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On the Development and Objectives of Statutory Share Law in Estonia

The Estonian law of succession as a whole is unarguably a part of continental European legal culture and essentially follows the traditions of German law. But it is not a one-to-one copy of German law. It has been influenced by Swiss and other law. For example, the procedure by which a successor acquires the estate under the Estonian law of succession is similar to the estate acceptance system recognised in Italian law.¹

The same may be said at the moment about the Estonian statutory share law. It has a distinct continental European basis, while being a unique mix of different families of law. The provisions of the Estonian Law of Succession Act regulating the statutory share have been influenced by German law but have characteristics of the French family of law as well, and the Soviet law that was earlier applicable in the Estonian territory. Following the latter's example, the Estonian law of succession relates the entitlement to a statutory share to the entitled person's incapacity for work, as was provided in § 540 of the former Civil Code of the Estonian Soviet Socialist Republic.² According to § 104 of the Law of Succession Act³ (LSA), in effect since 1 January 1997, the ascendant or descendant or surviving spouse of the deceased is entitled to a statutory share only if incapacitated for work at the time of the opening of the succession.

The criterion of incapacity for work as a basis for entitlement to a statutory share has, however, caused practical problems and disputes, which have even gone so far that the Supreme Court *en banc* had to put forth a view. Namely, in the course of constitutional review proceedings on 19 October 2004, the Civil Chamber of the Supreme Court *en banc* raised a question to the Supreme Court *en banc* — that of assessing the conformity of LSA § 104 to § 32 of the Constitution⁴ in conjunction with § 11 of the Constitution⁵ and to answer the question of whether the entitlement to a statutory share of the persons listed in LSA § 104 who

¹ See also R. Hausmann, U. Liin. Grundzüge des neuen estnischen Erbrechts. – Jahrbuch für Ostrecht. Vol. XLI 2000, Part Vol. 2. München: Beck, pp. 261–281.

² Eesti NSV tsiviilkoodeks (Civil Code of the Estonian Soviet Socialist Republic). Tallinn: Eesti Raamat 1988 (in Estonian).

³ Pärimisseadus (Law of Succession Act). – RT I 1996, 38, 752; 2002, 53, 336 (in Estonian).

⁴ Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia). – RT 1992, 26, 349; I 2003, 64, 429 (in Estonian).

⁵ According to § 11 of the Constitution, rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted.

do not need assistance, including persons factually capable for work, is in line with the principle arising from § 32 (4) of the Constitution that the right of succession is guaranteed.⁶

In its decision of 22 February 2005, the Supreme Court reached the conclusion that there was no contrarieness to the Constitution, because LSA § 104 can be interpreted so that the entitlement to a statutory share applies to only such persons listed in LSA § 104 as are actually in need of assistance and are not able to earn a living due to factual incapacity for work.⁷ The Supreme Court *en banc* found that 'testamentary freedom, like inviolability of property in general, is not an unrestricted fundamental freedom. According to § 32 (2) of the Constitution, everyone's right to freely possess, use, and dispose of his property may be restricted by law. As testamentary freedom is an expression of the freedom to dispose of property, it can be restricted by law; i.e., it is a fundamental freedom with a simple reservation by law. Therefore, the legislature is entitled to restrict testamentary freedom in the public interest for purposes that do not contradict the Constitution.'⁸

Over past decades, statutory share law has been one of the world's most debated issues concerning law of succession, alongside the spouse's right of succession. An optimal solution is being sought everywhere to the problem of the extent to which the restriction of a person's testamentary freedom corresponds with today's understanding of the family and the purposes of the right of succession. That is why the discussion that follows first examines the concept of testamentary freedom, its historical development, and the purposes of the right to a statutory share in general. This is followed by an analysis of the statutory share law applicable in Estonia and plans for its reform.

1. The concept of testamentary freedom and an overview of the development of this testamentary freedom in the European and Estonian legal arenas

The Estonian Constitution guarantees the right of succession (§ 32 (4) of the Constitution), which *inter alia* means that everyone can make such dispositions for bequeathing his property as he wishes. It is indeed so in most cases, but no freedom is absolute or unrestricted. A person making a disposition on his property, effective on his death, has to take into account both the general established legal procedure and good morals, as with any other transaction (§ 86 of the General Part of the Civil Code Act).⁹

Some restrictions to testamentary freedom arise from the very nature of the law of succession; according to these restrictions, certain dispositions are considered impermissible as they do not comply with the law and are hence legally void. One of the main restrictions on testamentary freedom, arising from the law of succession, is the entitlement of the closest family members of the deceased to a statutory share.

Testamentary freedom is thus a person's freedom to make such disposition on his property upon his death as do not contradict the general legal order and good morals of society and do comply with the restrictions established by the Law of Succession Act.

The principle of testamentary freedom is an expression of the principle of private autonomy, which is more broadly recognised in private law, being in turn closely related to the protection of private property.¹⁰ Testamentary freedom developed rapidly in ancient Roman law. At the same time, testamentary freedom was not particularly widespread in the Middle Ages, when the economy was based on the family as an economic entity and land ownership or the right to use land, which passed from generation to generation, was especially important. It was practically impossible to bequeath land by means of a will. The Church, however, was not pleased with this situation and exerted its influence to gradually reintroduce the will, which at first was still available for only very limited property. It may be said that, in the Middle Ages, the will was favoured mainly by the Church, which wanted to gain property *inter alia* by enabling pious people to bequeath their property to the Church. Such rather limited testamentary freedom prevailed for centuries in England¹¹ and elsewhere in Europe¹², including the Estonian territory. It was possible at that time only to

⁶ SCebd 3-2-1-73-04, para. 7. Available at: <http://www.nc.ee/klr/lahendid/tekst/222478590.html> (23.02.2005) (in Estonian).

