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NETHERLANDS COMPARATIVE LAW ASSOCIATION

New Developments in Succession Law*

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1. Preliminary Remarks

In his opening words the French reporter makes the following statement:¹

Rappeler que tous les foyers sont confrontés à l'épreuve du deuil confine à énoncer un truisme. Mais après la douleur que provoque la mort d'un être proche, les familles ressentent souvent un désarroi face à la difficulté – supposée ou réelle – du règlement patrimonial de la succession dans ses aspects civils et fiscaux.

Everyone who is involved in matters relating to succession law will, I am certain, be able to agree with this statement, without any hesitation. After a person's death, the property and debts of this person will pass to those who survive. Such passing (or transfer) of property and debts belongs to the area of property law. Traditionally, however, in succession matters the general rules of property law are supplemented by special rules concerning to whom and how a person's property passes upon his/her death: the law of succession. These rules are influenced by socio-cultural, socio-economic and sometimes also religious factors, very much as can be found in family law. As a consequence, succession law is still seen as typically local (national or regional) law or in some legal systems as belonging to religious law. This might explain why most publications on the law of succession aimed at an international audience are only meant to give information on one or more particular systems of succession law, without

* Session II.A. Développements du Droit des Successions. National reports received from: Belgium, F. Tainmont; Canada (Québec), B. Lefebvre; France, J.-F. Sagaut; Germany, Th. Raucher; Greece, N. Psouni; Japan, Y. Shiomi; the Netherlands, B. E. Reinhartz; New Zealand, N. Peart; Poland, A. Maczynski; South Africa, M. C. Schoeman-Malan; Spain, S. Camara Lapuente; UK, H. Hiram; US, R. J. Scalise Jr.

¹ J.-F. Sagaut, Présentation de la Loi réformant le droit français des libéralités et successions, p. 1. Unfortunately, this highly interesting report on the new French law of succession has not been published in the collection of French national reports, 2006(2) *Revue de Droit International Comparé*. The reporter revised his report shortly before the conference after the final version of the new law had been enacted.

offering a comparative legal analysis. A comparison of succession laws is quite often seen as not fruitful in the light of the differing underlying social, cultural, economic and religious aspects; it is considered to be a senseless exercise.² In the area of family law, however, this somewhat conservative view has already changed, as can be seen when looking at the result of the research carried out by the Commission on European Family Law (CEFL).³ The work done by the CEFL in the area of family law shows that it could prove to be very illuminating to analyse whether socio-cultural and socio-economic developments in one country can also be seen in other countries and to study the impact of these changes. What applies to family law might also apply to succession law. Furthermore, a comparative examination might very well bring to the surface that legal systems do resemble one another much more closely than previously thought. This might prove to be a foundation for future harmonisation of the law if, as a result of economic integration, international contacts intensify and international successions become more frequent.

For the time being, the unification or even harmonisation of succession law is not on the agenda of any law-making body. This is different with regard to the rules on private international law. A clear need exists to create uniform rules on private international law in this area in order to reduce the complexity which is so often characteristic of international successions. Various questions may arise here, of which I will mention only a few. First of all, the question of which law applies to the matrimonial property regime. Matrimonial property law and succession law are closely related. After it has been decided which law governs the matrimonial property regime it will become clear what the applicable rules and the resulting property relations are and only then can it be established which property and which debts belong to the decedent's estate. Questions on the applicable matrimonial property law might,

² Cf. for a more balanced approach M. J. de Waal, *Comparative succession law*, in M. Reimann & R. Zimmermann, *The Oxford Handbook of Comparative Law* 1071 *et seq.* (2006). See also the proceedings of the conference organised by the Council of Europe in co-operation with the European Commission and the International Union of Latin Notaries, held on 14 and 15 October 2002 in Strasbourg: *The legal protection of the family in matters of succession*, to be found at: http://www.coe.int/t/e/legal_affairs/legal_co-operation/family_law_and_children's_rights/Conferences/proceedings%20confam20023.pdf. A further reference can be made to M. Verwilghen & S. Mahieu, *Régimes Matrimoniaux, Successions et Libéralités dans les relations internationales et internes* (2003) (3 Volumes), published under the auspices of the Union Internationale du Notariat Latin, Commission des Affaires Européennes et de la Méditerranée.

³ For more information on CEFL I refer to their web site: <http://www2.law.uu.nl/priv/cefl/>. On this website the following can be found on the aim and scope of the research conducted by CEFL:

The CEFL was established on the 1st September 2001 and has as its main objective the launching of a pioneering theoretical and practical exercise in relation to the harmonisation of family law in Europe. This will be achieved by: Surveying the current state of comparative research on the harmonisation of family law in the European countries. Experiences will be exchanged and further research activities in this field will be coordinated. Searching for the common core for the solution of several legal problems on the basis of comparing the different solutions provided by the family laws of the various European jurisdictions. Surveying the role of (potential) future European EU member states in the process of the harmonisation of family law. The major benefit to be expected by the establishment of this Commission is the creation of a set of Principles of European Family Law that are thought to be most suitable for the harmonisation of family law within Europe.

On the CEFL website also a list of publications on comparative succession law can be found.

in turn, lead to further family law questions, such as whether the deceased was legally married or not. After questions relating to the matrimonial property regime and connected family law questions have been settled, succession law problems *stricto sensu* will arise. Which law governs the testate or intestate succession? Has a valid last will been made? The latter question could result in debates on the formal validity of the will and on the capacity of the testator. Further problems in an international succession may be caused by differences between legal systems concerning the transmission of the estate to the heirs. Common law and civil law systems differ fundamentally. Common law systems generally do not accept that the estate passes directly to the heirs, but demand the appointment of a personal representative. Civil law systems, however, do accept this direct transmission. All these questions, although of a private international law nature, are provoked by sometimes deep-rooted differences in the substantive laws of succession. This cannot but mean that, if private international law rules on international successions are to be harmonised, a comparative analysis of substantive succession law is unavoidable. Only after understanding the differences on a substantive law level will it be possible to fully understand how the rules on private international law function and whether the outcome of these rules will be workable. Private international law is not what might be called a blind process.⁴

