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Compulsory Portion and Family Provision in the Netherlands

Wilbert D Kolkman

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I. Introduction

One of the most fundamental issues in inheritance law is whether or not a person's responsibilities cease to exist when that person dies. If the answer is yes, the consequence (among other things) would be full testamentary freedom. However, all systems of succession law in Europe include some kind of claim that grants certain family members rights to the estate. These claims have a long tradition.¹

¹ See chs 1–3 above and ch 22 below.

Today, most systems of succession law can be roughly divided into three categories: countries that grant an actual forced heirship; countries with a compulsory portion in the form of a monetary claim; and countries with a high degree of testamentary freedom but with tailor-made claims based on need. In general, the basis of all these claims is the idea of care and family solidarity. Family ties are so strong that they cannot simply be negated by a will. After a brief historical overview in section II, section III of the chapter questions whether this basis is still sufficiently solid to justify the continued existence of the compulsory portion.

In 2003, the Netherlands moved from the first category, of forced heirship, to the second *and* third category: two systems have been combined in one code of law, as will be explained in sections IV and V. Children are now entitled to a compulsory portion – or *legitime* – in money as in, for example, Germany.² In addition, the spouse and also the children have ‘other statutory entitlements’, in the form of usufruct for the provision of needs and of a lump sum. These other statutory entitlements somewhat resemble the discretionary ‘family provision’ of the common law tradition.³ A number of practical problems caused by the different claims will be analysed in section VI. The key question, addressed in section VII, is whether the Netherlands is combining the best of both worlds or whether it is overplaying its hand and should actually put some restrictions in place.

In this chapter, the term *legitime* refers to both forced heirship (a real right, granted to descendants prior to 2003) and to compulsory portion (a personal right, since 2003).

II. Historical overview

1. Middle Ages and the Old Dutch period

From the early Middle Ages to the first codifications, Germanic law had a strong influence on inheritance law in the Dutch regions. In spite of the legal diversity that existed, one common feature of the beginning of this period was the absence of testamentary freedom: children inherited a deceased person’s entire estate.⁴ If

² See ch 9 above.

³ See chs 13, 15, and 16 below.

⁴ Wilbert D Kolkman, ‘Intestate Succession in the Netherlands’, in Kenneth G C Reid, Marius J de Waal, and Reinhard Zimmermann (eds), *Comparative Succession Law* vol II: *Intestate Succession* (2015) 225.

a marriage was childless, other relatives inherited the estate. Only in very exceptional cases did a surviving spouse become an heir.⁵

However, the surviving spouse was granted certain benefits, namely the right to take – without any compensation – certain goods from the estate,⁶ such as clothes, household effects, items of personal adornment, and jewellery. A man would sometimes also be entitled to armour, tools, and books.⁷ There are also cases known of children being entitled to such benefits.⁸

As regards the position of children, the question arises as to what extent they were treated equally. *Aasdom* law and *Schependom* law in most Dutch provinces did not make a distinction between sons and daughters.⁹ However, serfs had certain rights that were indivisible, so that they could only be inherited by one heir, usually the eldest son or, if there was no son, the eldest daughter.¹⁰ The three northern provinces (Groningen, Friesland, and Drenthe) were an exception in that land was left only to sons.¹¹ Later, in Groningen and Friesland, a son's share was twice as big as a daughter's.¹² In Groningen, there was also a rule that land accrued to sons as a benefit.¹³

Not only Germanic law, but also Canon law, made a fundamental impact on inheritance law. The church saw to it that testamentary freedom was gradually introduced.¹⁴ In the thirteenth century, wills came to be accepted.¹⁵ However, the influence of the typically Germanic prohibition of wills can be seen in other areas, such as the existence of what was known as a *réserve* – a share reserved for the heirs-at-law, which a person could not dispose of by will. The size of this *réserve* varied, but in the late Middle Ages it seems that *réserve des deux tiers* – a *réserve* of two-thirds – was customary.¹⁶ This *réserve* was in fact a forced heirship for children, because it ensured that part of the estate ended up with them. However, the historical

⁵ W C Baert, *De erfopvolging bij de Franken en Friezen* (Utrecht, 1897) discusses the oldest written Germanic law in this area. Under Dutch law, the term 'heir' refers to a person receiving the estate, or a proportionate share thereof, by universal succession.

⁶ E M Meijers, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlandsch Burgerlijk Recht*, IV, *Erfrecht* (1941) 329.

⁷ J S L A W B Roes, *Het naaste bloed erfde het goed* (2006) 101 ff.

⁸ Examples are to be found in R Keuchenius Driessen, *Specimen historico-juridicum inaugurale, sistens originem et causas privilegiorum, quae liberis utriusque sexus competunt in successione parentum* (Groningen, 1782) caput 1, §§ XIV, XV, XVII, and XVIII.

⁹ L M Rollin Couquerque, *Het aasdoms- en schependomsrecht in Holland en Zeeland* (The Hague, 1898) 4 ff.

¹⁰ A S de Blécourt, *Kort begrip van het Oud-Vaderlandsch Burgerlijk Recht* (1939) 110 ff.

¹¹ Baert (n 5) 121 ff.

¹² Keuchenius Driessen (n 8) caput 1.

¹³ In Drenthe, a similar system was in force: see de Blécourt (n 10) 347.

¹⁴ Wilbert D Kolkman, 'Testamentary Formalities in the Netherlands', in Kenneth G C Reid, Marius J de Waal, and Reinhard Zimmermann (eds), *Comparative Succession Law* vol I: *Testamentary Formalities* (2011) 143.

¹⁵ Roes (n 7) 120; de Blécourt (n 10) 352.

¹⁶ Roes (n 7) 124.

development of the two regulatory systems is different: whereas systems deriving from Roman law were based on testamentary freedom and the *portio legitima* later reduced this freedom,¹⁷ the rules that applied in the Netherlands were based on Germanic testamentary prohibitions which were gradually eased.

After the reception of Roman law, the *portio legitima* – forced heirship – also came into force in the Dutch regions, almost entirely as established by Justinian in Novels 18 and 115.¹⁸ At the time of the Dutch Republic, which came into being after the Middle Ages and ended around the time of the first codifications, this *legitime* was standard.¹⁹ It accrued to descendants and, if there were none, to ascendants.²⁰ This system was entirely of Roman law origin.²¹ However, at the time of the Republic many restrictions on testamentary freedom deriving from Germanic law were also still in place. An example is a prohibition on bequeathing land, whether inherited or not.²² In addition, in many regions the *réserve* was still present.²³

2. French era and the Civil Code of 1838

In the early nineteenth century, two French codes of law were in force successively: the Napoleonic code for Holland – *Wetboek Napoleon, ingerigt voor het Koninkrijk Holland* (1809–1811) – and the French *Code civil* (1811–1838). In this period, Dutch inheritance law was very firmly based on the French system.

The various trial versions of legislation that preceded the Dutch Civil Code of 1838 (henceforth referred to as OBW 1838, that is, *Oud Burgerlijk Wetboek* (Old Civil Code)), adhered closely to Roman law.²⁴ However, the OBW 1838 took its system of forced heirship from the French *Code civil*, with a few alterations.²⁵ The main difference was that in Dutch law the compulsory share was defined for each heir separately, whereas in French law it was defined negatively for all the forced heirs jointly.²⁶ The French *réserve* meant that a person did not have the power to

¹⁷ See ch 1 above at 6–10.

¹⁸ See ch 1 above at 13–16; de Blécourt (n 10) 362.

¹⁹ Roes (n 7) 124.

²⁰ For an example, see Inl II 18, paras 5–18 of Hugo de Groot, *Inleidinge tot de Hollandsche rechtsgeleerdheid* vol II (F Dovring, H F W D Fischer, and E M Meijers (eds), 1965) 96–100.

²¹ H W M van Helten, *Bijdrage tot de geschiedenis en critiek van het erfrecht ab intestato* (1902) 35.

²² de Blécourt (n 10) 329–30.

²³ de Blécourt (n 10) 330.

²⁴ For the 1820 Draft in particular, see Meijers (n 6) 147.

²⁵ G Diephuis, *Het Nederlandsch Burgerlijk Recht VIII* (Groningen, 1859) 131; H J Hamaker, 'De aard der legitieme' (1902) 1700–3 WPNR 353; H G Bakker, *Het rechtskarakter der legitieme portie* (1904) 12 ff; U O Stikker, *De aard van de legitieme portie* (Groningen, 1890) 14 ff.

