



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

Recent Changes in the Law of Succession in the Netherlands: On the Road towards a European Law of Succession?

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1. Reasons for a Change in the Law of Succession in the Netherlands

In the Netherlands, the rules of intestate succession were seen as inadequately protecting the rights of the surviving spouse. This led to a situation where in a large number of cases the surviving spouse was given as complete a right to the deceased's estate as possible by deviating from these intestate rules under a last will. The recent changes in Dutch succession law were in part aimed at creating a law of intestate succession that was in accordance with the existing legal practice, thus obviating the need to make a last will. As we will see below, during the development process some other issues were solved as well, for example the protection of the unmarried partner of the deceased.

2. Sociological Context: the '1½-Earners-family'

The regular pattern for a family of husband and wife and children in the Netherlands is that the man works fulltime and the women works part-time to supplement the family income. In Dutch we call this *anderhalfverdieners gezinnen* (1½-earners families).¹ This means that after the birth of children most women need protection to be able to continue their living standards if the husband dies:² his income no longer

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¹ Bos & Hooghiemstra 2004, p. 61-67. Although after the birth of the first child, 22 of the women that did not have a job before, started earning an income afterwards to keep up the family income, the tendency is different: of those who worked part-time before but did not earn much less than their partner, 35% earned considerably less after the first child was born. Of those who earned about as much as their partner before, only 9% continued to do so after the birth of their first child. Most of them would earn less, although not less than 1/3 of the income of the partner. That means that a large majority of families with children has one substantial income from the man who usually works full-time, and a smaller or very small supplementary income from the woman. This tendency was already described CBS 1998, and Keuzenkamp *et al.* 2000, p. 10. They stated that already in 1998 about 2/3 of the families with children chose for this model.

² In this report I will assume that the husband dies first. That means that the wife is considered to be the surviving spouse. Of course the rules apply the same way if the female partner dies first. Since 1998 the rules for married couples also apply to partners who have registered their

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supports the family whilst her income is usually much smaller than what he used to earn. Other sources of income are not able to supplement her income enough in order to enable her to pay the shares of the estate of the deceased father to the children. In that way she will usually not gain enough capital to provide for herself if the income of the spouse ends as a result of his death.

3. The new Law of Succession

On January 1st 2003 the new Book 4 of the Dutch Civil Code entered into force, containing the new law of succession. It consists of 233 articles.³

4. Objective of the new Law of Succession – Problems in the Legislative Process

The legislative process concerning the new law of succession started in 1947 when professor Meijers from Leiden University accepted the task to revise the Dutch Civil Code that stemmed from 1838. He managed to produce a draft for the Civil Code, including a text for Book 4 containing the law of succession.

Before his text had passed through Parliament, Meijers died and his work was continued by several groups of people because it was clear that it would take too long before the whole draft could become law. It was decided to give certain parts more priority and handle them with more speed than others. The first book that entered into force was Book 1 of the Dutch Civil code in 1970, followed by Book 2 on legal persons in 1976 and Book 8 on transport law in 1991. The general part of the Dutch Civil Code, Book 3, combined with the law on obligations (Book 6) and property law (Book 5) and some special contracts (part of Book 7 BW) entered into force in 1992. Books 1, 2 and 8 of the Dutch Civil Code have been adapted at that point. Since then Book 7 BW has been filled in with many other contracts. Book 4 finally entered into force in 2003. In the next part I will give an outline of the problems that had to be solved in the new law and which solutions were chosen to reach the desired effects.

5. Situation under the Law before 2003 – Main Problems

The law of succession that was valid until 2003 stemmed from 1838, although some important changes had been made in the meantime. In 1923 for example the rule was introduced that the surviving spouse inherits a share of the estate that equals the share of each of the children of the deceased if the testator has not stated otherwise in his will. Before that the surviving spouse only inherited if there were no family members of the deceased until the 12th degree, who could inherit according to the law.

Therefore the parents in many families with children felt the need to make a will to protect the interests of the surviving spouse as the estate usually was not large enough to be divided into several shares and still support her after her husband passed away.

Why had it been constructed that way in 1838? When the old law was passed, the law of succession was de facto not a law for the ordinary people as there was no estate that could be left to the survivors. The rich families, who had enough means to pass something on after death, often consisted of spouses who had their own means of

partnership. They do not apply to partners who live together without registration. If they have a cohabitation agreement, then some special protection measures can be taken, see Article 4:82 BW.

³ A translation into English can be found in Curry-Sumner & Warendorf 2005.

support. Therefore it was no problem that in case of a family with many children most of the estate would be divided between the children. The surviving spouse didn't need the estate of the deceased for her own support.⁴

In the Netherlands the idea of the support of the surviving spouse became popular after the decision of the Dutch Supreme Court, HR⁵ 30 November 1945, *NJ* 1946, 62 (*De Visser/Harms*) where it was decided that the support of the spouse prevails over the rights of the children as forced heirs.⁶

In a popular version of the will that married parents with children used to make since the beginning of the 1960s, the surviving spouse was given the whole estate while the children only got a financial claim against the surviving spouse. That claim could be invoked at the moments that were mentioned in the will, usually time of her death, bankruptcy etc. Because of developments in legal decisions the children couldn't do anything against this will, even if this meant that they – as forced heirs – could not receive their statutory share in goods right after the death of their parent as the law used to provide for. Only when the surviving spouse could provide for herself (which was to be judged at the moment that her husband passed away), then the protection of the surviving spouse was not deemed necessary which meant that the children could enforce their rights as forced heirs as far as this didn't interfere with the right of protection of the surviving spouse.⁷

This kind of will is called *ouderlijke boedelverdeling*. If the obligation to provide for the surviving spouse⁸ did in fact not exist, then there was no legal reason to block the rights of the children effectively.

