Chapter 19

Harmonization of the Law of Succession in Europe

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1. COMPARATIVE LAW, *IUS COMMUNE* AND HARMONIZATION

With the concept of harmonization, we refer to a wide variety of methods and techniques which attempt to realize, to a variable degree, an approximation of differing national legislations in a certain area of law.[1]

First of all, there is the influence of the existing apparatus of international courts or supranational authorities that may realize or improve the convergence between national legislations through judgments, decisions or resolutions.

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1. On these methods, *see* David, The Methods of Unification, *AJCL* 1968–1969, 13; Glenn, Unification of Law, Harmonisation of Law and Private International Law, in: *Liber memorialis François Laurent* (Brussels, Story-scientia 1989), 783; Goode, Reflections on the Harmonisation of Commercial Law, *ULR* 1991, 57; Kötz, Alternativen zur legislatorischen Rechtsverheinheitlichung, *RabelsZ* 1992, 215; Zweigert, Grundsatzfragen der europaïschen Rechtsangleichung, ihrer Schöpfung and Siche-rung, in: *Vom deutschen zum europaïschen Recht, Festschrift für Hans Dölle*, II (Mohr, Siebeck 1963), 410 ff.

Arthur S. Hartkamp, Martijn W. Hesselink, Ewoud H. Hondius, Chantal Mak & C. Edgar du Perron, *Towards a European Civil Code, Fourth Revised and Expanded Edition*, pp. 459–479.

Secondly, there is the increasing tendency of national legislations to grow more or less spontaneously towards each other based on comparative analysis. Finally, a uniform act, regarding conflict of laws or effectively unifying material law, elaborated in an international treaty will lead to unification, which is the most extreme form of harmonization, making one unified set of rules in lieu of the differing legislations. Application of these methods of harmonization to the area of the law of succession will be discussed in the third section of this contribution.

To find an answer to the question whether or not the harmonization of a certain field of law is feasible, one must start from comparative legal research, pursued according to the functional-typological methodology.[2]

Such a functional approach examines the function of a legal rule or institution in society and inquires whether this rule properly fulfils this function. Unlike the dogmatic method, this research is problem-oriented, not norm-oriented. With the typological method, one tries to find 'typical solutions'. These types are independent from one particular legal system. One chooses a type-determining criterion in order to transcend the differences between legal systems and to bring these systems together under a common denominator: the type.

The number of typical solutions will vary according to the legal systems involved and according to the nature of the analysed problem.

In a context of more or less socially, economically, politically and culturally comparable societies, such as the modern Western capitalist world, it is likely that the social problems to be regulated and solved by legal rules are similar. If, then, the analysed problem is one of a morally neutral nature, it is very likely that the solutions found for that problem will be very similar too. This has been called a *praesumptio similitudinis*, a presumption of similarity of legal solutions for social problems in the Western world.[3] Thus, for such social problems in the Western world, one would find only few 'typical solutions', since there are not hundreds of different legal answers to the same social problem.

This may sound somewhat misleading, since, of course, any legal solution for any social problem is determined and influenced by moral, social, economic, cultural, historical and political values.[4] A legal rule can never be the legal rule, as if it were the only possible solution, but will always be just one legal rule, one possible solution from several others. Why this solution has been chosen in a particular legal system, and not another one, is precisely the consequence of the social context and all kinds of values and interests involved. Any legal rule is

2. Canaris, Comparative Law, unification and scholarly creation of a new jus commune, *N.I.L.Q.* 1981, 283; Drobnig, Methodenfragen der Rechtsvergleichung im Lichte der 'International Encyclopaedia of Comparative Law', in: *Ius privatum gentium. Festschrift fiir Max Rheinstein* (Tübingen, Mohr 1969), 221. *See* for a different approach of harmonization, from the perspective of human rights: van Grunderbeeck. *Beginselen van personen- en familierecht. Een mensenrechtelijke benadering*, (Antwerp/Oxford, Intersentia 2003), 625 ff., n. 829 ff.
3. Zweigert and Kötz, *Introduction to Comparative Law*, I, *The Framework* (Oxford, Clarendon Press 1987), 36.
4. Watson, *Legal Transplants. An Approach to Comparative Law* (Edinburgh, Scottish Academic Press 1974), 4–5.

merely a choice, it is a political choice; in the best case, it is a fair compromise balancing all the interests involved.

However, some social problems are more influenced by particular moral and traditional values than others. In such a case, the similarity between legal solutions becomes less likely. Problems existing in the context of family relationships tend to be of the latter nature.

The typical solutions discovered by comparative legal research may reveal some general common principles of law, common to several legislations. These general principles have been denominated as comparative law notions,[5] general superior concepts,[6] *rein Rechtsvergleichenden Kategorien*,[7] forming a modern version of *ius commune*.[8]

The more these general transnational principles are found, the more the feasibility of a unified legal rule for a particular problem becomes likely. The more such unification seems feasible, the more it is desired.[9] Therefore, in contract law, where such a *ius commune* is present to a certain extent, the efforts for unification have been in-tense.[10] Also the European Parliament encourages unified codification as regards private law, especially contract law.[11]

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5. Rozmaryn, Communication at the conference of the international association of legal science on the legality rule, *Rev.int.dr.comp.* 1958, 70.
6. Von Caemmerer and Zweigert, Evolution et état actuel de la méthode du droit comparé en Allemagne, in: *Le livre du centenaire de la société de législation comparée*, II, *Evolution internationale et problèmes actuels du droit comparée* (Paris, L.G.D.J. 1971), 290–291.
7. Drobnig, *RabelsZ* 1969, 380.
8. Koopmans, Towards a New 'Ius Commune', in: de Witte and Forder (eds), *Le droit commun de l'Europe et l'avenir de l'enseignement juridique* (Deventer, Kluwer 1992), 43; Oppetit, Droit commun et droit européen, in: *L'internationalisation du droit, Mélanges Y. Loussouarn* (Paris, Dalloz 1995), 311; Schulze, Allgemeine rechtsgrundsätze and europaïsches Privatrecht, *ZEPR* 1993, 442; van den Bergh, Ius Commune, a History with a Future?, in: de Witte and Forder (eds), *Le droit commun de l'Europe et l'avenir de l'enseignement juridique* (Deventer, Kluwer 1992), 593; Zimmerman, Das römisch-kanonische ius commune als Grundlage europaischer Rechtseinheit, *JZ* 1992, 8. Cornu, Un code civil n'est pas un instrument communautaire, *Dalloz* 2002, 351; Compare with Legrand, Sens et non-sens d'un code civil européen, *Rev.int.dr.comp.* 1996, 806. *See also* Brauneder, *Europaïsches Privatrecht: historische Wirklichkeit oder zeitbedingter Wunsch an die Geschichte*? (Rome 1997), Saggi, Conferenze e Seminari, No. 23.
9. Although some authors object to unification or harmonization if there is no practical need for such venture. *See* Kahn-Freund, Common Law and Civil Law. Imaginary and Real Obstacles to Assimilation, in: *New Perspectives for a Common Law of Europe*, Capelletti (ed.) (London, European University Institute 1978), 141.
10. Lando, Principles of European Contract Law. A First Step towards a European Civil Code?, *Revue de droit des affaires internationales/International Business Law Journal* 1997, 189 ff.; Lando and Beale (eds), *The Principles of Contract Law*. 1 (The Hague, Martinus Nijhoff 1995); Lando, Principles of European Contract Law, *RabelsZ* 1992, 261 ff.; Schulze, Le droit prive commun européen, *Rev. int. dr.comp.* 1995, 8 ff.
11. Cauffman, De Principles of European Contract Law, *Tijdschrift voor privaatrecht* 2001, 1231; Hondius, Beginselen van Europees privaatrecht, *Tijdschrift voor Privaatrecht* 1994, 1455 ff.; Storme, Beginselen van Europees overeenkomstenrecht, *Tijdschrift voor privaatrecht*, 2001, 1311. Compare Cauffman, *De verbindende eenzijdige belofte* (Antwerp/Oxford, Intersentia 2005).