²⁶ J C Voorduin, *Geschiedenis en beginselen der Nederlandse wetboeken, Burgerlijk Wetboek, IV, art. 877–1268* (Utrecht, 1838) 98.

bequeath part of any land that he or she had inherited.²⁷ Instead, the next of kin of this person inherited this property as forced heirs. The goal of this rule was to keep the property in the family.²⁸ The difference becomes evident in the event that one of these heirs rejected the inheritance: in the French system the entire *réserve* then went to the other forced heirs, whereas in the Dutch system the rejection did not affect the rights of the other forced heirs, since by law each of them had a separate statutory share.²⁹

The various codifications of the nineteenth and twentieth centuries assigned no compulsory claim to the surviving spouse. Partially this may be explained by the generosity of the default matrimonial property system: a universal community of property.³⁰ But when – due to a marital agreement – the spouse received nothing under matrimonial property law, succession law would not come to the rescue, whether in the form of a statutory share or a *réserve*, or in the form of a claim for the provision of needs.

3. The Civil Code of 2003

This changed with the arrival of the Civil Code of 2003 (henceforth referred to as BW, that is, *Burgerlijk Wetboek*), which brought about three major alterations relating to compulsory succession law. First, to the extent that the surviving spouse is in need of support, he or she can have a right of usufruct in respect of the family dwelling and, less easily, on the other assets of the estate. Secondly, a minor child is entitled to claim a lump sum to pay the costs of care, upbringing, maintenance, and education. Both the usufruct and the lump sums are part of a new category of claims known as ‘other statutory entitlements’. The term ‘other’ means that they must be seen in the light of their relationship with the *legitime*.³¹

However, the most fundamental change was the third, which is a change to the juridical nature of the *legitime*. Instead of forced heirship, a child now receives a claim in money. This change signified a switch to the German system from the French system on which the 1838 OBW had been based.³²

²⁷ What was known as the *quatre quints*: see Meijers (n 6) 145. For the difference between the *Code civil* and the OBW, see also C Asser, *Het Nederlandsch Burgerlijk Wetboek, vergeleken met het Wetboek Napoleon* (The Hague, 1838) 328; P L Nève, ‘De legitieme portie in 1995’, in *De legitieme portie; Ars Notariatus LXIX* (1995) 8.

²⁸ Meijers (n 6) 145.

²⁹ Art 961 OBW.

³⁰ After 180 years, this default regime was replaced by the limited community of property on 1 January 2018.

³¹ In an earlier Bill for Book 4 BW the section containing the other statutory entitlements followed the section dealing with the *legitime*.

³² See ch 4 above at 84; ch 9 above at 281–82.

The most striking feature of the new legislation introduced in 2003 is that two different systems now operate simultaneously: the fixed monetary *legitime* and, in addition, other statutory entitlements which are mostly needs-based. These will be discussed in sections IV and V respectively.

III. Purpose and justification

Numerous arguments have been put forward in favour of the *legitime*. They include the force of tradition, the concept of propriety, and equal treatment of descendants.³³ Another point made is that the heir's level of wealth can be seen as a safeguard for the family's standing.³⁴ The distribution of wealth means a child is less likely to have to rely on public funds.

The aspect of care is also often highlighted.³⁵ This is relevant in connection with the other statutory entitlements, which are allocated on the basis of need. However, the *legitime* is a fixed claim and has no connection with the needs of the person entitled to it. It can be argued that such serious curtailment of an individual's freedom of testation requires more justification than providing for people who may have no need of such provision.

The next argument is a moral one. All modern legal systems in Europe attempt to balance the moral precept of family solidarity with the principle of freedom of testation.³⁶ This moral obligation has also been one of the main pillars of the *legitime* in the Netherlands. As Suijling puts it, individuals who are related in the direct line should stand by one another: this is required by 'popular belief'.³⁷ The family bond should not be negated by a will.

However, this moral argument seems to be wearing a little thin. Social and demographic developments over the past centuries, more specifically the increase in prosperity and life expectancy, have changed family ties fundamentally, particularly as far as property is concerned. Today, by the time parents die, the role of the family as a caring, supportive unit has faded into the background. The average life expectancy in Europe is over eighty years. When a child inherits, he or she is likely to be around fifty or sixty. This development puts a different perspective on the transfer of assets from one generation to the next – which is the essence of the law of succession.

On the other hand, these demographic trends can also serve as an increasingly powerful argument in favour of the *legitime*: compulsory succession law offers the

³³ In the first place, see A Pitlo's formidable discussion in *Preadvies BCN* (1954); however, to a large extent it is outdated. See also E A A Luijten, 'De legitieme portie; een waardevol rechtsgoed', in *Op recht* (1996) 175 ff; T J Mellema-Kranenburg, *De legitieme portie* (1988) 144–5; H M Sasse, 'De legitieme van afstammelingen' (1995) 6171 *WPNR* 168–9.

³⁴ J P Suijling and H F R Dubois, *Inleiding tot het burgerlijk recht, 6e stuk (erfrecht)* (1931) 448.

³⁵ For instance, in the German landmark case BVerfG, 19 April 2005; see ch 9 above at 296–99.

³⁶ See eg ch 22 below at 654 ff.

³⁷ Suijling and Dubois (n 34) 448

elderly protection against financial abuse, since they cannot dispose of their whole estate by will. However, a more appropriate solution would be to tackle the heart of this problem by creating robust regulations regarding undue influence.

Langbein says that in the last few decades of the previous century, particularly in the United States, inheritance law underwent drastic changes in the large group of middle-income earners. He identifies two main causes. The first is the rise of human capital: the fact that parents pay the considerable cost of their children's education – in the broad sense – is a significant development in the transmission of family wealth. The second is the rise of pensions: old-age provisions result in smaller estates.³⁸ Although Langbein's reasoning does not fit the Dutch situation quite so well because of the social education system in the Netherlands, it does apply to a certain extent: there is not such a need as in the past for succession law, and certainly not for compulsory succession law.

In addition, various arrangements which affect the inheritance (sometimes referred to as 'will substitutes') are becoming more influential, such as life insurance, *inter vivos* gifts, powers of attorney, joint bank accounts, and so on. Moreover, the position of the surviving spouse has risen in an unprecedented way. Over the past 150 years the spouse, initially an outsider, has become the key player in most succession systems, at the expense of the children.³⁹ All these developments have undermined the *legitime's* *raison d'être*.

In the nineteenth century and the first half of the twentieth, the *legitime* had few opponents. In 1884 the Dutch Lawyers' Association declared that it was unanimously in favour of keeping the *legitime*.⁴⁰ The Association of Civil Law Notaries did the same in 1920.⁴¹ Today the majority of authors argue – in strong or less strong terms – in favour of abolishing the *legitime*.⁴² Their pivotal argument relates to individual freedom: they believe the reasons for the *legitime's* existence do not sufficiently justify depriving individuals of their power to dispose of their property as they wish. Other arguments put forward by opponents of the *legitime* have to do with simplifying inheritance law, preventing the fragmentation of estates, the fact that family ties are now looser, and the rigidity of the *legitime*.⁴³

³⁸ John H Langbein, 'The Twentieth-Century Revolution in Family Wealth Transmission', *University of Chicago Law Occasional Paper* 25 (1989) 14.

³⁹ cf Kenneth G C Reid, Marius J de Waal, and Reinhard Zimmermann, 'Intestate Succession in Historical and Comparative Perspective', in Reid, De Waal, and Zimmermann (n 4) 489.

⁴⁰ Meijers (n 6) 157.

⁴¹ Meijers (n 6) 158.

⁴² See eg P W van der Ploeg, 'Het nieuwe BW: Het erfrecht bij versterf en de legitieme portie van de langstlevende echtgenoot' (1953) 4295 *WPNR* 233; W C L van der Grinten, 'De legitieme; de crux van het erfrecht', in *Recht zo die gaat* (1976) 31–41; G H A Schut, 'Legitieme portie: zinnvolle bescherming of ouderwetse bevoogding?' (1988) 3 *Rechtsgeleerd Magazijn Themis* 105; M J A van Mourik, 'De legitieme portie: weg ermee!' (1991) 6018 *WPNR* 621–5; S Perrick, 'Testeervrijheid en de zorg voor nabestaanden' (1994) 31 *TPR* 1885–6; L C A Verstappen, 'De legitieme portie', in J W Janse and F R Salomons (eds), *Langst leve het nieuwe erfrecht*, 58–9.