Aside from this main reason for the change (it was not deemed right that mainstream families with no special wishes or circumstances were obliged to make a will) there were some other parts of the old law that needed changes. For example:

- the position of the executor or personal representative of the testator (*exécuteur*) needed to be modernized;
- the rudimentary regulations on testamentary administration (*bewind*) did not provide enough possibilities to protect heirs and third parties;
- the rules on fidei-commissaire substitution which were quite restrictive and complicated, which is not very pleasant for estate planners nowadays;
- the fact that a certificate of inheritance was often given by notaries but the legal basis for this was very thin, especially concerning the position of third parties that acted on these declarations in good faith;

⁴ Van Mourik 2002, p. 87.

⁵ HR is the abbreviation for *Hoge Raad*, the Dutch Supreme Court. In the last instance, called *cassatie*, only questions of law may be raised before the court; factual matters have to be decided in the first two instances.

⁶ Luijten 2002, p. 47-49. See also the deliberations in the process of legislation, *Parlementaire Geschiedenis* InvW. 4, p. 1668 which were based on two long articles written by Van Oven 1958/1959.

⁷ In HR 17 January 1964, *NJ* 1965, 126 (*Schellens/Schellens*) and HR 29 September 1969, *NJ* 1969, 402 (*Makkumer Boedelverdeling*) the Hoge Raad decided that in the case of an *ouderlijke boedelverdeling* the rights of the forced heirs are reduced to claims in value rather than in goods. In most cases the surviving spouse is protected against the claims of the children, but in some cases she had enough capital or income to support herself. In those cases the children could claim their rights before she died, see for instance Hof 's-Hertogenbosch 14 December 1989, *NJ* 2001, 113; Rb. Rotterdam 25 February 1991, *NJ* 1995, 702; Hof Amsterdam 15 August 2002, nr. 0774/01, *Notamail* 2002, nr. 221.

⁸ This obligation is based on a *natuurlijke verbintenis*, a natural obligation in the sense of Article 6:3 BW.

- the impossibility for partners living together without marriage or registration of their partnership to provide for the other partner in case of one's death if the deceased had one or more children (forced heirs) when one considers the high percentage of children that are born out of wedlock, in 2000 already 1 of 3 children and the number is rising to 40% in 2005.⁹

6. Solutions in the new Law

First I will describe certain solutions to the problems mentioned above in the new law on intestate succession. After that I will mention certain solutions that are found in the part on the Dutch inheritance law concerning wills.

6.1. *The new Rules of Intestate Succession*

6.1.1. Protection of the Surviving Spouse

In the new law the legislator choose to favour the surviving spouse and partner; the descendants of the deceased, who had a strong position under the old law, have to wait in many cases until the surviving spouse or partner has also passed away. The solution which was found for this dilemma lies in the legal division of the estate, *wettelijke verdeling*.

If a husband with a wife¹⁰ and children dies without making any arrangements concerning his estate and the Dutch inheritance law is applicable, the *wettelijke verdeling* takes place.¹¹ In that case the widow inherits the normal share of the estate (Art. 4:10 BW)¹² of the estate but receives his whole estate (Art. 4:13 BW). The children have to wait until her death (or bankruptcy and suchlike events) until they receive the value of their share from their father's estate. If he desires, the testator can make a special provision in his will concerning the circumstances under which the children can claim the value of their share. He is also free to declare that apart from his surviving spouse and his children, also his stepchildren¹³ will be involved in the legal division as if they were his children as well.

The widow and the children can make an arrangement on the interest on those claims. Because of tax reasons, they will have to decide within 8 months after the day of the death. If they make no arrangement, the interest is equal to the legal interest minus 6%, but never less than zero unless stated otherwise in the will.

It is also possible that the widow decides within 3 months after the death that she abstains from the legal division. In that case she can denounce the legal division (*ongedaanmaking van de wettelijke verdeling*, Art. 4:18 BW) which has the effect that she and the children are equally entitled to the estate. It is advisable they decide before the decision is taken, how to divide the estate amongst each other in such a way that each heir receives a share that complies with the portion that person should get according to the law or the will. They can also decide that the bare ownership of

⁹ Alders & De Graaf 200; Latten 2005, p. 32.

¹⁰ The *wettelijke verdeling* only works if the spouses are not legally separated.

¹¹ A testator can change the share in his will; he can also disinherit one or more of thus children, but the legal division will only take place if at least one child and the surviving spouse inherit from him.

¹² Each child and the surviving spouse inherit the same portion of the estate. In the case of two children and a surviving spouse, each inherits one third.

