



# *Intestacy and Forced Heirship*

*Ondřej Horák*



# A) Two initial approaches to property and succession

we x I

family x individual

**property (estate):** ours (family) x mine (personal)

**principle:** necessity x autonomy

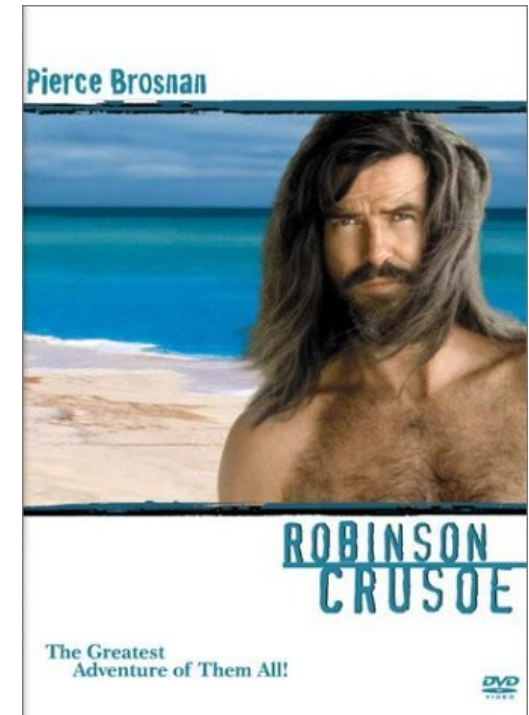
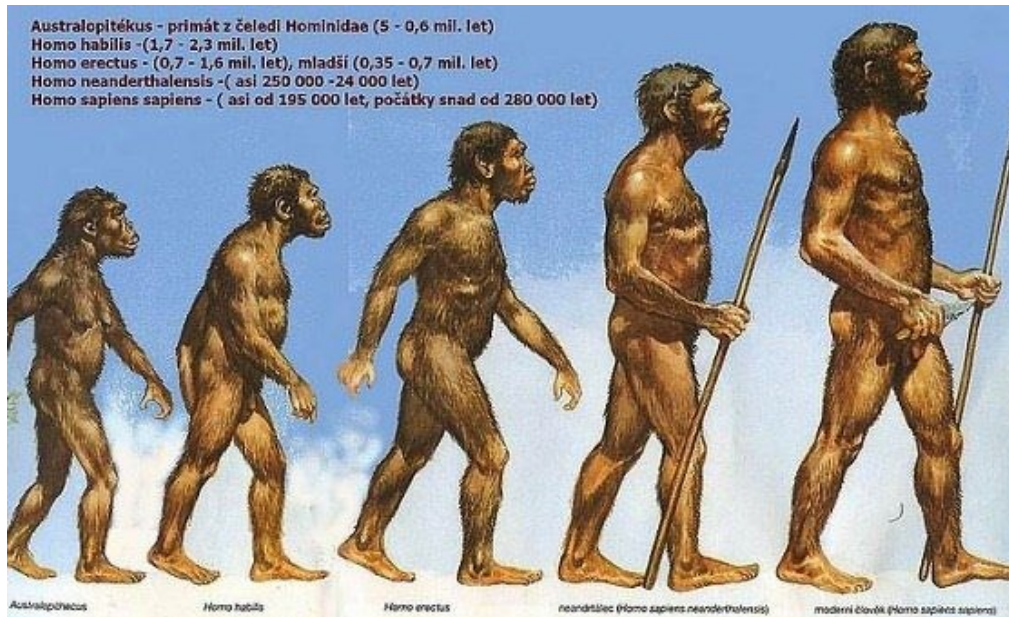
more recently: familiarization x individualisation

**paradigma:** family solidarity x freedom

**origin:** german x roman

## B) Two initial approaches to property and succession

- modern European legal orders as a compromise



# Principles of Law of Succession

- a) principle of conservation of values*
  - b) principle of transition to individuals*
  - c) principle of testamentary freedom  
(mitigated by the forced share)*
  - d) principle of equality of persons  
and matters*
  - e) principle of universal succession  
(mitigated by benefit of inventory)*
- influence of the Roman tradition

- Emanuel Tilsch (1866-1912)

- *Dědické právo rakouské se stanoviska srovnávací právní vědy* (1905)



# Law of Succession in New CC

- is based primarily on Austrian inheritance law, in which "he sees his pattern and is strongly inspired by him"
- strengthens the testator's freedom in his disposition with property mortis causa
- prefers "dead in front of the living"

Main source of inspiration: *govern. draft of CC 1937*

- Emil Svoboda - subcommittee deputy referee for inheritance law (Draft 1921 and 1924)

# Emil Svoboda (1878-1948)



- \* Prague, studies of Prague law
- ten years of legal practice
- professor at the Faculty of Law in Prague since 1921, Dean in 1929/30
- legal-philosophical orientation
- focus on family and inheritance law
- subcommittee Deputy Referee

## **Privat Autonomy and protection of heirs**

- A) testamentary freedom x the protection of the (forced) heirs = forced share, quarta Falcidia
- B) universal succession x protection of heirs = benefit of inventory (reservation of inventory)

**testamentary freedom**

**x**

**protection of forced heirs**

**= *Pflichtteilrecht - Forced Heirship***



# Reasons of Inheritance

- Inheriting takes place on the basis of
  - 1) inheritance contract,
  - 2) testament, or
  - 3) by means of a statute (Act).
- These reasons may also operate together.