The social problem to be solved by the law of succession is the issue of transferring, how and to whom, property after death. Even considering all of Europe as part of the modern Western capitalist world, the social problem involved is of a morally and culturally more delicate nature than contract law. Perhaps even more than family law, the law of succession is a field reserved to local rules and customs, a field in which the desire or need for unification seems to be, at best, moderate.[12]

Since the legal rules for these social problems are, to a larger degree than other problems, determined and dictated by moral and cultural values, there seem to be few general principles, not to speak of a *ius commune*. Therefore, both the feasibility of a unified family and/or succession law as well as its desirability are very often questioned.[13] Because of its deep roots in the fundamental social and cultural values of a society, it is argued that family and succession law should remain national (or regional in a federal system) legal matters.

However, this traditional view should be reconsidered. Family law as a whole is opening up more and more, looking over the boundaries and integrating new and modern ideas and concepts, based upon a more personalistic ideology.

Since the seventies, especially in the field of family law, under the strong influence of the European Treaty on Human Rights and the Council of Europe, there has been an undeniable evolution towards common general principles, such as equality of spouses, economical and financial marital solidarity, equality of all children irrespective of the means of descent (see section 3.1.3). These principles offer a (limited) basic *ius commune*,[14] affecting not only family law or marital property law, but also, although to a lesser extent, the law of succession.

Numerous reforms of national legislation regarding divorce and abortion have narrowed the gap between local legal systems. Also (although exceptionally) some judgments of the European Court of Justice are of importance to the areas of family law and succession law (see section 3.1.2). In some federal countries, such as Germany and Switzerland, family and succession law are federal matters. In those federations where it is not, as in the United States, there are several attempts to bridge the disparity of local state law through uniform acts.[15]

Specifically in the field of succession law, already more than thirty years ago, on 29 December 1972, the Benelux countries agreed on a regulation regarding

12. Remien, Illusion and Realitat eines europaïschen Privatrechts, *JZ* 1992, 277 ff. Compare Puelinckx-Coene, *La protection de la famille dans le domaine des successions*, general report on the 6th Conference on family law, Strassbourg, Council of Europe, 2002, No. 52 ff.
13. Luther, Einheitsrecht durch Evolution im Eherecht, *RabelsZ* 1981, 253 ff., 258.
14. Ost, La jurisprudence de la cour européenne des droits de l'homme: amorce d'un nouveau 'ius commune'?, in: de Witte and Forder (eds), *Le droit commun de l'Europe et l'Avenir de l'enseignement juridique* (Deventer, Kluwer 1992), 683; van Grunderbeeck (2003), 3 ff.
15. Family law: *see* Uniform Marriage and Divorce Act, Uniform Marital Property Act, Uniform Premarital Agreement Act. See Clark, *Domestic Relations* (St Paul, West 1988), second ed.; Verbeke, *Goederenverdeling bij echtscheiding* (Antwerp, Kluwer 1994, second edition); Verbeke, Perspectives for an International Marital Contract, *Maastricht Journal of European and Comparative Law* 2001, 189–200; Succession Law: Uniform Probate Code (*see* s. 3.2).

simultaneous death (commorientes). Somewhat later, with the Treaty of Washington of 26 October 1973, a uniform act regarding the form of an international will was presented (see sections. 2.3.1 and 3.2). Recently, it has been rightly argued that the issue of transfer of assets of the deceased should not be treated as a matter of the continuation of the person of the deceased nor as an issue of family solidarity, but that it should be approached as a problem of settlement and liquidation of an estate, bringing this matter within the ambit of economic and bankruptcy law.[16]

In the following section, the typical solutions for some important questions and problems of succession law will be analysed. This should provide us with the information needed to answer the question of whether we can go any further on the unification path as far as the law of succession is concerned.

This question will be explored in the final section. Here we will look at several options for harmonization and unification of national laws. We will conclude with a concrete suggestion as to the method that might be considered for harmonizing of the law of succession.

2. TYPICAL SOLUTIONS IN SUCCESSION LAW

2.1. TRANSFER OF THE ESTATE

A preliminary problem to be solved in succession matters is the question of how the estate of the deceased is transferred to his heirs. This problem has been comparatively examined.[17] A distinction should be made between the transfer of assets of the succession and the liability for the debts of the deceased and his estate.[18]

Regarding the transfer of assets, two criteria are used to distinguish between three typical solutions. The first criterion concerns the directness of transferring the estate, i.e., directly to the heirs (without an intermediate person) or indirectly, passing the estate through an intermediary. A second aspect is the immediateness of the heir's ownership, immediately upon the death of the decuius or deferred to a moment somewhat later. Thus, the three typical solutions are: (1) the French type of direct and immediate transfer; (2) the Austrian type of direct but deferred transfer; (3) the English type of indirect and deferred transfer.

As to liability for the debts of the deceased, the criterion relates to the extent of such liability, in particular whether it is limited to the hereditary goods (intra vires)

16. Leleu, *La transmission de la succession en droit comparé* (Antwerp/Brussels, Maklu/Bruylant 1996), No. 154, 491, No. 864, 500, No. 979, 565; Watté, La faillite internationale: quelques observations sur l'application du Traité néerlando-belge du 28 mars 1925 et l'interprétation de la 'lex concursus' étrangère, *Revue Critique de Jurisprudence Belge* 1993, 457, No. 6; Didier, La problématique de la faillite internationale, *Revue de droit des affaires internationales* 1989, 20.
17. Leleu (1996); Leleu, La transmission de la succession en droit comparé, *Revue du Notariat Belge* 1996, 46 ff.
18. Leleu, Nécessité et moyens d'une harmonisation des règles de transmission successorale en Europe, *EPRL* 1998.

or whether it might transcend (ultra) this boundary (vires) and involve the personal property of the heir. Again three typical solutions may be distinguished: (1) the French type tending towards unlimited liability; (2) the German type tending towards limited liability; (3) the English type of strictly limited liability.

2.1.1. Direct and Immediate Transfer by Virtue of Law (French Type)

This first type is the one where the estate is transferred directly and immediately, by virtue of law or *ipso iure*, to each one of the heirs. This is the French type, also known in countries like Belgium, the Netherlands, Greece, Germany and Switzerland. No initiative is required from the heirs or legatees. They are 'seized' by the deceased: 'Le mort saisit le vif, son hoir le plus proche habile a lui succeder'.

