

New Developments in the Spanish Law of Succession

Sergio Cámara Lapuente

Facultad de Derecho
Universidad de La Rioja

*Abstract**

Recent legislative reforms of law of succession in Spain affecting both the Spanish Civil Code (mainly from 2003) and the six civil laws of the Autonomous Communities (including changes in 2006-2007 in Galician law) give rise to a need to reevaluate and reassess some of its central features. This reassessment should, consider not only changes arising from legislative intervention, but also from case law and everyday practice, as these reveal new trends in a number of areas including the legal position of widows and widowers, the rights of unmarried couples when one of them deceases (with very different approaches depending on the Spanish regions), the impact of marital crises on succession, the formal requirements of wills, the validity of inheritance agreements, estate planning, substitutes for testaments, succession of family businesses and enterprises, and the scope of a testator's freedom of disposition and the role of the forced share (on which there is an intense debate).

This study explains these developments taking into account those three sources (legislation, case law and practice) and provides both an up-to-date summary of the existing legal framework and some reflections on the future based on recent proposals for further reform suggested by scholars and notaries. Finally, the experience of the Spanish jurisdiction, which comprises seven different laws of succession within one legal system, also allows observations to be made as the role of comparative law in legal development and the possibilities of harmonising law of succession in the European Union.

Keywords: Testament; Wills; Inheritance Agreements; Forced Heirship/Share; European Law of Succession; Estate Planning

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1. Introduction

This presentation will be divided into three parts: the part (I) will examine the general trends regarding recent changes, focusing particularly on not just the latest legal reforms but also changes arising from case law and the spontaneous practice; the part (II) will be focused on the influences of these changes on any comparative legal analysis and includes an examination of recent proposals for changes to law of succession presented by the Spanish “Association of Professors of Civil Law” at its monographic session held in February 2006 and by other entities; and part (III) will examine the impact of (regional) economic integration and offers some final reflections on the distinction between certain areas in which supranational harmonisation of Law of Succession may be more feasible than in others.

As a general prior framework to make it easier to understand the latest modifications to Law of Succession, it is worthwhile highlighting some genuine features of Spanish Law in this area: the existence of seven Law of Succession systems in Spain and the fact that Spain is one of the countries where wills are used most.

1.1. Seven Law of Succession systems in Spain

It is important to remember that Spain has seven Law of Succession systems with fairly different characteristics and institutions in many aspects. Thus, the Spanish Civil Code of 1889, book III title III of which contains the 331 articles on succession *mortis causa* (articles 657-1087 Cc), is accompanied by the specific civil regulations of six Autonomous Communities with powers to “conserve, modify and develop” their Civil Law within the limits established by the Spanish Constitution (article 149.1.8 of the Constitution). As a result, following the latest reforms, there are now different regulations governing the succession of the *de cuius* in Aragon (1999), the Balearic Islands (1990), the Basque Country (1992 and 1999), Catalonia (1991), Galicia (2006) and Navarre (1973)¹. In the overall structure of these “Autonomous Community civil laws” or “*Derechos forales*”, Law of Succession normally accounts for the largest proportion of rules in such systems. Thus, in Navarre one third of the region’s Civil Law is Law of Succession (197 of 596 rules); in Aragon it accounted for half (70 articles out of 153) of the Aragonese Civil Compilation of 1967, reformed in 1985 and currently it is contained an independent Law of Succession, dating from 1999, with 221 articles; in the Balearic Islands, which have two different bodies of laws, one body for Mallorca and Menorca and another for Ibiza and Formentera, it represents 85% (62 of 85 articles) of their genuine Civil Law; in the Basque Country, which also has three bodies of

¹ In Aragon, Succession Law was formerly within the Law 15/1967, of April 8 (Compilation of Aragonese Civil Laws) as amended by the Law 3/1985, now in the Law 1/1999, of February 24 on *mortis causa* successions. In the Balearic Islands, in the Legislative Decree 79/1990, of September 6 (which consolidates the text of the Law 5/1961). In the Basque Country, formerly in the Laws of July 30 1959 and Law 6/1988, now in the Law 3/1992, of July 1, on the Civil Regional (*Foral*) Law of the Basque Country, plus the Law of the *Fuero* of Guipúzcoa, of December 30 1999. In Catalonia, formerly in the Law 40/1960, repealed by the Law 13/1984, of March 20, now in the Law 40/1991, of December 30, of the Code of successions by cause of death in the Civil Catalan Law. In Galicia, in the Law 2/2006, of June 14, on the Civil Law of Galicia (that has repealed the Law 4/1995, of May 24, which substituted the Law 147/1963 [third additional disposition of the Law 2/2006, dealing with rights of stable couples, modified by Law 10/2007, of June 28, see *infra*]) on the Civil Law of Galicia. In Navarre, Law 1/1973, of March 1, on the Compilation of the Civil Foral Law of Navarre (modified by Law 5/1987).

regulations for different areas, more than half are articles concerning Law of Succession (77 out of 147 articles plus 47 new articles for the area of Guipúzcoa); in Galicia, more than one third of its Civil Law is Law of Succession (127 of 308); in Catalonia, where civil legislation has developed enormously in other areas, there is a Succession Code for *mortis causa* successions introduced in 1991 with 396 articles that are currently being reviewed within the scope of the Catalan Civil Code.

There are clear regulatory differences in terms of the legislative methods used and their content, ranging from complete codes or special laws on succession (in Catalonia and Aragón for example) and more or less detailed regulations within the Civil Law or Autonomous Community Civil Law or Compilation in question. The rules governing succession in the Civil Code – applied directly in the other 11 Autonomous Communities, as well as Ceuta and Melilla – complement legislation in these six Spanish regions, which sometimes avail from these regulations for specific topics, whereas the Spanish Civil Code is hardly applied there in many other topics. Regarding their content, the Autonomous Community civil law systems enjoy greater formal freedom (because they allow instruments prohibited under the Civil Code, such as inheritance agreements, joint wills, certain fiduciary schemes, etc.) and greater material freedom (differing enormously from system to system, and ranging from absolute material freedom in Navarre and in the *Fuero de Ayala* [Ayala Laws] in one part of the Basque Country, where testators are allowed not to leave anything to their children, to little material freedom in other parts such as the *Fuero de Vizcaya* [Vizcaya Laws] in another part of the Basque Country where testators are obliged to leave four-fifths of their inheritance to their children). The seven succession systems in Spain are coordinated by the same rules of conflict of laws governing international successions. The key factor is not nationality but “legal residence” (*vecindad civil*), determined on the basis of filiation, marriage or time of continuous residence in a given territory (article 14 Cc). According to article 9.8 of the Spanish Civil Code, “succession *mortis causa* shall be governed by the National Law of the deceased at the time of his or her death, regardless of the nature of the properties and country where they are located”².

Three conclusions may be drawn from this brief summary. Firstly, Spanish Law as a whole is a wonderful breeding ground for internal comparative law. In addition to looking at other international legislation, attention to reforms introduced in other Autonomous Community civil law systems and general case law of the Spanish Supreme Court has played an important role in the reforms of each law of succession system; however, this comparison has not yet reaped all the potential dividends and is very minimal when compared with the changes made to the Civil Code (with some exceptions, such as article 831, amended by Law 41/2003, and its inspiration on Navarran-Aragonese law; *vid. infra*). Secondly, although the Civil Code has been partially reformed on different occasions pursuant to succession regulations, many of its key features correspond to regulations introduced in the nineteenth century. In contrast, various regional laws have undergone global reforms updating their content, although more far-reaching reforms are required to adapt their provisions to reflect the changes in social conceptions of property and

² Article 9.8 Cc continues to deal with the problem of changes of nationality (or of *vecindad civil*, legal residence) between the moment a will is made and the moment of the death.

family since they were adopted. The differences are evident if we keep in mind that the Civil Code was passed in 1889 and the Autonomous Community Civil Laws were passed between 1959 and 1973, and some of these are even in their “second generation” (even a “third generation”, as the recent case of Galicia in 2006), with special succession laws or codes having been introduced since 1991. Thirdly, given the enormous plurality of Spanish legislation and the scope of this field of law³, this presentation will tend to focus on the reforms introduced in the field of “common Civil Law” (i.e., the Spanish Civil Code), although it will also examine the changes to Autonomous Community civil laws whenever the trends are worth highlighting.

1.2. Spain is one of the countries where wills are used most

Recent studies reveal one differential feature, namely that Spain is one of the countries in which wills are used most. Different statistics seem to suggest that almost half of inheritances may be ordered by the deceased (through a will or inheritance contract, in the provincial territories where this is permitted); in comparative terms, it has been affirmed that this represents a unique phenomenon in the world and that Spain may undoubtedly be the European country where wills are used most frequently⁴. Wills are used for very different reasons, and their use is increasing: apart from a historical tradition dating back to the Late Middle Ages – when drafting a will was considered a moral and a religious duty–, people have placed great faith in wills executed before notaries, and which are very safe, efficient and cheap (costing around 40 euros)⁵; in contrast with the probate of Common Law, notarial wills do not need to be judicially certified or proven to be effective⁶. Moreover, this use of wills infers a clear desire to avoid the legal distribution of intestate inheritances and to alter as far as possible the system of forced shares or *legítimas* established by law in favour of descendants, ascendants and spouse; in fact, as will be explained later, there is a clear tendency to strengthen the rights of the surviving spouse through testamentary provisions (or also through other channels *inter vivos* enforceable *post mortem*, the

³ For an overview on the Spanish system, J. D. GONZÁLEZ CAMPOS and A. BORRÁS (2002), “Spain”, in D. HAYTON (ed.), *European Succession Laws*, 2nd ed., Jordans, Bristol, p. 431 ff.

⁴ J. DELGADO ECHEVERRÍA (2006), “Una propuesta de política del Derecho en materia de sucesiones por causa de muerte. Segunda parte: objetivos de una reforma del derecho de sucesiones”, in *Derecho de sucesiones. Presente y Futuro. XII Jornadas de la Asociación de Profesores de Derecho Civil* [“XII Jornadas APDC”, Santander, 9-11 February 2006], Servicio de Publicaciones de la Universidad de Murcia, Murcia, § 9, pp. 103-115. According to this author’s conclusions –determined by the difficulties of obtaining reliable data and figures in Spain on this topic, which he tries to offer–, this trend is even increasing: wills are used much more today in Spain than 20 years ago (58% more, increasing 370,161 notarial wills in 1984 to 584,848 in 2002, for example). The proportion of 50% of wills regulated by will contrasts with the figures for Italy (around 15%), Belgium (between 10 and 15%), France (10%), Germany (20%) or England (33%): see A. ZOPPINI (2002), *Le successioni in diritto comparato*, in *Trattato di diritto comparato diretto da Rodolfo Sacco*, UTET, Torino, pp. 125-126.

⁵ DELGADO ECHEVERRÍA, *ibidem*, § 9.7, p. 115 (“the cheapest in Europe”).

⁶ A. SERRANO DE NICOLÁS (2005), “Estate planning: la planificación de la herencia al margen del testamento (*will substitutes*), in M. GARRIDO MELERO and J. M. FUGARDO ESTIVILL, *El patrimonio familiar, profesional y empresarial. Sus protocolos*, Bosch, Barcelona, III, pp. 496 and 503-504 (with figures on the almost non-existing litigation against notarial wills).

so-called “will substitutes”, “estate planning” and the use of other mechanisms), and whose position, within the comparative context, is extremely weak in the Spanish Civil Code⁷.

2. General trends regarding recent changes in Spanish Law of Succession

2.1. Changes originated from legislative reforms

a. Reforms in the Civil Code

Since the Civil Code was enacted, just over one quarter of its original articles have been amended (around 90 of 331 articles) through fifteen legal reforms. Of these laws, the most numerous and significant from the standpoint of *trends in legislative policy* have been introduced in the last 25 years⁸, following the important Law 11/1981, of 13 May (which amended around 45 articles) on filiation, parental authority and the economic regime of marriage. This Law sought to adapt the Civil Code to the new premises of equality established by the Spanish Constitution of 1978, not just within the scope of Family Law, but also in the area of Law of Succession. Bearing in mind the purpose of this law, the reform also provided for the recognition of equivalence of all children (in marriage, outside marriage and adopted) and enabled a number of other extremely important amendments such as the priority of spouses over collateral relatives in intestate successions (spouses came to occupy third place in this ranking after the descendants and ascendants). It also authorised the payment of the forced share (*legítima*) in money and not in property in certain special cases (articles 841-847 Cc) and reformed regulations governing preterition or wrongful omission (article 814 Cc, still the subject of controversy, gave rise to an unfinished debate on the possibility of applying the right of representation, inherent in the intestate succession, to testamentary successions). Surviving spouses were also empowered to distribute part of the estate of the deceased (the *mejora* - part of the estate that may be used to benefit any or some of the [descendants] forced heirs more than the others) to the descendants (article 831). However, apart from the 1981 reform and the reform introduced by Law 30/1991, of 20 December, on certain formal aspects of notarial wills, *the most significant changes in terms of legislative policy have taken place in the last three years, in the form of four legislative amendments, which we shall now examine in greater detail.*

⁷ S. CÁMARA LAPUENTE (2003), “¿Derecho europeo de sucesiones? Un apunte”, in S. CÁMARA LAPUENTE (ed.), *Derecho privado europeo*, Colex, Madrid, p. 1201.

⁸ Until 1981, only four Laws had been enacted to amend the Civil Code in this area: the Law of 21st July 1904 (holograph will is valid on any kind of paper), the Royal Decree-Law of 13th January 1928 (intestate succession only to the fourth degree of kinship, and not to the sixth degree), the Law of 24th April 1958 (changes on the legal position of the surviving spouse and valid succession contracts in favour of adopted children). After 1981, the following reforms were made: Law of 13th May 1981 (see text), the Law of 7th July 1981 (minor change to provisions on disinheritance), the Law of 31st March 1984, the Law of 15th October 1990 (non-discrimination for reasons of gender, indignity and disinheritance), the Law of 20th December 1991 (form of testaments, see text), the Organic Law of 15th October 1996 (consistence of certain articles and protection of minor children), the Law of 7th January 2000 (time of death of people disappearing at sea, in wars and natural disasters), plus the four Laws of 2003 and 2005 mentioned in the text.

- 1) In 2003, Law 7/2003, of 1 April (published in the BOE, Spanish Official State Gazette, on 2.4.2005) on “New Limited Liability Partnerships Law”, took advantage of a reform of Company Law to introduce three modifications in the Civil Code (articles 1056, 1271 and 1406) in order to *facilitate business succession*. Specifically, according to article 1056.2, testators who, in order to preserve the company or, in the interests of their families, wish to preserve an economic activity undivided or maintain control over a corporation or group of companies, may decide to pay the forced share corresponding to the other interested parties in cash, even if this is not included in the estate. This liquid money may come from sources other than the estate itself and its payment may be deferred – in contrast to the general rule that encumbrances, deadlines or payment conditions cannot be imposed with respect to the forced share (article 813.2 Cc) – for up to five years following the testator’s death. If the form of payment was not established, the forced heir may demand his or her forced share of goods from the estate. This reform aims to make the succession system sufficiently flexible to prevent companies or family businesses from being divided as a consequence of the effects of the *legítima* (forced heirship). In practice, other mechanisms *inter vivos* are being used to elude this undesired effect. The scope of the conditions established in the new article 1056 has given rise to a dispute on its purpose, creating a division between those who consider that the rule should be strictly interpreted and those who defend a broad interpretation, so that (i) strangers (non-relatives) may also inherit the company and pay money to the testator’s children, and that (ii) simple holding companies and not just companies *sensu stricto* may benefit from this form of privileged succession with respect to the general rules established in the Code⁹.

