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The Successions in Europe
A Contribution to the Classification and Unification of the Succession Systems in Europe

I Alea Iacta Est?

As it is evident, the expression *ius commune* refers to the Romanistic-Germanic legal family which was developed in the 12th and 13th century in Western Europe under the direct influence of Roman law, canon law and customary law. It is less-known that the English translation of this Latin term is 'common law' which, however, refers the Anglo-American law that is totally different from its continental homonym. What is more, today in Europe we are witnesses to the emergence of a new *ius commune* under the aegis of the European Union.

These different concepts of *ius commune* clearly show that, despite the basically different legal traditions in Europe, there is a recurring desire for some sort of unification in law. The experiment to unify material law directly failed, but managing conflicts between different legal traditions with the tools of private international law proved to be an acceptable solution.

Nowadays the most recent development in the field of private international law is the establishment of the 650/2012/EU Succession Regulation.[1] This is an outstanding work and an excellent example of bringing fundamentally different legal traditions together. On the occasion of its entry into force, in the present study we will compare the European legal solutions in the field of succession law as the incarnations of the cultural heritage of the legal traditions of European countries. We are aware of the difficulty of this task. Such authors as Pintens have already explained that 'the law of succession is, as it were, a part of a country's cultural goods – like its monuments and museums'[2]. This statement, according to Marius J. de Waal, has two

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1 European Parliament and Council Regulation 650/2012/EU on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107 (European Succession Regulation).

2 W. Pintens, 'Grundgedanken und Perspektiven einer Europäisierung des Familien- und Erbrechts' 1 (2003) Zeitschrift für das gesamte Familienrecht 329-331, cited in Kenneth GC Reid, Marius J. de Waal and Reinhard Zimmerman, *Exploring the Law of Succession – Studies National, Historical and Comparative* (Edinburgh University Press 2007, Edinburgh) 3.

implications: a legal comparison cannot be successful because the law is too firmly embedded in local culture and customs, and therefore comparison can be carried out only at 'micro-level'. Besides, de Waal comes to the conclusion that harmonisation in the field of succession law is not desirable because that would end up in some loss of cultural goods.[3]

Alea iacta est? The European Succession Regulation took effect from the 17th of August 2015. We can no longer circumvent examining the core and substance of the different European succession regimes. By fulfilling this task, we will use the famous set of categories called 'stylistic elements' as described by Zweigert and Kötz.[4] Obviously, this is not the only set of categories and it is far from being the best, but this list of 'stylistic elements' is quite comprehensive and practical, which form sufficient virtues for our purposes. With their use, we seek to arrange the mass of different legal rules in an understandable order. What we want is to understand the differences in the legal traditions of the European countries in a special field of civil law, namely in succession law. We carry out our examination along the lines of the legal families established by Zweigert and Kötz, namely the common law countries, the Nordic countries, the Romanistic legal family, the Germanic and the (Post-) Socialist one. However, many years have elapsed since the creation of the legal families; we find their classes in essence still valid to reflect the existing differences of the legal systems in European countries adequately. (Certainly we cannot deny that these legal families are somewhat outdated and cannot be clearly delimited from each other.)

In Hungary, one of the most outstanding contemporary scholars, Professor Burián, claims that those national private international codes which have a long history, theoretical grounds and are verified by practice are being frittered away and are being replaced by uniform Union conflicts of laws that are influenced by – often opposing – political interests, the building blocks of which are only loosely fitted together by general principles determining the direction and method of legislations[5]. Paul Terner more specifically states that the harmonisation of the law of succession is not only directed towards finding the best legal solution, but also towards finding a politically feasible solution.[6] We would like to reflect on these opinions, since nobody doubts that politics play a primordial role in the EU. However, we would like to verify our supposition that cultural background, historical origins, religious practices, etc. are even more important factors than the current political state of affairs.

[3] Marius J de Waal, 'A Comparative Overview' in Reid, de Waal, Zimmerman, *Exploring the Law of Succession – Studies National, Historical and Comparative* 3.

[4] K Zweigert, H Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998, Oxford) 71.

[5] Burián László, 'Európai kollíziós jog: Korszak- és paradigmaváltás a nemzetközi magánjogban?'(2012) 11 Magyar Jog 695-704.

[6] Paul Terner, 'Perspectives of a European Law of Succession' (2007) 14 Maastricht Journal of European & Comparative Law 147-178.

II Historical Development

1 The Difference in Legal Development

Zweigert and Kötz state that historical development is one of the main elements that determines the specificity of a legal system. In our view, it is not always like that – especially not in the field of succession law.

From the historical point of view, one may easily draw a line between the *common law countries* and the continental ones. The distinct historical development of their legal culture is obvious; the geographical boundaries make that more evident. English common law consists of case law, equity law and statute law, in which case law has the biggest quantity and statute law the most importance. In other European legal systems, case law exists somewhat while stress is on the written sources of law. In the field of succession law, the main characteristic of common law is the institution of the *trust,* used by the administration of the estate. That has medieval roots typical of the common law countries.

