

Mariusz Załucki

Uniform European
Inheritance Law

Myth, Dream or Reality of the Future

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Table of Contents

Introduction	7
 Chapter 1. The European path to uniform inheritance law	
1.1. The European integration	15
1.2. EU Succession Regulation (Brussels IV)	27
1.3. Fundamentals of institutional harmonization of inheritance law	32
1.4. Conclusions and recommendations	36
 Chapter 2. Values and principles of modern inheritance law	
2.1. Determinants of inheritance law standards.....	39
2.2. Selected basic principles and values of inheritance law	46
 Chapter 3. The ability to harmonize regulations on intestate succession	
3.1. Intestate succession - general comments	51
3.2. Selected theoretical concepts	55
3.3. Normative foundations	58
3.4. The circle of successors	69
3.5. Conclusions and recommendations	75
 Chapter 4. The ability to harmonize regulations on testamentary formalities	
4.1. Testamentary succession – general comments	79
4.2. The existing forms of wills	83
4.3. Development trends	92
4.4. New concepts	98
4.5. Conclusions and recommendations	102
 Chapter 5. The ability to harmonize regulations on the protection of family against testamentary dispositions	
5.1. The need to protect persons close to the testator	105
5.2. The circle of the entitled	108
5.3. The nature of individual rights.....	113
5.3.1. Reserve	113
5.3.2. Legitim	117
5.3.3. The quasi-maintenance system	120
5.3.4. Development trends	123
5.4. Conclusions and recommendations	125

**Chapter 6. The ability to harmonize regulations on liability
for inheritance debts**

6.1. The nature of liability for inheritance debts.....	129
6.2. Models of liability for inheritance debts	132
6.2.1. Unlimited liability	132
6.2.2. Limited liability	137
6.3. Developpent trends	140
6.4. Conclusions and recommendations	143
Concluding remarks	145
Bibliography	149

Introduction

The need to write this book has arisen in connection with my recent conviction that a common European inheritance law in any form (in particular within the European Union) would be highly desirable. Undoubtedly, inheritance law today belongs to the areas of private law, which in recent times, especially in Central and Eastern Europe, have been gaining importance. The solutions so far considered as stable are undergoing transformations associated with many dynamic changes in the social relations caused by an increase in the importance of private property, higher migration rates, and/or other factors that raise the value of assets. This is the perfect time to look at the current trends of development in the law and consider whether, in the individual countries making up the European economic area, any common denominators enabling the possible harmonization of inheritance law in Europe have come into existence.

It should be noted that in the individual countries included to the so-called Eastern bloc, due to the aforementioned reasons, and especially because of the political transformation, an increased legislative activity could have been observed for the last twenty-five years. This is due to, *inter alia*, the attempts which have been undertaken to adapt the civil law regulations to the new market economy, which of course applies to the whole matter of private law, not just inheritance law. Thus, in the area of private law, this period has been called a period of re-codification, understood either as a project to create a new civil code, or as an essential amendment to the existing regulations.¹ This counteracts de-codification, i.e. the phenomenon leading to the loss of the central role of the civil code. In this process, the legislators reach for different examples and base new solutions primarily on the western model. And although the process is, to a large extent coming to

¹ Cf. A.S. Hartkamp, *International Unification and National Codification and Recodification of Civil Law: The Dutch Experience*, [in:] *Questions of Civil Law Codification*, eds. A. Harmathy, A. Nemeth, Budapest 1990, pp. 67 et seq.; C. Kessedjian, *La codification privée*, [in:] *E pluribus unum. Liber amicorum Georges A.L. Droz*, eds. A. Borrás, A. Bucher, T. Struycken, M. Verwilghen, The Hague 1996, pp. 135 et seq.; G. Alpa, *European Community Resolutions and the Codification of Private Law*, *European Journal of Private Law* 2000/2, pp. 321-332; P. Cserne, *Drafting Civil Codes in Central and Eastern Europe. A Case Study on the Role of Legal Scholarship in Law-Making*, *Pro Publico Bono Online. Támop Speciál* 2011, pp. 1-34.

an end, as evidenced by the new civil codes in the countries such as Ukraine, the Czech Republic, Hungary, and Romania,² it is impossible to resist an impression that inheritance law has been largely spared re-codification. The political transformation, and the change associated with it, only affected this area of law to a minimal extent. The most important metamorphoses are related to legal relations *inter vivos*, mainly property law, and law of obligations. Now, after several years of this new reality, according to many authors, the legal solutions concerning inheritance based largely on the “old” patterns often fail to fulfil social needs. Thus, further modernization of the civil codes is postulated for this area, as well.

Similarly, in Poland, the country from where I come, the discussion on future inheritance law has not been completed yet, and it may be argued whether it has even started. Plenty of sources, however, indicate that changes are highly necessary.³ This position should be accepted. However, this raises serious problems, including such basic questions, as how the desirable changes should be wrought. While the European Union, until recently, has still believed that the issue of inheritance law is a matter best left to the individual Member-States, now, as it can be best judged, this conviction is gone. Thus, in the context of the possible further change to civil law, a variety of factors must be taken into account. The most recent include, among others, those solely associated with the European integration, which loomed over de-codification, the process that spawns the formation of independent statutory microsystems in other branches of private law.

This takes place in the European context, and it should be stressed that in Europe at different levels, various efforts are currently undertaken, and they are aimed at modernizing inheritance law. Nevertheless, just a juxtaposition of the English and German laws is enough to note that structures based on other traditions associated with different social, cultural, or economic determinants are so far apart that - ac-

² Cf., among others, R. Zimmermann, *Codification: History and Present Significance of an Idea. A propos the recodification of private law in the Czech Republic*, European Journal of Private Law 1995/3, pp. 95 et seq.; P. Gárdos, *Recodification of the Hungarian Civil Law*, European Journal of Private Law 2007/5, pp. 707-722; D. Elischer, *The New Czech Civil Code. Principles, Perspectives and Objectifs of Actual Czech Civil Law Recodification: On the Way to Monistic Conception of Obligation Law?*, Dereito 2010/2, pp. 431-448; I. Leş, S. Spinei, *Reflections on the New Romanian Codes*, Ius et Administratio 2013/1, p. 37-46; R. Welser, *Das ABGB als kodifikatorisches Meisterwerk*, Societas et Iurisprudentia 2013/1, pp. 24 et seq. Cf. also M. McAuley, *Proposal for a Theory and a Method of Recodification*, Loyola Law Review 2003/49, pp. 261-285.

³ Cf. M. Załucki, *Perspektywy rekodyfikacji polskiego prawa spadkowego*, [in:] *Pięćdziesiąt lat kodeksu cywilnego. Perspektywy rekodyfikacji*, eds. P. Stec, M. Załucki, Warszawa 2015; *idem*, *Współczesne tendencje rozwoju dziedziczenia testamentowego – czyli nie tylko o potrzebie wprowadzenia wideotestamentu do nowego kodeksu cywilnego*, Roczniki Nauk Prawnych 2012/2, pp. 23-52. See also: M. Kępiński, M. Seweryński, A. Zieliński, *Rola kodyfikacji na przykładzie prawa prywatnego w procesie legislacyjnym*, Przegląd Legislacyjny 2006/1, p. 10; Z. Radwański, *Uwagi do sprawozdania z dyskusji przeprowadzonej w Izbie Cywilnej Sądu Najwyższego nad „Projektem kodeksu cywilnego. Księga pierwsza”*, Przegląd Sądowy 2010/5, p. 5.

cording to many authors - it is hard to reach a common, uniform inheritance law regulation within the European Union. Despite this fact, and the position according to which for a time it was thought that inheritance law issues lie outside the competence of the European Union, the vision of a uniform European inheritance law has always seemed to be tempting. Therefore, individual legislators, regardless of EU legislative possibilities and theoretical arguments, in recent years, when changing their inheritance laws, generally have done it in the pro-European spirit. The European integration has been one of the most important factors shaping the new law. It can be even declared that in this area the observation of solutions in the foreign states has been of a great importance and served, among others, as a factor initiating the preparation of national normative solutions following the idea of integration. And although until today there have not been any serious efforts to harmonize substantive inheritance law at the European level, the concept of Europeanization of this law is still alive, if only because of the recently adopted Regulation No 650/2012 of the European Parliament and of the Council on succession matters (Regulation 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 Succession⁴). Undoubtedly, it has to be kept in mind when considering possible changes in the national laws. This new regulation creates indeed many far-reaching effects on the domestic inheritance law. The EU legislator, firstly, allowed to choose the law applicable to succession (Article 22 of the Regulation), and secondly, in the absence of choice of the law resigned from the link to law based on nationality and adopted a link to law based on habitual residence (Article 21 paragraph. 1 of the Regulation). The provisions of the Regulation will relate to all the succession matters (Article 23 of the Regulation), which often in practice, will exclude the application of the national legislation at the expense of other domestic legislation⁵. Paradoxically, the problems of the application of EU succession Regulation, which may and will appear in practice, are related to the lack of uniformity of substantive succession national regulations, and may force the EU legislator to undertake the work in this area, which could become a merit of inheritance law, a discipline considered until recently as the one remaining outside the competence of the European Union, and in fact, it may contribute to the emergence of a uniform European Civil Code. That possibility should not be underestimated, and national legislators should remember it when making any changes to their legislation.

A question that is impossible to be anticipated today is whether other amendments to law of succession should move towards further integration, or whether

⁴ Official Journal L 201 of 27.7.2012.

⁵ Cf. B. Ancel, [in:] *Le droit européen des successions. Commentaire du Règlement no 650/2012 du 4 juillet 2012*, eds. A. Bonomi, P. Wautelet, Brussels 2013, pp. 8 et seq.

they should be limited to a simple implementation of national needs. In any case, it should be noted that the possible drafting of a new inheritance law should start from a deep discussion on the condition of the current legislation. It is time to start this kind of discussion on a broad scale. Only a fuller analysis of individual institutions could allow making a decision in this regard. It seems, therefore, that the question of a possible future European Civil Code⁶ may obtain a new dimension. It happens because of the problems in the adjusting of the new reality to the national succession law regulations. Will it lead to a common European law of succession? It is certainly difficult to make such a judgment today.

As it may be assumed, the idea of a European Civil Code - at least at a philosophical level - seems right and is worth acceptance. As we know, in principle, no works on it have started yet. To this day, it has not been prejudged in any way whether this instrument will ever be created, or whether it will be only the subject of academic disputes, and whether it will include inheritance law. While the adjustment of the principles and concepts of law of succession to one model is a very difficult process, such a regulation is enticing and this is why the European Union should adopt measures to harmonize the law in this area. Is this harmonization possible? Despite many opinions to the contrary⁷, I think so. In several critical areas, such as statutory succession, wills, protection of relatives of the deceased, or liability for debts of the deceased, the statutory solutions of individual countries are based, in fact, on similar values and models. The presentation of these solutions, including the values, the standards and the principles underlying the normative regulations, is the central point of my analysis. I consider that despite the cultural, social, or economic differences⁸, individual legislators in principle seek to do one thing, namely, to establish the rules of succession after the death of the devisor, with a possibly far-reaching regard to their will as expressed *mortis causa*. This will, as the highest value of law of succession, remains in various legal systems under a special protection⁹. However, it is not absolute and has some limitations related to the protection of people close to the devisor and their creditors. Legislators, using a variety of tools, create solutions that actually lead to achieving in

⁶ Instead of many sources cf. O.Lando, *Unfair Contract Clauses and a European Uniform Commercial Code*, [in:] *New Perspectives for a Common Law of Europe*, ed. M.Cappelletti, Firenze 1978, pp.267 et seq.; R.Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription*, Cambridge 2002, p.4; G. Alpa, *European Private Law: Results, Projects, Hopes*, European Business Law Review 2003, pp. 379-403.

⁷ Cf, for example, concepts presented by P. Legrand, [in:] *Against a European Civil Code*, The Modern Law Review 1997/1, pp. 44-63.

⁸ These trends are presented, *inter alia*, by H. Collins, [in:] *The European Civil Code. The Way Forward*, Cambridge 2008, *passim*.

⁹ Cf. S. Van Erp, *New Developments in Succession Law*, Electronic Journal of Comparative Law 2007/3, pp. 3 et seq.

each of the countries the same consequence, namely, determining who is an heir, and on what terms they acquire the rights and obligations in relation to the estate. Moreover, although the individual solutions differ from each other, this does not mean that in the near future, it is not possible for them to get closer, and even to unify. I am of the opinion that the current trends prevailing in the area of succession law lead to blurring the differences between the various national regulations. Moreover, in many of the basic structures of succession law, legislators point to the same direction. I think this is the first step towards the single European inheritance law. Alternatively, maybe the second one, as the first law to be considered is the already mentioned Regulation No 650/2012 of the European Parliament and of the Council on succession matters.

With this in mind, in my book I try to make an analysis of the selected national regulations in the areas that, in my opinion, decide about the shape of inheritance law. Firstly, I try to present the principles and values that govern inheritance law encountered in various European countries. They determine the specific legislative concept and according to them specific normative solutions are developed. Then I explore the area of statutory succession, thus, the issues that in any society lead to the acquisition of the rights and obligations of the deceased by their successors. The presumed discrepancies in the national legal systems, especially occurring after the date of 17 August 2015 when the EU Regulation 650/2012 will be implemented, may appear to be a nightmare of testators and successors in the future, which in turn may prove to be the best stimulator of the substantive inheritance law unification. Hence, a number of comments have been devoted in this area to the issues of shaping the circles of the statutory successors in order to find some possible common grounds for a single group of the statutory successors in the European Union. Then, in the next part of the book, the subject of my discussion is the issues of property dispositions upon death, where I primarily examine the issues of preparing a will and its forms. Testamentary inheritance is in fact the most serious alternative to statutory succession and the possible future European law of succession should include the ability to make a will in the same form. With inheritance, especially testamentary inheritance is related a whole protection system of persons close to the deceased who in the event when the testator made a will may not receive any benefits from the inheritance. Thus, in various legal systems there are mechanisms allowing such close people to defy in a way the will of the testator. The conflict of values between the freedom of testation and the protection of the deceased's relatives is thus the subject of my analysis. The last chapter is devoted to the issues of liability for inheritance debts, as in any system of inheritance law the related rules decide about its image.

In my analysis, I try to find a possible common denominator of the individual national solutions and to answer the question about the possibility of unification

of inheritance law in the European Union. The issues that determine the shape of inheritance law in various legal systems have been analyzed by me to find a common reference framework, and possibly some foundations for the future European uniform regulation of inheritance law. In addition, as it has been already pointed out, in many cases, such a common law is possible, and the current structures of inheritance law in particular European countries are not as distant from each other as it is generally considered. Already today, it is possible to identify some general areas where practical solutions in many European countries do not differ from each other as they are based on the same guiding ideas; any potential legislative divergence is not a reason to consider the uniform law impossible in the future. Since the basic values and principles of the divergent legislative concepts are the same, finding the common principles (denominators) should allow in the future undertaking a detailed discussion on specific uniform solutions to inheritance law in the European Union. An indication of the common denominators in the areas that determine the image of inheritance law is therefore the primary objective of this work.

While choosing the legal systems for the analysis, I have first tried to use the solutions that have already been a reference for the legislative changes in other countries, and not only in Europe. Because of the cultural or economic discrepancies and the legal traditions, mentioned by many writers, I have tried to present a possibly wide spectrum of the solutions found in the national law systems of the European Union countries, discussing at the same time mainly the systems considered as the canons of the modern civil law. It is not possible to describe in a single work all the systems of inheritance law in the European Union. Thus, my work primarily refers to the law systems of the Germanic region, especially German law, as well as to the Dutch or French regulations. Because of the important role of the United Kingdom in the European structures, related also to a large flow of immigrants, the subject of my discussion is often inheritance law of England and Wales. From my point of view, this is indeed of some additional value as the United Kingdom, Germany and the Netherlands are the countries, where in recent years Poles have migrated most often¹⁰. Thus, the exploration of the legal systems in the context of the applicability of inheritance law seems important, even if in the future there was no standardization of the rules. The work could not miss as well the reference to the legal systems of the countries that in recent years have carried out the re-codification process of civil law in Europe and enacted new civil codes. The re-codification of civil law is in fact a phenomenon that was intended to adjust the legal systems of the Central and East European states to the modern requirements. Thus, I present, among others, the solutions taken from

¹⁰ These trends are presented, *inter alia*, by A. Bobrowska, *Migracje Polaków po przystąpieniu do Unii Europejskiej*, Colloquium WNHIS 2013/2, pp. 49-64.

the Romanian, Czech, or Hungarian legal systems. For obvious reasons I also present the achievements of the Polish legislators, especially because of the fact that recently, Poland has been also a country that has had to deal with the dilemmas of re-codification¹¹. Several times, I also recall the law of some non-European countries, especially when the structures encountered there are different from the legal systems of the European countries and for various reasons they deserve an interest of European lawyers. Today, law should not know any borders.

This work does not discuss private international law. Neither does it discuss the tax issues to which cross-border inheritance is strongly related. The intention of the work is in fact to show that in the area of substantive inheritance law, despite the existing differences in the national legal systems, there are similarities, which may allow for the future adoption of a uniform European inheritance law. In fact, my ideas can be treated as a vision of possible future work on the uniform European inheritance law.

At the end of the introduction, it seems necessary to explain why the work has been prepared in the English language. This has happened because in my opinion this is the right way to reach a wide range of readers. English is in fact the second language (other than the mother tongue) that we use the most often. Thus, the preparation of my dissertation in English has seemed natural. It is worth mentioning, however, that some of the terms used in the languages of the continental countries do not exist in the English language, as it is still not clear whether the area discussed here should be referred to in English as “*succession law*” or “*inheritance law*”. When you add to that the lack of an English term clearly identifying the person after whom inheritance takes place (for instance, in Polish the word is “*spadkodawca*” and in German “*Erblasser*”), and the uncertainty of whether the act of passing the property to heirs in the event of death should be called a “*will*” or a “*testament*”, some difficulties concerning the harmonization of inheritance law appear already in the area of the language. I do not think, however, that these difficulties are significant enough to become an obstacle in harmonizing of the law. The use of the term “*inheritance*” in place of “*succession*” or a “*testament*” in place of a “*will*” is understandable for everyone, and in the available translations of individual acts different versions of words are used to describe the same object, and accordingly, I often use the individual words interchangeably. I am convinced that any further discussion on the future European law of succession should take place in this language, which will potentially increase the number of its participants.

¹¹ Cf. *Green Paper. An Optimal Vision of the Civil Code of the Republic of Poland*, ed. Z. Radwański, Warszawa 2006, pp. 1-152.

This work has been created thanks to the kindness of many people with whom I contacted in the course of writing it, and who were inspirational to me. Without their comments and the time that they spent for me these considerations certainly would never come into existence. Today it is impossible to mention all those people, as well as to pass my words of gratitude in a single sentence in the book. Therefore, I will confine myself here only to thanks to my family, especially my small sons – Ksawery and Szymon – who patiently tolerate their dad's interests. I would also like to thank the reviewers of the book, Professor Jerzy Menkes (*Warsaw School of Economics, Poland*) and Professor Douglas Wood (*Staffordshire University, England*) for their valuable comments.

Kraków-Rzeszów, April 2, 2015

Chapter 1.

The European path to uniform inheritance law

1.1. The European integration

The European integration is a complex and multifaceted issue. The development of the European Union is running in stages¹. The integration has two faces: negative and positive. This first face is related to the removal of restrictions in trade between the Member States and it assumes the movement freedom of goods, services, capitals, and workers. The second face consists in a high-level coordination and harmonization of the national policies². The increasing of this process, known as the deepening of the integration, is to elevate the amounts of the spheres regulated by the authorities of the transnational nature³. This leads, amongst others, to standardization of provisions regarding various spheres of the economy.

The primary plane of the European integration has been economy. The integration in this field is a combination of separate national systems into one single European body. The introduction of legal, political and economic mechanisms, which in addition to the free movement of goods and capitals allow the freedom of human movements, has often given rise to some questions about a scope and a possible adjustment method, allowing a free circulation in the European area without internal borders⁴. The budgetary, fiscal, technical, and other cooperation have consequently led to the elimination of many barriers resulting, among oth-

¹ D. Dinan, *Fifty Years of European Integration: a Remarkable Achievement*, Fordham International Law Journal 2008/31, pp. 1118 et seq.

² Cf. F. Emmert, *Europarecht*, München 1996, *passim*.

³ Ch. Deubner, *How Can European Integration Advance in the 21st Century? Key Policies, Methods and Coalitions for the Deepening of EU Integration*, Brussels 2007, *passim*.

⁴ Cf. U. Sverdrup, *The EU Enlargement: Challenges to the Institutions – or the Existence – of the European Economic Area*, [in:] *The European Economic Area Enlarged*, eds. P-Ch. Müller-Graff, E. Selvig, Berlin 2006, pp. 11 et seq.

ers, in the increased migration of the European communities⁵. The times when Poles lived only in Poland, Germans in Germany, the French in France or the English in England, and only a small part of them migrated, are gone forever and the fusion of the economies of the individual EU states into a single economic organism seems only a matter of time. Today - for example - several million Polish citizens are living in other EU countries. There are also such countries as, e.g. Luxembourg, where currently more than 20% of the population is foreigners⁶. It has raised a number of questions related to the area of inheritance law. After all, when abroad, people often settle down without changing their citizenship; they acquire property abroad; they get married there and finally they die. Differences of the inheritance law regulations in the countries belonging to the European Union are therefore a practical problem. After all, determination what law (the law of what country) is governing a given inheritance case is the task exceeding the knowledge of a statistical citizen, not to mention the issues of jurisdiction and enforcement of foreign courts judgments⁷. Hence, the practical problem is becoming more challenging for the law enforcement organs and for the doctrine. If in the European Union over half a million cases a year are cases of cross-border inheritance (representing approximately 10% of all the inheritance cases)⁸, and in some countries, residents from foreign countries are a large part of the population, regulations of inheritance law may become the subject of much doubt. If the European Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons (Art. 3 paragraph 2 of the Treaty on European Union TEU⁹) is ensured, for the proper functioning of such a space it is necessary to adopt measures in the field of private law having cross-border implications, as it is necessary for the proper functioning of the common market.

The divergence problem of the national regulations in the area of the civil law relations was recognized in the European Union long ago. To harmonize the binding regulations of the national legislations various attempts have been made at various levels for changing the *status quo*. This process referred to as the approximation, harmonization and adaptation of laws (in the doctrine of individual countries this process is called differently) was started some time ago and is

⁵ J. Maudos, J.M. Pastor, L. Seranno, *Economic Integration, Efficiency and Economic Growth: the European Union Experience*, Applied Economics Letters 1999/6, pp. 389-392.

⁶ Cf. H. Dörner, P. Lagarde, *Etude de droit comparé sur les règles de conflit de juridictions et de conflits de lois relatives aux testaments et successions dans les Etats membres de l'Union Européenne*, Würzburg 2002, p. 12.

⁷ Cf. S. Van Erp, *New Developments...*, p. 3.

⁸ European Commission Press Release of 7 June 2012. See also: E. Cashin Ritaine, *National Succession Laws in Comparative Perspective*, ERA Forum 2013/14, p. 132.

⁹ Official Journal C83 of 30.03.2010.

well advanced. Harmonization, as the practice has shown, can have at least three forms: 1) doctrinal harmonization (legal scholarship), 2) spontaneous harmonization, 3) institutional harmonization¹⁰.

Doctrinal harmonization is associated with the comparative research conducted by the doctrine, tracking trends in the development of legislation and drawing conclusions as to the desired shape of the law in the future. In Europe, however, until recently the area of international inheritance law has been considered by many scholars as irrelevant, as after all, there were not many problems of inheritance law of cross-border character, since property was rarely purchased abroad. Even in 2009, R. Zimmermann called this area the “virgin territory”, which has been neglected by modern scholarship¹¹. Today the situation has changed radically; some significant practical problems have begun to appear, and some scientific works have tried to solve them. Some studies of informative and encyclopaedic character have been initiated in order to bring the reader to the solutions of inheritance law in the individual states¹². Finally, there have appeared scientific groups undertaking work in this area, looking for common elements in the national regulations of inheritance law (such as the *Comparative Succession Law* Group, led by K.G.C. Reid, M.J. de Waal and R. Zimmermann¹³) or proposing the adoption of the uniform solutions in the future, as for example, within the project “*The Perspectives of the Europeanization of the Law of Succession*” that was carried out by the support of the European Commission, Directorate - General Justice, Freedom and Security¹⁴. This kind of harmonization seems to be very desirable, and can be seen as a prelude to further-reaching harmonization of law¹⁵. Therefore, in the future the competent institutions of the working groups are expected to be appointed and they should deal with the unification of law in this area (an example

¹⁰ W. Pintens, *Need and Opportunity of Convergence in European Succession Laws*, [in:] *The Law of Succession: Testamentary Freedom. European Perspectives*, eds. M. Anderson, E. Arroyo i Amayuelas, Groningen 2011, pp. 3-23.

¹¹ R. Zimmermann, *The Present State of European Private Law*, *American Journal of Comparative Law* 2009/2, p. 504.

¹² Cf. *International Encyclopaedia for Family and Succession Law*, ed. W. Pintens, Kluwer Law On-line. This is a comprehensive comparative subset of the *International Encyclopaedia of Laws* (IEL) and it covers family law together with marital property law and succession law.

¹³ With a long-term programme to explore selected topics in law of succession from a historical and comparative perspective. See K.G.C. Reid, M. J. de Waal and R. Zimmermann, *Preface*, [in:] *Comparative Succession Law. Testamentary Formalities*, eds. K.G.C. Reid, M.J. de Waal, R. Zimmermann, Oxford 2011, p. x-xi.

¹⁴ The products of the Project are available in an electronic form at <http://www.pels.edu.pl/>.

¹⁵ See B. Akkermans, *Standardisation of Property Rights in European Property Law*, Maastricht Faculty of Law Working Paper 2013/9, pp. 3 et seq.

can be the Commission on European Family Law¹⁶), which should forego a more institutionalized harmonization.

In turn, the spontaneous harmonization is a phenomenon of the law change in individual states occurring in a single spirit, where legislators follow certain trends (doctrinal or coming from other countries), and in this respect, they adapt their law to the requirements of today. In addition, such a phenomenon has undoubtedly been observed in the recent years in Europe in the context of inheritance law, where the legislation, hitherto considered as stable, passed some transformations, taking into account the indicated trend, which, e.g., was connected with the process of the law re-codification in the countries of Central and Eastern Europe¹⁷. This trend and the behaviour of the legislators have a very interesting effect¹⁸. In itself, it leads to the removal of certain differences that until recently have been considered by many scholars as standing in the way of harmonizing the law in this regard. Hence, sometimes it is raised that the cultural or social diversity of individual countries treated as an obstacle to the harmonization activities due to the real transformations taking place in different countries, are just empty slogans¹⁹. Thus, undoubtedly such trends in inheritance law, in the absence of other inspiration sources for harmonization, may play an important role towards uniformity of the legal solutions used in this area. This kind of harmonization can also be the initial way to the institutional harmonization.

The institutional harmonization is generally the process of adjusting the legal system of each Member State to the standards and rules arising from a particular harmonization document²⁰. Such a harmonization document may be not only a directive, as it is commonly thought in the European Union, but also a docu-

¹⁶ An organization established on 1 September 2001 that consists of experts in the field of family and comparative law from all the EU Member States.

