

TABLE OF CONTENTS

PREFACE

ROGER DILLEMANS	v
-----------------------	---

INTRODUCTION AND OBJECTIVES

CHRISTOPH CASTELEIN.....	1
§1. Introduction.....	1
§2. Universality of succession law.....	1
§3. Ways in which property is inherited	3
§4. Symbolic function of the law.....	4
§5. Choices in our actual inheritance law	6
I. Choices within the intestate inheritance law	6
1. Ratio legis for the (reduction of) intestate inheritance law (to patrimonial rights)	7
2. Background perspective – individualism and private property.....	8
3. Founding principles.....	9
4. Legal translation of these founding principles	10
5. Consequences.....	18
6. The idea of intestate inheritance law as the tacit will of the deceased	23
II. Choices within the testamentary inheritance law.....	24
III. Choices within the imperative inheritance law.....	28
1. Introduction	28
2. Imperative inheritance law in a comparative law approach ..	30
a. First type – law of forced heirship	30
b. Second type – mandatory asset claims	31
c. No mandatory succession law.....	32
§6. Contestation of the choices made by our inheritance law	32
§7. Multidisciplinary International Seminar on Imperative Inheritance Law	34
I. Aim	34
II. Discussion proposals	34
§8. Conclusions	37

PERSPECTIVE 1 LEGAL ANTHROPOLOGY

MARIE-CLAIRE FOBLETS	39
§1. Introduction.....	39
§2. What is legal anthropology?	40
§3. Imperative inheritance law: ethnographic appraisal of 'discriminatory' practices	44
I. Women's lesser rights of inheritance.....	44
II. Women's 'exclusion' from independent ownership of land <i>versus</i> other avenues of obtaining property	47
§4. Inheritance Laws and Islam	52
I. Islamic inheritance law. A succinct presentation of the main basic principles	53
II. Practice: Estate planning and renunciation of specific fractional shares	55
III. Addressing Islamic inheritance law through international human rights standards.....	57
§5. Conclusion: Either your Culture or your Inheritance Rights?.....	61

PERSPECTIVE 2 LEGAL HISTORY

A History of the Law of Succession, in Particular in the Southern Netherlands/Belgium

DIRK HEIRBAUT.....	65
§1. The importance of the law of succession	65
§2. The diversity of the law of succession in the Southern Netherlands before 1795	66
§3. In spite of the diversity, some 'general principles of the law of succession' can be found	68
§4. The rest of the law has to follow the dictates of legal devolution.....	70
I. Limited possibilities for wills	70
II. Debts were no impediment.....	72
III. Restrictions on gifts and sales.....	72
IV. The mildness of the tax collector	73
V. Ransom.....	73
Vi. One exception: the rights of the surviving spouse	74
§5. The old law of succession was not static	75
§6. The law of succession as the best weapon of the French revolution	76
§7. Napoleon: tempering the Revolution.....	79
§8. After Napoleon: lethargy	80
§9. The future: is freedom possible?	82

PERSPECTIVE 3 SOCIOLOGY OF LAW

ANTON C. ZIJDERVELD	85
---------------------------	----

§1. Introductory comments	85
§2. Parallel ideal-types	85
§3. Socio-cultural transformations	86
§4. Recapitulation and conclusion	89

PERSPECTIVE 4 LAW AND ECONOMICS**The Post Mortem Homo Economicus: What Does He Tell Us?**

BOUDEWIJN BOUCKAERT	91
---------------------------	----

§1. Introduction	91
§2. Explaining inheritance	93
§3. Legitimate share or free will	94
§4. Regulating free bequest	100
§5. The state as the Heir: Inheritance Tax	102
§6. Conclusions	104
Bibliography	106

PERSPECTIVE 5 COMPARATIVE LAW – THE NETHERLANDS

MARTIN JAN A. VAN MOURIK	107
--------------------------------	-----

§1. The battle pertaining to new inheritance law (1947–2003)	107
§2. The arguments for upholding the legitimate portion	110
I. The family tie	110
II. Prevention of disputes and problems	111
III. Maintenance	112
IV. Sense of justice or juridical view	112
V. Incidental need	113
VI. Tradition and comparative law	114
§3. The arguments for abolishing the legitimate portion	114
I. The arguments in favour of the legitimate portion are not convincing	114
II. It's a free country	115
III. Justice	116
IV. Safeguarding of the financial provision	116
V. Simplicity	117

§4. Other statutory rights.....	117
I. Freedom of will making	117
II. Entitlements of imperative law.....	118
III. Critical remarks regarding the ‘other statutory rights’	119
§5. Forfeiture of the right to inherit (passive).....	120
§6. Forfeiture of the right to dispose of by will (active).....	121
§7. Conclusion	122

