Inheritance Rights and Entitlements of the Surviving Spouse - Some Comparative Insights

Romano, Gian Paolo

Inheritance Rights and Entitlements of the Surviving Spouse
Some Comparative Insights

Gian Paolo Romano

Professor at the University of Geneva

(Suzhou, 19 May 2018)

speech delivered at the

2nd Conference of Renmin-Geneva Seeding Funds Program

人大-日内瓦种子基金项目第二次研讨会

on

Civil Codification in China and in Europe

中国与欧洲的民法法典化：

Good evening everybody.

First of all, I want to thank our Chinese friends for hosting us here today.

My assistant Vito and I couldn't have hoped for a warmer hospitality on our first visit to the Middle Kingdom.

And by the way, I joined yesterday the community of WeChat users. That helps in China.

As has been said before, the University of Geneva is proud to welcome students from Renmin (and we look forward to the next intake).

We are impressed by their maturity, and thoughtfulness, and willingness to contribute to the progress not only of their country but also of the world's affairs at large.

And let me acknowledge our extraordinary former Dean, Christine Chappuis.

For it's under her inspired leadership that our Chinese-Swiss friendship flourished.

***

So China is working on a Civil Code.

This a challenging task (as we've just heard).

But this is also a glorious task.

Once completed, it's going to be a historic achievement.

The largest nation on earth will have a single piece of legislation governing most of the civil life and activities of 1.4 billion human beings.

That's unprecedent in all human history.

There is little doubt that a fully-fledged Civil Code will contribute to the freedom, security and prosperity of the Chinese people.

I believe it will also facilitate cross-border people-to-people relationships between China and other nations.

And so we stand shoulder-to-shoulder with the Chinese legal community on this incredible effort.

***

I was asked to say a few words on inheritance law.

Yesterday we talked about what happens when people get old.

If we go a step further, we should logically address what happens when people embark on their final journey (which is a more charitable way of saying: when they die).

Although we fear it, death is part of our common human condition.

In Steve Job's words it's (quote) 'the destination we all share. No-one has ever escaped it'.

So no difference between the Chinese, the Europeans, the Africans in this respect.

(Steve Jobs went on to characterize death as the 'single best invention of life'.

I won't comment on this rather counterintuitive statement.

I will refer you to his famous Standford speech for a thought-provoking justification.

The fact is any community of human beings has to forge rules on how their property will pass when they themselves pass away.

That's a necessity.

And so, there are few areas of law that are more consequential than law of succession.

***

More specifically, I will focus on the position of the *surviving spouse*.

There seems to be some debate going on in China as to how best to determine the inheritance rights of the surviving spouse, whether the Chinese Succession Act of 1985 needs modernizing as its substance is being migrated to the purposed Civil Code.

And so I thought that some comparative material and insight in this regard may be helpful.

***

By way of introduction, let me clarify a couple of points.

In as many as 20 countries, a surviving spouse may in fact be a *same-sex spouse*.

The Netherlands, Spain, Argentina, Mexico, France, the United States, South Africa and more recently the 'lucky country', Australia, do authorise same-sex couples – two women or two men – to get married.

I understand this is not on the Chinese agenda.

And so I will mainly have opposite-sex couples in mind.

Besides, I will exclusively focus on *civil* law.

I will leave aside any other areas where inheritance may have some consequences, such as tax law or social security law.

The last thing I want to say by way of background is that an increasing number of jurisdictions tend to award some inheritance rights to the surviving *partner*.

And this happens sometimes – for example in some Canadian provinces – by expanding the *notion* of 'spouses':

which in those jurisdictions designates not just married couples but also partners living in a stable relationship.

I nonetheless chose to stick to the narrower, more traditional notion of 'spouse'

that I understand is more in harmony with Chinese legal culture:

somebody who's married to somebody else and therefore has *marital status*.

***

Now, if you look at the inheritance rules in a sample of countries, what you'd immediately realise is the level of diversity among those countries.