⁷ *Ibid.*, para. 40.

⁸ *Ibid.*, para. 18.

⁹ Tsiiviilseadustiku üldosa seadus (General Part of the Civil Code Act). – RT I 2002, 35, 216; 2003, 78, 523 (in Estonian).

¹⁰ H. Brox. Pärimisõigus (Law of Succession). Tallinn: Juura 2003, para. 23, 27. See also SCebd (Note 6), para. 17.

¹¹ A. Borkowski. Textbook on Succession. London: Blackstone Press Limited 1997, pp. 39–41.

¹² H. Lange, K. Kuchinke. Lehrbuch des Erbrechts. München: Beck 1995, p. 813.

bequeath one's personal movables earned by one's own work and not inherited from the family (see, e.g., §§ 1993–2004 of the Baltic Private Law (BPL)).¹³

Thus, according to the Livonian town and country law, a testator could not make disposition on death for a manor or land inherited from his family, and, according to Estonian law, for any property acquired via succession or the fruits of such property. All this had to pass to the heirs (BPL § 1995). Such property could be disposed by a will only if the testator was the last of the lineage or if all blood relatives entitled to intestate succession granted their consent (BPL § 1997).

According to Livonian and Estonian law, parents with minor children who were not yet able to earn a living had to leave their children a share of their property subject to free testation such as was necessary for their maintenance and raising, as determined by their status, until they were able to earn a living themselves (BPL § 2001). The same restrictions as were established in the Livonian country law also applied in the town of Narva (BPL § 2004).

One of the best known persons who voiced an opinion against the will as the means of disposal of one's property beyond one's death was the French philosopher and lawyer Montesquieu, who said that ownership died with the man.¹⁴ In this view, testamentary freedom is not some fundamental right. Throughout its historical development, testamentary freedom has always been restricted; all legal orders since Roman law, as stated above, have placed the rights of the closest family members of the deceased above it.¹⁵ For a certain time, under Roman judicial practice, a court would nullify a will in which the testator left his children or grandchildren without any estate without stating adequate reason. Such a will was declared to have been drawn up in a state of mental incapacity.¹⁶

As the liberal view of the world began to spread, the understanding that only the person himself has the right to decide who will inherit his property gained more and more ground. Only if the person abuses his freedom may the state interfere and protect the family members of the deceased by way of entitling them to a statutory share.¹⁷

According to modern German legal literature, the purpose of the right to a statutory share is to balance the principle of testamentary freedom and the principle of the family's hereditary succession. This effectively reveals the link between the principle of the family's hereditary succession and the Constitution — it is an elaboration of the guarantee to the right of succession (the subjective right of succession, in this meaning), and the principle of family protection. Based on society's sense of justice, it is not permissible in continental European legal culture to leave those closest to one without any estate.¹⁸

Simultaneously with the debate over the conformity of the right to a statutory share with the Constitution in Estonia, a similar debate continued for years in the Federal Republic of Germany. In its decision of 19 April 2005, the German court of constitutional review (*Bundesverfassungsgericht*) finally took the view that the entitlement of the children of the deceased to a statutory share is based on the universal solidarity of the family. This is a lifelong link that creates not only rights but also obligations. It is not only an economic but also a psychological link. The function of statutory share law is thus to carry on the psychological and economic unity of the family regardless of the children's own economic needs. Based on this and other arguments, the German court of constitutional review found that children's right to a statutory share, which is principally non-voidable and irrespective of the children's economic status, is in conformity with the Constitution of the Federal Republic of Germany¹⁹ (GG Art. 14 (1) first sentence and Art. 6 (1)).²⁰

At the same time, the extent of a person's rights and freedoms has significantly increased in today's world; one of its expressions is the much greater recognition by society of testamentary freedom, and the shrinking circle of persons entitled to a statutory share. In English law, the right to a statutory share depends on the applicant's ability to apply reasonable financial provision.²¹ Also, as mentioned above, the right to a statu-

¹³ Liv-, Est- und Curländisches Privatrecht. St. Peterburg. In der Buchdruckerei der Zweiten Abtheilung Seines Kaiserlichen Majestät Eigener Kanzelei 1864.

¹⁴ A. Borkowski (Note 11), p. 239; H. Hattenhauer. Grundbegriffe des Bürgerlichen Rechts. Historisch-dogmatische Einführung. München: Beck 1982, p. 192.

¹⁵ A. Borkowski (Note 11), p. 240; J. N. Druey. Grundriss des Erbrechts. 3. Aufl. Bern: Verlag Stämpfli+Cie 1992, § 6 Rdn. 1; H. Hattenhauer (Note 14), pp. 192–195.

¹⁶ E. Ilus. Rooma eraõiguse alused (Bases of Roman Private Law). Ilo 2000, p. 181 (in Estonian).