- 2) In 2003, coinciding with the International Year of Disabled People, Law 41/2003, of 18 November (BOE, 19.11.2003), governing *the protection of assets of disabled persons*, directly modified three areas of the Civil Code (unworthiness to inherit, forced share and collation) to provide better protection for disabled people. The definition of disabled persons is not uniform because in the case of certain rights they must be judicially declared as disabled (articles 808, 813 and 782: forced share), whereas this requirement does not exist with respect to other rights (article 822: inhabitation right; 756.7 and 1041: unworthiness and collation). The reform also introduces significant amendments to one general article applicable to any person, although the stated purpose indicates that the aim of this institution is to provide “indirect protection for disabled people’s assets”: article 831 Cc allows the testator to confer to his or her spouse or to the other parent of their common children (not necessarily partner in a registered couple) broad powers to improve and distribute the estate of the predeceased among the

⁹ In favour of the narrow construction, M. ESPEJO LERDO DE TEJADA (2006), “La reforma del Código civil por la Ley de la Sociedad Limitada de la Nueva Empresa”, in J. M. ABRIL CAMPOY AND M. E. AMAT LLARI (eds.), *Libro Homenaje al Prof. Luis Puig Ferriol*, Tirant lo Blanch, Valencia, I, pp. 1263-1266. In favour of a broad interpretation, F. MILLÁN SALAS (2003), “La partición hecha por el testador al amparo del nuevo artículo 1056.2 del Código civil”, *Actualidad Civil*, 4, pp. 1181-1183; V. M. GARRIDO DE PALMA (2005), “Capitulaciones. Régimen matrimonial. Sucesión *mortis causa* y estatutos sociales. Armonización con el protocolo familiar”, in GARRIDO/FUGARDO, *El patrimonio familiar...*, [supra, fn. 6], IV, p. 646; V. M. GARRIDO DE PALMA (2005), “Los actuales artículos 831 y 1056.2 del Código civil. Aplicaciones prácticas ante el sistema de legítimas”, *Revista Jurídica del Notariado*, 55, pp. 133-134. However, with hesitation and some replies, L. RUEDA ESTEBAN (2005), “La modificación del párrafo segundo del artículo 1056 del Código civil”, in GARRIDO/FUGARDO, *El patrimonio familiar...*, (supra, fn. 6), IV, p. 215 and 218-221.

common children or descendants. This copies the provisions already established in various Autonomous Community civil laws¹⁰, by allowing distribution of the estate to be deferred substantially after the testator's death in order to verify the real qualities and needs of each potential heir, and strengthens the position of the surviving spouse or *de facto* partner of the deceased. This *fiducia sucesoria* (a sort of *mortis causa* trust) was already envisaged in the Civil Code, but its scope has now been broadened in terms of subjects and purpose and the applicable legal regime is explained in greater detail.

The mechanisms directly reformed to protect disabled people in Law 41/2003 include, most notably, two completely new developments in the Spanish legal system that, in addition to their specific purpose, may entail a reconsideration of the existing secular dogmas underpinning Law of Succession in the Spanish Civil Code. Firstly, the possibility of *encumbering the entire forced share* of the other forced heirs with a fideicommissary substitution in favour of the children or descendants declared incompetent by a Court (articles 782 and 808 Cc)¹¹. This creates an exception, for the first time, regarding the firm principle that no "encumbrance, or condition, or substitution of any kind" may be imposed on a *forced share* (article 808 Cc: qualitative intangibility of the forced share). Secondly, it establishes a *new right to inhabit the habitual residence in favour of disabled forced heirs* (article 822 cc)¹², which may be established voluntarily (by donation or legacy) and which, on a privileged basis, shall not be included for calculating the forced share, or shall be legally established in favour of the disabled forced heir under the double requirement of the disability and the prior living together with the deceased. This allocation of the inhabitation right *ex lege* represents a sort of "legal legacy", a category that had already disappeared from the Civil Code.

- 3) In 2005, Law 13/2005, of 1 July (BOE, 2.7.2005), which amended the Civil Code in matters relating to the right to marry, despite not expressly modifying any provision in the Civil Code on Law of Succession, by introducing the *right to marry a person of the same sex*, automatically grants the surviving spouse in a homosexual marriage exactly the same rights as those

¹⁰ An overview of the fiduciary instruments in the Succession Laws of the Autonomous Communities, in C. ASÚA GONZÁLEZ (1992), *Designación de sucesor a través de tercero*, Tecnos, Madrid; S. CÁMARA LAPUENTE (1996), *La fiducia sucesoria secreta*, Dykinson, Madrid, p. 13 ff.; S. CÁMARA LAPUENTE (2001), "Comentario a las leyes 281-288 del Fuero Nuevo de Navarra", in ALBALADEJO/DÍAZ ALABART (eds.), *Comentarios al Código civil y Compilaciones forales*, Edersa, Madrid, XXXVII.2, p. 323 ff.; J. L. MERINO HERNÁNDEZ (1994), *La fiducia sucesoria en Aragón*, El Justicia de Aragón, Zaragoza. On the new art. 831 Cc, A. RODRÍGUEZ YNIESTO (2005), "La reforma del artículo 831 del Código Civil por Ley 41/2003: la delegación de la facultad de mejorar", *Revista Jurídica del Notariado*, 55, p. 169 ff.; L. RUEDA ESTEBAN (2005), "La fiducia sucesoria del artículo 831 del Código civil", in GARRIDO/FUGARDO, *El patrimonio familiar...*, [supra, fn. 6], IV, p. 155 ff.

¹¹ On this, S. DÍAZ ALABART (2004), "La sustitución fideicomisaria sobre el tercio de legítima estricta a favor del hijo o descendiente incapacitado judicialmente", *Revista de Derecho privado*, p. 259 ff.; S. DÍAZ ALABART (2006), "El discapacitado y la tangibilidad de la legítima: fideicomiso, exención de colación y derecho de habitación", *Aranzadi Civil*, 3, pp. 15-37; M. ESPEJO LERDO DE TEJADA (2005), "El gravamen de la legítima en el Código Civil: situación tras la reforma del mismo por la Ley de Protección Patrimonial de las Personas con Discapacidad", *Revista Jurídica del Notariado*, 53, p. 113 ff.; L. F. RAGEL SÁNCHEZ (1995), "La sustitución fideicomisaria sobre la legítima estricta", in ABRIL/AMAT (eds.), *Libro Homenaje al Prof. Luis Puig Ferriol*, cit. [supra fn 9], II, p. 1995 ff.

¹² J. FLORES RODRÍGUEZ (2005), "El nuevo artículo 822 del Código civil: el derecho de habitación sobre la vivienda habitual como fórmula de tutela sucesoria preventiva en beneficio del discapacitado", *Revista Jurídica del Notariado*, 54, p. 37 ff.

bestowed upon a widowed spouse in a heterosexual marriage. With this reform, the on-going debate regarding succession rights of unmarried couples –whose situation is not governed by specific law at state law although laws have been introduced in this regard in different Autonomous Communities–, and, in particular, the succession rights of homosexual *de facto* couples, must necessarily amend its bases, premises and conclusions.

- 4) Another 2005 reform of Family Law affecting Law of Succession, although this time certain articles on succession *mortis causa* were specifically changed. Law 15/2005, of 9 July (BOE, 9.7.2005), on the reform of the Civil Code in matters relating to separation and divorce, changed the wording of five provisions governing the rights of surviving spouses¹³, and which doctrine had already been challenging for various reasons: (i) its incoherence (articles 834 and 945) because spouses may have rights to forced share in some cases when they lose their intestate rights due to marital crises, sometimes giving rise to relatively unfair situations; (ii) its evident incorrectness since the question of “fault” in separation or divorce proceedings was suppressed after the Code was reformed by Law 11/1981, and although this Law did modify other provisions in this area (including article 945 on situations in which separated but not divorced spouses are entitled to the intestate succession of their deceased spouses), it forgot to change the mention of separation for reasons “attributable to the deceased” as grounds for maintenance of his or her forced share in article 834 Cc; and finally, (iii) the unconstitutional nature of the provisions extending the rights of surviving spouses was reproved in cases when the deceased had illegitimate children during marriage.

Following these criticisms, the legislator introduced the following reforms: firstly, an harmonization of the situations in which the succession rights of spouses disappeared in marital crises, imposing the same criteria with respect to their forced share rights and their intestate inheritance rights: they would only hold such rights if “they are not separated legally or *de facto* when their partner dies” (articles 834 and 945). Secondly, the suppression of the rule whereby if the couple was separated following a judicial lawsuit, they would have to wait until the result of the litigation to decide whether or not to keep their succession rights (article 835); this was the object of much controversy in case law given the extremely personal nature of separation and divorce proceedings¹⁴. Thirdly, based on the principle of non-discrimination, the legislator suppressed the two exceptional situations in which rights of the surviving spouses were increased if competing in the succession proceedings with children belonging only to the their spouse who were conceived during their marriage. Consequently, this law suppressed article 837.2, whereby they such persons were entitled to the usufruct of half of the estate instead of their generic right to the usufruct of one third of the inheritance when competing with any children (as it is the current situation). The law also modifies the provision establishing the surviving spouse’s right to ask for his or her usufruct to be

¹³ See C. LÓPEZ BELTRÁN DE HEREDIA (2005), “Breve comentario sobre la modificación de los preceptos sucesorios operada por la Ley 15/2005, de 8 de julio”, *Revista Jurídica del Notariado*, 56, pp. 23-28; M. A. FERNÁNDEZ GONZÁLEZ-REGUERAL (2006), *Los derechos sucesorios del cónyuge viudo en la nulidad, la separación y el divorcio*, Dykinson, Madrid.

¹⁴ Art. 81 Cc. *Ad ex.*, challenging the rule of article 835 Cc, SCJ (Supreme Court Judgment) of May 26 1982 and SCJ of February 27 1999. This question has not been uniformly solved in case law.

transformed into money or into property; previously this could only be requested when competing with illegitimate children, but is now possible when competing with any children only of the deceased (article 840).

b. Reforms in special Laws outside the Civil Code

A number of recent reforms introduced outside the scope of the Civil Code have affected the inheritance phenomenon, because they affect the *persons* entitled to the inheritance, the *object* of the estate itself and its exceptional distribution in accordance with criteria other than the general criteria established in the Code. In the first case, mention must be made of Law 14/2006 of 26th May on *assisted human reproduction techniques* (which repeals Law 35/1988, of 22 November and its 2003 reform); article 9.2 of this Law allows husbands who give their consent, in a special document, a public deed, a will or a *post mortem* instructions document, for their reproductive material to be used for a period of twelve months after their death to fertilize their spouses, with the legal effects of marital filiation. This right is also granted to unmarried males. Although this article does not clarify whether future embryos must, from a legal standpoint, be treated in the same way as the *nasciturus* (article 29 Cc) and must therefore be considered to have been conceived at the time of the testator's death, this is the most tenable interpretation¹⁵. This has been expressly established in the civil laws of Catalonia (article 10.3 of the Catalan Succession Code of 1991) and Aragón (article 10 of its Succession Law of 1999).

In terms of the special objective situations of inheritance, we must start by indicating that the new Insolvency Law (Act 22/2003, of July 9, *Ley Concursal*, LC) consolidates the rules applicable to certain situations in which Succession Law and Insolvency Law converge¹⁶. It specifically establishes the system for declaring bankruptcy of the "lying" or "recumbent inheritance" (*hereditas iacens*) (people with legitimation, administration, prelation, etc.), which only takes place when the estate" is accepted on a benefit of inventory basis and not when it is accepted purely and simply (article 1.2 LC). It also establishes the consequences of the death of an individual who was declared bankrupt (article 182 LC). These rules are complemented by those established in the Civil Proceedings Law of 2000, which, based on trends in case law, established the procedural system governing *hereditas iacens* (open succession but not yet accepted by those called as heirs: articles 6.1.4º, 7.5 and 798); this last Law allowed for this estate still without a holder to be the plaintiff and defendant in procedures in which it was involved; it also established a new system for the legal administration and division of estates (articles 782-805).

¹⁵ M. A. MARTÍNEZ GARCÍA (2005), "Las disposiciones patrimoniales y las personas físicas no nacidas: el *nasciturus*, el *concepturus* y los bienes a ellos destinados", in GARRRIDO/FUGARDO, *El patrimonio familiar...* [supra, fn. 6], II, pp. 45-46.

¹⁶ See J. BOLÁS ALFONSO (2005), "El concurso del causante, de la herencia y del heredero", in *Estudios sobre la Ley concursal: libro homenaje a Manuel Olivencia*, Marcial Pons, Madrid, II, p. 1879 ff.; C. M. DÍEZ SOTO (2006), "La herencia en la nueva Ley Concursal", in ABRIL/AMAT (eds.), *Libro Homenaje al Prof. Luis Puig Ferriol*, cit. [supra, fn. 9], I, p. 1097 ff.; M. ESPEJO LERDO DE TEJADA (2005), "Presupuestos dogmático-sucesorios del concurso de la herencia: una aproximación civilística a la Ley Concursal", in *Estudios sobre la Ley Concursal...*, p. 1909 ff.

There are other “*special successions*” outside the Civil Code that, due to their specific purposes, have their own rules that introduce exceptions to the ordinary succession system under the Civil Code. The recent evolution of these regulations also reveals new trends. Firstly, the Urban Leasing Law of 1994 allows (article 16) certain relatives or persons related to the deceased lessee (spouse, heterosexual or homosexual person living with the deceased lessee for at least the last two years, descendants, ascendants, brothers and sisters or disabled relatives living with the person for the same period) *to be subrogated under a property lease*¹⁷. Secondly, as established in the new paragraph e) of article 24 of the Rural Leasing Law, according to the wording of the Law of 7 December 2005, such leases may be terminated in the event of “death of the lessee, preserving the rights of the person’s legitimate heirs. In such circumstances, and unless expressly stipulated by the testator, preference shall be given to persons who are young farmers”. Therefore, the legislator of 2005 removed this right from ordinary successions to *protect young farmers in particular who may be subrogated in rural leases*. Thirdly, in the case of *administrative concessions* or professional activities requiring certain licences (chemists, lottery outlets, tobacconists, etc.), the Administrative Law imposes special requirements on the heirs of such legal relationships or new authorisations for the continuation of such licenses by the person designated by the testator. The matter of whether these rights form part of the holder’s estate or not has been the object of contradictory decisions in more recent case law, hence future legislative clarification is required¹⁸.

c. Reforms in the Autonomous Community civil laws

Apart from the in-depth revisions of various Autonomous Community civil laws or Compilations in the area of Law of Succession (e.g. in Navarre in 1987, Catalonia in 1991 or Aragon in 1999, Galicia in 2006)¹⁹, it is worthwhile mentioning - given the national trends they may establish, which will be studied in the next section - the reforms introduced to modify the succession rights of widowed spouses or to acknowledge new legal benefits *mortis causa* attributable to certain individuals who are emotionally related to, or lived with, the testator.

One such law is the new Law 2/2003, of February 12, which establishes the economic marital and widowhood regimes of Aragon. This law amended the Aragonese Law of 1999 on successions *mortis causa* to solve a series of problems arising from the peculiar system in force in Aragon, and unique within Spain, whereby the spouse acquires, by virtue of marriage and not by death of his or her partner, the widow’s usufruct on all his or her partner’s property, hence it is normally considered to have two phases: an expectant phase (which has been reformed most) and another, after one of the spouses has died, when this universal usufruct is irrevocably acquired.

¹⁷Article 33 of the Urban Leasing Law permits the subrogation in rental contracts of premises where a professional business is held only to heirs or legatees of the dead contractor who continue the activity.

¹⁸ K. J. ALBIEZ DOHRMANN (2005), “Disposiciones patrimoniales en vida para después de la muerte”, in GARRIDO/FUGARDO, *El patrimonio familiar...*, cit. [*supra*, fn. 6], II, pp. 594-596; A. DOMÍNGUEZ LUELMO (2005), “Dos casos de sucesión *mortis causa* excepcional: las administraciones de lotería y las expendedorías de tabaco”, in T. F. TORRES GARCÍA (ed.), *Estudios de Derecho civil homenaje al prof. Francisco Javier Serrano García*, Universidad de Valladolid, Valladolid, p. 193 ff.

¹⁹ See information on those Laws and their amendments in footnote 1.

A paradigm of the recognition of succession rights in favour of people other than relatives or quasi-matrimonial living partners, are two Catalan laws with no equivalent regulation in the rest of Spain. These are Catalan Law 19/1998, of December 28, on situations of common residence and mutual support and Catalan Law 22/2000, of December 29, on private care of elderly people. Under the first law, the relations of two or more persons living together in the same residence and who, without forming a family nucleus, permanently share and help to pay common costs and to perform domestic chores, give rise, if one of the unit's members dies, to benefits including a regular maintenance pension, if necessary, payable by one of the heirs to the survivor for a maximum period of three years. Under the second law introduced in 2000, an agreement to care for persons aged over 65 or disabled people, giving rise to a relationship of coexistence in the same habitual residence where the sheltered persons is treated in the same way as a relative by the care-giver in exchange for a given price. The contracting parties must not be second-degree blood relatives. Termination of the care agreement due to the death of one of the parties gives rise to different rights on the property, as well as the right of the care-giver to request from the cared person's heirs an indemnity if there is a significant disproportion between the welfare and benefits received by the cared person and the compensation received *inter vivos* and *mortis causa* from the latter. Furthermore, and this is the most noteworthy aspect in the context of this study, Catalan Law 22/2000 only grants care-givers three types of succession rights: voluntary allocation *mortis causa*; one quarter of the value of the estate in any case; and summoning as abintestate heirs before the third-degree collateral relatives. The Catalan doctrine has criticised the unilateral nature of these succession rights and has proposed that cared persons should also have the same rights to the inheritance of the care-giver²⁰. There is also some scepticism regarding the concession of succession rights between the care giver and the care receiver, as a formula for providing better support in old age.