There are only few areas where legislations differ more profoundly than inheritance law.

This extraordinary variety of approaches and solutions is the product of different history, different concepts of family as well as different socio-economic and ultimately political relationships.

In the federal states where multiple legal systems coexist – such as the United States – the rights of the surviving spouse may also differ from state to state:

and so those rights might not be the same in New York or North Carolina.

This is to some extent also true for the Australian Commonwealth.

Surprisingly, English law and Irish law are worlds apart on a number of critical points with respect to succession.

Disparities are even more pronounced in Continental Europe, including among the Member States of the European Union.

There is no concrete initiative on the part of the European institutions to harmonise the substantive law in this field.

The reason is simple: family law falls outside the scope of their competences.

What the EU has been able to achieve though is to harmonise *private international law*.

The idea is to prevent the situation where legal *differences* – which ultimately reflect legal *pluralism* – actually turn into legal *conflicts*.

Those conflicts may hamper freedom of movement of the Europeans and their assets.

Let me offer an example.

I have an aunt who's Italian but has been domiciled in Paris for long years.

Italian law and French law differ significantly when it comes to the rights of the surviving spouse, who, for example, is a forced heir under Italian law (even if the decedent is also survived by children) but not under French law.

As a consequence, my aunt and her spouse (assuming she has one) would face a conflict of laws, a conflict between *Italian* law and *French* law, to the extent that Italy wanted to apply Italian law to the distribution of her estate because of her Italian *nationality*, while France wanted to apply French law because of her French *domicile*.

And so, to minimise the uncertainty and hardship flowing from that conflict-of-laws situation, the Member States have come together, debated vigourously for some years, and finally enacted a Regulation, which entered into force in 2015.

The purpose of that Regulation is to allocate adjudicatory jurisdiction – i.e. to determine which authorities are entitled to deal with which estate – and, perhaps more importantly, to lay down common conflict rules.

In my hypothetical, those rules essentially allow my aunt to choose between Italian law and French law as the law governing her estate.

So good news for her.

She is entitled to choose the law that suits best her needs and aspirations.

***

Coming back to domestic law, it is often said that change in inheritance law may be slower to occur than in other areas.

However, many jurisdictions have recently undergone a reform, including with respect to the surviving spouse.

That was the case for France in 2001 and again in 2006.

Legislative changes also occurred in England and Wales in 2014.

Belgium passed a reform on successions in 2017.

It will come into force in September this year.

Switzerland too contemplates to modernise its Civil Code with respect to inheritance law.

The Swiss Ministry of Justice instructed the Swiss Institute of Comparative Law in Lausanne to perform a comparative study.

One of the purposed innovation is reduce the extent of the forced heirship of the surviving *spouse* while awarding some protection to the surviving *partner*.

***

Now, I suggest we identify two broad scenarios and consider them in turn.

The first one is about *intestate succession* – or *intestacy*.

Roughly speaking, intestacy is when a person dies without making a (valid) testament or will.

According to English terminology, ‘testament’ is about *immovables* and ‘will’ is about *movables*.

But I will use both terms *interchangeably*.

The second situation is that of a *testate* succession.

This means there is a *will* (in fact one or more wills).

I suggest we take the perspective of a *would-be testator*:

he wants to get his affairs in order and do some *estate planning*;

and he wonders to which extent he’s permitted to *freely dispose* of his estate according to his wishes.

***

But first let’s assess the *intestate* rights of the spouse.

In most countries, the spouse is a *legitimate heir* or *statutory heir* and, as a consequence, legally entitled to a portion of the estate.

However, the extent and nature of this entitlement vary considerably, not only from country to country but also within a single legal system depending on a number of factors.

To make things easier to understand, let me take a rather common hypothetical:

a person dies *intestate* and is survived by *his spouse* and *two children*.

I will assume the decedent (or deceased person) is a man:

statistically, a wife survives his husband more often than the other way round

(because of longer life expectancy for men than for women, which seems to apply in virtually all parts of the world).