The *Nordic Countries,* namely Denmark, Finland, Iceland, Norway and Sweden, are undoubtedly bound together with their unique history, as a result of which it is obvious that they differ from other European countries with their social, cultural, political and commercial ties. In the second part of the 19th century, Denmark, Norway and Sweden even begun to cooperate on legislation – the two remaining countries could only join after the First World War for at the beginning Iceland was part of Denmark and Finland was a Grand Duchy of Russia. This cooperation between these countries ended up in nearly identical acts in such areas as maritime law, trademarks, commercial registers, cheques and bills of exchange.[7] In the field of succession law they remain separated; however, according to their legislation these countries can be divided into two groups: the Western Nordic countries (Norway, Denmark and Iceland) and the Eastern Nordic countries (Sweden and Finland). To reach common ground between themselves with the 1934 Nordic Convention[8] they worked out private international rules on succession matters.[9]

The *Romanistic legal family,* where it is easy to reveal the influence of the French Code Napoleon, needs no explanation, either. In the Netherlands, Belgium and Luxembourg this influence is without any doubt; some sort of reception can be identified in Italy, Spain and Portugal. The Code Napoleon was based on the concept of equality in the eyes of the law, in terms of private property, freedom of contract and the freedom to work in an occupation of one's choice; it strengthened the patriarchal family and refused to have any religious content. It was designed to be so clear as to be understood by the layman and aimed to be accessible to anybody. It was intended to be complete, logically arranged and based on experience.[10]

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[7] Severin Blomstrand, 'Nordic Co-operation on Legislation in the field of Private Law' (2000) 39 Scandinavian Studies in Law 59-77.

[8] *Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden as revised by the intergovernmental agreement between those States of 1 June 2012.*

[9] Torstein Frantzen, 'Reforming the Norwegian Inheritance Act' in Torstein Frantzen (ed) *Inheritance Law – Challenges and Reform, a Norwegian-German Research Seminar* (Berliner Wissenschafts-Verlag 2013, Berlin) 25-34.

[10] André Tunc, 'The Grand Outlines of the Code' in Bernard Schwartz (ed) *The Code Napoleon and the Common Law Word* (The Lawbook Exchange Ltd. 1998, New Jersey) 22-33.

The *Germanic family* is the one which shows the elements of the Pandectist influence with its clear-cut theoretical concepts. It mainly covers the German-speaking countries of Germany, Austria and Switzerland. The institution of *parentela* or succession order, which derives from Pandectist theory, appears in the succession regimes of these countries.

The question that remains refers to the classification of the *Post-Socialist Countries.* Regarding their historical aspects they seem to form a separate legal family but, from a holistic comparatist's point of view, after the disappearance of the Socialist legal family they instead lie in *'a state of flux'* because, having overcome the socialist era, they are all developing individually. That encourages us to conclude that common historical development is not always an unequivocal decisive element of distinction among legal families.

A good example for that is the historical development of the Hungarian legal system, which can be categorised into different legal families according to historical periods. Until the beginning of the 19th century it was a customary legal system, similar to common law, although it was influenced by the Pandectists as well. In the 20th century the socialist impact was very clear. By now it has become quite difficult to classify it under its historical features since it developed its own legal characteristics as well.

2 The Historical Development of the Hungarian Legal System

We could state that the Hungarian legal system is 'hybrid' hence 'not easy to put (it) in the right family' and '(it) is in the process of moving towards a particular legal family, (...) extremely doubtful at which point of time the change of family is complete, and may not be possible to fix upon an exact moment'.[11]

The basics of the present Hungarian succession law can be found in the written but never royally assented and promulgated code called the Tripartitum. It is a systematic compilation of the existing customary law from 1514. It successfully preserved and summarised the existing private law of the nobility but at the same time it caused the development of law to be frozen for centuries.[12]

The provisions were basically intact until the adoption of the revolutionary acts of April 1848. Those acts were created during the Hungarian war of independence against the Austrian Empire. They aimed at creating a democratic political system by establishing equality in the eyes of law. In succession law, *successio universalis* was introduced a principle which was taken from Roman law. In 1852 the provisions of testamentary succession were also established.

After the revolution was defeated by the Habsburgs with the aid of the troops of the Russian tsar in 1849, the Austrian Civil Code (ABGB, *Allgemeines Bürgerliches Gesetzbuch*) was introduced in the Hungarian territories. That brought the institution of the reserved portion into the Hungarian succession law.

[11] When we call it a 'hybrid system', we use the term of art of Zweigert, Kötz (n 4) 72-73.

[12] Petrik Béla, 'A Hármaskönyv 500 éve' (2014) 11 Magyar Jog 662-665.

By 1861 Hungary had gained some judicial autonomy from Austria and the Provisional Rules of Administration of Justice were worked out. These rules were approved by the parliament and Franz Josef also assented to them but neither the Parliament nor the monarch did so in accordance with the constitutional rules and so they had not become legal rules. They were applied as customary law until the Civil Code of 1959 entered into force.

The Provisional Rules party restored the previous, customary law-based Hungarian legislation without the outdated feudal rules and, with a partial reception, took over the modern rules of the Austrian civil code and the land registry provisions which suited the economic conditions of that time.[13]

In succession, through the Provisional Rules, a specific legal institution was introduced, namely the *succession according branches ('ági öröklés')* which had its roots in the feudal legal system. This still existing peculiarity of Hungarian law made a difference between estates that had been gained by the deceased through succession and those through other forms of acquisition. In the event of intestacy, where no descendants were extant, the surviving spouse could inherit that estate which had been gained by the deceased through other forms of acquisition. The estate received through succession must remain within the family of the deceased and therefore it reverts to the branch of the family from which it came.

Although the 19th century was the 'age of codification', in Hungary the attempts were unsuccessful in many fields. However, if Codes were created, in most cases they were drafted to a very high technical standard by one of the leading professors.[14] Zweigert and Kötz rightly pointed out that 'Several drafts for a Hungarian Civil Code were worked out based on German law, and although they never officially became law, the courts treated them as if they had.'[15]

It was in the mid-20th century when the socialist influence caused Hungary to have a written Constitution (1949) and Civil Code (1957) – these acts were the first general codifications in these fields of law. During that time private ownership was restricted, which resulted in the range of property subject to succession being narrowed. After the fall of the socialist regime these restrictions were demolished; private ownership was fully acknowledged and a growing demand appeared for a new Civil Code that reflects the actual social and economic situation in Hungary and its new basics. The new Civil Code was passed in 2013 and, during its creation, current judicial practice, as well as new modern European trends, was taken into account. That is true for all books of the Civil Code with regard to succession law.[16]

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13 Attila Harmathy, 'On the Legal Culture of Hungary' Legal Culture and Legal Transplants, Electronic edition of the national reports presented to the XVIIIth International congress of Comparative Law (2011) Volume 1 – Special Issue 1, Article 13, 342-361; <http://isaidat.di.unito.it/index.php/isaidat/article/viewFile/19/82> accessed in 20 April 2015.