However, the most noteworthy trend within civil regulations in the Autonomous Communities with competence in this area is the *concession of succession rights to heterosexual and homosexual de facto couples*. In this area, there are clear contrasts with Spanish national legislation, which still does not regulate in general terms, either through an *ad hoc* law or in the Civil Code, the succession rights of these non-married couples living together. Nor has national case law extended the rights to forced share or to intestate succession of spouses by analogy to cohabiting couples. Therefore, this area reveals a clear difference in rights between regions governed by the Law of Succession of the Civil Code (where legally constituted unmarried couples do not have reciprocal succession rights²¹ and where only spouses in different sex or same sex marriages have these rights) and the regions that have passed laws on unmarried couples (13 of 17 Autonomous

²⁰ In this sense, for further reference, see M. C. GETE-ALONSO, M. YSÀS SOLANES, S. NAVAS NAVARRO, J. SOLÉ RESINA, "Sucesión por causa de muerte y relaciones de convivencia", in *Derecho de sucesiones. Presente y Futuro. XII Jornadas de la Asociación...*, [supra, fn. 4], § 4.6-8, pp. 362-375.

²¹ And the constitution of a stable union or partnership may be subject to different requisites according to the different specific Laws on the topic; those Laws (see the next footnote) grant no right on the partner's estate when they are enacted by Autonomous Communities where the Civil Code is in force and they have no competence on Civil Law.

Communities have done so)²² where, because of competence in this area, civil benefits *mortis causa* are bestowed on stable couples only in 6 regions (Aragon, the Balearic Islands, the Basque Country, Catalonia, Galicia and Navarre).

Although it is particularly difficult to make a comparative synthesis of these six regimes without committing errors resulting from any simplification process, we can identify a series of *features of the legal regulations governing unmarried couples in Autonomous Community Civil Laws* (for a specific summary of the characteristics of each system, see Annex 1 to this study):

- 1) *There is no uniform notion of "unmarried couples" or "stable couples" in Spanish legislation since each law establishes differences in terms of both the requirements and forms of constitution of such couples. As regards the requirements, in addition to establishing similar but not identical impediments to the constitution of couples (previous marriage, kinship, etc.), some laws require partners to be of legal age, whereas under other laws it is sufficient for minors to be independent (vid. Annex 1). Regarding the ways of forming unmarried couples established by the Law, some Autonomous Communities require couples to register with a special Register before they can be treated as a legal couple (Aragon, Balearic Islands, Basque Country and Galicia [here, only after the amendment of the Law 2/2006 by the Law 10/2007 of 28th of June]), whereas others offer alternative methods for people to form such couples, such as public documents (Catalonia and Navarre) or evidence of having lived together for an uninterrupted period (two years for heterosexual couples in Catalonia; one year in Navarre [it was also so in Galicia, before the amendment of the Law 2/2006 by the Law 10/2007]); this period may be shorter if they have children in common.*
- 2) *All the abovementioned Autonomous Community laws grant the same succession rights to homosexual and heterosexual couples, except Catalonia, which grants more legal succession rights to the surviving partner in homosexual couples living together. The reasons given for this lack of equivalence in the statement of purposes of Catalan Law 10/1998 is that while heterosexual *de facto* couples decide not to marry for personal reasons, homosexual couples cannot do so. Evidently, after the state reform of marriage by Law 13/2005, this reason, which had already been criticised before, has disappeared. Therefore, in the future Catalan law must be reformed to ensure equivalent treatment of succession rights for homosexual and heterosexual couples, although it is not yet known whether this recognition of equivalence will grant more rights (with succession rights, as is currently the case for same-sex couples) or fewer rights (without succession rights, as it is currently the case for different-sex couples).*

²² In chronological order: Law 10/1998, of July 15 (Catalonia); Law 6/1999, of March 26 (Aragon); Law 6/2000, of July 3 (Navarre); Law 1/2001, of December 19 (Valencia); Law 18/2001, of December 19 (Balearic Islands); Law 11/2001, of December 19 (Madrid); Law 4/2002, of May 23 (Asturias); Law 5/2002, of December 16 (Andalusia); Law 5/2003, of March 6 (Canary Islands); Law 5/2003, of March 20 (Extremadura); Law 2/2003, of May 7 (Basque Country); Law 1/2005, of May 16 (Cantabria). Not by a special Law, but by a single article (Third Additional Disposition) in the Law 2/2006 of June 14, on the Civil Law of Galicia, this region has granted also *mortis causa* rights to stable unmarried couples (exactly the same rights granted to married persons); this Galician norm has been modified (as for the requisites to constitute a stable couple, without changes on the effects of this relationship) by Law 10/2007, of June 28.

- 3) Legislation governing unmarried couples grants two blocks of rights: authentic rights in mortis causa succession of the predeceased established by mandatory Law (forced share, although its qualification as such in these cases is debatable, and rights in intestate successions) or permitted by law if the testator wishes to grant or agree such rights (voluntary usufruct on the entire estate, whenever permitted). These laws recognise other civil non-succession rights, namely family, maintenance or compensation rights, albeit linked to the death of one of the partners in couples living together²³. In general, they are direct rights of the living partner based on economic need or dependency or on the emotional value of certain items of property, which are not treated as part of the inheritance but as separate items: the right to live for a given period in the common residence of the deceased, the right to be subrogated in the lease on the residence, the right to the “household furnishings” (clothing and furniture in the common residence and other movable items of little value, provided that they are not jewels, artistic objects, items of extraordinary value or, in some cases, family objects).
- 4) Spanish legislation adopts two approaches when it comes to recognising rights to the inheritance of deceased living partners: some laws envisage full equivalence in succession with the spouse in a marriage (Balearic Islands, Basque Country, Galicia, Navarre), whereas other laws opt not to grant this person succession rights in the strict sense of the term, although they do grant some other advantages under Public, Family or Support Law (namely in Aragon and, as regards heterosexual unmarried couples, Catalonia). Given this second alternative, doctrine is divided between the school of thought that considers this lack of full recognition of equivalence with the rights attributed to married couples to be a reactionary approach²⁴, and those who feel this decision stems from greater regulatory freedom for those who do not want to marry and, therefore, represents a more modern and liberal view of the function of Law of Succession. Nevertheless, legislation claiming to endorse the recognition of equivalence with marriage with respect to the forced share, intestate succession and the possibilities of voluntary succession, also contain certain imbalances between both legal realities: sometimes because they do not grant surviving partners certain non-succession civil rights that are granted to spouses (preferential allocation of the habitual residence to spouses as part of their share of inheritances in Navarre; family movable property in Catalonia) or, inversely, because they grant such rights to living partners and not to spouses (household furniture and use of the common residence for one year in the Basque Country). On other occasions, succession rights granted to unmarried couples are simply different to those attributed to partners in married couples (for example, the rights of homosexual living partners in intestate successions in Catalonia are different in terms of preference with respect to those of a spouse).

²³ For a good overview on both types of rights in the Civil Autonomic Laws, see GETE-ALONSO/YSÀS/NAVAS/SOLÉ, “Sucesión por causa de muerte...” [*supra*, fn. 20].

²⁴ For instance, as regards Aragón, see MERINO HERNÁNDEZ, J. L., in ALBALADEJO / DÍAZ ALABART (eds.), *Comentarios al Código civil y a las compilaciones forales*, Edersa, Madrid, 2000, XXXIII, 1, p. 655 ff.

- 5) Regarding *other rights not strictly relating to succession but dependent on the death of the partner*, legislation tends to expressly establish parallel rights to those granted to spouses. However, it does not use simple remissions. Instead, it attempts to preserve the conceptual distinction between both concepts, without merging all the rights because this would render the dichotomy ineffective. Thus, some laws recognise an individual's right to continue living for one year at the common residence that belonged to the deceased (Aragon, Basque Country, Catalonia), most allow living partners to take away from the estate clothing, furniture and items of little value ("removal right" or *derecho de predetracción*), Catalonia allows only heterosexual living partners in need to receive maintenance under the estate for one year, and some refer to the subrogation of survivors under leases contracted by deceased partners (Catalonia, the Balearic Islands). As explained above, this right has already been recognised in all Spain for all unmarried couples under the Urban Leasing Law (*supra*, 1.1.2), hence problems of competence may arise because the requirements in terms of the definition of unmarried couples are different in national leasing law and autonomous laws governing unmarried couples.
- 6) The other Autonomous Community laws on unmarried couples without jurisdiction in civil matters (seven laws) do not contain any Law of Succession rule for such situations. They simply treat the rights of *de facto* couples in the same way as the rights of married couples, according to their regulatory powers under Public Law²⁵.

2.2. Legislative trends

Judging from the reforms described above and some other less recent reforms, attention should be drawn to a series of *more technical amendments* and other modifications prompted by changes in legislative policy. Among the former and in addition to those relating to estate in bankruptcy or insolvency situations (Law 22/2003) and to the elimination of contradictions in certain provisions governing the legal succession rights of spouses in the event of marital separation or divorce (Law 15/2005), the following may be highlighted: first, the *way in which abintestate heirs are declared* was changed following the reform of the former Civil Proceedings Law (1881) by Law 10/1992, of 30 April; thereafter, abintestate heirs could not only be declared by judicial means (this is now reserved for collateral relatives and the State) but also by Notary when the heirs were the descendants, ascendants or spouse; the proposed "Law of Voluntary Jurisdiction", pending approval, will consolidate and apparently update this regime²⁶. Secondly, the *time when person disappearing in shipwrecks or accidents are legally certified as deceased* was modified by Law 4/2000, of 7 January; articles 193-194 of the Civil Code were changed to reduce the deadlines for declaring deaths, based on practical experience in recent times (from years to months). Thirdly, Law 30/1991, of 20 December, modified various articles of the Civil Code on the *formalities of wills*

²⁵ The only minor exception is Andalusian Law 5/2002, which envisages a non-successory right of living in the current dwelling for one year.

²⁶ Currently, the applicable rules are articles 979 and 980 of the Law of Civil Procedure of 1861, which are transitory in force by virtue of the new Law of Civil Procedure of 2000, until a new Law of Voluntary Jurisdiction is enacted (now in phase of blueprint).

executed before Notaries: the technical reforms included the confirmation of people's identities from their DNIs (Spanish National Identity Cards), the adaptation of wills concluded under transitory capacity to legal reforms on disqualification, the viability of mechanical means for "closed wills", the elimination of the need for witnesses to guarantee greater intimacy or the use by the testator of the different languages used in Spain that the Notary does not understand. Fourthly, certain reforms on succession rights were also introduced by Organic Law 1/1996, of 15 January, on the legal protection of minors; according to the statement of purpose of this law, the aim was to "resolve grammatical and content mismatches caused by successive partial reforms of the Code".

Regarding the *reforms revealing trends of genuine legislative policy*, it is worth mentioning the following, albeit accepting that most do not fully develop the underlying concept but simply represent timid or partial attempts at developing social-political currents that will probably give rise to further changes in the future.

a. Strengthen the legal position of surviving spouses under the law

Until now, this extremely strong guideline in testamentary practice (*vid. infra*, I.2) has had limited expression in the Civil Code, in contrast to clear provision in this regard in other laws. The last Civil Code reform giving preference to spouses over collateral relatives was introduced in 1981 (whereby spouses inherit in intestate successions with priority to collateral relatives, and after descendants and ascendants). The forced share to which spouses are entitled, only in one share (not in the entire inheritance as is the case under various Autonomous Community civil laws) and only in usufruct, and not in property, has not been changed since 1958. The only recent modification to the Civil Code, geared to strengthening the spouse's position with respect to the family, was made to article 831 Cc by Law 41/2003, as mentioned previously (*supra*, I.1.1.1.b); thus, if the spouse is empowered by the deceased to distribute the items in the estate left by the latter among the common descendants, respecting the minimum forced shares and other bequests of the testator, his/her family authority will also have been ratified since he/she will have decision power over the family estate. This fiduciary figure also exists, with its own features and established by secular practice, in various Autonomous Community civil law systems.

However, the rights of surviving spouses have been strengthened within common state law, as mentioned previously, mainly through different laws that establish special succession rights on certain property items or rights and thus give preference to the spouse over all the deceased's relatives: this is the case with the Urban Leasing Law of 1994 (article 16), the Rural Leasing Law of 2003 (article 24), different indemnities awarded under compulsory travel insurance coverage, death in road accidents or when the deceased is a victim of violent or terrorist crimes²⁷. Nevertheless, in terms of strict legal rights (forced share and intestate succession) to an individual's ordinary inheritance, Autonomous Community civil law systems have clearly gone beyond the Civil Code in terms of providing protection for surviving spouses (*vid. infra*, table as Annex 2, comparison of forced shares in Spain's seven civil law systems).

²⁷ In this respect, for further reference, see M. MARTÍNEZ MARTÍNEZ (2006), "La reforma de la sucesión intestada en el Código civil", in *Derecho de sucesiones. XII Jornadas...*, [*supra*, fn. 4], pp. 438-441.

In future legislative policy decisions concerning the rights of surviving spouses, at least two factors deriving from the latest legal reforms must be taken into account: firstly, the fact that in almost all the reforms spouses have been designated as the main obligors of certain types of care or duties with respect to their husbands/wives, with preference over other relatives (as guardians, providing maintenance, administering common property, etc.); and secondly, if the pressure to improve spouses' rights was a priority when marriage was indissoluble (until 1981 in Spain) or when there were important temporary and causal obstacles to obtaining divorce (until 2005), the current situation in which marriages may be terminated almost immediately by one of the spouses (since the introduction of Law 15/2005), the system should at least be reviewed. The need does not seem to have disappeared, but the grounds of law have changed. According to doctrine, one school of thought strongly supports greater freedom to testate, particularly with respect to descendants and ascendants, in order to give testators more scope to freely dispose in favour of their spouses, whenever this is the testator's wish. In any case, formal disinheritance of spouses under current Spanish legislation is still limited largely to fixed and exceptional causes, but it is very simple to eliminate any expectations a spouse may have of receiving an estate by obtaining the dissolution of the marriage relationship²⁸.

b. Special protection for certain collectives

The reason for this trend can be traced to at least three grounds. Firstly, *from an objective standpoint*, and in order to strengthen the undivided transmission of certain sources of wealth, the legislator has introduced certain mechanisms governing succession in family businesses (article 1056 Cc., in 2003, *vid. supra* I.1.1.a) or in farming businesses (article 24 of the Rural Leasing Law of 2005; inheritance agreements were accepted for that purpose in 1981, but this option was abolished in 1995). Secondly, *from a subjective standpoint*, the Civil Code has been modified to protect collectives in weaker or more defenceless positions, such as disabled people (Law 41/2003), minors (Organic Law 1/1996, modifying article 1057 on certain formalities regarding partition when minors or persons under guardianship or conservatorship) or *nascituri* conceived by means of assisted reproduction (provided for in Aragon and Catalonia, not expressly in the Civil Code). Thirdly, and also from a subjective perspective, some of the most important reforms of late seek, for reasons of opportunity or due to social pressure, to grant *ex novo* or strengthen the rights of persons with greater emotional ties to the *de cuius*: thus, apart from the limited recognition of new rights or powers for spouses, we may highlight, within the scope of the Civil Code, the new rights granted to spouses of the same sex, and within the scope of Autonomous Community civil laws, the legal succession rights of unmarried couples.

c. Granting legal succession rights to homosexual and heterosexual unmarried couples: various contradictory legislative policies

In Spain the legal reaction to this phenomenon has not been uniform, but it even reflects different contradictory approaches. As we have seen (I.1.1.3), six Autonomous Communities have

²⁸ DELGADO ECHEVERRÍA, *op. cit.*, § 10.2, p. 120.