⁴³ For a clear overview, see A L P G Verbeke, 'De legitieme ontbloeit of dood? Leve de echtgenoot!' (2000) 37 *TPR* 106 ff; M J A van Mourik, *Erfrecht* (2002) 125 ff. See also Gr van der Burght, E W J Ebben, and M R Kremer (eds), *Parlementaire Geschiedenis van het Burgerlijk Wetboek, Boek 4, Erfrecht* (2003) ('Parliamentary History') 341 ff and 1803 ff.

In 1997, during the preparation of the new inheritance law that eventually came into force in 2003, the Minister of Justice concluded that abolition of the *legitime* did not have the broad support required for such a radical step.⁴⁴ However, many believed that it would not have been a bad idea to consign this dinosaur – as Nève put it – to the paleontological zoo.⁴⁵ The other statutory entitlements, based on actual needs, are better suited to the present time.

IV. *Legitime*: from forced heirship to compulsory portion

1. The Civil Code of 1838–2002

(a) The nature of the 1838 *legitime*

The Dutch Civil Code of 1838, drawing on French law – which was heavily influenced by Roman law – stated that the *legitime* was ‘a portion of the assets which is assigned to the statutory heirs in the direct line of descent and which the deceased was not permitted to dispose of freely, neither by donation while alive nor by testamentary disposition.’⁴⁶

The legal character of this robust *legitime* can be summarized in three rules. First, the claimant had to receive his or her share as an *heir*.⁴⁷ However, this did not mean that the forced heir was entitled to a proportionate share of all property forming part of the notional estate of the deceased.⁴⁸ Forced heirship meant a right to property to the value of a proportionate share of the total value of the estate.⁴⁹

Secondly, the forced heir had the power to declare void any dispositions that reduced his or her entitlement. If the forced heir acquiesced in disinheritance or some other disadvantage, then the testator’s disposition became valid and incontestable. However, if the forced heir succeeded in having a disposition declared void, then the testator’s disposition regarding the property in question was invalid and the forced heir, as an heir under intestacy rules, could claim that property.⁵⁰ The legislature’s goal of assigning a certain share of an estate to the forced heir was thus attained by curtailing the freedom of testators to give or bequeath as they wished.⁵¹

⁴⁴ Parliamentary History (n 43) 1812. See also W Heuff, ‘Afschaffing van de legitieme portie van ascendenten’ (1995) 6206 WPNR 873.

⁴⁵ Nève (n 27) 18.

⁴⁶ Art 960 OBW.

⁴⁷ For a more detailed discussion, see Bakker (n 25) 11 ff; P W van der Ploeg, *Mr. C. Asser’s Handleiding tot de beoefening van het Nederlands burgerlijk recht: Erfrecht* (1980) 147. For the term ‘heir’, see n 5 above.

⁴⁸ The notional estate consists of the assets of the estate minus certain debts of the estate plus certain gifts; in short, *relictum plus donatum*: see ch 5 above at 119–21.

⁴⁹ Van der Ploeg (n 47) 165.

⁵⁰ Meijers (n 6) 150; HR 4 December 1885, W 5246.

⁵¹ Meijers (n 6) 152.

Thirdly, the testator was not permitted to make dispositions relating to that part of the estate that constituted the statutory share if they disadvantaged the forced heir in any way.⁵² One consequence of this was that the forced heir did not have to put up with receiving a mere legacy,⁵³ even if the value of the legacy was much higher than that of the *legitime*. Another consequence was the rule that the forced heir had to receive his or her share free and unencumbered: *legitima non recipit onus neque gravamen*. As late as 1914, the Dutch Supreme Court found that such encumbrances were invalid by law.⁵⁴ For instance, the forced heir did not have to accept that a regime of administration, a *fideicommissum*, or an executorship was associated with his or her share in the inheritance.

All provisions of the OBW 1838 in relation to succession were overshadowed by the *legitime*. Before a civil law notary could settle an estate or even issue a certificate of inheritance, the position of the forced heirs had to be clear. The *legitime* was, rightly, regarded as the crux of inheritance law.⁵⁵

(b) Who is entitled to the *legitime*?

The 1838 OBW allocated a *legitime* to descendants of the deceased, and, if there were no descendants, to blood-relatives in the ascending line.⁵⁶ In 1996, the *legitime* in the ascending line was abolished.⁵⁷ Pitlo had argued in favour of dropping this group of forced heirs as early as in 1954, reasoning that the law should not include any forced heirs who would rank after intestate heirs under intestacy law: parents rank behind the spouse, grandparents rank behind siblings, but neither the spouse nor the siblings are entitled to a *legitime*.⁵⁸ The Committee on Inheritance Law agreed with him. In its report of 1960, it stated that 'at the present time there is no basis' for a *legitime* for the parents in the estate of a child.⁵⁹ However, the New Civil Code was more reluctant to deviate from the old inheritance law on this point. Meijers's draft of 1954 included the parents and also the spouse as forced heirs.⁶⁰ This conformed to German law. However, around the end of the last century there was such a degree of consensus about abolishing the *legitime* for ascendants that the legislature did not wait for the introduction of the new inheritance law in 2003.

⁵² cf Art 960 OBW.

⁵³ Under Dutch law, a legacy or bequest is a claim against the account of the joint heirs. A legatee receives under particular title; no universal succession takes place.

⁵⁴ cf HR 22 February 1901, W 7575; HR 4 December 1914, NJ 1915 231.

⁵⁵ Van der Grinten (n 42) 31.

⁵⁶ Arts 961 and 962 OBW.

⁵⁷ See Heuff (n 44) 873.

⁵⁸ Pitlo (n 33) 65. See also Van der Ploeg (n 47) 162.

⁵⁹ Committee on Inheritance Law, *Rapport I: Erfrecht* (1960) 30.

⁶⁰ See question 38 of the question procedure, Parliamentary History (n 43) XXI ff and 368. Meijers, the founding father of the current Civil Code, finished his complete draft in 1954, of which the inheritance law part did not enter into force until 2003.

(c) Calculations

Two variables were involved in calculating the size of the *legitime* of 1838: the fraction, and the notional estate from which the forced heir could claim his or her share.

The fraction depended on the number of children the deceased had left behind: if there was one child, the share was one-half; if there were two, it was two-thirds; and if there were three or more, it was three-quarters.⁶¹ In this respect the 1838 OBW followed the French *Code civil*.⁶² In certain countries, including Italy, this fluctuating forced share still exists today.⁶³

Because the intestate share of a child is smaller if the deceased is survived by a spouse, the *legitime* is also affected by the presence of a spouse, even though the latter is not a forced heir. Under the law of 2003 the impact is even greater, since the *legitime* is often not immediately due and payable if it would have to be paid by the spouse.⁶⁴

Three elements are important in the calculation of the deceased's notional estate: the assets in the estate, any *inter vivos* gifts made by the deceased, and any debts of the deceased that fall to be deducted.⁶⁵ The addition of *all* gifts to the notional estate is derived from French law.⁶⁶ Roman law took a more limited approach: only gifts which were to the disadvantage of the forced heir were eligible to be annulled. The Roman approach had been adopted in old Dutch law.⁶⁷ The fact that the 1838 OBW included all gifts had to do with the principle that a person should not dispose of property, whether by will or by gift, in a way that would disadvantage the forced heir. The property that had been given away was therefore valued according to the state it was in when it was given away but according to its value, in that state, at the time when the deceased died.⁶⁸ This was in line with the 'reconstruction idea': the forced heir had to consider how much his or her inherited share would have been worth if the property given away had remained in the deceased's patrimony.⁶⁹

Experience was to show that including all gifts went too far – and, apart from that, was not really practically feasible.⁷⁰ This was one of the reasons the inheritance law of 2003 adopted a more workable system.

⁶¹ Art 961 OBW.

⁶² Van der Ploeg (n 47) 145; ch 4 above at 89.

⁶³ Alexandra Braun, 'Testamentary Freedom and its Restrictions in French and Italian Law: Trends and Shifts', in Reinhard Zimmermann (ed), *Freedom of Testation/Testierfreiheit* (2012) 62 ff; ch 5 above at 117.

⁶⁴ See at the end of IV.2(c) below.

⁶⁵ For a further discussion on the role of gifts, see VI.2 below.

⁶⁶ See Art 298 *Coutume de Paris* 1580, and Art 34 *Ordonnance* 1731. cf J C van Oven, 'Opmerkingen over schenking en legitime portie' (1939) 3622 *WPNR* 237.