It can therefore be no surprise that the European Union Green Paper on succession and wills, although its main purpose is to explore the needs and possibilities of the unification of private international law rules with regard to international successions, shows that harmonisation of private international law in this area cannot escape from considering the different substantive law rules in the various national legal systems. The Green Paper, however, shows more. It seems to imply that attempts to harmonise or unify private international succession law within the European Union may also result in examining the needs and possibilities of harmonisation or unification of precisely these substantive law rules.⁵ If, to give but one example, official documents issued in one Member State of the European Union may lead to amendments with regard to entries in the land register in another Member State, in fact the result is that, at least as far as this aspect is concerned, the law on land registers has been harmonised. The result of such a private international law rule can only be that each national legal system must accept the amendment of its land register if, e.g., a European certificate of inheritance drawn up in the prescribed international form is presented. The same applies if the Member States would be obliged to create a scheme for

⁴ See J. E. J. Th. Deelen, *De blinddoek van Von Savigny, inaugural lecture Tilburg University 1966*, in J. H. M. van Erp, M. P. J. M. de Vet & J. B. M. Vranken, *Audienda Verba* (selected essays of J. E. J. Th. Deelen) 64 ff. (1989).

⁵ Green Paper Succession and Wills, presented by the Commission of the European Communities, COM(2005) 65 final, Brussels, 01.03.2005. See also the Document de Travail des Services de la Commission, Annexe au Livre Vert sur les Successions et Testaments {COM(2005) 65 final}, SEC (2005) 270, Brussels, 01.03.2005.

registering wills, even more so if the outcome would be that a centralised register should be set up. Again, the outcome would be a harmonised or uniform law on registers for centralised wills. Furthermore, and this is an even better example of the foregoing, the Green Paper asks the question whether common law trusts should be recognised in all Member States as well as joint wills (wills made by two or more persons in the same document, either for the benefit of a third party or for their mutual benefit) or agreements on future successions (agreements made before death as to one or more future successions). Recognising a common law trust by a civil law system or accepting joint wills or agreements on future successions by legal systems which, thus far, did not accept trusts, joint wills or agreements on future successions, will inevitably imply that the national law will have to accommodate the foreign institution (adaptation) and that inequalities arise between non-nationals and nationals (why accept a foreign joint will by someone from abroad and not if a joint will is made by testators with no foreign connection?). To study the needs and possibilities of harmonising or unifying certain aspects of succession law, to solve problems of adaptation and to answer questions on possible discrimination between non-nationals and nationals, again comparative analysis of succession law will be difficult to avoid.

A further development that has led to a growing interest in comparative succession law and worth mentioning is the growing importance of “estate planning”: structuring the passing of property from one generation to the next in such a way that, for example, an estate will not be fragmented in an undesirable way and a family business can be kept together, while trying to avoid taxation as far as legally possible. In this general report succession taxes and the tax aspects of estate planning will not be discussed, but some substantive aspects of estate planning will be analysed, such as the interrelationship between matrimonial property law and the law of succession as well as the close connection between family law and succession law.⁶ It might be interesting, however, to remark that “estate planning” has led to what might be called a “contractualisation” of succession law or a “quasi-succession law”. Through the use of contractual arrangements the passing of a person’s estate is given shape and the use of succession law (especially making a testament) will then only be one element of the total arrangement.⁷ It is submitted that this is certainly also one of the recent trends in succession law, but as this particular trend is not discussed in any of the national reports it will also not be discussed in this general report.

The theme of this general report is “new developments in succession law.” The session is therefore not directly aimed at an in-depth analysis of the various national – and frequently

⁶ Cf. S. Ducamp-Monod, *Programmation successorale internationale*, in M. Verwilghen & S. Mahieu, *Régimes Matrimoniaux, Successions et Libéralités dans les relations internationales et internes* Vol. I, (2003) p. 469 ff.

⁷ See for the Netherlands F. W. J. M. Schols, *Quasi erfrecht* (2006).

highly technical – rules of succession, but at a comparative analysis of succession law from a more general viewpoint. As indicated in the “Guidelines for National Reporters”, the major aims of the session on succession law are to discover

- 1) general tendencies with regard to recent changes,
- 2) the influence on these changes of any comparative legal analysis and
- 3) the impact of (regional) economic integration.

I received national reports from Belgium, Canada (Québec), France, Germany, Greece, Japan, the Netherlands, New Zealand, Poland, South Africa, Spain, the United Kingdom and the United States.⁸ It is to be regretted that no reports were received from Middle and South America, other African or Asian countries and Australia. Also no reports are available on legal systems which have their roots in religious law. This means that from a socio-cultural viewpoint what follows is an analysis for the most part based on European and North-American developments.

It should further be mentioned that in two countries as to which national reports have been recently submitted the law of succession has been revised fundamentally: the Netherlands in 2003 and France as recently as 2006.⁹ Furthermore, in other national legal systems, such as Spain and England & Wales, more or less far-reaching revisions are being discussed.¹⁰ In Spain, to give but one example, a fundamental debate is going on concerning forced heirship, whereas in England and Wales the question of which succession rights should be given to cohabitants is now being discussed.¹¹

In the Netherlands the principal aim was to create a law of succession that would obviate the need to make a last will, by creating as the statutory default regime the arrangements

⁸ *Supra* note *. The Québec, French, German, Japanese, New Zealand, South African and Spanish reports on succession law have, as far as I know, not yet been published.

⁹ For the Netherlands *see* the new Book 4 of the Civil Code (in force since 1 January 2003) and for France *see* the Loi no. 2006-728 du 23 juin 2006 portant réforme des successions et libéralités, Journal Officiel no. 145 du 24 juin 2006, p. 9513. An overview of the history of the new law of succession in the Netherlands can be found in M. J. A. van Mourik *et al.*, *Handboek Erfrecht* 2 ff. (2006). A concise comparative analysis of the new Dutch law of succession can be found in M. Puelinckx-Coene, *Enkele rechtsvergelijkende beschouwingen bij Boek 4*, in Ministerie van Justitie, *Langst leve het nieuwe erfrecht* 91 ff. (2002). *See also* S. van Erp, *New Dutch succession law: a critical and comparative viewpoint* (to be published as part of the proceedings of a conference held at the University of Stellenbosch, South Africa, 2005).