Acceptance of the succession is not required to become the owner of an inheritance. Acceptance is mere confirmation of the ownership acquired by virtue of law. However, accepting or not accepting the succession is very relevant to liability for the debts of the succession. Acceptance implies liability. In this respect, the French type tends towards unlimited liability (*ultra vires*), i.e., liability of the heir with his personal property. Therefore, it may be important to renounce the succession (or to accept under the privilege of inventory limiting the liability *intra vires*). To the contrary, in Germany, a somewhat unique solution tending towards limited liability (*intra vires*) is in force, protecting the personal estate of the heirs.

Typical for the French type is also the dissociation between ownership and possession of hereditary goods. The mechanism of the saisine vests in some of the heirs or legatees the right of possession of the succession, while other heirs or legatees, also owners of the succession, do not have this right and must request delivery of their share. This saisine may also be found in the Belgian system,[19] but is unknown to the German, Swiss and Greek succession laws, where each heir or legatee by virtue of law also receives the right of possession, although the effect thereof is limited through the theory of *Erbschein*, requiring each heir to prove his quality as an heir. New legislation in France (3rd December 2001) regulates the *acte de notoriété*, being notarial confirmation of the quality as an heir, besides the *attestation d'hérédité*, the latter being functionally similar to the *Erbschein*.

2.1.2. Direct but Deferred Transfer (Austrian Type)

In this type, the ownership of the estate is transferred directly to the heirs and legatees, not passing through an intermediate person, but this transfer does not occur immediately upon death, but only at a later moment, after an initiative has been taken by the heir, this initiative being his acceptance of the succession (*aditio hereditatis*). In Italy and Spain, this acceptance may be silent. In Austria, however,

19. *See, e.g.*, Verbeke and van Zantbeek, Belgium, in: Hayton (ed.) *European Succession Laws* (Bristol, Jordans 2002, second revised and expanded ed.), No. 3.12–3.14.

an additional formality is required, being a court decision, the *Einantwortung*, explicitly transferring the succession to the heirs.

A disadvantage of such a system is the vacuum that arises between death and the acceptance of the succession. During that period, there is a hereditas jacens to be administered by a curator or one of the heirs. In Italy, acceptance operates retroactively to the moment of death, while in Austria, the court decision transfers the estate from that moment. An advantage of the Austrian judicial intervention is that the transfer of the succession occurs in a controlled and orderly manner. There is no need for a saisine, as in the first type.

Regarding liability for the debts of the deceased, the countries of this second type follow the French type tending towards unlimited liability.

2.1.3. Indirect and Deferred Transfer (English Type)

Finally, in the third type, the estate passes through the hands of an intermediate person, the personal representative. Heirs and legatees have to await the settlement and payment of the hereditary debts before having the net result of the succession transferred to them.

The first transfer of the succession, to the personal representative, occurs through a probate procedure where the court awards a grant appointing the personal representative. This may be the executor appointed in the will of the deceased, or in the absence of such designation, an administrator, being a family member appointed by the court. The executor or the administrator administers and settles the succession as a trustee, paying off the debts.

Heirs and legatees are only creditors of the net result of the succession. They have a claim upon the administrator to pay out their share of this net result. This is the second transfer of the succession, now to the heirs and legatees, obtaining by assent the ownership of their share in the succession.

It is quite clear that this type of transfer of assets does imply a strictly limited liability for the debts of the deceased. The heirs will never be liable with their personal assets, since they only receive their share in the net result of the succession, after the settlement of the estate and payment of the debts involved.

2.2. Intestate Rights. Position of the Surviving Spouse

In the absence of a will, the intestate succession will be transferred to the heirs, designated according to the legal principles on the devolution of a succession.

Basically, these principles are founded on consanguinity with preference to descendance, excluding more distant relatives.[20]

One of the common principles that have been growing during the last decades in family law is the tendency towards equality of illegitimate with legitimate

20. Spellenberg et al. Recent Developments in Succession Law, in: *Law in Motion* (Antwerp, Kluwer 1997), A.II and IV.2.

children. Therefore, equal inheritance rights for children born out of wedlock are generally admitted.[21]

Another generally accepted rule is the need to protect the surviving spouse. Although not a blood-related person, the spouse is recognized to have a legitimate claim towards the succession of his or her partner. In considering the position of the surviving spouse, one should also take into account what the surviving spouse receives through the liquidation of the marital property system.

The inheritance rights of the surviving spouse vary and may be quite modest in some countries.[22] First, there are countries where the spouse is limited to rights of usufruct (enjoyment and benefit) of the fruits and revenues of the succession. If there are descendants, in Belgium the spouse receives usufruct of the entire estate, while in France since the Act of 3 December 2001 the surviving spouse can choose between such usufruct over the entire estate or a share in full ownership of one quarter of the succession.[23] In several countries, e.g., in Germany, Austria, Denmark, Sweden, Italy, Portugal, Greece, the surviving spouse invariably receives a share of the succession in full ownership. The size of this share varies according to the number of other heirs. In England, the surviving spouse receives the personal chattels and an amount of money, smaller or larger according to the number of other heirs. In the US Uniform Probate Code the entire succession is awarded to the surviving spouse if there are common descendants or other blood relatives than parents.

An interesting intestate system (called the *wettelijke verdeling*) has been introduced in the Netherlands by the Acts of 3 June 1999 and 18 April 2002, which came into force as of 1 January 2003. All assets and debts are awarded by virtue of law to the surviving spouse, leaving the children with a claim towards that spouse, to be paid in principle upon death of that spouse.[24]

2.3. Wills and Forced Heirship

Anyone who has legal capacity can make a will, thereby instructing precisely how and to whom his estate should be transferred. There are two major problems to be solved.

21. Spellenberg et al. (1997), B.I.
22. *See* Hayton (ed.), *European Succession Laws* (Bristol, Jordans 2002, second revised and expanded ed.); Verbeke, *De legitieme ontbloot of dood? Leve de echtgenoot!*, Ars Notariatus CXIII (Deventer, Kluwer 2002), 4–14 (*see also* first edition in *Tijdschrift voor Privaatrecht* 2000, 1111–1236 with summary in English).
23. In Luxembourg, the same choice exists, but the spouse can take a larger share in full ownership, depending on the number of children (one half if there is one child and one third if two children and one quarter if more than two children). In Spain (not taking into account regional legislation) the surviving spouse only receives usufruct over one third of the succession if there are descendants.
24. Besides the abundant literature and comments in Dutch, *see* Nuytinck, *A Short Introduction to the New Dutch Succession Law* (Deventer, Kluwer 2002).

(1) what are the formal requirements in order to make a valid will? Are there any material limitations as to the content of the will, or in other words,
(2) is there a reserved part of forced heirship awarded by law to a certain category of heirs?

2.3.1. Formal Requirements

Four types of will may be distinguished: the holographic will, the witnessed will, the closed and international will and the public or notarial will.[25]

The holographic will must be written and signed personally by the testator. This type of will exists in most European countries, although the formal requirements are not as strictly applied in all of them. It does not exist in the Netherlands and Portugal, where the intervention of a notary is always required. Such a will is also unknown in Common Law jurisdictions, e.g., England and Ireland.

Typical for these Common Law jurisdictions is the witnessed will. It may be written personally, but also typed or even written by a third person. Even the signature does not have to be personal since a facsimile suffices. Essential here is the simultaneous presence of witnesses at the moment of signing the will, their confirmation of this signature and their signing of the will. A similar type of will is known in Austria and Denmark.