14 Like the Hungarian *1875. évi XXXVII. törvénycikk, kereskedelmi törvény* (Act XXXVII of 1875 on Act of Commerce) – was still in force after 1990.

15 See Zweigert, Kötz (n 4) 154.

16 Vékás Lajos, *Öröklési jog* (Eötvös József Könyvkiadó 2008, Budapest) 11-12.

III Distinctive Mode of Legal Thinking

According to Zweigert and Kötz, the typical mode of legal thinking is also a strong distinguishing feature of a legal system. We think that, in the succession laws of the EU Member States, the best way to observe this attribute is to look behind their probate procedures. In our view, the type of the authority which proceeds in a succession matter is itself a very relevant characteristic element, one that can help us to grasp the differences between the legal families.

1 The Nordic Countries

Taking the Nordic Countries, we can see that in these countries probate is an out of court procedure in which it is up to the beneficiaries themselves to settle the succession. If they cannot do that, a special person, an administrator of the estate and/or an estate distributor can be appointed by the court to solve their case. In *Sweden*[17] and *Finland*[18] the system is the following:

The *administrator of the estate* is generally but not in every case a third party, who acts under the supervision of the court. When appointing this person, the court takes the relevant wishes of the beneficiaries into account. The administrator has the knowledge and understanding to fulfil their duties but are not necessarily a lawyer – however, in most cases they are legal professionals. The administrator has the responsibility of drawing up an inventory, representing the estate towards third parties, paying and recovering debts, making decisions on payments of debts, sharing out the estate and settling the succession. They report to the beneficiaries as soon as they have prepared the estate inventory or it is possible to distribute the estate.

The *estate distributor* is appointed at the request of the beneficiaries, but, when no distributor has been nominated at the wishes of the parties, it is not excluded that an executor of a will carries out the function of this estate distributor. They do not need to be a lawyer either, but they must have the knowledge necessary to proceed in the actual case. They have to solve the material legal questions of the succession and distribute the estate. They accomplish their duties by making a decision regarding the distribution of the deceased's assets. This decision is valid if no beneficiary contests it before the court.

2 The Latin Civil Notarial System

In Member States having the Latin civil notarial system, mainly in France, Belgium and Luxembourg, where the estate includes immovable property the contribution of a notary is obligatory for the probate (it is also recommended for movable property). The invocation of

[17] Ferid, Firsching, Dörner, Hausmann, *Internationales Erbrecht,* (Verlag C.H. Beck, München) Rnz. 52-61; Swedish *Ärvdabalk* – Inheritance Code (1958:637) Chapter 18-23.

[18] Ferid, Firsching, Dörner, Hausmann, *Finnland,* Rnz. 213-243; Finnish Code of Inheritance 40/1965, Chapter 18-21.

a notary takes place in uncontested cases; in an unsettled case the parties certainly may go to court.

In *France*[19] notaries are not bound by competency rules – beneficiaries turn to someone they trust, so they are a bit like a 'friend of the family'.

During probate, the notary draws up a list of the people entitled to an inheritance and their respective rights, as well as an estimated inventory of the deceased's estate including the assets of the deceased and their liabilities. They are the one who completes the mortgage and tax formalities in connection with the death.

They certify the inheritance rights of the heirs in a notarial deed called *acte de notoriété.* This deed is drawn up on the basis of official documents of the case (certificate of deaths, marriage certificate, will, agreement as to succession, matrimonial property agreement) and the statements of the heirs, who are allowed to prove their capacity by any means. This notarial deed is suitable for officially proving the rights of the heirs and legatees, e.g. for the purpose of registering rights in land registers, although the notary is not performing a judicial function and their deed does not have a *res judicata* effect.

The procedure of the probate is not regulated at all. For instance, the notary does not have to summon *ex officio* all the interested parties and it is, without any prior notice, up to the beneficiary to act and to bring an action before a court if he or she feels that their right was overlooked. This system therefore also wants to solve problems primarily out of court and relies on the autonomy of the persons.

3 The Post-Socialist Countries

A more regulated system is the one that we can find in some Post-Socialist countries such as *Hungary,*[20] *Czech Republic*[21] and *Slovakia*[22]. In these states the notaries are the ones who proceed in a probate but their functions are very similar to courts. They are bound by procedural and especially by competency rules; they are impartial, they summon the beneficiaries and they deliver a decision to close the procedure, which has similar effects to court decisions and which can be appealed before court.

However *Austria*[23] is a Germanic country we would tend to include with this type of notarial system which performs judicial functions. This is because in Austria, a court of first instance proceeds in the inheritance procedure and technically it is the one that closes the probate by a vesting order; however, in the course of its procedure, it appoints a notary as a judicial administrator who, in practice carries out the main procedural acts. The notary is the one who

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[19] Ferid, Firsching, Dörner, Hausmann, *Frankreich,* Rnz. 303–313; French 'old' Civil Procedure Act – *Code de procédure civile* Arts. 907-1002; French Civil Code Arts. 720-842.

[20] See Hungarian *2010. évi XXXVIII. törvény a hagyatéki eljárásról* (Act XXXVIII. of 2010 on probate).