For the parliamentary history of the new French law *see* the ‘dossier législatif’ that can be found on the following websites: <http://www.legifrance.gouv.fr/> (French legislation), http://www.assemblee-nationale.fr/12/dossiers/successions_liberalites.asp (Assemblée Nationale) and <http://www.senat.fr/dossierleg/pjl05-223.html> (Sénat).

¹⁰ *See* the Spanish national report, p. 28 ff., United Kingdom national report, p. 12 with reference to the Consultation Paper published by the Law Commission for England and Wales on cohabitation: the financial consequences of relationship breakdown (Consultation Paper no. 179, published 31 May 2006). The paper can be found on the law commission’s website: <http://www.lawcom.gov.uk/index.htm>.

¹¹ Spanish national report, p. 25 ff., UK national report p. 12. The UK national reporter refers to a consultation paper published by the Law Commission for England and Wales, entitled *Cohabitation: The Financial Consequences of Relationship Breakdown* (The Law Commission Consultation Paper No 179). This consultation paper can be found on the law commission’s website: <http://www.lawcom.gov.uk/>.

which were nearly always chosen by those making a last will under the old succession law. If a last will was made, and that happened frequently, the testator generally wanted to appoint the surviving spouse as the sole heir, severely restricting the rights of the children as forced heirs (a so-called “survivor all” will). It is interesting to note that this same development as could be found in the Netherlands towards a broad use of a will to deviate from the statutory default regime, in order to safeguard the position of the surviving spouse, can also be seen in Spain.¹² This provokes, very much as it did in the Netherlands, a desire in Spain to at least rethink the existing default regime, as it appears that this regime is not what a large number of people want. In France the principal aims for the succession law reform were threefold: to provide more freedom to arrange the succession, to facilitate the management of the deceased’s estate and to accelerate and simplify the distribution of the estate.¹³ It is also an explicit aim of the French reform to facilitate the continuation of an enterprise.¹⁴ Under the new French law contracts relating to estates (“*pactes successoraux*”) and transgenerational estate planning techniques (“*donations partage trans-générationnel*”) are now allowed.¹⁵ Furthermore, it will become possible, albeit under strict conditions, to appoint a “*mandataire*” to manage the estate, who will have a position close to a regime of “*fiducie successorale*”.¹⁶ These are not isolated developments. It should be noted that the introduction of a trust-like regime in succession law can also be seen in Spanish law (“*fiducia successoria*” or, as the Spanish reporter states, “*mortis causa trust*”), to protect disabled persons.¹⁷ Furthermore, Spanish case law already accepted, in spite of the statutory ban on agreements relating to future successions, the validity of inheritance agreements, if these dealt with known and existing items of property.¹⁸

2. General Tendencies

In the following sections I will present an overview of what the various reporters wrote about the tendencies they perceived in their national legal traditions.

¹² Spanish national report, p. 3 & 4.

¹³ French national report, p. 3.

¹⁴ French national report, p. 13; *see also* Puelinckx-Coene, *supra* note 9, p. 91, who states that such an aim can also be regarded as a general tendency in succession laws. *See* the Spanish national report, p. 5.

¹⁵ *Cf.* French national report, p. 16.

¹⁶ French national report, p. 8. *See also* the “Proposition de loi, instituant la fiducie” (bill to introduce a civil law trust) in French law, which was adopted by the Senate and is now being discussed by the National Assembly. More information can be found in the “dossier législatif” at: <http://www.senat.fr/dossierleg/pp104-178.html>

¹⁷ Spanish national report, p. 6.

¹⁸ Spanish national report, p. 18.

2.1. Political Developments

The political changes in Central and Eastern Europe after the collapse of communism have had a considerable impact on certain aspects of succession law. In Poland before 1989 a distinction was made at a constitutional level between the right to succession regarding, on the one hand, personal objects and, on the other, the means of production, especially farmlands. As a consequence, special rules of succession applied to farmlands. These special rules were abolished in 1989. Since then, the Polish law of succession no longer makes a distinction between various types of objects.¹⁹

2.2. Socio-Cultural and Socio-Economic Developments

Several reporters mention (explicitly or implicitly) fundamental socio-cultural and socio-economic developments as the main reason why succession law is undergoing fundamental changes. The developments mentioned can be summarised as follows. First of all, it might be interesting to quote the prefatory note to the comparatively recently (1990) revised Article II (intestacy, wills, and donative transfers) of the Uniform Probate Code, a model law from the United States drawn up by the National Conference of Commissioners on Uniform State Laws.

In the twenty or so years between the original promulgation of the Code and the 1990 revisions, several developments occurred that prompted the systematic round of review. Three themes were sounded: (1) the decline of formalism in favor of intent-serving policies; (2) the recognition that will substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission; (3) the advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages and in the acceptance of a partnership or marital-sharing theory of marriage.

American authors have explored the various changes expressed in this prefatory note at some length.²⁰ The changes appear not to be limited to the United States, but can be found everywhere in the Western world. Puelinckx-Coene in her General Report for the 6th European Conference on Family Law on the legal protection of the family in matters of succession, identifies a 19th century model of succession law that is now being replaced by a new model.²¹ In her view 19th century succession law was based upon lineage, to keep assets within the family. The surviving spouse was a “stranger” to the family and could therefore not inherit. Children born out of wedlock were not considered to be part of the family and could therefore also not inherit. It could perhaps be added that in the 19th century the rules on succession law were only effective with regard to (and thus principally aimed at) people

¹⁹ Polish national report, p. 20, 21 & 23.

²⁰ Cf. E. G. Spitko, *The expressive function of succession law and the merits of non-marital inclusion*, 41 *Arizona Law Review* 1063, p. 1066 (1999); M. L. Fellows, *et al.*, *Committed partners and inheritance: an empirical study*, 16 *Law and Inequality: A Journal of Theory and Practice* 1, p. 2 (1998).