## A) Statutory succession of heirs

- six classes of heirs, cohabitant persons
- 1. class: inherit the decedent's children [own or adopted, not stepchildren] and spouse, each of them equally. If any of the children does not inherit, his share is acquired equally by his children; the same applies to more distant descendants of the same ancestor.

## **B) Statutory succession of heirs**

- 2. class: include the spouse, the decedent's parents and those who lived with the decedent in the common household for at least one year before his death and, as a result, cared for the common household or were dependent in maintenance on the decedent. [cohabitant person]
- Second class heirs inherit equally; however, the spouse shall always inherit at least half of the decedent's estate.

## C) Statutory succession of heirs

- 3. class: include decedent's siblings and cohabitant persons; inherit equally.
- 6. class: include the children of the decedent's siblings' children and the children of the decedent's grandparents, inherit equally.
- If any of the children of the decedent's grandparents does not inherit, his children shall inherit.

## D) Statutory succession of heirs

- 6. class: include the children of the decedent's siblings' children [children of nephew or niece] and the children of the decedent's grandparents, each of them equally. [aunt and uncle]
- If any of the children of the decedent's grandparents does not inherit, his children shall inherit. [cousins]

# ***Is inheritance guaranteed?***

## **Constitutional dimension of Czech inheritance law**

Art. 11 *the Charter of Rights:*

(1) Everyone has the right to own property. The ownership right of all owners has the same legal content and protection. **Inheritance is guaranteed.**

(3) **Ownership binds.** It must not be misused to prejudice the rights of others or in violation of lawful general interests. ...

Art. 32 (1) Parenting and **family are protected by law.** Special protection for children and adolescents is guaranteed.

# ***Inheritance is guaranteed!***

## **Constitutional dimension of German inheritance law**

*Grundgesetz für die Bundesrepublik Deutschland (1949)*

*I. Grundrechte (Art. 1-19)*

Art. 14, Abs. 1) Das Eigentum und **das Erbrecht** werden **gewährleistet**. Inhalt und Schranken werden durch die Gesetze bestimmt.

Abs. 2) **Eigentum verpflichtet**. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen. ...

BVerfGE 112, 332 ff. (19. 4. 2005) „Familiensolidarität“  
Pflichtteilrecht – Erbrechtsgarantie und Schutz der Familie

# Forced Heirs

- *ABGB i DraftCC/37* (descendants/if not so ancestors; descedanst  $\frac{1}{2}$ , ancestors  $\frac{1}{3}$  of **legal share**)
- *CC/50* (minor ch. full; adult ch. and ancestors in need  $\frac{3}{4}$ )
- *CC/64* (minor ch. full, adult ch.  $\frac{3}{4}$ , since 1991  $\frac{1}{2}$ )
- *CC/12* (only descendats; minor ch.  $\frac{3}{4}$ , adult ch.  $\frac{1}{4}$ )
- genesis (for adult child draft 2005  $\frac{1}{2}$ , draft 2007  $\frac{1}{3}$ )
- parents/ancestors: v.e. in Germany, Switzerland/France (until 2006), Austria, Poland



## Forced share for spouses?

- specific position of wife (widow's dowry ...)
- *ABGB* 1811 (statutory succession of spouses by the 1st partial amendment in 1914)
- original: Germany (BGB 1896), Switzerland (ZGB 1907)
- new: Austria (ABGB, sin. 1978), France (CC, sin. 2001)
- matrimonial property law:
- *s.c. koakvizice* (Hungarian law), 1949 (Family Act), 1964 (CC), the community property of the spouses

# Community property of the spouses in CC

- includes what was acquired during the marriage by one of the spouses individually or both spouses jointly
- except for what (§ 709): **a)** serves the personal needs of one of the spouses, **b)** was acquired as a gift, inheritance or legacy by only one of the spouses **c)** was acquired by one of the spouses as compensation for non-pecuniary harm to his natural rights, **d)** was acquired by one of the spouses by a juridical act relating to his separate property, **e)** was acquired by one of the spouses as compensation for damage, destruction or loss of his separate property.

# Resume

## „Protection“ of forced heirs in New CC

- we prefer private autonomy
- we protected forced heir, but...
- discontinuity with European legal and cultural convention (because of subject, counting donations...)

# Questions?

Thank you for your attention

