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Wealth, Families and Death: Socio-Legal Perspectives on Wills and Inheritance: Introduction

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Abstract

Inheritance as both a concept and a practice is of deep significance within all societies and jurisdictions. Located at the intersection between economics, family relations and the end of life, it offers a unique perspective on a variety of contemporary socio-legal debates. Yet the socio-legal phenomenon of inheritance has attracted relatively little scholastic attention. This special issue, which brings together eight papers coming from six different countries (and eight different jurisdictions): Belgium, England and Wales, Israel, Spain (Catalonia and the Basque Country), Switzerland and the USA, demonstrates the breadth of inheritance as a field of study in a number of ways and at the same time opens up important new lines of enquiry. This international breadth serves to foreground the significance of both national and regional political culture on inheritance law. Most significant in this respect is the fact that the authors are evenly split between those commenting on civil legal systems and those on common-law systems; for traditionally the two systems have adopted highly distinct responses to the principles of testamentary freedom and forced heirship. All the articles in this collection provide insight into this fundamental distinction but at the same time demonstrate its limits in practice.

Key words

Inheritance; death; wills; testamentary freedom

Resumen

La herencia, tanto como concepto o como práctica, es muy significativa en todas las sociedades y jurisdicciones. Situada en la intersección entre economía, relaciones familiares y el final de la vida, ofrece una perspectiva única sobre una variedad de

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debates sociojurídicos contemporáneos. Sin embargo, el fenómeno de la herencia ha atraído relativamente poca atención entre la comunidad académica sociojurídica. Este número especial, que reúne ocho documentos procedentes de seis países y ocho jurisdicciones diferentes: Bélgica, Inglaterra y Gales, Israel, España (Cataluña y País Vasco), Suiza y Estados Unidos, demuestra la amplitud de la herencia como campo de estudio desde diferentes puntos de vista, y al mismo tiempo abre nuevas e importantes líneas de investigación. Esta amplitud internacional sirve para dar relevancia a la importancia de la cultura política nacional y regional en materia de derecho de herencia. En este sentido, es representativo que los artículos se dividan, a partes iguales, entre los que se centran en los sistemas de derecho romano, y en los sistemas de derecho anglosajón, ya que, tradicionalmente, los dos sistemas han adoptado respuestas muy distintas a los principios de libertad testamentaria y herencia forzosa. Todos los artículos en este número ofrecen información sobre esta distinción fundamental, y al mismo tiempo demuestran sus límites al ponerlos en práctica.

Palabras clave

Herencia; muerte; testamentos; libertad testamentaria

Inheritance as both a concept and a practice is of deep significance within all societies and jurisdictions. Located at the intersection between economics, family relations and the end of life, it offers a unique perspective on a variety of contemporary socio-legal debates. Yet the socio-legal phenomenon of inheritance has attracted relatively little scholastic attention.

Within legal practice, succession law (or probate or 'estate-planning') is a distinct field (Reid *et al.* 2007). But concerns and disputes about inheritance raise significant issues within family law, mental health law, taxation and revenue, property and housing law, and, within the common law, equity and trusts (Blumenthal 2006, Brashier 2004, Fellows *et al.* 2010, Hacker 2010, Leslie 1996, Sherman 1999). More broadly as a cultural phenomenon, as a social stratification mechanism with far-reaching economic consequences, and as both a deeply intimate and at the same time a highly public issue, the legal frameworks, texts and practices of inheritance offer a rich site for inter-disciplinary and comparative scholarship from across both the social sciences and humanities (Cox 1993, Fellows 1991, Finch *et al.* 1996, Finch and Mason 2000, Miller and McNamee 1997, Shamma *et al.* 1987).