¹⁷ Cf. R. Zimmernann, *The Civil Law in European Codes*, [in:] *Regional Private Laws and Codification in Europe*, eds. H. MacQueen, A. Vaquer, S. Espiau Espiau, Cambridge 2003, pp. 18-59. See also: M. Załucki, *Inheritance Law in the Republic of Poland and Other Former Eastern Bloc Countries: Recodification of the Circle of Statutory Heirs*, *Electronic Journal of Comparative Law* 2010/2, pp. 1-8.

¹⁸ M. Załucki, *Wpływ prawa unijnego na polskie prawo spadkowe* [in:] *Wpływ *acquis communautaire* i *acquis Schengen* na prawo polskie – doświadczenia i perspektywy. Tom I – 10 lat Polski w Unii Europejskiej*, eds. A. Kuś, A. Szachoń-Pszenny, Lublin 2014, pp. 277-290.

¹⁹ D. Leipold, *Europa und das Erbrecht*, [in:] *Festschrift für Alfred Söllner zum 70. Geburtstag*, eds. G. Kölber, M. Heinze, W. Hromadke, München 2000, p. 650.

²⁰ The trends in this field are indicated, *inter alia*, by A. Kolesnichenko, V. Dimitrov, V. Dubrovskiy, I. Orlova, S. Taran, [in:] *Institutional Harmonization in the Context of Relations Between the EU and Its Eastern Neighbours: Costs and Benefits and Methodologies of Their Measurement*, ed. A. Kolesnichenko, CASE Network Reports 2007/75, pp. 8 et seq.

ment of another kind, such as *Uniform Probate Code* in the United States²¹, or legal acts in the area of human rights. Especially in relation to the regulations governing the protection of human rights in Europe in the last twenty-five years, one could observe some harmonization trends associated with the activity of the constitutional courts of individual countries, as well as the European Court of Human Rights (e.g. the cases of *Marckx*²², *Inze*²³, *Mazurek*²⁴, *Pla and Puncernau*²⁵), which directly or indirectly related to the area of inheritance law. In this context, the most notable are especially the guidelines for the fundamental laws on the protection of the inheritance right, where the constitutional courts guided, among others, by some views drawn from the decisions of international bodies in their jurisdiction, modernized inheritance law, rationalizing the system of rights and obligations acquired by the way of inheritance. The *acquis constitutionnel*, which has arisen against the background of the various laws, takes into account the global trends, respecting, *inter alia*, the jurisprudence of the European Court of Human Rights, relating to the interpretation of Art. 1 of Protocol No 1 to the European Convention on Human Rights²⁶, and the way established by certain judgments of the Courts is based on the experiences of other legislations. Hence it is often pointed out that the optimal model of changes in the national inheritance law, in the case of specific solutions that will have to satisfy the changing social reality²⁷, should be based on the harmonization trend, with the careful observation of the decisions of the constitutional courts, which, in turn, must follow the judicial decisions of the European Court of Human Rights, and the current views of the doctrine expressed in the changing reality. Such a perspective will enable developing common standards that may in the future allow synchronizing European inheritance law, perhaps in a more institutionalized form. The result of the decisions of the national constitutional courts are, after all, some “signals” to the legislatures on drafting specific solutions of inheritance law, and if they take into account the prevailing European standards, it might be a bit circuitous route to the harmonization of laws at the European level. Therefore, the institutional harmonization of law can be called creating a legal culture of a single character, and in the context of the EU, an instrument to combat the obstacles on the Community

²¹ It is a uniform act drafted by the National Conference of Commissioners on Uniform State Laws governing inheritance and the decedents' estates in the United States. Available at: <http://www.uniformlaws.org/>.

²² Case of *Marckx v. Belgium*, Application no. 6833/74 (1979).

²³ Case of *Inze v. Austria*, Application no. 8695/79 (1987).

²⁴ Case of *Mazurek v. France*, Application no. 34406/97 (2000).

²⁵ Case of *Pla ad Puncernau v. Andorra*, Application no. 69498/01 (2004).

²⁶ Cf. W. Pintens, *Need and Opportunity*..., pp. 8 et seq.

²⁷ Cf. S. Van Erp, *New Developments*..., p. 7.

market with a view of an even stronger link of the EU countries between each other, the opening of the internal market, and the unification and standardization of internal legal systems. The institutional harmonization is the most advanced form of harmonization, and as it seems, it is this kind of the legislative harmonization in the European Union that should be sought²⁸.

Here, one should remind that in the context of private law in the European Union there have been talks about a wide-ranging harmonization at least since the 1970s, when in the context of the European Economic Community there were demands for the adoption of a European Civil Code²⁹. So far, however, there have been no harmonization acts relating to substantive inheritance law, and originating from the European institutions. The main axis of the civil law harmonization in Europe is primarily law of obligations (both contractual and non-contractual), where a variety of projects relating to European law of obligations are created, and often associated with the institutions of the European Union³⁰. There are also a number of academic projects in support of the idea of integration, which today are a valuable source of legal solutions and they may be a possible inspiration for the legislature. These include the Principles of European Contract Law (PECL)³¹, the Principles of the Existing EC Contract Law (Acquis Principles)³², or the Draft Common Frame of Reference (DCFR)³³. At the same time, it should be emphasized that these sets of rules have been used as such to create a draft Common European Sales Law (CESL)³⁴, which is likely to become the European law (Regulation). Moreover, while all of these projects are part of the thought and concept of a common single European Civil Code, to this day,

²⁸ Instead of many sources cf. *Regional Private Laws...*, *passim*.

²⁹ The idea was presented by O. Lando: *Unfair Contract Clauses...*, p. 267.

³⁰ Cf. O.O. Cherednychenko, *The Harmonisation of Contract Law in Europe by Means of the Horizontal Effect of Fundamental Rights?*, Erasmus Law Review 2007/1, pp. 38 et seq.; B. Brouwer, J. Haage, *Basic Concepts of European Private Law*, European Review of Private Law 2007/1, pp. 3 et seq.; J. Rąjski, *Nowy etap rozwoju europejskiego prawa prywatnego*, Kwartalnik Prawa Prywatnego 2006/1, pp. 109 et seq.

³¹ Cf. *Principles of European Contract Law, Parts I and II*, eds. O. Lando, H. Beale, Hague-London-Boston 2000; *Principles of European Contract Law, Part III*, eds. O. Lando, E. Clive, A. Prüm, R. Zimmermann, Hague-London-Boston 2003.

³² Cf. Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles), Contract I*, München 2007; Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles), Contract II*, München 2009.

³³ Cf. *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, eds. Ch. von Bar, E. Clive, München 2009.

³⁴ COM(2011) 635. Cf. *Common European Sales Law (CESL). Commentary*, ed. R. Schulze, Baden-Baden 2012.

this idea has remained only in the postulational sphere³⁵. In no way it is a foregone matter whether such a European civil code will ever be created³⁶, and if so, in what form, just as it is not known whether it will include the issues of inheritance law³⁷. As already indicated, it has been thought so far that inheritance law does not in principle fall within the competence of the European Community, and - according to many scholars - in the primary law there were not sufficient grounds to carry out a unification of that law³⁸.

In the world, which for obvious reasons also includes individual countries making up the EU, the unification of inheritance law has taken place primarily at the level of international conventions (international treaties)³⁹. Moreover, the idea of the harmonizing of the national legal systems through the international conventions is not new. The subject of the regulations by a number of international conventions, however, has been primarily the issues of the law applicable to inheritance, and therefore private international law. The application of the Conventions, however, has been a problem due to the limited number of the countries-members of the Convention, which upholds the existing differences in the statutory regulations. It should be indicated here that in the world there are at least two opposing fundamental solutions for the conflict of law rules for inheritance. The first one embodies the principle of the inheritance statute unity (of the law governing an inheritance case), based either on the link of citizenship or domicile. The second one allows the fragmentation of the inheritance statute. For the law enforcement organs and the more for potential testators and heirs, these rules have been complicated. Perhaps that is why the first actions associated with the unification of inheritance law in Europe were already dated for 1893, when The Hague held the conference convened by the Dutch Government, and it started cyclic sessions of The Hague Conference on Private International Law⁴⁰, a regularly running international organization

³⁵ Cf. H. Collins, *The European Civil Code...*, *passim*.

³⁶ P. Legrand, *Against a European...*, pp. 44-62.

³⁷ Cf. J. Basedow, *Codification of Private Law in the European Union: the Making of a Hybrid*, *European Review of Private Law* 2001/1, p. 35-49; B. Akkermans, *The Role of the D(CFR) in the Making of European Property Law*, [in:] *The Draft Common Frame of Reference (DCFR): A National and Comparative Perspective*, eds. V. Sagaert, E. Terryn, M. Storme, Antwerp-Oxford-Portland 2011, *passim*.

³⁸ Cf. A. Verbeke, Y.H. Leleu, *Harmonisation of the Law of Succession in Europe*, [in:] *Towards a European Civil Code*, eds. A. S. Hartkamp, M.W. Hesselink, E.H. Hondius, Ch. Mak, C. Edgar du Perron, Nijmegen 2011, pp. 459 et seq. However, cf.: B. Akkermans, E. Ramaekers, *Article 345 TFEU (ex. 295 EC), Its Meanings and Interpretations*, *European Law Journal* 2010/3, pp. 292-314.

³⁹ Cf. Ch.H. Kälin, *International Real Estate Handbook*, Chichester 2005, pp. 43 et seq.

⁴⁰ Cf. A. Zieliński, *Haska Konferencja Prawa Międzynarodowego Prywatnego*, Państwo i Prawo 1982/11, pp. 61 et seq.

dealing with, *inter alia*, the harmonization of the law. The results of the Conference's actions are, for example, four Hague Conventions relating to the issue of inheritance law, i.e.:

1) The Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (concluded on 5 October 1961)⁴¹;

2) The Convention concerning the International Administration of the Estates of Deceased Persons (concluded on 2 October 1973)⁴²;

3) The Convention on the Law Applicable to Trusts and on their Recognition (concluded on 1 July 1985)⁴³;

4) The Convention on the Law Applicable to Succession to the Estates of Deceased Persons (concluded on 1 August 1989)⁴⁴.

Among these Conventions, the most important achievement of international inheritance law has been so far the Convention of 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. It has been ratified by many countries, making it widely applied. Its aim was to facilitate upholding the validity of wills, because the Convention provides, *inter alia*, that a will drawn up in accordance with the requirements of one of the many legal systems identified in the Convention is valid⁴⁵. In turn, the International Convention concerning the International Administration of the Estates of Deceased Persons was designed to facilitate the administration of the deceased's assets located in other countries. This is accomplished by means of an international certificate, whose production would enable the exercise of such an administration⁴⁶. In contrast, the Convention on the Law Applicable to Succession to the Estates of Deceased Persons is the regulation of private international law, designed to complement aspects of the conflict of law rules previously contained in the 1961 Convention concerning wills⁴⁷. The Convention of 1985 refers to the conflict of law rules within trusts and on their recognition, namely the le-

⁴¹ The Convention is the culmination of the work of the eighth and the ninth sessions of The Hague conference.

⁴² The Convention is the culmination of the work of the twelfth session of The Hague Conference.

⁴³ The Convention is the culmination of the work of the fifteenth session of The Hague Conference. Probate trusts are not recognized in many countries of continental Europe; some countries recognize legitims and re-estimating of the earlier donation value in the division of the inheritance estate (French: *rapport des donations*) as elements of the public order.

⁴⁴ The Convention is the culmination of the work of the sixteenth session of The Hague Conference.

⁴⁵ A. Mączyński, *Dziedziczenie testamentowe w prawie prywatnym międzynarodowym. Ustawowe i konwencyjne unormowanie formy*, Warszawa-Kraków 1976, pp. 43 et seq.

⁴⁶ K. Osajda, *Testament międzynarodowy i jego forma*, *Kwartalnik Prawa Prywatnego* 2007/4, p. 1093.

⁴⁷ P. Lagarde, *La nouvelle Convention de la Haye sur la loi applicable aux successions*, *Revue critique de droit international privé* 1989/2, pp. 249 et seq.

gal instruments for the administration of property, including the inheritance estate⁴⁸.

A harmonization act of certain importance is also the UNIDROIT Convention on the international will form⁴⁹ (concluded on 26 October 1973 in Washington), providing a uniform law on the form of an international will. The Member States that are parties to the Convention are Belgium, Cyprus, the Czech Republic, the Slovak Republic, France, Italy, the United Kingdom, Slovenia, and several third countries, including the United States and the Russian Federation. This convention provides for an international system of registration and a standard form for accomplishing this procedure⁵⁰.

In order to complete listing the international instruments of inheritance law, one should also mention that in 1972, the Basel Convention on the establishment of a scheme of registration of wills was signed⁵¹, and it was concluded under the auspices of the Council of Europe⁵². Its purpose is to allow the testator registering their will, no matter in which country they are, which definitely simplifies the issue of the disclosing or of the existence of a will after the death of an individual⁵³.

Due to the fact that at the end of the 20th century the number of probate cases with a foreign element increased, especially related to the territory of the Member States, other works were also started, which included primarily the initiative of the European group of private international law, working on the preparation of a draft convention regulating the jurisdiction in family and inheritance cases. In 1993, the group adopted the draft convention, but no further course was given to it⁵⁴. In turn, at the Community level the announcement to undertake works on a European instrument in matters of inheritance appeared in 1998 in the so-called Vienna Action Plan⁵⁵. Based on the carried out consultation, in 2002, the German Notaries' Institute in Würzburg announced a report with a proposal to harmonize international inheritance law, which was presented in Brussels in

⁴⁸ E. Gaillard, D.T. Trautman, *La Convention de La Haye du 1er juillet 1985 sur la loi applicable au trust et à sa reconnaissance*, *Revue critique de droit international privé* 1986/1, pp. 1 et seq.

⁴⁹ Cf. <http://www.unidroit.org/>.

⁵⁰ Cf. M. Revillard, *L'entrée en vigueur de la Convention de Washington du 28 octobre 1973 portant loi uniforme sur la forme d'un testament international*, *Journal du droit international* 1995/ 3, pp. 585 et seq.

⁵¹ Cf. <http://conventions.coe.int/>.

⁵² M. Jagielska, *Rejestr testamentów*, *Rejent* 2006/2, pp. 83 et seq.

⁵³ Cf. J. G. Sprankling, *The International Law of Property*, Oxford 2014, p. 343.

⁵⁴ E. Jayme, *Entwurf eines EG-Familien- und Erbrechtsübereinkommens*, *IPRax* 1994/1, pp. 67 et seq.

⁵⁵ Official Journal C 19 of 23.01.1999.

2004⁵⁶. In contrast, The Hague Programme of the European Council from 2004⁵⁷ called on the Commission of the European Communities to present a Green Paper covering the whole issue of international inheritance law.

In these times at the level of the European integration, the dominant was a view of the lack of the legal grounds for the harmonization of inheritance law in the European Union⁵⁸. Therefore, notable was the initiative by the Commission of the European Communities, externalized in the Green Paper on Succession and Wills⁵⁹, opening some consultations on the rules of succession *ab intestato* or testamentary inheritance in the international context and, therefore, aimed at the institutional harmonization. The Green Paper was in fact a response to the Programme from the summit of the European Council in The Hague in 2004. The document, prepared by the Commission of the European Communities, referred primarily to the regulations of two Conventions, already signed also in The Hague, i.e. the Convention of 1961 and the Convention of 1989. It contained mainly some considerations on the scope of the statute of inheritance law, the choice of the relevant law, the rules on jurisdiction, and the recognition and the enforcement of decisions in matters of inheritance.

The observations contained in the Green Paper were related primarily to the issue of the so-called cross-border inheritance, i.e. the legal situation where there is a conflict of several overlapping systems of substantive law, necessary to be resolved by the given legislation. As it is known, the problem arises then which law (the law of what country) is relevant to the assessment of the given legal case of inheritance. The Green Paper, published on 1 March 2005, was therefore an act signalling the need to reflect on the issues of private international law relating to the matters of inheritance. Its aim was to start a discussion on some conflict rules of private international law relating to the rules of succession *ab intestato* and testamentary inheritance. In the document, the Commission formulated thirty-nine questions to the people potentially interested in these issues, and related primarily to the relevant law and the jurisdiction of courts in probate matters, the ways to certify the qualifications of heirs or administrators of the estate or the register of wills⁶⁰. Justifying the need for the creation of the Green Paper, the Commission

⁵⁶ The report was presented during the conference *Les successions internationales dans l'UE. Perspectives pour une harmonisation*, Brussels 10-11 May 2004.

⁵⁷ Official Journal C 236 of 24.9.2005.

⁵⁸ Even the European Parliament said that the harmonization of the Member States' substantive law on succession falls outside the scope of the Community. Cf. European Parliament resolution with recommendations to the Commission on succession and wills of 16.11.2006 (2005/2148(INI)).

⁵⁹ COM (2005) 65.

⁶⁰ The issues of the Paper have been discussed in many countries. This was also the case of the Polish reference literature, for instance, by T. Pajor, *O projekcie harmonizacji międzynarodowego prawa spadkowego w Unii Europejskiej*, [w:] *Prawo prywatne czasu przemian. Księga pamiątkowa dedy-*

indicated (Part I of the Book) that it is necessary to simplify the legal situation of cross-border inheritance and the creation of a Community instrument dealing with the recognition of documents and extrajudicial acts (wills, notarial deeds, administrative documents). In this regard, the Commission noted that at that time, the total harmonization of the substantive regulations of inheritance law in the Member States could not be taken into account, and therefore it was necessary to act only in reference to the conflict of rules. Indeed, the Commission considered that at Community level there could be no progress in the field of inheritance law without the prior dealing with the question of the relevant law⁶¹. Therefore, it did not exclude such a possibility, but it was of the opinion that at first it was necessary to unify the rules concerning conflicts between laws.

The Green Paper did not provide for ready-made solutions, however, and it was only an attempt to identify in a complex way the problems that are associated with inheritance and the legal status of inheritance estates left on the territory of the European Union. Given the function of the Green Paper, which was - according to the declaration contained in the first sentence of the introduction - the opening of the consultation on the principles of intestate succession or testamentary inheritance in the international context, this document did not contain any proposals for specific regulations, and only an indication of the reflection areas on the future shape of inheritance law in the European Union, especially private international law relating to inheritance⁶². The Commission therefore concluded that in the first place it was necessary to reflect on the scope of the conflict rules application, which would become the core aspect of the legislative initiative in Europe⁶³.

The issues presented by the Commission were for several years the dilemmas of international inheritance law, which recognized as a challenge not the unification of the inheritance rules in the various national regulations, but to find a common link for the separation of the application and the use of the national standards. According to the Commission, lack of uniformity in conflict law made difficult the possible unification of substantive law.

After the consultation (the Green Paper), the preparation and implementation of the single European normative act regulating the issue of inheritance in

kwana Profesorowi Stanisławowi Sołtyśkiemu, ed. A. Nowicka, Poznań 2005, pp. 877 et seq.; J. Pazdan, *Ku jednolitemu międzynarodowemu prawu spadkowemu*, Rejent 2005/3, pp. 9 et seq.; M. Pazdan, [w:] *Zielona Księga o dziedziczeniu i testamentach – propozycje odpowiedzi na pytania*, Rejent 2006/5, p. 16.

⁶¹ Such is the conclusion from the reasoning of the Paper (part I of the Paper).

⁶² Cf. M.-C. de Lambertye-Autrond, *Quel droit européen en droit patrimonial de la famille? Le Livre vert sur les successions et les testaments*, Informations Sociales 2006/ 1, pp. 84-93.

⁶³ P. Turner, *Perspectives of a European Law of Succession*, Maastricht Journal of European and Comparative Law 2007/ 2, pp. 147-178.

case of law conflicts ensued⁶⁴. This act was intended to harmonize the national regulations. Even then some concerns were expressed whether this task is feasible at all, indicating fundamental differences in the approach to certain issues in the legal systems of different Member States⁶⁵. Some critics even claimed, “the concept of works on one comprehensive normative act must be dismissed at the outset as posing a very serious risk of stretching the works in time, without a prospect of any specific solutions within a reasonable time. It remains questionable, moreover, whether inheritance law requires any unification in the EU and it can be assumed that some objections to this idea will be formulated. Therefore, it seems reasonable to postulate that works on the European instrument should proceed according to the system of “small steps”. The priority should be given to works on solutions to specific problems that turn out to be the most troublesome for the practice. Among the issues, the most oppressive seem to be the ones of the applicable national jurisdiction in matters of inheritance and the procedure for the determination of inheritance. The next appropriate step seems to be unifying the conflict of laws rules of material nature (indicating the law relevant to the assessment of the effects of the inheritance opening), for the purpose of avoiding positive and negative conflicts concerning the jurisdiction⁶⁶.”

Despite similar concerns expressed by various circles, the work on collision inheritance law of the European Union continued, which, as the result, led to the adoption of an EU act of law governing the issues of international inheritance law in the form of a regulation⁶⁷. On 4 July 2012, the European Parliament and the Council adopted Regulation No 650/2012 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, called the EU Succession Regulation (or Brussels IV)⁶⁸. This act, as it is clear from its name, is the next integration level of conflict inheritance law within the European Union, being at the same time the first clear manifestation of the institutional harmonization of inheritance law in the European Union. The intention of the EU legislature was that the Regulation

⁶⁴ Cf. Ch. Koller, W. Pintens, *Entwicklungen im europäischen Familien- und Erbrecht 2008-2009*, Zeitschrift für das gesamte Familienrecht mit Betreuungsrecht, Erbrecht, Verfahrensrecht, Öffentlichem Recht 2009, p. 1529.

⁶⁵ W. Machała, *Zielona księga. Prawo spadkowe i testamenty*, Wiadomości Ośrodka Badań Adwokatury 2006/21, *passim*.

⁶⁶ *Ibidem*.

⁶⁷ E. Ramaekers, *Cross-border Successions. The New Commission Proposal: Contents and Way Forward. A Report on the 2010 Academy of European Law Conference*, Electronic Journal of Comparative Law 2011/1, pp. 1-6.

⁶⁸ Cf., for instance, B. Adamson, Ch. Sosna, *Mutual Wills as Inheritance Contracts*, Private Client Business 2012/1, p. 14.

should eliminate the existing legal barriers to the free movement of persons resulting from the existence in the individual Member States of different inheritance regulations. The rules were introduced, based on them, for solving the disputes about jurisdiction in the inheritance matters with the cross-border element, as well as for giving the grounds for the recognition and enforcement of judgments issued in such cases in one Member State by the competent authorities of another Member State⁶⁹. In addition, the Regulation provides for the institution of the European Certificate of Succession, which is intended to allow a rapid examination of international inheritance cases and to facilitate persons residing in the EU Member States claiming their property rights acquired on the grounds of a single title under inheritance law. This instrument does not introduce any harmonization of the national standards of substantive inheritance law. The Regulation was published in the Official Journal of the European Union on 27 July 2012, and entered into force on 16 August 2012, with the reservation that it will be applicable in relation to succession of the deceased, starting from 17 August 2015 (Art. 83 of the Succession Regulation)⁷⁰. As it can be believed this act will revolutionize international inheritance law.

1.2. EU Succession Regulation (Brussels IV)

Pursuant to Art. 1 Sentence 1 of the Regulation, it is applicable to inheritance of estates of deceased persons. According to Art. 3 Par. 1 Letter a), it includes all the transfer forms of assets elements, rights and obligations because of death, whether on the grounds of a voluntary disposition of the property upon death, or by means of intestate succession⁷¹. Its most important effect is the one described in the Art. 21 Par. 1 of the Regulation, according to which the law applicable to all the cases concerning inheritance is the law of the State in which the deceased had their habitual residence at the time of death. According to Art. 21 Par. 2 of the Regulation, in the event when exceptionally, it is clear from all the circumstances of the case that at the time of death the deceased was manifestly more closely connected with a country other than the country whose law would be applicable under Art. 21 Par. 1, the law applicable to the inheritance is the law of that other country⁷².

⁶⁹ Cf. M.A. Pollaroli, *EU Regulation No. 650/2012 and Access to New Forms of Intergenerational Transfer of Wealth*, Ricerche Giuridiche 2013/1 Supplement, p. 405.

⁷⁰ However, cf. C. Davidsson, *The Consequences of England's Decision Not to Opt into the Proposed EU Regulation on Succession and Wills*, Lund 2010, pp. 30-37.

⁷¹ It is even called as the "all inclusive" Regulation. Cf. J. Harris, *The Proposed EU Regulation on Succession and Wills: Prospectus and Challenges*, Trust Law International 2008/22, p. 188.

⁷² A. Wysocka, *Wybór prawa w międzynarodowym prawie spadkowym*, Warszawa 2013, pp. 139 et seq.

This solution is - at least from the viewpoint of some national legal systems, such as the Polish legislation - a breakthrough solution. It breaks with the traditional principle of the competence of the national law of the testator at the time of their death⁷³. In this regard, one needs to remind of two fundamental but competing links of the law relevant for the purposes of inheritance law. One of them is the connecting factor of the nationality, of the national law. The second one is the link of the domicile or of the habitual residence⁷⁴. So far, most of the legislators, including the Polish legislator, have used in this regard the link of citizenship⁷⁵. For the reminder, it should be noted that the old Polish Law of 12 November 1965 - International Private Law⁷⁶ stipulated in Art. 34 that in the inheritance cases, the relevant law is the national law of the testator at the time of their death. According to Art. 64 Par. 2 of the new Polish Act on Private International Law of 2011⁷⁷, in the absence of a choice of the law in an inheritance case, the relevant law is the national law of the testator at the time of their death.

Moreover, which is also a novelty in international inheritance law (e.g. in Poland the choice in this respect was not foreseen in the Act of 1965 and it was only introduced by the Act of 2011 in the contents of Art. 64 Par. 1), pursuant to Art. 22 of the Regulation, each person may choose the law of the country whose nationality they possess at the time of the law selection or at the time of death, as the law that governs general matters relating to their inheritance estate⁷⁸. Anyone who has more than one nationality may choose the law of each State whose nationality they possess at the time of the law selection or at the time of death (Par. 1). The choice must be made expressly in a statement in the form of a disposition of property upon death or it must result from the provisions of such a disposition (Par. 2)⁷⁹.

It should be added that according to Art. 23 of the Regulation, the law determined in accordance with Art. 21 or 22 govern all the matters concerning the inheritance. This law governs in particular: a) the reasons, the time and place of

⁷³ E. Jayme, *Party Autonomy in International Family and Succession Law: New Tendencies*, Yearbook of Private International Law 2009, pp. 3-10.

⁷⁴ Cf. M. Harding, *Conflict of Laws*, New York 2014, pp. 192 et seq.; Max Planck Institute for Comparative and International Private Law, *Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession*, eds. J. Basedow, A. Dutta, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2010/74, pp. 600 et seq.

⁷⁵ Cf. M. Pazdan, *Prawo prywatne międzynarodowe*, Warszawa 2012, pp. 284-304.

⁷⁶ Dziennik Ustaw 1965, No. 46, Item 290, as amended.

⁷⁷ Dziennik Ustaw 2011, No. 80, Item 432, as amended.

⁷⁸ K. Dreher, *Die Rechtswahl im internationalen Erbrecht*, Frankfurt/M.-Berlin-Bern-New York-Paris-Wien 1999, p. 130.

