a shield for one sibling against opportunistic behavior of another who wants to obtain all of the parents' assets.

The possibility of competition between siblings for the attention and support of parents is, of course, well known. In a regime of absolute freedom of testation, this competition may lead to the parental estate becoming the subject of selfish actions by one or more siblings. A sibling may try to influence the parents to change their wills in his or her favor, potentially becoming the sole heir by creating animosity toward the other children or by portraying himself or herself as the only one deserving of inheritance. The effects of such conduct can be devastating but are partly mitigated if the forced share guarantees all siblings equal treatment with respect to one portion of the estate.[17]

This is one of the most important functions of the forced share. One can argue that the vertical relationship between parents and children should not be conditioned on the protection of the horizontal one between siblings, but in fact both sets of relationships are tied together. Competition between siblings is a basic part of human nature, and the law can play an important role in mitigating the harmful effects of this competition when it comes to influencing inheritance decisions. The ability of parents to resist their children's demands is limited and the forced share should be viewed as an important regulatory tool in moderating the relationships between and among parents and their children.

[15] As noted, ironically, by Ángel Carrasco Perera (2003): "no es humano privar a los padres de la opción de sacar su herencia a una subasta en la que los hijos tengan que pujar con promesas de cariño y cuidados, con los que amenizar los tristes días de la ancianidad."
[16] For an opposite view, see Boudewijn Bouckaert (2009, p. 91).
[17] In fact, historically, forced heirship has fulfilled the function of preventing the eldest son from being priviledged, allowing the division of inheritance among all the children. This was the case, for instance, in revolutionary France under the provisions of the *Code civil* (Hyland 2009), and this stood in contrast to prior practice, as illustrated by Roussillon's experience (Peytaví Deixona 1996).

The increase in life expectancy and the inherent weaknesses brought about by old age make influence on the parent's will one of the major problems in contemporary successions. Freedom of choice is harder to exercise once one is old, has mental health problems, and feels week and alone. Even when elderly people are experiencing distorted states of mind, lawyers continue to give them counsel and public notaries register their wills without being really able to assess their mental capacities in every case. In these contexts, it is very difficult to distinguish between the mental ability to testate and presence of undue influence. The forced share, thus, provides a vital counterbalance against the Cain-like behaviors of children.

8. Family conflict and the loss of the forced share

The above arguments in defence of forced heirship relate to the protection of freedom of testation, the recognition of family solidarity, the existence of intergenerational transfers, and the volatility or weakness of the human will in matters of personal and familial relationships. Establishing a fixed right for children to a share of their parents' estate, however, is not incompatible with mechanisms to provide for the voluntary deprivation of this right under certain circumstances. These are the grounds for disinheritance, which the testator can use to deprive his or her descendants of the forced share.

An important question in this regard is whether the absence of an actual family relationship at the time of death should be a valid ground on which to deprive a biological child of the compulsory share (Martiny 2007, p. 195). Testators are often reluctant to leave any part of their estate to children with whom they have lost all connections due to conflict. It is argued that, despite the biological bond, one of the foundations of kinship between parents and children is the personal relationship; if it does not actually exist, the testator should have the right not to transfer anything to a biological child. This is an important argument, but one must also recognize the difficulty of ascertaining who is at fault in any personal conflict or to whom the breakdown of the family relationship is attributable. In many cases, the loss of the parent-child relationship results from the parents' divorce and the resulting physical separation of the family. When there is a conflict between parents, often children are forced to choose between them and this can cause an irreversible rift.

Viewed in this light, it seems incorrect to punish children for their parents' failures by depriving them of the forced share. Children are usually victims when it comes to divorce, and they suffer long-lasting damage that is difficult to repair. The issue is debatable but it is important to highlight these scenarios. At the same time, in the most egregious cases, such as serious assaults by children on their close relatives, deprivation of the forced share is clearly justified and will be established by legal regulation.[18]

9. Small estates, business assets, and taxation

Another critique of the forced share, from a different angle than those mentioned thus far, has to do with managing the probate process depending on the size and nature of the estate. It is argued that the forced share creates difficulties in small estates, particularly when it creates in-kind property rights that encompass all asset types. In such cases the forced share may end up applying to almost all assets in the estate, making it difficult to decide over, divide, and distribute anything that remains.[19] The management criticism is also raised on the context of business assets. It is argued, in particular, that the in-kind forced share makes it hard to transmit such assets to those who actually have the skills to manage them (Schmidt 2007, p. 37, Parra 2009, p. 481).