The closed will, written or typed by the testator or a third party and signed by the testator, must be put in a closed envelope and presented to a notary and several witnesses. Such a will is known in the Netherlands,[26] France, Denmark, Italy, Spain, Portugal, Greece. Some of these countries also recognize the international will created by the Treaty of Washington of 26 October 1973 (see sections 1 and 3.2). Other countries, like Belgium, have replaced the closed will with this international will.

Finally there is the public will, in most countries drafted by a notary but signed personally by the testator. In Austria, a public will can also be made by a judge. Under Belgian and French law, the will must be dictated by the testator to the notary. In other countries, like Germany and Austria, delivery of a document confirmed by the testator to be his will, is sufficient. Generally, the presence of witnesses is required.[27]

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25. Pintens, Erfrecht, schenkingen en testamenten in Europa. Van verscheidenheid naar eenheid?, in: *Les relations contractuelles internationales. Le rôle du notaire* (Antwerp, Maklu 1995), 521–524; Verbeke and van Zantbeek, Belgium, in: Hayton (ed), *European Succession Laws* (Bristol, Jordans 2002, second revised and expanded ed.), No. 3.101–3.115.
26. The new Dutch Inheritance Act does not require the presence of witnesses, not for a *closed* nor for a *public will.*
27. However not in the Netherlands.

2.3.2. Material Limitations: Forced Heirship[28]

One should distinguish between the Anglo-American legal systems where the freedom of will has traditionally been unlimited, and to a large extent still is. As opposed to that, the civil law countries defend the notion of forced heirship, thereby stating that the estate does not exclusively belong to the deceased but at least partially also to his family that may not be deprived of the entire estate.[29]

Thus, in the Anglo-American jurisdictions, freedom of will is not restricted, but those persons whom the deceased was bound legally or morally to support during his lifetime may claim a right of maintenance from the estate. The courts are given a discretionary power to award a so-called family provision.[30] Despite the common feature of forced heirship in civil law countries, there remains also in this matter a wide variety of national legislations. However, an evolution towards some common principles seems to be gaining ground.

There is a tendency towards reducing the class of heirs entitled to a forced heirship right. Descendants are invariably recognized as being entitled to a forced heirship. Often also the surviving spouse is protected through a reserved right. Forced heirship rights for ascendants have been limited[31] or abandoned. Reserved rights for brothers and sisters are very rare and seem to have been increasingly excluded.

Also the principle of a property entitlement upon hereditary assets has been abandoned in several countries. Thus, the German *Pflichtteil* represents only a claim in money for the protected heir. He has no property rights upon the assets of the succession. Quite analogously, under the new Dutch legislation, in force since 2003, the protected heir is reduced to a creditor of the succession. In France the entitlement of a protected heir to the assets of the succession was limited to the relationship towards third parties. In the internal relationship between heirs, the forced heirship right has been reduced since 1971 to a right in value. Under new French legislation in force since 2007 the forced heirship right has been reduced to a right in value in all cases (Act of 23 June 2006).

Belgian law still applies rather completely (with few exceptions) the traditional Napoleonic forced heirship property right upon the assets of the succession. The Belgian experience proves that this is an outdated principle, suffering not enough legal exceptions, entailing several practical problems and very often leading towards inequitable results for several of the heirs in question.[32]

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28. *See*: *Examen critique de la réserve successorale*. I. *Droit comparé* II *Droit belge*; III *Propositions* (Brussels, Bruylant 1997 and 2000); Verbeke, *De legitieme ontbloot of dood? Leve de echtgenoot!*, Ars Notariatus CXIII (Deventer, Kluwer 2002) (*see also* first ed. in *Tijdschrift voor Privaatrecht* 2000, 1111–1236 with summary in English).
29. Spellenberg et al. (1997), B.III.
30. For England: Inheritance (Family Provisions) Act 1938 and 1975.
31. In the German legal family only the parents are protected. In Belgium, ascendants have no reserved claim in relation to the surviving spouse, nor in relation to the surviving legal cohabitee, since the Act of 28 March 2007. In France, while the Act of 3 December 2001 has increased the intestate position of the surviving spouse (*see* above), the Act of 23 June 2006 also abolished the received claim of the ascendants.
32. *See Examen critique de la réserve successorale*, II and III, *Propositions* (Brussels, Bruylant 1997 and 2000).

3. HARMONIZATION OF THE LAW OF SUCCESSION

3.1. CONVERGENCE

3.1.1. Application of European Community Law

The first issue under consideration is whether European Community Law, based on the Treaty of Rome, might offer a solid foundation for the harmonization of succession law.[33] This may sound somewhat strange since the basic mission of the European Community/Union is situated in the economic area. However, Article 235 of the Treaty is broad and vague enough to enlarge the competence of the Community. In the Treaty of Maastricht (Article 3, h) the Community has been given the competence to realize the approximation of national legislations as far as this may be needed for the functioning of the common market and with respect for the subsidiarity principle.

(a) In two resolutions, the European Parliament has supported the idea of the approximation of national private law by developing a European Code of private law.[34] In the first place, unification of the law of obligations and contracts is stimulated, since this may clearly affect and improve the functioning of the common market.[35] However, the Parliament is of the opinion, interpreting the Treaty and the free movement of persons rather extensively, that also unification in the area of family law is desirable,[36] in order to obtain a better guarantee of the freedoms and liberties inscribed in the Treaty.[37] Regarding the law of succession, there has only been minor consideration thereof in the Resolution of 14 December 1994. According to the European Parliament, such unification should be realized by multilateral treaty, based on Article 220 of the Treaty of Rome (see section 3.2).[38]

(b) As opposed to the Parliament, the European Commission is far less enthusiastic as regards the desirability of unification of European family and succession law.[39] The attitude of the European Commission is rather negative since it

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33. Compare Pintens and Du Mongh, *Family and Succession Law* in the European Union, in: *International Encyclopedia of Laws*. Family and Succession Law (The Hague/London/Boston, Kluwer Law International 1997); Pintens, Rechtsvereinheitlichung und Rechtsangleichung im Familienrecht. Eine Rolle für die Europäische Union?, *ZEuP* 1998, 670.
34. Resolution of 6 May 1994, OJ 1994, C 205/518; Resolution of 26 May 1989, OJ 1989, C 158/400.
35. This has led to a Draft Common Frame of Reference for contract law, as reported in other chapters in this book. This development is passionately supported by some, and heavily criticized by others (cf. Verbeke, Negotiating [in the Shadow of] a European Private Law, *Maastricht Journal of European and Comparative Law* 2008, 400–404).
36. For example, parental authority. *See* Resolution of 29 Oct. 1993, OJ 1993, C 315/652; Resolution of 14 Dec. 1994, OJ 1994, C 18/96.
37. Resolution of 14 Dec. 1994; Resolution of 29 Oct. 1993; Resolution of 9 Mar. 1993, OJ 1993, C 115/33; Resolution of 8 Jul. 1992, OJ 1992, C 241/67.
38. Resolution of 9 Mar. 1993, nos 27–28.
39. *See*, however, one initiative: Sosson, *Les Politiques familiales des Etats membres de la Communauté européenne. Modèles familiaux et droit civil: la fillation et ses effets* (Brussels,

considers this field to be 'emotionally charged'.[40] Nevertheless, the Commission seems to have some concern about the diversity of national succession laws. Thus, in a recommendation of 7 December 1994, the Commission requested the Member States of the European Community to facilitate the transmission of small and medium companies in order to avoid their liquidation and growing unemployment. This would not only require measures in the areas of company and tax law, but also in the field of family property law, in particular concerning restrictions on transfers between spouses, the prohibition on contracting as regards a succession which has not yet occurred and the forced heirship property rights upon hereditary assets rather than rights in value or money's worth.[41] In addition, the Commission has repeatedly suggested that the Community should adhere to the European Convention on Human Rights.[42] In the recent Treaty of Amsterdam, some rules regarding human rights have been included.[43]