⁶⁷ Johannes Voet, *Commentarius ad Pandectas* (Paris edn, 1826, transl Percival Gane as *The Selective Voet: Being the Commentary on the Pandects*, 1956) 39, 5, 36; De Groot (n 20) 3, 2, 19.

⁶⁸ Art 968 OBW.

⁶⁹ Van der Ploeg (n 47) 173.

⁷⁰ See Parliamentary History (n 43) ad 4.3.3.4.

2. The Civil Code of 2003

(a) The nature of the 2003 *legitime*

Today, the *legitime* is that part of the value of the deceased's estate that a descendant may claim regardless of any gifts or testamentary dispositions made by the deceased.⁷¹ This rule not only defines the current *legitime*, it also reveals the essential difference between the old law and the new: the *legitime* is no longer an entitlement to a share of the deceased's estate but to a share of the value of that estate. Thus the term 'forced heir' is no longer suitable. The present-day *legitime* does not actually undermine the testator's dispositions: they cannot be declared void by a person claiming a compulsory portion. However, he or she can undermine the value of the dispositions by way of abatement or 'claw-back'.

It is known that Meijers frequently based arguments for his drafts of the new BW on comparative law. The current Dutch inheritance law includes numerous features of German law, especially as regards the *legitime*. A comparison of § 2303(1) BGB with Article 4:63 BW shows that the German and Dutch compulsory portions are almost identical: a monetary claim amounting to one-half of the estate. German law was not the only model used by Meijers.⁷² Nevertheless, the provisions regulating the *legitime* in the German BGB, which date from 1900,⁷³ can be seen as forerunners of many important parts of the legislation of 2003 regarding the Dutch *legitime*.

Although the difference between a claim to property and a monetary claim is fundamental, its importance should not be overestimated. This is so, in the first place, because persons entitled to a compulsory portion are often less concerned about what they receive than that they receive something in spite of having been wholly or partially excluded from the will. In both the old and the new system, a child who has missed out has the right to protest and will be keen to assert that right.

Moreover, it is a misconception to think that persons entitled to a compulsory portion can simply submit a claim and sit back and wait until they are paid in full. Disinherited descendants are entitled to inspect and receive copies of all documents they need in order to calculate their compulsory portion. The heirs and executor must make these documents available to them upon request and must provide them with any information they need for the calculation.⁷⁴ Even though the person entitled to a compulsory portion may not be a beneficiary under the will, he or she has the right to look over the heirs' shoulders. Often disputes then arise about the value of items in the estate;⁷⁵ while these items do not belong to the

⁷¹ See Art 4:63(1) BW.

⁷² cf E O H P Florijn, *Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek* (1994) 113.

⁷³ For German law, see ch 9 above.

⁷⁴ See VI.1 below on Art 4:78 BW.

⁷⁵ See HR 23 December 2016, ECLI:NL:HR:2016:2991; W Burgerhart, *Waarde en Erfrecht. Beschouwingen over de waarde van een onderneming in het erfrecht en enige verwante wetten* (2008).

person entitled to a compulsory portion, they are part of the notional estate in respect of which the statutory share must be determined.

Another factor is that the descendant may also be a beneficiary under the will. If so, then, in principle, the value of the property bequeathed is deducted from the *legitime* the descendant can claim.⁷⁶

(b) Who is entitled to the *legitime*?

According to Article 4:63(2) BW, those entitled to a forced share in the deceased's estate are the descendants of the deceased, either on their own account or by representation of individuals who have predeceased or have forfeited their right to inherit. In broad terms, the deceased's children are entitled to a forced share; if a child predeceases the deceased or forfeits the right to inherit, then that child's children (ie grandchildren of the deceased) takes the child's place.⁷⁷

Neither the deceased's spouse nor a parent of the deceased is entitled to a *legitime*. This is a fairly limited circle of persons entitled to a compulsory portion; in German law, for example, the circle is wider.⁷⁸ The limited number can partly be explained by the existence of the other statutory entitlements, described below,⁷⁹ which enable others in addition to descendants to make a claim against the estate.

(c) Calculations

This is not the place to discuss the exact method of calculating the *legitime*, but in broad outline it is done as follows. First, the notional estate has to be determined.⁸⁰ The persons with a claim to a compulsory portion are jointly and proportionately entitled to the value of half of this notional estate. If one does not claim his or her portion, the value of that unclaimed *legitime* is not added to the shares of the others, as would be the case with a *réserve*.

As regards debts, it is striking that the 2003 Civil Code indicates exactly what is to be deducted from the notional estate: any debts of the deceased that are not extinguished upon death, funeral costs, the costs of settling the estate, and the lump sums payable in respect of the other statutory entitlements.⁸¹ These debts can be regarded as ranking above the compulsory portion. According to the letter of the law, the costs of executorship are not a liability item in the calculation of the notional estate. However, because as a rule the executor does useful work in settling the estate – work that also benefits those entitled to a compulsory portion – there is

⁷⁶ See Art 4:72 ff BW; IV.2(c) below.

⁷⁷ For a distressing example, see Amsterdam Court of Appeal, 15 August 2002, *NJ* 2003 53. In this case the grandson of the deceased had murdered his own parent. The court deemed the claim to a forced share in the estate of the grandparent to be contrary to reasonableness and fairness.

⁷⁸ § 2303(2) BGB. See ch 9 above at 277–79.

⁷⁹ See V below.

⁸⁰ cf Art 4:65 ff BW; also n 48 above.

⁸¹ cf W D Kolkman, *Schulden der nalatenschap* (2006) 109 ff, and Art 4:65 in conjunction with Art 4:7 BW.

a lot to be said for adding the executor's costs to the costs borne by these persons.⁸² In addition, the reason why the executor's costs are not included seems to derive from the old inheritance law, under which the forced heir did not have to accept an executor.⁸³ Under the current law the position is different.⁸⁴

The reference date for the assessment of the value of the *legitime* is the time when the succession opens, in other words the time of the death.⁸⁵ This implies that any later fluctuations in value do not affect the compulsory portion. Mellema, however, argues that it was never the legislature's intention for the person entitled to a compulsory portion to receive a relatively large or small amount in comparison with the heirs as a result of significant fluctuations in value after the opening of the succession.⁸⁶ She says that the persons entitled to a compulsory portion have rights derived from the heirs and that there should be a certain relationship between the compulsory portion and the rights of the heirs. Mellema's view is that in certain circumstances the requirements of reasonableness and fairness mean that the person entitled to a compulsory portion should receive more (if the assets in the estate have increased in value since the deceased's death) or less (if the value has decreased) than the 'fixed' *legitime*. It is questionable whether this reasoning really corresponds with the legislature's aim and the nature of the new *legitime* (a claim to be determined in an estate in which the person entitled to a compulsory portion – in his or her capacity as such – has no further involvement).⁸⁷ It cannot be denied that criteria of reasonableness and fairness may sometimes play a role between the persons entitled to a compulsory portion and the heirs, that is between creditors and debtors, as the Arnhem Leeuwarden Court of Appeal also found in 2015.⁸⁸ However, it is doubtful whether fluctuations in value after the opening of the succession are likely to justify a successful appeal to the hardship clause of reasonableness and fairness.

The value of anything else a descendant receives pursuant to inheritance law is deducted from the descendant's compulsory portion. This is so even when the descendant renounces the deceased's estate or bequest, unless the assets were left subject to a condition or fiduciary administration, and the renunciation takes place within three months after the death of the deceased.⁸⁹ There are a number of

⁸² However, case law shows no such leniency: see eg 's-Hertogenbosch Court of Appeal, 19 February 2013, ECLI:NL:GHSHE:2013:BZ1949; Arnhem-Leeuwarden Court of Appeal, 8 December 2015, ECLI:NL:GHARL:2015:9251.

⁸³ See IV.1(a) above; Van der Ploeg (n 47) 175–6.

⁸⁴ Committee on Inheritance Law, 'Eindverslag Commissie Erfrecht KNB inzake Boek 4 BW (I)' (2010) 6866 WPNR 879.

⁸⁵ Art 4:6 BW.

⁸⁶ T J Mellema-Kranenburg, 'De invloed van de recessie op de legitieme portie' (2012) 6956 WPNR 961; *idem*, 'Waardering en de legitieme portie: de consequenties van de verschuiving van een goederenrechtelijke aanspraak naar een verbintenissenrechtelijke aanspraak' (2016) 2 *Tijdschrift Erfrecht* 21.