⁷⁹ These issues are discussed in detail by A. Wysocka-Bar, *Wybór prawa*..., pp. 183-350.

the inheritance opening; b) the identification of the beneficiaries, their shares and obligations which may have been imposed on them by the deceased, and the establishment of other inheritance rights, including the succession rights of the surviving spouse or partner; c) capacity to inherit; d) disinheritance and inheritance unworthiness; e) the transition of the assets elements, the rights and obligations included in the estate to the heirs and, in appropriate cases, to the legatees, including the conditions and effects of acceptance or rejection of the inheritance or the legacy; f) the powers of the heirs, the executors of wills and other administrators of the estate, in particular, regarding the sale of assets and the payment of creditors; g) liability for inheritance debts; h) the disposable part of the estate, the mandatory shares and other restrictions on disposal of property upon death, as well as claims that people close to the deceased may have against the estate or the heirs; i) the obligation to reimburse or to include donations and legacies when determining the shares of different beneficiaries; and j) the inheritance division⁸⁰. The regulation therefore breaks with the inheritance fragmentation that could have occurred so far in the event of the estate location in several countries.

The new regulation therefore creates a new situation from the viewpoint of national inheritance law, replacing the various national rules of private international law and has far-reaching effects for that law. The EU legislator, firstly, allowed choosing the law applicable to the inheritance case, and, secondly, in the absence of the law choice it resigned from the link of the national law for the sake of the habitual residence link⁸¹. Using the latter link is argued, e.g., by the increasing mobility of citizens, by the thought to ensure the proper administration of justice in the Union and to ensure a real link between the given inheritance case and the Member State in which the jurisdiction is exercised⁸².

In this area, one may wonder what the place of the habitual residence is. The Regulation does not include any definition of the habitual residence place, but it provides some guidance in this respect. As stated in Item 23 of the Preamble to the Regulation, in order to determine the habitual residence, the authority dealing with the inheritance case should make an overall assessment of the deceased's life in the years preceding their death and at the time of their death, taking into account all the relevant facts, in particular the duration and regularity of the presence of the deceased in the country and the conditions and the reasons for this presence. The habitual residence established like that should have a close and stable relationship with this country. On the other hand, due to the fact that in some cases the determination of the habitual residence of the deceased can be

⁸⁰ E. Cashin Ritaine, *National Succession...*, pp. 131 et seq.

⁸¹ Cf. M. Pfeiffer, *Choice of Law in International Family and Succession Law*, *The Lawyer Quarterly* 2012/4, pp. 291-303.

⁸² As indicated in the preamble to the Regulation.

complicated, especially when the deceased for professional or economic reasons went abroad to work there, sometimes for a long time, but kept a close and stable relationship with their country of origin, the regulation provides for a certain departure from the general rule. In this case, according to the guidance contained in Item 24 of the Preamble to the Regulation, - depending on the circumstances of the case - the deceased can be considered to have still their habitual residence in the country of origin, in which the interest centre of their family and social life was located. Other complex cases may arise where the deceased lived interchangeably in a few consecutive countries or when they travelled between the states, not settling permanently in any of them. If the deceased was a citizen of one of those states or all of their main assets were located in one of those countries, a specific factor in the overall assessment of all the facts would be their nationality or the location of those asset elements⁸³.

As one can see, the link of the habitual residence⁸⁴, in many cases, may result in an indication as the law relevant to the inheritance of another law than the national law. Undoubtedly, for the citizens of many European countries it may prove to be surprising in the future. The situation is somewhat mitigated by the provision of Art. 21 Par. 2 of the Regulation. According to that provision, interpreted in the light of the guidelines referred to in Item 25 of the Preamble to the Regulation, in determining the law relevant to the inheritance, the authority dealing with the inheritance case may in exceptional circumstances - for example, if the deceased moved to the country of the habitual residence a relatively short time before their death, and all the circumstances of the case indicate that they were manifestly more closely connected with another country - come to the conclusion that the law relevant to the inheritance should not be the law of the habitual residence of the deceased, but the law of the country with which the deceased was manifestly more closely connected.

The Regulation is therefore another step towards the harmonization of inheritance law in the European Union. So far, none of the instruments adopted in the area of private law has resolved the issues related to inheritance. The variety of substantive and procedural rules, as well as the multiplicity of bodies that are likely to consider the international inheritance cases, as well as numerous cases of estate dismemberment (where various elements of the estate may be subject to different legal systems) have undoubtedly been for citizens a considerable difficulty in the implementation of the freedoms granted to them, including, in particular, the treaty freedom of movement⁸⁵. The consequence of the lack of uniform

⁸³ R. Mańko, *"Habitual Residence" as Connecting Factor in EU Civil Justice Measures*, Library of the European Parliament of 22.01.2013, pp. 1-2.

⁸⁴ E. Lein, *A Further Step Towards a European Private International Law Code - The Commission Proposal for a Regulation on Succession*, Yearbook of Private International Law 2009, p. 128.

⁸⁵ Cf. B. Akkermans, *Free Movement of Goods and Property Law*, European Law Journal 2013/2, pp. 237-266.

and coordinated standards at the European level has often been the need for the citizens to have several inheritance proceedings in different countries. Because of various proceedings in different countries according to their national law, different heirs could be entitled to the inheritance after the same person. Undoubtedly, it made difficult to handle the property rights due to the unclear legal situation of the various components of the estate. The Regulation aims to change this state of affairs. Citizens of the individual EU countries, whose professional and life activity often requires to transfer, at least temporarily, the centre of life outside their country, can now appreciate the provisions of the Regulation, which should remove some of the barriers of this type. Nevertheless, the provisions of the Regulation - as it can be thought - can cause even a greater controversy. By indicating the national law other than the domestic law for many potential testators and heirs, the legal situation relating to the application of substantive inheritance law can be very surprising. The point here is the four areas of inheritance law, i.e. statutory succession, testamentary inheritance, legal regulations concerning the protection of the persons close to the deceased (the mandatory part of the inheritance) and the issues of liability for inheritance debts. In different countries, there exist different rules of statutory succession, testamentary inheritance, the protection of the persons close to the deceased and the liability for inheritance debts⁸⁶. In practice, it may be that the differences in the rules of the entitlement to inheritance or the receipt of benefits from the inheritance are significant enough that the practical application of the inheritance regulation will arouse a lot of emotion⁸⁷. After all, the matters of statutory succession, testamentary inheritance, the protection of persons close to the deceased and the liability for inheritance debts are vital issues, deciding on the image of the given system of inheritance law. If a valid testamentary disposition according to one system proves to be invalid according to another one, if a person is entitled to a legitim according to the law in the State X, and is not entitled to any benefits from the inheritance according to the law in the State Y, and similarly, if a person, according to the law in the State X, is entitled to statutory succession in a different order than according to the law in the State Y, the rules covered by the provisions of the Regulation may begin to raise negative social emotions and cause a decrease in the citizens' trust in the law, which in turn will become a barrier to maintaining and developing an area of freedom, security and justice. Perhaps this will become an impulse for further integration works; this time concerning substantive inheritance law.

⁸⁶ Cf. *International Succession*, eds. L. Garb, J. Wood, Oxford 2010, *passim*.

⁸⁷ For a compendium of succession laws throughout Europe see: <http://www.successions-europe.eu/>.

1.3. Fundamentals of institutional harmonization of inheritance law

In the opinion of many scholars, in a situation when differences of the legal systems are far-reaching, only after the harmonization of the conflict rules, an opportune time can come to try harmonizing the substantive rules of statutory succession, the rights of the deceased's relatives in the event of their nonappointment to the inheritance, the contracts for the inheritance or wills⁸⁸. Such a moment is just coming. The adoption and entry into force of Regulation No 650/2012 have caused significant changes in the field of inheritance law⁸⁹. The progressive increase in the mobility of citizens and the increasing acquisition of assets abroad, being a result of the European integration, are the events that in a broad perspective, not only cause complications concerning the conflict of laws, but also in the area of substantial law. Today, the differences between the national laws arising according to the general position from distinct values underlying them, in particular due to the distinct cultural, social, or economic values, seem to be an area that needs to be addressed⁹⁰. Not without any reason, at its meeting in Brussels on 10-11 December 2009, the European Council adopted a new multiannual program called "The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens"⁹¹, resulting in the position that the European Council considered that the mutual recognition should be extended to the areas not covered by it yet, and being basic to everyday life, such as inheritance and wills. As it was stated in the Preamble to Regulation No 650/2012, the proper functioning of the internal market should be facilitated by removing obstacles to the free movement of persons who currently face difficulties in exercising their rights in terms of inheritance matters of cross-border implications. In the European area of justice, the citizens must be able to organize their inheritance matters in advance. The rights of heirs and other persons close to the deceased, and the creditors of the inheritance must be effectively guaranteed. The current state, where there are differences between specific rules of national laws, cannot guarantee them, especially in the area of statutory succession, testamentary inheritance, the protection of the persons close to the deceased and the liability for inheritance debts. There-

⁸⁸ Cf. W. Pintens, *Need and Opportunity...*, p. 21.

⁸⁹ Cf. R. Frimston, *Brussels IV? Conflicts of the Laws of Succession in the European Union: Perspectives for Harmonisation*, Private Client Business 2004/ 6, pp. 351-355; *idem*, *The European Succession Regulation (EU) No 650/2012*, Private Client Business 2012, pp. 213-216; *Le droit européen des successions...*, *passim*.

⁹⁰ Cf, for example, Ch. Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, EUI Working Paper Law 2014/12, pp. 5-48.

⁹¹ Official Journal C 115 of 4.5.2010.

fore, it must be considered whether at the level of the European Union there is a possibility of further institutional harmonization of inheritance law.

In this context, it should be noted that in the European Union the differences between the Member States in the field of inheritance law are in some cases substantial. In principle, one can speak of two families of inheritance law, i.e. the ones derived from the Germanic and Romanic traditions, but also about the Anglo-Saxon or Nordic law⁹². It is sufficient just to juxtapose, for instance, the English law and the German law to note that the constructions based on different traditions associated with different social, cultural or economic determinants are so far apart that today - according to many scholars - it is hard to arrive at one common, uniform regulation of inheritance law in the European Union. While the issues of inheritance are based on the same foundations, the fact remains that the legal structures of individual institutions of inheritance law vary, which is also characteristic of all matters of civil law. The basic differences exist, for instance, in the field of statutory succession. They refer, e.g., to the circle of statutory successors and the order of their succession, the rule of representation among the relatives or inheritance of the spouse. Moreover, the ability of testation follows different rules in these laws. At the same time, there are also differences in relation to the protection of the family of the deceased due to nonappointment of its members to inherit. It all makes a very difficult process the adjustment of the principles and the concepts of inheritance law to one model. However, such a regulation would be tempting, and that is why - as it can be believed - the European Union should take further measures to standardize the law.

At this point, one needs to recall that as to inheritance law, until recently it has been considered that there are no sufficient legal grounds for the competence in this area of the former European Community, and the present European Union⁹³. Despite this position, the processes and trends of harmonization in Europe, since the beginning of the integration, have been so strong that, in the opinion of some scholars, in time, the obstacles to harmonizing of inheritance law⁹⁴ will become inadequate to deter the common European regulation of inheritance law⁹⁵. Hence, even at the time when the dominant was the view of the impossibility or even no need for unification of inheritance law, some scholars saw the legal grounds for undertaking by the European Union of efforts to harmonize substantive inheritance law already in the Treaty Establishing the European Commu-

⁹² Cf. C. Hertel, *Aperçu sur les systèmes juridiques dans le monde*, Notarius International 2009/1-2, p. 142.

⁹³ Instead of many sources cf. A-L. Verbeke, Y-H. Leleu, *Harmonization of the Law...*, p. 475.

⁹⁴ Instead of many sources cf. H. Dörner, P. Lagarde, *Etude de Droit Comparé...*, p. 5.

⁹⁵ Cf. W. Pintens, *Tendencies in European Succession Law*, [in:] *Inheritance Law – Challenges and Reform. A Norwegian-German Research Seminar*, ed. T. Frantzen, Berlin 2013, pp. 9-23.

nity⁹⁶. The grounds for such an action were to be the provision of Art. 95 of the Treaty, according to which the Council shall, after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation, or administrative action in Member States that have as their object the establishment and functioning of the internal market⁹⁷. The immediate impulse was one of the fundamental principles of the European law, i.e. the principle of the property protection, particularly in relation to the judgment of the Court of Justice of 3 December 1988 in the case No C-368/96 - *The Queen v The Licensing Authority established by the Medicines Act 1968 (acting by The Medicines Control Agency), ex parte Generics (UK) Ltd, The Wellcome Foundation Ltd and Glaxo Operations UK Ltd and Others (the Generics case)*⁹⁸. According to that judgement, under the Court's case law, the right to property forms part of the general principles of the Community law. Those principles are not absolute, however, but must be viewed in relation to their social purpose. Consequently, the exercise of the right to property may be restricted, provided that the restrictions in fact correspond to the objectives of the general interest pursued by the Community and do not constitute disproportionate and unacceptable interference, impairing the very substance of the right guaranteed. Moreover, in the present circumstances, the impulse to undertake the appropriate work can also be a judgment of the Court of 21 March 1972 in the case of *Pubblico Ministero della Repubblica italiana v Società agricola industria latte (the case Saii)*, according to which 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 Treaty⁹⁹.

These views, before the entry into force of the Treaty on the Functioning of the European Union¹⁰⁰ were not as uniform as it is often pointed out. According to some authors, the arguments were sufficient for the undertaking of the harmonization works in the field of inheritance law. Despite various concerns, in many respects the positions advocating for the commencement of the harmonization works were correct. As I have often pointed out, such a single solution is very tempting.

Today, the position of the grounds absence for the harmonization seems to be already an ancient history. This happens for several reasons. One of them is the modifications introduced by the Treaty on the Functioning of the European Union, which clearly indicated that the bodies of the European Union may adopt

⁹⁶ Official Journal C 321 of 29.12.2006.

⁹⁷ Cf. B. Łukańko, *Europeizacja prawa spadkowego*, Europejski Przegląd Sądowy 2007/7, p. 37.

⁹⁸ C-368/96.

⁹⁹ 82/71.

¹⁰⁰ Official Journal C 326 of 26.10.2012.

measures for the approximation of the laws, regulations and administrative provisions of the Member States which have as their object the establishment and functioning of the internal market (e.g. Art. 114 of TFEU), which - as one may think - should also refer to substantive inheritance law. Moreover, some differences in substantive inheritance law, due to the possibility of applying foreign law in the relations governed by inheritance law, may lead to the adoption of the position that some EU citizens are discriminated, which is known to be incompatible with the EU law (compare, e.g. Judgment of the ECJ in the cases *Hubbard*¹⁰¹ or *Barbier*¹⁰², which are, after all, some guidelines for the legislators in the matters related to inheritance). As already pointed out repeatedly by ECJ, inheritance falls under Heading XI of Annex I to Directive 88/361, entitled “Personal Capital Movements” and is a capital movement within the meaning of Art. 63 TFEU, except the cases in which the occurrence of its constituent elements is confined to a single Member State. Thus, the provisions of the TFEU on the free movement of capital may be applicable in the area of inheritance law¹⁰³, which should also be one of the institutional harmonization stimulants. One must notice in this regard Regulation No. 650/2012, already mentioned several times, with all the consequences of its validity.

The impact of EU private law today is much broader than it was some time ago. Indirectly, the shape of private law is affected by the provisions of the Charter of Fundamental Rights, in particular its Art. 17 concerning the protection of property¹⁰⁴. It is against the constitutional regulations concerning the protection of property and inheritance in the European countries that the framework of national regulations in the field of inheritance law has been shaped. Many times in this respect, also the constitutional courts of the European countries expressed their opinions. It is against the background of such regulations that the Polish Constitutional Court in its widely commented judgment of 25 October 2003 pointed out that the right of succession is an individual’s constitutional right, closely connected with the right of ownership¹⁰⁵. The Constitution does not allow ownership to be shaped as a right that may not be the subject of succession. The right of ownership vested in a natural person may not expire at the moment of their death but should continue to exist, thereby implying transfer to other persons. Accordingly, when fulfilling the requirement to protect ownership, the legislator is obliged to shape the principles of succession appropriately. According

¹⁰¹ Official Journal C 326 of 26.10.2012.

¹⁰² C-364/01.

¹⁰³ C-25/10, item 16.

¹⁰⁴ Cf. B. Akkermans, *The European Union Development of European Property Law*, Maastricht European Private Law Institute Working Paper 2011/27, pp. 1-18.

¹⁰⁵ K 37/02.

to that judgement, the most significant element of the right of succession is the testamentary freedom. It is the testator's will, and not statutory rules regarding succession, which should primarily determine the fate of the testator's property. Statutory succession is supplementary in nature, applicable whenever the testator did not decide, *mortis causa*, on the fate of their property. Challenges against the testator's will should occur only exceptionally, in particularly justified cases. Anyhow, the grounds for the protection of inheritance are also the the regulation context of the European Convention on Human Rights. This Act, in the content of Art. 1 Par. 1 of the Protocol No 1 to the Convention provides that "any natural or legal person is entitled to the peaceful enjoyment of their possessions. No one shall be deprived of their possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law" which in the context of a broad interpretation used in the judgments of the European Court of Human Rights (and previously of the European Commission of Human Rights) means the protection of inheritance. There is no way today to hold that inheritance law and inheritance, should be and are outside the competence of the European Union.

The next step on the road to a uniform substantive inheritance law seems to be a step in the direction of undertaking works on some elements of inheritance law deciding on its image. Comparing the matters of statutory succession, testamentary dispositions, or the protection of the persons close to the deceased, some attempts to find common denominators of individual national regulations are the factors that may encourage further efforts to develop some uniform standards of substantive law in this field. It would be a great achievement of the Community legislation. The legislation, which then must decide on the legal form in which to accept any common single inheritance law. Whether it will be a regulation, an optional instrument, or maybe "only" a directive is now a secondary issue and not a problem. The adoption of such an act will result in abolishment of the present legal barriers to the free movement of persons and capital, arising from the existence of the different regulations concerning inheritance in the individual Member States.

1.4. Conclusions and recommendations

In the light of the above, there is a reason to believe that the European Union is competent for the adoption of future solutions that will provide an instrument of the uniform inheritance law. The existing barriers that are often cited by the proponents of the national law autonomy do not seem to be strong enough to be able to oppose the idea of further integration¹⁰⁶. In attempting to codify the

¹⁰⁶ Cf. W. Pintens, *Towards a Ius Commune in European Family and Succession Law?*, Cambridge-Antwerp-Portland 2012, pp. 8-12, 24-34, 88-90.

European inheritance law one must first agree on some guiding ideas, vital for the regulation of inheritance law. It is on these ideas that the detailed regulation must be based, and it must be a more balanced concept of the European law based on the traditions of individual countries. This can help to avoid the effect, expected by many critics, where one can meet in the proclaimed assessment a view that the introduction of the uniform substantive law does not necessarily lead to the idea of the law unification intended by its supporters. It will be applied by lawyers from dozens of the member countries with different legal traditions, influencing the way of its interpretation. Therefore, before proceeding to any detailed analysis one should consider if within inheritance law of the European countries there are some common principles that could be the grounds for the future European regulation. Only establishment of common values underlying the specific normative solutions might allow a closer look at the possible solutions and an attempt to design some new solutions. Undertaking of the research by the doctrine, the result announcement of these studies, the use of the scientific thought by the courts are the first steps towards the harmonization in a more institutionalized form.

Chapter 2.

Values and principles of modern inheritance law

2.1. Determinants of inheritance law standards

So far, it has been indicated that a prospective way to the uniform inheritance law in Europe will be bumpy but possible. When drafting some individual solutions, the values and principles of inheritance law, which the discipline has managed to develop, must be kept in mind. Today, one cannot analyze a narrow segment of law in isolation from the whole system, the context of the individual solutions and achievements underlying it. Inheritance law cannot exist without property law, family law, and contract law. In turn, the formation of these disciplines cannot be done without regard to the constitutional regulations or those concerning the human rights protection. These regulations define the directions of the development in such a field as inheritance law. The process known as “*constitutionalisation of private law*”, which in fact is an impregnation of private law with the concept of human rights and other values of constitutional law is confirmed by the achievements of the judicial decisions of the European constitutional courts and international bodies¹. The main idea of this process is the notion according to which the private law provisions should not be used in conflict with the system of values specified by the constitutional fundamental rights². Undoubtedly, the property and the related inheritance is the area that has always been concerned and will be concerned with the standards of the constitutional status. The discussion on a possible common European inheritance law cannot therefore ignore the progressive constitutionalisation of private law. Some guidelines of the constitutions and the legal acts relating to

¹ However, see J. Smits, *Private Law and Fundamental Rights: A Skeptical View*, [in:] *Constitutionalisation of Private Law*, eds. T. Barkhuysen, S. D. Lindenberg, Leiden-Boston 2006, pp. 9-22.

² Cf. H. Collins, *Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization*, LSE Law Society and Economy Working Papers 2007/6, pp. 1-21.

the protection of human rights must be taken into consideration when drafting the regulations of inheritance law³.

Therefore, in this context, no one should be surprised that inheritance, as the transition process of the rights and obligations of the deceased to their legal successors, is nowadays protected in the various jurisdictions by the acts of the constitutional rank, and the international conventions. The scope and details of the regulations provided for in the individual acts are varied. This has been due to many factors associated with both the evolution of the legal system of a given state and its society. Inheritance was constitutionally guaranteed already in the 19th century, for example in § 107 of the Constitution of the Kingdom of Norway from 1814, where it was indicated that “the right of the inherited property possession and the right to inherit land may not be abolished”⁴ or Art. 26 of the Constitution of the Congress (Polish) Kingdom in 1815. (“All property of any name and kind whether located on the surface, or in the interior of the earth, owned by anyone, is sacred and inviolable. No authority has any right to violate it under any circumstances. Whoever trespasses someone else’s property shall be regarded as a violator of the public security and as such they shall be punished”⁵). The legislation in this area has evolved differently over the years; on one occasion providing for the literal protection of inheritance, and on another occasion confining to the protection of property. In addition, although now the European Convention for the Protection of Human Rights and Fundamental Freedoms, thus an act of fundamental importance in terms of the regional protection of human rights, does not directly address the issue of inheritance, it is apparent from the rulings and opinions of the doctrine, Art. 1 of the Protocol No. 1 to the Convention concerning the protection of property in its content includes not only the right of ownership in the strict sense of the word, but also, *inter alia*, the inheritance rights. It results from the wording of that provision that any natural or legal person is entitled to the peaceful enjoyment of their possessions. No one may be deprived of their possessions unless in the public interest and subject to the conditions provided for by law and according to the general principles of international law⁶, which obviously also applies to the legal relations in the event of death. This is reflected, e.g., in the existing case law of the ECHR, which has repeatedly set standards of

³ Cf. M. Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, German Law Journal 2006/4, pp. 341-370.

⁴ *The Constitution of the Kingdom of Norway* of 17 May 1814.

⁵ *The Constitutional Act of the Congress (Polish) Kingdom* of 27 November 1815.

⁶ The prototype for this regulation was, for example, the French Declaration of Human and Civic Rights passed on 26 August 1789. In Art. 17 it indicated that the property is the sacred and inviolable right of which no one can be deprived, unless it is required by the public interest, legally justified, and the expropriated person is entitled to the appropriate compensation. Cf. *The Monuments of Human Rights*, vol. I, ed. M. Zubik, Warszawa 2008, p. 170.

the European inheritance law, indicating in its rulings on inheritance law, above all, the need to fight discrimination in the approach of some national legislators to certain specific issues in this field of private law (see, first of all, the rulings in the cases of *Marx*, *Inze*, *Mazurek*, *Pla and Puncernau*⁷). Undoubtedly, the decisions of the ECHR have been and will be a valuable inspiration for the legislators.

In the European reality, it should be noted that also the Charter of Fundamental Rights of the European Union provides for this type of protection. Pursuant to Art. 17 Par. 1 of this Act, everyone has the right to own, use, dispose of, and test his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as it is necessary for the general interest. It is in this provision - in the EU legal order - that one can trace some tips for the EU legislator to draft some inheritance law solutions consistent with human rights standards⁸. Thus, it is not that substantive inheritance law remains completely outside the scope of EU legislation. A small expression of this has already been given by the ECJ that, in its few decisions, created some standards for the inheritance cases in the European Union. And despite the fact that the rulings in such cases as *Hubbard* (C-20/92) or *Barbier* (C-364/01) were made in a slightly different normative context than the Charter of Fundamental Rights, they were an unmistakable signal to the national legislators, as well as to the European legislator in the context of the creation and the interpretation of the rules of the national law⁹.

For the determination of the European constitutional standards of inheritance law relevant are also the provisions of the constitutional acts in the individual European countries. Currently in Europe, a guarantee of the inheritance right, clearly expressed in the Constitution, can be found, for example in the Bulgarian Constitution (Art. 17 - "the right to property and inheritance shall be guaranteed and protected by law"¹⁰), in the Croatian Constitution (Art. 48 - "the right to inheritance shall be guaranteed"¹¹), in the Czech Constitution (Art. 11 Par. 1 Sentence 3 - "the right to inheritance shall be provided as the guarantee"¹²), in the Estonian

⁷ The cases were mentioned in the previous Chapter.

⁸ Cf. B. Akkermans, *European Union Constitutional Property Law*, Maastricht European Private Law Institute Working Paper 2014/14, pp. 2 et seq.

⁹ Cf. R. Koch, *Einwirkungen des Gemeinschaftsrechts auf das nationale Verfahrensrecht*, Europäische Zeitschrift für Wirtschaftsrecht 1995, pp.78-85; M. Dassesse, "Droit au départ" et droits de succession, *Droit des Affaires* 2004/72, pp. 3-11.

¹⁰ *The Constitution of Bulgaria* of 12 July 1991.

¹¹ *The Constitution of the Republic of Croatia* of 22 December 1990.

¹² In fact, in the Czech Republic it results from the provisions of *The Charter of Fundamental Rights and Freedoms* of 16 December 1992 as part of the constitutional order of the Czech Republic.

Constitution (§ 32 - “the right to inheritance shall be guaranteed”¹³), in the Spanish Constitution (Art. 33 Par. 1 - “the right to private property and inheritance shall be recognized”¹⁴), in the German Constitution (Art. 14 Par. 1 - “the right to ownership and the right to inheritance shall be provided for”¹⁵), in the Romanian Constitution (Art. 42 - “the right to inheritance shall be guaranteed”¹⁶), in the Slovak Constitution (Art. 20 Par. 1 Sentence 3 - “the inheritance shall be guaranteed”¹⁷) or in the Hungarian Constitution (§ 14 - “the Constitution guarantees the right to inheritance”¹⁸). Other acts of the constitutional status as well, despite the fact that in their texts they do not use the term “inheritance”, protect this right by protecting property (e.g. Art. 72 of the Icelandic Constitution¹⁹, Art. 35 of the Russian Constitution²⁰, Art. 42 of the Italian Constitution²¹, or Art. 26 of the Swiss Constitution²²). The situation is somewhat different in the Anglo-Saxon countries, where, however, the guarantees for the protection of inheritance are also highlighted²³. In Poland, in the Constitution of 2 April 1997²⁴, the term “right to inheritance” appears in three provisions (Art. 21 Par. 1, Art. 64 Par. 1, and Art. 64 Par. 2). According to the first one, the Republic of Poland protects property and the right to inheritance. Pursuant to the second one, everyone has the right to property, to other proprietary rights and the right to inheritance. The third one provides that ownership, other proprietary rights, and the right to inheritance are subject to the legal protection that is equal for everybody.

Inheritance law is therefore protected at the constitutional, international, and European level. If, however, there is no clear normative guidance on the shape of inheritance law, and the various regulations are very general (constitutions, international conventions or the Charter of Fundamental Rights), there is no doubt

¹³ *The Constitution of the Republic of Estonia* of 28 June 1992.

¹⁴ *The Constitution of Spain* of 27 December 1978.

¹⁵ *The Constitution of the Federal Republic of Germany* of 23 May 1949.

¹⁶ *The Constitution of Romania* of 21 November 1991.