On 12 December 2007 the Presidents of the Commission, European Parliament, and the Council have signed and solemnly proclaimed the Charter of Fundamental Rights of the European Union in Strasbourg, thus opening the way for the signing of the Treaty of Lisbon.[44] The Charter will give European citizens a catalogue of rights legally binding on the institutions and bodies of the European Union and on the Member States when they are implementing EU law. If the Lisbon Treaty is ratified, the charter will become legally binding. The Charter will usefully complement other international instruments such as the European Convention on Human Rights, to which the EU is also likely to become a party.[45]

(c) Based on Article 189 of the Treaty of Rome, the European Council of Ministers can issue a regulation, a directive or a decision. Through directives, the company law of the Member States has been harmonized.[46] Rules have profoundly modified national competition law and social legislation. In the area of family law, harmonization of national legislation could be based on the objective of effective

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C.O.F.A.C.E. 1990); Sosson, La filiation dans les pays membres de la Communauté européenne. Etude de droit interne comparé, *Revue Trimestrielle de Droit Familial* 1992, 5.

40. Question, No. 861/92, 14 Apr. 1992, OJ 1993, C 40/17. Compare with Question of Kostopoulos, No. E-3630/93, OJ 1994, C 251/37, regarding the Greek Law on adoption; Bangemann, *ZEPR* 1993, 383; Basedow, Konstantinidis v. Bangemann oder die Familie im europaïschen Gemeinschaftsrechts, *ZEPR* 1994, 197 ff.
41. OJ 1994, C 400; OJ 1994, C 400/6. *See*: Leleu, Les pactes successoraux en droit comparé, in: *Les relations contractuelles internationales. Le rôle du notaire* (Antwerp, Maklu 1995), 545; Leleu, La réduction et le rapport en valeur. Reflexions critiques en vue d'une r6forme legislative, in: *Examen critique de la reserve successorale*, II, *Droit belge* (Brussels, Bruylant 1997), 213.
42. Communication of the Commission of 19 Nov. 1990, *Bull. E.C.*, 10-1990, No. 1.3.218 and I 11990, No. 1.3.203; Memorandum of the Commission of 4 Apr. 1979, *Bull. E.C.*, suppl. 2/79.
43. Regarding the draft of the Amsterdam Treaty, *see* Dehousse, La conference intergouvernementale apres la reunion de Rome, *JT* 1997, 266, column 1.
44. Charter of Fundamental Rights: The Presidents of the Commission, European Parliament and Council Sign and Solemnly Proclaim the Charter in Strasbourg, 12 Dec. 2007, IP/07/1916.
45. IP/07/1916.
46. *See* Drobnig, *Private Law in the European Union*, Forum Internationale, No. 22 (Kluwer, Deventer 1996), 4; Oppetit, Droit commun et droit europ6en, in *L'internationalisation du droit. Mélanges Y. Loussouarn* (Paris, Dalloz 1995), 316.

integration of the European employee in the foreign Member State of his residence. However, such basis seems to be very weak since some link with the economic objectives of the Community is required. Although the Court of Justice in Luxembourg has recognized, based on a wide interpretation, the Community's competence in certain areas of family law and even in succession law (see section 3.1.2), it remains doubtful that the Treaty offers an acceptable basis for the harmonization of national legislation in the field of succession. Additionally, the principle of subsidiarity (Article 3B of the Treaty of Rome) might prevent such initiative by the Community,[47] since the Member States themselves possess the necessary instruments to realize the objective of the unification of private law.

Recently the European Commission has changed its attitude towards the field of European family and succession law. The Green Paper on Successions and Wills the Commission states as follows:[48]

> The adoption of a European instrument relating to successions was among the priorities of the 1998 Vienna Action Plan (OJ C 19, 23.1.1999). The Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (OJ C 12, 15.1.2001) adopted by the Council and the Commission at the end of 2000 provides for an instrument to be drafted. More recently, the Hague Programme (See Presidency conclusions, Brussels European Council, 4 and 5 November 2004) called on the Commission to present a Green Paper covering the whole range of issues – applicable law, jurisdiction and recognition, administrative measures (certificates of inheritance, registration of wills).
>
> The growing mobility of people in an area without internal frontiers and the increasing frequency of unions between nationals of different Member States, often entailing the acquisition of property in the territory of several Union countries, are a major source of complication in succession to estates. The difficulties facing those involved in a transnational succession mostly flow from the divergence in substantive rules, procedural rules and conflict rules in the Member States. Succession is excluded from Community rules of private international law adopted so far. There is accordingly a clear need for the adoption of harmonised European rules.

The Commission further states:

> As full harmonisation of the rules of substantive law in the Member States is inconceivable, action will have to focus on the conflict rules. The Commission concludes that there can be no progress on succession in the Community without the question of the applicable law being settled as a matter of priority.

47. In this sense: Collins, European Private Law and the Cultural Identity of States, *ERPL* 1995, 355; Martiny, Europaïsches Familienrecht – Utopie oder Notwendigkeit?, *RabelsZ* 1995, 436. Gaudis-sart, La subsidiarité: facteur de (dés)intégration européenne?, *JT* 1993, 173; Lenaerts and van Yper-sele, Le principe de subsidiarité et son contexte: Etude de l'article 3B du traité CE, *Cahiers de Droit Européen* 1992, 3.
48. COM(2005) 0065 final.

> The European Parliament agrees with the Commission's view:[49]
>
> While the harmonisation of the Member States' substantive law on succession and wills falls outside the scope of the European Community's competence, the Community is competent, under point (b) of Article 65 of the EC Treaty, to adopt measures 'promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction'.

Both the European Parliament and the European Commission consider harmonization of substantive law on succession and wills to be outside the competence of the European Community, but stress the need for harmonization of conflict rules in the field of succession and wills (see Section 3.2 on Unification concerning the European Parliament resolution with recommendations to the Commission on succession and wills).

While the complications of an international succession may not be underestimated, a much more disturbing problem for the citizens in Europe is the nuisance of multiple taxation. More and more situations arise where citizens must pay double and even triple succession taxes.[50] It goes without saying that this heavily impacts ordinary people and should be treated with the utmost priority. Unfortunately, Europe seems not to be very interested in solving these inequities.

3.1.2. Influence of International Courts

(a) As has been pointed out already, the European Court of Justice has considered itself competent to decide matters of family law, if these rules affect a right guaranteed under the Treaty. This has been done in two cases, one relating to the law of names (Konstantinidis)[51] and the other concerning the administration of an international succession (Hubbard).[52] In both cases, the plaintiff challenged national legislation that imposed restrictions on him because of his nationality, thus restricting his freedom of establishment as an employee (Article 52 of the Treaty) or his freedom of provision of services (Article 59 of the Treaty).