¹³ Stepchildren are defined in Article 4:8 Para 3 BW as: 'a child of a spouse or registered partner of the deceased where the latter is not a parent of the child. Such a child shall remain a stepchild if the marriage or registered partnership has ended'.

the estate is to be given to the children and that the usufruct of the estate goes to the widow. If one part is bigger than the share that person is entitled to, he or she has to pay compensation to those who have not received enough. They can also decide that the payment can be made in installments.

The transferal of the rights has to be made by the three co-owners together. During the period that the division is not effectuated, the three co-owners have to take most of the legal steps together (Art. 3:170 BW), unless it is for example absolutely necessary to act at once.

If they have not made the pre-agreement, then the widow loses the protection of the legal division and cannot be sure to get what she wants if the children play foul play afterwards.

6.1.2. Protection of the Children

Transferal of goods

Dutch law has special rules concerning the right of the children to ask their mother to transfer goods from their father's estate when she announces a new marriage or a registered partnership to a new partner in order to:

- be certain that they will receive their part of their father's estate;
- be certain that certain family goods will not go to the family of their stepparent when their mother dies.

The same right applies against the stepfather or –mother concerning the estate of their mother when their mother dies or the stepparent dies. These optional rights (*wilsrechten*) are laid down in the Article 4:19-4:22 BW. In some cases the goods have to be transferred in full ownership; in others the mother (in case of the claims in their father's estate) or stepfather (in case of the claims in their mother's estate) can transfer the bare ownership and keep the right of usufruct to be able to continue the use of the goods.

The children can demand the transferal of the goods with a maximum of the value of their claims. If more is transferred, for example because of the fact that one valuable item is transferred the value of which exceeds the entitlement of that child, it will be treated as a gift for the exceeding part. For that part the child will have to pay gift tax.

Payment of a lump sum

In certain cases children¹⁴ of the deceased have a claim to a lump sum that is required for the child's care and upbringing until his or her 18th birthday, and for his or her maintenance until the child is 21 years of age, Article 4:35 BW. This claim only exists if for example if the spouse of the deceased or an heir of the deceased is not legally or contractually obliged to provide for these costs. The child's claim will be smaller or non-existent if it has received a bequest from the deceased or a capital sum insurance policy. In those cases the amount that it has received will be subtracted from the claim that the child has against the estate.

In the law before 2003 a similar claim could be made, but the article on which this claim was based, was part of Book 1 of the Dutch Civil Code on family law, Article 1:406b BW.

¹⁴ This also applies to children to whom the deceased is not a father in the legal sense but he is a person named in Article 1:394 BW, a man who fathered the child in the natural way (*verwekker*) or gave his consent to an act that made the conception of the child happen, e.g. artificial insemination with the sperm of a donor (*instemmend levensgezel*).

Article 4:36 BW also gives a claim to certain children of the deceased who used to work for him in his household or business but were not duly paid, either directly or by a bequest of a capital sum insurance policy (*salaire différé*).

Transferal of the business or the shares in the business of the deceased

The children can ask to have the shares of a business of the deceased transferred to them but they have to pay a reasonable price, Article 4:38 BW. To qualify for that arrangement the father had to be on the board of each company and have ownership of the majority of the shares of the company alone or together with the other board members. The child that buys the shares has to be on the board of the company as per the day the father died or has to take over his place in the board that becomes vacant because of the demise of the father.¹⁵

The children can ask the court to arrange payment in instalments or after a certain period (Art. 4:5 BW).

Even if the deceased does not make any provisions for the transferral of the business shares to his children, they have legal rights to take over the shares against a payment of the value of the shares (if necessary in instalments, Art. 4:5 BW) because they are already running the business at the moment he dies, Article 4:38 BW.

Conclusion

We see that major changes have been introduced into the rules of intestate succession. The goal was that it would not have to be necessary to make a will in the case of a mainstream family while leaving the surviving spouse protected against the claims of the children during her life. In my opinion that goal has been achieved. In the notarial practice we now see that less mainstream wills are made. Nowadays often wills are made by people who want to make special arrangements in the context of their estate planning.

One possible problem under the new rules of intestate succession is the short period of three months in which the surviving spouse has to decide whether to keep the legal division intact or not. Compared to the wills under the old law where a similar decision was to be made within a period of eight months, the three month period is indeed much shorter. In modern wills who aim to copy the possibilities under the old law, one sees that often the notaries and other financial and fiscal advisors are looking for special provisions that enable the surviving spouse to postpone this choice.

But if you consider that under the old law most surviving spouses didn't use the opportunity to denounce the *ouderlijke boedelverdeling* for the whole or a part of the estate even while they had eight months to consider that choice, there is no reason to assume that great numbers of surviving spouses will seriously consider making use of that opportunity under the new law.

6.2. Dutch Inheritance Law concerning Wills

In this paragraph I will look into changes that are introduced in the new rules concerning wills.

¹⁵ See about this issue Stille 2002.

