THE EFFECT OF THE ABOLITION OF THE ENTAIL SYSTEM (IUS AVICITUM) AND THE ENTRY INTO FORCE OF THE AUSTRIAN CIVIL CODE ON THE TESTAMENTARY FREEDOM IN HUNGARY

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Abstract

Testamentary freedom is a part of the dispository freedom over property appearing as the owners' constitutional right, on the basis of which the owner can make decisions about the future fate of his/her property upon death. We distinguish two sides of the testator's testamentary freedom inspecting from the effects it may have on the legal heirs, therefore on the one hand, testamentary freedom means the possibility of positive dispositions over the estate, the possibility that the testator can donate them assets with his/her disposition of property upon death, considering its negative effect, on the other hand, it is an opportunity that the testator deprives his/her heirs of the complete portion of assets they are entitled to. We can make a further distinction between the two restrictions of the above mentioned two sides: the testator's testamentary freedom is restricted by the provision of law that a certain proportion of their assets has to be left untouched to the circle of subjects defied by law, while the law also restricts the possibility of the complete deprivation of the assets, that is disinheriting, by taxatively listing its cases.
Testamentary freedom has never been completely without restrictions in Hungarian succession law, the legislator sometimes narrowed it, sometimes gave more space for owners over their assets. The present study investigates the process of changes in testamentary freedom from the introduction of intestate succession by King St. Stephen up to the appearance of the reserved portion in Hungarian legislature, paying more attention to the legislature of this latter period.

Keywords: legal history; Hungarian law of succession; reserved portion; inheritance; last will

1. Distinguishing the inheriting of ancestral and acquired assets in our country

The possibility of making disposition of property upon death was declared as early as by King St. Stephen; the right, however, was rather restricted, because the consent of the King and the members of the genus had to be required for it[1] and only the circle of subjects defied by law could be named as heir, that is the testator's wife, sons, daughters and the Church, respectively. With enacting the daughter's quarter in 1222, testamentary freedom became narrowed on the material side, as in accordance with the legal institution, the testator had to leave the complete

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[1]See: ZLINSZKY, Imre: *A magyar örökösödési jog és az európai jogfejlődés*. Budapest, Athenaeum, 1877, 196-197.

one fourth of his estate intact for his daughters, over that he had no testamentary freedom,[2] however, on the subject side it opened, because testators deceasing without a male heir could testate their assets not only to the members of their genus and to the clergy, but in accordance with the interpretation of the text of the Golden Bull of 1222, free of restrictions to anybody.

With the appearance of the daughter's reserved portion, thus the first factual restriction of testamentary freedom was introduced, while in case of a male heir, according to the law, he was entitled to the testator's complete estate, and it was not possible to deviate from this with a will. King Andrew III, the last king of the Arpadian House, confirming the so far effective rules in his decree of 1291, further restricting the possibility of making dispositions of property upon death ruled that only the clergy or the relatives could be named as heir, however, the King's approval was no longer necessary for its validity.[3]In the Arpadian Era thus testamentary freedom was rather restricted, in its regulation therefore the new act about the entail system proclaimed by King Louis the Great in Buda on 11 December 1351 was another significant turn. By dividing the possibility of making dispositions of property upon death about the estate belonging to the testator's legacy into two parts, it forbade the free disposition over every inherited – ancestral – estate and it ordered them to be inherited by the genus; testatory freedom was allowed exclusively in case of estate of acquisition – acquired – and not for every testator either.[4]It is important to see that by proclaiming the Law of Entail (ius aviticum) into Hungarian inheritance law, King Louis the Great thus introduced into Hungarian inheritance law that the estate inherited from the ancestors of owners without heirs also remained undoubtedly within the genus, that is, it ruled out the above mentioned subjective unlimitedness granted by the Golden Bull of 1222. While owners with no heir could make disposition of property upon death, even if limited in range; owners having heirs could not make dispositions of property upon death even about their acquired estate after the Law of Entail was enacted. Our ancestors considered ancestral estate 'what we inherit[5] after our fathering ancestors throughout intestate succession.' Therefore the estate-element passed down from child to father, or from brother to brother did not belong to the circle of ancestral estate, except if the brothers[6] inherited it from their ancestors, neither did the estate that the testator purchased or was donated in his life. The Law of Entail had made the ancestral estate practically unmarketable, because its owner could not alienate it in his life, he could not make disposition of property upon his death. From then

[2] Article IV of 1222. so that the nobility be free with his riches and his estate.
If some nobleman deceases without a male offspring, let the daughter get the quarter of his estate: with the rest, he should do whatever he feels like.
Section 1 If his death occurs without a testament, if any, let some of his closer kins have, and if he should have no genus of his own at all, let the King inherit his estate.
https://net.jogtar.hu/ezer-ev-torveny?docid=22200004.TV&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D2#, (date of download: 10. 08. 2020.)