[21] See Ferid, Firsching, Dörner, Hausmann, *Tschechische Republick,* Rnz. 118–135; Czech Civil Procedure Act No. 99/1963.

[22] See the following homepage: <http://www.successions-europe.eu/en/slovakia> accessed 20 April 2015.

[23] See Austrian law on judicial administrators, Bundesgesetz vom 11. November 1970 *über die Tätigkeit der Notare als Beauftragte des Gerichtes im Verfahren außer Streitsachen (Gerichtskommissärsgesetz – GKG).*

draws up an inventory of the estate. From the transmission of the estate till issuing a vesting order, the heritage is a *hereditas iacens* i.e. it is considered as lying in abeyance, which justifies the appointment of the notary as well.

4 The Germanic Countries

Finally we have to mention those Member States in which probate is performed by courts in a classic sense. That is typical in Germanic countries, such as Germany.

In *Germany*[24] special courts deal with succession matters; the inheritance procedure comes under the material jurisdiction of the probate court called *'Nachlassgericht.'* This court is bound by strict procedural rules. It protects the estate, decides who the heirs and legatees are and upon request it issues certificates of succession or similar certificates. When it is requested, the court divides the joint property of the heirs and shares them out the estate.

Estonia[25] could be classified as a Post-Socialist country; nevertheless, in its probate procedure, we can find a lot of similarities with Germany. In Estonia it is also the court that handles succession matters. The court is competent to deal with the estate of the deceased; it decides on requests relating to disputes, on sharing out the estate and on establishing the heirs, legatees and other beneficiaries under the general rules of civil procedure. Notaries can be involved in probate as well, but their functions are less decisive since they are only competent to certify the acceptance or renouncement of the succession, making the inventory and issuing the certificate of succession. This certificate is authentic, develops *bona fidei* acquisitions of rights and it is presumed to be valid as long as it is not contested before court successfully.

As we have seen, the traditional boundaries of legal families created by Zweigert and Kötz are blurred. The examination of probate procedures leads us to the observation that some countries need to be reclassified.

IV Unique Legal Institutions

Legal institutions, according to Zweigert and Kötz,[26] are so characteristic that they form the third stylistic element in our study. As examples of these institutions we take the institution of the reserved portion, the inheritance right of the surviving spouse and clawback. We investigate their nature, appearance in the national legal systems and try to reflect on them.

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[24] See Ferid, Firsching, Dörner, Hausmann, *Deutschland,* Rnz. 2644–2681; German Law *'Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit'* from 17.12.2008.

[25] See Ferid, Firsching, Dörner, Hausmann, *Estland,* Rnz. 204–208.

[26] Zweigert, Kötz (n 4) 71.

1 Reserved Portion

The individualist anthropology of the Anglo-Saxon culture and the almost unlimited natural right of ownership is expressed by the succession law in the way in which, in *England, Wales and Northern Ireland,* the reserved share of it does not exist. That means that no-one, not even one of the deceased's next of kin, can automatically have a part of the estate. However, the case law makes it possible for the surviving spouse or the child of the deceased, or anyone else who immediately before the death of the deceased was being maintained by the deceased, either wholly or partly, to submit a request before court. This person can claim that the deceased did not properly take care of their maintenance and the court – having examined the reasons for the maintenance –may order for their benefit payment out of the net estate or transfer of property.[27]

In *Germany,* if descendants, the spouse or registered partner or the parents of the testator are excluded by the disposition of property upon death from the succession, they can demand a reserved share from the heirs. The extent of the reserved share is half of that portion which would be due in the event of intestate succession. (For parents and remoter descendants, it is necessary for their entitlement to the reserved share that there should be no closer relative who would exclude them in the event of intestate succession.)[28] They do not have to prove any financial dependence or expectation from the deceased person; it is possible for them to require this reserved share simply upon the existence of kinship with the deceased.

The regulations in *Hungary* are similar to the German ones. The descendants, surviving spouse or registered partner and parents of the deceased (if the deceased has not left any descendants) are entitled to a reserved share. It is one third of the hereditary portion under the statutory inheritance. The reserved portion is a debt claim for part of the financial value of the estate. If the surviving spouse or registered partner received by intestate succession a *usufruct* right, their reserved portion is the restricted *usufruct* right on their inheritance.[29] (Under the previous Civil Code of Hungary which was in force until 15 Mach 2014, the proportion of the reserved share was the half of the property.)[30]

Spain seems to be exceptional. There, succession is regulated by different sources of law, in the sense that, in addition to the civil code, the law of different autonomous communities exist, too. This is the reason that the institution of reserved share is determined in so many ways. Legal solutions are extremely diverse: in some autonomous communities the extent of the reserved share is significant, while in others it is almost nothing.[31]

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[27] Ferid, Firsching, Dörner, Hausmann, *Groß-Britannien,* Rnz. 229–232.
[28] German Civil Code, *Bürgerliches Gesetzbuch* 2303 §, 2309 §.
[29] Hungarian *2013. évi V. törvény a Polgári Törvénykönyvről* (Act V of 2013 on the Civil Code), 7:75-82 §§.
[30] Previous Hungarian Civil Code, *1959. évi IV. törvény a Polgári Törvénykönyvről* (Act IV of 1959 on the Civil Code), 661-672. §§.
[31] The reserved portion in Spain is generally established by the Civil Code but in Aragon, the Balearic Islands, Catalonia, Navarre, Galicia and the Basque Country by the laws of the autonomous community in question determine different portions.