Provisions in a Will

In Dutch inheritance law the testator can make a will. Usually wills are made in the form of notarial deeds. The testator can make provisions on the following points amongst others:¹⁶

- Who inherits his estate and how big their portions of the inheritance are. The heir or heirs are liable for the debts of the estate pro rata.
- Who is entitled to a legacy (*legaat*). The legatee(s) have the right to claim the legacy from the heirs. It can be a legacy of goods or money but also of a right to certain actions. If the testator does not provide protection for his surviving spouse via the legal division, often the surviving spouse gets a legacy of the usufruct of the whole estate or of the assets that she chooses. This kind of testamentary provision is very popular in the northern parts of the country, in order to keep the agricultural business of the testator 'in the family'.

A legacy can be given subject to the obligation of paying the value of the legacy back to the estate. Often that claim only has to be fulfilled at the time of her death.

- Who must perform a testamentary obligation (last). That is an obligation to do something but the other party is not a creditor that is entitled to the payment in such a way that it can claim the payment before a court. It may concern the payment of a certain amount of money but also other actions, for example to have a prayer service held for the deceased each year on the date he died. This testamentary obligation may also be used to give something to a person that is not born or conceived on the day the testator dies. Those future persons can not be heir or legatee (Art. 4:56 Para 1 BW, with special exceptions in Para 2-4).

If the obligation is not met, the inheritance or legacy that the debtor has received can be denounced by a court in favour of those who would then benefit.

In order to ensure that his will is carried out after his death, the testator often appoints an executor or personal representative (*exécuteur*) in his will. A standard executor is the representative of the heirs and has to pay the debts of the estate. His task ends when the estate is ready for division amongst the heirs.

The appointment of an executor is especially important when the will contains the right to the usufruct of the estate for the surviving spouse. Amongst those debts are also those from legacies, as they are listed in Article 4:7 BW. Often it is a good idea to appoint the surviving spouse as the executor: the right of usufruct can then be established by making a notarial deed without having problems with the children who – without an executor – would also have to appear before the *notaris*.¹⁷ This may lead to a smooth realization of the provisions of the will, especially in cases where the relationship between the children and their (step)mother are not good.

¹⁶ The testator must stay within the kind of provisions that the law allows him to make. In a Dutch will it is not possible to make provisions concerning a trust. It is also not possible for spouses to make a joint will or a mutual contract concerning their estates (*Erbvertrag*).

¹⁷ In the Netherlands a *notaris*, a civil law notary, plays important roles in the process of making a will and executing the will after the testator passed away. Usually the heirs also consult a *notaris* if the deceased died intestate in order to have a certificate of inheritance drawn up. The *notaris* also usually also is involved by the heirs to help with and complete the partitioning of the estate. If an immovable property has to be assigned to one of the heirs, the *notaris* will draw up the deed that is necessary for the transferral of the property to the new owner.

Provisions of Forced Heirship

The Dutch inheritance law contains rules of forced heirship which will be triggered if the children of the deceased¹⁸ don't not receive their statutory share (*legitieme portie*)? That share roughly amounts to half of the fraction a child is entitled to according to Article 4:10 BW (an equal share with the other children and the surviving spouse of the value of the estate as it is to be reckoned with for the statutory share, the so called *legitimaire massa*). To the value of the estate gifts to third parties during the last five years before his death are to be added, as are all the substantial gifts that the children have received from him (in principle).

If the forced heirs receive less than their statutory share, for example because of the usufruct of their mother, they can ask her to pay them the rest unless the testator has implemented the clause of Article 4:82 BW: then the children have to wait to get the remaining value until she is dead also. In the meantime, they can demand payment from others that have received something through the will, which unlawfully diminishes their portion.

If only one child has received too little but the other has received enough (because of extra gifts of legacies) then the other child can also ask his brother or sister to pay the remaining part that he/she has not received enough. This payment can never lead to the effect that the 'rich child' would not get enough himself, considering his own statutory share, but it is possible that they have to wait until the death of their mother until they get their full statutory portion.

If the portion of the children becomes too small because of provisions in the will, they do not have the right to claim payment from people that have received gifts from the deceased during his lifetime.

Forced heirs will have to accept the appointment of an executor, but this is not the case if an administrator has been appointed: in general the forced heir may claim his statutory share without having the value of the share, which he or she might have received under the administration, deducted from his statutory share. This is different if the testator has stated that the administration is placed on the share of this heir because he or she is not able to administer these assets properly himself or have them administered properly by somebody else, or that these assets would immediately be claimed by creditors of the heir, Article 4:75 BW. In that case the share that the heir could have received under administration is deducted from the statutory share. Usually there will be nothing left to be claimed by the forced heir.

An heir may ask the sub-district court to end the administration if five years have passed after the death of the testator.

If the testator however has appointed an administrator over the share of a minor, Article 1:253i Para 4 sub c BW, the child has to accept this administrator until the end of his minority.

The forced heirs may also decide that they do not contest the will and accept the testamentary provisions and the gifts that the deceased has made.

Protection of the Surviving Spouse against the Testator

The surviving spouse has the right to remain in the house where she and her husband had their habitual residence before he died for six months after his death, Article 4:28 BW. If she gets the right of usufruct of the house, then she is well provided for in that aspect. If not, she can claim the right of usufruct on that house, Article 4:29 BW, provided that this problem is the effect of a provision in the will. If the provisions for

¹⁸ Or other descendants according to Article 4:63 Para 2 BW.

the surviving spouse are not enough to provide her with a standard of living that is comparable to the standard after a divorce, she could also claim the right of usufruct on the rest of the estate, Article 4:30 BW.