[3] HAJNIK, Imre: *Magyar alkotmány-és jogtörténelem.* Volume I. Magyar alkotmány és jog az Árpádok alatt. Pest, Published by Heckenast Gusztáv, 1862, 328.

[4] In Section 10 of the Preamble to the Act of 1351, Louis I confirmed the provisions of the Golden Bull of 1222, except for its Article IV: 'Section 11 Except for the above mentioned article, namely: 'The noblemen deceasing without leaving heirs, still alive or upon their death, are entitled and free to testate, to sell, to endow, to alienate their estate to the Church or other persons to their liking.' What is more, exactly its opposite, they should not have the right to do so, but in accordance with the law and act, their estates should clearly and inevitably, without the slightest contradiction, go into the hands of the closest kins and genus.'https://net.jogtar.hu/ezer-ev-torveny?docid=35100000.TV&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D3, (date of download: 05.08.2020.)

[5] WENZEL, Gusztáv: *Az 1848. előtti magyar magánjog tekintettel újabb átalakítására*. Budapest, Hungarian Royal University Printing House, 1885, 252.

[6] See: ZSÖGÖD, Benő: *Öröklött s szerzett vagyon*. *Tanulmány újabb irodalmunkból. Függelékkel a kiskorúak utáni törvényes öröklésről.* II. unchanged edititon. Budapest, Politzer Zsigmond, 1897, 90.

on, our inheritance right was determined by the Law of Entail for half a millennium, and because of the restricted testamentary freedom, 'typically'[7] the intestate succession prevailed instead of the testamentary. This latter characteristic feature of the era can be well observed in Werbőczy István's Triple Book (Tripartitum) as well, which does not contain provisions concerning dispositions of property upon death, the first written legislature aiming at wills is provided by Article XXVII of 1715, his law, however, did not affect the material side of the legal institution, it provided extensive details only about the formal requirements of despositions of property upon death.

2. The abolition of the entail system in Hungary

Due to the expansion of enlightenment ideas, the medieval achievements started to become outdated in our country too, so the legal life and politics in the first half of the XIXth century were characterised by the desire to abolish the Law of Entail: several politicians and statesmen heavily criticised the legal institution and urged its abolition for the sake of the country's development. The legal institution of the entail system made estate transactions completely impossible; owners did not get a loan for the many times little acquired estate, as they could not indebt the inherited estate. Several outstanding statesmen of the era recognised the paralysing effect the entail system had on the economy and they raised their voices in order to demand the abolishing this obsolete institution from legislature. Lajos *Kossuth's* opinion was that the existence of the entail system was an obstacle to the normal state in which the Hungarian landowner may call his estate his own[8]and also to the blooming of the country's public good. Kossuth also shared Ferenc *Deák's* opinion that in our country the Law of Entail – deceivingly suggesting to owners that they are the free owners of their estate – is the bad and harmful compound of feudalism that other nations had long shaken off themselves.[9]Kossuth expressed that the power of time, the demand of the age 'enormously call for' the abolishing of the entail system [10]all the more because the possibilities offered by the loan acts accepted at the last Diet could only be available to the indebted nation if with the abolition of the entail system the esteem, value, price and therefore this way also the credit of their estate would grow.