[18] On these cases, see Antoni Vaquer Aloy (2011, p. 89) and Jordi Ribot Igualada (2009, p. 1393).
[19] This is referred to as "the implementation cost of legitimate share" by Bouckaert (2009, p. 98).

The above criticisms are sound, but they can be easily addressed by limiting the size and the nature of the forced share rather than eliminating it (Dutta 2011, p. 1381). In other words, the question is really one of details. A forced share of between 20 and 30 percent of the estate, which is set out as a cash, rather than in-kind, right, solves the problem for both small estates and business assets and should be viewed as the best-practice approach.

Finally, it should be noted that taxation favors the transfer of assets to relatives, with inheritance transfers to non-related persons often being fiscally prohibitive. In any discussion of forced heirship and freedom to testate, taxation must be considered since it influences inheritance decisions. Although this varies by jurisdiction, taxation generally favors testation to relatives and especially to close ones.

10. Compulsory share for ascendents

We have dealt, so far, almost entirely with the question of forced heirship in favor of descendants because this is the more common situation at issue and because this is the situation at the center of the current debate. In many jurisdictions, however, a forced share may be established in favor of ascendents when the decedent has no children. Do the arguments expressed above apply also in these situations?

I believe that they do, albeit with certain adaptations and caveats. Parents should have the right to a forced share only if they survive their children, which means we are already dealing with an unusual and very sad situation. For the parents to be awarded a share of the estate by mandate, moreover, the deceased child must not have any surviving children of his or her own. If, in this situation, the child dies intestate, and the spouse is the only heir appointed by law, the forced share makes the parents also beneficiaries, jointly with any spouse or cohabitant of the child. Thus, the forced share for ascendents will only play a role in those sad and extreme situations.[20]

11. The surviving spouse compulsory share

The compulsory share awarded to the surviving spouse or partner is quite different from the share granted to those relatives on a direct line. Each legal system offers different solutions for the relationship between the marital property regime and succession.[21] For the purposes of this paper, the relevant question is how to combine the desire that often occurs to define the spouse as the sole heir, without limitation, with the constraints of imposing a forced share in favor of children.

We must understand that this generally is a temporary situation between the death of one parent and the death of the other, now a widow. Where there are second marriages and recomposed families, however, the situation is more complex. In all cases, assuming a forced share exists, regulation should strike a balance between the expectations of the children in the inheritance of the parent and the intent to make the spouse the sole heir. A reasonable measure would be to put on hold the first claim to a forced share, suspending the statute of limitations until the spouse passes away, and to then aggregate both claims assuming the family is not a recomposed one. Obviously, if a child demands the first forced share from the widowed spouse, his or her expectations in the second estate will be reduced, and

[20] This happens, for example, in Catalan law, when in the absence of children, the surviving spouse is the sole intestate heir, leaving to the parents only the right to the forced share. Art. 442-3.2 Catalan Civil Code.

[21] For a very interesting analysis of this subject, see Laura A. Rosenbury (2005, p. 1227), and, more recently, J. Thomas Oldham (2010, p. 95).

family conflict may occur. The way to legally respond to these issues is to condition the forced share of both estates on respect of the right of the widowed spouse.[22]

12. Forced share, succession agreements, and gifts for children

Abolition of the forced share may have adverse effects on family dynamics and solidarity among family members. If the fate of the parent's estate can depend on a capricious, possibly last-minute decision, it is reasonable to think that solidarity will only be achieved when there is a guaranteed right to the parents' estate. The forced share offers an assurance through clear and stable rules. If it is suppressed, however, the forced share can end up being replaced in practice by agreements between ascendents and descendants.[23]