I will leave open a number of issues for the time being:

whether the spouse is the mother of the two children, or whether spouse and children are *unrelated*, typically because the children are born out of a prior union of the decedent with another woman.

(By the way, the spouse may be the mother of one of the children but not of the other).

I will also refrain from specifying the *duration of marriage* (how long had they been married?), or whether the decedent and his spouse were *living together* or whether they were in fact *separate* (factually or judicially), or whether the spouses were living under a community property or separate property regime, or whether the spouse was financially dependent on the deceased, or whether the children were financially dependent on the deceased, or whether they were minors or adult children or affected by some disabilities, or whether they are both sons or both daughters or one son and one daugther, or whether the decedent is also survived by one of his parents, or both of them.

The reason is some countries make the extent of entitlement of the spouse ad the children conditional upon some of those circumstances.

***

So let me review how law stands in a selection of countries.

I have tried to identify those I thought might be more interesting under a Chinese perspective.

I will start with Switzerland – rather unsurprisingly.

Under Swiss law, the spouse inherits half of the estate and the two children the other half, to be shared equally between them.

This is also the Japanese position.

When it comes to the children, if one of the them was legitimate and the other born out of a bedlock (unelegantly called illegitimate), the legitimate child would, under the Japanese *horei* of 1898, take 2/6 of the estate and the other 1/6.

It was not until 2013 that the Japanese Constitutional court declared this discriminatory treatment inconsistent with the Japanese constitution.

Incidentally, it was the first time ever than a provision of the Japanese Civil Code was struck down by the Constitutional court.

In South Korea, the share of the widow in our hypothetical is of 3/7 of the estate – which is between one third and one half – and each child will get 2/7.

So arithmetics get more complicated in South Korea.

***

There are a number of countries that treat spouse and each of the two descendants on an equal footing.

And so, our widow would, under Dutch or Italian law, or the law of Quebec for example, get one third, as would each of the two children.

I understand this is also the situation in China under the Succession Act 1985.

Spouse and children belong to the 'first in order' relatives (together with parents, as I will say in a minute).

This also apply in Germany but only to the extent that the spouses were living under separate property, otherwise spousal share is one-fourth.

Let me specify that in Quebec, the child would get two thirds even if it's an only child, while in Italy and China, he or she would then get one half and the surviving spouse the other half.

In Italy – and I think in all of those countries – the widow in our case-study is entitled to inherit even if the spouses were living separate and separation had been pronounced judicially.

In other words, a separation decree does not affect her inheritance rights.

I understand this is also true for China.

I am not sure this is fair.

My cousin, who's Italian, died not too long ago after she obtained a separation order.

And her husband – who had been making her life miserable: so she kept on saying – was still entitled to a half of her estate.

My aunt, the surviving mother (not the one living in France, another one) has been struggling with what she believes it's an unspeakable injustice.

***

There are some countries that go even further.

The surviving spouse is still entitled to her portion even after she files for divorce and the decedent spouse dies during the divorce proceedings.

This is what happens in France.

A few words about French law.

In the original version of the *Code civil*, the surviving spouse wouldn't qualify *as statutory heir* as long as a next-of-kin up until the 12th degree was in existence.

It was not until 2001 that the situation was improved, although the *filiation* bond is still regarded by French law as stronger in many ways than the *marital* bond for succession purposes.

Today, the surviving spouse has a *choice*:

either she elects to benefit from the *usufruct* ('life interest') of the whole of the estate or from the *full ownerhip* of one fourth (25%) of the estate.

This is called 'option right' (*droit d'option*).

The usufruct may be converted into a *monthly payment* (*rente viagère*) or in a *lump-sum* if spouses and the children so agree.

Importantly, the option right is awarded only if the surviving spouse is the mother of *all children* of the deceased.

If the children or one of them is not related to her, she's entitled to one fourth of the estate, whatever the number of children.

In Belgium, the spouse has no option but the *life interest* of the *whole* of the estate, whatever the relationship between the children and the spouse.