PERSPECTIVE 5 COMPARATIVE LAW – UNITED KINGDOM

PAUL MATTHEWS.....	123
§1. Introduction.....	123
§2. Common law European legal systems.....	123
§3. What is a property right?.....	125
§4. Patrimony and estate	127
§5. Administration of estates.....	130
§6. Freedom of testation.....	130
I. Land	130
II. Chattels.....	131
III. Intestacy.....	132
IV. Twentieth century reform	133
V. Scotland and the Channel Islands	134
§7. The Inheritance (Provision for Family and Dependants) Act 1975	137
I. Introduction	137
II. Domicile of the deceased.....	138
III. Time limit for bringing a claim	139
IV. Who can bring a claim?.....	139
V. The court’s approach	140
VI. The tests for reasonable financial provision	140
VII. What is maintenance?	141
VIII. What are the factors the court considers to ascertain ‘reasonable provision’?.....	141
IX. Common law and civil law compared.....	142
X. Claims by surviving spouses/civil partners	142
XI. Ancillary relief cases	143
XII. Impact of the ancillary relief cases on 1975 Act claims	144
XIII. Claims by adult children	144
A. Evolution	144
B. Myers v Myers.....	145
C. Gold v Curtis	147

D. Land v Estate of Land	147
E. Garland v Morris	148
XIV. Anti-avoidance	148
XIV. Judicial attitudes to the legislation	149
§8. The impact of the legislation	150
§9. Conclusion	151

PERSPECTIVE 5 COMPARATIVE LAW – BELGIUM

HÉLÈNE CASMAN	153
§1. Introduction	153
§2. Intestate Inheritance Law	153
§3. Remarks regarding children	154
§4. Imperative rights for descendants and ascendants	155
§5. Intestate rights for the surviving spouse	156
§6. Remarks about this matrimonial property	156
§7. Imperative rights for the surviving spouse	158
§8. Intestate rights of the surviving partner	159
§9. Imperative inheritance rights now	160
§10. Imperative inheritance rights in a future law	161
§11. By way of conclusion	165

PERSPECTIVE 5 COMPARATIVE LAW – GERMANY

Compulsory Portion and Solidarity Between Generations in German Law

WALTER PINTENS and STEVEN SEYNS	167
§1. Concept	167
§2. Historical development	168
§3. Constitutional protection	169
I. Constitutional approach: Articles 6 and 14 GG	169
II. The Constitutional Court's decision of 2000	171
III. The Constitutional Court's decision of 2005	172
§4. Holders	174
I. Descendants, parents, surviving spouse and registered partner	174
II. Condition: exclusion of hereditary succession	175
§5. Calculation of the <i>Pflichtteil</i>	176
I. Calculation of the <i>Pflichtteilsquote</i>	176
A. Descendants	176

B.	Parents	177
C.	Surviving spouse and registered partner	177
II.	Calculation of the value of the <i>Pflichtteil</i>	179
§6.	Claims for the protection of the <i>Pflichtteil</i>	179
I.	Right to information	179
II.	Claim for the remainder of the compulsory portion (<i>Pflichtteilsrestanspruch</i>)	180
III.	Deduction (<i>Anrechnung</i>)	180
IV.	Right to a supplement to the compulsory portion (<i>Pflichtteilsergänzungsanspruch</i>)	181
§7.	Forfeiture of the <i>Pflichtteil</i>	182
I.	Loss of the right of succession	182
A.	Unworthiness	182
B.	Introduction of divorce proceedings	182
C.	Renouncement of the right of succession or of the compulsory portion	182
D.	Renouncement of the estate	183
II.	Deprivation by the testator	183
III.	Limitations ex bona mente	184
§8.	Prescription	185
§9.	The future of the compulsory portion	186

PERSPECTIVE 5 COMPARATIVE LAW – FRANCE

Réserve héréditaire, ordre public et autonomie de la volonté en droit français des successions

FRÉDÉRIQUE FERRAND	189
§1. Introduction	189
§2. Les apports de la loi du 3 décembre 2001 : faveur au conjoint survivant .	191
I. Droit du conjoint survivant sur le logement de la famille	191
II. Autres droits successoraux du conjoint survivant : l'apparition d'une réserve en l'absence de descendant du défunt	192
§3. La loi du 23 juin 2006 : une réforme favorisant l'autonomie de la volonté	195
I. Disparition du droit de réserve héréditaire des ascendants	195
II. De la nullité à la validité contrôlée des pactes sur succession future	196
III. Clarifications apportées par la loi du 23 juin 2006	197
IV. Régime des restitutions	197

V.	Admission des donations-partages transgénérationnelles.	199
VI.	Modernisation des opérations de partage.	199
§4.	Conclusion.	201

CONCLUSIONS – TOWARDS AN OPEN AND FLEXIBLE IMPERATIVE INHERITANCE LAW

	RENÉ FOQUÉ and ALAIN VERBEKE.	203
§1.	Introduction.	203
§2.	Four preliminary perspectives.	205
I.	Anthropology of law.	205
II.	History of law.	206
III.	Sociology of law.	207
IV.	Law and economics.	209
§3.	Comparative legal perspective.	210
I.	From context to law, and from “institution” to multiple “institutes”.	210
II.	Forced heirship.	211
III.	Intermediate position: forced heirship limited to some type of assets.	214
IV.	Potential inheritance claim.	215
1.	England.	215
2.	Other countries.	216
V.	Legal certainty vs. flexibility.	217
§4.	Openness and flexibility.	219