¹⁷ *The Constitution of the Slovak Republic* of 1 September 1992.

¹⁸ *The Constitution of the Hungarian Republic* of 20 August 1949.

¹⁹ *The Constitution of the Republic of Iceland* of 17 June 1944.

²⁰ *The Constitution of the Russian Federation* of 12 December 1993.

²¹ This regulation provides at the same time that the statute sets out the principles and limits of the statutory succession and the testamentary inheritance, as well as the rights of the State in relation to the inheritance estates. Cf. *The Constitution of the Italian Republic* of 27 December 1947.

²² *The Federal Constitution of the Swiss Confederation* of 18 April 1999.

²³ Cf. P. Monopoli, “Deadbeats Dads”: *Should Support and Inheritance be Linked?*, University of Miami Law Review 1994/49, p. 282; C.H. Sherrin, R.C. Bonehill, *The Law and Practice of Intestate Succession*, London 2004, p. 4.

²⁴ Dziennik Ustaw 1997, No. 78, Item 483.

that the individual legal systems must provide for some regulations concerning inheritance in their legislation. It is therefore not possible here such a regulation that was in force in the Soviet Union in the years 1918-1922 where there was an abolition of inheritance in general²⁵. This should be a starting point for the future European regulation and be rather an argument for its creation / standardization²⁶. The right to inheritance belongs to the fundamental rights of the EU citizens.

The content of inheritance law is shaped by the judicial decisions of the courts (constitutional and international) and by the views of doctrine. Hence, it is emphasized overwhelmingly that the right to inheritance in terms discussed here should be understood as an indicator for the legislature directing how the regulations of inheritance law should be drafted. It is raised that the relevant legal standards governing inheritance law should consider also other values protected at the constitutional level, especially the protection of the persons closest to the deceased²⁷. This protection is also provided for by the various constitutions, and in many respects, it may influence the perception of the right to inheritance. The protection of the family is expressed, for example, in the Irish Constitution (Art. 41 Par. 1 - "the State recognizes the family as [...] the fundamental social group [...] [and] ensures the protection of the family"²⁸), in the Macedonian Constitution (Art. 40 - "The Republic specially cherishes and cares for the family"²⁹), in the Portuguese Constitution (Art. 67 - "the family, as the basic social unit, is entitled to the protection by the society and the State"³⁰), or in the Slovenian Constitution (Art. 53 - "The State takes care of the family, motherhood, fatherhood, children and youth, and creates the necessary conditions for the realization of this care"³¹), and also in the European Convention on Human Rights (Art. 8), or the Charter of Fundamental Rights of the European Union (Art. 33 Par. 1 and Art. 24 Par. 1). The boundary between the protection of the family and the protection of ownership (of inheritance) is not always clear. In the event of a conflict between the two principles, there is no one general rule indicating which of the

²⁵ Cf. M.K. Cowley, *The Right of Inheritance and the Stalin Revolution*, Kritika: Exploration in Russian and Eurasian History 2014/1, pp. 103 et seq.

²⁶ S. Kreiczler-Levy, *The Mandatory Nature of Inheritance*, The American Journal of Jurisprudence 2008/53, pp. 1 et seq.

²⁷ Cf. D. Schwab, *Einführung in das Symposium und das Thema*, [in:] *Familienerbrecht und Testierfreiheit im europäischen Vergleich*, ed. D. Heinrich, D. Schwab, Bielefeld 2001, pp. 1 et seq., and the papers presented during the conference.

²⁸ *The Constitution of Ireland* of 1 July 1937.

²⁹ *The Constitution of the Republic of Macedonia* of 17 November 1991.

³⁰ *The Constitution of the Portuguese Republic* of 2 April 1976.

³¹ *The Constitution of the Republic of Slovenia* of 23 December 1991.

conflicting values stands higher in the hierarchy and has the priority. The legislator should seek to ensure both of them to the greatest feasible extent, according to the severity of the values at the heart of each of them. An omission to consider sufficiently one of them in the legislative act is a tantamount to its violation³². Only when the concomitant use of both colliding rules is not possible, one should refuse the application of one of them, but only to the extent to which both of them cannot be reconciled³³.

Thus, the constitutional and conventional provisions form the basis for determining the mechanisms for the effective protection of wider ownership (in a broad sense, the right to property also protects the right of inheritance), and these mechanisms should be found in acts of a lower rank³⁴. Based on the above rules, all the property is subject to the State protection, both serving the objectives of production, and designed to meet the individual needs of the owner and their family. The same applies to inheritance law. Hence, the above rules determine the directions of the private law development, mainly the regulation concerning inheritance law³⁵. The protection of inheritance is connected directly to the protection of the private property of individuals. Protecting the right to inheritance each State ensures, *inter alia*, that the testator will be able to dispose freely of their possessions in the event of the death and the heir, and possibly other persons will not incur excessive costs of obtaining the property rights. It can therefore be assumed that the constitutional and conventional regulations are a kind of norm constituting an order for the State authorities to enact such laws that would ensure succession of rights and obligations by the way of inheritance³⁶. The content of inheritance law, constructed like that, consists of several key elements that were once mentioned in Poland by the Constitutional Court³⁷. These are the elements universal enough to enable their transfer to other legislations, regardless of the cultural and social differences, and legal traditions. This standard is in fact primarily justified under the European Convention on Human Rights, which correspondingly is moved to the constitutional national regulations. In Poland, it gave the grounds to extract primarily the following construction rules of the inheritance law regulations:

³² Also K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 198.

³³ M. Jackowski, *Ochrona praw nabytych a kryzys gospodarczy*, Państwo i Prawo 2009/8, p. 6.

³⁴ Cf. E. Łętowska, M. Bednarek, *Ochrona własności – pewność prawa – konflikt między cywilistyczną tradycją a historycznymi rewindykacjami*, [in:] *Prawo w XXI wieku. Księga pamiątkowa 50-lecia Instytutu Nauk Prawnych Polskiej Akademii Nauk*, ed. W. Czapliński, Warszawa 2006, pp. 499 et seq.

³⁵ W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Kraków 2000, p. 32.

³⁶ L. Garlicki, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, Warszawa 1999, a comment to Art. 21, p. 10.

³⁷ Some views were “cataloged” by the Constitutional Court in its reasons for the judgment in the case P 20/06.

1) the freedom to acquire property, to keep it, and to dispose of it in transactions *mortis causa*;

2) the order to cover by the statutory regulation of a specific sphere of issues arising in connection with the death of a natural person;

3) the prohibition of the arbitrary takeover by the State or other entities of public law of the deceased persons' property; the property right vested in an individual cannot expire on their death, but it should continue, which implies its transition to another person or persons; in other words, the legislature cannot introduce a "hidden" expropriation by depriving the deceased's assets of the private property status;

4) the order to take into account the will of the owner as the primary factor determining who should receive the components of their assets in the event of their death; the fate of the assets making up the inheritance estate should be decided in the first instance by the will of the testator, and not the rules of inheritance determined by the legislature;

5) the freedom of disposition of own assets in the event of death; an excessive interference by the legislators or other public authorities in the sovereignty of the last will of the deceased is a violation of the inheritance law;

6) the duty to establish a subsidiary regulation relating to the inheritance based on the will of the testator and allowing to determine clearly the circle of heirs in a particular case; the legislator has at the same time a wide discretion; the statutory regulations, however, should refer to the presumed rationality of the testator and bear in mind a certain typicality of the testamentary dispositions;

7) the order of equal treatment of heirs in similar or close legal situations; the selection by the legislature of a specified inheritance model should be consistent, i.e. the legislature cannot create any exceptional rules, violating the principle of the equal protection of the inheritance right; however, this does not mean the equality of the heirs' rights, because the diversity can arise, for example, from an appropriately expressed will of the testator;

8) the prohibition of depriving a certain category of persons of their capacity to inherit, or to acquire some property and other property rights after the death of the person entitled to them during their lifetime; the acquisition of a deceased person's property by the State or other public entity is not categorically excluded, but it may be considered only when it is not possible to determine the individuals whose succession of the deceased is more reasonable due to the closeness of the relationship between such persons and the deceased;

9) the rights protection of the persons who have acquired the status of an heir after the death of a given person;

10) the order to shape the legal regulations in a way allowing the heir - designated by the testator, or in the absence of such an indication, determined by the legislature - the definitive acquisition of the estate assets;

11) the possibility of introducing the regulations that provide additional entitlements for the closest persons in case of the deceased's death (e.g. legitim); but there is no guarantee for the institution of legitim itself or a similar one. Since the legislature may, without prejudice to the norms of the Constitution, exclude certain property rights from the mechanism of succession, and introduce their particular succession in case of death of the person who was its subject, it can also modify or repeal the regulation concerning legitim³⁸.

The above, in the context of a possible future European regulation, is very important. Such guidelines, as some determinants of the future regulation, must be observed when designing it. Against the background of the different legal systems, they are the contemporary values that each modern democratic legislator should follow. The above-mentioned principles and assertions constitute the *acquis constitutionnel* that, together with the subsequent judgments of the constitutional courts and the international bodies, deepening the essence of the constitutional issue of the inheritance, set a clear line of the jurisprudence. The line that against the background of the individual systems is an important clue to the legislature. Therefore, undoubtedly, also the European legislator should have these guidelines in mind. In addition, although the individual national legislators otherwise concretize these guidelines, one cannot consider that the social and cultural differences, or traditions of each country allow to deviate from these guidelines. The protection of the testator and his/her property, the freedom to dispose of the property, the protection of the persons close to the deceased and their creditors are today the values that are protected by all the legislatures in Europe, regardless of the social, cultural, and economic factors, or some different legal traditions. Also against the background of the Charter of Fundamental Rights of the European Union, it seems to be up to date.

2.2. Selected basic principles and values of inheritance law

Against the background of constitutional law and international protection of human rights, over the years, inheritance law has developed a series of principles that today are considered as its canons. The canons, without which no legal regulation can operate. They are the result of the practical observation, the social needs, and the evolution of the legal relations, as well as a synthesis of the ideas of human rights and other constitutional values. This group certainly includes the principle of the testator's protection and their property, the principle of the freedom to dispose of the property upon death, the principle of the protection of the persons closest to the deceased and the protection of the testator's creditors.

³⁸ Cf. M. Załucki, *Wydzielanie w prawie polskim na tle porównawczym*, Warszawa 2010, pp. 135 et seq.

They are the starting point for drafting of inheritance law solutions and they decide on the image of the given legislation. As they often protect different values, a proper balance between the protection and the interdependence of these rules in a particular system is a challenge for the legislature. Only such a balance allows to draft properly the provisions relating to statutory succession and testamentary inheritance, and to construct the rights of the persons close to the deceased in the event of their death, or to sketch the skeleton of the provisions relating to the liability for inheritance debts.

In the context of these principles, it should be noted that while drafting some new statutory solutions, the legislature faces a number of dilemmas³⁹. Firstly, it must take into account that today inheritance clearly seems to be associated with succession of the persons closest to the testator. In this context, it is, *inter alia*, about ensuring the continuation of the family and the preservation of its assets. A related issue is, e.g., the proper determination by the legal system of the statutory successors' circle, or taking into account the provisions relating to the so-called compulsory part of the inheritance attributable to the closest person. Not without any significance, here are the standards for the freedom to dispose of the property upon death and its possible limitations. There is a belief shaped for centuries that the rules of inheritance law should bond and strengthen the family ties⁴⁰. Secondly, inheritance is an institution that should provide the best possible utilization of the deceased's assets after their death. The institutions of inheritance law must therefore stimulate an individual to the active life and wealth creation. In this context, acquisition of the inheritance by the State should be the last resort, and the deciding importance in the inheritance law regulations should have the will of the testator. The exercise by them of the possibility to dispose *mortis causa* opens the door for them to prolong their earthly existence, and is a form of self-realization even after the death⁴¹. Thirdly, at drafting the inheritance provisions it is necessary to take into account the moral element of this phenomenon. The persons behaving negatively to the deceased and thus violating the moral standards should not be entitled to inheritance, as this would be contrary to the universal sense of justice. The legal system should create some mechanisms for the exclusion of such an entity from inheritance, even if they were appointed to inherit not by virtue of law, but by the will of the testator⁴². Moreover, the legal system should not allow for extinction (cessation) of the legal proprietary relations after the death of the testator. The termination of the civil liability on that

³⁹ See, for example, T. Frantzen, *Reforming the Norwegian Inheritance Act*, [in:] *Inheritance Law – Challenges and Reform...*, pp. 25-33.

⁴⁰ J. Gwiazdomorski, *Prawo spadkowe*, Warszawa 1959, p. 20.

⁴¹ M. Pazdan, [in:] *Green Paper. An Optimal Vision...*, p. 181.

⁴² See: A. Stelmachowski, *Zarys teorii prawa cywilnego*, Warszawa 1998, pp. 63 et seq.

moment does not seem to be morally correct. It is rather moral to continue this type of relationships, and to indicate a new entity responsible for the debts of the deceased. Otherwise, the death of the testator could pose a significant threat to the legal relations.

It should be emphasized that today's most estimated value among the relationships under inheritance law is considered the will of the testator⁴³. With the development of legislation on inheritance in the particular legal systems, one can observe a certain evolution of rules concerning the influence of the will of the testator on the mechanism of inheritance. At the initial stages of the law development in this area, the crucial importance had the statute. It was only later noticed that a will is an institution that allows the testator to settle certain tangible and intangible relations after their death in a manner adapted to the specific case. Hence, its role increased over the years, and with it, the powers of the testator increased in shaping the fate of their property *mortis causa*. Today these powers are in general terms referred to as the so-called freedom of testation. By the freedom of testation, one should understand the extent of the testator's powers in disposing of their assets in the event of death⁴⁴. It is a legally protected opportunity to implement some effective dispositions of the property upon death⁴⁵. This freedom is not arbitrary, however, because the legislators put it into the institutional framework. This generally means that the testator may dispose of their estate in the event of death but only if they do so by using the mechanisms provided for by law. It is therefore a piece of the will autonomy of private law entities and it boils down to the freedom of making such a legal act, which is a will, and to the possible inclusion in the will of different dispositions of the testator's assets that will be legally effective on the moment of their death⁴⁶. Moreover, this kind of freedom is a starting point for some further adjustments under inheritance law. In other words, modelling of inheritance law solutions should be started from designing the legislation on the freedom to dispose of the property upon death. Here, and especially for the widest possible implementation of the will of the testator, it is necessary, first of all, to think about the issue of the formal requirements, especially in the area concerning the forms of testamentary dispositions⁴⁷.

⁴³ See: R. Kerridge, *Freedom of Testation in England and Wales*, [in:] *The Law of Succession...*, pp. 131-153; A. Röthel, *Law of Succession and Testamentary Freedom in Germany*, [in:] *The Law of Succession...*, pp. 155-166; A.J. Hirsch, *Freedom of Testation/Freedom of Contract*, *Minnesota Law Review* 2011/95, pp. 2180-2253; E.G. Hosemann, *Protecting Freedom of Testation: A Proposal for Law Reform*, *University of Michigan Journal of Law Reform* 2014/47, pp. 420-466.

⁴⁴ Cf. B. Kordasiewicz, *Testamentowe dziedziczenie gospodarstw rolnych*, Warszawa 1978, p. 58.

⁴⁵ T. Kipp, H. Coing, *Erbrecht*, Tübingen 1990, p. 109.

⁴⁶ S. Wójcik, *Podstawy prawa cywilnego. Prawo spadkowe*, Warszawa 2002, p. 43.

⁴⁷ Cf. R. Zimmermann, *Testamentsformen: „Willkür” oder Ausdruck einer Rechtskultur?*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2012/76, pp. 473 et seq.

They are the ones that decide on the image of the regulation. The more freedom is given to the testator, the greater are the chances of the proper reflection of their will, but there is also a greater risk of an unfair interference in the will⁴⁸. Allowing the testator to use some simple instruments would enable them to shape the legal relations after their death in a manner corresponding to their will, which today should be the priority for the regulations of the inheritance law.

Another important thing is the area of protecting the closest to the deceased⁴⁹. Because the impact of inheritance law standards on the personal relations between people is undeniable, as one of the most important functions of inheritance law - in the non-pecuniary sphere - one generally mentions the function to protect the family of the deceased. In this way, one appreciates, on the one hand, the role of some family relations influencing certain behaviour of the future testator, and on the other hand, the need for the proper adjustment of the proprietary situation created because of their death to the personal relationships linking them with their family members⁵⁰. The deceased is usually in specific legal family relations with others and for this reason they may have had certain responsibilities, especially to their closest relatives and spouse. Therefore, some regulations of inheritance law must consider this. The point here is, first of all, the shape of statutory succession, as well as some possible solutions for defying the will of the testator. The conflict that may arise between the dispositions in the event of death, made by the testator, and the property protection of the persons close to them is also one of the biggest dilemmas of the contemporary legislators of inheritance law. Should the primacy be given to the last will of the deceased or should their close persons be protected at the expense of interfering with the freedom of testation? This substantial problem also affects the perception of the inheritance law system.

Moreover, the legislature must protect the creditors of the testator⁵¹. Some solutions of inheritance law need to touch the issue of inheritance debts and to indicate who and on what terms is responsible for them.

⁴⁸ Cf. M. Puelinx-Coene, *La protection des différents membres de la famille par le droit familial patrimonial en Europe*, *European Review of Private Law* 2004/2, pp.143-166.

⁴⁹ Cf., for example, J. Unger, *The Inheritance Act and the Family*, *Modern Law Review* 1943/12, pp. 215-228; W.F. Fratcher, *Protection of the Family Against Disinheritance in American Law*, *International and Comparative Law Quarterly* 1965/1, pp. 298-302; T. Rauscher, *Reformfragen des gesetzlichen Erb- und Pflichtteilsrechts*, Regensburg 1993, *passim*; J.-L. Renchon, *Le droit belge de la personne et de la famille: de l'indisponibilité à l'autodétermination?*, *European Review of Private Law* 2007/3, pp. 349-418; P. Księżak, *Zachowek w polskim prawie spadkowym*, Warszawa 2012, *passim*.

⁵⁰ Accordingly: J. Biernat, *Ochrona osób bliskich spadkodawcy w prawie spadkowym*, Toruń 2002, p. 11.

⁵¹ Cf. E. Macierzyńska-Franaszczyk, *Odpowiedzialność za długi spadkowe*, Warszawa 2014, pp.41 et seq.

Legal succession under the general title (and such is inheritance) requires indicating the successor, the person taking over all the rights and obligations of a financial character. Therefore, the lawmakers in the different national regulations determine the extent of the responsibility for inheritance debts, indicating the responsible entity. It is a source of some further conflicts of values, especially in a situation where the liability for inheritance debts results in the liability reaching beyond the inheritance estate. The European legislator, while designing its own solutions to inheritance law, will have to decide about this conflict as well.

All these dilemmas in the European context may be resolved only after finding some possible common characteristics of the individual national regulations, at least in the critical areas, deciding on the image of the inheritance law regulations. Among these areas, the most significant functions are played by the provisions relating to statutory succession and testamentary inheritance, the regulations concerning protection of the persons close to the testator in the event of their death, and usually the responsibility for inheritance debts. Finding a common denominator of these areas, together with the preliminary rules presented here and accepted by the various European legislators, is the first step on the road attempting to outline the principles of the possible harmonization of this area of law in the European Union⁵².

⁵² Cf. B.E. Reinhartz, *Recent Changes in the Law of Succession in the Netherlands: On the Road Towards a European Law of Succession?*, Electronic Journal of Comparative Law 2007/1, pp. 13-15.

Chapter 3.

The ability to harmonize regulations on intestate succession

3.1. Intestate succession – general comments

Inheritance or succession is presented in the doctrine as entering by an heir (or several heirs) in the legal situation of the testator, being the result of an individual's death, and it consists, particularly, in acquisition of property rights and obligations whose subject was the decedent¹. In other words, inheritance is a transfer of rights and obligations of the deceased natural person (the testator) to one or more persons (heirs). By inheritance, the heir acquires all the rights and obligations related to the inheritance estate, becoming in this way the general heir of the decedent². At the same time inherited are only the rights and obligations arising from the civil law relations, and thus having the character described by civil law³.

The grounds for inheritance (or more precisely - entitlement to inherit) are usually the will of a testator, generally expressed in the last will and testament or the applicable laws (this also depends on the possible recognition by the legislature of the so-called inheritance contracts and determination of their place in the system of law)⁴. Therefore, testamentary inheritance and intestate succession are

¹ See, for example, G.A. Pelletier Jr., M.R. Sonnenreich, *A Comparative Analysis of Civil Law Succession*, Villanova Law Review 1966/11, pp. 323 et seq.; F. Longchamps de Bérrier, *Law of Succession. Roman Legal Framework and Comparative Perspective*, Warszawa 2011, pp. 23 et seq.; G. Brambring, Ch. Mutter, *Erbrecht*, München 2014, pp. 1 et seq.

² A.-M. Leroyer, *Droit des successions*, Paris 2009, pp. 3 et seq.; F. Rainer, T. Helms, *Erbrecht*, München 2013, pp. 1 et seq.

³ Instead of many sources cf. M. Pazdan, [in:] *Kodeks cywilny. Komentarz*, Vol. II, ed. K. Pietrzykowski, Warszawa 2000, pp. 695 et seq.

⁴ Cf. J. St. Piątowski, H. Witczak, A. Kawalko, [in:] *System prawa prywatnego. Tom 10. Prawo spadkowe*, ed. B. Kordasiewicz, Warszawa 2013, pp. 148-151.

essentially distinguished. Intestate succession occurs when a person died intestate (left no valid will) or no person appointed in a will can or wants to inherit. In this case, the applicable law must precisely define and determine the circle of successors, the order, and the proportions of intestate succession. The laws governing intestate succession exist in all the countries in the world. Even the common law states, which are often referred to as countries where many legal areas are non-codified, have their statutory regulations relating to intestate succession⁵. Thus, the order of succession results from the law in the event when the decedent left no will or when there is no inheritance because of other reasons. The rules governing the principles of intestate succession are therefore of a dispositional character. As a principle, they only apply in the absence of a valid will⁶.

The rules of intestate succession are constructed in different ways based on own legal traditions of a given state and on various rules to which different legal systems assign different weight and importance⁷. Thus, the criteria that guide individual legislators are different in this respect. Hence, also in this respect domestic laws are different⁸. However, the differences are not significant. Without going into a deep analysis, and only after a superficial examination of the case, it can be assumed that usually such a statutory entitlement to inheritance results in the first place from family relationships based on kinship or legal ties of a family character (marriage, adoption). This is because - as indicated in Poland by J. Wierciński - the institutions of inheritance law, in the hands of a conscious and determined lawmaker, serve effectively to achieve and secure the designed objectives, desirable from the viewpoint of the public order. Although these objectives were various historically, today, one of the fundamental objectives of the inheritance law regulations is strengthening and bonding the family ties. These rules are indeed shaped in such a way as to reflect how people tend to act, in order to secure their families in the event of their death by making a will. This is linked with the principle that the rules of intestate succession should be broadly accepted socially. They should establish a fair and rational system that adequately reflects the views of the majority of the society. They are to act as a kind of a safety net for those who, for one reason or another, have not drafted their last will⁹. Because of the fact that the family is the basic unit of the society today, no one can be surprised that intestate

⁵ See C.H. Sherrin, R.C. Bonehill, *The Law and Practice...*, pp. 4 et seq.

⁶ S.L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, Harvard Law Review 2006/119, pp. 966 et seq.; A.J. Hirsch, *Incomplete Wills*, Michigan Law Review 2013/111, pp. 1424 et seq.

⁷ Cf. A. Verbeke, Y.H. Leleu, *Harmonisation of the Law of Succession...*, pp. 465-466.

⁸ Cf. *International Succession...*, *passim*.

⁹ J. Wierciński, *Uwagi o teoretycznych założeniach dziedziczenia ustawowego*, Studia Prawa Prywatnego 2009/2, pp. 81 et seq.

succession usually involves the entitlement of someone from the deceased's family circles to inherit¹⁰. In this way, the legislators adapt intestate succession to the typical situations often corresponding to the wishes of the statistical testator, and in this way, the latter may not want to draw up their last will. If the circle of intestate successors suits a given testator then there is no reason to make a will, whose contents would be equal to the statutory provisions.

Therefore, the impact of the inheritance law norms on personal relations between people is unmistakable. One of the most important functions of inheritance law - in the non-financial sphere - is generally referred to as the function to protect the family of the deceased¹¹. In this way is appreciated, on the one hand, the role of family relations affecting certain behaviour of future testators, and on the other hand, the need for proper adjustment of the proprietary situation, created as the result of their death, to the personal relationships linking them with the family members¹². In fact, the testator generally remains with others in some specific family relations regulated by law, and for this reason, they may have certain responsibilities, especially to their closest relatives and spouse. The provisions of inheritance law shape, however, the economic and personal situation of not only those persons connected with the testator with ties of kinship, marriage or adoption, thus the ties of the family character, but also with entities that remain with the testator in some specific close personal relations, which do not have such a character¹³. As the doctrine shows, the feature of such relationships is a spiritual, emotional, and personal community, with a considerable degree of intensity, and it may be based on different kinds of circumstances (kinship, marriage, affinity, concubinage, engagement, adoption, love, friendship, companionship, cohabitation, liking, etc.)¹⁴. Thus, a person who is joined with the testator by such a relationship should be considered as a person close to them. The interest protection of those persons and their consequential rights is considered by some writers as a natural thing¹⁵. During the lifetime of the testator, the protection is executed by the institutions of the family law (e.g., alimentation). However, after their death, certain functions in this area can be performed by inheritance law. A specific role in this field is played by the regulations concerning intestate succession.

¹⁰ Cf. A. Dyoniak, *Ochrona rodziny w razie śmierci jednego z małżonków*, Warszawa-Poznań 1990, pp. 19 et seq.

¹¹ M. Załucki, *Wydzielnictwo*..., pp. 299 et seq.

¹² Cf. J. Biernat, *Ochrona*..., p. 11.

¹³ S. Wójcik, *Ochrona interesów jednostki w polskim prawie spadkowym w zakresie powołania do dziedziczenia*, Zeszytu Naukowe Uniwersytetu Jagiellońskiego. Prace Prawnicze 1981/98, p. 175.

¹⁴ Cf. J. Biernat who analyzes comprehensively individual criteria to recognize a given person as a close one under inheritance law ([in:] *Ochrona*..., pp. 20 et seq.).

¹⁵ Cf. J. Beckert, *Inherited Wealth*, Princeton 2008, pp. 8 et seq.

The rules relating to disposing of property by virtue of law are associated with a particular situation in which the inheritance property is after the testator's death. In the absence of a disposition of the property upon death, it is necessary to establish a statutory mechanism for the transition of all rights and obligations of the deceased individual to their successors¹⁶. It must therefore follow from the law who acquires what and on what grounds. Here, legal succession is important because the ownership does not expire with the death of an individual, and debts incurred by that person do not usually expire either¹⁷. Thus the function of the rules of intestate succession is to find the optimal circle of successors, socially acceptable, not only in terms of "what one should get", but also in terms of "who is responsible for what". Therefore, the legal regulation cannot be arbitrary in this respect. It has been seen by individual legislators who, since the ancient times, have introduced regulations on intestate succession to their legal systems. The ancient solutions did not differ so much from today's regulations¹⁸. Besides, even when the succession followed on the grounds of customary law, the rules did not differ significantly from those of today. Hence, one cannot say that in the 21st century there is a need for any sudden metamorphosis of the intestate succession rules. In addition, despite the fact that since the ancient times, some legal systems in Europe have developed in other directions than the remaining ones, it may seem *prima facie* that bringing the principles of intestate succession to a common denominator will not be necessarily difficult. As one can believe, it is extremely desirable, if only due to the increased and ever increasing migration of the population¹⁹. Today, the family of a Polish citizen who dies abroad should not be surprised by the regulations of intestate succession, for instance, in the Netherlands, especially in a situation where Dutch law, because of the provisions of the EU Succession Regulation No. 650/2012, can be applied to the succession case of a Pole deceased in that country after 17 August 2015. As the result of the legal provisions of the regulation, the rules regulating intestate succession will be a little refreshed, in the sense that they will no longer be exclusively a national domain, but they will be applied in cases of cross-border inheritance by foreign courts or for the regulation of legal relations of foreign citizens²⁰. Therefore, it is necessary today to examine the principles that govern the evolution of intestate successors' circles in particular countries of the European Union, and to answer the question whether social, cultural, or economic differences are so far apart that they constitute an obstacle to the unification of inheritance law in this area.