István *Széchenyi* also criticised the entail system in his work titled Credit published in 1830 and he related to this, in connection with credibility, he explained that money, land and anything else is useful if it can be used, as well as there is everything in the country for which a loan could be given, but owners are forced to set to the air instead of marketing them.[11] Móric *Szentkirályi*, member of the Diet, the last Chief Mayor of Pest also argued for the extension of testamentary freedom and he emphasised that there must be a change in the principle according to which all estates derive from the Crown and therefore it has to return to it, because the owners of the estate are individuals and not the genus, thus it is more fair to consider that acquiring each estate comes from diligence and keeping it is a result of wise economy.[12] At the same time, he highlighted that the security granted to the genus by the institution of the entail system also has to be preserved in a way so that everyone has complete freedom to make provisions over his ancestral and acquired assets, either for the benefit of his legal heirs or to strangers, but he

[7] MEZEY, Barna (Ed.): *Magyar jogtörténet*. Budapest, Osiris, 2007, 132.
[8] KOSSUTH, Lajos: Ősiség. *Pesti Hirlap*, 1841/23, 183.
[9] See: KOSSUTH, Lajos: Ismét Ősiség. *Pesti Hirlap*, 1841/24, 191.
[10] KOSSUTH, Lajos: Adalék az ősiség kérdéséhez. *Pesti Hirlap*, 1843/235, 217.
[11] SZÉCHENYI, István: *Hitel*. Pest, in Petrózai Trattner J. M. and Károlyi István's printing institution. 1830, 42-43.
[12] SZENTKIRÁLYI, Móricz: Ősiség. *Pesti Hirlap*, 1841/23, 189.

is obliged to leave ¼ of his ancient assets to his children without burdening it.[13] Móric Szentkirályi also remarked that he felt the restriction towards the legal quarter in the inherited assets as a compensation for the loss of the entail system, but at the same time its true basis laid down on truth he could not see in general, except for cases of juvenile orphaned children. [14]

Ferenc Deák also attacked the institution of the entail system and in accordance with the spirit of development, he urged its final abolition. In his famous envoy report written about the Diet of 1839-1840, Deák named it the primary task of legislature[15] to terminate this most serious obstacle to development.

Thus, the extension of provisionary and testamentary freedom became a unified desire in the country. In accordance with the desires, the proposal[16] to abolish the entail system was finally made at the Diet of 1847-1848 and as a result of that, in the Article of XV of the April Laws the abolition of the entail system was proclaimed and it was ordered that in order to fully and perfectly abolish the entail system, the ministry work out a civil code and submit it to the next Diet.[17]The creation of the civil code did not occur as a consequence of the events in 1848-49 and following the suppression of the war of liberty, the Habsburg Empire began the transformation of the legal system after the Austrian model. Emperor Franz Joseph I in an open emperal patent ruled the termination of the entail system, as well as the previously advanced entry into force of the Austrian Civil Code, together with it the termination of laws and customary law applied or in effect so far.[18]

Thus the institution of the entail system was abolished, therefore in principle; testamentary freedom was extended to the complete estate of citizens, but in the five years that passed between its abolition and the entry into force of the Austrian Civil Code, courts – in the absence of a civil code – had to apply the rules of inheriting in effect before 1848 regardless of the abolition of the entail system.[19]

3. The Austrian Civil Code enters into force in Hungary

The Austrian Civil Code (ACC), which, instead of the ordered elaboration of the Hungarian Civil Code, in order to make the Austrian power complete, was brought to force[20] on 1 May 1853, brought about fundamental changes into the Hungarian legal life. Besides creating legal unity in the field of Hungarian private law, so far regulated only in certain details, or unregulated, the code explicitly recorded the freedom of property, its absolute and unrestricted feature (Section 353-355), in addition, it created the complete property right dispository freedom by abolishing its restrictions.

[13] SZENTKIRÁLYI, Móricz: Ősiség. *Pesti Hirlap*, 1841/24, 196-197.
[14] SZENTKIRÁLYI, Móricz: Az ősiségről. *Pesti Hirlap*, 1842/127, 198.
[15]*Envoy report about the Diet of 1839-1840.* Deák Ferencz and Heretlendy Károly envoys of Zala county. Pest, Landerer and Heckenast, 1842, 77-78.
[16] MÁRKUS, Dezső (Ed.): *Magyar Jogi Lexikon, Volume V.* Pallas Literature and Publishing Co., Budapest, 1904, 798.
[17] XV. Törvény-Czikk. Az ősiség eltörléséről. 1.§. In: Corpus Iuris Hungarici. *MAGYAR TÖRVÉNYTÁR 1000-1895*. Millennal Memorial Publication Budapest, Franklin, 1896, 237.
[18] Hirdetési Nyiltparancs 1. Czikk. See: WENZEL Gusztáv: *Az Ausztriai Általános Polgári Törvénykönyv magyarázata Magyar-, Horvát-, Tótország, a Szerbvajdaság és a Temesi Bánság viszonyaira alkalmazva. Pesten*, Geibel Armin's own, 1854, 53.
[19] ZLINSZKY, Imre: *A magyar magánjog mai érvényében különös tekintettel a gyakorlat igényeire.* Seventh edition. Budapest, Franklin-Association – Hungarian Literature Institution and Publisher, 1899, 1033.
[20]Effective on 1 September 1853, in Transsylvania.