¹⁷ H. Hattenhauer (Note 14), p. 203.

¹⁸ T. Kipp, H. Coing. Erbrecht: ein Lehrbuch. T. Kipp, H. Coing (Bearb.). 14. Bearb. Tübingen: Mohr 1990, pp. 51–53; J.N. Druey (Note 15), § 6 N 2; Parry & Clark. The Law of Succession. 10th edition. London: Sweet & Maxwell 1996, p. 121.

¹⁹ Grundgesetz für die Bundesrepublik Deutschland (GG). – BGBl. 1949, 1; BGBl. I p 2862/2863.

²⁰ BverfG, 1 BvR 1644/00 vom 19.4.2005, Absatz-Nr (1-98). Available at: http://www.bundesverfassungsgericht.de/entscheidungen/frames/rs20050419_1bvr164400.html (08.07.2005).

²¹ A. Borkowski (Note 11), pp. 256–264; C. Rendell. Law of Succession. Macmillan 1997, pp. 251–256.

tory share depended on the family member's own capacity for work under Soviet law, which tradition is followed in today's Estonian statutory share law. In this sense, Estonia may be regarded as a country that recognises a fairly broad testamentary freedom, where the right to a statutory share in the continental European meaning practically does not exist and where the liberal restrictions concerning the testator are closest to those of English law, of all of today's European legal orders.

2. Who is entitled to a statutory share under the Estonian law?

According to LSA § 104, the following persons are entitled to a statutory share:

- the spouse of the deceased;
- the children, grandchildren, and other descendants of the deceased; and
- the parents and grandparents of the deceased.

As already mentioned above, the Estonian law of succession imposes an important additional condition on these persons. Namely, they are entitled to a statutory share only if they are incapacitated for work at the time of the death of the deceased.

However, the requirement of incapacity for work has been subject to different understandings and disputes in the courts recently, and the courts have interpreted 'incapacity for work' in different ways.

In its decision of 4 July 2003, the Tartu County Court found that only persons who are incapacitated for work due to illness or the functional status of the organism at the time of opening of the succession should be regarded as incapacitated for work for the purposes of LSA § 104. So, the fact that the testator's daughters who requested a statutory share had reached pension age was not in itself sufficient in the Court's opinion to regard them as incapacitated for work for the purposes of LSA § 104. The Court took the view that only those persons incapacitated for work who would be entitled to maintenance under the Family Law Act should be entitled to a statutory share.^{*22}

The testator's pension-age daughters did not agree to this solution and appealed against the decision, after which the dispute was heard by the Tartu Circuit Court. In its decision of 11 February 2004, the Tartu Circuit Court, in contrast to the Tartu County Court, found that, for the purposes of LSA § 104, the testator's ascendants and descendants who are heirs should include persons who have reached pension age, regardless of whether they still work. According to the Circuit Court's interpretation, the objective of the statutory share institution was to guarantee, regardless of the testator's will, a share of the estate to those heirs who were left without estate and who had limited means of provision due to incapacity for work, which it considered to apply to persons who have reached pension age.^{*23}

The testator's son, who was the sole testamentary heir did not agree to this solution and filed an appeal in cassation against the decision of the Tartu Circuit Court. After that, the Civil Chamber of the Supreme Court gave its assessment of the dispute on 19 October 2004 and essentially supported the position of the Tartu Circuit Court concerning the interpretation of LSA § 104, stating in its ruling that, according to its interpretation of the above section, all persons listed in LSA § 104 were entitled to a statutory share regardless of their actual capacity for work.^{*24} The Civil Chamber of the Supreme Court expressed the same position in an earlier decision of 23 December 1998, according to which factual employment *per se* does not preclude entitlement to a statutory share.^{*25}

But this did not end the dispute over incapacity for work as a criterion for entitlement to a statutory share. Namely, in its ruling of 19 October 2004, the Civil Chamber of the Supreme Court *en banc* questioned the statutory share regulation as prescribed in the LSA and deemed it necessary to assess its conformity with the Constitution. To be more exact, the Civil Chamber of the Supreme Court sought an answer from the Supreme Court *en banc* to the question of whether such a restriction on testamentary freedom was necessary in a democratic society and whether it did not distort the nature of the right of succession as guaranteed under § 32 (4) (§ 11) of the Constitution.^{*26}

After a very long and thorough discussion, the Supreme Court *en banc* reached the following decision on 22 February 2005. In the application of LSA § 104, the basis for incapacity for work may be, in particular, age,

²² See SCEbd (Note 6), para. 4.

²³ Tartu Circuit Court decision 2-2-23/2004 (in Estonian).

²⁴ CCSCr 3-2-1-73-04 (in Estonian).

²⁵ CCSCd 3-2-1-134-98 (in Estonian).