Succession agreements are not accepted in all Civil Law jurisdictions, and neither are joint or mutual wills. These agreements are a major constraint on the freedom to testate once one has entered into them. Their advantage is that they clarify the inheritance within the family; but the main disadvantage is that the testator is unable to amend them based on changes of mind or of circumstances. It seems clear that if the forced share is abolished, it should be replaced by a contractual instrument between parents and children. It is important to analyse the trade-offs between the two institutions since both the reduced forced share and the succession agreement limits freedom of testation. The benefits of the latter are not clear. Even if they provide certainty, those agreements introduce elements of market exchanges within the family and encourage disclosure of preferences. They can be like putting a price on the love and care of children which, under a system of forced share, are taken for granted by the regulation (Braun 2012, p. 461).

Gifts from parents to children while they are alive pose similar puzzles. These can be a way to condition future care during old age. Unlike succession agreements, gifts in a system that recognizes forced heirship, can have a distorting effect on the whole succession, depending on whether the default rule establishes that such gifts constitute advance forced share payments (Lamarca i Marquès 2011, p. 44). Secondly, gifts are also relevant because they may become inefficient tools for their intended goals as a result of the forced share.[24] In any case, it is important to highlight that gifts can play the role of succession agreements where those are not allowed and that they can be treated as advance payments of the forced share.

13. Concluding remarks

This paper has discussed the main charges leveled against forced heirship and it has presented a moderate defence of the institution. Freedom of testation, the changed character of family estates, and a lack of need on the part of descendants have all been asserted as reasons not to carve out a forced share from an estate that is otherwise transferred by will. These arguments, however, break down on close examination and they are overshadowed by strong reasons to believe that forced heirship enhances social welfare.

The principle of freedom of testation must be considered against the complex and emotional backdrop of family dynamics, estate planning that is often done at an advanced age, and the unique situation of property transfer by death. Forced share, in these circumstances, can actually protect individual choice more than hinder it. A

[22] A clear case of how to implement and solve this situation is the German "Berliner Testament", where the universal institution of the children in the second succession is conditioned on their not claiming a forced share in the first one (Lange 2011, p. 107).
[23] On this point, the recent work of Hendrik Hartog (2012) is particularly interesting.
[24] This is the so-called "Clawback", one of the main grounds of opposition in the United Kingdom to opting-in to European Regulation 650/2012. See Report of the House of Lords, "The EU's Regulation on Succession. Report with Evidence", March 2010, at http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/75/75.pdf (including the opinion of Profs. Paul Matthews and Roger Kerridge).

Oñati Socio-legal Series, v. 4, n. 2 (2014), 264-282
ISSN: 2079-5971

more fundamental response to the economic arguments, moreover, is that the forced share protects the core value of solidarity between generations and a range of other values that are not quantifiable or capable of evaluation in market terms. Moreover, the forced share can serve to restrain competition and opportunistic behavior among siblings.

The forced share model that best achieves these benefits is one involving only a moderate portion of the estate and awarding this portion as a personal right to cash rather than an in-kind entitlement.[25] The details of any forced heirship regulation, of course, are influenced by the traditions, personal experiences and preferences of law-makers and scholars in each jurisdiction, and any amendments to forced heirship rules or decisions to abolish the institution altogether have a high degree of path dependence. In addition, forced heirship is threatened by the persuasive regimes of the common law jurisdictions. Ultimately, however, there are still good reasons to defend and preserve forced heirship and it is important to reflect closely on the tradeoffs involved when considering the arguments of its detractors.

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[25] See also Pintens (2011, p. 17), who notes that this must be the tendency for a reform of forced heirship, arguing that "[i]t is clear that the compulsory portion will remain a part of continental succession law for a long time, but reform attempts will aim to restructure the compulsory portion through a compulsory portion in value and an extension of the deprivation grounds. Both reforms seem to be sufficient to relax the relationship between testamentary freedom and the family's right to succession."

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