⁸⁷ According to W D Kolkman, 'Kroniek Erfrecht' (2016) 30 *FJR* 124, 125.

⁸⁸ Arnhem-Leeuwarden Court of Appeal, 8 December 2015, ECLI:NL:GHARL:2015:9251.

⁸⁹ See more elaborately Art 4:71-3 BW.

exceptions to this technically complicated rule.⁹⁰ One of these is set forth in Article 4:74 BW, which states that the value of a bequest payable in instalments will also, in the case of renunciation, be deducted from the compulsory portion if the will provides that, without such a disposition, the continuation of a business of the deceased would be in danger.⁹¹ Since 2003, inheritance law has given a few interests priority over those of the persons entitled to a compulsory portion. In other words, in certain precisely defined cases, freedom of testation has priority over mandatory claims. This is the case with business succession,⁹² stepchildren,⁹³ and – most importantly – the surviving spouse. In general, the claim will only become exigible after the spouse's death.⁹⁴

V. Other statutory entitlements

1. Introduction

As mentioned above, the Civil Code of 2003 introduced the 'other statutory entitlements' in addition to the compulsory portion. This new category of provisions contains the surviving spouse's right of usufruct in case of need, as well as a child's claim to certain lump sums. Finally, a right of continued residence and a right to take over business assets were introduced. These are available to both the spouse and the children.

These new statutory entitlements differ fundamentally from the *legitime*. The *legitime* – both the old and the new – consists of a fixed share, regardless of the circumstances of the case. The new statutory entitlements are based on need and therefore have a far less predictable outcome. The juridical nature of these entitlements resembles the family provision claims found in the common law systems.⁹⁵ In this chapter the new Dutch entitlements will therefore also be referred to as 'family provision'.

2. Spouse: usufruct for the provision of support

In conformity with developments in intestate succession law over the last two centuries, the spouse has also acquired a more important position in the field of family

⁹⁰ The person entitled to a compulsory portion can only renounce 'with impunity' if he or she complies strictly with Arts 4:72 ff BW. If the person fails to do so, a deduction will be the result.

⁹¹ A similar provision exists in Spain: see ch 6 above at 169.

⁹² See for example the takeover right of Art 4:38 BW, discussed in V.6 below, and also Art 4:74 BW.

⁹³ Arts 4:27 and 4:91 BW (in short, they are protected only to the extent as if a child of the deceased).

⁹⁴ This follows from the rules of intestate succession (Art 4:81 BW) or from a testamentary clause (Art 4:82 BW).

⁹⁵ See n 3 above.

provision. The nature of the spousal claim was discussed extensively in Parliament at the time of the 2003 reforms.⁹⁶ A compulsory portion, a statutory legacy, and a lump sum for the spouse all made it to the proposed Bill at some point in time, but all were ultimately rejected. The main reasons for this rejection were uncertainty as to the amount to be awarded for the provision of need, and the difficulty the heirs would encounter having to pay a large sum of money out of the estate.⁹⁷

The eventual solution was to give the spouse a right of usufruct. The advantage is that a right to use the home, household effects, and other assets of the estate is exactly what a surviving spouse generally needs. Moreover, a usufruct requires a less detailed assessment of the circumstances of the case compared to when an exact sum of money must be calculated.⁹⁸

The law of 2003 provides the spouse with a right of usufruct to the extent that he or she is in need of support. That last qualification is crucial. In 2007, the Dutch Supreme Court made clear that these entitlements are no more than a safety net for the surviving spouse, resulting in an 'appropriate level of support' that is comparable with spousal support after divorce.⁹⁹ The pivotal question is how far this provision of support goes: what is an appropriate level of support and what circumstances are taken into consideration to determine this? In other words: what decline in the surviving spouse's living standard justifies an infringement of the freedom of testation of the first spouse to die? Article 4:30(1) BW makes clear that the court is not restricted when ascertaining the need for support: all relevant circumstances must be taken into account. Article 4:33(5) BW provides a non-exhaustive list of those circumstances. The resemblance to section 2 of the Inheritance (Provision for Family and Dependents) Act 1975 in England and Wales is striking.¹⁰⁰ The principle of structured discretion¹⁰¹ has thus quietly entered the Dutch succession law.

Another question of practical relevance, touched on in the case mentioned above, was the issue of burden of proof. Must the surviving spouse prove his or her need for support, or rather must the heir show that there is no such need? Drawing on the official explanatory memorandum, the Supreme Court considered the latter to be the case in relation to a usufruct of the family dwelling and the household effects, but in relation to all other assets of the estate the former was the case.¹⁰² As a result of this sharp difference in the burden of proof, the usufruct of the dwelling and its contents will, as a rule, be claimed successfully. The other assets, in contrast, are usually a bridge too far for the spouse.

⁹⁶ Parliamentary History (n 43) 342 ff, 535 ff, and 1657 ff.

⁹⁷ Parliamentary History (n 43) 1673.

⁹⁸ Parliamentary History (n 43) 1673.

⁹⁹ See HR 8 June 2007, *NJ* 2008 220.

¹⁰⁰ See ch 13 below at 392–95.

¹⁰¹ The terminology of Elizabeth Cooke, 'Testamentary Freedom: a Study of Choice and Obligation in England and Wales', in Zimmermann (n 63) 133.

¹⁰² HR 8 June 2007, *NJ* 2008 220.

The provision for support can only be claimed by (married) spouses. Despite pleas for a more generous treatment of unmarried cohabitants, their only 'other statutory entitlement' is the right of continued residence.¹⁰³

3. Children: lump sum for the provision of support

A child of the deceased not only has a right to a compulsory portion but may also be entitled to a lump sum provided that he or she has not reached the age of twenty-one.¹⁰⁴ The lump sum is to cover the costs of care, upbringing, maintenance, and education.

The rationale behind the lump sum is the responsibility of parents to provide maintenance for their children. This responsibility cannot be evaded even after death; it outweighs the parent's freedom of testation.¹⁰⁵ However, two conditions must be met for a successful claim. The first resembles the requirement for the spouse's usufruct: a lump sum can only be requested to the extent that it is needed by the claimant.¹⁰⁶ Surprisingly, the explanatory memorandum does not comment on the extent to which a child's own financial resources play a role. Arguably, a child is not required to use up all his or her own assets first.¹⁰⁷ The role, and ability to pay, of the surviving parent (if there is one) remain unclear too.¹⁰⁸ The explanatory memorandum also fails to explain why the other individuals entitled to maintenance in Articles 1:392 ff BW, namely the 'adults who need support', are not included among those entitled to a lump sum under inheritance law.¹⁰⁹

Secondly, the lump sum is disallowed if the spouse or an heir of the deceased is responsible for the child's care and upbringing.¹¹⁰ The reasoning is that if such a person exists, the child's needs are already provided for.¹¹¹ The criticism of this limitation is obvious: the presence of a spouse or heir enables testators to evade their responsibility to their children. In addition, the rule can lead to arbitrary results. For example, why should the exception referred to in Article 4:35(2) BW be restricted to a 'spouse' or 'heir' of the deceased? Would it not be better to replace

¹⁰³ See V.5 below; F W J M Schols, *Samenlevers-erfrecht? Waar een wil is, is een wet* (2014) 21.

¹⁰⁴ Art 4:35 BW. The age limit for care and upbringing is eighteen, and for maintenance and education twenty-one.

¹⁰⁵ See J H M ter Haar, *Minderjarigen en (de zorg voor hun) vermogen* (2013) 157 ff.

¹⁰⁶ Art 4:35(1) BW.

¹⁰⁷ J H M ter Haar, 'De som ineens als versterkte legitieme portie' (2009) 6788 *WPNR* 180.

¹⁰⁸ Arnhem-Leeuwarden Court of Appeal, 1 December 2015, ECLI:NL:GHARL:2015:9090, takes the financial position of the surviving parent into account.

¹⁰⁹ E A A Luijten and W R Meijer, *Huwelijksgoederen- en erfrecht, II: Erfrecht* (2008) 660.

¹¹⁰ Art 4:35(2) BW.