²⁶ CCSCr 3-2-1-73-04 (in Estonian).

personal injury, or disability, due to which a person cannot yet or cannot any longer earn a living. At the same time, the criterion of need for assistance should be taken into account, since, in addition to the inability of earning a living, the application of LSA § 104 requires that the person have no adequate means of providing for himself in another way. The Supreme Court *en banc* found that the need for assistance should be identified by assessing whether the person who is entitled to a statutory share was maintained by the deceased at the moment of the death of the deceased or was entitled to maintenance due to his need for assistance. According to the Supreme Court *en banc*, it was reasonable to presume in the interpretation of the provision that its scope covers the minor descendants of the deceased. The need for assistance should be presumed in their case; i.e., in the event of a dispute, the other heirs would have to prove their lack of need for assistance by relying on the preclusion of their entitlement to a statutory share. In the case of this not occurring, a person claiming a statutory share should prove that he is incapacitated for work within the meaning of LSA § 104 — i.e., cannot earn a living and has no adequate means of subsistence in another way.^{*27}

The Supreme Court *en banc* thus found that if incapacity for work within the meaning of LSA § 104 were understood as the factual inability to earn a living and if adding to this is the criterion of the claimant's actual need for assistance, this provision is guaranteed to comply with the Constitution. By such an interpretation, the Supreme Court *en banc* essentially distanced itself from previous practice and gave new content to LSA § 104, which in turn coincides with the initial position of the Tartu County Court in this dispute.

The Supreme Court *en banc* found that the institution of the statutory share, based on the need for assistance of a heir who is incapacitated for work, is a suitable, necessary, and proportionate restriction to testamentary freedom to guarantee the coping of the family. Furthermore, 'There are no other measures of comparable efficiency that burden the testator less and would help to reduce the heir's need for assistance.'^{*28} The Supreme Court *en banc* justified its decision with the following arguments:

- If all pension-age descendants or ascendants and the spouse were entitled to a statutory share under LSA § 104, it would be difficult to find a constitutional justification for such a provision. This raises the question of the potential unjustified unequal treatment of persons due to the different ages for retirement pensions. The age of retirement pension receipt has changed over the years and is currently 63 years under § 7 (1) 9) of the State Pension Insurance Act²⁹ (SPIA), whereas a transition period applies to the pension age of women. Further, the SPIA provides for a number of options for retirement before the general pension age (SPIA § 9 (1), § 10).^{*30}
- It is also incorrect to presume that old age pensioners are automatically incapacitated for work and need assistance. This presumption might have been valid before Estonia's regained independence when there was a general obligation to work until pension age. The Supreme Court *en banc* believes that arrival at a certain age does not in and of itself mean that the person is no longer able to work and thus needs assistance. Therefore, the Supreme Court *en banc* finds that an interpretation of LSA § 104 by which all old age pensioners would be entitled to a statutory share without consideration being given to their need for assistance is not an adequately justified restriction on testamentary freedom so as to support the goal of supporting family members in need of assistance.^{*31}
- 'Using the factual incapacity for work as a basis is not justified, even if most persons who are factually incapacitated for work need special assistance, since, in the particular case, the entitlement to a statutory share of a person who is incapacitated for work yet has a high living standard could result in disproportionate restriction of testamentary freedom. The Supreme Court *en banc* does not see goals that would justify such disproportionate restriction in an individual case.'^{*32}
- 'Limiting the circle of persons entitled to a statutory share to close relatives and spouse who are factually incapacitated for work is not contrary to the principle of the family's hereditary succession. The principle of the family's hereditary succession does not give rise to a constitutional requirement for all relatives of the deceased to be entitled to a share of the estate in the event of testate succession. The legislator may, but is not required to, take account of the principle of the family's hereditary succession as an objective of restricting testamentary freedom. The principle of the family's hereditary succession should be given more weight in the event of intestate succession. This legislator has done so by ensuring the succession of the estate to the family members,

²⁷ SCEbd (Note 6), para. 41.

²⁸ *Ibid.*, para. 40.

²⁹ Riikliku pensionikindlustuse seadus (State Pension Insurance Act). – RT I 2001, 100, 648; 2005, 37, 283 (in Estonian).

³⁰ SCEbd (Note 6), para. 37.

³¹ *Ibid.*, para. 38.

³² *Ibid.*, para. 39.

not to the state or third parties. The legislator has no constitutional obligation to protect the family's interests against the exercise of the person's testamentary freedom.^{*33}

However, the position of the Supreme Court *en banc* was not nearly unanimous. Five of the 17 members of the Supreme Court did not agree to such interpretation and appended their dissenting opinions to the decision. These opinions in large part stated that the entitlement to a statutory share cannot be linked under the applicable law to the claimant's need for assistance, and some support was given to the view that the Estonian Constitution allows for guaranteeing all children equal rights to a statutory share.^{*34}

In connection with private law reform, there have been relatively few disputes of interest to the wider public in Estonia. Statutory share law certainly deserves more public discussion, to generate a well-justified solution that is acceptable to as large a majority as possible. It is hoped that the Supreme Court's decision is initiating such a debate. The debate should then continue over the text of the new draft Law of Succession Act, which is available to everyone on the Internet and for which, according to the Ministry of Justice, plans will be submitted by the government to the Riigikogu in autumn this year. Following is greater detail on the amendments planned for statutory share law in the course of the above reform.