²¹ M. Puelinckx-Coene, General Report, Possible follow-up to the Conference by the Committee of experts on family law, nos. 54 and 55.

who were wealthy and in those days wealth still meant the ownership of land. It should not be forgotten, however, that this 19th century model at the time it came into existence was the result of progressive thinking, although it seems outdated now. As the French national reporter mentions, the French Civil Code of 1804 treated all “citoyens” as equals and abolished the discrimination of female heirs. A revolutionary law from 12 brumaire An II conferred succession rights on natural children.²² With the growth of general welfare and wealth, together with the declining importance of land as the sole main asset of value, the underlying presumptions of the model no longer applied to the same extent as earlier. In Puelinckx-Coene’s view the 19th century model is being replaced by a model based upon a “logic of affection” and no longer a “logic of blood”. She concludes that the following common elements of the new model can be seen within the European context: the contraction of family ties, often reduced to the nuclear family, (and consequently) the importance attached to solidarity between spouses, the rejection of any form of discrimination, the acceptance of other cohabiting unions than marriage, spectacularly increased longevity and, finally, wealth consisting generally of assets acquired rather than inherited.²³ To these factors could be added: the “multiple marriage” society, the one-parent family, the one or no child family and the “one and a half earners family”, as the latter is called in the Dutch national report.²⁴ Because of the rising number of divorces as a result of a marriage or partnership breakdown, followed by second and further marriages, it occurs more and more frequently that step-parents and stepchildren are involved in a succession. Also as a result of a marriage or partnership breakdown, the number of one-parent families is rising. It seems, furthermore, that at least in some countries the number of families with only one child or no children at all is increasing, partly as a consequence of marriages at a later age. As to the one and a half earners family, the Dutch reporter writes that in such a family the husband works full time and the wife only part time to supplement the family income.²⁵ This makes the wife vulnerable, because of income loss, in the case of her husband’s death. To summarise: Marriage is no longer seen as the only acceptable way of living together for a husband and a wife. It is also no longer perceived to be a life-long commitment that would only end upon the death of one the spouses. The aforementioned socio-cultural and socio-economic changes with regard to marriages are not the only factors influencing the recent developments in succession law. Another factor is longevity. People live longer and therefore heirs might not be very young themselves when they inherit. Heirs will have reached an age upon which they have already accumulated wealth of their own.²⁶ Furthermore, and this is pointed out in the German national report,

²² French national report, p. 1.

²³ Puelinckx-Coene, *supra* note 21, no. 55.

²⁴ Dutch national report, p. 59.

²⁵ Dutch national report, p. 59.

²⁶ *Cf.* the French national report, p. 1 & 2.

due to the aging population in Europe, which has led to a deferred passing of estates to the next generation, during the coming decades a great amount of wealth will be transferred through succession law.²⁷ This will also have an important impact from the perspective of tax revenues (and hence tax law), because everywhere the state through its succession tax is, in an economic sense, involved in any estate as an outside heir.

It should, however, also be noted that these developments do not take place everywhere or with the same intensity. The Japanese national report makes explicit reference to the debate in Japan on whether freedom of testation should be limited or not, if such freedom is used to recreate the old succession structure under which the first-born son or only one other child would inherit “the house”, meaning the family property.²⁸ On the other hand, the reporter also mentions that it could very well be that this debate is based on certain incidents and that generally it is the surviving spouse who is given protection in a last will.²⁹ It is quite interesting to see that in Germany, in a case concerning the noble family of Hohenzollern, a clause in a last will limiting an heir in his freedom to marry in order to ensure that the house estate of the dynasty should pass in dynastical order could be considered to violate the constitution.³⁰ It seems, therefore, that in all countries on which national reports have been submitted a more modern model is replacing the 19th century model of succession law.

2.3. Impact of Changes in Family Law on the Law of Succession

These socio-cultural and socio-economic changes have not only had an enormous impact on family law (and, it should be added, on matrimonial property law), but also – partly as a consequence of the changes in family law – on succession law. Let me give a few examples. The categories of heirs include everywhere the surviving spouse and the children. Through the creation of “registered partnerships” for cohabiting partners and widening the definition of marriage to allow both heterosexual as well as homosexual partners to marry, the law of succession is already undergoing fundamental changes even without modifying the rules of succession law. Only several decades ago a cohabiting partner could merely inherit if an explicit arrangement, such as a last will, had been made in his/her favour. By entering into a registered partnership or, as has become possible for homosexual partners in several countries, by marrying the partner now enjoys succession rights even in a situation of intestacy. The same is true with regard to children born out of wedlock and adopted children. By no longer discriminating against children born out of wedlock and fully accepting adopted children as heirs, they now have succession rights in the case of intestacy, just as all the other children of

²⁷ German national report, p. 10.

²⁸ Japanese national report, p. 3.

²⁹ Japanese national report, p. 8.

³⁰ German national report, p. 5 & 6.

the deceased. Finally, new medical developments concerning *in vivo* or *in vitro* fertilisation have led to a discussion concerning the question of when children can still be considered to be a “child” of the deceased. Under United States law it is even held in some states that a child not only born but also conceived after the death of the father through the use of frozen sperm can be an heir under the intestacy laws of the state.³¹

A further development that can be seen is that, once registered partnerships have been accepted and marriage has been opened up to homosexual partners, the question is now asked whether these formal ties are really a *conditio sine qua non* for having the right to inherit. Why not accept that a surviving cohabiting partner, if living in a committed and stable relationship, has the same rights as a surviving spouse or surviving registered partner?³² Under New Zealand law, as laid down in the Property (Relationships) Act 1976, also a *de facto* partner is given the right to apply for the division of the couple’s relationship property. This act is one of the three statutes that, according to the New Zealand national reporter, significantly curtail the principle of testamentary freedom.³³ It could further be asked why it should not be accepted that also foster children or other *de facto* members of the family are given succession rights? The difficulty seems to be that, if no formalities such as a registration or a marriage have been fulfilled, problems of proof arise. The law of New Zealand concerning the Relationships (Statutory References) Act 2005 is a good illustration. According to the New Zealand national reporter the aim of the New Zealand parliament was to remove all discrimination based on marital status. This aim “was abandoned when it became clear that the uncertainty surrounding the existence and commencement of *de facto* relationships would create significant problems for the application of many statutes.”³⁴ As a result it is now decided for each statute separately whether that statute will also apply to *de facto* relationships. It will, so it can be concluded, prove to be difficult to draw a clear line between, on the one hand, committed and stable relationships and, on the other, non-committed and non-stable relationships. Drawing such clear lines, however, is inevitable in property law, because of the interests of third parties, such as creditors. Again the New Zealand experience is a good example. The recognition of *de facto* relationships under New Zealand law goes so far that, as the New Zealand national reporter writes, “multiple

³¹ Cf. the US national report, p. 108 ff.; see also the Greek national report, p. 44 ff.