established specific rules to regulate this phenomenon; of these six, four (Galicia, Navarre, the Balearic Islands and the Basque Country) grant similar rights to *de facto* couples as those enjoyed by married couples, one (Catalonia) grants succession rights to homosexual couples but not to heterosexual couples and one (Aragon) does not grant any testamentary rights to any unmarried couples. In the rest of Spain, the Civil Code has not been modified to extend testamentary rights to unmarried couples, which means these couples have no right *ex lege*. Nor has any specific law been announced in this area, such as the one proposed by the current Government when it was in the opposition during the previous legislature. It is clear that since 2005 the debate on this issue has changed radically following the admission of marriage for all persons, even those of the same sex who wish to marry, and the elimination of obstacles to divorce (so much so that another characteristic differentiating married and *de facto* couples has been suppressed, namely the requirements for dissolution). In any case, the Autonomous Community civil law model concerning the rights of stable couples has, so far, prioritised the recognition of equivalent rights and benefits to those enjoyed by married couples, but it has failed to take into consideration various “disadvantageous” aspects of this recognition of equivalence (presumptions of fraud, compulsory duty to reserve family goods received by the surviving spouse or testamentary conditions on not marrying), which should be taken into account in a future state law²⁹.

d. Modifying the grounds for disinheritance and unworthiness to inherit in order to adapt them to new social conceptions

This has been limited and fragmented in time and has only taken place in response to relatively evident situations. Thus, with the decriminalisation of adultery, this was suppressed as a ground for not being entitled to inherit from the injured party (Law 22/1978); the reform of marital crises situations reviewed the grounds for disinheriting spouses (Law 20/1981); the latest penal reforms and practical experience established that the abandonment, prostitution or corruption of children, not just daughters, are grounds for unworthiness to succeed (Law 11/1990); and the Law protecting the estate of disabled people established new and extensive grounds ruling that persons not providing appropriate care to disabled people are unworthy to succeed (Law 41/2003).

e. Applying the constitutional principles of non-discrimination for reasons of gender or equality of all children before the law

Although the main impetus to adapt the Civil Code to these key directives came from the Law of 13 May 1981, attempts have recently been made to eliminate discrimination that still existed in the succession *mortis causa* of people with children conceived in adultery during marriage (articles 837 and 840 Cc., *vid. supra*). However, it is worth noting that equal testamentary treatment between children conceived in marriage, children conceived outside marriage and adopted children, achieved by virtue of the 1978 Constitution and implemented in the Civil Code by the abovementioned Law 11/1981, is only fully enforceable in relation to successions initiated

²⁹ M. CUENA CASAS (2005), “Uniones de hecho y abuso del derecho. Acerca de la discriminación en contra del matrimonio”, *La Ley*, nº 6210, March 15, § III.

after the Constitution. In other words, based on a Supreme Court's decision, and for reasons of legal certainty, if the father of children born outside marriage, or "illegitimate" children, died before the Constitution was approved, these children were not be entitled to the succession *mortis causa* of their father, in accordance with legislation in force at the time of the latter's death; however, they may take appropriate action to declare their filiation during their entire lives, although this will not have any successory consequences³⁰.

f. Should the formal requirements of wills be made more flexible?

This idea has not been a priority for the legislator, although some small steps have been made in this regard particularly by suppressing witnesses who were necessary until the 1991 reform in the case of wills executed before notary. Thus, the legislator endorsed the general opinion of Notaries and testators that witnesses are not necessary for either probative or formal purposes³¹. This minimum flexibility has so far not been translated into an increase in legal instruments for disposition *mortis causa*, since the request of notaries, lawyers and private individuals to validate instruments other than individual wills, such as inheritance agreements or joint wills, is still not contemplated in the Civil Code.

g. Minimum flexibilisation of the rigidity of material limits (forced share, reserves) at the free disposition of the testator

There has been a timid trend in this direction within the scope of the Civil Code, starting in 1981 with the possibility of awarding items in the estate to one child or descendant and paying the forced share to the others in the form of out-of-the-estate money (articles 841-847 Cc.), in contrast to the previous prevision whereby the forced share should be distributed in items from the estate. The regulations became more flexible in 2003 with the possibility of not just paying the forced share in money to any forced heirs specifically to maintain economic activities or businesses undivided (article 1057.2), but which even allows for such payments to be deferred for up to five years following the death of the testator. For now, it has also halted the serious undermining of another principle, namely the qualitative and quantitative intangibility of forced share (this may not be subjected to encumbrances or conditions or deadlines), with the 2003 reform that allows the entire forced share of descendants to be subject to a fideicommissary substitution in favour of the descendant disqualified as unable by a Court judgment (articles 808, 818 and 782 Cc.); thus, forced heirs who are fideicommissary substitutes will not receive anything until the disqualified fiduciary dies. As can be seen, all these modifications aim to soften the insurmountable restrictions imposed by the concept of forced share (*legítima*) on the free disposition of the testator, granting new possibilities for payment or allowing them to be used in favour of a specific group, but without directly tackling the challenge of suppressing or reducing forced shares. When examining legislation currently in force in certain Autonomous Communities

³⁰ For instance, Spanish Supreme Court Judgments of March 17 1995, July 28 1995, October 15 1997 and, particularly, the one of March 17 2005.

³¹ On this, see J. J. RIVAS MARTÍNEZ (1993), *El testamento abierto otorgado ante Notario después de la Ley de 20 de diciembre de 1991*, Dykinson, Madrid, p. 66 ff.

which have their own Civil Law systems (*vid.* Annex 2, *infra*), these contrasts enormously with the Civil Code since the forced share is lower in certain areas or even only formal, without any patrimonial content in others (in the Ayala Laws within one part of the Basque Country and in Navarre).

h. Readapting legislation to new family situations and to the new legal bearings governing marital crises

The legislative changes introduced to reflect new family trends are exemplified in the Civil Code through the admission of marriages between people of the same sex, in some Autonomous Community civil law systems through the recognition of rights of succession *mortis causa* of unmarried couples, and in Catalonia through the recognition of the effects of succession on new personal relations such as care for elderly or disabled people or non marital couples in which both members receive mutual assistance. The adaptation of regulations to the new legislation governing marital crises is manifested by the elimination of obligatory succession rights in the case of judicial or *de facto* separation and in the event of divorce. Some legal declaration should still have to be issued on the destination of voluntary dispositions established in wills in favour of the spouse at the time the will is executed and no longer at the time of death of the testator without revocation of the will (or if they are legally separated). While legislation in Aragon (article 123), Catalonia (article 132), Galicia (art. 208 of the Law 2/2006) and Navarre (law 201, only with respect to joint will provisions) establishes the presumption that such designations of heirs or legatees are deemed to be revoked, the question remains less clear within the scope of the Civil Code³².

i. Future reforms? Two dynamic factors: family and estate

Finally, more legislative reforms can be expected in the near future due largely to two transformations in existing regulations governing succession originating mainly from systems and situations dating from the 19th Century. *Firstly*, social changes in the core of traditional family structures have influenced parallel changes in the testamentary intentions of testators that represent a break with the past. These changes include most notably³³: (i) the transformation from extended families to nuclear families and, in recent years, from nuclear families to new forms of coexistence based on affection and individualism (compared with the collective systems

³² See RDGRN (Resolution of the Directorate General of Registries and Notary's Offices) of November 26 1998 and some recent judgments of different Courts of Appeal. In doctrine, A. VAQUER ALOY (2003), "Testamento, disposiciones a favor del cónyuge y crisis del matrimonio", *Anuario de Derecho Civil*, 56-1, p. 67 ff.; A. VAQUER ALOY (2003), "Wills, Divorce and the Fate of the Dispositions in Favour of the Spouse: a Common Trend in European Laws of Succession", *European Review of Private Law*, p. 782 ff.; T. F. TORRES GARCÍA (2005), "Disposiciones testamentarias y vicisitudes del matrimonio", in TORRES GARCÍA (ed.), *Estudios de Derecho civil homenaje...* [*supra*, fn. 18], p. 9 ff.; M. E. GÓMEZ CALLE (2007), *Error del testador y el cambio sobrevenido de las circunstancias existentes al otorgamiento del testamento*, Thomson-Civitas, Cizur Menor.

³³ Among many other studies on these transformations, recent overviews may be found in I. GOMÁ LANZÓN (2005), "Los derechos del cónyuge viudo", in J. F. DELGADO DE MIGUEL and M. GARRIDO MELERO (eds.), *Instituciones de Derecho privado. V.3. Sucesiones: las atribuciones legales*, Thomson-Civitas, Cizur Menor, pp. 917-936; V. MAGARIÑOS BLANCO (2005), "La libertad de testar", *Revista de Derecho privado*, September-October, pp. 20-23.

of the past); (ii) the desire to benefit those closest in terms of affection and coexistence and not purely blood relatives, which challenges the standard formulae such as the forced share system and, in Spain, leaving as much property as possible to the spouse or living partner; (iii) the fragility of marital links and the appearance of quasi-matrimonial structures or at least ones that seek similar regimes to marriage; (iv) the loss of the family's character as a production unit, as an instrument for the labour and economic integration of its members, which implies less economic and professional dependence; (v) the virtual disappearance of the stem family and the softening of the obligation to keep property within the family at all costs (coupled with the transformation of an agricultural society into an industrial and services society); (vi) in contrast, this transformation gives rise to the need to maintain certain family assets undivided, such as companies, businesses or industries, which require *ad hoc* solutions and not obligatory equal distribution among forced heirs; (vii) greater life expectancy, which extends family cycles, means that children stay at home for longer and inheritances are passed on much later when children have established their economic future³⁴ to some extent (depending more on their qualifications and training than on inheritance), giving rise to more problems relating to maintenance and living together, etc.; (viii) the introduction of "express divorce" mechanisms means that the same person is linked to different families and sometimes becomes more distant from their previous families (in Spain, the phenomenon of "recomposed families" has been on the rise since the divorce law was reformed in 2005: according to statistics published recently, the number of divorces doubled within a couple of months after this law was enacted); (ix) the welfare function of inheritance has largely been assumed by the public institutions of the Welfare State.

The other great transformation accompanying the changes to the social physiognomy of the family has been the metamorphosis of the composition of wealth and estate, affecting its distribution *mortis causa*. Real estate and house are no longer the physical elements of reference: the standard flat or block of flats has become fungible, interchangeable, like most rural properties and many companies. The number of real estate properties left in estate has tended to decrease while the amount of movable property has increased, securities have been dematerialised and financial assets acquired greater relevance. The appearance of new methods for investing, saving or accumulating wealth, such as life insurance policies, pension funds or investment funds, social security insurance or administrative concessions, has meant that wills are no longer the only source of redistribution of patrimony; instead, para-successory phenomena are appearing and there has been an increase in the number of early successions through transfers *inter vivos* (with immediate effect or enforceable *post mortem*)³⁵.

³⁴ On this, with statistics as argument against the existing forced shares, see recently A. VAQUER ALOY (2007), "Reflexiones sobre una eventual reforma de la legítima", *InDret* 3/2007, pp. 8-11: in 2003, life expectancy is around 80 years (whereas at the time of the Civil Code, at the end of XIX century was 35 years), average age of descendants at the time of death of their ascendants is between 40 and 55 years old, which coincides with the average age when the top incomes/richness are in hands of the eventual heirs. Inheritances (and forced shares) are, therefore, received in the moment of best welfare status of the beneficiaries.

³⁵ See SERRANO DE NICOLÁS, "Estate planning: la planificación..." [*supra* fn. 6], p. 496-497 and 512-514.

2.3. Changes originating from case law

The Spanish Supreme Court has been rather creative in “complementing” (article 1.6 Cc) the legal regulations governing succession *mortis causa*³⁶, particularly with regard to some too short articles of the Civil Code. The new rules of case law are more technical in nature and less associated with the trends in legislative policy mentioned previously (for example, forced share of estate has not been extended by analogy to members of unmarried couples). The following examples highlight this trend:

- 1) *Inheritance agreements*: although the Civil Code (unlike Autonomous Community civil laws) generally prohibits inheritance contracts (articles 658, 816 and 1271.2 Cc), case law has allowed for such agreements, but only when they deal with known and existing items of property when the contract is executed, interpreting the prohibition on agreements about “future inheritance” on a restrictive basis only in the sense of the universality of the inheritance (the entire inheritance)³⁷.
- 2) *Donations mortis causa*: according to prevailing doctrine, article 620 Cc eliminated these types of donations as an independent category and also their historical function by including them in testamentary provisions (similar to legacies). The Supreme Court has endorsed this interpretation, although it has striven to provide a clear definition of its features based on the ambiguous rule of the Civil Code, requiring, in order for said rule to be enforceable, compliance with the formalities of wills³⁸, or alluding to their revocability³⁹ (in contrast to pure donations *inter vivos*) or to the time when they become enforceable or to the application of rules governing legacies and forced shares of estate to such donations.
- 3) *The “Socini” clause*: in accordance with the *general desire to favour the spouse as much as possible*, despite the insurmountable limit represented by the concurrent forced shares of the estate for children, it is standard testamentary practice for testators to designate their spouses as legatees in the usufruct of the entire estate and their children as heirs to the bare legal title of everything. Thus, children would agree to temporarily receive less quality of

³⁶ On this role, see M. PASQUAU LIAÑO (1994), *Código civil y ordenamiento jurídico*, Comares, Granada, p. 102 ff.; M. PASQUAU LIAÑO (ed.) (2000), *Jurisprudencia civil comentada. Código civil*, Comares, Granada.

³⁷ Spanish Supreme Court Judgments of May 4 1902, October 8 1915, October 8 1916, October 26 1926, May 16 1940, June 12 1956, January 24 1957, March 3 1964 and June 22 1997.

³⁸ Spanish Supreme Court Judgments of March 23 1948, June 7 1960, June 13 1994, June 15 1995, July 25 1996, December 30 2003 and March 12 2004.

³⁹ See Spanish Supreme Court Judgments of January 28 1898, June 13 1900, March 27 1957 or December 30 2003. Those features are currently the object of dispute in the doctrine, which in most cases does not support the revival of *mortis causa* donations: for contradictory views, see I. BELUCHE RINCÓN (1999), “La donación “mortis causa” (desde la prohibición de pactos sucesorios)”, *Anuario de derecho civil*, 52-3, p. 1057 ff.; M. ESPEJO LERDO DE TEJADA (1999), *La sucesión contractual en el Código civil*, Universidad de Sevilla, Sevilla, p. 125 ff.; M. ESPEJO LERDO DE TEJADA (2006), “Donaciones *mortis causa*. Posibilidades actuales en el Código civil y propuestas de reforma”, in *Derecho de sucesiones. Presente y Futuro. XII Jornadas... [supra, fn. 4]*, pp. 241-287; J. B. VALLET DE GOYTISOLO (1978), “La donación *mortis causa* en el Código civil español” in his *Estudios sobre donaciones*, Montecorvo, Madrid, p. 13 ff.

the estate received in exchange for receiving more goods in the medium term (*plus quantum, minus quale*). If such distribution is not accepted, the testator may reduce their rights to the estate to the legal minimum and leave the spouse the one third portion of estate disposable at will plus his or her right to the usufruct of another one third share. These “optional compensatory dispositions for forced share” or “Socini clauses” (named after the 16th-Century Italian jurist Mario Socino) are not envisaged in the Civil Code but are used in 90% of wills executed by married people with children. Case law has accepted their validity based on a broad interpretation of article 820.3 Cc⁴⁰.

- 4) “Residual fideicommissary substitution” system. This type of fideicommissary substitution, often used in its two modalities of *fideicomissum si quid supererit* and *de eo quod supererit*, are not expressly regulated by the Civil Code, with the exception of a vague reference in article 783.2, pursuant to which case law has built a detailed system still in development and still with gaps⁴¹. This has done away with former reluctance to include this in the Code, due to the obligation to keep the property established in article 781 for the fiduciary heir in fideicommissary substitution and has incorporated a type of provision originating from the testamentary practice.
- 5) *Tacit revocation of the will*: case law has softened the rigorous rule of the Civil Code by which a previous will could be revoked by a will executed subsequently if the testator does not express in this later will his or her desire for the former to prevail entirely or in part (article 739 Cc). According to the Supreme Court, it is sufficient to understand that there is an intention for both wills to prevail; this may be deduced from the will by interpretation and it is even sufficient for nothing to have been indicated to the contrary and that both wills are not incompatible⁴².
- 6) *Validity of extrinsic evidence to determine the real will of the testator*. This is a creation of case law, which permits the use of evidence external to the will (letters, documents, previous wills, documents of the testator, witness statements or notarial declarations, etc.) to determine the real intentions behind the testator’s dispositions *mortis causa*, provided that the result is somehow supported by the wording of the will and, therefore, falls within the scope of interpretation and does not represent the integration of a non-existent intention if

⁴⁰ Mainly, SCJ of July 10 2003; see also SCJ of December 3 2001 and SCJ of December 29 1939. In any case, the number of judgments dealing directly with this clause is actually scarce, surely due to their frequency and clarity. The clause is deemed valid expressly in the Law of Catalonia (art. 360), Mallorca and Menorca (art. 49), Aragón (art. 185.1) and, to some extent, in the *Fuero of Vizcaya* in the Basque Country (art. 61). On the topic, see A. REAL PÉREZ (1988), *Usufructo universal del cónyuge viudo en el Código civil*, Montecorvo, Madrid; A. L. CABEZUELO ARENAS (2002), *Diversas formas de canalización de la cautela socini*, Tirant, Valencia; L. F. RAGEL SÁNCHEZ (2004), *La cautela gualdense o socini y el artículo 820.3º del Código civil*, Dykinson, Madrid.