3. About the reform plan of Estonian statutory share law

The above dispute in the courts has, in a certain sense, triggered the current reform of the Estonian law of succession. Namely, the draft Law of Succession Act Amendment Act that had already been drawn up by spring 2002 had as one of its objectives to reduce the circle of persons entitled to a statutory share so that the claimant's need for assistance would be added to the criterion of incapacity for work. This position was maintained as the draft amendment act was elaborated upon — meaning the draft Law of Succession Act Amendment Act published in the autumn of 2004 and sent to the Government of the Republic for approval at the end of the same year. In both cases, it was planned to replace the phrase 'incapacity for work' in LSA § 104 by means of a direct reference to the maintenance provisions of the applicable Family Law Act^{*35} (FLA). Maintenance duty, according to the principles of the applicable Family Law Act, presumes that the person claiming maintenance is either a minor or incapacitated for work and does not have the necessary means of coping (see FLA §§ 21, 60, 64, 65, 66).

According to the explanatory memorandum on the draft Law of Succession Act Amendment Act, the amendment is based on the 'consideration that a statutory share should help carry out the maintenance duty, which the testator already has and which takes account of the needs of the testator's relatives and spouse, also after the testator's death'.^{*36} The drafters of the Law of Succession Act Amendment Act thus consider it an excessive restriction on testamentary freedom if the receiver of a statutory share is actually not in need of assistance.

Following the Supreme Court's decision of February 2005 on the right to a statutory share, the reform committee at the Ministry of Justice prepared a new amendment to the part on statutory share law. Specifically, the document that the Ministry of Justice sent on for a new round of approvals in May 2005 and is now formalised as the text of the new draft Law of Succession Act omits the direct reference to the applicable Family Law Act. This means, amongst other things, that it will not be necessary to start amending the new Law of Succession Act immediately after its adoption. Along with the new text of the LSA, the Ministry of Justice plans to adopt a new Family Law Act, according to the draft of which the earlier principles of the mutual maintenance duty of family members are substantially changed.

According to the current reform plan, the right to a statutory share as set out in the Law of Succession Act in the future thus shall also directly depend on the maintenance duty rules provided in the (future) Family Law

³³ *Ibid.*, para. 43.

³⁴ See the dissenting opinions of Justices Ants Kull (available at: <http://www.nc.ee/klr/lahendid/tekst/222478593.html>, 23.02.2005), Erik Kergandberg (available at: <http://www.nc.ee/klr/lahendid/tekst/222478594.html>, 23.02.2005), Henn Jõks and Lea Laarmaa (available at: <http://www.nc.ee/klr/lahendid/tekst/222478595.html>, 23.02.2005), and Jaak Luik (available at: <http://www.nc.ee/klr/lahendid/tekst/222478596.html>, 23.02.2005) (in Estonian).

³⁵ Perekonnaseadus (Family Law Act). – RT I 1994, 75, 1326; 2005, 20, 124 (in Estonian).

³⁶ Explanatory memorandum of 27 May 2005 to the draft Law of Succession Act (available at: <http://eoigus.just.ee/>); this position was presented in the same way also in the explanatory memorandum of 5 October 2004 to the draft Law of Succession Act Amendment Act and in the explanatory memorandum to the draft Law of Succession Act Amendment Act submitted by the Government of the Republic to the Riigikogu on 23 May 2002. Available at: <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=021430016&login=proof&password=&system=ems&server=ragne1> (20.01.2005) (in Estonian). The testator's son in his counterclaim relied *inter alia* on this argument as a fact precluding his sisters' right to a statutory share (see the Tartu Circuit Court decision, Note 23).

Act. This is why it is still difficult to predict exactly how the Estonian statutory share law is going to develop in the near future.

However, it may already be said, based on the new draft Law of Succession Act, that another major change in the circle of persons entitled to a statutory share is that it will exclude the grandparents of the deceased. And this will be the case regardless of the fact that the new draft Family Law Act will maintain the principle recognised in the currently applicable Family Law Act that there is a maintenance duty between grandchildren and grandparents (FLA §§ 65, 66 and new draft FLA § 101).

It is worth noting in this context that the entitlement of grandparents to a statutory share is fairly rare in the succession law of European countries. For example, it does not exist in Germany (BGB^{*37} § 2303 (2)), Switzerland (ZGB^{*38} Art. 470 (1))^{*39}, Austria^{*40}, Italy^{*41}, the Netherlands^{*42}, the Nordic countries^{*43}, Lithuania (CK Art. 5.20)^{*44}, and elsewhere. It would be easier to list the countries where a grandparent's right to a statutory share is still recognised. These are: France (Cc^{*45} Art. 914), Belgium, Portugal^{*46}, Latvia (CL^{*47} Art. 423), Estonia (LSA § 104), and Serbia and Montenegro. According to the law of Serbia and Montenegro, like that of Estonia, grandparents are entitled to a statutory share only if they are incapacitated for work and do not have adequate means of subsistence.^{*48} The sisters and brothers of the deceased have the right to a statutory share on the same grounds as grandparents do under the law of Serbia and Montenegro.^{*49}

If we look back in time, grandparents, as a rule, were not entitled to a statutory share under Soviet law either (§ 540 of the Civil Code of the Estonian Soviet Socialist Republic). Grandparents could claim a statutory share only if they were heirs, and not second order but first order heirs as the dependants of the deceased, who were incapacitated for work. As a side note, the new succession law of the Russian Federation (Civil Code of the Russian Federation^{*50} Art. 1149 (1)), which entered into force on 1 March 2002, maintains the same principle.

Thus, it may be said in summary that since the right of grandparents to a statutory share is fairly rare, the change brought about by the Estonian succession law reform is fully justified.