***

Let us cross the Channel (la *Manche*) and see what the approach in England and Wales looks like.

Traditionally, the spouse is preferred when it comes to the first 250.000 pounds:

all of which go to him or her.

So if the deceased in our hypothetical leaves no real property but just bankable assets worth some 200.000 pounds, the wife will get *all of it*.

As to the part of the estate exceeding 250.000 pounds, the spouse used to get the *life interest* of *half* of that amount.

Things have changed in 2014.

The spouse is now entitled to half of the balance in *full ownership*, rather than just interest, whatever the number of children.

The spouse's also entitled to what is called the '*chattels*':

i.e. the items of movable personal property, such as furniture or cars or domestic animals.

Ireland seems to grant the greatest protection to our hypothetical's widow:

under Irish law, she would get two thirds of the estate, regardless of the number of children.

And so, Ireland views the spouse as the closest member of the decedent's family, closer than the children, contrary to what France does.

***

I suggest we cross the *Atlantic* – as we say in Europe; I guess in China you'd rather say: 'we cross the *Pacific*' – and have a look at the situation in the United States.

Inheritance is a matter for *state* legislation (as opposed to federal legislation), as with almost all areas of private law.

However, a significant harmonisation is brought about by the Uniform Probate Code, commonly abreviated 'UPC'.

The UPC was promulgated in the late sixties.

It has been since modernized several times, lastly in 2008.

The primary purposes was to streamline the probate process and to standardize the various state laws governing wills, trusts and intestacy.

According to the UPC, (quote) 'if all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent', than the surviving spouse inherits the *entire estate*.

The UPC has been adopted (although sometimes with variations) in 18 states, including Arizona, Florida, Minnesota, South Carolina, Alaska, etc. – but not in the others, such as New York, California, Texas or Illinois.

In our hypothetical, the wife would, under the laws of Arizona or Florida, inherit the entire estate to the extent that, number 1, she's the mother of the two chi-ldren and, number 2, she has herself no other children from another man.

New York has failed to align with the UPC.

In New York, our widow will get 50.000 USD plus half of the balance, and the two children will inherit the other half, regardless of any other circumstances.

In California, things are a little bit different because California is a community property state (while New York as 40+ states are separate property states).

The spouse will get the whole of the community property and 1/3 of the separate property belonging to the deceased.

Importantly, the portions I mentioned tend to refer, in the U.S., to what is called *intestate property*.

The fact is some assets are not affected by intestate succession laws, as with life insurance proceeds, property transferred to a living trust or property held with someone else in joint tenancy.

***

In Canada, inheritance law is constitutionally a provincial matter.

If the decedent is survived by a spouse and two children (as in our hypothetical), then there's generally a *preferred share* that goes to the spouse (influence of the English approach)

The amount vary from 50.000 dollars to 300.000 dollars depending on the province.

If there's a balance, either half of the balance goes to the spouse and half to the children, like in British Columbia and Alberta, or one third to the spouse and two thirds to the children, like in Ontario and most of other provinces.

Importantly, however, in Alberta and Manitoba, if the spouse is the parent of the children, he or she will inherit everything (which is, as I said, the solution embraced by the UPC).

Let me make some clarifications as to the meaning of the word 'spouse'.

In some provinces, notably Ontario, this term only extends to legally married couple.

In British Columbia, it also includes *de facto* relationship lasting for more than two years and, in Manitoba, *common-law* partners.

The term 'spouse' excludes in Alberta (but not in Quebec) spouses who had been separated.

In Saskatchewan, it excludes legally married spouses who were cohabiting with someone else at the date of death, while in Nova Scotia and in the Northern Territories, spouses living in *adultery* are barred from inheriting.

To our fellow human beings leaving in those distant provinces: be careful what you do!

***

A word about Russia.

Russia is the only country among those I have examined – together with China – where surviving parents are placed on a par with surviving spouse and children.

So if the decedent in our case-study is survived not only by his wife and children but also by his mother, wife would get one fourth, mother would get one fourth and so would each of the children.