⁴¹ Spanish Supreme Court Judgments of November 13 1948, October 25 1954, November 21 1956, January 7 1959, April 10 1985, March 13 1989, July 22 1994, May 4 2000, February 12 2002; RDGRN of September 17 2003 [with note by S. CÁMARA LAPUENTE (2004), in *Cuadernos Civitas de Jurisprudencia*, 65, p. 689 ff.].

⁴² Spanish Supreme Court Judgments of February 1 1988, May 7 1990 and May 14 1996. Those judgments depart from an old and strict interpretation of the case law that required (as the Civil code’s wording) an express intention to preserve both wills.

a gap is identified⁴³. These last two examples (revocation and interpretation) show *the tendency of case law to prioritise genuine intentions of the testator without breaching testamentary formalism*, a principle which the Supreme Court continues to apply rigorously.

7) *Old age is not in itself grounds for lack of capacity to testate*. This is associated with the factor of greater life expectancy, mentioned previously, and there has been an increase in the number of lawsuits seeking to revoke wills executed by people in old age, with deteriorated physical or mental health, with signs of senile dementia, depression or incipient phases of Alzheimer. Spanish case law has continued to uphold that neither old age nor the existence of such weaknesses are, in themselves, grounds for declaring such people unable to testate and supports this principle on the grounds that the declaration of the Notary who considered the elderly person in question as a person of sound mind settles a strong presumption of capacity, difficult to rebuke unless absolutely clear evidence against (article 663.2 Cc.)⁴⁴. In this area, consideration is given to the difference between incapacity and the lack of autonomy of an elderly person or his or her difficulties to communicate⁴⁵.

8) *Non-admission of partial renvoi or remission to the Spanish Law on International Successions*. Since 1996, Spanish case law has established the restrictive conditions in which *renvoi* or remission to Spanish Law in succession matters may be admitted, based on three important sentences⁴⁶ (article 9.8 in relation to article 12 Cc): it has only been possible for succession *mortis causa* to be governed by Spanish Law after this identified, as applicable Law⁴⁷, a

⁴³ From SCJ of July 8 1940 onwards, case law has admitted this instrument. For instance, Spanish Supreme Court Judgments of March 26 1983 [with note by P. SALVADOR CODERCH (1983), in *Cuadernos Civitas de Jurisprudencia Civil*, 1, p. 289 ff.]; February 10 1986; December 31 1992; October 6 1994; January 30 1995; January 30 1997; and May 24 2002. On this, see J. B. JORDANO BAREA (1999), *El testamento y su interpretación*, Comares, Granada, p. 100 ff.; A. VAQUER ALOY (2003), *La interpretación del testamento*, Cálamo, Barcelona, p. 70 ff. (with comparative analysis).

⁴⁴ Spanish Supreme Court Judgments of April 18 1916, October 25 1928, April 26 1995, November 27 1995, January 27 1998, February 15 2000 and March 31 2004. Only when the lack of capacity to express the testamentary will is fully proven by medical evidence may a will be declared void (SCJ of May 18 1998 and SCJ of July 24 1995).

⁴⁵ A. M. RODRÍGUEZ GUTIÁN (2006), *La capacidad de testar: especial referencia al testador anciano*, Thomson-Civitas, Cizur Menor, p. 90 ff.

⁴⁶ Spanish Supreme Court Judgments of November 15 1996, May 21 1999 and September 23 2002. On those judgments and problems, M. VIRGÓS SORIANO and E. RODRÍGUEZ PINEAU (2004), "Succession law and renvoi: the Spanish solution", in H. P. MANSEL *et al.* (eds.), *Festschrift für Erik Jayme*, Sellier, München, p. 977 ff.; M. VIRGÓS SORIANO (2004), "Derecho de sucesiones y reenvío: la respuesta del sistema español", *Anales de la Academia Matritense del Notariado*, p. 181 ff.; S. ÁLVAREZ GONZÁLEZ (2005), "Dos cuestiones de actualidad en el reciente Derecho internacional privado español de sucesiones: los derechos del cónyuge superviviente y el reenvío", in TORRES GARCÍA (ed.), *Estudios de Derecho civil homenaje...* [supra, fn. 18], p. 131 ff.; T. ORTIZ DE LA TORRE (2003), "¿Anular por reenvío la voluntad del testador?", *La Ley*, September 9, p. 1 ff.; E. CASTELLANOS RUIZ (2004), "Reenvío, unidad de la sucesión y armonía internacional de soluciones en el Derecho sucesorio antes y después de la STS de 23 de septiembre de 2002", in A. L. CALVO CARAVACA and E. CASTELLANOS RUIZ (eds.), *El Derecho de familia ante el siglo XXI: aspectos internacionales*, Colex, Madrid, p. 239 ff.; E. CASTELLANOS RUIZ (2007), "Sucesión hereditaria", in CALVO A. L. CARAVACA and J. CARRASCOSA GONZÁLEZ (eds.), *Derecho internacional privado*, 8th ed., Comares, Granada, II, p. 291 ff.

⁴⁷ The single connecting factor in Spain is the nationality of the *de cuius*. According to article 9.8 of the Spanish Civil Code, succession by reason of death shall be governed by the *national Law* of the person whose succession is

foreign law that, given its rules (whereby succession is governed by the deceased's last domicile or estate is divided into movable property items according to its own law and into immovable property according to its location following the *lex rei sitae*), allows for remission to Spanish law if two conditions are fulfilled: the remission must respect the principles of unity and universality of Spanish private international law in the succession (without subjecting the succession to various different laws); and acceptance of the remission must lead to an international harmony on solutions (hence the results obtained with Spanish law is similar to the one that would have been reached with the foreign law). With this new restrictive interpretation on the part of the Spanish Supreme Court, it will be difficult to apply the remission procedure in Spanish legal practice in relation to international successions, unless (and this is debatable) the second requirement is made less restrictive and the only items in the inheritance correspond to immovable property located in Spain (according to the controversial Supreme Court judgment of 23 September 2002, i.e. when remission is en bloc to Spanish Law).

2.4. Changes originating from daily practice

We can still identify some other clear trends, originating from standard legal practice, which have not yet left such clear-cut marks in case law. This lack of endorsement through judicial decisions is normally due to their legality, but their very existence outside the specific provisions of the Civil Code reflects the desire of testators to achieve, through indirect mechanisms, certain objectives for which legal reforms should perhaps be introduced. Specifically, it is worth highlighting the following: (i) the execution of two correlative wills by both husband and wife, before the same notary and with identical reciprocal dispositions and declarations to benefit third parties, reflecting their intention to execute a joint will⁴⁸, which is prohibited by the Civil Code; (ii) the different dispositions to protect the patrimony of persons conceived but not yet born (*nascituri*) and *concepturi*, through the fideicommissary substitution, designation of fiduciaries, *ad hoc* testamentary executors or administrators, legacies under condition, etc.⁴⁹; (iii) the exclusion by will of intestate heirs of the *de cuius* in the event of opening such an intestate succession⁵⁰ and other atypical testamentary dispositions⁵¹; (iv) the increase in *estate planning* independently of

in question at the moment of his or her death, regardless of either the nature of the assets in the estate or whatever may be the country in which they are located. Moreover, the "remission to foreign Law shall be understood as made to its substantive Law, without taking into account the renvoi that its conflicting rules may make to a law other than Spanish Law (article 12.2 Cc.). Therefore, "second degree" *renvoi* (to the rules of a third country) is forbidden under Spanish Law and the "return renvoi" or "first degree" *renvoi* (back to Spanish Law) is only allowed in the field of succession Law and very restrictively according to this new case law.

⁴⁸ For instance, see M. YZQUIERDO TOLSADA (2002), "La planificación hereditaria", *Revista General de Legislación y Jurisprudencia*, 3, 2002, p. 486 ff.

⁴⁹ *Vid.* MARTÍNEZ GARCÍA, "Las disposiciones patrimoniales..." [*supra*, fn. 27] p. 27 ff.

⁵⁰ S. CÁMARA LAPUENTE (2000), *La exclusión testamentaria de los herederos legales*, Civitas, Madrid. Recently admitted in Aragon (arts. 198-199) and partially in Galicia (art. 226 of the Law 2/2006).

⁵¹ L. FERNÁNDEZ DEL MORAL (1996), *Autonomía privada y testamento en derecho común: contribución al estudio de las disposiciones testamentarias atípicas*, Comares, Granada.

traditional forms of succession *mortis causa*; (v) the modern methods for achieving a more efficient transition of the family business after the death of any of its members.

Estate planning, which has no strong tradition in Spain, unlike the situation in other legal systems, particularly in Common Law systems, is being used more and more in recent times, particularly for the transmission of large fortunes. Alternative testamentary instruments (so-called "*will substitutes*") are used by testators to transfer estate upon death for numerous reasons: sometimes the aim is to anticipate the transmission of the owner's estate in life independently of the formalities and limits of the inheritance (particularly to elude forced shares whenever possible); on other occasions, the aim is to ensure the transmission of property during the life of the principal but postponing the full enforceability of said transmission until the moment of the person's death; or they may use such instruments in order to obtain advantageous tax treatment. Sometimes these objectives are achieved through contracts or specific company instruments that pay certain amounts or income from the content of the estate which are received by the contractually established beneficiaries: this is the case with life insurance policies, pension plans, mutual funds, life annuities, bank deposits or pre-emptive right agreements in the case of death of a partnership shareholder. On other occasions this is achieved through the use of standard contracts entered into on the basis of their enforceability *post mortem*, such as donations (conditional upon the survival of the donee or with the reservation of the power to dispose until the death), stipulation in favour of third parties *post mortem* or *post mortem* or *trans mortem* mandates⁵². Trusts are not recognised by Spanish Law, although similar instruments or devices are frequently used such as fiduciary contracts *inter vivos* and *fiducias mortis causa* to carry out functions similar to estate management and election of beneficiaries⁵³; these types of trusts are governed by case law and the different regulations of the Autonomous Community civil law systems.

Spain still has no specific civil law system governing *succession in family businesses*⁵⁴ (although tax benefits are provided), despite Recommendation 1994/1069/EC, of 7 December, and the European Commission Communication of 28 March 1998 on the transfer of SMEs. In 2000 a report was published by the Spanish Senate containing numerous guidelines aimed at strengthening family businesses, although it did not recommend the development of specific legal rules to integrate all aspects relating to this matter. Some of the Senate's warnings were

⁵² For a detailed description of these instruments, see K. J. ALBIEZ DOHRMANN (1998), *Negocios atributivos post mortem*, Cedecs, Barcelona; ALBIEZ DOHRMANN, "Disposiciones patrimoniales en vida...", 2005 [*supra*, fn. 18], p. 581 ff.; R. SÁNCHEZ ARISTI (2003), *Dos alternativas a la sucesión testamentaria: pactos sucesorios y contratos post mortem*, Comares, Granada; SERRANO DE NICOLÁS, "Estate planning: la planificación de la herencia..." [*supra*, fn. 6], p. 491 ff.

⁵³ See S. CÁMARA LAPUENTE (1999), "Trusts in Spanish Law", in M. CANTIN-CUMYN (ed.), *La fiducie face au trust dans les rapports d'affaires / Trust vs Fiducie in a business context*, Bruylant, Bruxelles, p. 191 ff.; S. CÁMARA LAPUENTE (2003), "El trust y la fiducia: posibilidades para una armonización europea", in S. CÁMARA LAPUENTE (ed.), *Derecho privado europeo*, Colex, Madrid, p. 1099 ff.; S. CÁMARA LAPUENTE (2005), "Elementos para una regulación del trust", in GARRIDO/FUGARDO *El patrimonio familiar...*, [*supra*, fn. 6], III, p. 523 ff.; S. CÁMARA LAPUENTE (2005), "Trust a la francesa", *InDret* 2/2005, pp. 1-41; U. MATTEI, M. GRAZIADEI and L. SMITH (eds.) (2005), *Commercial trusts in European Private Law*, CUP, Cambridge.

⁵⁴ See M. L. PALAZÓN GARRIDO (2003), *La sucesión por causa de muerte en la empresa mercantil*, Tirant lo Blanch, Valencia.

taken into account in Law 7/2003, of 1 April, which, together with other measures, particularly in connection with succession *mortis causa* matters, allowed companies to be transferred to one heir and compensating the others by awarding them their forced shares in money (*vid. supra* I.1.1.1.a). The legal gap is being filled by *family protocols*, which are atypical agreements entered into between family members; the clauses of these agreements on the future ownership, management and distribution of work and benefits are not all binding: some of these protocols are genuine legally-binding agreements, whereas others are more like moral commitments. Some specific problems exist in connection with clauses on *mortis causa* transfers of companies or shares⁵⁵, such as the commitment to make a will as provided in the protocol (this may be unlawful since inheritance agreements are prohibited under the Civil Code, with the exception described previously; penalties for testating against the agreement could also not be imposed by virtue of articles 737 and 794 Cc, which preserves the absolute freedom to make wills), the breach of duties on forced shares if these shares are not paid at least in money to the other forced heirs, the need to respect established deadlines against long-standing vinculations on property or the unenforceability of donations promised in the protocol. The growing use of family protocols in Spain in recent years has still not completely resolved some of these problems.

2.5. Specific issue: the principle of free will or the restriction of testamentary autonomy

The principle of free will to determine succession *mortis causa* can be divided into two areas: a formal side, with either more or fewer available instruments; and a material side, where the restrictions stem mainly from the existence of a larger or smaller forced shares. The debate on these issues has strongly intensified in Spain in recent years.

a. Formal freedom: successory instruments

In the Civil Code voluntary succession is governed exclusively by individual wills (article 658 Cc) and the Spanish Supreme Court continues to be absolutely rigorous in its demand for compliance with all legally established requirements (*ex* article 687 Cc), with mere knowledge of the testator's intentions being insufficient, even if this is clear, in the event of non-compliance with compulsory requirements⁵⁶. A similar principle is applied in Autonomous Community civil law systems, but there are other formats for distributing inheritance: codicils, testamentary memories, inheritance agreements (in the six autonomous communities with their own civil law systems) and joint wills (Aragon and Navarre for several centuries; recently only admitted in Guipúzcoa within the Basque Country and in Galicia since 1995). In doctrine, many authors support the need to

⁵⁵ A comprehensive critical view with further references in I. GOMÁ LANZÓN (2005), "El protocolo familiar", in GARRIDO/FUGARDO, *El patrimonio familiar...*, [*supra*, fn. 6], IV, p. 654 ff., particularly, p. 683 ff. In the same book, a number of studies on the topic may be consulted. Also see F. VICENT CHULIÁ (2000), "Organización jurídica de la sociedad familiar", *Revista de Derecho Patrimonial*, 5, p. 21 ff.