In *Finnish and Swedish* law the surviving spouse is not entitled to a reserved share, only the descendants can assert such a right. In both countries the descendants are treated as joint heirs and they receive the half of the statutory inheritance portion.[32]

2 Inheritance Right of the Surviving Spouse

Another significant and characteristic institution in intestate succession matters in Europe is the inheritance right of the surviving spouse. This right competes with the inheritance right of the relatives and it aims at securing the widow's position in society. To achieve this aim, different solutions are to found in the national legal systems.

a) Some legal systems stipulate that the surviving spouse should receive maintenance *(Unterhaltsprinzip).* It is the case in South Africa, for example.[33]

b) In other legal systems the surviving spouse obtains *usufruct,* namely the right to use the estates that comes into the legacy of the relatives of the deceased *(Nutzungsprinzip).* One can recognise the elements of this solution e.g. in France, the Netherlands and Hungary.

In *France* the surviving spouse previously received in most intestate succession cases a *usufruct* only on a given portion of the estate. That has historical reasons: when creating the French Civil Code local customary provisions were mostly taken from northern France, according to which the surviving spouse should be insured by matrimonial assets especially through their share from the common matrimonial property. Namely, in the event of one of the spouses' death, the matrimonial and succession matters had been divided. Having settled matrimonial matters, the questions of the succession could be solved. In practice that meant that – unless the division of matrimonial assets were regulated otherwise by the spouses – first the surviving spouse would get 50 % of the whole property as the distribution of matrimonial property and only the other 50 % would be the subject of the succession.[34] Today, in succession matters, when the spouses' common children or descendants are at hand, the surviving spouse has an option between the *usufruct* on the whole estate and the ownership of one quarter of it.[35] Where the surviving spouse inherits together with other relatives they cannot choose and would simply get ownership of a special part of the property depending on the quality of the other relatives.[36] However if later the spouse, the heirs or other interested parties change their mind, they have a possibility to request the conversion of the *usufruct* into a life annuity.[37]

In *the Netherlands,* the situation is quite unique. The surviving spouse inherits in first degree with the descendants of the deceased. However if both the widow(er) and children are statutory heirs, the widow(er) receives all the estates of the deceased, including its debts and

[32] Swedish *Ärvdabalk* – Inheritance Code (1958:637) Chapter 7 Section 1; Finnish Code of Inheritance 40/1965, Chapter 7 Section 1.
[33] See Maintenance of Surviving Spouses Act 27 of 1990 of South Africa.
[34] Ferid, Firsching, Dörner, Hausmann, *Frankreich,* Rnz. 76–83.
[35] French Civil Code Art 757.
[36] French Civil Code Art 757-1 – 758.
[37] French Civil Code Art 759–762.

obligations. The children only acquire a right for a money claim, which they can require upon the insolvency of the widow(er), by his or her death or at a different time determined in the will of the deceased. As long as the children cannot realise their money claim, the spouse has a special *usufruct* right. The Dutch law however gives the opportunity to the widow(er) to deviate from this provision by a notarial declaration in which they choose another way of intestate succession, namely inheriting in equal shares with the children.[38]

In *Hungary,* until March 2014 the *usufruct* right of the surviving spouse was clear.[39] They inherited the *usufruct* of all property not otherwise inherited by them. The *usufruct* existed as long as they did not remarry. Descendants, however, could request the limitation of spousal *usufruct* to the degree that the limited *usufruct* provided for the needs of the spouse, in consideration of the property he or she had inherited, his or her own property and the earnings from his or her labour. Besides this, either the spouse or the descendants had the right to request the redemption of the spouse's *usufruct.* In that case the widow(er) was entitled to a share of the redeemed property which was equal to a child's portion.

c) This latter solution of Hungarian law, namely that the surviving spouse receives by redemption a child's portion from the estate, leads us to the third above mentioned category, when the widow inherits a part of the estate *(Teilungsprinzip).*[40]

This type of regulation can be found in a clear manner in the *Czech* legislation, where the surviving spouse is a joint heir with the descendants of the deceased; his or her inheriting position is equal to that of the children of the deceased.[41] However, in the absence of descendants, he or she cannot be the sole heir; he or she then shares the estate with the second degree of successors (also with the parents of the deceased and other persons who were being maintained by the deceased one year before his death).[42] To supplement this allocation, the surviving spouse has a right to active wage claims and income claims.[43]

The current Hungarian Civil Code foresees a similar solution. It treats the surviving spouse as a child who inherits an equal share with the children – however, in addition to that, he or she receives a *usufruct* on the marital home and household, too. In the absence of descendants, he or she inherits together with the parents and gets half of the estate plus the marital home and household. She is the sole heir if there are neither descendants nor parents.[44]

In *Germany,* the regulations are somewhat complicated. Here the spouse's share from the estate depends on the degree of *parentela* or succession order with which the spouse inherits. If the heirs are descendants of the deceased (1st *parentela*), the widow(er) gets one quarter of the estate. This portion is half upon inheriting with parents and their descendants (2nd *parentela*)

38 Dutch Civil Code Art. 7:13, 7:18.
39 Previous Hungarian Civil Code 615-616. §§.
40 Ferid, Firsching, Dörner, Hausmann, *Deutschland,* Rnz. 1546.
41 Czech Civil Code Art. 473.
42 Czech Civil Code Art. 474.
43 Czech Labour Code Art. 260.
44 Hungarian Civil Code, Art. 7:58-7:62.

or with grandparents together.[45] Next to this portion, the widow(er), when inheriting with the 2nd *parentela* or grandparents, gets the objects belonging to the marital household, as well, as a preferential benefit; if the widow is an heir with the 1st *parentela*, she has a right to these objects only to the extent that she needs them to maintain a reasonable household.[46] Moreover, the share of inheritance of the surviving spouse increases by an extra one quarter of the inheritance on the title of dividing the matrimonial property by reason of death of one of the spouses (unless the spouses had agreed to regulate their matrimonial property regime otherwise).[47]

d) We also have to mention the solutions of England and Wales because they do not fall under the above categorisation of *Unterhaltsprinzip, Nutzungsprinzip* and *Teilungsprinzip*. Their systems show a totally different legal institution for securing the situation of the surviving spouse. In the culture of *common law,* the estate normally is not transferred to the heirs but to a so-called 'personal representative' who is a trustee and their task is to administer the estate as a proprietor for the benefit of the heirs. This is a 'trust for sale', where the trustee (the personal representative) can sell, manage or distribute the estate. The trustee does not need to distribute the inheritance in cash; if there is an agreement between the beneficiaries then they can hand it over *in natura.*[48]