Moreover, even the right of the parents of the deceased to a statutory share has been questioned for a length of time — e.g., in Germany — since parents often do not belong to the family within the meaning of today's small social group.^{*51} It should be pointed out by comparison that already parents do not have the right to a statutory share under the succession laws of European countries such as England^{*52}, Denmark^{*53} and other Nordic countries^{*54}, and the Czech Republic.^{*55}

³⁷ Bürgerliches Gesetzbuch (BGB). – BGBl., p. 195; BGBl. I, p. 3138.

³⁸ Schweizerisches Zivilgesetzbuch (ZGB). – Systematische Sammlung des Bundesrechts (SR) 210; Sammlung der eidgenössischen Gesetze (AS) 2005, 2117.

³⁹ However, grandparents, as well as the sisters and brothers of the deceased, had a right to a statutory share in Switzerland before 1 January 1988. See M. Näf-Hofmann, H. Näf-Hofmann. *Das neue Ehe- und Erbrecht im Zivilgesetzbuch. Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht. Einführung für den Praktiker.* Zürich: Schulthess Polygraphischer Verlag 1986, paras. 1334–1336.

⁴⁰ P. Bydliński. *Grundzüge des Privatrechts für Ausbildung und Wirtschaftspraxis.* 3. Aufl. Wien: Manz 1997, para. 178.

⁴¹ W. Zankl. *Das gesetzliche Vorausvermächtnis des Ehegatten. Österreichisches Recht und Rechtsvergleichung.* Wien: Manz 1996, p. 52.

⁴² G. van der Burght, M. Franssen. *The Netherlands.* – International Encyclopaedia of Laws. The Hague, London, Boston: Kluwer Law International 1997, p. 172.

⁴³ For Finland, see, e.g., M. Savolainen. *Finland.* – International Encyclopaedia of Laws. Family and Succession Laws. Volume 1, Suppl. 3 (December 1997), The Hague: Kluwer Law International 1998, pp. 120–121. For Norway and Sweden, see, e.g., M. Ferid, K. Firsching, H. Dörner, R. Hausmann. *Internationales Erbrecht. Quellensammlung mit systematischen Darstellung des materiellen Erbrechts sowie des Kollisionsrechts der wichtigen Staaten;* M. Ferid, K. Firsching (Creator). H. Dörner, R. Hausmann (eds.). *Stand der 42. Ergänzungslieferung.*, München: Beck 2000, Vol. XXIII, Norwegen, Texte 1, pp. 14–17; and Vol. XXXII, Schweden, Text 1, pp. 10–12.

⁴⁴ Lietuvos Respublikos Civilinis Kodeksas (Civil Code of Republic of Lithuania). Available at: [http://www3.lrs.lt/c-bin/eng/preps2?Condition1=245495&Condition2 \(16.02.2005\)](http://www3.lrs.lt/c-bin/eng/preps2?Condition1=245495&Condition2 (16.02.2005)).

⁴⁵ Code Civil (French Civil Code). Available at: [http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm \(19.11.2004\)](http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm (19.11.2004)).

⁴⁶ C.T. Ebenroth. *Erbrecht: juristisches Kurzlehrbuch für Studium und Praxis.* München: Beck 1992, paras. 997, 998, 1001.

⁴⁷ *Civillikums* (Civil Code of the Republic of Latvia). See M. Ferid et al. (Note 43), Vol. XLII, Lettland Texte B, p. 18.

⁴⁸ M. Ferid et al. (Note 43), Vol. XLI., BR Jugoslawien, paras. 231, 235.

⁴⁹ *Ibid.*

⁵⁰ *Grazhdansky kodeks Rossyskoy Federatsy. Chast tretya.* 3. Ts. Federal Law from 26 November 2001, code 146-ÔÇ.

⁵¹ T. Rauscher. *Reformfragen des gesetzlichen Erb- und Pflichtteilsrechts.* Bd. I., I. Grundlagen des Erbrechts. Regensburg: S. Roderer Verlag 1993, p. 93.

⁵² C. Rendell (Note 21), pp. 242–243.

⁵³ *Danish Law in a European Perspective.* B. Dahl, T. Melchior, L.A. Rehof, D. Tamm (eds.). Copenhagen: GadJura 1996, p. 180.

⁵⁴ See Note 43.

⁵⁵ C. Trilsch-Eckardt. *Das tschechische Erbrecht im Vergleich zum deutschen und Reformüberlegungen.* – *Zeitschrift für Erbrecht und Vermögensnachfolge* (ZEV) 1996, p. 8.

Apparently, Estonian society is not yet ready to leave parents without the right to a statutory share, although this issue could be at least discussed in the course of the current reform.

The above-mentioned changes are not the only ones that are desired in statutory share law. It is planned to change the legal meaning of a statutory share in the course of the reform. This means that the current 'material' system of rights to a statutory share (*Noterbrecht*), which gives the entitled person a minimum position as a heir, will be replaced by the statutory share as a financial right of claim (*Pflichtteil*), following the example of German law. The latter means in practice that a person who is disinherited under the beneficiary's will or succession contract but is entitled to a statutory share may claim from the heir under the will or the succession contract not the position of a co-heir but monetary compensation for the minimum share of the estate that the law provides for the person.