¹⁶ See A. J. Hirsch, *Default Rules in Inheritance Law – A Problem in Search of its Context*, Fordham Law Review 2004/73, pp. 1031-1131.

¹⁷ Ch. Jubault, *Droit civil. Les successions. Les libéralités*, Paris 2010, pp. 2 et seq.

¹⁸ D. Guével, *Droit des succession et des libéralités*, Paris 2009, pp. 17 et seq.

¹⁹ Cf. J. Harris, *The Proposed EU Regulation...*, pp. 181-235.

²⁰ See, for example, J.G. Miller, *International Aspects of Succession*, Aldershot 2000, *passim*.

3.2. Selected theoretical concepts

Theoretically, it should be noted that the doctrine of individual countries identifies three main concepts to justify the construction of the rules for intestate succession²¹. The first concept, referred to as the concept of the implied will of the testator is based on the assumption that the rules of intestate succession lead to the disposition of the assets of the deceased in accordance with their normal desires, and thus they realize their alleged wishes in this regard. The second concept, of the so-called obligation, is not based on the search for what was the real intention of the testator, but rather on the study what it should be, and therefore on the belief that members of the immediate family of the deceased, i.e. the spouse and some relatives, are in a sense the “natural heirs”. In turn, the third concept is called the concept of the public interest, according to which inheritance should serve the public interest, to protect family members financially dependent on the deceased, to develop relationships within the immediate family, and not to lead to squandering of wealth but to encourage its collection²².

Despite the apparent differences, these approaches often lead to the same conclusions, at least in the most common situations. The content of the obligation seems to be settled by the social sense of fairness, which usually coincides with the typically implied will of the testator²³. However, if the results of these concepts were to be different, the choice of the concept by the legislature should reflect the international and constitutional guidelines regarding inheritance law. Hence, the theory of the implied will of the testator seems to be the most tempting²⁴. The point here is the distribution of an individual's property, and the decisive importance should have what they want, and not what is expected of them, or what satisfies broader social needs. These other values can be protected by inheritance law with other instruments. In turn, the implied will of the testator, in a typical situation, must lead to the protection of the testator's closest persons in the event of their death²⁵.

Hence, from a theoretical point of view, one can attempt a thesis, even without a closer and detailed analysis of the normative acts of the individual EU countries that the current regulations of inheritance law in these countries in terms

²¹ For example, these concepts are presented in detail in the Polish reference books, for example, by J. Wierciński, [in:] *Uwagi o teoretycznych...*, pp. 81 et seq.

²² See, for example, J. G. Fleming, *Changing Functions of Succession Laws*, American Journal of Comparative Law 1978/2, pp.233-238; A. J. Hirsch, *Default Rules in Inheritance Law...*, pp. 1 et seq.; F.H. Foster, *Should Pets Inherit?*, University of Florida Law Review 2011/4, pp. 802-855.

²³ J. Wierciński, *Uwagi o teoretycznych...*, pp. 88 et seq.

²⁴ C.H. Sherrin, R.C. Bonehill, *The Law and Practice...*, pp. 4 et seq.

²⁵ See, for example, The Law Commission for England and Wales, *Intestacy and Family Provision Claims on Death. A Consultation Paper*, London 2009, *passim*.

of intestate succession should be used primarily for strengthening the bonds between the closest persons. This is reflected even in the fact that generally, the rules governing inheritance law in the Member States give primacy in the order of succession to the deceased's children. An important role is also played by the spouse of the deceased, which *prima facie* leads to the conclusion that the category that plays the most important role in determining the intestate successors' circle is the family²⁶. In addition, as far as the concept of family is generally not defined in law of the individual countries and may be understood differently, it seems that for the regulation of inheritance law, one can assume that the family is the smallest social unit, after an individual. Its character, size, and the role that it plays, may be different in different societies²⁷. In many cultures, the family is based on the marriage bond, which was also reflected in some regulations of inheritance law. Only the person who is married to the testator at the time of their death is a potential heir²⁸. It should be noted, however, that there are also societies in which the marriage or another relationship, but treated as a marriage, consists of more than two persons, especially where there is a strong tradition of the extended family²⁹. Thus, in inheritance law the concept of "a close relative", already mentioned, is rather used³⁰. They are the people with whom the testator was linked in a special personal relationship. It is primarily among them that the legislator should seek "candidates" for intestate successors³¹. Of course a separate group of potential intestate successors - in many legal systems - consists now of other persons,³² especially, more distant descendants of the deceased, the deceased's parents and siblings, and descendants of the siblings, which is understandable not only because of blood ties, but also because in case of testamentary dispositions these persons

²⁶ See the concepts presented by A. Alstott, [in:] *Family Values and the Law of Inheritance*, Socioeconomic Review 2009/7, pp. 145 et seq. (reviewing the book of J. Beckert, *Inherited Wealth*, Princeton 2008).

²⁷ Cf. K. Boele-Woelki, *The Principles of European Family Law: Its Aims and Prospect*, Utrecht Law Review 2005/2, pp. 160 et seq.

²⁸ Cf. F. Burns, *Surviving Spouses, Surviving Children and the Reform of Total Intestacy Law in England and Scotland: Past, Present and Future*, Legal Studies 2013/1, pp.86-118.

²⁹ Cf. J. Mee, *A Critique of the Law Reform Commission's Consultation Paper on the Rights and Duties of Cohabitees*, Irish Jurist 2004, pp. 74 et seq.; Y. Olakulehin Abubakri, *Women and Intestate Succession in Islamic Law*, Lagos 2008, pp. 16 et seq.; J. Mee, *Succession and the Civil Partnership Bill 2009*, Conveyancing and Property Law Journal 2009/14, pp. 86-88; B. Sloan, *The Concept of Coupledness in Succession Law*, Cambridge Law Journal 2011/3, pp. 623-648

³⁰ Cf. W. Reimann, *Familienerbrecht und Testierfreiheit in deutschen Recht*, [in:] *Familienerbrecht und Testierfreiheit...*, pp. 42 et seq; J. Biernat, *Ochrona osób bliskich...*, pp. 11 et seq.

³¹ Cf. L.M. Friedman, *The Law of Succession in Social Perspective*, [in:] *Death, Taxes and Family Property*, ed. E.C. Halbach, Jr., St. Paul 1977, pp. 9 et seq.

³² Cf. T. Kipp, H. Coing, *Erbrecht*, p. 38; S. Buchholz, *Gestaltungsprobleme des Ehegattenerbrechts: Teilungsprinzip oder Nutzungsprinzip*, Monatschrift für Deutsches Recht 1990, p. 375.

are often appointed for inheritance by the will of the testator³³. Omitting them in the statute would certainly be inappropriate and not conducive to the purpose, which is to ensure the best possible utilization of the assets of the deceased after their death. The inclusion of other individuals - such as adoptees, justifies the need for a comprehensive look at inheritance law, i.e., against the background of other regulations, especially those relating to family law³⁴.

Various laws in this regard are based on the combination of proprietary relations of the testator with their family situation. Many writers therefore regard intestate succession as a guarantee of a private estate transfer and leaving the property in private hands³⁵. Linking of the assets concept with the institution of the family leads to a conclusion that the most appropriate (and perhaps the fairest?) form of the property transfer upon death is to transfer it within the family³⁶. The closest persons in a typical situation are the family members and - as sociological research has frequently shown - usually every man would like to transfer their assets to those people³⁷. Thus, the testator as if takes care of people close to them and provides them with some means of existence. Thus, the economic functioning of the people close to the deceased after their death is one of the values that the provisions of intestate succession should take into account³⁸. Different things are in fact regulations related to social security, burdening the State, and different are the regulations under civil law, chargeable on assets of an individual. In contrast, a detailed implementation of this type of protection, i.e. the protection *mortis causa*, depends only on the concept of a given legislator. This idea, of course, may be different; there are systems where, for example, the role of the spouse is weaker than in others³⁹; there are also some solutions that will close the circle of successors relatively quickly, so that the State should acquire an estate just after close persons⁴⁰. Regardless of the present trends in individual countries, already at this point, and therefore somewhat anticipating, one can conclude that the link between inheritance law and intestate succession as well as family law is unquestion-

³³ Cf. M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, University of California Davis Law Review 1989/22, pp. 917 et seq.

³⁴ Cf. M. Puelinckx-Coene, *La protection de differents...*, pp. 145 et seq.

³⁵ See, for example, J. Unger, *The Inheritance Act...*, pp. 216 et seq.

³⁶ Cf. F. Gschnitzer, *Österreichisches Erbrecht*, Wien-New York 1983, pp. 2-3; D. Leipold, *Erbrecht*, Tübingen 2010, p. 35.

³⁷ See, however, D. Monk, *Sexuality and Succession Law: Beyond Formal Equality*, Feminist Legal Studies 2011/19, pp. 231-250.

³⁸ M. Załucki, *Wydziedziczenie...*, pp. 453 et seq.

³⁹ U. Liin, *Laws of Succession in Europe and Estonia: How We Got to Where We Are and Where We Should Be Heading*, Juridica International 2001/6, pp. 119-124.

⁴⁰ Cf. A.M. Bell-Macdonald, *French Laws of Succession*, International and Comparative Law Quarterly 1958/2, p. 418.

able, and the form of the regulations of inheritance law is usually determined by the relationships under family law⁴¹. Thus, despite possible differences, looking at inheritance law in the individual European countries one can also see common characteristics. The most important feature of the inheritance law regulations is the protection of the family, which of course can be and is being implemented in different ways, using different instruments⁴². One of these instruments, but of far-reaching importance, is regulations on intestate succession. Individual persons under the statute acquire an estate only if they meet the conditions set out in the statute. An intestate successor is thus the person who has been designated by law and belongs to the successors appointed in a given order. This is now the undisputed rule for the legal regulations of the contemporary states.

3.3. Normative foundations

The acts that currently regulate in various European countries the issues of intestate succession are primarily civil codes. They regulate particularly the circle of successors and the order of their appointment. It is generally accepted that this matter is appropriate for each national legal system and that the European law should not interfere in the national systems. This view is often justified by the cultural and social differences, and the legal traditions of each country. Without going into details, I believe, however, that without a detailed sociological study one cannot clearly disqualify attempts to find a common denominator of all the regulations, especially since - as already mentioned - different legal systems protect by means of the intestate succession regulations primarily one value - the family life. Therefore, below are presented the legal regulations of some selected European countries relating to intestate succession.

Looking at the outlined issue from the perspective of Polish law it must be indicated that, according to the applicable regulations (Articles 931-935 of the Civil Code⁴³), as the first in the entitlement to inherit an estate are the children of the deceased (or more distant descendants) and the spouse of the deceased. In the absence of the testator's descendants, the spouse and the parents are entitled as the second to inherit the estate. If one of the parents of the deceased did not reach the opening of the inheritance, the share of the inheritance that would have fallen to them, falls to the siblings of the deceased. If any of the siblings of the deceased did not reach the opening of the inheritance, leaving their descendants, the share

⁴¹ Cf. N. Papantoniou, *Die soziale Funktion des Erbrechts*, Archiv für die Civilistische Praxis 1973/173, p. 399.

⁴² P. Księżak, *Zachowek...*, pp. 25-40.

⁴³ See W. Borysiak, [in:] *Kodeks cywilny. Komentarz*, t. 3: *Spadki*, ed. K. Osajda, Warszawa 2013, pp. 157-194.

of the inheritance, which would have fallen to them, falls to their descendants. In the third order, in the absence of the descendants, the spouse, the parents, the siblings and the descendants of the siblings of the deceased, all the estate falls to the grandparents of the deceased. If any of the grandparents of the deceased did not reach the opening of the inheritance, the share of the inheritance that would have fallen to them, falls to their descendants. In the fourth order, in the absence of the spouse of the deceased and their relatives entitled to inherit by intestate succession, the estate falls to the stepchildren of the deceased. In the fifth order, in the absence of the spouse of the deceased, their relatives and the children of the deceased's spouse, entitled to inherit under the statute, the estate falls to the municipality of the last residence of the deceased as the intestate successor. If the last residence of the deceased in the Republic of Poland cannot be determined or the last place of residence of the deceased was abroad, the estate falls to the State Treasury as the intestate successor⁴⁴.

The rules of succession are not complicated. The successors are entitled to inherit in an order of succession; each group follows in a sequence. The spouse and the children in the first group inherit in equal parts. However, the part attributable to the spouse cannot be smaller than a quarter of the entire estate. If the child of the deceased did not reach the opening of the inheritance, the share of the inheritance that would have fallen to them, falls to their children in equal parts. This rule is applicable to the more distant descendants respectively (Art. 931). In the second group of succession, the share of each parent, who inherits jointly with the spouse of the deceased, is a quarter of the entire estate. If the father's paternity was not established, the succession share of the deceased's mother, inheriting jointly with their spouse, is half of the estate. In the absence of the descendants and the spouse of the deceased, the entire estate falls to their parents in equal parts. However, if one of the parents of the deceased did not reach the opening of the inheritance, the share of the inheritance that would have fallen to them, falls to the siblings of the deceased in equal parts. If any of the siblings of the deceased did not reach the opening of the inheritance, leaving some descendants, the share of inheritance that would have fallen to them, falls to their descendants. The division of this share takes place according to the rules that apply to the division between the more distant descendants of the deceased. The share of the surviving spouse who inherits jointly with the parents, the siblings and the descendants of the siblings of the deceased, is half of the estate. In the absence of the descendants of the deceased, their parents, siblings and their descendants, the entire estate falls to the surviving spouse of the deceased (Art. 932, 933). If one of the parents did not reach the opening of the inheritance and there are no siblings of the deceased or their descendants, the inheritance share

⁴⁴ Instead of many sources cf. M. Załucki, [in:] *Podstawy prawa cywilnego z umowami w administracji*, eds. P. Stec, M. Załucki, Warszawa 2011, pp. 343-348.

of the parent inheriting jointly with the spouse of the deceased is half of the estate. The grandparents of the deceased entitled to inherit in the third group of succession inherit the estate in equal parts. However, if any of the grandparents of the deceased did not reach the opening of the inheritance, the share of inheritance, which would have fallen to them, falls to their descendants. In this way, the inheritance comes to uncles and aunts of the deceased. The division of this share takes place according to the rules that apply to the division between the descendants of the deceased. In the absence of descendants of the grandparent who did not live to see the opening of the inheritance, the share of the estate, which would have fallen to them, falls to other grandparents in equal shares (Article 934). Stepchildren can inherit in the absence of the spouse of the deceased and the relatives entitled to inherit by law, if neither of their parents reached the time of the inheritance opening (Art. 934¹). At the very end, in the absence of other intestate successors, the estate falls to the municipality of the last residence of the deceased as the intestate successor. If the last residence of the deceased in the Republic of Poland cannot be determined or the last place of residence of the deceased was abroad, the estate falls to the State Treasury as the intestate successor (Art. 935)⁴⁵.

Such a regulation is undoubtedly to protect the family⁴⁶. The circle of the successors is in fact very wide, not often found in other systems. Law in principle does not restrict the blood ties, which are the basis for the qualification of a person to the circle of the successors. Thus, even the most distant relatives can be entitled to inherit. An important role is also played by the spouse, whose position is not dependent on the length of the marriage, but only on the fact whether at the time of the decedent's death they remained married to them. Anyway, in this respect Polish law provides for an interesting solution. According to Art. 940 of the Civil Code, the spouse is excluded from inheritance if the deceased requested the divorce or separation due to the spouse's guilt, and the claim was justified. Such an exclusion of the spouse from inheritance follows a ruling by the court. Each of the other successors entitled to inherit jointly with the spouse may require the exclusions. The reasonable time limit for filing of an action is six months from the date on which the successor heard about the opening of the inheritance, but not later than one year from the inheritance opening. This solution is associated with another regulation of Polish law according to which an action for divorce or separation initiated by one of the spouses during the life of another, in case of the death of one of them is discontinued, if not completed before that moment (Art. 446 of the Code of Civil Procedure)⁴⁷. The fact that such action was pending at

⁴⁵ *Ibidem*.

⁴⁶ J.S. Piąkowski, H. Witczak, A. Kawalko, [in:] *System prawa prywatnego...*, pp. 187-265.

⁴⁷ T. Żyżnowski, [in:] *Kodeks postępowania cywilnego. Komentarz do artykułów 367-729*, Vol. II, eds. A. Marciniak, K. Piasecki, Warszawa 2014, *passim*.

the time of the testator's death, however, does not remain inert and may have just an impact on the order of succession after them, although formally the marriage at the time of the inheritance opening exists. The legislature foresaw a possibility of a sanction in the form of exemption of the surviving spouse to inherit if the testator petitioned before their death for the divorce or separation due to their spouse's guilt, and such a request was justified. This provision thus contains derogation from the rule expressed in Art. 931 § 1 of the Civil Code, according to which the entitlement of a spouse to inherit by law is subject to the formal existence of the marriage with the testator at the time of their death. At the core of the provisions of Art. 940 of the Civil Code is an assumption that inheritance should be barred to a spouse who was at fault with respect to the deceased and they would not have inherited after them, but a judgment of divorce due to their guilt could not be decreed because of the deceased's death. In this way, intestate succession gains a moral element, present in all inheritance law, for example, in the context of the regulations related to unworthiness of inheritance or disinheritance⁴⁸.

The Polish regulation of intestate succession is therefore based on two basic grounds for the entitlement: kinship and marriage. It is a guarantee that the assets should remain in private hands, and it can be assessed as serving creation of wealth, mobilizing to its collection. However, not without reservations, it is based on the concept of the implied wish of the testator⁴⁹. It is therefore to express a hypothetical will of the latter. The testator knowing how the legal order of succession is shaped, may judge it to be in accordance with their will, and consciously give up making the last will and testament.

Also in German law, intestate succession is based primarily on two grounds of the entitlement to inherit kinship: (§ 1924-1929 of BGB) and marriage (§ 1931-1934 of BGB)⁵⁰. The order of intestate succession is oriented to common intentions of the testator, imaged by the average life situations regarding the succession cases⁵¹. It results from the inheritance system contained in the German Civil Code that the first entitled persons are the spouse and then the close relatives, and it can be concluded from this that the German legislature gives priority to personal relationships of the decedent with their successors. According to the German Civil Code, the surviving spouse is entitled to one-quarter of the inheritance if there are heirs of the first order living and is entitled to one-half of the inheritance if there are heirs of the second order or grandparents living. Furthermore, when descend-

⁴⁸ Cf. H. Witczak, *Przyczyny niegodności dziedziczenia (uwagi dotyczące art. 928 § 1 kc)*, Studia Prawnicze KUL 2008/1, p. 80.

⁴⁹ Cf. W. Żukowski, *Projektowana nowelizacja przepisów regulujących dziedziczenie ustawowe*, Kwartalnik Prawa Prywatnego 2008/1, pp. 269 et seq.

⁵⁰ W. Schlüter, *Erbrecht*, München 2007, pp. 1 et seq.

⁵¹ D. Solomon, *The Law of Succession*, [in:] *Introduction to German Law*, eds. M. Reimann, J. Zekoll, The Hague 2005, pp. 271 et seq.

ants of a grandparent would take a share in accordance with the provisions of Art. 1926 of BGB, the surviving spouse will take that share. In the absence of heirs of the first or second order or the grandparents, the surviving spouse takes the entire inheritance (Art. 1931 of BGB). The mentioned order of succession is determined in accordance with the heirs' blood ties with the deceased as follows: Heirs of the first order comprise direct descendants of the deceased. A descendant who is living when succession occurs will exclude from the succession those descendants who are related to the deceased through them. If this descendant is no longer living at the time that the succession takes place, those descendants who are related to the deceased through them will take in their place (succession *per stirpes*) (Art. 1924 of BGB). Children will take in equal measures. Heirs of the second order comprise the parents of the deceased and their descendants (brothers and sisters, including half-siblings, nephews and nieces and their children). If the parents are alive when succession takes place, they alone will succeed in equal measures. If the father or the mother is no longer alive when the succession takes place, their descendants will take in their place in accordance with the provisions applicable to the succession of heirs of the first order. If the deceased parent does not leave any descendants, the surviving parent alone will succeed (Art. 1925 of BGB). Heirs of the third order comprise the grandparents of the deceased and their descendants (uncles and aunts, cousins, etc.). If the grandparents are alive when succession occurs, they alone will take in equal shares. (Art. 1926 of BGB). Heirs of the fourth order comprise the great-grandparents of the deceased and their descendants (Art. 1928 of BGB). Heirs of the fifth order and of subsequent orders comprise ancestors that are more distant and their descendants (Art. 1929 of BGB). In theory, the principle of blood-related succession continues infinitely from the closest to the most distant relative. However, from the fourth order onwards, the surviving spouse's (or civil partner's) right supersedes any right to inherit as relative (Art. 1931 II of BGB)⁵².

As it can be seen - in the light of the regulation - the rule is that close personal contacts generally exist between the testator and the closest members of their family (the spouse, the children, the grandchildren, the parents), which also result in specific obligations to provide support. With these personal ties also go hand in hand economic ties. In most cases, the testator did not create the left property by themselves; the spouse also contributed to its creation either by cooperation or by conducting the household or raising children. Parents also contribute to the proprietary development of their children through their financial support, and raising or enabling education. In many life situations, children support their parents after the end of their education. These arguments had - according to some commentators - a decisive influence on the shape of intestate succession in Germany

⁵² D. Olzen, *Erbrecht*, Berlin 2005, pp. 1 et seq.; M. Rudolf, R. Redig, U. Stehlin, *Erbrecht*, Köln 2003, pp. 19 et seq.; F. Rainer, T. Helms, *Erbrecht*, pp. 1 et seq.

and in this context, one should evaluate the freedom of testation and its possible limitations. This shows that the German system of inheritance is thought to protect the family⁵³. The estate left by the deceased whose creation and expansion occurred due to the contribution of the closest circle around them, is, in principle, to remain in the family and to provide the economic existence for its members. Nevertheless, there are voices in that doctrine questioning the above motives, indicating that the social function of inheritance law has changed for the last hundred years, so the guideline to preserve the assets in the family is not valid any longer and derogations from it can emerge. It could be supported, for instance, by an admission of some solutions in which intestate succession need not be within the family of the deceased. And although German law has not incorporated this idea yet into a new circle of intestate successors, one must indicate that non-statutory inheritance using a will or a contract of inheritance enjoys great popularity in Germany and, therefore, due to the social needs there is a noticeable rapprochement of lawyers to liberalization of the rules on any proprietary disposals of the testator in the event of their death. An argument is indicated, among others, that the modern life expectancy has been extended in relation to the time when the BGB was created, and therefore at the death of their parents the descendants are generally independent on them financially, which makes it no longer necessary to protect the interests of those persons by an extensive system of legitim or other payments (such as maintenance) to the heirs-at-law⁵⁴. That is why now one can observe a tendency to interpret the existing legislation in the spirit of facilitating free testation. This is reflected, among others, in the view of the Federal Constitutional Court, expressed in its judgment of 19 April 2005 (in the joined cases 1 BvR 1644/00 and 1 BvR 188/03), which indicated that legitim is not subject to a constitutional protection, therefore, it is for the legislature to decide whether such an institution should be maintained in the applicable regulations⁵⁵. This is of importance to intestate succession in so much that it justifies its treatment rather in terms of the complementary system to testamentary inheritance than *vice versa*.

In other countries of the Germanic circle, the rules of intestate succession are slightly different. In Austria the parental system of intestate succession is bind-

⁵³ W. Edenhofer, [in:] P. Bassenge, G. Brudermüller, U. Diederichsen, W. Edenhofer, J. Ellenberger, Ch. Grüneberg, H. Heinrichs, A. Heldrich, H. Sprau, W. Weidenkaff, *Palandt Bürgerliches Gesetzbuch*, München 2008, p. 2118; A. Dutta, *The Legal Protection of the Surviving Spouse – German Law in Comparative Perspective*, [in:] *Inheritance Law...*, pp. 35-50; N. Dethloff, *The Protection of Children in German Inheritance Law*, [in:] *Inheritance Law...*, pp. 97-104.

⁵⁴ Cf. G. Schiemann, *Die Renaissance des Erbrechts*, Zeitschrift für Erbrecht und Vermögensnachfolge 1995, pp. 197-201.

⁵⁵ Cf. F. Wall, *Das Valutaverhältnis des Vertrags zugunsten Dritter auf den Todesfall – ein Forderungsvermächtnis*, Tübingen 2010, pp. 485-489.

ing (§ 731 et seq. of ABGB)⁵⁶, which means that the potential successors are divided into four groups of succession: 1) the first group consists of the deceased's children and their descendants; 2) the second group consists of the deceased's parents and their descendants; 3) the third group consists of the grandparents and their descendants; 4) the fourth group are the great-grandparents⁵⁷. The successors from different succession groups are entitled to inherit according to the principle of "one by one". Thus, the closer group precludes participation of a further group. The spouse does not belong to the parental system. Their right to inheritance exists beside the right of the relatives (§ 757 of ABGB). The inheritance share of the spouse is dependent on which of the above groups they inherit jointly. If the inheritance is jointly with the deceased's children and their descendants, the inheritance share of the spouse is a third. If they inherit jointly with the deceased's parents and their descendants, the spouse receives two thirds. If they inherit jointly with the deceased's grandparents, their share is also two thirds⁵⁸. Also, the statutory order of inheritance in Switzerland, which admittedly does not belong to the European Union, but its civil code is a common point of reference in the study of comparative law, and is based on the principle of the entitlement to inherit by the family - assuming, however, that the term "family" also means in this regard the children born out of wedlock, the adopted children and their descendants⁵⁹. At the time of replacement of inheritance law at the level of cantons by ZGB, the legislature had to choose between the class system, existing mainly in the western cantons of Switzerland, and the parental system prevalent in the German-speaking part. In ZGB, it was decided to introduce the parental system. In this way, three groups of succession were identified: 1) the first group is the descendants of the deceased; 2) the second group is the parents of the deceased and all their descendants; 3) the third group consists of the grandparents of the deceased and their descendants⁶⁰. People from more distant groups may become intestate successors, if none of the persons belonging to a closer group is a successor. The spouse inherits jointly with persons belonging to a given group. The type of the group decides on the size of their share of the inheritance (Art. 462 of ZGB). In a situation where the deceased leaves no surviving spouse or relatives entitled to inherit the inheritance goes to the canton in which the testator

⁵⁶ N. Foster, *Austrian Legal System & Laws*, London-Sydney-Portland 2003, pp. 1 et seq.

⁵⁷ S. Ferrari, *Familienerbrecht und Testierfreiheit in Österreich*, [in:] *Familienerbrecht und Testierfreiheit...*, p. 174.