The children have to tolerate this and the values of these legal rights of usufruct are not deducted from the *legitimaire massa*, Article 4:76 BW.

Protection of a Partner against the Children of the Testator

Under the old law of succession only the surviving spouses (and registered partners since 1998) could be protected by an *ouderlijke boedelverdeling* against the forced heirs of the testator. It seems that this even was a reason in many cases of homosexual couples to register their partnership if one or both partners had children from previous heterosexual marriages or cohabitations. Until 1996 also the parents of the deceased were forced heirs, which sometimes led to very unpleasant situations when for example their sons died of AIDS and they suddenly claimed a part of the estate against the homosexual partner of their sons whom they never accepted. Although he was the only heir appointed in the will of the deceased, he could do nothing against these claims which led to a co-ownership between the heir and the forced heirs.

In the new law people in these conditions are no longer forced to marry or register their relationship. In Article 4:82 we find a provision which makes it possible for the testator to make a will in favour of his surviving partner (married, registered or living together with the testator with a cohabitation contract) while his forced heirs have to wait to receive their claims until the surviving partner has died, falls into bankruptcy etc.

This protection of the unmarried partner, who was living together with the deceased, is new under Dutch succession law. It answers to the tendency in Dutch society to marry less and live together without marriage or registration more often.

Conclusion: A system of Forced Solidarity between the Spouses and the Generations

The system outlined above shows that the new legislation is based on the thought of forced solidarity between the generations. This intent lay behind several earlier versions of the law in the long process that preceded the law that actually entered into force. In that process also other solutions were found that were designed to protect the surviving spouse, i.e. a forced heirship for the surviving spouse or the legal usufruct as it was considered in the beginning of the 1980'ies.

In the end the legal division was chosen as the most favorite solution. That is understandable because it resembles the notarial practice of the will containing an *ouderlijke boedelverdeling*. But because it was introduced rather late in the legislative process (in 1992), it does not fit well into the system of the law on several points, but this is mostly a problem for academics. It does not hinder the practitioners much.

In an international context it is quite amazing to what extent the rules that inhibit the testator are of a mandatory nature. The effect is that – although the testator is left rather free to arrange the content of his will in any way he likes – after his death it is possible that several claims are made which disturb the handling of the estate as he provided in his will. This is especially the case when one considers the provision of Article 4:38 BW, the transferral of the business of the deceased or the shares thereof. Although the testator may have made different provisions concerning the business, the children and others named in the article may exercise their rights.

The protection of the spouse in Articles 4:28-30 BW is not so extraordinary when one considers that under the Dutch law the testator may totally disinherit his surviving spouse. The protection is also valid against claims of other heirs than the children. It

seems that this protection can be seen as a continuation of the duty to care that applies between the spouses during marriage, Article 1:81 BW.

7. Comparative Legal Analysis

Meijers, as the initiator of the new codification, has a lively interest in foreign legal systems, as the dissertation of Sütő¹⁹ shows. He was very much interested in several European and Non-European countries and it seems that he left for a trip to Switzerland to study the new Swiss law the day after he was appointed to recodify Dutch civil law. He was very much interested in states which had adopted a new civil code recently (Switzerland and Italy), but he is also interested in many others, as show his contacts with Belgian and South-African colleagues. French law is also considered but he didn't find it as interesting as some other legal systems as the old Dutch law of succession resembled the French Code Civil in many ways. Differences could be found for example in the articles on forced heirship which didn't favour the strict rules on the reserve of the French Code Civil which were taken over in Belgian law. The reason for these differences was the fact that after the separation of Belgium from the Netherlands in 1830, some particularities of Roman-Dutch law were incorporated in the Dutch Civil Code.²⁰

When the new Dutch Civil Code was discussed in the Netherlands, obviously some aspects have been influenced by foreign law. We know that Meijers and his assistant, Jan Drion, had a great interest in foreign law. Also the committee for the law of succession (*Commissie Erfrecht*), that mainly consisted of notaries and university professors, that published several reports as answers to the work in progress, referred to foreign law in many instances. For example in the second report²¹ we find references to the law of France, Germany, England and the United States.²²

In the beginning of the parliamentary discussions, Meijers asked a number of *Vraagpunten* in a questionnaire. *Vraagpunten* 36-42 were relevant for the law of succession.²³ When one looks at the whole of the parliamentary history of the new law of succession, there are for instance 84 references to German law, 34 to Swiss law, 42 to French law, and 6 to Greek law. It is not possible within this article to list all references in detail but one can note that only a few members of parliament themselves referred to foreign legal systems. In most cases they used the references that were given by Meijers and later by the groups that proposed the other parts of the new law.²⁴

I will list some of these fields where foreign law, and often German law in particular, has influenced the legislation in the Netherlands:

¹⁹ Sütő 2004, concluding remarks on p. 38.

²⁰ See for details on differences Greuter-Vreeburg 1987.

²¹ Completed in the years 1963-1966.

²² Florijn 1994, p. 282.