***

Speaking about parents, what happens if the decedent leaves no children but one or more parents plus the spouse?

A number of countries provide that the whole of the estate passes on to the spouse.

Parents are no statutory heirs.

This is typically the position of the Commonwealth jurisdictions.

In other countries – China, Italy, Switzerland, France and so on – the parents are entitled to a portion of the estate.

And so the spousal share is reduced accordingly.

If the spouse competes against brothers or sisters of the deceased, including half brothers and half sisters, Italian and Swiss law would grant a share to them.

In China, if the deceased has no children nor parents, the spouse will get everything.

Brothers and sisters are no statutory heirs.

And that's also the case for France for example.

***

A quick look at the Muslim countries as well as the countries where there is a significant Muslim community, such as India.

In some of those countries, the sex of the surviving spouse or children may still play a role.

What's also true is that calculation of inheritance rights under traditional Muslim law may be extremely complex.

I took Morocco as an example.

In 2005, the Family Law Act, so called 'Moudawana', was signed into law by the King of Morocco.

If the surviving spouse is in fact wife (as in our hypothetical) and children are two, the spouse will get, under Moroccan law, 1/8.

If the spouse is a man (husband), he will get ¼.

That's not the only gender-based discrimination.

There're more.

If the children are two sons, they will share the balance in equal parts.

If one of them is a boy and the other is a girl, the boy will inherit two thirds of the balance and the girl one third.

If they are two girls, they will inherit 1/3 of the balance each and the remaining third will distributed to the closest male.

In Iranian law, the surviving spouse, if it's a woman, cannot inherit immovables.

A proposal to reform this was signed by Mr Ahmadinedjad in 2009 but met with opposition from the hardliners and, more importantly, from the Guardians of the Revolution.

***

In virtually all jurisdictions, if the spouse is responsible for the death of the deceased, or manslaughter, they lose their inheritance rights.

And naturally so.

What about *domestic abuse*?

In the U.S. experience, a majority of states view domestic abuse as an egregious act of marital misconduct.

However, only a minority of states bar a spouse from inheriting if he or she has abused the decedent spouse.

Under Chinese Succession Act (quote) 'a serious act of abandoning or mistreating the decedent' may lead to disinheritance.

It would be interesting to see what amounts to 'mistreating' in Chinese judicial practice.

But that's a think a very wise and inspiring approach.

I think more countries should follow suit.

***

It's about time we move to *testacy*.

That's our second scenario.

The main issue is to which extent the testator is permitted to dispose of his estate as he thinks fit:

typically through will or similar instruments.

Now, if we go back to our hypothetical, this freedom may be used to the *advantage* of the surviving spouse, in order to increase her share, and, as a consequence, to the *disadvantage* of his children.

And so the first question that arises is:

Can the testator leave the *whole estate* to his spouse and nothing to his children?

But the freedom of disposition may also be used to the detriment of the spouse.

And so, here's the second question:

Is it permissible for someone to disinherit his husband or wife by leaving the whole estate to their children or cousins or non-family members, such as charities, or the universities of Geneva or Renmin?

With respect to testamentary freedom, legislations may be divided into two broad categories:

Countries that tend to recognize an almost limitless freedom to the testator, and countries that restrict that freedom by awarding a reserved share to the closest family members.

***

The first category typically includes England and most jurisdictions influenced by the English approach (although not all of them, for example not *Ireland*).

The organizing principle under this approach is that a person is free to distribute his or her wealth in the way that he or she thinks is the most appropriate.

That's the starting point.

There are narrowly crafted restrictions to the principle of testamentary freedom.

Those restrictions essentially boil down to the possibility for disinherited spouses or children or other people (typically those who were financially *dependent* on the deceased) to apply for what is called a '*family provision order'*.

A good example is offered by the Succession Act 2006 of New South Wales, Australia.

A former spouse is the first on the list of the 'eligible persons', i.e. the persons who may apply for a family provision order.