⁵⁸ Cf. R. Welser, [in:] *Kommentar zum Allgemeinem bürgerlichen Gesetzbuch*, ed. P. Rummel, Wien 2000, pp. 800 et seq.

⁵⁹ P. Tuor, B. Schnyder, *Das schweizerische Zivilgesetzbuch*, Zürich 1986, pp. 1 et seq.

⁶⁰ H. Hausheer, R. Aebi-Müller, *Familienerbrecht und Testierfreiheit in der Schweiz*, [w:] *Familienerbrecht und Testierfreiheit...*, pp. 215-216.

had the last place of residence or to the municipality which, in accordance with the legislation of the canton will be determined as authorized to receive it (Art. 466 of ZGB). These rules have been binding since 1988, when ZGB was amended in terms of inheritance. In this regulation, the Swiss doctrine draws attention to the fact that the intention of the legislature was possibly far-reaching favouring of the surviving spouse in relation to other successors, which was to reflect the prevailing need among the public⁶¹.

Similar solutions have been adopted by the new Romanian Civil Code. The law, by Art. 963 of the new Civil Code, shows that the inheritance is due, in the order and according to the rules set by the Code, to the surviving spouse and to the relatives, namely offspring, ancestors and collaterals, where applicable. The offspring and ancestors are entitled to the inheritance, regardless of their kinship to the deceased person; and the collaterals, only to the fourth degree inclusively. In the absence of legal or testamentary heirs, the deceased person's patrimony shall be transmitted to the village, city or, where applicable, to the municipality in whose jurisdiction the assets were located, on the legacy opening date. According to Art. 964 of the new Civil Code, the deceased person's relatives succeed to the legacy as follows: first class - offspring; second class - privileged ancestors and privileged collaterals; third class - ordinary ancestors and fourth class - ordinary collaterals. Likewise, apart from the four classes of heirs, according to Art. 970 of the new Civil Code, the surviving spouse inherits the deceased spouse's legacy if, on the inheritance opening date, there was no final divorce judgement; and, in line with Art. 971 of the new Civil Code, the surviving spouse is called for inheritance, in competition with any class of legal heirs; and, either in the absence of heirs from the four aforementioned legal classes, or, if they do not want or cannot succeed to inheritance, the surviving spouse collects the entire succession⁶².

Very interesting solutions have also been adopted in the new Czech Civil Code. The first class of heirs, according to the new Czech Civil code (§1635), are the children and the surviving spouse of the deceased, each of them inherits equally. In the absence of an offspring, the second class of heirs inherits. It is composed of the surviving spouse, the deceased parents, and those who lived with the deceased for at least one year before their death in the same household and who for this reason, cared for the common household or were dependent on the deceased. The third class of heirs is the deceased's siblings and those who lived with the deceased for at least one year before their death in the same household and who for this reason, cared for the common household or were dependent on

⁶¹ Cf. E. Bucher, [in:] *Introduction to Swiss Law*, eds. F. Dessemonet, T. Ansay, The Hague-Boston-London 2004, pp. 107 et seq.

⁶² See C. Dinu, I. Bărsan, *Succession Problems in the Context of the New Civil Code and in International Private Law Relations*, Bulletin of the Transilvania University of Brasov, Series VII: Social Sciences and Law 2014/1, pp. 70-71.

the deceased. The fourth class of heirs is the deceased's grandparents. The fifth and sixth classes include other relatives. Attention is drawn primarily to mentioning as heirs of the people who lived with the deceased for at least one year before their death in the same household.

In turn, in the new Hungarian Civil Code (Art. 7:55-7:66), in the first place to inherit are the descendants and the surviving spouse of the deceased. Further, the parents and their descendants inherit, then the grandparents and their descendants and other relatives. The new Hungarian law is, therefore, a traditional solution concerning the statutory succession and is based on two main titles of statutory succession: kinship and marriage.

Extremely interesting are the rules of intestate succession contained in Dutch law⁶³. In that law, the belonging to a group of intestate successors is decided by kinship and marriage. It introduces four groups of succession: (1 - the spouse and the children of the deceased; 2 - the parents and the siblings, 3 - the grandparents, 4 - the great-grandparents)⁶⁴. The descendants of the child are entitled on the basis of representation, whereas a relative of the deceased to the extent further than the sixth degree of relationship does not inherit by law (Art. 4:10 of the Dutch Civil Code)⁶⁵. In the absence of the successors, the estate falls to the State, which is not regarded as the successor (Art. 4:189 in conjunction with Art. 226 of the Dutch Civil Code). In the case of the first group if there is no will, the surviving spouse and the children of the deceased inherit in equal shares. In order to protect the surviving spouse, the law stipulates that the entire estate goes to the surviving spouse and that the children have a monetary claim equalling their statutory share (statutory distribution). However, in certain circumstances there is a possibility of exercising a right (*wilsrecht*) by which the child may ask for their share in the property of the estate⁶⁶.

However, in English law (England and Wales) the intestate succession system deviates slightly from those in continental Europe⁶⁷. Intestate succession is governed by the Administration of Estates Act 1925 as amended. According to that Act (Art. 46) where a person dies in England & Wales leaving a surviving spouse, but no issue, parents or siblings, the spouse or civil partner inherits the estate in its entirety. Where there is a surviving spouse and issue, the spouse takes the personal chattels,

⁶³ Cf. M.W. Hesselink, *The New European Private Law. Essays in the Future of Private Law in Europe*, The Hague-London-New York 2002, pp. 151 et seq.

⁶⁴ S. Van Erp, *The New Dutch Law of Succession*, [in:] *Exploring the Law of Succession. Studies National, Historical and Comparative*, eds. K.G.C. Reid, M.J. de Waal, R. Zimmermann, Edinburgh 2007, pp. 193 et seq.

⁶⁵ Cf. M. Pazdan, *Polsko-holenderska wymiana poglądów na temat prawa spadkowego*, Rejent 2006/2, pp. 13 et seq.

⁶⁶ B.E. Reinhartz, *Recent Changes...*, pp. 4 et seq.

⁶⁷ C.H. Sherrin, R.C. Bonehill, *The Law and Practice...*, pp. 4 et seq.

plus the first £250,000 and a life interest in half of the remainder⁶⁸. The Intestate's issue take half the residue of the estate immediately and the other half on the death of the surviving spouse or civil partner (retaining an interest in this second half in the interim). If there is no issue, but the Intestate's parents or siblings survive, the spouse or civil partner takes the first £450,000 plus half of the remainder. The rest passes to the parents absolutely or, if both have predeceased, to the siblings of the whole blood (or, if predeceased, their issue). If the estate falls below the above-mentioned limits, it passes in whole to the spouse. If there is no spouse surviving, the estate passes to the Intestate's issue *per stirpes*. If there is no issue, the parents benefit. If there are no surviving heirs in these classes of kin, the estate passes to the first of the following classes of kin which contains someone alive (or who survived the Intestate): siblings of the whole blood or their issue *per stirpes*, siblings of the half blood or their issue *per stirpes*, grandparents *per capita*, uncles and aunts of the whole blood or their issue *per stirpes*, uncles and aunts of the half blood or their issue *per stirpes*. If there are no survivors in any of these classes, the estate passes to the Crown⁶⁹.

Undoubtedly, the role of marriage in this system seems to be very important. Speaking of English law one should also mention that in the *common law* systems, for the regulation of the property matters on death, the construction of a *trust* is very often used. It is an institution characteristic of the Anglo-Saxon countries that has no equivalent in the systems of statutory law, which is a kind of legal relationship of the fiduciary type. According to the classical approach, a *trust* is a fiduciary obligation of a trustee to deal with the fiduciary property, owned by them and separated from the mass of their personal property, on behalf of the beneficiaries (other people but also the trustee himself) who have the right to demand performance of the trust obligation or for the implementation of a specific purpose. It can be created by a legal action or *ex lege*, and for inheritance law the most important are trusts established *mortis causa*⁷⁰. In the context of the transformation of inheritance law in the countries of Central and Eastern Europe, it is worth mentioning the introduction of the construction of trust by the Czech legislature⁷¹.

Similar solutions associated with the circle of intestate successors and the order of such inheritance, to a greater or lesser extent deviating from the above mentioned, have other countries of the European Union. How one can judge, the picture that emerges after the presentation of the selected regulations - despite

⁶⁸ The amounts are specified in *The Family Provision (Intestate Succession) Order 2009*.

⁶⁹ Cf. A. Borkowski, *Succession*, Oxford 2002, pp. 2-37.

⁷⁰ See, for example, S. Gardner, *An Introduction to the Law of Trusts*, Oxford 2011, pp. 1 et seq.; A.J. Oakley, *Parker and Mellows: The Modern Law of Trusts*, London 2008, pp. 13-38; M. Zachariasiewicz, *Trust i inne stosunki powiernicze – potrzeba zmian w polskim prawie prywatnym?*, [in:] *Europeizacja prawa prywatnego*, vol. 2, eds. M. Pazdan, W. Popiolek, E. Rott-Pietrzyk, M. Szpunar, Warszawa 2008, p. 728.

⁷¹ Those new provisions were modelled on those of the Canadian province of Quebec.

some apparent differences of each legal system - has not changed since the initial assumptions presented earlier. Each of the regulations protects in the appropriate way the legal relations in the family of the deceased. The circle of successors and the order of their inheritance are dependent on the concept adopted in the system, and they express in general the traditions of each country. Using these solutions in practice, especially because of the Succession Regulation No 650/2012 after 17 August 2015, it may appear sometimes that the citizens of foreign countries will be surprised with the regulation on inheritance law. Although the differences are not significant, the lack of a person in the circle of intestate successors in another legal system or another order of their entitlement to inherit may be surprising. In this way, citizens may lose confidence in the law. On the other hand, the differences may help to achieve interesting results in the estate planning process, and to enable circumvention of own regulations according to the law. This happens because some rights under inheritance law of certain categories of people belonging to a specific category of persons are dependent on their entitlement to become intestate successors. If under a foreign law that, under the provisions of the Regulation No 650/2012, will be applicable, a given person is not a successor, they will not be entitled to any rights associated with that status. For example, in the Polish doctrine it is indicated that the application of the provisions of Regulation No 650/2012 is a fairly certain way to circumvent the provisions of legitim. It should be recalled here that the protection concept of the persons closest to the testator, provided for in the content of Art. 991 of the Polish Civil Code assumes that the descendants, the spouse and the parents of the deceased, who would have been entitled to inherit by law, have the right, if the entitled is permanently unable to work, or if the entitled descendant is minor – to two-thirds of the inheritance share which would have fallen to them at intestate succession, while in other cases – to half of the share value (legitim). If the entitled has not received legitim due to them in the form of a donation made by a testator donation, or in the form of a bequest, or a legacy, they are entitled to a claim against an heir for payment of a sum of money needed to cover the legitim or to complement it. This regulation is based on the indisputable axiom, according to which the testator, by their dispositions, could not have led to exclusion or limitation of that protection. Meanwhile, the provisions of Regulation No 650/2012 constitute a significant departure from this rule. The testator may in fact lead to a change in the type and scope of the protection of people closest to them, for example, by the fact that they will not choose the national law and the applicable law will be a foreign law in relation to Polish law. Then, in some situations, it is not excluded to have even the complete abolition of the protection in relation to the persons close to the deceased. For example, in a situation when the habitual residence of the deceased is The Netherlands, in the light of the local regulations only the descendants of the deceased are entitled to legitim (Art. 4:63 Par. 2 of the Dutch Civil Code). When

the law applicable to probate cases will be that law, the other entitled under Polish will not receive the legitim⁷². This solution is so controversial because a large number of Poles have the habitual residence outside Poland today, and some suggest that there are even a few million of them, so making such choices in this regard may become very popular in the future. The Regulation provisions may therefore be in this respect the cause of many disputes and misunderstandings in the future. Perhaps these misunderstandings will be an impetus to work on some uniform regulations under substantive law, so that there will be no such differences and possibilities of abuse. After all, inheritance law should bond family ties, and not lead to their corruption.

In this light, it seems that, most of all, a determination of the people who can belong to the circle of those who can become intestate successors is of the utmost importance in the context of a possible future European solution. The order of inheritance may in fact vary, which in different countries can be seen indeed while looking at the historical development of the local legal regulations. Determining the potential circle can afford to consider the rules for granting the title for individual persons from the circle to the succession. In light of the above, there is therefore a question of the way to select the circle of the successors, which could be versatile enough to be accepted in the systems that - according to an opinion - have different beliefs in this respect. Is it possible, after many years of the national regulations, to replace them and introduce some single solutions? Do the current regulations in relation to the circle of intestate successors meet the expectations connected with the legal regulations of inheritance law?

3.4. The circle of successors

The circle of potential intestate successors cannot be accidental. It must be determined by the functions of inheritance law, and - because of the close ties of inheritance law with family law - by some regulations in the field of family law. With the reservation, that the consequences of these assumptions are not sharp and may be different. Always the final settlement is the matter of the legislature here. Thus, the principle of intestate succession (*ab intestato*) is an expression of a particular concept of a legislator⁷³. Currently, the European legislator has no such concept. Will they have it in the future?

If so, the nature of the concept should refer to the views found in the society, and lead to the strengthening of the family ties. As I have already pointed out, inheritance law is that area of private law, where the special role is played by considerations of moral, personal, or emotional nature. Omission of these

⁷² As indicated by P. Księżak, [in:] *Zachowek...*, p. 96.

⁷³ See, for example, F. Longchamps de Brier, *Law of Succession...* p. 123.

reasons could lead to a situation contrary to the sense of the social justice, and cause a condition in which the citizens would begin to lose confidence in the binding law. Reconciling these values within the European Union does not seem to be an overly complicated task. The typical situations, and such are to be regulated by the rules of the intestate succession, are generally similar in different countries. Besides, the differences that occurred a few years ago are becoming blurred, even because of the greatly increased migration of the communities. Hence, in the first place, when determining the circle of intestate successors in Europe one should take into account the people who are linked by bonds of kinship with the deceased. As the previous closer observation of some legal systems shows, it may even be a very distant relationship. However, if the possibility of succession by the relatives in the direct line is limited by the duration of human life, such a limit does not exist in the case of relatives in the collateral line. It is thus even possible such a concept, where the most distant relatives would be intestate successors, regardless of the degree of kinship⁷⁴. There are, in principle, no contraindications to accept it. Undoubtedly, also in any future European inheritance law the circle of intestate successors should be sought in the first place among the relatives.

However, intestate succession based on kinship with the deceased has its drawbacks⁷⁵. According to many critics, and it is not at all devoid of fairness, the system limits extensively the rights of the deceased's spouse. It is possible here such a concept, according to which the spouse will be entitled to inherit only in the absence of the relatives belonging to the original family of the deceased. It would be rather inapt, particularly because the spouse is often a person who contributes to the assets of the estate⁷⁶. This may, however, be balanced by the concept, according to which the circle of intestate successors, entitled by kinship, should not extend beyond the feeling of family ties⁷⁷. In this way, it refers to the close relatives and the spouses, improving the situation of the latter⁷⁸. Meaningful can also be the length of the married life, so that inheritance should be banned for the person in relation

⁷⁴ Cf. J.S. Piąkowski, [in:] *System prawa cywilnego. Prawo spadkowe*, ed. J.S. Piąkowski, Wrocław 1986, p. 119.

⁷⁵ See, for example, S. Cretney, *Succession – Discretion or Whim, Freedom of Choice or Caprice?*, Oxford Journal of Legal Studies 1986/2, p. 302.

⁷⁶ A. Vaquer, *Wills, Divorce and the Fate of the Dispositions in Favour of the Spouse: A Common Trend in European Laws of Succession*, European Review of Private Law 2003/6, pp. 782-790.

⁷⁷ In Poland it was indicated especially by J. Gwiazdomorski, (*Dziedziczenie ustawowe w projekcie kodeksu cywilnego PRL*, [in:] *Materiały dyskusyjne do projektu kodeksu cywilnego PRL*, Warszawa 1955, p. 226).

⁷⁸ Cf. R. Peptan, D.-M. Dijmarescu, *Inheritance Rights of the Surviving Spouse in the Regulation of the New Civil Code. Comparative Approach*, Annals of the „Constantin Brâncuși” University of Târgu Jiu, Juridical Sciences Series 2013/4, pp. 77 et seq.

to whom one can believe that they should not be a successor because this disrupts the family ties. Dilemmas in this regard are certainly numerous.

Moreover, in addition to the criteria of the blood relationship and the sense of close family ties intestate succession is possible based on the criterion of belonging to a certain group of people entitled to succession due to a specific factual relationship that linked them with the testator, and of a nature analogous to the family union⁷⁹. For example, I mean here some persons unable to work, who at the time of the testator's death remained their dependents, or persons who at the time of the deceased's death were in the common household with them, and, finally, for example, the persons caring for the deceased⁸⁰.

As the concept of the intestate successors circle is usually based on formal or substantial ties between a potential testator and the successor, the European legislator should go in this direction in the future. The formal ties are prejudged by the fact that they refer to a specific conditions of a legal nature (e.g. marriage). The substantial bond is the one that is expressed by the actual closeness, regardless of the legal ties connecting the testator and the successor. The advantage from the use of these ties is a relatively clear and precise designation of the subject scope of the individual institutions of inheritance law⁸¹. Therefore, it is necessary to balance the interests of different groups and to take a direction that will allow resolving the emerging conflict of values. What direction will it be? It cannot be anticipated today without a broader discussion. It seems, however, that the above criteria for selecting intestate successors are characteristic for all the legislations, presented in this part of the work. If there are similar mechanisms underlying the design of national rules, the more it should not be difficult to agree on the need for their use in the event of a pan-European regulation. The specific solutions must be discussed many years before their possible entry into force. Otherwise, one may find that the new law will cause far-reaching doubts.

In this regard, one can recall the doubts that appeared in Poland a few years ago, before the rules of intestate succession were modified (the year 2009). Among the public there were opinions that the inheritance regulation then in force in Poland, insufficiently took into account the welfare of the family in the social and economic policy of the State (in Poland it is an obligation resulting from Art. 71 Par. 1 of the Constitution). The discussion was joined, among others, by the Ombudsman who argued that the existing legal status sometimes led to effects conflicting with the sense of justice, such as in an event when during a tragic accident the parents were killed, and soon afterwards - as a result of injuries sustained in the

⁷⁹ Cf. A. Kayiket, *The Process of Intergenerational Transmission of Housing Wealth*, Ankara 2003, p. 59 et seq.

⁸⁰ Cf. J.S. Piątkowski, [in:] *System prawa cywilnego...*, p. 122.

⁸¹ See. J. Biernat, *Ochrona...*, pp. 23-28.

accident - their only minor child died. The intestate successor, with no possibility of rejecting the estate was in this cases the municipality and not the grandparents of the deceased minor (being the parents of the spouses, who died in the accident). The reported postulates led to the conclusion that the municipality or the State Treasury received the rights and obligations of the deceased too early, at the expense of the deceased's relatives. One of the purposes of inheritance law - as it was raised - should be bonding and strengthening of the family ties, which in turn cannot be disregarded in determining the criteria for determining intestate succession. The death of the deceased - as far as is possible - should not, in fact, lead to the extinction of the relations that are closely associated with the individual. In addition, although the personal relations are extinguished with the death of the entitled, the proprietary relations existing after the death of the testator should refer to the personal relationships prevailing before the event. Hence, too quick succession by the municipality or the Treasury, in the opinion of some critics, appeared to be contrary to the principles of the social coexistence. There were also voices that the institutions of inheritance law must encourage an individual to life activity and wealth creation⁸². Their task is to grant a broad freedom to a potential testator to dispose of their assets in the event of death, and in case of the absence of such a disposition, to allow succession to persons close to the decedent⁸³. In these circumstances, consistent was the opinion that in the absence of a disposition of the last will by the deceased, the widest possible circle of successors should be entitled to inherit by law, and it should consist of persons who are the closest to the deceased. It is important, however, to determine whom to include among such persons, as well as in what order they should be entitled to inherit. There is no doubt that the entitlement of all the closest people to inherit at the same time would be undesirable, often leading to an excessive dispersal of the assets of the decedent, which usually would not correspond to their wish, if they left a will. Intestate succession should be shaped in such a way that the successors are those who would be tested by the deceased - assuming, however, that we are dealing with a hypothetical will of an abstract testator.

The legislature, accepting the need for changes, introduced new regulations, which reflect the current legal position and which tried to follow the designated values. However, when the legislature made the changes, it did not avoid a material error. The changes, which came into force on 28 June 2009, resulted in profound doubts about the situation in which the spouse succeeded jointly with one parent while the other was dead, and at the same time the deceased had no siblings and descendants of the siblings who could come to replace the deceased's

⁸² Instead of many sources, cf. H. Witczak, *Uprawnienia rodziców i dziadków spadkodawcy w dziedzinie ustawowym w nowym stanie prawnym*, Monitor Prawniczy 2009/11, pp. 582 et seq.

⁸³ See, for instance, *Green Paper. An Optimal Vision...*, p. 181.

parent in the intestate succession. According to the wording of Art. 932 § 1 of the Polish Civil Code, the spouse of the deceased and the surviving parent should be entitled then. However, difficulties were arising at trying to determine what their shares of inheritance were. According to the wording of Art. 933 § 1 of the Polish Civil Code the inheritance share of the spouse who inherits jointly with the parents, the siblings and the descendants of the siblings is half of the estate, and in accordance with Art. 932 § 2, the first sentence of the Civil Code, the inheritance share of the parent who inherits jointly with the spouse is a quarter of the entire estate. In the absence of the siblings and the descendants of the siblings who would have been entitled in the place of the deceased parent, the uncertainty appeared of the fate of a quarter of the estate, which would have fallen to the other parent of the deceased if they lived. The law did not contain any indications in that matter. As admissible, according to the doctrine, there were the following interpretations: 1) it could be said that the use *per analogiam* would be found by Art. 932 § 2 Sentence 2 of the Polish Civil Code, which establishes the principle that when paternity of the father has not been established, the mother, inheriting the estate jointly with the spouse is entitled to half of the estate, which would mean that this part of the estate would fall to her (as the surviving parent); 2) one could try to argue that that part would fall to the spouse of the deceased; 3) one could consider the application of Art. 933 § 3 of the Polish Civil Code in the current wording, which showed that if inheriting jointly with the spouse, the only successors were either only the parents or only the siblings, they inherited in equal parts that inheritance share which would fall jointly to the parents and the siblings, whereby the inheritance share of the parent would be half of the estate; 4) it also seemed admissible the assertion that to the remaining quarter of the estate were entitled further groups of successors, for example, the municipality of the last residence of the deceased; 5) one could try to refer *per analogiam* to the wording of Art. 965 of the Polish Civil Code regulating the institution of accretion, according to which, when a testator had tested their estate to several testamentary heirs, and one of them did not want to or could not inherit, then their share would fall to the remaining heirs in proportion to their shares, which would result in the receipt by the spouse of two thirds of that inheritance share, and by the parent of one third of the inheritance share; 6) one could finally try to claim that the remainder of the estate was *hereditas iacens*, untaken inheritance⁸⁴. None of these interpretations could be unambiguously excluded. This error was repaired by the legislator after more than two years, in the Act of 18 March 2011 on the amendment of the Civil Code and some other laws, which came into force on 23 October 2011, adding to the Polish Civil Code the provision of Art. 932 §

⁸⁴ W. Borysiak, P. Książak, *Dziurawe przepisy o dziedziczeniu ustawowym*, Rzeczpospolita of 18 June 2009, p. C6.

6, as follows: “If one of the parents did not live to the opening of the inheritance estate and there are no siblings of the deceased or their descendants, the inheritance share of the parent inheriting jointly with the spouse of the deceased is half of the estate”. Thus, the doubts were resolved and the equality of the inheritance shares in such a situation was prejudged.

The above just shows that any legislative proposals in the area of inheritance law, even the most legitimate, must be formulated carefully. And although there is no doubt that the issue of the intestate successors’ circle requires, first of all, taking into account the social needs, when considering this issue one should also take into account a number of other factors. Pointing to the social expectations, after all, the most manifested in some countries (e.g. in Poland) are those postulates, which aim at introducing to inheritance law the succession of partners in the same-sex partnerships⁸⁵. The consequence would be enabling succession of the partners on the grounds of the statutory order of succession⁸⁶. Such solutions are already known in some European countries and the differences on this background (and therefore concerning things that really do not decide on the image of inheritance law) can cause the most far-reaching controversy. In a similar direction go the voices, which indicate a need for introducing a regulation, according to which cohabitants, in other words the persons living analogously to marriage, but not joined legitimately, should inherit after each other. In this regard, it would be desirable for the representatives of this group to have such a solution, where the cohabitants would inherit after each other as spouses⁸⁷. This issue is related to inheritance of the cohabitants’ children. Certainly, these are the issues worth of discussion, whose outcome, however, should not affect the position according to which it is or is not acceptable to converge on intestate succession at the European level.

It follows from the above that the criteria for isolating the circle of intestate successors are not uniform, but typically, they are based on the closeness of the bonds referred to above. One can also note trends whereby the circle of those entitled to inheritance is very wide, and even the most distant relatives are entitled to inherit. Inclusion into the circle of intestate successors is decided, above all, by a family connection and bonds of this nature, i.e. marriage. It is a generally ac-

⁸⁵ Cf. W. Chan, *Cohabitation, Civil Partnership, Marriage and the Equal Sharing Principle*, Legal Studies 2013/1, pp. 46-65.

⁸⁶ Instead of various sources cf. the information on the website of Human Life International Europa, <http://www.hli.org.pl/>.

⁸⁷ Cf. T. Eeg, *Inheritance Rights for Cohabitants: Current Norwegian Law and Some Thoughts on Future Regulations*, [in:] *Inheritance Law...*, pp. 63 et seq.; I. Kroppenbergh, *Should the Surviving Cohabitants Be Given Hereditary Rights to the Estate of the Deceased? A European Quest*, [in:] *Inheritance Law...*, pp. 73 et seq.; C.M. Araújo Dias, *De Facto Relationships as a New Family Form in the Jurisprudence of the European Court of Human Rights*, International Family Law 2014/3, pp. 20-24.

cepted rule. Because different legal systems, by the regulation of intestate succession primarily protect the family life, I do not think, therefore, that the cultural, social, or economic differences occurring between individual countries could be significant enough to exclude a unification of the rules of intestate succession⁸⁸. What is more, for some time, while observing the changes to intestate succession, taking place in some European countries, one can confidently defend the position that they have been made in the pro-European spirit, taking into account the trends taking place in other European countries. Perhaps the next wave of changes will involve a unification of these rules. Certainly, there are no major obstacles in this area. Therefore, how could the EU intestate succession be formed?

3.5. Conclusions and recommendations

Moving on to the ground of the potential EU legislation, in particular, to the proposals of its formation, it seems that in the light of the regulations and trends, the circle of intestate successors should be as wide as possible. The descendants or the spouse of the deceased, who in the typical situations are the most dependent on the inheritance assets and who often have contributed to their creation are the categories of the individuals who should be surely included into such a circle in the future regulation. One cannot question the need for inclusion into that circle the parents of the deceased, as after all, they usually educated the decedent and equipped them with the property. These people should be entitled to inherit but in a different order, as it is currently the case in most national laws⁸⁹. In the first place, it seems that succession in the first group of succession should take place jointly between the descendants of the deceased and their spouse. In general, it is the children of the deceased who need the greatest protection, so that category of individuals should be the most privileged⁹⁰. The spouse is generally the person who jointly with the testator and the children forms a family, so their preference is also not surprising. In this regard, one can consider whether the spouse should or should not first inherit alone, and the children should obtain the status of successors after their death (something in line with Dutch law)⁹¹. In addition, the duration of the married life could have some meaning⁹². Surely, these solutions

⁸⁸ Cf. D. Reid, *From the Cradle to the Grave: Politics, Families and Inheritance Law*, Edinburgh Law Review 2008, pp. 391 et seq.