⁵⁶ *Ad exemplum*, Spanish Supreme Court Judgments of March 8 1975, June 21 1986 (nullity by lack of expression of the hour in a notarial will), May 9 1990, April 25 1991, June 16 1997, April 29 1999. There are only some old and few examples of certain flexibility: SCJ of February 28 1906 and SCJ of March 15 1951.

incorporate joint wills in the Civil Code⁵⁷ in view of the benefits it affords, the positive and successful experience from its use in regional legal systems in the Basque Country and Navarre, the disappearance or rebuttal of arguments used against these instruments in the 19th Century (“captation” or obtaining succession by insidious means, fraud, loss of testamentary freedom, etc.) and the confirmation of the widespread practice by married testators who make two official wills in the form of one joint will (*supra*, section 3). Similar arguments are used with respect to inheritance agreements, although on this point academic doctrine is perhaps slightly more divided⁵⁸; there should surely be fewer technical problems because these instruments were admitted for a while within the scope of the Civil Code under the Law of 24 April 1958, in connection with the successory rights of adoptive children (until 1970), and from 1981 to 1995 in relation to agreements on successions in agricultural businesses. Both issues continue to depend above all on reasons of opportunity and legislative policy.

b. Material freedom and forced share: to be or not to be?

i) Summary of systems co-existing in Spain and their trends

The greater or lesser freedom regarding the content of wills and the portion of property freely disposable by testators is the essence of any succession system. In Spain, the maximum exponent of the diversity of legal systems is the greater or lesser flexibility of the *legítimas* (forced shares or statutory shares of estate). The seven legal systems regulate forced shares of inheritances but there are various elements that reveal important differences between them (for details see table of Annex 2)⁵⁹:

- 1) In terms of the *content or amount* of these forced shares, some Autonomous Community laws award testators complete freedom to determine them, since the forced share is not patrimonial in nature (Navarre) or allows the testator to freely exclude forced heirs from the inheritance (*Fuero de Ayala*, within the Basque Country), whereas the other systems apply different rules on shares: thus, for children some laws establish a small portion (1/4

⁵⁷ J. J. CASTIELLA RODRÍGUEZ (1993), “El testamento mancomunado, institución exportable al Código civil”, *Revista Jurídica de Navarra*, 15, p. 35 ff., and in *Revista Jurídica del Notariado*, 39, 2001, p. 9 ff.; J. R. GARCÍA VICENTE (2006), “El testamento mancomunado: razones para la derogación del artículo 669 del Código civil”, in *Derecho de sucesiones. Presente y futuro. XII Jornadas...* [*supra*, fn. 4], p. 289 ff., both with comprehensive arguments. On similar proposals by notaries and scholars, see *infra* 3.1.

⁵⁸ In favour of the admission of inheritance contracts in the Civil Code, DELGADO ECHEVERRÍA, “Una propuesta...”, [*supra*, fn. 4], § 12.3, p. 134-136; J. L. LACRUZ BERDEJO *et al.* (2004), *Elementos de Derecho civil. V. Sucesiones*, 2nd ed., Dykinson, Madrid, p. 300-301; R. SÁNCHEZ ARISTI (2006), “Pactos sucesorios. Propuesta para una reforma del Código civil”, in *Derecho de sucesiones. Presente y futuro. XII Jornadas...*, [*supra*, fn. 4] § 1.A, p. 477 ff.; R. SÁNCHEZ ARISTI, “Dos alternativas...” [*supra*, fn. 51], p. 237-238. Against, ESPEJO LERDO DE TEJADA, *La sucesión contractual...* [*supra*, fn. 38], p. 91 ff.

⁵⁹ Before the reform of the Civil Law of Galicia by Law 2/2006 of 14th June, the amount of the *legítima* and the persons entitled to it were identical to the Civil Code by express remission of the Galician Law. For an overview on the different systems, see, for instance, M. MARTÍN CASALS and J. SOLÉ FELIU (2001), “Testierfreiheit im innerspanischen Vergleich” in D. HENRICH and D. SCHWAB (eds.), *Familienerbrecht und Testierfreiheit im europäischen Vergleich*, Giesecking, Bielefeld, p. 310 ff.; M. FERNÁNDEZ HIERRO (2004), *La sucesión forzosa. Estudio sobre las legítimas y reservas en el Derecho común y foral*, Comares, Granada.

in Catalonia and, since 2006, in Galicia), whereas others consume virtually the entire estate (4/5 in the *Fuero de Vizcaya*, within the Basque Country, although this is a collective share that can be distributed among all the children freely), and even one law (in the Balearic Islands) establishes different shares according to the children surviving the *de cuius*. In the Civil Code, the forced share allocable to children and descendants is 2/3 of the inheritance, but this share (*legítima larga* or “broad forced share”, which is the sum formed by the *legítima estricta* or “strict forced share”, equivalent to one third of total value divided equally among the lawful heirs, and the *tercio de mejora*, literally the “third for betterment”) is divided into two parts: 1/3 (the *legítima corta*) must be left in equal portions, and without encumbrances, to all the children (or descendants if there are no children), and another 1/3 (*mejora* or betterment) may be distributed freely by the testator among all his or her children and descendants. This third allows the testator to improve the position of any children or descendants; and represents a genuine attempt, within the comparative context, at making regulations on forced share more flexible, since, together with the freely-disposable third of estate, it furnishes testators with a mechanism for leaving most of their estates to one of their children.

- 2) There are also noteworthy differences regarding the *subjects* entitled to claim the forced share. With regard to *ascendants*, there are three scenarios, within which the shares also vary according to the specific system in question: forced shares may be awarded to parents and (in their absence) ascendants (Civil Code and various parts of the Basque Country), to the parents only (Catalonia and the Balearic Islands) or no forced shares may be awarded to parents (Aragon, Navarre and, since 2006, Galicia). The rights of *surviving spouses* also vary enormously and, without taking into consideration the serious objections to their classification as genuine forced heirs, various trends may be identified: (i) acknowledge their legal right to a share of property (only in Catalonia), award them a legal share of the estate in usufruct (Civil Code, Galicia and areas under the Vizcaya and Ayala Laws systems in the Basque Country) or award them the legal usufruct on the entire estate (Aragón and Navarre always; Mallorca-Menorca, only if there are no children); (ii) some laws that only award a share in usufruct to the widow, allow testators to voluntarily and expressly increase the aforementioned usufruct to cover the entire inheritance (Galicia and areas under the Vizcaya and Ayala Laws systems in the Basque Country). As can be seen, in this area the law expressly acknowledges the general tendency of many testators who, within the scope of the Civil Code, where this is not expressly permitted because it represents a breach of the children’s forced share, feel obliged to resort to the “trick” of “Socini clause” (*supra*, I.2); (iii) in most of the systems, the share of the surviving spouse is regulated under mandatory law and only disappears if proven and fixed grounds can be presented (remarriage or living together as a *de facto* couple, etc.). However, there are exceptions: in Catalonia, this right is only granted in event of need; in Ibiza and Formentera, there is no usufructuary share if there is no will, but this share is awarded when the intestate succession takes place; and in the Basque Country, the *Fuero de Ayala*, which affords maximum freedom in this respect, is the only system that allows testators to

withdraw the widow/widower's usufruct without having to justify legal grounds for such decision.

- 3) There are also substantial differences regarding the *methods for calculating and paying* forced shares and their *legal nature* (rights *in personam* against the estate or not, *pars valoris, pars bonorum*, etc.)⁶⁰.

ii) The current debate regarding the suppression of the "legítima"

This is the legislative panorama in Spain today, after various revisions of the Autonomous Community civil law systems. In recent years, and particularly in the last three, an *extremely interesting debate* has re-emerged in Spain among notaries, academics and practitioners on the *appropriateness of suppressing forced shares or making the regime governing them more flexible*. A similar dispute took place in the 19th Century before the Spanish Civil Code was approved. The arguments then were the same as they are now but the underlying factors fuelling controversy were different, namely that a single Civil Code for all Spain was at stake and there was a struggle to reflect the irreconcilable traditions of Spanish Law and the different "foral" regions in this Code regarding the issue of testamentary freedom. With the approval of the Civil Code and eventually various Autonomous Community laws, this cause of cultural and political conflict in relation to testamentary matters has disappeared. But Spain continues to offer clear examples of the difficulties involved in harmonising essential aspects of Law of Succession, such as the forced shares, in international proposals. Today, the reopening of the debate (a general debate, but focusing more on the system of *legítimas* provided in the Civil Code)⁶¹ is closely related to the social, family and patrimonial changes described previously (I.1.2.9). To summarise, we will now examine in detail the arguments in favour and against greater testamentary freedom in order to sketch after a summary of the main proposals for reform⁶².

⁶⁰ An updated review of the different theories in TORRES GARCÍA, "Legítima y legitimarios y libertad de testar (síntesis de un sistema), in *Derecho de sucesiones. Presente y futuro. XII Jornadas...*, [supra, fn. 4], pp. 191-203.

⁶¹ The current project to review the whole successory system in Catalonia, in the frame of the enactment of the Catalanian Civil Code (Book IV on Succession Law now under debate in the Parliament of Catalonia: see blueprint in <http://www.parlament-cat.net/activitat/bopc/08b033.pdf>) focuses on devices to reckon the forced shares in relation to previous gifts (*computación, imputación...*), but does not modify neither the amount of the forced share nor the persons entitled to it; there is not (at least yet) a similar strong debate on the Catalanian forced share. For a short overview of this future reform as for the *legítima* in Catalonia, see E. ARROYO I AMAYUELAS (2007), "Pflichtteilsrecht in Spanien", in RÖTHEL, A. (ed.), *Reformfragen des Pflichtteilsrechts (Symposium vom 30.11-2.12.2006 in Salza)*, Carl Heymanns, Köln, pp. 274-275; VAQUER ALOY, "Reflexiones sobre una eventual reforma de la legítima", [supra, fn. 34], p. 11-12.

⁶² For further information on the reasons and references to (old and recent) authors, see mainly ARROYO I AMAYUELAS, "Pflichtteilsrecht in Spanien" [supra, fn. 61], pp. 268-276; M. M. BERMEJO PUMAR (2005), "La legítima (función y estructura)", in J. F. DELGADO DE MIGUEL and M. GARRIDO MELERO (eds.), *Instituciones de Derecho privado. V.3. Sucesiones: las atribuciones legales*, Thomson-Civitas, Cizur Menor, p. 21 ff.; A. CALATAYUD SIERRA (1995), "Consideraciones acerca de la libertad de testar", *Academia Sevillana del Notariado*, IX, p. 241 ff.; M. T. CARRANCHO HERRERO (2006), "Reflexión crítica de los derechos sucesorios del cónyuge viudo en el actual modelo de familia", in ABRIL/AMAT (eds.), *Libro Homenaje al Prof. Luis Puig Ferriol*, cit. [supra, fn. 9], I, p. 733 ff.; A. CARRASCO PERERA (2003), "Acoso y derribo de la legítima hereditaria", *Actualidad Jurídica Aranzadi*, 580, June, p. 11 ff.; M. E. COBAS COBIELLA (2006), "Hacia un nuevo enfoque de las legítimas", *Revista de Derecho Patrimonial*, 17, p. 49 ff.; P. DE LA

- Arguments in favour of forced shares (“legítimas”):
 - a) *Legal arguments*: (i) existence of a type of family co-ownership of property; (ii) the *mejora* (one third of the inheritance) already allows for a more flexible system of forced shares, albeit only in favour of descendants; (iii) it is a matter of public order that cannot be suppressed (as affirmed in the Supreme Court judgment of 23 October 1992, but, after better consideration, rejected by the Supreme Court judgment dated 12 February 1999, in view of the diversity of the Spanish legislative system); (iv) it is an equivalent or subrogate of the maintenance rights of certain relatives.
 - b) *Ethical-family arguments*: (i) the equality of all the children before the law makes equal treatment obligatory in Law of Succession; (ii) children are the clear successors of the physical and spiritual personality of their parents, hence they should also be the successors of their patrimonial personality; (iii) a moral duty exists towards descendants, ascendants and spouses in both life and after death in accordance with the minima established by law; (iv) forced shares derive from Natural Law, on the same grounds of law as the duty to feed and maintenance; (v) the suppression of forced shares would infringe family unity and increase litigation, particularly if strangers become rich at the expense of more direct relatives.
 - c) *Economic arguments*: (i) forced shares favour movement in property and avoid permanent vinculations with respect to goods; (ii) reciprocal family support in the obtainment of property requires family members to participate in its distribution after the death of the holder or owner.
 - d) *Other arguments*: the long historical tradition gives rise to strong inertia that is difficult to break down immediately.
- Arguments in favour of testamentary freedom:
 - a) *Legal arguments*: (i) the family as such does not own estate and, hence, at least a distinction would have to be made between items of property received freely from the family itself and items of property acquired by the own efforts of the testator; (ii) it is incoherent to allow owners total freedom in life with respect to their property transfers and contracts they enter into and restrict them with respect to their *mortis causa* transfers; (iii) although the duty to feed and to provide maintenance and the forced share are based on the common principle of

ESPERANZA RODRÍGUEZ (2002), “Perspectiva de la legítima. Notas para una revisión”, *Libro Homenaje a Ildefonso Sánchez Mera*, Consejo General del Notariado, Madrid, I, p. 1097 ff.; DELGADO ECHEVERRÍA, “Una propuesta...” [*supra*, fn. 4], p. 122-131; MAGARIÑOS BLANCO, “La libertad de testar”, [*supra*, fn. 33]; TORRES GARCÍA, “Legítima y legitimarios...” [*supra*, fn. 60]; J. J. RIVAS MARTÍNEZ (2004), *Derecho de sucesiones. Común y foral*, 3rd ed., Dykinson, Madrid, II-1, pp. 346-347; E. VALLADARES RASCÓN (2004), “Por una reforma del sistema sucesorio del Código civil”, in J. M. GONZÁLEZ PORRAS and F. P. MÉNDEZ GONZÁLEZ (eds.), *Libro homenaje al profesor Manuel Albaladejo García*, Universidad de Murcia, Murcia, II, p. 4893 ff.; VAQUER ALOY, “Reflexiones sobre una eventual reforma de la legítima”, [*supra*, fn. 34], p. 3-19. Of those authors, some in favour of the suppression of the *legítima* are notaries (BERMEJO, CALATAYUD, DE LA ESPERANZA, MAGARIÑOS).

the duty to protect the family, the former is based on the real need of the beneficiary, whereas the latter is an arbitrary fixed share, which does not examine the real economic needs of the forced heirs; (iv) the example of some Autonomous Community civil law systems that allow maximum testamentary freedom and the tendency of comparative law in this area are worth imitating; (v) there are various examples in daily practice that the legal system governing forced shares fails to cater for the needs and desires of most testators: thus, the frequent use of wills to try to modify the distribution of the Code, the regular use of the "Socini clause", the huge number of lawsuits concerning the disinheritance of relatives outside the scope of legally accepted grounds of law or the changes in "legal residence" to avail of a system allowing greater testamentary freedom (Supreme Court judgment of 5 April 1994) and even the allegation of false residence for this purpose (Appeal Court of Vizcaya, judgment of 15 June 2001); (vi) various legislative changes have shown that the primary functions of forced shares have disappeared: equal treatment of all children born in and outside marriage, and the rights of non-relatives such as the spouse, today question the historical roots whereby the forced share system tries to maintain property within the lineage or original family; and forced shares are no longer used to ensure that all children receive so-called production assets because they can be compensated with money, and the exceptions continue (Law 41/2003); (vii) the local regime protecting forced shares has become so technically complex that it exceeds practical needs; (viii) the suppression of forced shares would not violate the Spanish Constitution. Although this matter is not so controversial as in other countries (e.g. in Germany, see BGH judgment of 19 April 2005), only some authors consider that full testamentary freedom would be fully in line with the Constitution, deriving from the fundamental right to the free development of personality, as well as due to the lack of a real social function of forced shares, which are now an obstacle to that function: testamentary freedom would improve the protection of the family and the Constitution only recognises "the right to private property and to the inheritance" (article 33)⁶³; instead of the forced share, a part of the doctrine promotes the admission of maintenance duties *post mortem* only in cases of genuine need.

- b) *Ethical-family arguments*: (i) only testamentary freedom can do justice to relatives who depend on the testator, because not all of them have the same needs or merits; the mechanical, egalitarian and abstract application of the law does not enable fair inequalitisation in favour of minors, disabled people, poorer relatives, etc.; (ii) greater freedom will strengthen the authority of parents at the helm of family life; (iii) the forced share system is an obstacle to the satisfaction of socially legitimate interests, such as spouses' capacity to guarantee the well-being of their partners.

⁶³ *Against the abolition* of the forced share for constitutional reasons, A. M. LÓPEZ LÓPEZ (1994), "La garantía institucional de la herencia", *Derecho privado y Constitución*, 3, p. 35 ff.; TORRES GARCÍA, "Legítima y legitimarios..." [*supra*, fn. 60], p. 41 ff. *In favour of its abolition*, arguing the constitutionality of that reform, DE LA ESPERANZA RODRÍGUEZ, "Perspectiva de la legítima..." [*supra*, fn. 62], p. 1115 ff.; MAGARIÑOS, "La libertad de testar" [*supra*, fn. 33], p. 25-27; VALLADARES, "Por una reforma..." [*supra*, fn. 62], p. 4901; ARROYO I AMAYUELAS, "Pflichtteilsrecht in Spanien" [*supra*, fn. 61], p. 273; with a slightly different approach, promoters de *constitutional possibility of reforming the legítima*, with some nuances and limits, such as the need of protection of the family, VAQUER ALOY, "Reflexiones sobre una eventual reforma de la legítima" [*supra*, fn. 34], pp. 12-14.