In the 18th and 19th centuries debates about inheritance laws in many countries were a key focus for ideological and political conflicts that sought to redefine the relative power of the individual and the State (Counter 2010, Friedman 2009). While rarely achieving the high profile of these earlier debates, in recent years legal reforms relating to inheritance have been introduced in numerous jurisdictions and debated in many others (Reid *et al.* 2007, see also Asua González 2014, Cottier 2014, Lamarca i Marquès 2014, in this collection). These contemporary engagements attest to the fact that in late-modernity the socio-legal institution of inheritance is facing significant challenges. In the current economic climate, the impact of neo-liberalism, with its individualistic emphasis and withdrawal of state welfare provisions for the vulnerable, draws attention to the relationship between testamentary freedom and increasing inequality (Beckert 2007, Chester 1982, 2007, Madoff 2010, see also Leslie 2014, in this collection). The implications of enhanced life expectancy with the related problems of care for the elderly and increasing mental incapacity similarly come to the fore in the context of practices and politics of inheritance (Tate 2008, see also Douglas 2014, in this collection). Changes in family structure create another challenge. Post-divorce families, same-sex families, increased single or solo-living, unmarried cohabitants, and children conceived by assisted reproduction that allows for the separation between genetic, biological and social parenthood, all in distinct and unpredictable ways raise questions as to the relevancy of existing intestacy provisions which is still in most jurisdictions exclusively focused on the institution of marriage and genetic relations (Douglas *et al.* 2011, Hacker 2010, Monk 2011, 2013, see also Asua González 2014, Douglas 2014, Hacker 2014, Monk 2014, in this collection)

An additional challenge is created by globalization and immigration, which increase the tensions between dominant cultural understandings of inheritance and inheritance practices of religious and other minorities (Kreiczer Levy and Pinto 2012, see also Hacker 2014 in this collection). These tensions bring to the fore questions of forced heirship and the introduction of human rights informed anti-discrimination provisions in inheritance law (Monk 2011, Sherman 1999, see also Swennen and Barbaix 2014, Lamarca i Marquès 2014 in this collection), as well as the right of minorities to handle their inheritance procedures within autonomous religious courts. Finally, the internet, with its do-it-yourself kits for will writing, and the call for ethical and emotional emphasis in wills, call for a re-conceptualising of the role of professionals in the field.

This special issue, which brings together 8 papers from a workshop held in April 2013, does not set out to provide in any sense a comprehensive overview of all these diverse perspectives and lines of enquiry. Collectively, however, the articles

here demonstrate the breadth of inheritance as a field of study in a number of ways and at the same time open up important new lines of enquiry.

The commentators come from 6 different countries (and eight different jurisdictions): Belgium, England and Wales, Israel, Spain (Catalonia and the Basque Country), Switzerland and the USA. This international breadth serves to foreground the significance of both national and regional political culture on inheritance law. Most significant in this respect is the fact that the authors are evenly split between those commentating on civil legal systems and those on common-law systems; for traditionally the two systems have adopted highly distinct responses to the principles of testamentary freedom and forced heirship. All the articles in this collection provide insight into this fundamental distinction but at the same time demonstrate its limits in practice.

One way in which the articles here trouble or complicate a simplistic binary view of the systems is by revealing how policy makers, legislators, judges, and indeed individual complainants across the divide confront similar concerns. Central here are understandings of the 'the family' and the articles here explore how shifting understandings of the family and questions of care, age, gender, religion and sexuality shape personal experiences of the law and inform law reform agendas.

A key question that the articles here address explicitly and implicitly is method. What criteria should be used to evaluate the effectiveness of inheritance laws? To what extent does laws' normative stances reflect mainstream values? These are crucial questions that we hope this collection will open up for debate and conversation across disciplines and jurisdictions.

We would like to thank the Oñati International Institute for the Sociology of Law, and in particular Malen Gordea Medizabal, for hosting the workshop that yielded this volume. Special thanks to Cristina Ruiz, Head of the Publications Department of the Institute, for her dedicated assistance. Finally, we thank all the participants and writers for their insightful contributions. We hope that this volume will be of interest to scholars from a variety of disciplines, fields of interest, and countries, who share our fascination with the socio-legal aspects of inheritance and last testaments.

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