The relevant act foresees five groups of legal heirs: (1) the surviving spouse, (2) the descendants, (3) the parents, (4) the sisters or brothers of the whole blood and (5) distant relatives.[49] If there are neither descendants, nor parents, sisters, nor brothers of the whole blood, nor their descendants then the surviving spouse inherits the whole estate. It is a 'residuary estate', where the funeral and administration costs and inheritance tax have to be paid before the spouse gets the net estate.

Where the deceased has descendants besides the surviving spouse, the spouse inherits a fixed amount of 250 000 GBP,[50] personal chattels, and the residual estate is a trust administered by the personal representative and divided in two equal parts. One half is a statutory trust, where the beneficiaries are the descendants, and other one is a 'life interest' for the benefit of the surviving spouse.

Where the deceased has parents, sisters or brothers of the whole blood or their descendants besides the surviving spouse, the spouse inherits 450 000 GBP,[51] personal belongings, 'personal chattels',[52] and the residual estate is divided in two halves. One of them belongs to the relatives and the other one to the spouse 'absolutely', so this time not as a 'life interest' trust but as a sheer right.

[45] German Civil Code Art. 1931.
[46] German Civil Code Art. 1932.
[47] German Civil Code Art. 1971.
[48] Ferid, Firsching, Dörner, Hausmann, *Groß-Britannien,* Rnz. 135.
[49] On the whole succession of the surviving spouse see: Administration of Estates Act 1925, Sec. 46.
[50] Family Provision Act 1966, Sec. 1.; < http://www.successions-europe.eu/en/united-kingdom/topics/in-the-absence-of-a-will_who-inherits-and-how-much> accessed 20 April 2015.
[51] Family Provision Act 1966, Sec. 1.; <http://www.successions-europe.eu/en/united-kingdom/topics/in-the-absence-of-a-will_who-inherits-and-how-much> accessed 20 April 2015.
[52] Administration of Estates Act 1925, Sec. 55 (1) (x).

3 The Institution of Clawback

There is a very special legal institution which by its own nature provokes significant debates on the national law of the Member States. That is the so called 'clawback'. Its purpose is to protect the interests of beneficiaries who are entitled to a reserved share under the applicable succession law, *lex successionis.* Its conditions vary greatly depending on the material law of the Member State concerned. It enables the persons entitled to a reserved share *to claim the gifts made by the deceased during their lifetime* in order to ensure that the beneficiary receives his or her reserved share from the estate.[53]

In *Belgium* these rules, incorporated in the Civil Code (Art. 920-930), are quite general. The restoration of the gift can be claimed indeed thirty years after the death of the testator. The reserved portion is calculated on the basis of a fictive hereditary mass and includes not only the assets existing at the time of death but gifts given by the testator during his lifetime, too.[54] If the assets existing at the time of death are not sufficient to cover the reserved share, first the property included in testamentary dispositions has to be exhausted; only then it is possible to challenge the *inter vivos* gifts starting with the gift made most recently and following with the others increasingly longer ago.[55]

In *Germany* the clawback *(Pflichtteilsergänzungsanspruch bei Schenkungen)* is a right to a supplement from the *inter vivos* gifts made by the testator in the last *ten years* of his or her lifetime if the estate is insufficient to cover the claims for a reserved portion.[56] With spouses there is an exception – any gift which was made before the divorce is not to be taken into account. As time elapses the less of the value of the gift is to be taken into account. Namely, in the very first year the beneficiary is entitled to claim the whole amount of the gift; in the second year 10 % less; in the third 20% less and so on. There are various rules which have to be taken into account when determining the gifts which cannot fall under the clawback. For instance a gift given to discharge a moral debt is excluded from the clawback.[57]

The Civil Code of *Hungary* regulates the clawback under the provisions of the *'felelősség a kötelesrész kielégítéséért'*[58]. According to these rules, the dispensation or completion of reserved portions can be demanded first from the persons having a share of the estate. If the reserved portion cannot be satisfied from the estate, the recipients of gifts from a testator within *ten years* prior to his or her death are responsible for reserved portions, irrespective of the temporal order in which the donations were received. The share of responsibility of several persons is determined by the applicable value of their allocations. A person who lost an allocation without fault is not liable for a reserved portion. A recipient is responsible for

[53] More on clawback see Annex 1 ('A Comparative Analysis of the Succession Laws of Member States of the European Union on the Issue of Clawback' by Professor R. Paisley) of the Consultation Paper CP41/09 of the Ministry of Justice of the United Kingdom published on 21 October 2009.

[54] Code Civil Belge Art. 922.

[55] Code Civil Belge Art. 923.

[56] German *Bürgerliches Gesetzbuch* Art. 2325.

[57] German *Bürgerliches Gesetzbuch* Art. 2329.

[58] Hungarian Civil Code 7:84. §, previous Hungarian Civil Code 669-670. §§.

satisfying the reserved portion up to the total value of their allocation. However, an heir entitled to a reserved share is responsible only up to the value of the allocation that exceeds their reserved share. (The Hungarian Civil Code is in force since mid-March 2014; it only changed the previous clawback rules in reducing the time limit from fifteen to ten years during which the reserved share can be required from a recipient.)