⁸⁹ Cf. N. Peart, *New Zealand's Succession Law: Subverting Reasonable Expectations*, Common Law World Review 2008/4, pp. 1 et seq.

⁹⁰ Cf. R. Kerridge, *Reform of the Law of Succession: A View from England*, Edinburgh Law Review 2010, pp. 323 et seq.

⁹¹ S. Van Erp, *The New Dutch Law...*, pp. 198-202.

⁹² Cf. A. Humfrey, G. Douglas, *Inheritance and the Family: Attitudes to Will-Making and Intestacy*,

can prevent conflicts in the family and be a counterweight to the possibility of the estate fragmentation, which, for example, in the event when the object of succession is a company or a farm can be extremely important. Only in the event, when the decedent did not leave any descendants, then the next group of successors should be taken into account, and the spouse should inherit jointly with another category of individuals.

In the second group of successors, it is worth considering that the parents and the siblings of the deceased should inherit. It is reasonable to consider whether the parents of the deceased deserve a better treatment than their siblings. The situation in which they inherit equally with the siblings of the deceased is not without some drawbacks. Typically, the parents have their large share in the formation of the deceased's assets, which cannot always be said of the siblings. Hence, perhaps it would be more appropriate - if the parents of the decedent are living - to shape the rules in such a way that the deceased's parents should go before their siblings and their descendants. This concept has been adopted recently, for example in Poland, where in the reasons for the introduced changes it was raised that at least two arguments spoke for it: the life situation of the parents and their frequent merits in creation of the estate assets. The parents are usually at an age that makes their life chances (for earning their living and others) gradually decreasing. After the death of a child, they can no longer count on their help in a variety of difficult life situations. Frequently, they also provided them upbringing and education. Thanks to their efforts, the child acquired some possibilities of earning money. Thus, indirectly, the parents contributed to the creation of the estate assets, if the testator is their child. Therefore it was raised that the parents should acquire the estate in the event of their child's death, provided, however, that the child does not leave any descendants willing and being able to inherit⁹³. This view should be shared. If the deceased left no descendants, to the next order of succession should therefore be entitled the parents of the deceased jointly with the deceased's spouse. In turn, in the event when one of the parents did not live until the opening of the inheritance, then the deceased's siblings should be entitled to inherit, taking over the share of the parent who did not live to see the opening of the succession.

In the absence of the descendants, the spouse, the parents, and the siblings, relatives that are more distant should be entitled to inherit, especially the grandparents of the deceased and their descendants. In this way, the siblings of the decedent's parents could be entitled to inherit (i.e., their uncles and aunts). In the same group, there will also be a place for the children and further descendants of the deceased's siblings. The degree of the family ties is usually similar here. In

National Centre for Social Research 2010, pp. 10 et seq.

⁹³ Cf. *Reasons for the Draft Statute on the Amendment of the Law – the Civil Code in Respect of the Intestate Succession of 14 March 2007*.

turn, the ties that exist between the testator and the members of this group do not justify that they should inherit equivalently, e.g. to the spouse of the deceased. Such a shape of statutory inheritance is promoted by not only the considerations of fairness, but also the prevailing belief that it will serve the strengthening of the family ties. Justifying the need for such a shape of that succession group, one can also rely on the family and spiritual bond between the grandparents and the grandchildren, which usually occurs in the family relationships. Inheritance of the grandparents fits, moreover, the tendency of expanding the catalogue of the intestate successors of the deceased to the persons closest to the decedent, while minimizing a possibility of inheritance by public entities. These entities have in fact a kind of a “better” priority to the estate, which is justified on the grounds of a social nature. If a grandparent would not want to or could not inherit, it seems that it should be possible to make their share fall to their descendants. In this way, the siblings of the deceased’s parents could be entitled to the inheritance estate. Further inheritance (i.e. inheritance of further ascendants) is not a major problem, because it happens extremely rarely that great-grandchildren are survived by their great-grandparents, and in addition, there would not be any other people who could be considered as belonging to the successors of an earlier group of succession.

Some further problems arise, however, when other categories of entities may come into question as intestate successors. For example, the matter of statutory inheritance of stepchildren is problematic by the fact that not necessarily there is a bond between the testator and the stepchild that would justify admissibility of inheritance. Nevertheless, in a situation in which a municipality or the State Treasury would inherit one should consider that possibility. In addition, the matter of inheritance between cohabiting people raises serious doubts in some countries because its legislation may not enjoy too much popular support, as well as lead to loosening the ties, which should be guarded, *inter alia*, by inheritance law. In addition, on the one hand, demonstrating the evidence for the existence of cohabitation at the time of the testator’s death could be difficult, and on the other hand, it could lead to some abuses and a threat to the safety of succession. The legal situation of cohabitants also refers to persons of the same sex. In some countries, some attempts to legalize this type of relationships have already been successful, but in others - such as Poland - there is still resistance in this matter. Certainly, the development of the community in recent years requires an increase in the tolerance by certain social groups that traditionally recognize marriage as a union between a man and a woman. However, bearing in mind the examples of West European countries one should - as one can suppose - prepare the grounds for legalization of the same-sex partnerships in the context of legal succession.

Certainly, at the very end, when there are no relatives or spouse, or no other natural persons who may be considered as intestate successors the inheritance es-

tate should go to the municipality of the deceased's last residence or the State Treasury. This solution appears to be corresponding to the social demand as well as the prevailing trends in the world today.

Given the above, I am of the opinion that at least these entities - in the context of a possible future regulation of inheritance law in the European Union - should be taken into account as intestate successors. As they are already present in most of the laws (especially the descendants, the spouse, and the parents), they do not seem to be in any way controversial. Cultural, economic, or social diversities, do not have, or at least do not seem to have any relevance to the possible regulation of this issue. Even different perception of certain institutions, such as marriage, for instance due to religious reasons, does not seem to be an obstacle to the legislation unification in this area at the EU level. Therefore, I believe that it is possible to adopt some common principles, rules, and concepts of intestate succession in the European Union.

Chapter 4.

The ability to harmonize regulations on testamentary formalities

4.1. Testamentary succession – general comments

The rule is that a legal act takes effect at the moment of its performance. Exceptionally, its effect can be delayed in time. An example of such a construction is legal acts in event of death (*mortis causa*)¹. Being part of a particular legal system, they are a body that is somehow isolated from the rest of the legal institutions. Such a distinction is necessary due to the nature of an individual's death. Because of this event, all activities of the entity are ended, including the legal sphere. In this respect, it is very important for the legal relations to preserve continuity even then, which makes it necessary to determine the rules according to which another entity will enter into the rights of the individual whose legal subjectivity was terminated. These acts are the manifestation of the principle of intention autonomy of the parties, present in the contemporary legal systems, and being a guarantee of a possibility to take a free decision on the fate of the person's assets after their death. As the statutory order of succession only considers typical situations, and therefore not in every case it is a reflection of the testator's will on the question who should get their assets after their death². Hence, in principle, since the ancient times, in the legislation of each country it has been permitted for this purpose to make an appropriate legal act *mortis causa*³.

¹ D. Olzen, *Erbrecht*, Berlin 2005, pp. 73 et seq.

² Cf. E. Jayme, *Party Autonomy in International...*, pp. 1-10.

³ Cf. J.F. Hunger, *Das Römische Erbrecht*, Erlangen 1834, pp. 21 et seq.; F.H. Vering, *Römisches Erbrecht in historischer und dogmatischer Entwicklung*, Heidelberg 1861, pp. 121 et seq. See also in the contemporary reference literature, for instance, T. Rüfner, *Testamentary Formalities in Roman Law*, [in:] *Testamentary Formalities...*, pp. 2 et seq.; F. Longchamps de Brier, *Law of Succession...*, pp. 58 et seq.

Legal acts *mortis causa* are all the legal acts, which, according to the intention of the legislature, will have an effect after the death of a specific person. The basic legal act in the event of death, known to all modern legal systems, is the last will and testament⁴. This act allows an individual to regulate their proprietary situation in the event of death. Under the existing legislations, in particular European countries, the concept of a will is not generally defined by the legislature. Definitions are formulated by the law doctrine. Regardless of the legal system, most of the resulting definitions point to at least four basic characteristics of the will. These are: 1) it is made for the event of death, 2) unilateral, 3) revocable, and 4) formal⁵.

Performing of an act in the event of death means that the testator, drawing up a will, must be made aware of the importance of the act and want to cause the legal consequences as to their proprietary rights and obligations in the event of their death (*animus testandi*). At the same time, they must be capable to perform legal acts and not be under the influence of external factors, especially of other people⁶. By such an act, they may determine the fate of their assets in the event of death, i.e. indicate the circle of their heirs different from the statutory successors, and basically dispose of all their assets for the benefit of their chosen persons, or exclude an entity from inheritance or obtaining certain benefits from the inheritance estate. It is the testator who decides whether and what benefit should be conferred on a given person from the inheritance, and who possibly should be deprived of such an advantage. It is in this kind of rights that the autonomy of the testator's intention is expressed. Firstly, they have freedom to decide whether to make a will at all, and, secondly, in case of making it, they are free to shape the content of the testamentary dispositions. This freedom is implemented in the various provisions of inheritance law, which guarantee the testator an opportunity to take free decisions and to make acts in the event of death⁷.

⁴ Instead of many sources, cf. S. Wójcik, F. Zoll, *Testament*, *Studia Prawa Prywatnego* 2006/2, pp. 79 et seq.

⁵ Cf. F. Terré, Y. Lequette, *Les successions, les libéralités*, Paris 1997, pp. 4 et seq.; W.S. Holdsworth, C.W. Vickers, *The Law of Succession. Testamentary and Intestate*, Clark, New Jersey 2004, pp. 25-33; D. Olzen, *Erbrecht...*, pp. 75 et seq.; E. Skowrońska-Bocian, *Testament w prawie polskim*, Warszawa 2004, pp. 13 et seq.

⁶ Cf., for example, R. Frimston, *Incapacity of Adults – Cross Border Issues*, *Private Client Business* 2009, pp. 264 et seq.; F. Foster, *Should Pets...*, pp. 813 et seq.; M. Rzewuski, *Zdolność testowania – uwagi de lege lata i de lege ferenda*, *Przegląd Sadowy* 2012/6, pp. 93 et seq.

⁷ Cf. E. Bonnal, *Liberté de tester et la divisibilité de la propriété*, Paris 1866, pp. 7 et seq.; J. Gold, *Freedom of Testation. The Inheritance (Family Provision) Bill*, *Modern Law Review* 1938/3, pp. 296 et seq.; D. Henrich, *Testierfreiheit vs. Pflichtteilsrecht*, München 2000, pp. 19 et seq.; S.L. Blumenthal, *The Deviance of the Will...*, pp. 962 et seq.; J. Kerrigan, *Testamentary Freedom Revisited – Further Erosion?*, *Scots Law Times* 2012, pp. 29 et seq.

Unilateralism of the will means that it is not a legal act, which for its validity requires a declaration of intent by any other person⁸. The validity of a will is generally not dependent on the knowledge of its contents by another person. The presence of certain persons at the declaration of their last will by the testator (e.g. of a notary, an official, witnesses) does not mean that these persons are a party to the legal act. Their presence can be one of the conditions of the will validity, the authenticity guarantee of the testator's declaration or an instrument allowing recreating and explaining the meaning of their will. Unilateralism is thus closely linked with the views and attitudes of the testator; it also allows preserving in secret the statement contents, which can cause some changes in the personal relations of the deceased. It guarantees full freedom of the testator's actions and is closely related to the personal nature of the will. This is reflected in the adoption of the idea that the content of the last will must come from the testator, and not from another person⁹.

On the other hand, revocability is a feature that distinguishes the will from other legal acts¹⁰. In principle, the testator, who has made their will may revoke it at any time, which makes it ineffective. The revocation may cover all or part of the will, but also only some particular provisions of it. This is a consequence of accepting that the will causes some effects only upon the death of the testator. The testator, revoking the testament, does not infringe anyone's rights. The testator until their death (if their retained the capability of testation) maintains the freedom to adjust their will to the current system of relationships and to take into account the occurring changes. The will does not have any legal effects until the testator's death. This is its basic feature. It does not confer any rights on anyone as long as the testator is alive. It does not deprive the testator of any entitlements for their lifetime. They can do practically everything with the item, in relation to which they have made a disposition by the will, including dismissing it.

In contrast, formalism of the will as the legal act is a feature that allows consolidating the statements of the testator in a way that enables to know them after the death of the testator¹¹. This is to ensure a full compatibility between the con-

⁸ E. Skowrońska-Bocian, *Testament...*, pp. 16-18.

⁹ Cf. P. Reed, *Challenges to Wills*, Private Client Business 2012, pp. 109 et seq.

¹⁰ Cf. D. Olzen, *Erbrecht...*, pp. 75 et seq.; R. K. Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, Boston College Law Review 2013/53, pp. 906 et seq.

¹¹ Cf. J. Lindgren, *Abolishing the Attestation Requirement for Wills*, North Carolina Law Review 1990/3, pp. 544 et seq.; M. Beutgen, *Die Geschichte der Form des eigenhändigen Testaments*, Berlin 1992, pp. 11 et seq.; Ch.J. Caldwell, *Should „E-Wills” Be Wills: Will Advances in Technology Be Recognized for Will Execution?*, University of Pittsburgh Law Review 2002/2, pp. 479 et seq.; G.W. Beyer, *Wills, Trusts, and Estates. Examples and Explanations*, New York 2005, pp. 70 et seq.; R.W. Andersen, I. M. Bloom, *Fundamentals of Trusts and Estates*, Newark-San Francisco-Charlottesville 2005, pp. 74 et seq.; G.W. Beyer, C.G. Hargrove, *Digital Wills: Has the Time Come for Wills*

tent that the testator included in the testament at the time of its preparation and the content that will be reconstructed and have legal effects upon their death. It is also important that in this way falsification of the will can be prevented, or at least hindered; an opportunity is created to establish a reliable identification of the testator's person; a determination of the mutual relations to each other of several wills is facilitated; and making of a will under the pressure of others is excluded, or at least hindered. Finally, as in the case of a particular form of other legal acts, it is aimed at making the testator aware of the importance of their will and convincing them to make deliberate and prudent dispositions¹². Therefore, the formal requirements of the will are to protect not only against forgery or undue influence of other people, but also against hasty or ill-considered dispositions. Formalities emphasize seriousness of the testation act and serve as a form of a test against a careless action. Generally, they can be justified as a need to provide reliable evidence of the testator's intentions, which, after all, can be expressed many years before their death. Therefore in all the legal systems the will is today an act, which is widely accepted (by virtue of the legal provisions) to be obligatorily made in a special form. The testator's declaration of intention must be submitted not in any way, but in a manner determined by law¹³.

It is obvious that the property issues *post-mortem* may be also adjusted by the testator through other instruments that can be found in the individual legal systems. However, it is the will that is the most frequently used as an alternative to statutory succession and a possibility of its unfettered preparation has been a challenge for legislators for a long time. While the first three of the identified features of the act are generally understood in a similar way in the national legal systems, many forms of testamentary dispositions found in some European countries differ significantly *prima facie*¹⁴. Moreover, this is the form of a will that is the most important issue in this area, as after all, thanks to the correct form of the will (and therefore the form provided by law) the testator can effectively distribute their assets upon the death. Each legislator, to a greater or lesser extent, recognizes the principle of testation freedom, which allows the testator to make appropriate dispositions. However, in order to make them effective, the testator must use the legal instrument provided for them by the legislature. This issue is approached differently by individual legislators. Therefore, do the instruments currently found in the national regulations allow for the implementation of the principle of testation

to Join the Digital Revolution?, Ohio Northern University Law Review 2007/3, pp. 875 et seq.; R. Zimmermann, *Testamentsformen...*, pp. 471 et seq.

¹² S. Wójcik, F. Zoll, [w:] *System prawa prywatnego...*, pp. 323-324.

¹³ Cf., for example, N. Jansen, *Testamentary Formalities in Early Modern Europe*, [in:] *Testamentary Formalities...*, pp. 27 et seq.

¹⁴ Cf. A.-L. Verbeke, Y.-H. Leleu, *Harmonisation of the Law of Succession...*, p. 467.

freedom in the new European reality and can one talk about some common ideas of modern inheritance law in the area of testamentary inheritance? Is there a possibility of introducing common, uniform formal requirements?

4.2. The existing forms of wills

The principle of testamentary inheritance in relation to the forms of testamentary dispositions, occurring in different legal systems, is to regulate the will forms depending on capabilities of its preparation at a given moment. Hence, there are ordinary forms, which can be used by the testator entitled to make a will basically at any time, and extraordinary forms, where the ability to take advantage of them depends on the fulfilment of additional requirements, on the occurrence of the specific circumstances provided for by law¹⁵. Another well-known division of will forms is a division to private forms and public forms. Drawing up of a private will does not require participation of an official, while a public testament is a sort of an act *mortis causa*, in which, in addition to the testator, a role for the entity performing public tasks (a civil servant, a local government official, a notary) is provided for¹⁶. Often in the context of will forms, there also appears a requirement of participation of witnesses in its preparation, and their role is limited primarily to confirmation of the last will authenticity¹⁷.

Ordinary wills generally take one of the written forms. For example, among ordinary wills Polish law distinguishes a holographic will (Art. 949 of the Civil Code), a notarial will (Art. 950 of the Civil Code), and an allographic will (Art. 951 of the Civil Code)¹⁸. The simplest form of the ordinary will is a holographic (hand-written) will. In accordance with Art. 949 § 1 of the Polish Civil Code a handwritten will is valid if it satisfies jointly three conditions: 1) it was hand-written by the testator in its entirety; 2) it was signed by the testator; 3) it was dated by the testator. Among those conditions, the first two are strictly necessary and must be always met. As for the third condition, there are some deviations from it¹⁹. The second form of an ordinary testament is a will drawn up by a notary. For its preparation, the procedure specified by the statutory provisions for notarial acts is used. The testator declares their last will before a notary, who then writes down the contents of the will in a notarial deed; then the testator and the

¹⁵ D. Leipold, *Erbrecht...*, pp. 105 et seq.; G.W. Beyer, C.G. Hargrove, *Digital Wills...*, pp. 866 et seq.; K.H. Gursky, *Erbrecht*, Heidelberg-München, Lansberg, Frechen, Hamburg 2010, pp. 31 et seq.

¹⁶ Cf. W.S. Holdsworth, C.W. Vickers, *The Law of Succession...*, pp. 34 et seq.

¹⁷ R. Zimmermann, *Testamentsformen...*, pp. 477 et seq.

¹⁸ Cf. M. Załucki, *Testamentary Succession, New Technologies and Recodification. On the Research That Needs to Be Conducted*, *Societas Et Iurisprudentia* 2014/2, pp. 20-24.

¹⁹ Cf. K. Liżyńska, *Badanie autentyczności testamentu holograficznego*, Wrocław 2008, pp. 17-46.

notary sign such an act²⁰. In turn, an allographic testament is a will, which involves making a statement of the last will in the presence of others, who then write down this will instead of the testator. Polish law provides for participation of two witnesses and making of the last will statement to an official person (including the head of a municipality, the secretary of a municipality or the head of a registrar's office). Then, such a statement is written down in a protocol with the date of its preparation, the protocol is read out to the testator in presence of witnesses and then the read protocol is signed by the testator, the official person, and the witnesses of the will²¹.

Similar solutions have been adopted by German law, which, among ordinary wills, distinguishes a holographic will and a notarial will²². According to Art. 2247 of the BGB, the testator may make a will by a declaration written and signed in his own hand. The testator should state in the declaration the time when (day, month and year) and the place where they wrote it down. The signature should contain the first name and the last name of the testator. If the testator signs in another manner and this signature suffices to establish the identity of the testator and the seriousness of their declaration, such a signature does not invalidate the will²³. According to the provision of Art. 2231 of the BGB, a will made by declaration to a notary is made by the testator declaring their last will to the notary or handing a document with a statement that the document contains their last will. The testator may hand over the document either unsealed or sealed; it is not required to be written by them²⁴.

Austrian law as well, among ordinary forms of wills, mentions holographic and notarial wills, and judicial and allographic wills²⁵. Holographic wills are supposed to be handwritten, dated and signed by the testator themselves (§ 577 of ABGB)²⁶. Notarial wills and judicial wills are often mentioned together. There are six different types of notarial and judicial wills: 1) an oral will declared before and minuted by the court (§§588-590 of ABGB); 2) a written will handed over to the court (§§587, 589-590 of ABGB); 3) an oral will declared before and min-

²⁰ S. Wójcik, F. Zoll, *Testament...*, pp. 97-99.

²¹ Cf. J. Gwiazdomorski, *Formy testamentu*, Nowe Prawo 1966/6, pp. 717 et seq.; M. Niedosiał, *Testament allograficzny (administracyjny)*, Warszawa 2004, *passim*.

²² L. Michalski, *BGB - Erbrecht*, Heidelberg-München, Lansberg, Frechen, Hamburg 2010, pp. 66 et seq. See also: R. Zimmermann, *Testamentary Formalities in Germany*, [in:] *Testamentary Formalities...*, pp. 176 et seq.; A. Röthel, *Law of Succession and Testamentary Freedom in Germany*, [in:] *The Law of Succession...*, pp. 157 et seq.

²³ D. Leipold, *Erbrecht...*, p. 109 et seq.; K.H. Gursky, *Erbrecht...*, pp. 37 et seq.

²⁴ K.H. Gursky, *Erbrecht...*, pp. 32 et seq.; D. Olzen, *Erbrecht...*, pp. 98 et seq.

²⁵ Cf. M. Ivens, *Internationales Erbrecht*, Norderstedt 2006, p. 361; Ch.C. Wendehorst, *Testamentary Formalities in Austria*, [in:] *Testamentary Formalities...*, pp. 223 et seq.

²⁶ R. Welser, [in:] *Kommentar zum ABGB*, ed. P. Rummel, Wien 2000, *passim*.

uted by a notary (§§70-73, 75 of the *Law on Notaries*); 4) a written will handed over to a notary (§§70, 72-75 of the *Law on Notaries*); 5) a will in a form of a notarial act (§§57-67 of the *Law on Notaries*); 6) solemnization of a written will by a notarial act (§§52-54 of the *Law on Notaries*)²⁷. An allographic will is a witnessed will, written wholly or in part by persons other than the testator, declared by the testator in front of witnesses²⁸.

In turn, Dutch law, frequently regarded as a desirable model for a possible future European legislation, provides for two basic, ordinary forms of wills: a notarial will and a deposited holographic will (Art. 4:94 of the Dutch Civil Code)²⁹. A notarial will is made in front of a notary, according to the dispositions of the Notaries Act. A deposited will, also called a holographic will or last will made by private deed, actually is a combination of a secret will and a holographic will. According to Art. 4:95 of the Dutch Civil Code, it can be written in the testator's own handwriting, by mechanical means, or written by some person other than the testator and must be signed by the testator personally. Where a holographic will contains more than one page and is written by another person than the testator personally or by mechanical means, each page must be numbered and certified with the signature of the testator. Then a will must be handed over by the testator to a notary. The testator must declare, when doing so, that the presented private deed contains their last will. When the private deed is presented in a closed envelope or in another closed form, the testator may also declare, when handing it over to a notary, that it may be opened only if specific conditions have been fulfilled on the day of their death. The notary draws up a notarial deed of the declarations of the testator and of the safe custody, to be signed by the testator and the notary. When the testator declares that they are not able to sign the before mentioned notarial deed of safe custody themselves due to a specific event that occurred after they signed the private deed that contains their holographic will, then this declaration replaces their signature on that notarial deed of safe custody, provided that it is included in that notarial deed of safe custody. A will shall remain in the keeping of the notary who received the private deed containing that last will³⁰.

Similar solutions were adopted in the new Romanian Civil Code, where the ordinary forms of wills are also linked to the requirement of the written form³¹. The

²⁷ M. Loewenthal, [in:] *International Succession*..., pp. 33 et seq.

²⁸ Ch.C. Wendehorst, *Testamentary Formalities in Austria*..., pp. 240-245.

²⁹ S. Van Erp, *The New Dutch Law*..., pp. 197 et seq.; B.E. Reinhartz, *Recent Changes in the Law of Succession*..., pp. 6 et seq.

³⁰ Cf. W.D. Kolkman, *Testamentary Formalities in the Netherlands*, [in:] *Testamentary Formalities*..., pp. 147 et seq.

³¹ Cf. I. Gvelesiani, *The Concept of Testate Succession in the Romanian and Georgian Legal Systems*, *Challenges of the Knowledge Society. Private Law 2013*, pp. 290 et seq.

new Romanian inheritance law among ordinary forms of wills lists holographic wills and notarial wills (Art. 1040 of the Romanian Civil Code)³². According to Art. 1041 of the Romanian Civil Code, a handwritten will, under the clause of nullity, must be fully written by hand and signed by the testator. In turn, a notarial (public) will must be authenticated by a notary or possibly by another person exercising a public function, whom the law confers such a competence (Art. 1043 Par. 1 of the Romanian Civil Code)³³. In turn, according to the Czech new law, ordinary forms of wills include a holographic will (§ 1533 of the Czech Civil Code), an allographic will (§ 1535 of the Czech Civil Code) and a notarial will (§ 1537 of the Czech Civil Code)³⁴. Those three options mean that in the Czech Republic a will can be: (i) written by hand, dated and signed; (ii) written otherwise than by hand (e.g. by computer), dated and signed, declared in front of two witnesses (who are not the heirs) that the document contains the last will; or (iii) made in a form of a notarial deed.

Not much different from the indicated regulations is the solution of the new Hungarian Civil Code (see § 7:13 et seq. of the Hungarian Civil Code)³⁵. The statute allows, among ordinary wills, to distinguish public and private wills. Private wills are a holographic will and an allographic will, while the latter should be written by somebody else other than the testator or by machine and signed by the testator. This form requires the involvement and signature of two witnesses that testify that the testator signed the will in front of them or the testator confirmed that the signature is theirs. Each of these wills can be deposited with a notary. The testator gives it to a public notary who does not know the content and therefore they are not involved in making of the will. The notary's sole duty is to keep the will safe and to make sure it is going to be used after the death of the testator. In contrast, a public will is such a will that can be made in front of and with an involvement of a notary public. Their involvement is crucial to create a valid public will³⁶.

A slightly different regulation from the above-mentioned ones, but also with maintaining of the written form of wills, is provided for, e.g. by English law³⁷. According to Section 9 of the Wills Act 1837, no will shall be valid unless: (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and (b) it appears that the testator intended by his signature to give

³² Ch. Alunaru, *Rumuńskie prawo spadkowe. Między dwoma kodeksami cywilnymi*, Transformacje Prawa Prywatnego 2011/1, pp. 28 et seq.

³³ *Ibidem*.

³⁴ Cf. M. Rutland, *Inheritance of Foreigners According to Czech Law*, available at: <http://www.rutlandjezek.cz/>.

³⁵ Cf. P. Gárdos, *Recodification...*, pp. 707 et seq.

³⁶ L. Vékás, *Testamentary Formalities in Hungary*, [in:] *Testamentary Formalities...*, pp. 255 et seq.

³⁷ Cf. R. Kerridge, *Parry & Kerridge: The Law of Succession*, London 2009, pp. 33 et seq.

effect to the will; and (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and (d) each witness either - (i) attests and signs the will; or (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation shall be necessary³⁸.