²³ Sütő 2004, p. 40-43 and p. 61-63; *Parlementaire Geschiedenis* Boek 4, p. XIII- XXXIX.

²⁴ Sütő states in her dissertation on p. 90-91 that after the death of Meijers, who had a wide interest in foreign legal systems, his successors neither had the time nor the means nor the interest in consulting 'surprising' legal systems, as she qualifies the legal systems of Siam (Burma) Israel or Mexico. One exception is Jan Drion, see Sütő 2004, p. 40-43, 211-213, who filled many notebooks and library cards with information on foreign law, as stated by his widow and brother. Drion died in 1964.

See Sütő 2004, p. 226-228 about critical notes in the literature about the use of the foreign legal systems. Was the knowledge as thorough as it might seem or was it some kind of window dressing? See Van Dunné 1982, p. 37-68.

The position of the surviving spouse: The discussion about the protection of the surviving spouse has been influenced by foreign systems quite thoroughly. Meijers asked in *Vraagpunt 37* whether the share of the surviving spouse should be increased because the changes in the Dutch Civil Code in 1923 didn't help much if the deceased left behind a great number of children, as the spouse was only entitled to a share that was equal to that of the children, unless the deceased had provided otherwise in his last will.²⁵ He also asked if she should be entitled to a forced heirship like in other countries²⁶ and if the forced heirship for the descendants had to imply that they become proper heirs if they invoke their rights as forced heirs.²⁷ In the end a very different solution was chosen, but it was not until many years later that the Dutch invention, the *wettelijke verdeling*, was inserted in Book 4 of the Dutch Civil Code.²⁸

The position of the forced heir: should he be a proper heir and therefore entitled to a share of the estate in property or should he only have a claim in value.²⁹ It was decided that it was not politically feasible to abolish forced heirship completely, but it was seen as necessary to reduce the claim of the forced heirs to a claim in value like in Germany. That meant that the new law made the switch from basically the system of the Code Napoleon with a position in which the forced heir can claim goods of the estate³⁰ to the German system of the claim in value, § 2303 BGB.³¹

The position of the executor and the testamentary administrator: how far should they be entitled to make decisions about the estate without the consent of the heirs.³² This is a difficult matter because of the differences in the Dutch and German law concerning the period after the death of the deceased. In Dutch law the *notaris* leads the necessary measures which the heirs or the executor have to take. In German law the *Nachlassgericht* is involved, even if there is no real problem with the estate. In that context it is not easy to compare the position of the executor and the testamentary administrator as they function in quite different contexts. In Dutch law it is therefore a question how far the executor and testamentary administrator (if supplied by the testator with as much power as possible) may go in exercising their rights. One special question concerns the ability to divide the estate between the heirs without their consent after all debts have been paid.

*The position of the notaris vs. a judge in the period after the death of the deceased and the question if the resolution of the estate should be undertaken by a liquidator (vereffenaar) in the cases where serious problems arise.*³³ In the new law one sees

²⁵ *Parlementaire Geschiedenis* Boek 4, p. XV.

²⁶ *Parlementaire Geschiedenis* Boek 4, p. XXI.

²⁷ *Parlementaire Geschiedenis* Boek 4, p. XXVIII.

²⁸ The idea was raised in 1992 after a serious crisis in the development of the draft for Book 4 BW because no consensus could be reached about the position of the surviving spouse. Later the original idea was supplemented with the optional rights for the children, which had earlier been presented in 1984 by Heuff and Heyman, see Van Mourik *et al.* 2002, p. 6-7. In 1997 a new draft was presented to the parliament containing the new system, *Kamerstukken II 1996/97*, 17 141, nr. 21.

²⁹ Schols 2002, p. 75.

³⁰ But as it is mentioned before, under the old law the forced heir had no right to a reserved portion of the estate (*réserve héréditaire*).

³¹ See Pitlo & Kisch 1954, who wrote a thorough analysis of the rules of forced heirship, also comparing the Dutch system to foreign legal systems.

³² Schols 2004; Schols 2001; Schols 1999, p. 745-750.

³³ Schols 2002, p. 73-78.

that the liquidation is usually settled out of court amongst the heirs. Only when the balance of the estate is negative or the heirs are not able or willing to pay the debts, the court appoints a liquidator. If the situation is very complicated, this liquidator can get special powers, comparable to the liquidation in a bankruptcy procedure.

In many cases the German law was looked at closely, for example concerning the position of the forced heirs, but we find some interesting differences in the way the protection of the surviving spouse works out if there is no will and no marriage contract: the surviving spouse is entitled to half of the community of property, irrespective her share in the goods that are part of that community, and then she is entitled to the estate of her deceased husband while the children will have to wait until her death to claim their shares if they can't or do not want to claim their optional rights (*wilsrechten*) in between. If one compares this position to the position of the surviving spouse in other countries, her position in the Netherlands is very good, even if she is disinherited. In that case she can claim the usufruct of the house and its contents or even the whole estate if necessary.³⁴ In the constitution of the protection of the spouse in Dutch law, the legislators looked closely at the solutions found in other countries as well,³⁵ such as Belgium, France, England and Austria but it was acknowledged that the Dutch rules gave a greater amount of protection than most other countries. The reason for that was the testamentary practice in the Netherlands as it had developed in the last decennia.