The *Spanish* Civil Code (Art. 636. to read with Arts. 806-822) creates a fictive hereditary mass which has to be taken as a basis for the reserved portions. It contains the estate of the deceased at the time of death and all the *inter vivos* gifts made by him or her. If a beneficiary does not receive their entire reserved portion, they may request its completion. The Spanish Civil Code does *not contain a special time limit* for raising such claims but the general provisions of negative prescription apply, which is 6 years for movables and 30 years for immovable.[59]

In the *United Kingdom,* the institution of clawback does not exist. As we read in the consultation paper[60] prepared on the opt-in to European Commission proposal on the European Succession Regulation, the UK was not very keen on this institution. Probably its suspicion and reluctance for this legal institution is why it finally opted out and did not participate in the European Succession Regulation, which was officially adopted in 2012. UK criticised clawback for making transactions insecure, for undermining the integrity of registers and the use of *inter vivos* trusts as a mechanism for estate planning and thus eventually causing legal uncertainty.

V EU Legislation & Private International Law: Beyond Statutes vs. Cases

With regard to the sources of law, Zweigert and Kötz made an elementary distinction between statutory and case law systems; however at the same time they admitted that this statute law/case law dichotomy was a bit exaggerated.[61]

This is justified by the fact that European succession regimes are essentially regulated by statutes. The clear domination of statutes and acts can be observed in each country. Even in England, next to case law we can find a lot of statutes, although they are not incorporated into one single act but create the corpus of the English succession law.[62] In other EU countries, the provisions of succession law are compiled in one Act; in the Roman, Germanic and Post-Socialist countries they are normally a separate part of the national Civil Code[63] while in the Nordic countries these matters are regulated in special acts.[64]

[59] Spanish Civil Code Arts. 1962-1963.
[60] Consultation Paper CP41/09 of the Ministry of Justice of the United Kingdom published on 21 October 2009.
[61] Zweigert, Kötz (n 4) 71.
[62] The most important English acts in this field are the following: Wills Act 1837, Administration of Estates Act 1925, Intestate Estates Act 1952, Inheritance Act 1975, Wills Act 1963.
[63] Examples for that are the French, Belgian, German, Austrian, Polish and Hungarian Civil Codes.
[64] See the Swedish *Ärvdabalk* – Inheritance Code (1958:637); Finnish *Perintökaari* – Code of Inheritance 40/1965; Danish *Arvelov* – Succession Law No. 215 of 1963.

In this type of source of law, namely in the statutes, we can find a common basis for the European legal systems as regards succession matters. It is a very important conclusion because, with its assistance, the European countries could start to consider a uniform instrument that would meet the needs of European citizens moving in the continent from one country to another or even all around the world. However, we have to admit that at the moment it is impossible to create a single act which shapes the content of European succession law, because of the differences in legal instruments and the various traditions of the states. The best legislative solution for this situation is the use of the connecting factors of private international law. Private international law neither requires nor implies the unity of substantive or even procedural law between the countries but it satisfies the need to solve different cases using connecting factors or conflict of laws rules. For a legal practitioner these connecting factors give simple and plausible answer to the *questio iuris:* the practitioner is directed to the forum and to the substantive law which are the most appropriate to govern the specific case.

This private international law approach at the beginning resulted in memberships in bilateral and multilateral agreements On the one hand, it is worth first mentioning the 1961 Hague Convention on the form of testamentary dispositions.[65] It has been ratified by fourteen European countries. Five states acceded and five became members as legal successors of a former state. This Convention however was signed by only one European country.[66] On the other hand the Nordic Convention (that has already been referred to) as a multilateral agreement contains private international law provisions as well. These relate to succession matters, wills and estate administration in the context of Denmark, Finland, Iceland, Norway and Sweden.[67]

The latest solution is the already mentioned Union instrument, the 650/2012/EU Succession Regulation prepared to meet the needs of those citizens (and their heirs) who have estates in several countries. Unlike the international agreements in force, this Regulation touches not just some but almost all Member States[68] and additionally contains provisions regarding third states. We therefore find it quite appropriate to focus on it as a new international source of succession law, applied in full from 17 August 2015.

The 650/2012/EU Regulation determines in matters of succession the rules regarding jurisdiction, applicable law, recognition and enforcement of decisions, as well as the acceptance

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[65] *Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.*

[66] It was ratified by Austria, Belgium, Denmark, Finland, France, Germany, Greece, Luxembourg, the Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom, was acceded by Estonia, Ireland, Ukraine, Turkey, Moldova, became member it as legal successor of the former Yugoslavia: Bosnia & Herzegovina, Croatia, Montenegro, Serbia, Slovenia, was signed by Italy. (These data are available at the homepage of the Hague Conference on Private International law – <http://www.hcch.net>.)

[67] *Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden as revised by the intergovernmental agreement between those States of 1 June 2012.*

[68] Those Member States which are not bound by the European Succession Regulation are the following: United Kingdom, Ireland and Denmark by reason of the Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union as well as the Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, [2012] OJ C326/295, 299.

and enforcement of authentic instruments. What is more, it creates a European Certificate of Succession which will be a *sui generis* legal instrument for use by heirs, legatees having direct rights in the succession and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate. The Certificate will produce its effects directly in all Member States. It is presumed that it reflects accurately the elements which have been established under the law applicable to the succession or under any other law applicable to specific elements. The person mentioned in the Certificate as the heir, legatee, executor of the will or administrator of the estate will be presumed to have the status mentioned in the Certificate and/or to hold the rights or the powers stated in the Certificate, with no conditions and/or restrictions being attached to those rights or powers other than those stated in the Certificate. The Certificate will form a valid document for the recording of succession property in the relevant register of a Member State.[69]

As we look at the history of the European Succession Regulation, we have to state that an unusually long time elapsed from its proposal made by the Commission in October 2009[70] until its acceptance by the European Parliament and the Council in July 2012. This reflects that the basic differences in the legal traditions in the matter of succession made it extremely difficult to finalise this instrument. It is not self-evident how to unify even the connecting factors of so many countries, either. Hard work needed to be done to find a solution that was acceptable to all Member States and all legal traditions. In that sense the European Succession Regulation could not be a full success, since the two Member States which have an opt-in possibility do not make use of it, as the United Kingdom and Ireland do not participate in the application of the Regulation.