- c) *Economic arguments*: (i) the absence of forced shares would make it easier to maintain family estate intact and its productivity; (ii) it also makes it easier for testators to be sure they choose the most ideal successor for this purpose and it also favours succession within the company.
- d) *Sociological arguments*: today different changes, such as greater life expectancy or the very absence of the transfer of economic and social power through inheritances⁶⁴, are altering the need for, and efficiency of, the forced shares system; changes in the structures of families and estate corroborate this hypothesis.

Support for the need to broaden testamentary freedom within the scope of the Spanish Civil Code is virtually unanimous, among notaries and scholars for example (*vid. infra* II.1), although there are more radical and more moderate supporters of this principle. Some suggest suppressing all forced shares in general, others propose eliminating the forced shares of parents and ascendants and reducing those of children, and others recommend eliminating forced shares and replacing them with a series of support benefits similar to maintenance (article 142 Cc) that would be deducted from the estate if needed by these relatives⁶⁵; at present, parental authority and the maintenance obligation end when the principal dies (articles 169 and 150 Cc.), hence different formulae have been presented to cater for this extension of testamentary freedom without neglecting the real duties of family maintenance.

Regarding the legal rights of spouses in *mortis causa* successions, a wide variety of proposals have also been presented. There is a general consensus that regulations should be introduced to benefit spouses more and that their minimum rights in usufruct do not reflect current social realities: from a legal standpoint, spouses bear a larger legal burden with respect to their partners (guardianship, maintenance, etc.) than blood relatives, but the gradual increase in their obligations has not proportionally improved their rights; furthermore, some of the latest legal reforms, such as the declaration of testamentary equality of all children (in 1981), and the removal of the latest discrimination against children born in adultery (in 2005), have reduced their rights to inheritance. For these reasons, a general consensus exists that *the minimum rights in usufruct acknowledged today are insufficient*. The numerous proposals for reform go in two directions: either extending their legal rights (as done in the Basque Country in 1992) along one of these ways, namely increasing their share in usufruct or granting them a share (in property or equivalent to the value of this property) in property⁶⁶, or, in the other direction, reducing the legal share of children to allow testators to freely dispose of a larger part of the estate in favour of

⁶⁴ See fn. 34 for details.

⁶⁵ For detailed proposals in this sense, see DELGADO ECHEVERRÍA, "Una propuesta..." [*supra*, fn. 4], §§ 10.2 to 11.4, pp. 119-131; MAGARIÑOS, "La libertad de testar" [*supra*, fn. 33], pp. 27-29; GOMÁ LANZÓN, "Los derechos del cónyuge..." [*supra*, fn. 33], pp. 934-935. Against those reforms, TORRES GARCÍA, "Legítima y legitimarios..." [*supra*, fn. 60], pp. 220-224 and 227. Also against the "quasi-maintenance" solution is VAQUER ALOY ("Reflexiones sobre una eventual reforma de la legítima" [*supra*, fn. 34], pp. 14-15), who uphold the problem of determining the moment of necessity, the confrontation with the traditional system of fixed shares and the high transaction costs; this author proposes a fixed (and reduced) forced share only for descendants up to 25 years old and for disabled persons.

⁶⁶ Thus, for instance, CARRANCHO, "Reflexión crítica..." [*supra*, fn. 62], I, pp. 747-750.

the spouse (as was done in Aragon in 1999 or in Galicia in 2006). This final proposal is surely the most coherent, since it strengthens genuine testamentary freedom in accordance with the new social principles, which may also be combined with new maintenance rights *post mortem* (or at least with the reduction of the number of other forced heirs and the amount of their right). This approximation to models used in *Common Law* is evident. Of course, the economic regime of marriage and the rights recognised to spouses in intestate successions⁶⁷ must also be brought into line with these proposals.

3. Comparative legal analysis and new lege ferenda proposals in Spanish Law of Succession

3.1. Proposals of the Spanish Association of Professors of Civil Law and of the Spanish Notaries

So far no publicly recognised commission has been set up by the Government to propose legislative reforms based on comparative research. However, an interesting academic initiative has prepared these proposals for changes to Law of Succession in which special attention has been given to comparative law, not just within the Spanish legal system but also focusing on foreign jurisdictions (particularly the reforms and proposals of French Law and Puerto Rican Law [2005-2006], taking into account that Puerto Rican Law of Succession is still based on the Spanish Civil Code).

The XII Seminar of the Association of Professors of Civil Law was held in Santander on February 9-11 2006, on the monographic theme of the revision and reform of Law of Succession. The seminars were inaugurated by the General Director of Registries and Notary's Offices (Ministry of Justice). All the preparatory material, surveys, speeches and conclusions are available on the Association's web page. The Association would present its conclusions to the Ministry of Justice. The work was structured as follows: two general speeches were to be given, one by Professor T. TORRES GARCÍA on *Legítimas, legitimarios y libertad de testar* ("Forced shares, forced heirs and testamentary freedom"), which reviewed the main problems in this area, and the other by Professor J. DELGADO ECHEVERRÍA, entitled *Una propuesta de política del Derecho en materia de sucesiones por causa de muerte* ("A proposal for legislative policy on successions *mortis causa*"), which was divided into two parts: a general section on the contribution of Legal Science to the tasks of legislating and another on the "objectives of a reform of Law of Succession". The aspects relating to this are undoubtedly more interesting and innovative given their material content and results. To complement this general speech, eight other academics were asked to prepare speeches on specific subjects. Two surveys based on questionnaires were carried out among all the associates and conclusions were drafted and voted on in the Association's plenary meeting⁶⁸. The ten speeches addressed and developed different aspects of Comparative Law. To give an

⁶⁷ See specially M. PÉREZ ESCOLAR (2003), *El cónyuge superviviente en la sucesión intestada*, Dykinson, Madrid; also E. CORRAL GARCÍA (2007), *Los derechos del cónyuge viudo en el Derecho civil común y autonómico*, Bosch, Barcelona.

⁶⁸ Some of those papers have been quoted throughout this study (see printed version reference *supra*, fn. 4). Although the results of the polls are very interesting, only 49 scholars answered.

idea of the proposals (the final survey-questionnaire contained 34 questions and there were 20 conclusions), these were some of the most significant conclusions, which did not always coincide with the proposals of the speeches:

- 1) It was recommended that the call order in intestate successions be modified, in particular to give priority to surviving spouses over ascendants and include them in first call together with the descendants at least in one share (1/3). For this solution, special consideration was given to the measures adopted in the reform of the French Law of 3 December 2001⁶⁹.
- 2) It was recommended that the Civil Code be modified to guarantee the enforceability of legacies of universal usufruct in favour of surviving spouses, in the presence of any forced heirs.
- 3) It was recommended that the forced share system of the Civil Code be reformed. On this point, a full consensus was not reached on the purpose of the reform, although the conclusions took into account the possibility of suppressing the *legítimas* of ascendants, except the maintenance allocations, and reducing the forced shares of descendants, generalising their payment in money, even if this money is not part of the estate. Regarding the forced shares of widowed spouses, no consensus was reached on the purpose of its reform.
- 4) It was recommended that joint wills and inheritance agreements should be included in the Civil Code. In particular, in order to propose a detailed system of inheritance contracts, consideration was given to Comparative Law, particularly German, Swiss and Portuguese Law, as well as Dutch Law on agreements relating to specific items of property and the French proposal of 2005 (now Law in 2006) on the anticipated waiver of the *reserve* of estate; the Autonomous Community civil law systems in Spain were also studied in detail for this purpose as good patterns⁷⁰.
- 5) It was recommended that heirs' liability with respect to debts associated with the inheritance and the *de cuius* should be limited and the separation of estate to benefit the different creditors should be guaranteed (*beneficium separationis*).

Other topics were also addressed in the speeches, with some proposals for reforms of regulations governing donations *mortis causa*, preterition, representation rights, and the consequences of marital separation for inheritances. No clear agreement was reached in terms of whether a proposal should be presented to acknowledge the mandatory rights in *mortis causa* successions of

⁶⁹ DELGADO ECHEVERRÍA, "Una propuesta..." [*supra*, fn. 4], § 10.1, pp. 116-119, 147-149 and 163-164; MARTÍNEZ MARTÍNEZ, M., "La reforma de la sucesión intestada en el Código civil" [*supra*, fn. 27], p. 429 ff., with broad grounds on Comparative Law (European countries, Latin-American countries and some others as Japan or Quebec).

⁷⁰ DELGADO ECHEVERRÍA, "Una propuesta..." [*supra*, fn. 4], § 12.3, pp. 134-136; SÁNCHEZ ARISTI, "Pactos sucesorios..." (*supra*, fn. 58), *passim*.

surviving partners in unmarried couples; although the speech focusing on this issue suggested this⁷¹, the result of the surveys revealed clear opposition to this idea.

Finally, the conclusions highlighted the need for empirical information (surveys, statistics) to formulate and evaluate civil legislation and greater participation of different groups of experts in the drafting of laws. The reasons were presented for and against a global reform of Law of Succession, as a priority before an overall reform of the Civil Code.

The [9th Congress of Spanish Notaries](#), held in Barcelona between 12th and 14th May 2005, proposed in its conclusions as a first measure (I.1) the following: “to take on legislative reforms that, based on the principle of civil liberty, provide mechanisms for legal auto-regulation. For this purpose, *it is considered very useful to review the rigid aspects of the system of forced shares* and to enable the development of legal formulae to control the creation, organization and transmission of family companies, such as *joint wills, inheritance agreements and fiduciary institutions*, provided that these comply with our public economic order”⁷². As can be seen, both officially and the individual opinions of different notaries mentioned previously, the aim is to increase formal and material testamentary freedom by reviewing the system of forced shares.

3.2. Impact of Comparative Law on Spanish legislation and case law on Law of Succession

Although the consideration of Comparative Law in the field of Law of Succession has been the focus of clear and detailed attention in Spanish academic doctrine (books and reform proposals), this instrument is less evident, at least from the standpoint of public pronouncements, in Spanish legislation and case law⁷³. In terms of legislation, some of the latest reforms in the Spanish Civil Code have clearly been inspired by the revised regulations incorporated in Autonomous Community civil law systems, as it is the case with the Laws of Aragón or Navarre with respect to the new article 831 Cc.⁷⁴. During the debate on Law 13/2005, which allows same-sex marriages (accompanied by the corresponding successory rights), the examples of Dutch, Belgian and North American Law were presented. In the explanation of motives of Catalan Law 22/2000 on care for elderly people, mention is made of the solutions of Comparative Law as a model; despite the legislator’s ruling in this regard, this law was mainly inspired by French Law, which does not grant succession rights to these figures, unlike Catalan Law⁷⁵.

Spanish case law on Law of Succession contains few references to Comparative Law or foreign legislation (with the exception of legislation governing international successions whenever

⁷¹ GETE-ALONSO/YSÀS/NAVAS/SOLÉ, “Sucesión por causa de muerte...” [*supra*, fn. 20] § 3.3, pp. 345-348 and 392-397; against, for instance, the general reporter, DELGADO ECHEVERRÍA, *op. cit.*, § 13, pp. 136-138.

⁷³ For a review of judgments in which foreign Law was used as a tool to enhance arguments in contract law developed by the Spanish courts, see A. DOMÍNGUEZ LUELMO (2003), “La unificación del Derecho contractual europeo por vía jurisprudencial (*legal transplants*)”, in S. ESPIAU ESPIAU and A. VAQUER ALOY (eds.), *Bases de un Derecho contractual europeo*, Tirant lo Blanch, Valencia, p. 665 ff.

⁷⁴ See RIVAS MARTÍNEZ, *Derecho de sucesiones...* (*supra*, fn. 62), II-1, p. 486.

⁷⁵ GETE-ALONSO/YSÀS/NAVAS/SOLÉ, “Sucesión por causa de muerte...” [*supra*, fn. 20], § 4.3, pp. 354-356.

required by the provisions of International Private Law)⁷⁶. However, there are some interesting cases in which Comparative Law does provide valuable arguments to support the reasoning behind the Court decision: the Spanish Supreme Court Judgment of March 6 1945 compared Spanish regulations governing partitions *inter vivos* with article 1076 of the French Civil Code, which was imitated on this by other European and American Codes, but not by the Spanish Civil Code. In the Supreme Court Judgment of January 22 1963, which aimed to determine whether elected beneficiaries should be classified as heirs or legatees, the court referred to the spiritualist and subjective criteria of Spanish Law, “without neglecting to value the underlying objective criterion in comparative law”. The Supreme Court ruling of June 12 2002, on the tacit revocation of a holograph will, compared similar solutions offered by § 2258 of the BGB (German Civil Code), and article 739 of the Spanish Civil Code and case law interpreting the mentioned article.

However, the most specific explanation of the value of Comparative Law for the Spanish Supreme Court undoubtedly came in its ruling of February 10 1994, which reproduced in detail § 578 of the Austrian Civil Code and § 2247 of the German BGB to support its arguments in favour of softening (something not very common) the formalities on dates stipulated in the Spanish Civil Code in connection with a holograph wills executed by a Spanish citizen in conformity with this Code. According to this ruling, “these considerations explain, or are based on, the background information of the holograph will and on its regulation in modern Codes, based always on the fact that *the interpretative cooperation of foreign law must be considered with caution and only as a subsidiary element, although this does not mean that it is no longer useful in times such as the present, when the scope and intensity of the international community has increased the frequency of relations between different countries, and it could be argued that participation in the interpretation of national regulations by foreign institutions, based, as in this case, on the same Common Law inherited from Roman Law, forms part of a sociological hermeneutics admitted in article 3 of the Civil Code under the expression of “the social reality of the time in which (the norms) must be applied.”*

4. Impact of economic integration and possibilities for a European Law of Succession

The question of the potential harmonisation of rules on Law of Succession in a specific region and, in particular, within the European Union and its incipient European Private Law, has received little attention in Spain. Only one study in 2003 actually addressed the problem directly⁷⁷, since most existing analyses of European Private Law in Spain simply exclude, from the outset, the possibilities of harmonising Law of Succession given its cultural characteristics and the fact that it is somewhat removed from the economic purposes of the internal market. Four aspects may be considered in the light of the questions presented for consideration at this congress: a) the reasons for and against the harmonisation of Law of Succession in the European

⁷⁶ For instance, Spanish Supreme Court Judgments of February 11 1952 (Law of France), October 4 1982 (Law of France), May 11 1989 (Law of Venezuela), November 18 1994 (Law of France), November 21 1999 (Law of England), March 5 2002 (Law of Ghana and England), and October 13 2005 (Law of Italy).

⁷⁷ CÁMARA LAPUENTE, “¿Derecho europeo de sucesiones? Un apunte” [*supra*, fn. 7], pp. 1181-1233.

Union; b) the question of whether the unification of International Private Law would be sufficient; c) the fields more easy and more difficult to harmonise in case of an hypothetical unification of substantial Law; d) the creation of a supranational group to draft rules on this ambit.

a) *The arguments against the European harmonisation of Law of Succession and possible counterarguments* are as follows⁷⁸: (i) the lack of competence of the EU and the needs of the internal market; in contrast to what may be argued that successions have great economic importance in the transfer of property, they are linked to Economic Law (companies, insurance, methods of transferring wealth, ownership rights and obligations) and Family Law (bottom-up harmonisation is already being studied by the CEFL- Commission on European Family Law), and it has already been proposed that estate debts should be treated in accordance with the rules governing insolvency proceedings; moreover, lack of competence is not an obstacle to the proposal of a model law or base text for an international treaty; (ii) Law of Succession is a distinguishing feature based on local traditions with genuine socio-cultural characteristics; although the argument is convincing, it is also true this is strongly linked to an important common tradition and that many existing rules originate from Roman Law, Canon Law and Common Law. Socio-cultural changes are also producing convergence in certain values and legal solutions; (iii) the local or regional character of Law of Succession, since it is mainly applied at national level, is slightly undermined by the growing frequency of cross-border problems associated with international successions; (iv) the radical differences between Civil Law and Common Law are perhaps less problematic than in other areas of Private Law; undoubtedly, both the divided structure of the probate in an administration/liquidation phase and another distribution phase through personal representatives does not reflect the situation on the continent, while the use of Common Law trusts and the absence of forced shares do little to facilitate harmonisation. However, testamentary freedom is not so absolute in Common Law because of the “family provisions for dependants”; some countries, such as Ireland, recognise a lawful share in favour of the spouse, and English Law of Succession, for example, is not governed first and foremost only by case law but rather by various legislative texts; (v) not all Law of Succession is non-mandatory; instead, there are numerous mandatory legal regulations (formalities, capacity, reserves and forced shares, etc.) which, in the absence of harmonization, of a genuine European public order, are being violated or abused using the resources of other systems.

b) *International Private Law* regulations on international successions are currently too problematic to be deemed efficient. One of the main problems is the coexistence of unitary and dualist or “schismatic” systems. The change in the connecting factor when a person makes a will also gives rise to serious conflicts in Law governing succession. For these and other reasons, proposals have been presented in Spain for the international unification of norms of conflict of

⁷⁸ For full arguments, further reasons and references, see CÁMARA LAPUENTE, “¿Derecho europeo de sucesiones?...”, *ibidem*, pp. 1186-1191. This view is shared by GOMÁ LANZÓN, “Los derechos del cónyuge...” [*supra*, fn. 33], p. 933-934.