³² See the Spanish national report, p. 16; UK national report, p. 8 & 9.

³³ New Zealand national report, p. 1 & p. 6 ff. The reporter mentions next to the Property (Relationships) Act 1976, the Family Protection Act 1955 and the Law Reform (Testamentary Provisions) Act 1949.

³⁴ New Zealand national report, p. 3. The national reporter writes (p. 3):

For purposes of succession rights they (i.e. *de facto* relationships, SvE) are defined in the Property (Relationships) Act as two persons, whether of the same sex or the opposite sex, living together as a couple without being married to, or in a civil union with, each other. The Property (Relationships) Act provides a list of factors to assist the Court in determining whether two people were living together as a couple, such as sharing a residence, caring for children, financial interdependence, sexual intercourse, mutual commitment to a shared life and public reputation. None of the factors is essential. However, the Courts have generally treated the mutual commitment to a shared life as a key ingredient of a *de facto* relationship.

contemporaneous relationships” can qualify as a *de facto* relationship and therefore several partners will then have to share equally the intestate entitlement of one surviving spouse or partner.³⁵ Monogamy as the basis for succession entitlements is in such a situation abandoned, a consequence that most legal systems in the Western world will find hard to accept.

2.4. Strengthening the Position of the Surviving Spouse, Weakening the Rights of Children

Another general tendency is the strengthening of the rights of the surviving spouse.³⁶ It is well known that the surviving spouse is frequently given initial protection by giving her/him a strong position in matrimonial property law. Puelinckx-Coene has called these solutions “*Erstatz* inheritance laws”, as matrimonial property law is “replacing” succession law.³⁷ Changes in matrimonial property law will in such a case directly affect the rights of the surviving spouse. Surviving spouses can also be given initial protection through the law of succession. Still, whatever approach is chosen, the position of spouses after a divorce is considered to be fundamentally different from the position of a surviving spouse. Nevertheless, in the light of the rising number of divorces, marriages are less and less terminated by the death of one of the spouses and the question has been asked whether this does not create an imbalance between the rights of, on the one side, divorced and, on the other side, surviving spouses. The difference may result more from coincidence than from principle. In some of the national reports it is discussed – perhaps surprising at first sight, but upon further reflection also highly interesting – whether this imbalance should not be removed by giving the surviving spouse a position equal to the divorced spouse. This is an approach which, at least in my view, also touches upon the rights of children and close relatives in legal systems that accept forced heirship. These rights of forced heirship, be it in the form of the *réserve* or the *Pflichtteil* give, for example, children a right to a minimum part of the estate. Children do not have these rights in the case of a division of property resulting from divorce. Equalizing the rights of a surviving spouse with the rights of a divorced spouse would therefore have a serious impact on the rights of forced heirs. As a brief comment I would like to say that it is an undeniable fact that in Western societies a considerable number of people marry more than once in their lifetime and that as a result the differences between the two situations of the termination of a marriage (i.e. divorce and death) become at the same time more significant as well as questionable.³⁸

³⁵ New Zealand national report, p. 12.

³⁶ In Greece also the divorced spouse may be protected with regard to her alimony claim. Greek national report, p. 37.

³⁷ Puelinckx-Coene, *supra* note 21, no. 5.

³⁸ *Cf.* the New Zealand national report, p. 4.

Without ignoring what was said before, it must be concluded from the various national reports that the prevailing approach towards strengthening the position of the surviving spouse is expanding her/his rights under the law of succession.³⁹ This can be done in various ways. The surviving spouse can be given the right to approach the court for a maintenance claim against the estate (common law systems) or (in civil law systems) can be given the position of a forced heir. The mixed jurisdiction of Québec follows an intermediate approach by accepting maintenance claims *post mortem*.⁴⁰ The surviving spouse can further be given preferential rights with regard to the family home (irrespective of whether it was owned or rented) allowing her/him to continue living there.⁴¹ Another way of protecting the surviving spouse in civil law systems is to limit the categories of forced heirs other than the surviving spouse and/or limiting the parts to which forced heirs are entitled. Forced heirship might further be limited by changing it from a right to property to a money claim. The Netherlands has gone quite far on this road of protecting the surviving spouse through the law of succession, even though the present statutory (default) matrimonial property regime is a total community of property. According to the new, fundamentally revised, Dutch law of succession, in the case of intestacy the surviving spouse will inherit the whole estate. The children are given a monetary claim against the surviving spouse, which represents their share in the estate, but this claim is postponed until the death or insolvency of the surviving parent.⁴²

The other side of the coin, however, is that children, other family members and relatives are losing certain rights. A clear example is again the new Dutch succession law, although even in Dutch law the rights of the children have not been eliminated completely. Under Dutch law in certain specific situations the children are given the right to convert their monetary claim into a property claim, even during the surviving spouse's lifetime, for example if the surviving spouse announces that she/he intends to remarry. This mechanism is aimed at protecting the children against the step-parent and his/her children.⁴³

2.5. Last Wills: Softening Formalities

The growing acceptance of informal ways of living together and the growing awareness that living together, even if not in a formalised way, should also have consequences at a property law level, such as the law of succession, seems to have led to the further acceptance of ways

³⁹ See, to give but one example, the Belgian national report, p. 103 ff., mentioning statutes from 1981 and 2003.

⁴⁰ Québec national report, p. 4 ff.

⁴¹ See, e.g., the Greek national report, p. 5 ff.

⁴² Dutch national report, p. 63 ff.. If a last will has been made, the surviving spouse is given mandatory rights with regard to, e.g., the matrimonial home.

⁴³ For a critical and comparative analysis see S. van Erp, *New Dutch succession law: a critical and comparative viewpoint*, to be published in a collection of essays on the law of succession edited by K. Reid & R. Zimmermann.

to transfer property by means of an informal last will. The formal requirements for a valid last will are sometimes softened, in order to give more weight to substance (the deceased's intent) than to form (validity rules). This development can be seen with great clarity in the United States and in Québec, although to a certain degree also in German law this development towards the softening of formalities seems to be occurring.