Looking upon the inheritance laws of the ACC it can be said that however much the Hungarian estates were averse to its introduction and application and however much Hungarian people considered it a means if dictatorship, it did bring positive change into the legal system, statutory relationship and for the enforcement as well. The ACC established legal security and visibility of the provision both for citizens, legal experts in an important field of law, besides – as we are going to see – the main thread of the conception of legislature remained, the desired abolition of the entail system, and together with it the longed-for extension of testamentary freedom took place.

With the ACC entering into force the Hungarian basic principle of inheritance system so far did not change, the purpose remained to be keeping the interests of the family and keeping the family estate together in the foreground both in relation to intestate and testamentary succession. At the same time the law explicitly stated that had been a part of the Hungarian inheritance law since King St. Stephen's second decree, that is, intestate succession is possible in the absence of a valid will, and concerning the testatory assets it did not dispose about (Section 727-728). The fundamental, Hungarian customary rules of intestate succession remained: the persons entitled to inheriting were primarily the testator's descendants, in second line his ancestors, in the absence of the above mentioned his collateral relatives followed. Besides this, the ACC provided a much more extensive and detailed legislature in the inheritance of the descendant and ancestral lines, in addition, it introduced the survivor spouse's property inheritance into Hungarian legal relations.

Primarily the testator's children – from now on both legitimate and illegitimate sons and daughters – continued to inherit in equal proportions, or in accordance with the principle of representation, his/her children after the right of the deceased parent. The succession stayed on the line of the descendants as long as any of the testator's descendants lived and could inherit. In the absence of descendants the testator's parents inherited in equal proportions, as well as in accordance with the principle of representation, their descendants on the next line, and if neither the testator's parents nor his descendants were alive, then the inheritance, in accordance with the above described rule, as entitled to the testator's grandparents and their descendants. The next inheritance line was the testator's great- grandparents and their descendants, then the great-great grandparents and their descendants followed at the end of the fifth line, and if none of the above listed was still alive, the testator's descendants from his/her great-grandparental and great-great-grandparental relatives closed the line of the legitimate heirs on the sixth line. The law excluded the inheritance right of relatives over the sixth line. (Section 751).

In relation to the surviving spouse, the ACC established completely different provisions as compared to the previous legislature. The Austrian codex provided usufruct for the surviving spouse if he/she had children after the testator: if the testator had left three or more children, then the complete legacy on one child's portion, while in case of less than three children, on one quarter of the complete estate. If there were no child heirs, then the widow/widower inherited one fourth of the complete legacy as property. The widow/widower could inherit the complete legacy if nobody of the above-mentioned six lines remained to become an heir. In Hungarian legislature the protection of widows/widowers has been a priority case of the state from as early as King St. Stephen, on the basis of the right of the widowed (ius viduale), the surviving spouse inherited usufruct on the complete estate of the deceased, which lasted to the remarrying or to the death, therefore he/she could continue the lifestyle he/she was used to. Compared to this, the ACC ordered less favourable rules to apply for widows/widowers. Apparently, legislature wanted the relatives to receive the assets of the deceased and the fiscus inherit in the ultimate case only (Section 760) when not even the most distant relatives were alive or to be found.

4. The settlement of testamentary freedom in the Austrian Civil Code

The ACC with its coming into force thus allowed the free provision over the testator's complete assets, however, by the introduction of the reserved portion (Section 762) – not completely unknown in Hungarian legislature because of the daughter's quarter – it set certain restrictions; it was determined the half of the inheritance entitled to the descendants (Section 765), one third in case of parents (Section 766), and while the spouse also qualified as legal heir, he/she was not entitled to the reserved portion any more.

The persons entitled to the reserved portions (or as the law named them: required heirs) could lose the above mentioned portion if free of charge or for payment they renounced it, if the testator disinherited them in a will or the law excluded them form inheriting due to a determined reason.