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49. European Parliament resolution with recommendations to the Commission on succession and wills (2005/2148(INI), A6-0359/2006).
50. Nijs and Maelfait, Artikel 17 Wetboek Successierechten en fictieve onroerende goederen, *Tijdschrift voor Fiscaal Recht* 2008, n. 351, 995–998; Sonneveldt, General Report: Avoidance of Multiple Inheritance Taxation within Europe, *EC Tax Review* 2001, 81–97; *see also* Maisto and Liberatore (et al.), *Death as a taxable event and its international ramifications, IFA cahiers de droit fiscal international – 95b* (Amersfoort, Sdu 2010), 887 p.
51. ECJ 30 Mar. 1993 (Konstantinidis), *ZEPR* 1995, 90, annotation Pintens, *ECR* 1993-1, 1191, *ERPL* 1995, 483, annotation Gaurier, Schockweiler and Loiseau. *See* Aps, Bescherming van het recht op naam in bet Europees recht, *Burgerzaken & recht* 1995–1996, 85; Pintens, Der Fall Konstantinidis. Das Namensrecht als Beispiel für die Auswirkung des Europaïschen Gemeinschaftsrecht auf das Privatrecht, *ZEPR*, 1995, 91.
52. ECJ 1 Jul. 1993 (Hubbard/Hamburger), *ECR* 1993, I, 3777, *Rev. Crit. dr. int. pr.* 1994, 663, annotation Droz, *JT* 1994, 36, annotation Ekelmans, *Tijdschrift voor Notarissen* 1994, 187, annotation Bouckaert.

In the Hubbard case, an English solicitor operating as an administrator of a succession in Great Britain, was forced to pay a judicial deposit to cover the costs of proceedings in Germany which were instituted in pursuit of hereditary assets. The Court decided that Articles 59 and 60 guaranteeing freedom of provision of services, oppose a national rule that requires a judicial deposit from a professional, if solely based on the fact that this professional is a citizen of another Member State.[53] Furthermore, the Court stated that the fact that the litigation concerned a matter of succession law is not a bar to the Court's competence based on the freedom of the provision of services.

Even before these two cases, the Court of Justice had already established that the power of the Community may transcend the strictly economical framework of Articles 2 and 3 of the Treaty of Rome in order to further the integration of a foreign employee in the social life of his country of residence.[54] Thus, it seems to be the opinion of the Court that if a right guaranteed under the Treaty can be claimed, all discrimination based on nationality is forbidden, even if such discrimination results from a rule in an area of law which does not form part of the objectives of the Treaty.[55]

Nevertheless, harmonization through the European Court of Justice's case law will remain very modest. For succession law, the connection with the economic objectives and liberties of the Treaty is simply too weak.[56] Moreover, since the Court can only intervene in concrete litigation, its influence and impact will always be coincidental without any reference to a concrete project or model of harmonization or unification.[57]

(b) Another important court is the European Court of Human Rights, which has stimulated the convergence of the national legislation of the Member States of the Council of Europe in a number of private law areas.[58] In the field of family law, this Court has forced several Member States to reform their legislation to a considerable extent.[59] Its greater influence on family law, as opposed to the

53. For a criticism, *see* Leleu (1998), No. 60.
54. *See* ECJ 11 Jul. 1985 (Mutsch), ECR 19854, 2691; ECJ 12 Feb. 1989 (Cowan), ECR 1989-I, 221.
55. ECJ 21 Mar. 1972 (Sail), ECR 1972 (119), 136, No. 5.
56. *See* Kohler, L'article 220 du Traité CEE et les conflits de juridictions en matière de relations familiales: premières réflexions, *Riv. dr. int. priv. proc.* 1992, 232–233, note 28. *See* however ECJ 11 Dec. 2003 (*Barbier v. the Netherlands*), PB EU C47/6, 21 Apr. 2004, and ECJ 11 Sep. 2008 (*Eckelcamp v. Belgium*), PB EU C285, 8 Nov. 2008.
57. In this sense: Weatherhill, Prospects for the Development of European Private Law. through 'Europeanisation' in the European Court: The Case of the Directive on Unfair Terms in Consumer Contracts, *ERPL* 1995, 308. *See also*: Martiny, Europaïsches Familienrecht – Utopie oder Notwendigkeit?, *RabelsZ* 1995, 434; Schwartz, Perspektiven der Angleichung des Privatrechts in der Europaïschen Gemeinschaft, *ZEPR* 1994, 576
58. In this sense: Jayme, Die Entwicklung des europaïschen Familienrechts, *FamRZ* 1981, 223.; van Grunderbeeck (2003).
59. Concerning Belgian law and the consequences of the Marckx case: Leleu, Erfrechtelijke discriminatie van buitenhuwelijkse kinderen: Quousque tandem, Gallia, abutere patientia nostra?, *Tijdschrift voor privaatrecht* 2001, 1353; *see* Rigaux, La loi condamnée, *JT* 1979, 513; Senaeve,

European Court of Justice, results from the fundamental rights and liberties guaranteed by the Treaty. Fundamental human rights are substantially affected by family and penal law.

Technically, the Strasbourg Court's influence is realized by the direct applicability of the Treaty in the Member States, the binding force of its judgments towards a Member State involved in litigation (Article 53),[60] the interpretative authority of such judgments in other Member States[61] and especially by the method of evolutive interpretation of the Treaty; this is a form of judicial activism enabling the Court to apply the Treaty to new situations and thus to create new law. In the area of succession law, certain devolution rules might infringe on the respect for the family life (Article 8)[62] and some rules on the distribution of a succession might violate the respect for the property rights of the heir (Article 1 of the First Protocol).[63]

However, the Court leaves a large margin of appreciation to the Member States to bring their legislation into line with the Treaty.[64] There remains a broad freedom of choice for the Member State as to the means to be used.[65] Therefore, this Court cannot effectively realize the unification of national law.

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van Marckx tot Vermeire. 12,5 jaar rechtspraak van her Straatsburgse Hof, *Tijdschrift voor familie- en jeugdrecht* 1991, 195, 244; Senaeve, Het personen- en familierecht, de Grondwet en bet E.V.R.M., in: *Gezin en recht in een postmoderne samenleving* (Ghent, Mys and Breesch 1994), 331. In the Netherlands, this evolution has been anticipated (Act of 27 Oct. 1982). In France, after being condemned by the European Court of Human Rights to abolish all discriminations in the field of succession against children born out of wedlock (Eur. Ct. H. R., 1 Feb. 2000 (Mazurek) *Dalloz*, 2000, 332, note Thierry, *Revue trimestrielle de droit familial*, 2000, 390, note Leleu), the French legislature now treats all forms of filiation equally (Inheritance Act of 3 Dec. 2001).