Such change is rationalised in the explanatory memorandum to the draft Law of Succession Act by the fact that the Estonian succession law follows the Swiss and French examples. The authors of the draft, however, believe that such a solution is based on 'a family as an economic entity, characteristic of an agrarian society, and its purpose is to keep the property of the deceased in the family. Another approach to a statutory share — i.e., that applicable in Germany — is based on a greater testamentary freedom, the needs of today's industrial society, and the speed and certainty of civil transactions.'⁵⁶

What exactly will this most fundamental change bring about in the current reform? As already mentioned, there are in practical application two systems of statutory share regulation in today's continental European legal system:

- 1) the 'French system', in which a share of the estate is left free (*portion disponible*) such that the testator may leave it to anyone he wants, while another share (*portion réservée*) must be left to the closest family members as listed by law⁵⁷ and
- 2) the 'German system', in which a person may bequeath all his property by means of a will and, after his death, the persons entitled to a statutory share have a financial right of claim against the testate heirs (Austria is another European country that has adopted this principle).⁵⁸

The drafters of the German BGB also considered using the material statutory succession right (*Noterbrecht*) but in the end decided in favour of the view of the statutory share as a financial claim (*Pflichtteil*), which was already recognised in the 1794 Prussian General Land Law (*Allgemeines Landrecht für die königlichen Preussischen Staaten*).⁵⁹ Although there have been discussions in Germany since the entry into force of the BGB over whether the statutory share should be a real share of the estate, this has been considered to be an excessive restriction on the testator's private autonomy.⁶⁰

The negative aspect of a statutory share as a right of claim, according to special literature, is that the applicant for a statutory share is in a much better situation than the testamentary heir. He does not have to deal with the creditors of the estate, perform any duties of governing the estate, or find the best buyer for the assets of the estate for paying debts or obtaining money for disbursing any statutory shares. So, in many cases of succession, the receiver of a statutory share with his lesser extent of rights is in a better position than the testamentary heir is.⁶¹ On the other hand, it is difficult for the person entitled to a statutory share to receive complete information on the size and value of the estate — for that, the possibilities for him amount to less than those for the heirs. This enables 'skilled' testamentary heirs to more easily damage the rights of the receiver of a statutory share.

It has been stated in German special literature that neither justice nor the idea of a statutory share requires the statutory share to be a real share of the estate. For example, if the integrity of an enterprise or property has to be maintained, a statutory share in the form of monetary compensation is justified.⁶²

⁵⁶ See the explanatory memorandum to the draft Law of Succession Act of 27 May 2005 (Note 36).

⁵⁷ E. Ilus. Tsiviilõiguse eriosa: Autoriseeritud konspekt E. Ilusa loengute järgi (Special Part of Civil Law: Authorised Conspect of the Lectures by E. Ilus); A. Rammul, E. Talvik (koost.). Tartu: Akadeemilise Kooperatiivi Kirjastus 1938, p. 96 (in Estonian).

⁵⁸ C.T. Ebenroth (Note 46), para. 1007; W. Schaer. Ist ein Pflichtteilsrecht ein erhaltenswertes Institut? Eine rechtspolitische Betrachtung zum schweizerischen Pflichtteilsrecht mit rechtsvergleichenden Hinweisen. Zürich: Schulthress Polygraphischer Verlag 1976, p. 32; E. Feil. Pflichtteilsrecht: Kurzkommentar für die Praxis. 2. Aufl. Wien: Linde 1998, para. 2; Schwimann. Praxiskommentar zum ABGB samt Nebengesetzen. 2. Aufl. M. Schwimann (Hrsg.). Bd 3. §§ 531–858; ABGB, AnerbG, KärtnerG, Tiroler HöfeG. B. Eccher, B. Eggelmeier, H. Hofmeister (Bearb.). Wien: Orac Verlag 1997. Schwimann – Eccher, § 764 para. 1; H.-K. Gursky. Erbrecht. 2. Aufl. Heidelberg: Schaeffers Grundriß C.F. Müller Juristischer Verlag 1994, p. 132. See also U. v. Lübtow. Erbrecht. Ein systematische Darstellung. Part Vol. 1. Berlin: Duncker & Humblot 1971, p. 555.

⁵⁹ U. v. Lübtow (Note 58), p. 21; Erman. Handkommentar zum Bürgerlichen Gesetzbuch. 9. Aufl. Bd. 2. Münster: Aschendorff, 1993. Erman – Schlüter, § 2303 Vorwort para. 1; H. Klingelhöffer. Pflichtteilsrecht. München: Beck 1996, para. 1.

⁶⁰ H. Hetmeier. Grundlagen der Privaterbfolge in der Bundesrepublik Deutschland und in der DDR. Berlin: Duncker & Humblot 1990, pp. 52–53.

⁶¹ H. Klingelhöffer (Note 59), para. 3.

⁶² U. v. Lübtow (Note 58), p. 556.

