FORCED SHARES IN SPANISH AND PHILIPPINE SUCCESSION LAW
LAS LEGÍTIMAS EN DERECHO DE SUCESIONES ESPAÑOL Y FILIPINO

José Manuel de Torres Perea
Profesor Titular de Derecho Civil
Universidad de Málaga

Abstract
Spanish and Philippine Succession Law are based on the same concepts, traditions and Civil Code. In fact, the Civil Code of the Philippines of 1950 tries to improve the Spanish Civil one, which was up until then in force in the archipelago. Therefore, it is based on it. Moreover, in spite of the fact of numbering the articles in accordance with the new text, in the official version of the Code, most of the articles have an additional number cross referencing the original article in the Spanish Civil Code.
One of the sections of the Philippine Civil Code that has maintained a close connection with that of its Spanish roots is Succession Law. In fact, Philippine law on succession is mostly Spanish Law. Out of a total of 332 articles, only 29 originate from North American Law. In this article we want to analyse the similarities and differences between both succession laws, in order to be able to propose different possibilities for a future evolution of both twin systems, specially in matter of inheritance forced shares.

Key words: Spanish and Philippine Succession Law, Civil Code, forced shares, inheritance, evolution of law, illegitimate children, usufruct of the widowed spouse

Resumen
Tanto el Derecho español de sucesiones como el filipino siguen una misma tradición jurídica. De hecho cuando el vigente Código civil de Filipinas fue aprobado en 1950 supuso una notable mejora del español al introducir nuevos conceptos elaborados por la propia doctrina y jurisprudencia españolas. Por otro lado es significativo que el Código filipino conserva junto a la nueva numeración de cada artículo, la antigua correspondiente al Código español.
Una de las materias en las que se aprecia claramente la influencia y huella del Código español es el derecho de sucesiones, pues de un total de 332 articulos solo 29 proceden del derecho norteamericano. En este artículo analizamos las similitudes y diferencias existentes entre ambas regulaciones en materia de sucesiones a fin de vislumbrar qué mejoras podrían proponerse de cara a su actualización, muy especialmente en materia de legítimas.

Palabras clave: Derecho de sucesiones español y filipino, Código civil, legítimas, herencia, evolución del derecho, hijos ilegítimos, usufructo del cónyuge viudo.

Introduction

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

Therefore, we can affirm that the regulation of Succession Law in both codes is parallel, however there are important differences that we should take into account: Perhaps the most important one is that the Spanish Law abolished the distinction between legitimate and illegitimate children in 1981[1], while the Philippine law keeps it.

The second important difference is that the 1950[2] Philippine lawmaker decided to abolish the "mejoras" or betterments in favour of children or descendants. It was said that the betterments could not be accepted by a society accustomed to not discriminating between children. Therefore, keeping the betterment would subvert the essence of the Philippine family relationship. What, however, it has not been an obstacle in the PCC to maintain the legal distinction between legitimate and illegitimate children.

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

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

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

---

[1] Ley 11/1981, de 13 de mayo, de modificación del Código Civil en materia de filiación, patria potestad y régimen económico del matrimonio. BOE 19th May 1981.
[2] Civil Code of the Philippines . Republic Act. No.386.

The form of testaments is also different in both countries, being substituted the Spanish notarial last will by the so called attested one in the PCC. The only other type of testament in the Philippine Code is the handwritten one, therefore the closed testament and the special ones have been abolished by the Code of 1950. The PCC also provides for greater powers to prove the existence of last wills. In fact, it now allows *ante mortem* probate of wills, during the lifetime of the testator. What implies that the testator himself files for probate.

Moreover, the PCC applies art 739, that rules on the cases of prohibited donations, to the law on succession. In accordance with this article the following are void donations: a. those made between persons who are guilty of adultery' or concubinage at the time of the donation. b. Those made between persons found guilty of the same criminal offence, in consideration thereof. c. Those made to a public officer, or his wife, descendants or ascendants, by reason of his office. Therefore, we find that sometimes the PCC and the Philippine Criminal Code maintain criteria from the nineteenth century.

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

For the rest, both systems, maintain the same rules on Succession Law. This resemblance allows us to make a joint study in order to analyse their adaptation to the new demands of the real society in accordance with the specific peculiarities of each community. Undoubtedly, the issue regularly discusses by the academics is whether maintaining the force shares established in the traditional Succession Law is justified. This is the big issue in vogue. If fact, we find opinions of a wide range of professors. We find supporters of the current system as Espejo Lerdo de Tejada, together with professors that prefer to reduce them significantly, like ARROYO I AMAYUELAS 2007[3], or others that directly wish their abolition, and refer the forced shares as "relics"[4].

Now, we would like to expose the alleged reasons for this debate, in order to analyse which could be an optimal proposal for a future amendment of the regulation in the case of the Spanish and in the case of the Philippine Succession Laws.
It is alleged that the current succession law implies a truly limiting system of the autonomy of the testator, since in most of the cases the law delimits his capacity to only dispose of a limited share of the estate, in the Spanish model, a third

[3] ARROYO I AMAYUELAS, "Pflichtteilsrecht in Spanien", en *Reformfragen des Pflichteilsrecht*, Colonia, 2007, p.270 y ss.
[4] SONNEKUS, "The New Dutch Code on Succession as Evaluated Through the Eyes of a Hybrid Legal System", *Zeitschrift für Europäisches Privatrecht*, 2005, pp. 71, 84.

share of the estate if there are children or descendants; his or her capacity is also considerably limited if there are no descendants, but ascendants.