The order is, however, granted only (quote) for '*maintenance, education and advancement in life*' of the applicant.

There is a long list of matters to be considered by South Welsh courts: inclusding duration of the relationship, financial needs of the applicant, her age, and so on.

As to the nature of the family provisions, it can be a lump sum, or periodic payment, or interest in property, or transfer of a specific asset.

What's important to stress though is that the level of protection is *maintenance* or little more.

So a spouse who's indipendently wealthy or has an income or earning capacity is unlikely to be awarded family provision.

This was recently confirmed by the UK Supreme Court, who handed down a landmark ruling in 2017, in *Ilott v. Mitson*.

The Court awarded 50.000 pounds for maintenance to the decedent's daugther who had left all her wealth (worth half a million pound) to three charities.

And the importance of paying heed to testamentary wishes was emphasized by the Law Lords.

***

Perhaps surprisingly to some Western lawyers, I would also include in this group of countries China and Russia.

According to the Chinese Succession Act (quote… from the translation)

'*reservation of a necessary portion of an estate shall be made in a will for a successor who neither can work nor has a source of income*'.

In our hypothetical, if the surviving spouse has no source of income nor is it reasonable to expect her to look for a job (this may, I guess, depend on her age as well as on other factors), then the decedent's will has to 'reserve a portion' to her.

It's not clear to me what is that 'necessary portion'.

I must confess I haven't checked whether any interpretive rules by the Chinese Supreme Court are available.

I nonetheless think the drafting of that provision may be improved.

***

I also suspect Chinese law is influenced on this point by Russian law, although Russian legislation is more specific as to the extent of this 'necessary share'.

For the Russian Family Code expressly provides that the amount of it may *not be less than half* of the *statutory share*, which in our hypothetical is one third if the decedent has no surviving parents, one fourth if the decedent is survived by one parent (in addition to his spouse and two children) and one fifth if he had two living parents.

The Russian Family Code seems to protect the 'minor or disabled child' or the 'disabled spouse' only.

Does this mean that only a spouse with actual disabilities may benefit from this forced share?

I had no time to dug deeper into Russian practice.

***

The second category of jurisdictions includes the majority of the countries in the world.

They see fit to restrict the freedom of disposition through what is called a 'reserved share' (*réserve héréditaire*), regardless of whether the beneficiary is independently wealthy or has a comfortable source of income, as often happens.

Curiously enough, there are countries that provide for a reserved share *for both* the surviving spouse and the children, countries that provide for such a reserved share *for children only*, and yet other countries that grant it to *surviving spouse only*.

***

Most of the jurisdictions provide for a reserved share for both the spouse *and* the children.

That's the approach under Swiss, Italian, German, Belgian and Spanish law…

And so, in Switzerland and Italy, the reserved share of the surviving wife would be *one fourth* of the estate.

In Germany it would be *one eight*.

So if the decedent in our hypothetical made a will leaving everything to the Renmin law school, and Swiss law applies to his estate, then the wife would be able to claim *one fourth* of the estate, even if she's millionnaire.

And the children would also get *one fourth* even if they are *sixty-five*, already retired, and in an extremely comfortable financial position.

I am not sure this is entirely fair.

I think students from Renmin law school would need this money (to study abroad for example) more than our testator's wealthy and senior descendants.

What's true though is that the Swiss Government is contemplating reducing the surviving spouse' share to one *eight.*

I believe it is a good thing.

In Belgium, 2/3 of the estate is the reserved portion for the two children.

Two thirds, would you believe this?

And the spousal share is *life interest* of the half of the estate.

No much is left for the testamentary beneficiaries.

The reform that will enter into force next september will reduce the reserved portion of the children to 50%.

Under Irish law, the surviving spouse will get one fourth if there are children and one third if there is no children.

That's called '*legal right share'* in Irish legal parlance.

I told you, Irish law and English law are significantly different.

***

In other countries, the spouse is not protected to the extent that there are children.