¹¹¹ Committee on Inheritance Law, 'Eindverslag Commissie Erfrecht KNB inzake Boek 4 BW (I)' (2010) 6867 *WPNR* 922.

the word 'spouse' with 'any person liable to pay maintenance' and the word 'heir' with 'any person acquiring under inheritance law'?¹¹²

Although the combined lump sums may not exceed one-half of the value of the estate, they are highest in rank of all compulsory claims and family provisions.¹¹³ Both the spousal usufruct and the children's *legitime* yield to the lump sums. The reason for this priority is that it would be inconsistent with the Dutch legal system for the surviving spouse to be well provided for while the child, for whom the deceased was financially responsible, does not receive the resources that can (if necessary) be used to provide maintenance until the age of twenty-one is attained.¹¹⁴ Moreover, the lump sum is always due and payable after six months of the opening of the estate.¹¹⁵ For the sake of simplicity, gifts by the deceased are not taken into account in calculating the notional estate for the purpose of the lump sums.¹¹⁶

4. Children: lump sum as deferred wages

According to Article 4:36(1) BW, a child of the deceased who, having attained the age of majority, performed work in the deceased's household or in the conduct of the deceased's profession or business without having received a fitting remuneration for such work, may claim a lump sum constituting fair compensation.¹¹⁷

In practice, courts are cautious in applying Article 4:36 BW.¹¹⁸ They realize that these are safety-net provisions. When someone claims a lump sum, criteria are put forward that are not always to be found in the law. It seems that the work in question has to have been long-term work in the deceased's professional practice, business, or household. Another criterion, derived from the discussion in Parliament, is that this work must be of 'economic value'.¹¹⁹ The explanatory note to Article 4:36 BW further states that, in view of the familial relationship, 'factors of fairness' must be taken into account.¹²⁰ Once again, this seems to invite an approach comparable to common law systems of family provision. This indeed is a point of criticism of the Article: the parties involved do not know exactly where they stand beforehand.¹²¹ What will a fair compensation amount to?

¹¹² Ibid.

¹¹³ See Art 4:37(4) BW.

¹¹⁴ According to J H M ter Haar, 'De kantonrechter kiest voor een ruime uitleg van artikel 4:35 BW' (2010) 6 *Tijdschrift Erfrecht* 112.

¹¹⁵ Art 4:37(2) BW.

¹¹⁶ Parliamentary History (n 43) 1850–1.

¹¹⁷ The same applies to a stepchild, a foster child, a child-in-law, or a grandchild.

¹¹⁸ See eg The Hague Court of Appeal, 1 August 2007, RN 2007 104; 's-Hertogenbosch Court of Appeal, 22 July 2008, RN 2008 107; The Hague Court of Appeal, 16 March 2011, RN 2011 73.

¹¹⁹ Parliamentary History (n 43) 1359.

¹²⁰ Parliamentary History (n 43) 1750–1.

¹²¹ Committee on Inheritance Law (n 84) 886.

5. Spouse: right of continued residence

The right of continued residence in Article 4:28 BW enables the spouse¹²² to make use of the home and household effects for a period of six months. There is a long history behind this provision. In the past, a variety of legal concepts such as ‘peace and quiet in the house of mourning’ or ‘continuation of the community’ made it possible for the surviving spouse to remain in the marital home, at the expense of the state, for a certain period of time – usually a month or six weeks – after the other spouse’s death.¹²³

However, the striking feature of the current rule is that Article 4:28 BW not only provides shelter for the surviving spouse, but also for those who shared a household with the deceased on a long-term basis. This is in keeping with Article 7:268(2) BW regarding tenancy rights, which enables a person who shared a household with a deceased tenant on a long-term basis to continue the tenancy agreement for six months after the tenant’s death.¹²⁴ German law also draws a wider circle than the spouse alone: by virtue of § 1969 BGB, the ‘family members of the deceased who belonged to the deceased’s household at the time of his death and were supported by him’ are entitled to a ‘Dreißigster’: this means that the family members must be supported for thirty days at the expense of the estate and that, during that period, they may use the home and the household effects. The Dutch right to continued residence is also at the expense of the estate; the entitled person does not owe the heirs any reimbursement.

6. Transfer of business assets

The inheritance law of 2003 explicitly singles out the importance of business continuity. In certain circumstances, Article 4:38 BW grants a child, stepchild, and spouse of the deceased a right to business assets belonging to the estate. The same applies with respect to shares in a company of which the deceased held the majority.¹²⁵ A transfer of these assets or shares can be awarded by the court after a weighing of interests of the owners (ie the heirs) and the person continuing the business (ie the child, stepchild, or spouse).¹²⁶ However, as with the lump sums, the courts seem reluctant to make an award.¹²⁷

¹²² Or the long-term housemate referred to in Art 4:28(2) BW.

¹²³ See R W H Pitlo, *De ontwikkeling der executele* (1941) 26 ff.

¹²⁴ This is referred to in Parliamentary History (n 43) 1702.

¹²⁵ For further details, see Art 4:38(2) BW.

¹²⁶ It is not required that the person continuing the business actually worked there while the deceased was still alive, according to Parliamentary History (n 43) 1765.

¹²⁷ See for example Arnhem-Leeuwarden Court of Appeal, 28 February 2014, ECLI:NL:GHARL:2014:2269.

The entitlement conferred by Article 4:38 BW is rather different from the rest of the statutory entitlements. The reason it is never bracketed together with the lump sums of Articles 4:35 and 4:36 BW has to do with the requirement of transfer at a reasonable price. Unlike the lump sums, therefore, the benefits of Article 4:38 BW are conferred ‘for a consideration’.¹²⁸

VI. Practical problems

The wide variety of possible claims under Dutch mandatory inheritance law gives rise to a number of practical problems. Four of these will be addressed below.

1. Right to information regarding the estate

As we have seen, in 2003 the *legitime* assumed a different juridical character, being downgraded from a share in the actual estate to a monetary claim. This has paved the way for a new battleground: obtaining information about the estate.

Prior to 2003 this battle for information did not take place, or at least took place to a much lesser extent, since the forced heir, just like the testamentary heirs, was entitled to all available information.¹²⁹ But because, since 2003, disinherited descendants have no ties to the actual estate, the legislature has come to their assistance: under Article 4:78 BW they have the right to inspect and receive copies of any documents needed to calculate their compulsory portion and the heirs must provide any relevant information upon request.¹³⁰ The reasoning behind this provision is that descendants must be able to assert their special claims effectively.¹³¹ Without access to the estate, it would be easy for the heirs – their debtors – to mislead them. Unlike in, for example, standard situations of contract law, in which as a rule creditors and debtors have an equally clear picture of the subject of the contract, the persons entitled to a compulsory portion are completely dependent on the other party to determine the value of their claim.

Since 2003 there have been numerous lawsuits over Article 4:78 BW, focusing on how far the right to information goes. The case law shows that, while it is to be interpreted broadly, it is limited to information that is required for the calculation of the *legitime*.¹³² This implies that the person entitled to a compulsory portion

¹²⁸ Wilbert D Kolkman, ‘Freedom of Testation in the Netherlands’, in Zimmermann (n 63) 49.

¹²⁹ cf S Perrick, *Mr. C. Asser’s Handleiding tot de beoefening van het Nederlands burgerlijk recht: 4, Erfrecht* (2013) 333.

¹³⁰ The same applies to the other statutory entitlements: see Art 4:39 BW.

¹³¹ Parliamentary History (n 43) 1907–8.

¹³² Arnhem-Leeuwarden Court of Appeal, 18 October 2011, ECLI:NL:GHARL:2011:BU9640, followed by other courts including The Hague Court of Appeal, 5 August 2014, ECLI:NL:GHDHA:2014:2987.

does not need to know anything about the administration and disposal of the estate, since the reference date for the claim is the deceased's date of death. This is confirmed by case law, for example in a judgment by the Arnhem-Leeuwarden Court of Appeal, which takes into consideration that regular heirs are not obliged to draw up an inventory of the estate for a forced heir, although they must provide an overview of the assets and debts present on the date of death.¹³³ In the literature a more generous view is sometimes expressed,¹³⁴ but this seems to be based on the memory of inheritance law before 2003.

The regular heirs' obligation to provide information does not mean that they are required to render accounts. That would be going too far. An obligation to render accounts would suggest a legal relationship between the parties under which one party is obliged to justify itself to the other with regard to the soundness of decisions about assets.¹³⁵ There is no such legal relationship between heirs and persons entitled to a compulsory portion. This is another source of conflict: as long as the compulsory portion is paid, the heirs can do whatever they please with the estate – even squander it. The persons entitled to a *legitime* are sometimes unhappy with the decisions of the heirs, who are often their siblings or stepparent.