As a part of testamentary freedom, the ACC provided a wide range of possibilities for the testators to deprive their heirs of their reserved portion, therefore the person whom the testator validly disinherited from the complete estate 'holds no claim and at imposing it he is considered to be non-existent'.[21]Differently from the so far familiar Hungarian legislature,[22], the codex established the accessories of legal disinheriting concerning parents and children in a unified way, that is all the persons entitled to reserved portion became disinheritable on the basis of the same attitudes[23]:

> *'Section 768. The child can be disinherited:*
> *1. if he/she breaks away from Christianity;*
> *2. if he/she had left the testator without help when in need;*
> *3. if he/she was sentenced to lifetime or a twenty years' imprisonment for committing a crime;*
> *4. if he/she obstinately lives a lifestyle conflicting public morality.*
> *Section 769 On account of the same reasons, parents can be disinherited from the reserved portion; especially if they paid no attention to raising the child.*
> *Section 770 In general on account of acts which according to Sections 540-542, [24] qualify some heir as unsuitable for the inheritance right by the means of a testament, the required heir can be excluded from the reserved portion.'*

The distinction between inheritance and unworthiness reasons was introduced by the ACC into the Hungarian civil law, but we can see the first appearance of the legal institution of disinheriting too. The codex listed the attitudes unworthy of inheriting in Sections 540-544. Among them we

[21] ACC. Section 767.
[22] The Tripartitum applied so far established the possibility for excluding from the assets separately concerning parents and children.
[23] WENZEL, Gusztáv: *Az Ausztriai Általános Polgári Törvénykönyv magyarázata*… 462.
[24]ACC. Section 540. He who with his evil intention had hurt so much or had thrived to hurt the testator, his parent, or spouse in his honour, body or assets that ex officio or to the requirement of the injured party it may involve criminal proceedings in accordance with the laws, he will be unworthy of the inheritance right until it can be understood from the circumstances that he had won the testator's forgiveness.
ACC. Section 541. The descendants of someone who had made himself unworthy of the inheritance right, if this latter had died before the testator, are not excluded from the inheritance right.
ACC. Section 542. He who forced or fraudulently coaxed the testator to make a testament, hindered him in making or altering his testament, or embezzled the already prepared testament, is to be excluded from his inheritance right and remains responsible for every damage he had caused.

can find reasons called unworthiness (Section 540), reasons called exclusion (Sections 542-543)[25], as well as a special reason, terminating inheriting capacity (Section 544). Their common feature is that due to the power of the law extending to the reserved portion, their implementer would have fallen out from inheriting after the testator if he/she had not disinherited him/her.

On the basis of Section 543, persons in whose cases incest or adultery has been proved were excluded from inheriting after each other, which provision did not affect intestate succession, only excluded these couples mutually from the transfer of property for each other upon death. On the basis of Section 544, the wills of testators who had illegally emigrated were invalid, and what they would have inherited from a will or on the basis of the law – including the reserved portion –, were passed to the persons who would have inherited in their absence, that is, in accordance with the law, they lost their testatory capacity both from the active and the passive side.[26]

According to Section 770, a person became especially unworthy of inheriting, who with his evil intention had hurt so much or had thrived to hurt the testator, his parent, or spouse in his honour, body or assets that ex officio or to the requirement of the injured party it may involve criminal proceedings in accordance with the laws, and it cannot be understood from the circumstances that he had won the testator's forgiveness (Section 540), in addition, who forced or fraudulently coaxed the testator to make a testament, hindered him in making or altering his testament, or embezzled the already prepared testament (Section 542). It can be read that the two mentioned attitude circles are special unworthiness, furthermore, any other individually judged case that similarly can be classified as unworthy could lay the foundation for disinheriting parents and children as well.

If we compare the attitudes that can entail the division of assets listed in the Tripartitum, [27]and the disinheriting and excluding system of the ACC, we can see that the attitudes of the

[25]The concept 'exclusion' applied by theACC. is not identical with the concept 'exclusion' known and applied by us; according to the latter, the testator can leave out his heir from his assets by means of silence or naming someone else as heir, but even in this case, he is entitled to reserved portion. The exclusion in the ACC. was defied by the legislator and it meant the particular heir's complete loss of the legacy. The ACC. also knew the institution of silence; it was regulated in Section 776.

[26]Emperor's patent issued on 21 March 1832., 10. §. See: WENZEL Gusztáv: *Az Ausztriai Általános Polgári Törvénykönyv magyarázata* … 693.