According to the United States national reporter "a great degree of liberalization has occurred in the formal requirements for an effective will or testament. The trend is decisively toward enforcement of wills that do not comply with the standard form requirements, if the testator's intent can be safely ascertained and no fraudulent activity is suspected."⁴⁴ The United States reporter mentions various approaches: employing the idea of harmless error in wills, granting courts the power to "dispense" with non-compliance, utilising the doctrine of substantial compliance, and the imposition of a constructive trust. The party with an interest in proving that the last will, although not in conformity with the formal rules, is valid and can be admitted in probate (the legal procedure aimed at supervising the process leading to the distribution of the estate) has to prove this. This same approach can be found in the law of Québec. The Québec national reporter makes an explicit reference to article 714 of the Québec Civil Code, which is used by the courts to justify a more relaxed approach to formal requirements concerning wills.⁴⁵ In German law the rules on the formal validity of public wills have been relaxed in the case of persons who are unable to speak and write. Such a person can make a last will by expressing his intentions in any acceptable way, as long as it is clear to the notary that, indeed, these are his/her intentions.⁴⁶ Some flexibility can also be seen in Spanish law, but has not yet been very effective.⁴⁷

It might be expected that related to this more liberal approach towards formal requirements also a more liberal approach to the interpretation of wills might be found. That this could indeed be the case can be seen in United States law.⁴⁸ The United States national reporter mentions explicitly that the United States courts have recently begun to interpret wills more liberally. Again various techniques are used. The basic rule is that extrinsic evidence can be admitted to clarify an ambiguity or contradiction. Next to this basic rule some courts have

⁴⁴ US national report, p. 110.

⁴⁵ Québec national report, p. 9 ff.. Article 714 reads as follows (n. 62 at p. 10 Québec national report): "Le testament olographe ou devant témoins qui ne satisfait pas pleinement aux conditions requises par sa forme vaut néanmoins s'il y satisfait pour l'essentiel et s'il contient de façon certaine et non équivoque les dernières volontés du défunt."

⁴⁶ German national report, p. 2 & 3.

⁴⁷ Spanish national report, p. 15 & 16.

⁴⁸ Cf. the remarks made by the US national reporter on the construction and interpretation of wills, US national report, p. 116.

allowed evidence of a drafting error to show a testamentary intent contrary to the indication of otherwise clear language. This more liberal interpretation of last wills has even gone so far that courts interpret wills “loosely” to “achieve the desired result of the testator.”⁴⁹

2.6. The Law of Succession and Fundamental Human Rights

Also in succession law the more general trend of the constitutionalisation of private law can be found. This becomes very explicit in the South African and the German national reports, but is also mentioned in other reports.⁵⁰

In the new South Africa, which is developing into a modern multi-cultural, multi-lingual and pluralist society, constitutional law is playing a pivotal role in the development of succession law.⁵¹ The South African national reporter mentions that most of the differences between common law and customary law were considered to be unconstitutional and that the legislature revoked existing and adopted new legislation. Freedom of testation finds its limits where it results in discrimination based upon race, gender or religion.⁵² The South African reporter also makes clear that certain rules of customary succession law are being subjected to the influence of the constitution, such as, e.g., a rule preferring male primogeniture.

In Germany the federal Constitutional Court has ruled in a tax case that the freedom of testation and the principle of family succession (“*Prinzip des Verwandtenerbrechts*”) is a fundamental human right. Furthermore, tax law should not make the law of succession worthless.⁵³ This is based upon article 14(1) of the German constitution, which protects not only private ownership, but also explicitly protects the right to inherit.⁵⁴ The same article of the constitution, together with article 6(1) concerning the protection of the family, provides a constitutional guarantee of forced heirship.⁵⁵ The Spanish national reporter states, however, referring explicitly to the developments in Germany, that under Spanish law the abolition of forced heirship would *not* violate the constitution.⁵⁶ In the perspective of the developments in Germany it is also quite remarkable to see that in the mixed jurisdiction of Québec since 1801 the unlimited freedom of testation, which was introduced together with the abolition of forced heirship, is now seen as a “*principe fondateur du droit successoral québécois*.”⁵⁷ It is

⁴⁹ US national report, p. 116.

⁵⁰ Polish national report, p. 20 & 21; Spanish national report, p. 15.

⁵¹ See, more generally, on the constitutionalisation of property law in South Africa: A. J. van der Walt, *Constitutional property law* (2005), p. 72 ff.

⁵² South African national report, p. 17.

⁵³ Bundesverfassungsgericht 22. June 1995 – 2 BvR 552/ 91. German national report.

⁵⁴ Article 14(1) reads as follows: “Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.” Cf. the earlier mentioned Hohenzollern case, German national report, p. 6.

⁵⁵ Bundesverfassungsgericht 19 April 2005 – 1 BvR 1644/00 and 1 BvR 188/03. German national report, p. 5.

⁵⁶ Spanish national report, p. 27. Article 6(1) reads as follows: “Ehe und Familie stehen unter dem besonderen Schutze der staatlichen Ordnung.”

⁵⁷ Québec national report, p. 3.

also striking that the United Kingdom national reporter states that it is no longer clear whether the principle of testamentary freedom, so characteristic from a comparative law viewpoint for common law systems, remains a “guiding principle” rather than a “default position”, to which the national reporter adds that the principle of testamentary freedom is itself of fairly recent origin.⁵⁸

3. The Use of Comparative Legal Analysis

It appears from the national reports that comparative legal analysis, if it plays any role at all in the reform of succession law, is mainly of interest to academic researchers or research institutions. This is mentioned explicitly in the Spanish national report, but it can also be found in several of the other national reports.⁵⁹ The Belgian national report even states that the use of comparative law is “a défaut d’objet” and that to “notre connaissance, aucune étude de droit compare n’a, en effet, été la l’origine d’une quelconque initiative législative en Belgique.”⁶⁰ Nevertheless, the Belgian national report does mention that the Belgian parliament sometimes consults academic researchers with knowledge of foreign law.⁶¹ It is interesting to note that in the common law world the law reform commissions sometimes consider the results of comparative legal analysis. The United Kingdom national reporter refers to the work done by the Law Commission for England and Wales in the area of the unworthiness of an heir to inherit, if the heir has unlawfully killed the deceased. The Law Commission made references to the laws of France, Italy, the United States and Scotland. The South African report mentions that the South African Law Reform Commission in a report on succession law looked at the laws of Malawi, Ghana, Zimbabwe and Zambia.⁶² The New Zealand national report states that, given the migration between New Zealand and Australia, efforts are being made to assimilate legislation between these two countries “where that is possible and practicable”, which implies at least some comparative analysis.⁶³

It should further be mentioned that comparative legal analysis is not limited to comparison between national legal systems. The United States national reporter and the Spanish national reporter make clear that, given the existing legal diversity within their respective countries, comparing the laws of states or regions is done frequently, when looking for alternative solutions to solve existing problems. This might be called the use of “internal” comparative law, in contrast to the more traditional use of “external” comparative law. Wherever states

⁵⁸ UK national report, p. 9.