The controversial doctrinal debate about the justification of the forced shares

Doctrinal positions that limit or abolish the force shares

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

Having said that, could the system of legitimes in Spain or in the Philippines be suppressed or limited? Germany has been the only legal system that has brought this matter to the Constitutional Court, in which the ruling of April 19, 2005 held that the legitimes should be maintained although they could be amply restricted. The German Constitutional Court concludes that there is no mandate that obliges granting equal treatment to children in the inheritance, although the constitutional protection of the right to private property includes a minimal participation of the children in the inheritance. However, because of the reasons stated above, we do not share these arguments which in any case shall not apply to Spain where, in fact, we have a territory that excludes material legitime (Navarra).

Part of the doctrine alleges that the system of legitimes established by the Civil Code in 1889 responded only to a principle of cross-generational solidarity. If we accept this position, it is easy to conclude that the social reality then in force in which the average life expectancy was around forty-five years; and in which there was no social State governed by the rule of law, guarantor and protector of minors and elders. The absence of any social protection implied that once the parents died, usually when their children were still minors, the latter could be left homeless and without access to every kind of resources. That is why the system of legitimes provided in 1889 was justified, in part, to ease this situation by allocating at least two-thirds of the hereditary estate to the descendants. It was a matter of prioritizing these vulnerable family members against the arbitrariness of a testator who could try to ignore them and transfer his assets to a non-family member. From this perspective, these legal legitimes could be interpreted as an extension of the duties imposed by parental authority and support of the elderly.

Following this perspective, it is said that the social reality has undergone a Copernican turn. Currently the average life expectancy is around eighty years

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

Shares of ascendants

Some doctrine indicates in case of accepting the forced share of the ascendants, it should be limited to the parents. Others in the contrary refuse any legitime in favor of parents. The reason is that the situation of need in which parents could be found is already sufficiently covered by different legal procedures. First, due to the fact that a welfare State provides the protection of all citizens through an integral system. But also, the Civil Code itself in its articles 142-153 SCC regulates the right to support that includes ascendants. It is stated that in practice there is a generation around 40 and 60 years old that is financing the coverage of their elders through the taxes, but that they are also being required to cover their needs directly through the so-called "kinship support". From this perspective, this generation is paying twice for the same coverage. It is argued that it should be or a duty of the welfare State, or a duty of the relatives, but not of both. Paying taxes to the State to provide pensions, health care and so on to parents and being able to be legally obliged to pay for support with respect to them can be abusive because they put excessive financial pressure on the children who comprise this intermediate generation. In any case, it is clear that the needs of parents will be covered by one way or another, or rather both, being not necessary forced inheritance right in their favour.

In light of this, parents should only be forced heirs when there are no other legal means already provided to supply the possible situation of need in which they might incur. This seems excessive. In addition, when parents reach retirement age, they are not only protected by a public pension system -retirement pension- but in a large number of cases by a private one -private pension schemes-. This is another reason alleged for suppressing the legitime of the parent.

Share of the widowed spouse

Without a doubt, another situation that deserves more reflection is the legitime of the widowed spouse. Should he/she inherit before the children and descendants of the decease? Should he/she be in the same position as the children? What should be the amount of the share of the widowed spouse? It should be a usufruct right or an ownership one? In any case, it does not seem appropriate to assimilate it to a right to support to be decided by the judge

according to circumstances for the unpredictability that it would cause, such as it occurs under English Law when there is a divorce or a dissolution of a marriage.

Perhaps a solution is to legally envisage a lifetime usufruct over the conjugal home, in order to give a legal response to the problem that usually occurs when the only hereditary estate is a share of said family dwelling and we must resort to the "*cautela socini*" solution. If the right to use the family dwelling is safeguarded, the said lifetime usufruct could be extended up to a percentage of the inheritance. This percentage could range between 30 and 50 per cent of the inheritance, provided that the value of the usufruct of the part of the family dwelling integrated in the inheritance does not exceed the aforementioned percentages.

CONCLUSION

The tendency is to defend a greater freedom to make testaments, in order to align the Spanish inheritance system to the one copy other cultural models in which the children are forced to be detached from their families when they are of legal age? Is it incorrect our traditional way to understand family relations and affects? Should this global world try to reduce all family models to only one, or at least align them as close as possible? Should the Western model be identified with the one followed by the Common Law countries? Should this model be imposed on other cultures? Can statistics be enough to justify a social model?

It could be argued that statistics only reflect a reality, and that the Law should be adapted to this reality. However, we could ask if the only reason of Law is to be an echo of society, or if it could be conceived the Law as a tool to improve human relationships. It is a clear fact, that new models that claim to be imposed as global ones, lead the human being to the isolation, and shatters family links which are contrary to the free development of the personality, and the autonomy of will. This social individualism is creating a new type of human being, independent, and converting the families bounds in encumbrances. We ask if this is morally acceptable, or if our lawmaker should try to refocus this situation and encourage human relations and the familiar ones as base for a healthy society. We should rethink the consequences of this exacerbated individualism, otherwise the future of this society could be a future of isolated and forgotten old relatives, condemned to pass away in cold residences, and spend their later years far from their theoretical loved ones, forgotten by them, waiting or wishing to finish their meaningless lives.

Should our children be linked to internet avatars? Is it a healthy a model the system in which children prefer to play with online imaginary friends, before their siblings or cousins? Is it a respectful model the one in which parents have no quality time to share with their children? Recently I read that in Silicon Valley

it is now developing the custom not to allow children of scientists to use the Internet until a higher age, due to the harmful consequences of allowing the contrary. Maybe in time to avoid this drastic social evolution, we could be attempt to strengthen the family links instead of weakened them. Therefore, from this perspective I do not consider it justified to reduce the inheritance rights of family relatives based on only statistics, if we not firstly analyse, what is the actual reality behind them.