Practically all continental European countries except for Austria, the Netherlands and Germany belong to the French system. Even the Greek Civil Code, the succession law part of which is very similar to the German model, has adopted the French system when it comes to statutory succession.^{*63} According to this system, the person entitled to a statutory share may claim the position of a heir. The law guarantees for the closest family members the right to a certain minimum share of the estate, which cannot be disinherited by the will of the deceased. A disposition that conflicts with the statutory share requirement is not *eo ipso* void. A heir whose right to a statutory share has been violated must apply to the court for reducing the disposition made by the will during a specified period (*Herabsetzungsklage*; see, e.g., ZGB Art. 522 et seqq.).^{*64}

The Estonian statutory share law may indeed be classified as belonging to the French system, based on the above division. Although the Law of Succession Act does not expressly prohibit one covering the entire estate with a will or succession contract, any dispositions made for one's death should be regarded as void in line with the meaning of LSA § 104 insofar as they damage the right to a statutory share of the persons protected by law. According to LSA § 205, they receive one half of the share of the estate that they would have received in the event of intestate succession.

At the same time, the Estonian statutory share law does not follow the principle of the French family of law to the end but, rather, has borrowed a number of important elements from the German family of law. Namely, according to the Estonian law, a testator may preclude a person who is entitled to a statutory share from being part of the circle of heirs by designating a legacy that covers the value of the statutory share. This would not be possible under French law, but it is possible in German law. Thus, from this angle, testamentary freedom is restricted as little by Estonian succession law as it is in German law.

But there is another rather significant difference between the French and German laws. Under French law, a person's right of disposal is also restricted by free transactions *inter vivos*, referring to making a gift. For example, if a person grants an essential part of his property (more than the freely disposable part of it) before his death, the donor's child or spouse may reclaim the granted property even before the donor's death, under French law. This is not possible under German law; a certain possibility arises only after the donor's death. According to German law, the receiver of a statutory share may claim the annulment of the gratuitous contract only if the deceased has also made dispositions for other property — i.e., if he has bequeathed the rest of his property via a will. That is because the statutory share right is applicable only in the case of testate succession. But if the property remaining, property not granted, is subject to intestate succession, the persons entitled to a statutory share have no possibility of contesting the gratuitous contracts.^{*65}

Thus, under French law, the rights of one's family members to their future estate can be damaged neither by transactions between living persons nor by the last will. According to German law, close family members are protected, as a rule, only in the case of testate succession.^{*66} In this sense, the Estonian statutory share law is similar to German law (LSA § 106 (4)) and gives the testator a much greater testamentary freedom than does either French or Swiss law.

4. Summary

In summary, it may be said that the Estonian statutory share law is a unique mix of the principles of the French and German families of law and gives a person testamentary freedom practically as great as that enjoyed under German law. That is why one cannot fully agree to the assessment of the Estonian statutory share system made by the authors of the new draft Law of Succession Act, which states that this state of affairs does not meet the needs of today's industrial society and places excessive limits on a person's testamentary freedom.^{*67} On the contrary: Estonia's law of succession ensures both *de lege lata* and *de lege ferenda* testators a much greater testamentary freedom than German law does.

At the same time, the position of the Supreme Court *en banc* and of the current reform plans of the Ministry of Justice, according to which only a close relative or spouse who is factually incapacitated for work and in

⁶³ C.T. Ebenroth (Note 46), para. 997–1004, 1006; W. Schaer (Note 58), p. 31.

⁶⁴ U. v. Lübtow (Note 58), p. 21; Erman – Schlüter (Note 59), § 2303 Vorwort para. 1; H. Klingelhöffer (Note 59), para. 1; Kommentar zum Schweizerischen Privatrecht. H. Honsell, T. Geiser, N.P. Vogt (Hrsg.). Schweizerisches Zivilgesetzbuch 2. Art. 457–977 ZGB; Art. 1–61 SchlT ZGB. Basel, Frankfurt am Main, Helbing und Lichtenbahn 1998, ZGB-Staehelin, Art. 470 N 4; M. Ferid et al. (Note 43), Lfg. XIX, Italien, para. 182.

⁶⁵ A. Baumann. Gesetzliche Erbfolge und Möglichkeiten testamentarischer Erbeinsetzung im französischen Code Civil. Inaugural-Dissertation zur Erlangung des Akademischen Grades eines Doktors der Rechte durch die Rechtswissenschaftliche Fakultät der Westfälischen Wilhelms-Universität zu Münster 1996, pp. 78–89.

⁶⁶ *Ibid.*

⁶⁷ See the explanatory memorandum to the draft Law of Succession Act of 27 May 2005 (Note 36).

need of assistance can claim a statutory share following the principles of the family's maintenance duty, distances Estonian statutory law even further from the continental European tradition in its liberal nature, and hence is more similar to the stance of English law. This is even notwithstanding the fact that in other respects the continental European principles are followed and the amendments and improvements of Estonia's law of succession largely follow the example of German law. At a time when, in German law and practice, the statutory share law is, proceeding from the idea of the universal solidarity of the family, still a balancing element between two important principles of succession law — the family's hereditary succession and testamentary freedom — the nation's statutory share law has become a restriction on testamentary freedom only to the minimum extent, given the latest developments in Estonia. According to the position of the Estonian Supreme Court *en banc*, the regulation complies with the Constitution only if the purpose of the statutory share is to ensure the economic coping of the closest family members.^{*68} The law of succession reform committee supports this view.^{*69}

⁶⁸ SCEbd (Note 6), paras. 34, 37, 39, 40, 41.

⁶⁹ See the explanatory memorandum to the draft Law of Succession Act of 27 May 2005 (Note 36).