Law of Succession⁷⁹. However, these proposals have not been formulated as incompatible with a future process of harmonisation of material regulations, in contrast with the [suggestions of the “German Notary Institute”](#) in 2004⁸⁰. It is true that Spanish doctrine does not suggest proceeding towards this material harmonisation of Law of Succession, but it has also stated, with respect to the rules of International Private Law inherent in European Private Law, that its harmonisation cannot replace the harmonisation of Material Law regulations but rather complement it⁸¹. In any case, the harmonisation of International Private Law would not solve all the problems, e.g. those arising from national differences regarding whether or not heirs should be treated as owners, when and in accordance with which requirements, or the problems of qualifying and adapting foreign law⁸². Apart from that, so far the attempts of international conventions on International Private Law in relation to Law of Succession (The Hague 1961, 1973 and 1989) have been largely unsuccessful, since they only address a small number of less relevant issues, and few are in force or have been ratified.

- c) To conclude, the harmonisation of International Private Law regulations on international successions is not only positive, given the existing substantive and procedural problems, but truly necessary. However, this should not stop us from continuing to examine possibilities for future European or international harmonisation of material Law of Succession. To achieve this distant objective, there are *three different areas in which it may be easier or harder to reach a consensus on a uniform solution*. Firstly, the scope of the *formalities* and testamentary instruments (wills, inheritance contracts, codicils, etc.), international agreements could be reached in this area (see, for example, the Washington Convention of 1973 providing a uniform law on the form of international wills or the Basle Convention on the Establishment of a Scheme of Registration of Wills of 1972) and priority should be given to the principle of maximum freedom, by providing the largest possible number of mechanisms; harmonisation is more feasible in this area. Secondly, the existing differences in the *technical structure* of the succession phenomenon make harmonisation very difficult. These differences are evident in the systems for transferring ownership, the existence or absence of the forced share and its limits, and the order and amount of intestate successions. Thirdly, there are *certain historical and socio-cultural differences* (e.g. the level of legal protection for children or spouses) in which globalisation and social changes with converging core values, rights and freedoms may induce *relative spontaneous convergence*. To a certain extent, this is what happened following the evolution of Family Law and its impact on succession *mortis causa*, resulting in equal

⁷⁹ E. CASTELLANOS RUIZ (2001), *Unidad vs. pluralidad legal de la sucesión internacional*, Comares, Granada, p. 214. Some of the few [Spanish responses to the EU Green Paper on Succession Law](#) support the unification of the International Private Law in this field, but suggest that some attention should be paid to the diversity of succession laws within a country (like Spain) and promote harmonisation in phases and not in a single Regulation.

⁸¹ S. SÁNCHEZ LORENZO (2002), *Derecho privado europeo*, Comares, Granada, pp. 330-332 and pp. 203-206.

⁸² Y. H. LELEU (1998), "Nécessité et moyens d'une harmonization des règles de transmission successorale en Europe", *European Review of Private Law*, 6, p. 168 ff.; CÁMARA LAPUENTE, "¿Derecho europeo de sucesiones? Un apunte" [*supra*, fn. 7], p. 1192.

treatment of children, an increase in spouses' rights, a reduction in the number of relatives entitled to forced shares, etc.⁸³

- d) Some suggestions have been presented for the creation of a *European research group* to perform a broader study of national regulations on European Law and provide specific information on comparative law⁸⁴. However, for now it seems very unlikely that its function should be to propose specific rules as a basis for hypothetical harmonisation. Instead, it should initially explore real coincidences and differences between national systems, identify converging trends and detect areas in which harmonisation proposals may be successful in the future.

5. Table of cases

Spanish Supreme Court's Civil Chamber (1939 onwards)

<i>Date</i>	<i>Ref.</i>	<i>Delivering Opinion</i>
December 29 1939	RJ 1939\105	-
May 16 1940	RJ 1940\416bis	-
July 8 1940	RJ 1940\689	-
March 6 1945	RJ 1945\272	-
March 23 1948	RJ 1948\303	Celestino Valledor y Suárez-Otero
November 13 1948	RJ 1948\1270	Celestino Valledor y Suárez-Otero
March 15 1951	RJ 1951\997	Felipe Gil Casares
February 11 1952	RJ 1952\284	Celestino Valledor y Suárez-Otero
October 25 1954	RJ 1954\2862	Juan Serrada Hernández
June 12 1956	RJ 1956\2482	Obdulio Siboni Cuenca
November 21 1956	RJ 1956\3830	Juan Serrada Hernández
January 24 1957	RJ 1957\366	Celestino Valledor y Suárez-Otero
March 27 1957	RJ 1957\1573	Francisco Eyré Varela
January 7 1959	RJ 1959\119	Francisco Rodríguez Valcarce
June 7 1960	RJ 1960\2082	Juan Serrada Hernández
January 22 1963	RJ 1963\447	Francisco Bonet Ramón
March 3 1964	RJ 1964\1254	Francisco Bonet Ramón
March 8 1975	RJ 1975\2600	Federico Rodríguez Solano y Espín
May 26 1982	RJ 1982\2600	José Beltrán de Heredia y Castaño
October 4 1982	RJ 1982\5537	Antonio Fernández Rodríguez
March 26 1983	RJ 1983\1644	Antonio Sánchez Jáuregui

⁸³ For full details, CÁMARA LAPUENTE, "¿Derecho europeo de sucesiones? Un apunte" [*supra*, fn. 7], p. 1230-1232.

⁸⁴ LELEU, "Nécessité..." [*supra*, fn. 82], p. 193; D. LEIPOLD (2000), "Europa und das Erbrecht", in *Europas universale rechtsordnungspolitische Aufgabe im Recht des dritten Jahrhundert. Festschrift für Alfred Söllner*, Beck, München, p. 647 ff.; C. PAMPLONA CORTE-REAL (2000), "Um Código civil para a Europa. Neccessidade e interesse de uma unificação no âmbito do Direito das sucessões", in the Coimbra Congress on a European Civil Code, June (unpublished), p. 31; CÁMARA LAPUENTE, "¿Derecho europeo de sucesiones? Un apunte" [*supra*, fn. 7], p. 1232.

April 10 1985	-	-
February 10 1986	RJ 1986\ 513	Matías Malpica González-Elipe
June 21 1986	RJ 1986\ 3788	José María Gómez de la Bárcena y López
February 1 1988	RJ 1988\ 581	Gumersindo Burgos Pérez de Andrade
March 13 1989	RJ 1989\ 2036	Mariano Martín-Granizo Fernández
May 11 1989	RJ 1989\ 3758	Ramón López Vilas
May 7 1990	RJ 1990\ 3687	Francisco Morales Morales
May 9 1990	RJ 1990\ 3695	Gumersindo Burgos Pérez de Andrade
April 25 1991	RJ 1991\ 3029	Eduardo Fernández-Cid de Temes
December 31 1992	RJ 1992\ 10426	Gumersindo Burgos Pérez de Andrade
February 10 1994	RJ 1994\ 848	Jaime Santos Briz
June 13 1994	RJ 1994\ 6507	Eduardo Fernández-Cid de Temes
July 22 1994	RJ 1994\ 6578	Alfonso Barcalá Trillo-Figueroa
October 6 1994	RJ 1994\ 7461	Jaime Santos Briz
November 18 1994	RJ 1994\ 8777	Luis Martínez-Calcerrada y Gómez
January 30 1995	RJ 1995\ 388	Alfonso Barcalá Trillo-Figueroa
March 17 1995	RJ 1995\ 1961	José Almagro Nosete
April 26 1995	RJ 1995\ 3256	Teófilo Ortega Torres
June 15 1995	RJ 1997\ 2889	Gumersindo Burgos Pérez de Andrade
July 24 1995	RJ 1995\ 5603	Gumersindo Burgos Pérez de Andrade
July 28 1995	RJ 1995\ 6633	Jesús Marina Martínez-Pardo
November 27 1995	RJ 1995\ 8717	Eduardo Fernández-Cid de Temes
May 14 1996	RJ 1996\ 3910	Francisco Morales Morales
July 25 1996	RJ 1996\ 5572	Francisco Morales Morales
November 15 1996	RJ 1996\ 8212	Jesús Marina Martínez-Pardo
January 30 1997	RJ 1997\ 159	Eduardo Fernández-Cid de Temes
June 16 1997	RJ 1997\ 5411	Alfonso Barcalá Trillo-Figueroa
June 22 1997	-	-
October 15 1997	RJ 1997\ 7614	Luis Martínez-Calcerrada y Gómez
January 27 1998	RJ 1998\ 394	José Luis Albácar López
May 18 1998	RJ 1998\ 3376	José Almagro Nosete
February 27 1999	RJ 1999\ 1418	Pedro González Poveda
April 29 1999	RJ 1999\ 2618	Alfonso Barcalá Trillo-Figueroa
May 21 1999	RJ 1999\ 4580	Pedro González Poveda
February 15 2000	-	-
May 4 2000	RJ 2000\ 3385	Antonio Gullón Ballesteros
December 3 2001	RJ 2001\ 9925	Antonio Gullón Ballesteros
February 12 2002	RJ 2002\ 3191	Xavier O'Callaghan Muñoz
March 5 2002	RJ 2002\ 4085	Antonio Romero Lorenzo
May 24 2002	RJ 2002\ 4459	Francisco Marín Castán
June 12 2002	RJ 2002\ 8581	Ignacio Sierra Gil de la Cuesta
September 23 2002	RJ 2002\ 829	Antonio Gullón Ballesteros
July 10 2003	RJ 2003\ 4628	José Manuel Martínez-Pereda Rodríguez
December 30 2003	RJ 2004\ 360	Román García Varela
March 12 2004	RJ 2004\ 932	Antonio Romero Lorenzo
March 31 2004	RJ 2004\ 1717	Alfonso Villagómez Rodil
March 17 2005	RJ 2005\ 2389	Ignacio Sierra Gil de la Cuesta
October 13 2005	RJ 2005\ 7233	Xavier O'Callaghan Muñoz

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Annex 1: Succession Rights of Unmarried Couples According to the Autonomous Community Civil Laws in Spain

	LEGAL CONCEPT		SUCCESSION RIGHTS			OTHER RIGHTS		
	REQUIREMENTS	CREATION	LEGÍTIMA (FORCED SHARE)	INTESTATE SUCCESSION	VOLUNTARY SUCCESSION (Ways to make one's will, agreements, incl. a voluntary universal usufruct)	HOUSEHOLD, FURNISHINGS. DERECHO DE PREDETRACCIÓN	HOUSING	PENSION OR COMPENSATION FROM THE ESTATE
ARAGON Law 6/1999	Legal age	Constitutive compulsory registration in a special registry	No rights (≠ spouse)	No rights (≠ spouse)	= spouse	Yes	One year, free	
BALEARIC ISLANDS Law 18/2001	Emancipated minor	Constitutive compulsory registration in a special registry	= spouse	= spouse	= spouse	Yes	Subrogation in rentals	
BASQUE COUNTRY Law 2/2003	Emancipated minor	Constitutive compulsory registration in a special registry	= spouse (vid. Annex 2 on the different rights in each Basque area)	= spouse (vid. Annex 2 on the different rights in each Basque area)	= spouse (vid. Annex 2 on the different rights in each Basque area). Voluntary universal usufruct	Yes	One year	
CATALONIA Law 10/1998	Legal age	a) Public deed ² or b) Two years ³ of cohabitation or c) Cohabitation + common children	a) Homosexual: ¼ of the estate b) Heterosexual: no rights	a) Homosexual: a.1) ¼ of the estate in case of financial needs if there are concurrent descendants and ascendants a.2) ½ of the estate if there are 2 nd degree collateral relatives a.3) All the estate in absence of the former relatives b) Heterosexual: no rights	a) Heterosexual: it is possible to grant a universal usufruct b) Homosexual: not foreseen	Yes (for all couples)	One year (for all couples) and subrogation in rentals	Maintenance for one year (only heterosexual couples)
GALICIA⁴ Law 2/2006	Emancipated minor ?	Constitutive compulsory registration in a special registry	= spouse	= spouse	= spouse			
NAVARRRE Law 6/2000	Emancipated minor	a) Public deed, or b) One year of cohabitation or common children or prior deed ⁴	= spouse (legal universal usufruct)	= spouse (except in family assets or bienes troncales)	= spouse			

⁽¹⁾ New rights created by the Third Additional Disposition of the Law 2/2006 of 14th June on the Civil Law of Galicia (no further special law on unmarried couples); rules on requisites for creation of a stable couple, modified by Law 10/2007, of 28th June.

⁽²⁾ Both for stable homosexual and heterosexual couples.

⁽³⁾ Only for stable heterosexual couples

⁽⁴⁾ Before the Law 10/2007, requisites were (Law 2/2006): a) One year of cohabitation proved by a.1) Registration, or a.2) Public deed, or a.3) Other means b) Cohabitation + common children

Annex 2: Forced Share or Legítima in the Spanish Civil Code and in the Autonomous Community Civil Laws

	CHILDREN	DESCENDANTS	ASCENDANTS		WIDOW(ER) SPOUSE *		
			ALONE	WITH A WIDOW(ER) SPOUSE	ALONE	WITH DESCENDANTS	WITH ASCENDANTS
SPANISH CIVIL CODE	2/3: <i>legítima larga</i> (1/3 <i>legítima estricta</i> + 1/3 betterment or <i>mejora</i>)	In absence of children. Betterment also in detriment of existing children	1/2	1/3	2/3 usufruct	1/3 usufruct (on the 1/3 of betterment or <i>mejora</i> of the children)	1/2
ARAGON	"Collective <i>legítima</i> ": 1/2 for descendants at any level: equal, unequal or individual distribution		Nothing		Universal usufruct (mandatory). Special effects while alive, from the wedding onwards		
BALEARIC ISLANDS	1/3 if they are 4 or less ½ if they are more than 4	Representation	1/4: only the parents in absence of descendants		Mallorca-Menorca: Universal usufruct (mandatory)	Mallorca-Menorca: 1/2 usufruct Ibiza-Formentera: nothing in case of will; but if intestate succession: 1/2 usufruct	Mallorca-Menorca: 2/3 usufruct Ibiza-Formentera: nothing in case of will; but if intestate succession: 2/3 usufruct
BASQUE COUNTRY	1. F. Vizcaya: Children and descendants: 4/5 collective <i>legítima</i> : free distribution 2. F. Ayala: total testamentary freedom: (all can be excluded) 3. Areas without their own Law (fueros) = Spanish Civil Code		1. F. Vizcaya: 1/2 2. F. Ayala: freedom 3. F. Guipúzcoa= Spanish Civil Code except for farmhouses		1. F. Vizcaya: 2/3 usufruct, with possible legacy of universal usufruct (voluntary) 2. F. Ayala: legal usufruct = Civil Code, but removable. And voluntary universal usufruct	F. Vizcaya: 1/2 usufruct	F. Vizcaya: 1/2 usufruct
CATALONIA	1/4	In absence of children (representation)	1/4: only the parents in absence of descendants		1/4 ownership (only in case of need)		
GALICIA	1/4	In absence of children (representation)	Nothing		1/2 usufruct (but a voluntary universal usufruct is also lawful)	1/4 usufruct (but a voluntary universal usufruct is also lawful)	1/2 usufruct (but a voluntary universal usufruct is also lawful)
NAVARRRE	Formal <i>legítima</i> ; without patrimonial content	In absence of children, also formal <i>legítima</i> (limit in favour of the children of the first marriage)	Nothing		Universal usufruct (mandatory)		

(*) The widow spouse is not deemed as a forced heir (*legitimario*) in Catalanian Law, despite the granting of some similar legal rights. The legal nature of the widow's legal rights is under discussion within the scope of the Civil Code and other Autonomous Communities Civil Laws.