Under French law for example, our testator would be able to leave nothing to the spouse, while his two children may claim half of the assets despite any testamentary dispostion failing to adequately provide for them.

That's also the case in Lousiana, which is the only U.S. state to have enacted a Civil Code.

With an important variation though.

Children are, in Louisiana, reserved shareholders as long as they are under 23 only.

So, in our hypothetical, if one of children is 21 and the other is 24, the younger one gets 1/3 and the older one gets nothing.

Is it fair?

The Louisiana Supreme Court said years ago, in the *Lauga* case, that this difference of treatment is *inconsistent* with the Louisiana Constitution.

But the Lousiana state legislator insisted on this stance.

So much so that this difference of treatment is now *enshrined* in the Lousiana Constitution.

***

In yet other countries, the surviving spouse is the only forced heir.

Children are not.

This is what happened across most of the United States (apart from Lousiana).

The term commonly used in U.S. parlance is '*elective share*'.

'Elective share' refers to the portion of the estate which a spouse may elect, i.e. claim, in place of what they were left in the decedent's will.

That's also called (rather confusingly) 'statutory share' or, less elegantly, 'widow's share'

(not *widower's* share, although a widower is also entitled to it).

The election shall be done within a deadline that is generally *six months* (as provided by the Uniform Probate Code) but may be shorter, depending on the legislation of the individual state.

Apparently, an Illinois lawyer once caused her client to lose an elective share worth 3 million dollars because he told her client she could do her election within six-months.

He did not know the the time-limit is reduced to three months under the laws of Florida.

The elective share is significant in some U.S. states: between one third and one half of the estate property.

But a number of states require the marriage to have lasted a certain number of years for the elective share to be claimed.

Following earlier versions of the UPC, other states adjust the share based on the *length of the marriage*.

In Massachussets, the elective share to which the surviving spouse in our hypothetical is entitled is 3 % if the marriage lasted 1 year, 12 % if it lasted 6 years, 25 % if it lasted 15 years, and so on.

Let's face it, comparative law indeed gives some ideas…

***

What if the decedent has no children nor spouse but he's survived by one of his parents, his Mom for example, or both?

The growing trend is to *abolish* the reserved share of the parents and to set no restriction to the testamentary freedom in that case.

France and the Netherlands have already gone down this way.

That's also true for Belgium as of next September.

Switzerland intends to do the same. That's what the proposed legislation calls for.

In Italy and Spain, parents are still beneficiaries of forced heirship.

Under Spanish law, *grand-parents* may also benefit from it in the absence of parents.

***

One of the most practically relevant questions about forced heirship is how gifts made *inter vivos* by the testator ought to be calculated.

And what about transfers of part (or most) of his wealth to trusts or similar institutions in order to frustrate inheritance expectations of members of his family?

In a case I had to work on as an adviser, an Italian citizen was domiciled in Switzerland at the time of death.

He left an estate worth 1.6 million Swiss francs.

As I said before, under both Swiss law and Italian law the reserved share for the spouse is *one fourth*.

But the spouse was not happy with 400.000 francs (1/4 of 1.6 million).

She claimed more.

She contended that, under Italian law, you have got to factor in *all gifs* made by the deceased during his lifetime.

And apparently, the testator had, long before he died, donated a beautiful mansion on the Como lake worth approx. 1 million francs to a congregation of nuns (or monks).

And she was right:

under Italian law, that amount has to added to the value of the estate at the time of death to determine the extent of her forced share.

So the amount of the forced share was in fact, under Italian law, 650.000 francs.

Under Swiss law, it was 400.000 francs.

For only gifts occurring in the five years prior to death have to be included when determining the total value of the estate.

One of the most controversial question about elective share in the U.S. is whether only *probate* assets or also *non-probate* assets (including funds transferred to trusts prior to death) are part of the estate for the purpose of identifying the amount of the elective share.

I'd rather not spend time on this.

***

For I would like to briefly touch upon two last points.

The first is about the practical difficulties that prospective heirs often face when searching for information as to the true magnitude of the estate.