[27]Tripartitum, Part I, 52. Czim Cases in which the father can force his son to divide his assets.

'Furthermore, we have to know that the father can force his son who has grown into life and come of age – but not the prepubescent one – to divide his inheritance and his other estate, but he cannot disinherit him in the following cases.

Section 1First: if the son places a violent hand on his parents, or he commits any other serious and conspicuous insult against them.

Section 2 In addition: if he initiates a criminal charge against the parents in a case which does not constitute endangering the prince/chieftain or the whole public safety of the country.

Section 3. In addition: if he is endeavouring to put an end to his parents lives, that is, with poison or with in another way he is seeking their hurt.

Section 4. In addition: if against the father's will, while viciously wasting the paternal assets, he is befriending evildoers or other people leading unholy life.

5. Section: Furthermore: if he fails to ransom or to rescue or is reluctant to voucher for the father taken captive from the hands of the enemy or from the dungeon when he would have the means.

Tripartitum, Part I, 53. Czim: About cases in which conversely the boy can share his assets with his father

'And vica versa, the son (even if still under the paternal power) can force and enforce his father to divide the real estate and assets in the following cases, the predominant paternal power cannot stand in its way:

Section 1 First: when the father is wasting his assets and has alienated both his and his sons' assets not out of necessity and for the right cause, but rather out of treachery, or he is intent on alienating them and this intention of his becomes known to his son.

Tripartitum are mixed, they both contained disinheriting and unworthiness reasons, however, it is its common feature with that of the ACC that they were related to the attitudes to be punished.

The ACC mentioned breaking away from Christianity as the first reason for disinheriting, which was though not a crime, but someone who tempted the given person for the breaking away committed a crime and was to be penalised with imprisonment.[28]

In the second point of Section 768 the disinheriting reason is a two-way failure of fulfilling obligations, because primarily it could mean ignoring moral obligations if the child owing gratitude to his/her parent did not help them out in their need, on the other hand, this disinheriting reason could involve the implementation of punishable attitudes. According to the criminal code effective at the time of the ACC, if someone left his/her ill parent or child without medical help, or he/she left his/her parent or child unable to look after himself/herself or to defend himself/herself from danger without help, could be imposed an imprisonment. On the basis of Section 5 of Czim (Title) of the Tripartitum, the testator's son rather implements failure of fulfilling moral obligations towards his parent. The contemporary criminal code dedicated a separate chapter (ACrC Chapter 13 Misdemeanours and transgressions against public morality) to the legislature concerning the lifestyle conflicting public morality. The law listed among the acts to be punished lewdness, adultery, deflowering of minor females, procurement, commercial whoredom, the deeds when someone through portrayal or pervert action publicly conflicted morality, modesty, the more serious cases of begging, forbidden gambling, drunkenness, as well as classified cases of domestic chastisement towards children, spouses, relatives or servants (that is if the chastisement was so serious, that the help of the authority was required). This latter attitude can be found with almost identical content in Tripartitum (Part I Czim 53), the parent could force the child to give out the estate on account of the monstrousness and ruthlessness of the chastisement. Lőrincz *Tóth* called the attention to the fact that the attitude conflicting public morality could implement disinheriting attitude as well if it was repeatedly committed[29] (obstinately pursues'). The ACC did not record acts against the testator's life as a separate reason for disinheriting, in connection with which Alajos *Bozóky* remarked[30] that this is not accidental, because the unworthiness cannot be terminated even by the forgiveness from the testator's part, therefore the child is to be deprived of inheriting after him/her if the testator had not disinherited him/her referring to making an attack on his/her life, or withdrawed or forgiven this attitude. Bozóky's previous stance and statement that though 'thriving against the testator's life constitutes a reason of unworthiness, but not a reason for disinheriting' is not correct, because on the basis of Section 770 referring to disinheriting, it can be included into Section 540 regulating unworthiness, in addition, it does not appear to be in accordance with the purposes of legislature, if the legislator hadn't allowed the testator to disinherit their children wanting to terminate their life. In addition, Section 540 also states that the person who with his evil intention had hurt so much or had thrived to hurt the testator, his

Section 2 In addition: when though he has not alienated the inheritance and the possession right, neither does he intend to alienate them, but he does not cultivate them properly, lets them to their demise.
Section 3 In addition: if the father chastises the son monstrously and ruthlessly without the fair reason and without a major misdemeanour.
Section 4 In addition: when his father forbids his adult-ages son from the marital ties.
Section 5 In addition: when the father forces his son to commit a crime.