When we summarize the facts stated above, the conclusion is that especially in the beginning of the legislative process the influence of foreign law is clearly visible. In later stages mainly national arguments were used to decide conflicts on the further progress of the work.

One must not forget that some changes already had taken place before 2003 that were inspired by the decisions of the former European Commission and the European Court of Human Rights. One very important change was the fact that the rights of children who were born in and outside a marriage became equal in 1979 because of the decision in the *Marckx*-case concerning Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.³⁶ Since 1998 we do not speak about legitimate and illegitimate children anymore. The only distinction we still make is between children who have legal ties to a mother or a father and another parent³⁷ and those who only have a mother. The child always has legal ties to the mother who gave birth to it, unless it is adopted.³⁸

In the changes in 2003 for example the right to make a will was extended to people over whom a guardian is appointed in account of a mental disorder (*curatele wegens geestelijke stoornis*). They are now able to make a will with the consent of the sub-district court. It was found necessary to give the right to make a will to these people as well because of the right to make a disposition over their estates after death, based on the criticism in the doctrine in the line of the *Marckx*-case of the European

³⁴ Pulinckx-Coene 2002, p. 91-96.

³⁵ *Parlementaire Geschiedenis* InvW. 4, p. 1675.

³⁶ ECHR 13 June 1979, *NJ* 1980, 462 (*Marckx*), *ECHR*, *Series A*, vol. 31.

³⁷ In the Netherlands it is possible to have two mothers or two fathers by adoption.

³⁸ This rule was introduced in 1947. It marked the return to the Germanic principle (mother makes no bastard) as opposed to the French principle that was valid from the introduction of the 1838 Dutch Civil Code where children born out of wedlock had to be recognized in order to create legal ties between the child and its parents. See Vlaardingerbroek *et al.* 2004, p. 180, and Smits 1998, p. 50-54.

Court of Human Rights. The Minister of Justice stated that he would like to wait for the outcome of the work of a commission within the Council of Europe concerning the position of incapable persons, but we do not find evidence that it had any influence later.³⁹ We there find the influence of the English law, where these people have the right to make a will since the beginning of the 1980s.⁴⁰

Also the legislator was concerned whether the rights of the surviving spouse of the Articles 28-30 of the Dutch Civil Code are in compliance with Article 1 Para 1 and 2 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as they are mandatory rules which constitute an infringement of the freedom of the testator to dispose of his estate any way he likes (as part of the peaceful enjoyment of his possessions). These articles – together with the rights of the children stated in the Articles 4:35, 36 and 38 BW – constitute an infringement of the freedom of the testator to dispose of his estate but it was felt that these infringements are within the boundaries as they are defined in the Marckx-decision.⁴¹ Another possible infringement of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms is constituted by forced heirship. On several occasions lengthy discussions have taken place on this issue.⁴² The general feeling was that also this infringement is found in the laws in most of the other states of the Council of Europe.⁴³

The outcome of these discussions was that the position of the forced heir was cut back considerably: he no longer has any rights to goods of the estate like a real heir and the testator has the possibility to postpone his claims until the surviving spouse or partner dies. But it was not possible in the current political setting to abolish the statutory share all together without incurring a mayor delay in the introduction of the new law of succession.⁴⁴

Apart from the legal division of the estate, which can be characterized as ‘typical Dutch’, we find several other specialties in the new law of succession, for example:

- the position of stepchildren (Arts. 4:27 and 4:91 BW);
- the right of transferal of the assets of a profession or a business to the surviving spouse, a child or a step-child of the deceased (Art. 4:38 BW);
- the protection of the surviving unmarried partner.

In the parliamentary discussions about these provisions we do not encounter any references to foreign legal systems.

8. Movement towards Drafting Principles of Succession Law or even Creating a Supra-national Law of Succession?

The outline of the parliamentary history as stated above and the various books and articles in legal journals concerning the new law of succession very rarely mention a solution in foreign legal systems as a basis for the development of certain legal

³⁹ *Parlementaire Geschiedenis* InvW. 4, p. 1790.

⁴⁰ Mental Health Act 1983, s 96, 1, e, mentioned in *Parlementaire Geschiedenis* InvW. 4, p. 1790.

⁴¹ *Parlementaire Geschiedenis* InvW. 4, p. 1674, 1808.

⁴² *Parlementaire Geschiedenis* InvW. 4, p. 1808.

⁴³ *Parlementaire Geschiedenis* InvW. 4, p. 1808. See also the doctoral thesis on this issue by Mellema-Kranenburg 1988, p. 142 e.v.