VI Ideology

Ideology was that stylistic element under Zweigert–Kötz that served to separate the socialist countries from the others. Two decades after the collapse of the socialist era, this element no longer seems to be relevant. Nevertheless, in our opinion, we could regard this stylistic element as useful if we examined, under the notion of ideology, the anthropology of the legal systems, more specifically what is the relationship between the state and its citizen, how the state treats their people and what attitude do the citizens show. From this point of view one could distinguish three categories, the 'independent', the 'semi-independent' and the 'dependent' type of citizenship.

[69] See Chapter VI on the European Certificate of Succession of the European Succession Regulation.
[70] COM(2009)154 final, 2009/0157 (COD), Brussels, 14.10.2009.

1 Independent Citizen

The independent citizen covers that kind of individual whose financial decisions are not influenced by family relations. That would be typical in common law countries where, in the field of succession law, there is no reserved portion and matrimonial property regime does not exist; people are free to arrange their assets and they are not limited even by moral and legal expectations based on kinship.

2 Semi-independent Citizen

In some countries – mostly in the Romanist legal family and especially in France, Belgium and Luxembourg – people act in an active, autonomous way; we could say that they behave in an 'adult' manner when it comes to business and administrative matters. This type of semi-independent citizen stands up for their rights and acts if something is affecting them detrimentally. A typical example for that is the French probate, where the citizen monitors the arrangements of the notary and immediately starts a court procedure if they realise that a notarial deed was issued to his disadvantage. This type of self-determination leads the citizen to be aware of his legal options and obligations. In material succession law the assertive citizen's freedom to dispose of their succession is somewhat limited but at the same time their sovereignty is respected.

3 Dependent Citizen

The behaviour of the dependent citizen is totally different from the above ones. They rely on the assistance of a paternalist state, since the legislator supposes that they are unable to act on their own initiative. That would be typical in Hungary and Slovakia – probably because in those countries the people are used to the paternalistic interventions of the state, but we could perceive this phenomenon in Germany as well. Let us just take the probate again. In these countries, the court or the court-like authority acts *ex officio* and guarantees the protection of the interested parties by strict procedural rules, e.g. by the formal service of summons. Here the judicial system serves the citizens: it accomplishes the probate and informs them constantly on their rights and obligations. This type of citizen does not need to grow up, and act independently or autonomously because the state stands beside them, ready to intervene and assist when they might fall.

VII Concluding Remarks

From five aspects, we have seen the five stylistic elements whereby the legal traditions in succession law are quite different. Some similarities can be found and upon them some classification is possible but it always needs to be revised when we start to examine a stylistic element. For example, from a historical point of view, Estonia is a Post-Socialist country, but its

probate is nearly the same as the Germanistic solution. Since the Hungarian legal system during its historical development showed resemblance with common law countries, then it was under German influence and later belonged to the socialist countries, today it does not have such clear attributes that would let it be placed into one single legal family.

We have also seen how rich the European legal systems are when it comes to their succession regimes. Sometimes they have totally different solutions for the same problem, e.g.: how to hand over the estates of the deceased to the heirs and beneficiaries. This richness is a value which must be highly appreciated, since it forms part of the legal and 'cultural heritage' of Europe.

We therefore agree with de Waal's conclusion cited in the first part, in the sense that we also think that a harmonisation of succession law would end up with a loss of cultural heritage; nevertheless, we believe that in our modern mobile world in which people live in different counties and collect property in different states, the matter of international successions has to be solved in a satisfactory manner, which preferably can be foreseen by the testator themself. We consider that it is the task of the international private law to handle this complex issue.

Within the European Union, there have been attempts to unify the European succession regimes when experts had to face with this diversity of cultural richness; the stakeholders finally chose the instruments of private international law to achieve some unity in this field.[71] The politically feasible solution demanded by Terner in the first part has been achieved. The brand new 650/2012/EU Regulation is on the table. From the practice, soon we will see whether this Regulation can achieve unity in diversity or not.

However, we also have to consider Professor Burián's and Paul Terner's thoughts, namely that postmodern private international law is often influenced by different, sometimes even contradictory political interests, the elements of which are loosely fixed together by such general principles that could determine the path and method of legislation. We completely agree with this statement but we are more optimistic. We think that there exists a type of true and righteous politician who is not focussing on current affairs; but instead sticks to long-terms values and principles to organise public life. Acting in this manner, they have strong roots in the legal culture and in that way politics and legal culture are not separated from each other. Succession matters are part of the cultural heritage and as such they cannot be overlooked at the level of legislation and general politics.

[71] However we have to admit, that once it was succeeded in Europe to unify different succession regimes. Namely by creating Book Five (on the law of succession) of the German Civil Code the legislators had to harmonise the succession regimes in force in different parts of the German territories, such as the *ius commune,* Saxon Common Law, Prussian *Allgemeines Landrecht* and French law and more than 100 local regimes. See D. Leipold, 'Europa und das Erbrecht,' in *Europas universal rechtsordnungspolitische Aufgabe im Recht des dritten Jahrtausends: Festschrift für Alfred Söllner* (2000) 647-649, cited in Reid, de Waal, Zimmerman (n 3) 5.