⁵⁹ Spanish national report, p. 30, although the Spanish reporter also mentions some notable exceptions.

⁶⁰ Belgian national report, p. 101.

⁶¹ Belgian national report, p. 131.

⁶² South African national report, p. 19. The relevant paper can be found on the website of the South African Law Reform Commission: <http://www.doj.gov.za/salrc/index.htm>.

⁶³ New Zealand national report, p. 18.

or regions are becoming involved in an economic and political integration process, it seems that particularly “internal” comparative legal analysis frequently becomes part of such an integration process. Economic integration is aimed at reaching efficient results and the minimisation of transaction costs. Legal diversity is a source of transaction costs and the question then arises whether harmonisation or unification could perhaps lead to further economic integration. It is also a historically well-known phenomenon that new political entities want to establish their self-identity by creating “national” codes and statutes. In order to find the most efficient or merely the “national” rule comparative legal analysis will be unavoidable. Such an analysis will, more often than not, focus on the legal systems of the countries or regions, which are involved in the integration process and will therefore tend to be “internal” comparative legal analysis. “External” comparative legal analysis will then only play a subsidiary role. These remarks bring me to the last topic of this general report: the impact of economic integration on the harmonisation or unification of succession law.

4. The Impact of Economic Integration

In the debates on whether the European Union, given its ever closer and intensifying internal market, is in need of a uniform private law, reference is frequently made to developments in Germany leading to the Civil Code of 1900. The German Civil Code created unity between the various German states and became a part of the German legal identity. Could, perhaps, Germany prove to be an example for Europe? It is interesting to note that both in the United Kingdom national report as well as the Spanish national report clear references are made to the existing *diversity* within the United Kingdom and Spain respectively, in spite of an existing (national) internal market. In the United Kingdom three legal systems can be distinguished: England and Wales, Scotland and Northern Ireland. The United Kingdom national report particularly stresses that major differences exist between, on the one side, the law of England and Wales and, on the other side, the law of Scotland. Examples are the freedom of testation (accepted in England and Wales, but not in Scotland) and the common law trust (not accepted in Scotland). The Spanish national report makes explicit reference to the existence of the “*decreches forales*”. Next to the Spanish Civil Code the regions of Aragón, Catalonia, Galicia, the Balearic Islands, Navarre and the Basque Country have their own law of succession. Studying the various solutions found in Spain has led to the Spanish reporter to state: “Spanish law is a wonderful breeding ground for internal comparative law.”⁶⁴

⁶⁴ Spanish national report, p. 3.

This remark makes one think of the famous statement by the United States Supreme Court Justice Brandeis that within the federal system of the United States a single state can act as a “laboratory”.⁶⁵

The existing legal diversity, in Europe and elsewhere, with regard to succession law – also in the light of the differences with regard to matrimonial property law as well as tax law (particularly inheritance tax) – is a clear and convincing indication that attempts to harmonise large parts of succession law are bound to fail. The tendencies in the various legal systems may be the same, or at least comparable, but the approaches still differ to a large degree. Nevertheless, this does not mean that partial harmonisation might not be desirable and feasible. The Greek national report points out that a widely recognised uniform (European) certificate of inheritance would certainly be welcomed by Greek notaries and the reporter also advocates the creation of central registration systems to make last wills more easily traceable and accessible. It seems that the national reporters are more hesitant about the harmonisation of substantive succession law than the participants at the 6th European Conference on Family Law.⁶⁶

⁶⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (J. Brandeis, dissenting): “[...] a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

⁶⁶ The participants at the 6th European Conference on family law, held in Strasbourg on 14 and 15 October 2002, when examining the topic “the legal protection of the family in matters of succession”, agreed that (*see* Proceedings, p. 85 ff.)

- 1.[...] further steps were still necessary to improve the legal protection of the family. They took note of the work of the Council of Europe to improve national standards concerning succession and matrimonial property regimes and the work of the European Commission to reduce the difficulties arising out of succession and matrimonial property regimes involving different European Union States.
- 2.The participants recognised that it was particularly important for spouses and unmarried couples to be made aware of the different means to organise their succession. These means may include, for example:
 - a.agreeing to appropriate matrimonial property regimes or property arrangements;
 - b.co-owning or co-leasing the family home;
 - c.making wills in order to avoid intestacy and the consequent reduced rights for a surviving spouse or loss of all rights or reduced rights for partners.
- 3.The participants agreed that the law should provide sufficient rights for a surviving spouse. These rights may include:
 - a.giving the spouse either an automatic right to a share or the ability to apply for a share in case of need;
 - b.ensuring that, in case of intestacy, the surviving spouse will be entitled to a significant share. The participants recognised that, in relation to the rights of the surviving spouse, consideration should be given to the situation of the children. The participants noted that, in appropriate cases, account should be taken of possible means of providing sufficient rights for a surviving partner.
- 4.The participants agreed that consideration should be given, in appropriate cases, to the extension of Principles 4 and 8 of Recommendation No. R (81)15 concerning the right of a surviving spouse to continue to occupy the family home and use the household contents, to cover a surviving partner, especially a dependent partner.
- 5.The participants agreed that the means to ensure that the amount of any death duties to be paid did not deprive the surviving family of a reasonable standard of living should be examined.
- 6.The participants recognised that, in matters of succession, adopted children and children born out of wedlock of a deceased parent should, as already provided in the European Convention on the adoption of children [ETS 058] and the European Convention on the legal status of children born out of wedlock [ETS 085], be treated as if they were born in wedlock. The participants noted that other children of the family (e.g. stepchildren) were not always treated in the same way as children of both parents (e.g. absence of a share in the succession of the step-parent or higher amount of death duties to be paid).
- 7.The participants agreed that in matters of succession rapid and simple procedures should be available for both testate and intestate succession.