[28]The Austrian Criminal Code (ACrC.) entered force on 1 September 1852 in Hungary, Sections 122-123. of which disposed about the crime of *violence against religion* In: SZOKOLAY István: *Az új Osztrák Büntető Törvénykönyv magyarázata.* Published in at Lukács László, in Pest, 1852, 136.

[29] TÓTH, Lőrincz: *Örökösödés az Ausztriai Általános Polgári Törvénykönyv szerint*. Pesten, 1854, Heckenast Gusztáv's own, 183.

[30] BOZÓKY, Alajos: Adalék a köteles rész kérdéséhez. *Jogtudományi közlöny,* 1878/20, 161-162.

parent, or spouse in his honour, body or assets is unworthy of the inheritance until it can be understood from the circumstances that he had won the testator's forgiveness, that is, the ACC made this case of unworthiness forgivable, thus ineffective. The legislator placed sanctioning the punishment of the imprisonment of the person entitled to the reserved portion with a moral character into Section 768: the crime did not necessarily have to aim at the testator or his/her relative. According to Ágost *Karvasy* [31], the attitudes explained in the ACC are unduly narrow in scope, because besides them there may be several cases in which the descendant child shows such a degree of heartlessness, that due to the sorrow and despair the death of the parent may occur without being mentioned among the cases included in law, as well as outside the reasons for disinheriting which are common knowledge – such as committing crimes –, it might be very difficult to prove their implementation. Besides this, it is also a question whether the parent suffered by his/her child is going to initiate legal proceedings against the child at all, or to make the feud between us public or chooses to remain silent. One can agree with this opinion, because really several unique situations besides the cases listed in the ACC can happen, as well as proving isn't easy in cases the happening of which is supported by circumstantial evidence only, but this equally true for the disinheriting system of the ACC and the deprivation system established in the Tripartitum; both contain a similar number of such cases concerning the circle of depriving children and parents of the legacy assets.

In connection with the Hungarian points of view in legal literature, it is also worth quoting the contemporary Austrian legal literature. We can find the contemporary conceptual explanation of pursuing a permanent lifestyle conflicting public morality in one of the excellent works written by Franz Xaver *Rippel* lawyer, author of several scientific specialist books and publications[32] in which he made the reserved portion the object of a detailed inspection. He explained[33] that – with no difference regarding daughters and sons – forbidden gambling, drunkenness, begging, infringing the law, in case of daughters, profligate lifestyle and fornication, in addition the testator cannot be expected to grant anything to the descendant after bringing shame on him/her. In connection with Point 2, Rippel[34] remarked that it evidently involved the assistance that the descendant is obliged to provide to the testator in his/her powerless condition. Regarding the special disinheriting reason concerning the parents, Rippel[35] explained that it involves both the schooling and the physical nurturing of the child, as well as preparing for the morally correct path. Parents who had neglected their juvenile children lose their children's gratitude out of their own mistakes, therefore they deserve if their children disinherit them. Professor Joseph *Winiwarter*, the Rector of the University of Lviv also held similar views on the meaning of disinheriting reasons.[36]. According to his opinion, by the circle of cases listed in Point 2 one must mean situations which come up in connection with life danger, the needs of human life, deprivation of freedom and in connection with which it can be expected that the direct family members help each other. It would be contradictory if relatives failing to fulfil the expectable obligations would get a share of the testator's assets. He added

[31] KARVASY, Ágost: Észrevételek a végrendelkezési jognak a törvényes osztályrész általi korlatolását illetőleg. *Jogtudományi közlöny,* 1866/20, 343-344.
[32] RIPPEL, Franz Xaver: *Erläuterung der gesetzlichen Bestimmungen über den Pflichttheil und der Anrechnung in denselben, nach dem österreichischen bürgerlichen Gesetzbuche*. Linz, Im Verlage der k. k. priv. akademischen Kunst-Musik- und Buchhandlung, 1828.
[33] RIPPEL: op. cit. 44-46.
[34] RIPPEL: op. cit. 44.
[35] RIPPEL: op. cit. 46.
[36] WINIWARTER, Joseph: *Des dinglichen Sachenrechtes zweyte Abtheilung, nach dem Oesterreichischen allgemeinen bürgerl. Gesetzbuche, systematisch dargestellt und erläutert.* Zweyte vermehrte und verbeſſerte Auflage. Bey Braumüller und Seidel, Wien, 1841, 342-343.