How can you possibly enforce your right if you ignore what the extent of your right is?

Except that, in order to know the extent of your inheritance rights, you first need to know the extent of the estate based on which your entitlement is determined.

Now, this is particularly challenging when the estate is dispersed across several countries.

Typically, beneficiaries of a reserved share may not know exactly where assets are and what's their total value – especially when there are undisclosed assets.

And the banks or other entities they turn to may not be cooperative, depending on the countries.

The increasing trend at least in Europe, including Switzerland, is towards greater transparency.

The Swiss Federal Tribunal tends to award rights to seek information from banks or other financial institutions that may hold part of the estate or be able to locate it.

But more work needs to be done in order to make sure information rights are truly effective.

***

The final point I want to address is the possibility for the parties, typically the testator and the members of his family, to come to *family arrangements* prior to death.

This is called in French '*pacte successoral*', '*Erbvertrag*' in German.

The term sometimes used in English language is '*succession agreement*'.

Those agreements are generally permissible under Swiss and German law.

They are rather common in the practice of those jurisdictions.

And so, husband and wife may, in our hypothetical, under Swiss and German law, go to a notary public and agree that she will relinquish her reserved share, possibly in exchange for a gift, to be immediately executed, of a lesser amount.

In New York, informed consent is an exception to the elective share.

If the surviving spouse is fully informed of the extent of her husband's estate and executes a written consent agreeing to receive less than her elective share, then, that's *binding* on her.

In Italy, on the contrary, such an agreement is not even worth the paper is written on.

The testator is not bound by what he may have contractually promised to third parties (e.g. I undertake to bequeath that property to you when I will no longer be of this world), any more than a forced heir, i.e. a child, is bound by his waiving up his rights prior to those rights coming to full existence, i.e. prior to passing away of his father or mother.

Of course, after the death, but not before it, he may validly relinquish those rights.

***

Let me try to state some conclusions.

When it comes to *intestacy*, China is one of the few countries that still places surviving parents on an equal footing with surviving spouse and children.

I wonder whether the parents' rights should not be set aside in the presence of children.

That's what does the vast majority of countries.

This would lead to an increase in the spousal share.

On the other hand, I wonder whether it wouldn't be wise to specify that spousal inheritance rights are terminated when an action for divorce is filed (and not at the time when the divorce decree becomes final).

I also believe the idea embraced by some Canadian provinces – whereby spousal rights are terminated in case of separation or at least when the surviving spouse is cohabiting with another person – makes some sense to me.

I would finally try to enshrine domestic violence (and possibly gross marital fault) as a self-standing cause for disqualification.

The Chinese Succession Act stands, on this particular point, as an example that I think other countries would be well-advised to follow.

***

When it comes to *wills*, the overall trend is to expand the testamentary freedom of the estate owner by *abolishing* the reserved portion of the parents and *reducing* that of children and the spouse.

The *enacted* reform in Belgium and the *proposed* reform Switzerland are reflective of that trend.

The truth is the rationale behind the reserved share is of less momentum in present-day societies: life expectancy is longer – median of age of children is above 45 – social security is more developed and works better than it used to be, and couples are increasingly two-income as a result of a greater equality in the distribution of roles and responsibilities within families.

I personally think that making the extent of the spousal forced share conditional upon the duration of the marriage, as the Uniform Probate Code suggests, is an interesting solution.

This question is, however, of limited interest to China.

For I guess there is no willingness in China to introduce a proper forced heirship 'continental style' at the time when the general tendency across the world is to downsize it wherever possible.

On the other hand, I would urge Chinese legislators, as well as legislators in other countries, to consider the option of expressly and unambiguously granting statutory or reserved heirs rights to seek information from private entities as to the existence and amounts of estate assets held by them.

Awarding rights on paper without providing for the tools that are instrumental to enforcing them is not consistent with the idea of 'taking rights seriously' (to echo the title of the Ronald Dworkin's book).

Thank you all very much.