Both the United States as well as the New Zealand national reporter, the latter referring to Australia, point out that in a federal system legal cooperation and, in some areas, harmonisation or unification are more likely to occur.⁶⁷ The United States reporter states that the “cause of unification is only a feasible goal when cultural and economic integration already exists. To that extent, economic integration of the fifty state economies into one American economy has served as the foundation upon which two further unification projects [...] have built.”⁶⁸ The reporter refers to the Uniform Probate Code, a model law drafted by the National Conference of Commissioners on Uniform State Laws and the Restatement of Wills and Other Donative Transfers, promulgated by the American Law Institute.⁶⁹

5. Conclusions

The modern tendencies in succession law are closely related to far-reaching socio-cultural and socio-economic changes. These changes affect not only family law, but also succession law. Two examples can be mentioned. When marriage is being opened up to same sex partners, the concept of the “surviving spouse” who is entitled to inherit is, as a consequence, extended to include the surviving same-sex partner, without changing one word in the rules of the law of succession. The same applies with regard to children, after the abolition of discrimination between children born within and outside of wedlock. A further tendency is the increased protection of the surviving spouse or partner. This protection is at the same time a limitation of the rights of the children. It seems that most legal systems to a greater or larger extent demonstrate uncertainty as to how the right balance should be achieved between, on the one hand, the rights of the surviving spouse and, on the other, the children, other family members

8. The participants proposed:

- a. that greater use be made of the possibility to register wills
- b. that States be encouraged to ratify the European Convention on the establishment of a scheme for the registration of wills [ETS 077].

9. The participants requested the Council of Europe, in particular the Committee of experts on family law (CJ-FA), to examine the means of improving the legal protection of the family in matters of succession, especially in case of the intestacy or other inadequate provision, in the light of the reports and discussions of the 6th European Conference on family law.

⁶⁷ US national report, p. 122 ff., New Zealand national report, p. 18. The US reporter, when comparing the US and Europe, writes (p. 122):

Given the purview of succession law in the United States vis-à-vis that of most of the rest of the world, it would be true, but misleading, to state that there is not a movement towards drafting supra-national laws of succession in the United States. This statement is true in that there has been little initiative to harmonize American succession law with the laws of Europe, South America, Africa, or any other countries. At the same time, this statement is misleading because, as mentioned above, succession law is not a primary concern of national or federal law. Instead, it is within the domain of each of the fifty American states. To the extent a parallel can be drawn between American states and European countries, a supra-national (or the in the case of the United States, a supra-state) succession law has begun to emerge.

⁶⁸ US national report, p. 123.

⁶⁹ US national report, p. 123. For more information on the National Conference of Commissioners on Uniform State Laws see <http://www.nccusl.org/> and for information on the American Law Institute see <http://www.ali.org/>.

or relatives. The generally perceived difficulty seems to be that some differentiation should somehow be made between minor or otherwise dependent (such as handicapped) children and children who have already had a full life of their own and are well able to support themselves. The New Zealand courts already face this problem when they have to apply the Family Protection Act. Under this act, a will can be set aside if no adequate provision has been made for the proper maintenance and support of the testator's wife, husband or children.⁷⁰ Applications under the act, originally meant as a mere maintenance provision, gradually developed into a system of forced heirship, although the courts still had a discretionary power in this area. This discretionary power is now used to restrict the rights of, for example, adult children who are not in financial need.⁷¹

It could very well be that the growing awareness that the rights of children, other family members and relatives should perhaps be approached in a more diversified way, i.e. depending upon their age and/or financial situation, will also influence the debate on the principle and limits of testamentary freedom. Estate planners, such as notaries, solicitors and estate lawyers, prefer as much freedom as possible to make transgenerational arrangements, in such a way that tax payments are avoided as much as possible and, e.g., a family business can be continued after the death of the owner. Freedom of testation might also allow a testator to provide for the surviving spouse in a way, which he/she deems most appropriate, irrespective of the statutory default regime. Examples of such use of the freedom of testation are the Netherlands under the old succession law and Spain. However, testamentary freedom is limited by the protection given to the surviving spouse whenever he/she is disinherited or to the children, particularly those children who are in need of support after the testator's death. This leads to the paradoxical situation that freedom of testation is only truly a freedom if it fulfils previously set policy goals, such as the protection of the surviving spouse or the continuation of the family business. If these goals are not met, testamentary freedom will be restricted. In New Zealand, however, the development goes in a somewhat different direction, as the courts are becoming more cautionary with regard to intervening in the last will of a deceased, although it is still true that the rights of a surviving spouse or partner are well protected by statute.⁷²

The national debates are sometimes influenced by comparative legal research, but the research carried out is usually limited and it seems that it hardly plays a role anymore once proposals for legislative change have reached the political arena. This is to be regretted, as much information from comparative analysis can be gained concerning developments (problems as well as solutions) which occur in large parts of the world.

⁷⁰ New Zealand national report, p. 12.

⁷¹ New Zealand national report, p. 15.

⁷² New Zealand national report, pp. 2 & 12 ff.

Economic integration seems to have a minor impact on the harmonisation of succession law, if it does not take place within a closer political entity, such as a federal state. Nevertheless, there seems to be general support for the creation of uniform private international succession law. It also seems that there is support for the creation of a universally acceptable certificate of inheritance which proves authoritatively who the heirs and/or executors/mangers are and what their rights and liabilities should be. It is also generally supported that more information on foreign succession law should be made available, especially by means of Internet access. Such an endeavour would, however, presuppose the establishment of a working group or international institution that would be made responsible for such a task.⁷³ It would be a tremendous project to assemble the information, but an even more daunting task to keep the information up to date. An example of how such a web site could look like is the experimental European Union website on national law: N-Lex.⁷⁴ That it would be a daunting task will indeed become clear after reading all the national reports for this conference, given the changes, proposed changes, tendencies and debates they describe in the field of succession law.

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⁷³ Cf. what the Spanish national reporter writes about the possible establishment of a European research group in the area of succession law, Spanish national report, p. 33 & 34.

⁷⁴ The URL is: <https://europa.eu.int/celexdev/natlex/index.html>, opened on 28 April 2006.