to the reason in Point 3 that the shame that a perpetrator of a serious crime brings to the family with his/her action does not justify either that he/she be given a share from the family assets and enjoy it. According to his opinion, what the legislator may have meant by public morality in the current circle of application can only be defied with the help of the criminal code; the implementation of the acts against public morality included in it may involve a reason for disinheriting, such as fornication, begging, forbidden gambling, drunkenness, that is, acts which are able to generate anger and disgust in society. In connection with Point 1, he remarked that the child leaving the religious community unifying the Christian society alienates from his/her own by this.

With reference to the procedure law, the law also named the very significant condition that disinheriting must be proved by someone wishing to inherit and it is possible to disinherit someone only naming real reasons and some of the attitudes listed by the law unambiguously; the disinheriting can only be withdrawn in the legal written form, orally not (Section 772). The law contained a specific provision for cases when the person entitled to the reserved portion, due to his wasting lifestyle and being indebted, presumably would not be able to keep his/her reserved portion, and would not pass it to his/her children: the testator could disinherit his/her heir referring to it and he/she could pass the reserved portion further to that person's children (Section 773). The law established that the testator's testamentary freedom is complete beyond the reserved portion, however, all burden or legal transaction restricting the reserved portion is invalid. The law provided the right to attack wills to the heir whose claim for the reserved portion was partially or completely taken away by the testator and it established that omission of heir by means of silence denotes that the heir can claim the reserved portion, but not the complete portion of the inheritance (as opposed to Roman law and the provisions of the pervious legislature, Codex Theresianus). According to the ACC, if an heir appeared following the death of the testator whom the testator had had no knowledge of at the time of his/her death, he/she could claim up not only for the reserved portion, but the full portion of the inheritance he/she was entitled to (Section 777-778). In connection with the surviving spouse, the last paragraph of the main part 14 (Section 796) wrote that although he/she was not entitled to reserved portion, however, if the testator did not provide about him/her in his/her will, then he/she has the right for the decent keeping, to the standard of living he/she was used to living in until remarrying. This provision does not apply to the surviving spouse divorced on account of his/her own fault. Considering that the surviving spouse, in accordance with the original provisions of the ACC, inherited usufruct from the deceased spouse's assets, therefore within the framework of decent keeping, he/she had the opportunity to stay in the spouse's family and raise his/her children, he/she managed the deceased's assets without possessing them. If the widow/widower remarried, in accordance with the law, his/her usufruct was terminated.

The legal institution of reserved portion introduced with the ACC became a part of the Hungarian inheritance law; it was not rejected by the Judge Royals' Meeting of 1861 aiming at 'the possibly widest range of restoration of the old law' either, but it was declared under the name of 'legal portion'[37].

[37] Temporary Legislative Rules Section 7-8.

5. Summary

The extent of testamentary freedom was constantly changing in legislature concerning Hungarian inheritance laws; slowly though, but apparently it did increase, because while at the beginning the legislator restricted the circle of testamentary heirs, two hundred years later it terminated the restrictions of the subject side for a certain circle of heirs by introducing the reserved portion for daughters and paralelly, that is, by setting the first material restriction. King Louis the Great practically almost completely paralysed the material possibility of making disposition of property upon death with the introduction of the entail system for half a century, while it preserved its subjective restrictions, which order of succession prevailed till 1848, a direct consequence of which was that in later centuries it seriously hindered the social and economic transformation. The Law of Entail (ius aviticum) not only conserved the estate system, but also the structure of feudalism, therefore it became the main obstacle of capitalism and the development of citizenship in the modern era. The ACC with its Hungarian entry into force allowed visibly free provision over the full estate of the testator, however, it did restrict it by the introduction of the – not completely unknown in Hungarian legislature through the daughter's quarter – reserved portion, while it introduced the complete subjective freedom, because the testators could testate to anybody from its coming into effect. The factual restriction of testamentary freedom still exists in the institution of the reserved portion to be passed to the closest relatives introduced by the Austrian rules, which also serves the interests of families in our days and not with the purpose of keeping the family estate together, like done by the Law of Entail, but it served the protection of the testator's closest relatives' pecuniary interests.