2. Gifts

If gifts made *inter vivos* played no role in the determination of the *legitime* and the other statutory entitlements, then it would be easy to get around these mandatory provisions. By making gifts, if necessary gifts which only take effect upon death, a testator could reduce an estate to nothing. This is why gifts are included in the notional estate (for the calculation of the compulsory portion) and they are subject to abatement (for the acquisition of the compulsory portion). The rules about gifts raise at least two questions.

(a) Which gifts count?

The first is: which gifts count? Inheritance law before 2003 rigorously included all gifts made by the deceased in the calculation of the notional estate. In reality this system was not in common use because it was impracticable, and as a result, functioned rather randomly.¹³⁶ Since 2003, the point of departure has been that a gift is only eligible if it took effect within five years of the deceased's death.¹³⁷ The somewhat unconvincing reasoning behind this is that testators should have taken the compulsory portion into account when making any substantial gifts in those last

¹³³ Arnhem-Leeuwarden Court of Appeal, 23 June 2015, ECLI:NL:GHARL:2015:4560.

¹³⁴ Luijten and Meijer (n 109) 527; Perrick (n 129) 333.

¹³⁵ HR 3 December 1971, *NJ* 1972 338.

¹³⁶ See IV.1(c) above; Parliamentary History (n 43) 410.

¹³⁷ Art 4:67 BW.

years.¹³⁸ The time limit of five years also prevents the necessity of looking too far back in the past to determine the *legitime*.¹³⁹

However, there is a crucial exception to the five-year rule: gifts to descendants always count, provided that they or their own descendants are entitled to a compulsory portion.¹⁴⁰ This makes the scope of the rules on gifts much wider; in fact, they are not so very different from the 'impracticable' rules dating from 1838. This is also evidenced by the right to information discussed above: in principle this extends to all gifts.¹⁴¹

It has been suggested in the literature that a child who has received a substantial gift more than five years before the deceased's death might consider renouncing heirship and not claiming a compulsory portion. By doing this, the child would ensure that the gift could not be touched by others entitled to a compulsory portion. The reasoning is that if the person who received the gift, or a descendant of that person, does not assume the role of claimant of a compulsory portion, then the time limit of five years will apply and the gift will be safe from challenge.¹⁴² Whether this trick would really work is, however, open to question.¹⁴³

The normal time limit of five years applies to grandchildren, if they are not entitled to a compulsory portion.¹⁴⁴ In some cases, for instance with a business transfer with elements of a gift, this can serve as a way of circumventing the compulsory portion – provided the donor lives another five years.

'Customary' gifts do not count as gifts in relation to the *legitime* as long as they are not excessive.¹⁴⁵ A simple example would be birthday presents. To determine whether a gift is 'customary' and 'not excessive', the individual testator and his or her assets, and also the testator's relationship with the donee, must be taken into account. Gifts of tax-exempt amounts may therefore be permitted for some testators, while for others they will be regarded as 'excessive'.¹⁴⁶ This again illustrates the complexity of calculating the *legitime*.

(b) How are gifts to be valued?

The second question is: at what value are gifts to be included in the notional estate? Two dates are conceivable for determining the value: the date when the gift took effect and the date of the donor's death. We have already seen that, on the basis of the 'reconstruction idea', the 1838 OBW took the value at the time of death, but

¹³⁸ Parliamentary History (n 43) 1863–4.

¹³⁹ See Kolkman (n 81) 105–6.

¹⁴⁰ See Art 4:67(d) BW, with a few other exceptions as well. For a similar system, see eg Poland (ch 12 below at 379).

¹⁴¹ Arnhem-Leeuwarden Court of Appeal, 18 October 2011, ECLI:NL:GHARL:2011:BU9640.

¹⁴² Luijten and Meijer (n 109) 540.

¹⁴³ Kolkman (n 81) 106.

¹⁴⁴ cf Arnhem-Leeuwarden Court of Appeal, 16 April 2013, ECLI:NL:GHARL:2013:BZ7960.

¹⁴⁵ See Art 4:69 BW.

¹⁴⁶ Proceeds of a gift and interest are not to be included, according to Parliamentary History (n 43) 391.

with the stipulation that the gift was to be valued 'according to its state when it was given'. Here, 'state' meant the physical condition of the item.¹⁴⁷ The result was for the forced heir to be neither adversely affected, nor benefitted, by any change made by the donee.

The law of 2003 switched to valuation of the gift at the time the gift took effect.¹⁴⁸ The reason given for this was that it was a more reasonable and practicable system than that of the old inheritance law.¹⁴⁹ It was not seen as a problem that the gift may have been made far back in the past, because now the general rule is that only gifts made in the past five years are taken into account.¹⁵⁰ However, as we have seen, this general rule does not apply to gifts to descendants, so that often an expensive search for information about old gifts still has to be undertaken.

In addition to the two core questions discussed above, the rules about gifts also generate countless other implementation issues. Examples are the distinction between a gift and a natural obligation,¹⁵¹ and abatement and exceptions to it.¹⁵² Problems also arise if a donor is married in community of property: there is a chance that half the gift has been at the expense of this community of property.¹⁵³ In short, the regulations about gifts are intricate; they are, however, a necessary evil within the tenet of compulsory portion.

3. Conduct-based disqualification

How absolute is the right to a compulsory portion and to the other statutory entitlements? Can it be taken away by a testator? In the Netherlands there is a general doctrine of 'unworthiness to inherit'. This means that a person who has been convicted without the possibility of an appeal for committing a grave crime against the deceased (these crimes being listed in Article 4:3 BW), forfeits, by law, the right to benefit from the estate.¹⁵⁴ This is hardly controversial: a child who murders a parent cannot then hold up a (bloody) hand to inherit from that parent.¹⁵⁵ However, the

¹⁴⁷ Van der Ploeg (n 47) 173.

¹⁴⁸ Art 4:66(1) BW. Art 4:66(2) and (3) BW contain some exceptions to this rule.

¹⁴⁹ Parliamentary History (n 43) 392.

¹⁵⁰ Parliamentary History (n 43) 391.

¹⁵¹ This obligation cannot be enforced at law, but performance does not constitute a gift.

¹⁵² Arts 4:87 ff BW.

¹⁵³ In a case like this the obvious solution would seem to be to attribute the gift wholly to the person whose name is on the gift deed: see Arnhem-Leeuwarden Court of Appeal, 16 April 2013, ECLI:NL:GHARL:2013:BZ7960, and 21 October 2014, ECLI:NL:GHARL:2014:8057. cf Parliamentary History (n 43) 1870 and 2277.

¹⁵⁴ The exhaustive list in the Article includes a few other grounds for forfeiting an inheritance, such as falsifying the will.

¹⁵⁵ 'The bloody hand may not inherit': for this topic: see eg F du Toit, 'Erfregtelike Onwaardigheid: Enige Lesse te Leer vir die Suid-Afrikaanse Reg uit die Nederlandse Reg?' (2012) 23 Stellenbosch LR 137 ff; W Breemhaar, *Van bloedige en andere handen in het erfrecht* (2013).

law does not include any provisions aimed specifically at annulling the right to a *legitime* – only the *lex generalis* of Article 4:3 BW blocks the descendant's path. The principle of 'unworthiness' also applies to all other acquisitions under inheritance law, such as legacies and intestate shares.

A number of other European countries have a *lex specialis* for the *legitime*.¹⁵⁶ Under German law (§ 2333 BGB), in the event of serious misconduct (*schwere Verfehlung*), a testator can deprive a forced heir of the *legitime*: *Pflichtteilsentziehung*.¹⁵⁷ This is possible for less drastic crimes than those leading to 'unworthiness' in the Netherlands, but it does not happen *ipso iure*. Perhaps the most striking ground for depriving a person of the *legitime* is deliberate dereliction of a statutory duty to support the testator.¹⁵⁸ This means that people who seriously neglect a parent can be disinherited in Germany.

These grounds for denying the *legitime* would be a welcome addition to 'unworthiness'. The Dutch legislature could consider adopting them in order to make the *legitime* less rigid.¹⁵⁹ It is sometimes difficult to explain to the general public that it is impossible to take away the forced share of a child who has behaved badly. The parent wants to disinherit the black sheep, but is told by the civil law notary that the child's misconduct is not sufficiently serious. The potential downside of an addition of this kind is the risk that it may be a source of conflict.