⁴⁴ *Parlementaire Geschiedenis* InvW. 4, p. 1432.

solutions in the new Dutch law. On some occasions we find that foreign law is used to understand the new legal concepts in our code.⁴⁵

It is remarkable that European developments were included in the legislative process in a neighbouring field, matrimonial property law where a thorough report on several European legal systems was commissioned by the government.⁴⁶ The idea was that the changes in the community property rules should bring Dutch law closer to the European common denominator, but unfortunately that common denominator did not really exist. The reason why this European focus can be found in the process of revising the matrimonial property law and much less in the process of the renewal of the law of succession can in my view be explained by the factors I mentioned before:

- Meijers had a great interest in foreign legal systems but after his death and the death of Jan Drion his successors had nor the time nor the means or the interest in foreign legal systems in order to pursue his path of legal comparison;
- it took a very long time to implement the law of succession, about 50 years. It would have meant further delay if the legislator had made a thorough study of the international aspects of the changes to the original draft. Especially these changes, the legal division and the protection of the unmarried partner were answers to changes in society that took place after Meijers' death;
- in the beginning of the work on the new law of succession it was very difficult to find the information on foreign legal systems. In the years after the war everything had to be noted, mostly by hand,⁴⁷ because computers and the internet did not exist.

Is there a movement in the Netherlands towards drafting principles of succession law or even creating a supra-national law of succession? As the law of succession is quite new, practitioners are mainly interested in understanding the new law and finding solutions for gaps or inconsistencies in the new legislation. The books and articles about the new law are mainly aimed at helping the practitioners and the students who learn the content of the new Book 4 of the Dutch Civil Code. As mentioned before, we sometimes find references to foreign legal systems on succession but that is not used to draw up international principles of succession law. In the Netherlands, one is more concerned about the developments that were initiated to fight the violation of human rights, for example the question whether same-sex couples or unmarried couples in general should or could benefit from the same advantages as married couples (of different sexes or same-sex married or registered couples), but as the developments in family law in the Netherlands are much faster than in many other countries, there was no reason to wait for the other countries in these issues.

When the European Commission was asking for answers to the questions in the Green Paper on Succession and Wills,⁴⁸ we saw that several different groups started to work on those issues, adhering to the idea that common rules of private international law will be sufficient to solve problems arising from international succession cases. The problems now partly have their origin in the fact that the Hague Convention on Convention on the Law Applicable to Succession to the Estates of Deceased Persons,

⁴⁵ For example Schols 2004 and Schols 2001.

⁴⁶ Boele-Woelki *et al.* 2000.

⁴⁷ Take for example all the notebooks that Jan Drion used to fill with notes about foreign law. Jan Drion used to be the most important assistant of Meijers. He used to do research in the *Vredespaleis* (peace palace) in The Hague. After Meijers died, he was part of a threesome who took over the work on the new civil code.

⁴⁸ *Green Paper on Succession and wills*, SEC(2005) 270, COM(2005) 65, March 2005.

concluded on 1 August 1989, is already used as the source of the rules of private international law of succession in the Netherlands, but this convention is not very popular.⁴⁹ There are not enough ratifications to have it enter into force. It is therefore a good thing that the European Commission is now working on the harmonization of the private international law rules on succession, at least for the European countries. If that leads to results, there will be even less reason for the harmonization of the substantive rules on succession, many will think.⁵⁰

There is however a general tendency to make Dutch civil law in general and Dutch law of succession in particular, more available to scholars and practitioners who do not read Dutch texts. In 2002 an introduction to the new Dutch succession law⁵¹ was published, followed by a translation of Book 4 Dutch Civil Code by Ian Sumner and Hans Warendorf in 2005.⁵² In 2006 a description of the Dutch law of succession will be published as a chapter to: *An Introduction to Dutch Law*.⁵³

The introduction to this translation by Walter Pintens confirms that in the Netherlands the new code is in accordance with the tendencies in the rest of Europe where also the strong position of the surviving spouse to the detriment of the position of the children of the deceased, equality of all children, whether born inside or outside a marriage, the reduction of the rights of the forced heirs away from a substantive share in goods to a less substantive share in value and the protection of the rights of a surviving partner who was not married or registered to the deceased.⁵⁴ In the Dutch view it seems more important that these goals were reached in a way that fitted in the Dutch system. The work on a European Code of succession law is not high on the priority list.⁵⁵ The basis of the different codifications concerning the law of succession are very different from each other and closely related to several matters of family law, for example the affiliation of children, the different forms of relationships which have different effects in each country,⁵⁶ and the need for protection of surviving spouses, especially women, which is closely linked to their participation in the workforce as was mentioned before.

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⁴⁹ See about this convention: Westbroek & De Lange 1990 and Ten Wolde 1995; Ten Wolde 1996.

⁵⁰ See also the Press Release by the CNUE (the Conference of the Notariats of the European Union) on: 'Green Paper on Succession: EU notariats respond', Brussels, 30 September 2005, <<http://www.cnue.be/fr/000/cp-successions-en.pdf>>, 18 October 2005.

⁵¹ Nuytinck 2002.

⁵² Curry-Sumner & Warendorf 2005.

⁵³ Chorus *et al.* 2006. Chapter 11 by Gerver will deal with the law of succession.

⁵⁴ Pintens 2005, p. VIII.

⁵⁵ Although the practitioners might dream of this because of practical reasons, Handelmann 2004, p. 311-313.

⁵⁶ See Waaldijk *et al.* 2005.

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Cite as: B.E. Reinhartz, *Recent Changes in the Law of Succession in the Netherlands: On the Road towards a European Law of Succession?*, vol. 11.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (May 2007), <<http://www.ejcl.org/111/article111-17.pdf>>.