60. *See* Leuprecht, The Execution of Judgements and Decisions, in: *The European System for the Protection of Human Rights*, Mc Donald, Matscher and Petzold (eds) (Dordrecht, Martinus Nijhoff 1993), 793.
61. For further details, *see*: Cohen-Jonathan, Quelques considerations sur l'autorité des arrêts de la Cour européenne des Droits de l'Homme, in: *Liber Amicorum Marc-André Eissen* (Brussels, Bruylant 1995), 53 ff.; Goedertier, Het interpretatief gezag van het arrest Marckx, annotation on the judgment of the Cour de cassation of 7 Apr. 1995, in: *Mensenrechten. Jaarboek van het Interuni-versitair centrum Mensenrechten* (Antwerp, Maklu, 1997), 407.
62. Eur. Ct. H.R., 13 Jun. 1979 (Marckx), A, No. 31, § 52, 59; Eur. Ct. H.R., 29 Nov. 1991 (Vermeire), A, No. 214-C, § 25, Eur. Ct. H.R., 22 Jan. 2004 (*Jahn v. Germany*), EuGRZ 2004, 57.
63. Eur. Ct. H.R., 28 Oct. 1987 (*Inze v. Austria*), A, No. 126, § 38, 45; Eur. Ct. H. R., 1 Feb. 2000 (Mazurek), *see* fn. 53. For further analysis, *see* Leleu (1998), No. 64; Leleu (2001), 1357 ff. More recently: Eur. Ct. H.R., 13 Jul. 2004 (*Pla and Puncernau v. Andorra*), nr. 69498/01, *FamRZ* 2004, 1467, note Pintens.
64. *See* Ganshof van der Meersch, Le caractère 'autonome' des termes et la 'marge d'appréciation' des gouvernements dans l'interprétation de la Convention européenne des Droits de l'Homme, in: Mélanges en l'honneur de G.J. Wiarda (Köln, Heymanns 1988), 201; Kastanas, Unité et diversité: notions autonomes et marge d'appréciation dans la jurisprudence de la Cour européenne des Droits de l'Homme (Brussels, Bruylant 1996).
65. *See* Callewaert, Article 53, in *La Convention européenne des Droits de l'Homme*, Pettiti, Decaux and Imbert (eds) (Paris, Economica 1995), 850.

It merely imposes some kind of convergence of national legislations, forcing them to look in the same direction.

3.1.3. Spontaneous Convergence

Such convergence of different national legislations not only occurs as a result of the influence of supranational jurisdictions and authorities or the application of supranational law. Comparative law learns that in comparable societies the solutions to problems are limited (see section 1). A more extensive use of the comparative legal method upon the reform of national legislation has increased the impact of foreign law and even led to the reception of foreign solutions and institutions. Thus, national rules are growing spontaneously towards each other.[66] Spontaneous convergence also exists in the field of succession law. In the second section we pointed to the evolution towards common principles such as the protection of the position of the surviving spouse, the equality of children born in and out of wedlock, the reduction in the class of heirs entitled to a forced heirship right and the evolution towards abolition of the principle of distribution of the hereditary goods.[67] No such tendency of convergence, however, can be discerned regarding the issue of transfer of the succession.[68]

3.2. Unification

Article 220 of the Treaty of Rome, allowing Member States to enter into international conventions related to the objectives of the Community could offer a solid basis for the unification of the law of contracts. The European Parliament has invoked Article 220 as a basis for a convention regarding guardianship and abduction of children.[69]

In our opinion, the law of succession is not sufficiently linked to the economic objectives of the Treaty of Rome in order to base a convention regarding succession law thereon. However, this article does not prevent or forbid Member States from entering into international conventions related to succession law. It is quite clear, however, that the need for uniform acts in the field of family and succession law is much less pressing than it is in other areas of private law more related to business and economy.[70]

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66. *See* van Grunderbeeck (2003), 4.
67. In the same sense M. Puelinckx-Coene (2002), No. 53–55.
68. *See* the analysis of Leleu (1998), No. 69.
69. Resolution of 29 Oct. 1993, B; Resolution of 9 Mar. 1993, No. 28. *See* Martiny, Europaïsches Familienrecht – Utopie oder Notwendigkeit? *RabelsZ* 1995, 442; Meulders, Vers la co-responsabilité parentale dans la famille européenne, *Revue Trimestrielle de Droit Familial* 1991, 26.
70. *See* Goode, Reflections on the Harmonisation of Commercial Law, *ULR*, 1991, 54. Examples are: Uniform Act on the Formation of Contracts for the International Sale of Goods, The Hague, 1 Jul. 1964; Uniform Act on the International Sale of Goods, The Hague, 1 Jul. 1964. In some countries, these treaties have been revoked upon the adoption of the United Nations Convention

It has been argued that the unification of laws should not be realized by the unification of substantive law but rather by the unification of the principles of private international law.[71] The law to be applied to a transnational conflict is designated according to the national rules on conflict of laws (private international law) of the country of the judge or authority deciding the case.

However, also on the level of conflict of law rules, unification of conflict rules regarding family and succession law is not so simple, given the wide variety of conflict rules in that field. Therefore, in the Treaty of Brussels of 27 September 1968, family matters, except for alimony, are omitted from the field of application. Also the Treaty of The Hague of 2 October 1973 on the administration of successions has a very limited objective and success.[72] The Treaty of The Hague of 1 August 1989 regarding the law applicable to successions is an attempt to unify the conflict rules. The Treaty has only been ratified by the Netherlands, and it made a reservation regarding the rules of transfer of the estate.[73]

As said above (section 3.1.1), on 16 November 2006 the European Parliament adopted a resolution with recommendations to the Commission calling on the Commission to submit a legislative proposal for the future regulation on succession.[74] According to these recommendations, the applicable law should govern the whole succession, from the beginning of the procedure to the transmission of the inheritance to the persons entitled. The objective connecting factor should be the last habitual residence. The future deceased should be able to designate the law of his nationality or the law of his habitual residence at the moment of designation.

Finally, on 14 October 2009 the Commission presented a legislative proposal for a Regulation of the European Parliament and of the Council on jurisdiction,

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for the International Sale of Goods (Vienna, 11 Apr. 1980; although this convention does not contain any uniform act). For the text of these treaties, *see* Watté and Erauw, Les sources du droit international privé belge et communautaire (Antwerp/Brussels, Maklu/Bruylant 1996), nos 186–188, 161–196. For further details: van der Velden, Het Weense koopverdrag 1980 en zijn rechtsmiddelen (Deventer, Kluwer 1988).

71. Catala, La communauté induite aux acquêts, *Les petites affiches* 1992, No. 58, 84, No. 11; Glenn, Harmonisation of Law, Foreign Law and Private International Law, *ERPL* 1993, 47; Jayme and Kohler, Europaïsches Kollisionsrecht 1994. Quellenpluralismus and offene Kontraste, *IPRax* 1994, 405; Kohler, Zum Kollisionsrecht internationale Organisationen: Familierechtliche vortragen im europaïschen Beamtenrecht, *IPRax* 1994, 416. *See also*: Jessurun d'Oliveira, Towards a European Private International Law? in: de Witte and Forder (eds), *Le droit commun de l'Europe et l'avenir de l'enseignement juridique* (Deventer, Kluwer 1992), 265.
72. Ganshof, La convention de la Haye du 2 octobre 1973 sur l'administration internationale des successions, *Revue du Notariat Belge* 1975, 490; Watté, *Les successions internationales. Conflits de lois. Conflits de juridictions*, in *Répertoire Notarial*, t. XV, l. 14/3 (Brussels, Larcier 1992), No. 227, 181–183; Lalive, L'administration des successions internationales, *Annales suisses de droit international* XXVIII, 66.
73. This Treaty forms part of Dutch private international law: Art. 1 of the Wet Conflictenrecht Erfrecht (*see* Stille, Het nieuwe Nederlandse internationale erfrecht, *Tijdschrift voor familie- en jeugdrecht* 1996, 216).
74. Report with recommendations to the Commission on succession and wills, 2005/2418 (INI), A6-0359/2006.

applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession.[75] The proposal should considerably simplify the rules on successions with an international dimension in the European Union. The aim is to make life easier for citizens by laying down common rules enabling the competent authority and law applicable to the body of assets making up a succession, wherever they may be, to be easily identified. In addition to providing more effective guarantees for the rights of heirs, legatees and other interested parties, the proposed Regulation will take some of the stress out of succession planning by enabling people to choose the law that will govern the transmission of all their assets. The Commission is also proposing the creation of a European Certificate of Succession enabling an heir or the administrator of a succession to prove their capacity easily throughout the EU.[76]

The technique of a multilateral treaty proposing a uniform act does not directly affect national legislation. The states which sign and ratify it should integrate it in their national legislation. To achieve effective unity, the Member States of the treaty should abolish their national legislation and replace it by the uniform act. They should not make any reservation. In order to preserve unity, there should be a supranational authority or court to determine the interpretation of the treaty.[77] The existence of an official publication, enabling Member States to exchange information, might also facilitate the application of a uniform act.[78]

The 1973 Treaty of Washington regarding international wills is a very valuable attempt to unify one aspect in the area of succession law.[79] However, the unification is not as effective as it could be, since several Member States have simply added this form of will to the existing wills which remain in force (see section 2.3.1). Also the rules for interpreting the uniform act are not identical in all Member States.[80]

A greater and more successful and effective unification has been realized by the American Uniform Probate Code unifying the rules of transfer of succession (see also section 1).[81] This should set an example for Europe, without forgetting,

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75. COM (2009) 154.
76. Press Release IP/09/1508, Brussels 14 Oct. 2009: The Commission proposes to simplify the settlement of international successions and to make the rules governing them more predictable.
77. E.g. the Office central du chemin de fer deals with problems of interpretation of the international convention concerning transportation of passengers and luggage by railway (Bern, 25 Feb. 1961).
78. UNIDROIT publishes the Uniform Law Review. In the United States, similar publications attempt to improve the application of uniform acts (e.g., *Uniform Commercial Code Journal*).
79. For Belgium, *see* the Act of 2 Feb. 1983 (Vander Elst, Le testament international, *JT* 1984, 257). For France, *see* the Act of 1 Dec. 1994 (Byk, La forme internationale du testament, *JCP*, Edition notariale 1994, doctr., 331).
80. Compare with Art. 15 of the uniform act. *See* Watté, *Les successions internationales. Conflits de lois. Conflits de juridictions*, in *Répertoire Notarial*, t. XV, 1. 14/3 (Brussels, Larcier 1992), No. 51, 85.
81. Wellman, The Uniform Probate Code. A Possible Answer to Probate Avoidance, *Indiana Law Journal* 1969, 191 ff.; *see also* Reimann, Amerikanisches Privatrecht und europäisches

however, that the conditions in Europe are not as favourable as in the United States, where unification takes place within one federation.[82] Being part of such a federation may explain why the differences between the state legislations are less far-reaching than in Europe; why efforts aimed at the approximation of laws seem to be more evident and desirable; why there is a tradition of organizations and institutions charged with the unification of law.[83] Furthermore, the common language, legal tradition and education are factors which facilitate unification to a very considerable extent.[84]

4. CONCLUSION

True unification of differing national legislations, in our view, can only be realized by the adoption of a uniform act, elaborated in an international treaty that is signed and ratified by several countries, committing themselves to integrating that uniform act in their internal legislation. This method seems to offer an acceptable compromise between the autonomy of the Member State and the need for precision in order to obtain an effective unification of the law.

The emergence of some common principles in the field of succession law (see sections 1 and 2) shows that there might be a solid basis for the unification of some

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Rechtseinheit. Können die USA als Vorbild dienen?, in: Zimmermann (ed.), *Amerikanische Rechtskultur und europaïsches Privatrecht* (Tübingen, Mohr 1995), 132 ff.; Clark, Lusky and Murphy, *Gratuitous Transfers. Wills, Intestate Succession, Trusts, Gifts, Future Interests and Estate and Gift Taxation* (St Paul, West 1985), 624.

82. *See* Reimann, Amerikanisches Privatrecht und europaïsches Rechtseinheit. Können die USA als Vorbild dienen?, in: Zimmermann (ed.), *Amerikanische Rechtskultur und europaïsches Privatrecht* (Tübingen, Mohr 1995), 147. More optimistically: Weigand, The Reception of American Law in Europe, *AJCL* 1991, 229.

83. The National Conference of Commissioners on Uniform State laws was founded in 1892. With the American Bar, it has achieved several successes: the Uniform Commercial Code (*see* Malcolm, The Uniform Commercial Code in the United States, *ICZQ* 1963, 226); in family law, the Uniform Marriage and Divorce Act and the Uniform Marital Property Act (*see* Verbeke, *Goederenverdeling bij echtscheiding*, second ed. (Antwerp, Maklu 1994), No. 28, 38); Verbeke, Die Guteraufteilung nach Billigkeit aus Anlaß den Ehescheidung. Judicial application of statutory factors for an equitable distribution of marital property upon dissolution of the marriage on divorce in New York. An Illustration, ZVgl. 1989, 170–214. The American Law Institute is responsible for the research and preparation of uniform acts and is charged with the publication of the Restatements of Laws which synthesize, codify and unify the Common Law rules regarding the law of contract, tort, property, trust and conflict of laws. For each unified area of law, there is a law journal publishing all the necessary information in order to obtain a more or less uniform application (*see also supra*).

84. Concerning the influence of legal education on the unification of law: de Witte and Forder (eds), *Le droit commun de l'Europe et l'avenir de l'enseignement juridique* (Deventer, Kluwer 1992); Oppetit, Droit commun et droit européen, in: *L'internationalisation du droit. Mélanges Y. Loussouam* (Paris, Dalloz 1995), 318; Sacco, Droit commun de l'Europe et composantes du droit, in *Nouvelles perspectives d'un droit commun de l'Europe*, Capelletti (ed.) (Brussels, Bruylant/Sijthoff 1978), 107; van Gerven, Casebooks for the common law of europe. Presentation of the project, *ERPL* 1996, 67.

parts of the law of succession. Following the example of the uniform act regarding international wills, certain aspects of the law of succession could be subjected to the long procedure aiming at an international treaty promulgating a uniform act.

We believe in the feasibility of such a uniform act for those aspects where some kind of similar orientation is growing (see section 3.1.3). It might even be possible to elaborate such a uniform act regarding issues where no convergence nor common principles seem to appear, such as the transfer of the succession. A proposal in this regard has even been made already.[85]

There is however not only the issue of the feasibility of a more European succession law. Whatever may be feasible, we should always question the desirability of any evolution towards more unity or harmonization in the field of private law. For the European diversity is a virtue in itself; it should not be offered on the altar of efficiency without good reason. It is therefore of the utmost importance that such developments should occur in an open context and initiatives be embedded in a process of a genuinely transparent dialogue.[86]

85. *See* Leleu (1998).
86. Cf. Verbeke, *o.c. Maastricht Journal of European and Comparative Law* 2008, 411–413.