Of course, provisions similar to § 2333 BGB could be added to the general rules about 'unworthiness'. For instance, in South African law a person who is unworthy is one 'who has behaved in an extremely reprehensible way in general towards the testator'.¹⁶⁰ However, the German approach is preferable: a specific testamentary provision is needed to remove the *legitime*,¹⁶¹ and this implies a well-considered, explicit choice on the part of the testator. It also prevents disputes about what can be regarded as 'extremely reprehensible behaviour' in cases where there is no will.

Nevertheless, current Dutch law does include a special provision in the rules about the *legitime*, which comes close to the *exheredatio bona mente facta* of Roman law.¹⁶² This provision makes it possible to place a compulsory portion under the administration of a third party without this being regarded as an encumbrance; the descendant simply has to put up with it.¹⁶³ The will must state that the reason for this measure is that the person entitled to a compulsory portion is unsuited to or

¹⁵⁶ For instance, Spain (ch 6 above at 159–61), Austria (ch 8 above at 245–47), Germany (ch 9 above at 303–12), and Hungary (ch 11 below at 353–56).

¹⁵⁷ See ch 9 above at 305–6.

¹⁵⁸ See § 2333(3) BGB.

¹⁵⁹ cf S G Canes, 'Ontervang en onwaardigheid' (1913) 2285–9 WPNR 489.

¹⁶⁰ See *Taylor v Pim* (1903) 24 NLR 484 and the discussion of the case by Du Toit (n 155) 139.

¹⁶¹ cf § 2336 BGB. The reason for taking away the *legitime* must exist at the time the will is made and must be stated explicitly in the will.

¹⁶² Art 4:75 BW. cf Voet (n 67) 5, 2, 22 on the *exheredatio*.

¹⁶³ Similar provisions are known in Austria (§ 771 ABGB) and Germany (§ 2338 BGB).

incapable of managing the inheritance, or that without this measure the property would mainly benefit the descendant's creditors. Hence the colloquial term for this type of provision is 'the drugs clause'. This means that, while descendants cannot be entirely deprived of their compulsory shares, the testator can severely restrict their rights.

4. Waiver

In contrast to a number of other European countries,¹⁶⁴ Dutch succession law does not allow a person to waive his or her right to a compulsory portion. Any legal act performed prior to the opening of the estate is null and void to the extent that it restrains a person from exercising any powers conferred by inheritance law.¹⁶⁵ The same applies to prior agreements disposing of the estate.¹⁶⁶

This strict approach often causes difficulty in the practice of estate planning, for instance in case of business succession or a second marriage. As already said, the new inheritance law in 2003 led to changes as regards testamentary freedom. The effect of the blind claims of the *legitime* was reduced, but provisions based on need were introduced. These other statutory entitlements create both legal and economic impediments.¹⁶⁷ The trend towards greater freedom in inheritance law seems to be consistent with a current Bill aimed at increased self-determination in the area of maintenance law.¹⁶⁸ If there is to be more freedom during a person's life to shape claims for maintenance, there should also be more autonomy in dealing with the other statutory entitlements which operate on death. It should be possible to exclude a claim on the part of the spouse to the other statutory entitlements.¹⁶⁹ Such developments are in line with the changing composition of families. For instance, often people who marry for a second time want to remain financially independent. This would mean excluding any inheritance rights for the new spouse, yet under current legislation this is impossible. With the proper caveat – that family contracts must always be scrutinized with care – succession contracts should at least be on the legislature's agenda for the coming years.¹⁷⁰

¹⁶⁴ For instance, France (see ch 4 at 106–7), Austria (see ch 8 at 247), Germany (see ch 9 at 311–12), and Poland (see ch 12 at 374).

¹⁶⁵ Art 4:4(1) BW.

¹⁶⁶ Art 4:4(2) BW. See F W J M Schols, *Quasi-erfrecht, met bindende elementen* (2005) 37 ff.

¹⁶⁷ W Burgerhart, 'De notaris voor ondernemers in het MKB; een metgezel in de OASE?' (2016) 7120 WPNR 735.

¹⁶⁸ Legislative Proposal no 34231, pending in the House of Representatives.

¹⁶⁹ F W J M Schols, 'De (missing) link tussen het nihilbeding en de andere wettelijke rechten' (2015) 4 FTV 49.

¹⁷⁰ J H Lieber, 'De erfovereenkomst om ruzie te voorkomen' (2017) 12 FJR 55.

VII. Conclusion

The rules of Dutch family protection throughout the centuries present a varied picture. In the time before the codifications, there was no uniformity whatsoever: both the *legitime* and the *réserve* existed, as well as various benefits, of limited size, for the spouse. With the advent of the OBW in 1838 the spouse receded even further into the background, with only a right to keep the household effects in return for consideration. In contrast, the deceased's children were granted a rock-solid *legitime* in the form of a share in the estate.

The inheritance law which came into force in 2003 introduced fundamental changes both to the circle of potential claimants and to the nature of the provisions. Today the spouse has 'other statutory entitlements' in the form of a right of usufruct to potentially all assets of the estate. Children are downgraded to creditors, for a person with a claim to a *legitime* no longer has a position which is equal to that of an heir. Moreover, in many cases the monetary claim is not due and payable within the foreseeable future. On the other hand, children now have certain additional claims in the form of lump sums, specifically for minors in need of support. Is, therefore, the Netherlands now enjoying the best of both worlds by combining the compulsory portion, a concept from the civil law tradition, and the 'other statutory entitlements', which are more in line with the common law?

This is doubtful. The wide variety of provisions amounts to overkill and also leads to concurrence problems.¹⁷¹ There is much to be said for making further changes, both regarding the nature of the entitlements and also to the group of potential claimants. At present the composition of this group is fairly arbitrary. For example, why should the lump sum be limited to minors? Why is there no provision for an unmarried cohabitant? A possible solution is to give every dependant the right to bring a claim based on need.

There is even more to say about the nature of the entitlements. The spouse has a right of usufruct, while the children have a monetary claim. This is rather inflexible. There is much to be learned here from those common law countries in which provision can be made in all kinds of way: by periodical payments, a lump sum, an obligation to transfer assets, and so on.¹⁷² In such cases the court must take into consideration certain circumstances listed in the relevant legislation; it is at the court's discretion how much weight it gives such circumstances. This approach based on specific principles ensures an attractive system of 'structured discretion'.

Favouring such an approach implies that the *legitime* should be abolished. An individual's freedom to dispose of property should take priority over the 'blind'

¹⁷¹ For instance, between a child's compulsory portion and his or her lump sum: see W D Kolkman, 'De sommen ineens en de legitieme portie in het nieuwe erfrecht' (2003) 6553 *WPNR* 833.

¹⁷² See eg in England and Wales, Inheritance (Provision for Family and Dependents) Act 1975 s 2(1) and, in Ontario, Succession Law Reform Act s 58(1).

claims of descendants. Statutory claims of a fixed size are unnecessary legislative nannying and deny the multifaceted nature of life. The *legitime* is socially and socio-economically outdated. What then remains are the other statutory entitlements – infringements that take individual circumstances into account and can be justified by the fact that they provide for specific needs.

Of course, there would also be drawbacks if mandatory family protection were to be implemented in this way. The other statutory entitlements might lead to unpredictability and uncertainty, and therefore to litigation. However, the first seventeen years that the current inheritance law has been in force present a reassuring picture. During that period three judgments relating to the lump sum of Article 4:35 BW have been published and more than 100 on the compulsory portion.¹⁷³ Obviously the first figure would rise if the compulsory portion were to be abolished, but there is no need to worry about overburdening the judiciary.

Given that the position of succession law has changed, for reasons explained earlier,¹⁷⁴ it may be concluded that there are today fewer justifications for infringements of testamentary freedom. Would it in fact be desirable to go a step further and abolish the other statutory entitlements as well as the compulsory portion? This would probably be going too far. Some limitation of testamentary freedom is advisable in order to prevent absolute arbitrariness.¹⁷⁵ Testamentary freedom and family solidarity would be held in balance by means of the other statutory entitlements, which are based on the needs of the claimant. Such a modest, tailor-made limitation to a testator's freedom of testation should suffice.

¹⁷³ The main features of the *legitime* now in force are simple, but the details are complicated, and this complexity is a rich breeding-ground for disputes. cf Parliamentary History (n 43) 409.

¹⁷⁴ See above at III.

¹⁷⁵ cf Roger Kerridge, 'Freedom of Testation in England and Wales', in M Anderson and E Arroyo I Amayuelas (eds), *The Law of Succession: Testamentary Freedom* (2011) 133.