Other systems of inheritance law in Europe - on a closer examination - allow formulating a claim that, in fact, the regulations on the ordinary forms of wills in the national law of individual European countries are not so very distant from each other³⁹. An unquestioned rule in each system is the regulation according to which a choice of one of these forms of the will is at the discretion of the testator. Failure to meet the formal requirements generally leads to invalidity of a testamentary disposition. Such requirements for the particular forms of the will correspond rather to the prevailing trend in this respect, although, of course, they are not accepted by everybody⁴⁰.

The different legal systems also provide for extraordinary forms of wills, as I have already mentioned it. Such wills are mainly characterized by two essential features. Firstly, they can be made only in the event of certain specific circumstances, preventing from or at least hindering making an ordinary will by the testator. Secondly, the legal validity of extraordinary wills is usually time-limited because lawmakers take solutions according to which an extraordinary will is repealed with the passage of the time period, specified by law, counting from the date on which the circumstances justifying disregarding an ordinary will terminated. A simplified form of the will, which is usually one of the extraordinary forms, does not guarantee fully taking into account and respecting the real will of the testator. Hence, there is a need to limit the force of an extraordinary will in time, which is usually followed by legislators⁴¹.

Analyzing various forms of extraordinary wills, there is a need, however, to emphasize at the very beginning that in practice their role is not and should not be significant. Their admissibility is linked with some extraordinary, unusual circumstances, and because of it, no wider considerations associated with any potential harmonization in this area will be conducted by me.

Presenting these forms only superficially it should be stressed that the extraordinary forms of wills often include an oral will. It is done so, for example,

³⁸ G. Miller, *The Machinery of Succession*, Aldershot-Brookfield-Singapore-Sydney 1996, pp. 118 et seq.; J.G.R. Martyn, Ch. Ford, A. Learmonth, M. Oldham, *Theobald on Wills*, London 2010, pp. 8 et seq.

³⁹ The concepts are presented in detail in the reference literature, *inter alia*, by M. Ivens (*Internationales Erbrecht*) or K.G.C. Reid, M.J. de Waal, R. Zimmermann (*Testamentary Formalities*).

⁴⁰ Cf. J.H. Langbein, *Substantial Compliance with the Wills Act*, Harvard Law Review 1975/3, p. 489; G. Miller, *The Machinery...*, pp. 118-122.

⁴¹ Cf. L. Michalski, *BGB-Erbrecht*, p. 72 et seq.; D. Olzen, *Erbrecht*, pp. 105 et seq.

by the Polish legislator that in the content of Art. 952 of the Polish Civil Code provided that: § 1. If imminent death of the testator is expected or, if due to extraordinary circumstances, it is not possible or very difficult for a will to be made in an ordinary form, the testator may declare their final wishes orally in the simultaneous presence of at least three witnesses. § 2. The content of an oral will may be established in such a way that one of the witnesses or a third party writes down the testator's declaration within a year of it being made, giving the place and date of the declaration and the place and date of the written instrument, and the instrument is then signed by the testator and two witnesses or all of the witnesses. § 3. If the content of an oral will has not been established in the above manner, it may be established, within six months of the succession being opened, by the consistent testimonies of the witnesses given before a court. If the testimony of one of the witnesses cannot be heard or encounters obstacles that are difficult to be overcome, the court may consider the consistent testimonies of two witnesses sufficient⁴².

Sometimes in extraordinary wills a relaxation of the formal requirements boils down to a substitution of a notary with some other authority. This is the case of the Netherlands, where the Civil Code (Art. 4:98 et seq.) recognizes three categories of extraordinary wills: 1) a military will; 2) a journey will; 3) a disaster will. According to Art. 4:98 of the Dutch Civil Code, soldiers and other persons in the armed forces may, in the event of a war or civil war, make a last will before an officer of the armed forces. Soldiers and other persons in the armed forces may also in other situations than in the event of a war or civil war make a last will in the way as mentioned in the previous paragraph, provided that they belong to a part of the armed forces that has been assigned:

- a. to participate in a military expedition;
- b. to fight against the army of an enemy;
- c. to protect the neutrality of the State;
- d. to participate in an action either in self-defence on a collective or individual basis, or to maintain or restore the international order and safety, or;
- e. to follow an order of the competent authority in case of riots and rebellions⁴³.

A kind of an extraordinary will, encountered in some jurisdictions, is also a journey will. For example, German law knows it. According to the local § 2251 of BGB, a person who during a sea voyage is on board a German ship beyond a domestic port may make a will by oral declaration before three witnesses. In this case, the mere fact of the journey is the sufficient basis to make a will in the special form provided by that provision. It is not necessary for additional circumstances

⁴² Instead of many sources, cf. S. Wójcik, F. Zoll, *Testament*, pp. 99-110.

⁴³ W.D. Kolkman, *Testamentary Formalities in the Netherlands*, [in:] *Testamentary Formalities...*, pp. 159-160.

to take place, for example, a fear of imminent death, or inability or significant impediment to make the will in the ordinary form⁴⁴.

These kinds of statutory solutions are also found in other systems of the European law. Thus, extraordinary wills can have a specific complementary role in relation to ordinary wills. However, one can believe that the importance of this kind of solutions will be marginalized in the future. It is hard to imagine, for example, a journey will on the aircraft made before its captain during the flight, although this possibility is provided for by some legal systems today (e.g. Dutch law - Art. 1: 101 of the Dutch Civil Code, Polish law - Art. 953 of the Polish Civil Code)⁴⁵. Practical considerations or those related to flight safety, certainly exclude a possibility of making such a will. In the future, legislators will rather retreat from regulations of this type.

It also should be mentioned that the issues associated with the forms of wills are also issues of joint wills. The institution of a joint will, understood as a will including dispositions of more than one testator, is subject to different regulations based on various normative systems. These differences are expressed primarily on the fundamental issues of admissibility of non-defective making of a joint will, and further, in the event of the adoption of the regulation concerning this institution, on the differences in defining the concept of a joint will, in specifying the circle of testators who can make non-defectively a joint will, in normalization of joint will contents and the rules of its appeal, and finally in the minuteness of the regulations. Perhaps, in the future European inheritance law also these issues should be synchronized.

In the context of the harmonization of international inheritance law, an important instrument, which is The Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, signed on October 5, 1961, should be recalled⁴⁶. Its aim was and has been to help maintain validity of wills, because it provides, *inter alia*, that a will should be drawn up in a form complying with the requirements of one of the many legal systems identified in the Convention in order to be valid⁴⁷. It is therefore sufficient that a will meets the requirements as to the form in the State of its preparation, citizenship, domicile, or place of habitual residence of the testator, and it causes that in other countries it cannot be regarded as invalid⁴⁸. The content of Art. 1 of the Convention shows that a testamentary disposition is valid as regards its form if it complies with the internal law:

⁴⁴ L. Michalski, *BGB-Erbrecht*, p. 72.

⁴⁵ K. Osajda, [in:] *Kodeks cywilny. Komentarz...*, ed. K. Osajda, pp. 400-402.

⁴⁶ Cf., for example, Ch.H. Kälin, *International Real Estate Handbook*, Chichester 2005, p. 43 et seq.

⁴⁷ M. Tomaszewski, *Konwencja haska o kolizji praw w zakresie formy rozporządzeń testamentowych*, Nowe Prawo 1966/5, pp. 616 et seq.

⁴⁸ J.A. Schoenblum, *Multistate and Multinational Estate Planning*, Chicago 2009, pp. 15-17 et seq.

- a) of the place where the testator made their disposition, or
- b) being in force in the country whose national was the testator either at the time of the disposition, or at the time of death, or
- c) of the place where the testator was domiciled either at the time of the disposition, or at the time of death, or
- d) of the place where the testator had their habitual residence either at the time of the disposition, or at the time of death, or
- e) in relation to the real estate - where it is located⁴⁹.

The Convention has been ratified by many countries (in Europe they are: Albania, Austria, Belgium, Bosnia and Herzegovina, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Macedonia, Moldova, Montenegro, The Netherlands, Norway, Poland, Portugal, Serbia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom), so it is widely used and has an impact on the daily inheritance law relations. The Convention has become integrated with the internal legal systems and its functioning is particularly useful for testators with the inheritance assets in more than one country. They are able to distribute these assets with a single will.

Reflecting on the potential harmonization possibilities of the will form, I think that the most important is harmonization of ordinary wills. This is because usually these forms are used by testators, and extraordinary forms do not play a greater role in practice.

In this respect, it should be recalled that the discussion on a single form of wills in cross-border relations has been conducted on the global scale for decades. The most momentous effect of these considerations is the Washington Convention Providing a Uniform Law on the Form of an International Will, signed on October 26, 1973. Although the Convention is not especially popular, because to the end of 2013 only a dozen or so countries adopted it (in Europe: Belgium, Bosnia and Herzegovina, Croatia, Cyprus, France, Italy, Portugal, Russia, Slovenia and the UK), this solution seems to be interesting as a possible option for the future of the single inheritance law in Europe. Here it should be firmly noted that the Convention does not aim at harmonising or unifying the forms that already exist in the different systems of national law. These are neither modified nor abolished. It simply proposes, alongside, and in addition to the traditional forms, another new form, which as it is hoped, the practice will bring into use mainly, but not exclusively, when in the given circumstances a will has some international characteris-

⁴⁹ Cf. E.J. Griew, *Hague Draft Convention on the Legalisation of Foreign Documents and the Form of Wills*, *International and Comparative Law Quarterly* 1959, pp. 559 et seq.; G.A.L. Droz, *Les nouvelles règles de conflit françaises en matière de forme des testaments*, *Revue critique de droit international privé* 1968, pp. 1 et seq.; E. Jayme, *Grundfragen des internationalen Erbrechts - dargestellt an deutsch-österreichischen Nachlassfällen*, *Zeitschrift für Rechtsvergleichung* 1983/24, pp. 162 et seq.

tics⁵⁰. The “international will” as introduced by the Convention, is certainly new, but it seeks to meet the needs shown in the various existing systems. Lawyers from civil law countries will not find in it the holographic will or the notarial will with which they are familiar; neither will Common lawyers find exactly the will made in the presence of witnesses. However, each will find therein different features that have been derived from these different forms, so that whatever the place or circumstances, neither testator nor practicing lawyers will be surprised or bewildered by useless innovations⁵¹.

The Uniform Law is intended to be introduced into the legal system of each Contracting State. Therefore, it introduces into the internal law of each Contracting State the new basic principle according to which the international will is valid irrespective of the country in which it was made, the nationality, domicile, or residence of the testator and the place where the assets forming the estate are located⁵². The idea underlying the Convention was the recognition that very stringent formal requirements as to the validity of a will should not be formulated, because then the testator could easily not make them satisfied, and this would lead to the annulment of an act of their last will. Thus, for the compliance with the form of the international will it is sufficient to meet the following: 1) to have the will drawn up in writing, not necessarily by the testator, by hand or in any other manner (Art. 3 of the Annex to the Convention); 2) the testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is their will and that they know the contents thereof. The testator need not inform the witnesses, or the authorized person, of the contents of the will (Art. 4 of the Annex to the Convention); 3) in the presence of the witnesses and of the authorized person, the testator shall sign the will or, if they have previously signed it, shall acknowledge their signature (Art. 5 of the Annex to the Convention).

Such formal conditions are therefore a compromise between the holographic will and the allographic will or the notarial will, and they resemble the solution operating in England and Wales. Undoubtedly, as one of the possible instruments of inheritance law the international will, seen as an interesting tool, which used by European countries, would be part of the institutional harmonization of law, although lying outside the structures of the European Union. The possible accession of the European Union countries to the Convention would not undermine the existing national standards of inheritance law, but it would allow adoption of an additional instrument, whose exercise in the future could become a reasonable

⁵⁰ Cf. C. Hall, *Towards a Uniform Law of Wills: The Washington Convention 1973*, International and Comparative Law Quarterly 1974/23, pp. 851 et seq.

⁵¹ J.A. Schoenblum, *Multistate and Multinational...*, pp. 15-24 et seq.

⁵² Cf. K. Nadelmann, *The Formal Validity of Wills and the Washington Convention 1973: Providing the Form of an International Will*, American Journal of Comparative Law 1974/22, pp. 365 et seq.

compromise on the way to unify international inheritance law. This kind of solutions is becoming more and more necessary, hence the reminder of the Convention text in this context seems to be very reasonable. Moreover, the mere fact of non-adherence to the Convention by many countries is a bit surprising. In the conference in Washington 42 countries took part and they accepted the text of the Convention. One of these countries was, among others, Poland. However, here as well, the State authorities have not been convinced so far to ratify the Convention. Whereas, there do not seem to exist any special justifying reasons or contraindications for not doing it. The success of The Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions should contribute to the increase in popularity of the Washington Convention. The first stage of harmonization is usually unification of the conflict of laws rules, in order to follow it by works on the harmonized substantive law.

In practice of inheritance law, in the near future, it may turn out that the individual testators will often apply foreign law to their testamentary dispositions, especially because of the provisions of the succession Regulation No 650/2012 after 17 Aug. 2015. This in turn may cause a surprise to people close to the testator who due to the consequences of the foreign law application may be deprived of certain privileges of inheritance law. One should remind here the opportunity to choose the appropriate law by the testator (Art. 22 of the Regulation) and the provision of Art. 27 of the Regulation. According to the latter standard, a disposition of the property upon death made in writing is valid as regards the form if it complies with the law: a) of the country in which the disposition was made or the agreement as to succession was contracted; b) of the country whose nationality the testator or at least one of the persons whose succession the succession agreement concerns had at the time of the disposition or the agreement, or at the time of death; c) of the country where the testator or at least one of the persons whose succession the succession agreement concerns domiciled either at the time of the disposition or the agreement, or at the time of death; d) of the country where the testator or at least one of the persons whose succession the succession agreement concerns had their habitual residence either at the time of the disposition or contract, or at the time of death; or e) in case of real estate - of the country where the property is located. Determining whether the testator or the persons whose succession the succession agreement concerns were residing in a given Member State is subject to the law of that State.

4.3. Development trends

The formal requirements for testamentary dispositions are considered by some critics as too restrictive and thus requiring changes. In the doctrine of in-

dividual countries, some changes have been postulated resulting primarily from the situation that it is the court that should decide whether a document actually contains the last will and was drawn up as the disposition *mortis causa*. Similarly, some relaxation of the inheritance formalities has been suggested. The will of the testator, even if it were to be the cause of the court proceedings is a value that in the opinion of many proposers is to be protected.

Certainly, an important feature, which should be fulfilled by the regulations concerning the form, is to enable the most accurate reproduction of the testator's last will. Thus, in some jurisdictions, one can already see some relaxation of the form, especially in situations where establishment of the testator's intentions by evidence extrinsic to the will is unquestionable. In this light, it must be emphasized that the world can observe a general tendency to deformalize testamentary dispositions. In fact, it is assumed that it is not the requirements regarding the form, but reflecting the testator's last will is one of the main priorities of the modern inheritance law⁵³. Following this direction one needs to consider admissibility of such forms of testamentary dispositions that firstly enable execution of the testator's will, at the same time not raising any doubts about the authenticity of the disposition *mortis causa*, and only then to proceed to the formulation of the rules concerning failure to maintain the form⁵⁴. In this regard, a special attention deserves the development of the legal thought in the common law countries, which admittedly is based on other traditions, completely different from continental law, especially in the context of testamentary inheritance⁵⁵, but it should not be irrelevant in the context of attempts to find a future for continental legislators, for example, in the case of the legal institutions of a universal character, or of tracking current trends in the interpretation. It is in the latter case that one should pay attention to the fact that the Anglo-Saxon doctrine has noted recently the prevailing trend in court decisions to liberalize the formal requirements of testamentary dispositions, designed to keep the will of the testator, even if their disposition does not correspond with the will forms provided for by the law, in the event when their will can be reproduced in a precise manner and there is no suspicion of falsifying it⁵⁶. The result of the adoption of a similar concept is, for example, the provision of Art. 714 of the Quebecois Civil Code, according to which a holographic testament or a will made in the presence of witnesses, which does not meet all the formal requirements provided for in the law, will not be rendered invalid because of

⁵³ Compare, however, S. van Erp, *New Developments...*, p. 13.

⁵⁴ Cf. however, on the formalism of wills: K.-H. Gursky, *Erbrecht*, pp. 22 et seq.; E.B. Capdevila, *Testamentary Freedom and its Limits*, [in:] *The Law of Succession...*, pp. 73 et seq.

⁵⁵ Cf. S. Gardner, *An Introduction...*, pp. 1 et seq.

⁵⁶ These trends are indicated, *inter alia*, by S. van Erp, (*New Developments...*, p. 13).

this if it only satisfies part of these requirements, but, based on it, the last will of the deceased can be indisputably established⁵⁷. As going in the same direction, one can evaluate the regulation of § 2232 in conjunction with § 2233 of BGB according to which an illiterate person can express their will in any other acceptable manner, as long as it is understood by a notary drawing up the will⁵⁸.

Another important observation of the trends in the development of inheritance law in the world, which is truly only associated indirectly with the forms of testamentary dispositions, is an observation that it is raised more frequently in the doctrine and the jurisprudence that during the interpretation aiming at reflecting the last will of the testator it should be allowed to use extrinsic evidence, and therefore outside the will. Such a solution is contained, for example, in Art. 32 of the Succession Act from 2006 of New South Wales State in Australia⁵⁹. According to this provision, the use of the extrinsic evidence to interpret the wish, including the intention of the testator, is permissible to assist in the interpretation of vague wording of the will. An interpreter may therefore seek to determine what the testator understood by the used terms, which aims - in a sense - to complement the contents of the will⁶⁰. It is not, however, to supplement the contents of the will, for example, by some new dispositions, but to explain the meaning of the dispositions *mortis causa* already made by the testator. Hence, one must emphasize here that in the European reference literature such a possibility is accepted quite commonly⁶¹, not necessarily drawing any practical conclusions from it. While acceding to this concept, it must be clearly said that with the interpretation of the will one should seek to determine the actual intention of the testator, by any means, taking into account all the circumstances, including those external to the will. There is a tendency according to which, an intention of testation can be proved both by the content of the statement and the expressions used in its formulation, as well as the circumstances of this declaration⁶². Undoubtedly, such an interpretation is a breakthrough compared to the traditional approach to the

⁵⁷ On the Quebec legal system see, for example, Ch. Morin, *Balancing Interests and Setting Priorities in Family Matters: The Model Advocated by the Law of Succession in Quebec*, [w:] *12th World Conference of the International Society of Family Law*, Salt Lake City 2005, pp. 1 et seq.

⁵⁸ Cf. M. Avenarius, [in:] *BGB Kommentar*, eds. H. Prütting, G. Wegen, G. Weinreich, Köln 2010, § 2233.

⁵⁹ Cf. P. McGowan, *Recent Amendments to the Succession Laws in New South Wales*, *Elder Law Review* 2010/1, pp.1-14.

⁶⁰ See, for example, F. Burns, *Key Aspects of the Succession Act 2006 (NSW)*, [in:] *Law and Public Policy: Taming the Unruly Horse?*, eds. M. Adams, D. Barker, K. Poludniewski, Lindfield NSW 2007, pp. 3 et seq.

⁶¹ See, for example, in the Polish reference literature: E. Skowrońska-Bocian, *Komentarz...*, p. 91; M. Pazdan, [in:] *Kodeks cywilny...*, p. 795.

⁶² E.M. Blomberg, *Freiheit und Bindung des Erblassers*, Tübingen 2011, *passim*.

interpretation of wills, but aiming at respecting the rules of *favor testamenti* and modernizing testamentary inheritance, and that is why it should be used in practice.

This trend also appears - as it can be judged - in Europe. Loosening concerning the form is also characteristic for the continental legislations. As an example, one can point to a case before a Polish court in which it was found that an allographic will, drawn up by the testator, includes the date of its drafting; however, the district court on the basis of an expert's opinion determined that the date of its preparation was reworked by the reporting clerk, and that the original date of making this will was earlier, which led the district court to believe that said will should be regarded as invalid and it decided that statutory successors were entitled to the inheritance estate⁶³. However, the Supreme Court recognizing the legal issue presented to it by the court of the second instance came to the conclusion that there were no legal grounds to recognize as invalid an allographic will for the sole reason that the actual date of its preparation was later reworked. The Court pointed to the fact that void is only a will that was made in violation of the provisions for the will form; thus invalidity applies to breaches of the requirements as to the form of the will, and does not refer to later events. The rework of the will, drawn up in compliance with all the requirements as to the form, does not involve the effect of the will invalidity; however, according to the Court, it may entail unworthiness of the heirs if it was proved that they remade the will or knowingly benefited from the will remade by another person⁶⁴. Another example could be a different case also decided in Poland, in which a will was drawn up in such a way that the testator in the presence of two witnesses declared her last will orally to the leader of a village, which, according to the district court resulted in the invalidity of the will, since it contained the last will statement of the testator submitted to an unauthorized person, not listed in Art. 951 of the Polish Civil code. The Supreme Court, however, deciding the questionable legal issues presented to it by the court of the second instance came to the conclusion that the invalidity of the will provided for in Art. 951 of the Civil Code, caused by failure to observe the applicable provision of law, may be considered as an exceptional circumstance in the meaning of Art. 952 § 1 of the Civil Code, justifying the treatment of the last will statements made by the testator as an oral will. In the opinion of the court, the fact that the leader is the representative of the local government in the village, and performs a number of tasks assigned to them in the field of public administration may give rise to a false belief that a village leader is the local

⁶³ The facts based on the resolution of the Supreme Court of 7 March 1978, III CZP 13/78, Lex-
Polonica No. 296779.

⁶⁴ Reasons for the resolution of the Supreme Court of 7 March 1978., III CZP 13/78, LexPolonica
No. 296779.

government agent and that, similarly as a mayor of a municipality, its secretary or other authorized persons, is a person empowered to cooperate in preparation of an allographic will. Not being authorized to perform this type of acts, the leader should have refused to receive the last will statement of the testator. However, if they failed to do it, this only reinforced the mistaken belief of the testator that the will had been drawn up in compliance with the applicable law. The special circumstance in the meaning of Art. 952 § 1 of the Civil Code - in the opinion of the Court - is, therefore, the inability to make an allographic will caused by the mistaken belief of the testator, who declared her last will to the leader, that the leader was a person empowered to reception of such a statement. This particular circumstance causes that keeping of the usual will form was impossible or very difficult. In this situation, the conditions laid down in Art. 952 § 1 of the Civil Code, conditioning the opportunity to make an extraordinary will, which is an oral will, were met, allowing - in case of fulfilment of the other conditions, which determine the validity of the will - the recognition of the last will statements made by the testator as such a will⁶⁵.

With the above in mind, one can be tempted to declare that in any future European inheritance law, these issues should find the right place in addition to the form of testamentary dispositions. Templates for such regulations can be found especially in Anglo-Saxon countries.

Against this background, a very interesting topic - as one can think - is issues of digital testamentary dispositions. The virtual reality has undoubtedly left the legislators behind here, if only because some attempts to dispose of the property in the virtual worlds have already taken place repeatedly, as well as attempts to take over the virtual rights and obligations of the testator. So far, there has not been in the European doctrine any wider debate on whether the forms of wills, traditionally found in different legal systems, are sufficient for the digital, virtual worlds. It is therefore in no way prejudged whether an appropriate regulation should appear in the future or whether the existing regulations are sufficient. Surely, this should be the subject of further discussion. In this context, it should be noted that in some jurisdictions, lawyers have repeatedly had to consider the relationship between the formal requirements set by the law for wills and the will of the testator expressed in the electronic form, therefore, left after their death as a digital content. This form of the property disposition upon death generally does not meet the current formal criteria laid down in the respective legal systems, and generally an attempt to determine the entitlement to inheritance on the basis of such a will should lead to the finding of invalidity of such a property disposition. Still, in many cases, attempts have been made to uphold the power of such a testamentary

⁶⁵ Cf. the resolution of the Supreme Court of 22 March 1982, III CZP 5/82, LexPolonica No. 301662.

disposition, which has been typical in recent years, especially for the Anglo-Saxon systems. The local doctrine seems to defend the position according to which a wide range of circumstances in which the testator expresses their wish, including the use of various kinds of applications, computers or tablets, should not be a barrier to making their disposal of property upon death. Furthermore, the legal system should strive for the realization of the last will of the deceased, and present no formal limitations. In this context, also the local judiciary expressed their opinion. More than twenty years ago, one of the Australian courts pointed out that, in practice, they had to deal with a large number of cases in which the deceased's will could not be taken into account, which in their opinion is "evil that should be remedied as soon as possible"⁶⁶.

Coming back to the European ground, it should be mentioned that in one of the recent cases in Sweden, it was found that the deceased had spent the last few hours of his life writing text messages (SMS) to his close persons, indicating in a very detailed way what assets of his property should fall to them after his death. After a few hours, he committed suicide. In the court proceedings, it was established that the dispositions were his real will; he wanted to dispose of his property *mortis causa* in such a way. The court of the first instance held that on such grounds, the heirs could be entitled to inherit, but the court of the second instance changed the ruling, indicating the invalidity of such a disposition as in contradiction with the formal requirements set by law. Commenting on the judgment the local doctrine indicated *inter alia* that it was time for a profound reform of inheritance law in Sweden. The present solutions - according to this opinion - are aged, because "a lot has changed since the time when they were drafted at the beginning of the last century"⁶⁷. Similar problems have also appeared in other systems. For example, in the Australian law, effectiveness of a will made by using a Smartphone has been considered. In this regard one must first recall that the provision of Art. 10 of *Succession Act* (1981) of the Australian State of Queensland provided for formal requirements concerning the preparation mode of property dispositions upon the death (the signature, the presence of witnesses), and the lack of compliance with these requirements generally resulted in the need to recognize testamentary dispositions as invalid. The changes introduced in 2006 by *Succession Amendment Act* (2006), involving, among others, an introduction of a regulation according to which in the absence of compliance by the testator with all the formal requirements posed to testamentary dispositions by law, the court having found undoubtedness of testation and the unambiguous intention of the testator,

⁶⁶ Judgment of the Court of Appeal of the State of New South Wales on 18 May 1994. in the case *Re: Estate of Masters; Hill v Plummer*, New South Wales Law Reports 1994, No. 33, p. 462.

⁶⁷ A statement by M. Brattström for the Swedish Radio, quoted by *The Local* from 14 February 2014 in the article: *SMS not a valid last will and testament: court*, <http://www.thelocal.se/20140224/sms-not-valid-last-will-and-testament-court> (03.05.2014).

may consider such dispositions as valid, were a significant breakthrough in the principle of the testamentary disposition formalism. Recently, this regulation has allowed, among others, to ascertain entitlement to inheritance on the grounds of a property disposition made on the iPhone. In the facts of the case the testator made on his phone some records in the “Notepad”, and one of them turned out to be his last will, carrying the title “This is my last will and testament”. Shortly after it, the testator committed suicide and the person named in the note made on the iPhone as the will executor petitioned the court to declare his entitlement to inheritance. The court found the petition effective, indicating that the words contained in the electronic document and its contents left no doubt that the testator wanted to dispose of his assets *mortis causa* just in the way presented there⁶⁸. Commenting on these issues one cannot forget about the new inheritance law of the Canadian Province of British Columbia *Wills, Estate, and Succession Act* (WESA), which entered into force on 31 March 2014; it introduced changes also in this area. For the issues of the virtual world a significant meaning may have the provision of Art. 58 of the Act, according to which the court may deem as a valid disposition each “record, document, writing or marking” if it considers that it contains the intentions of the deceased. The digital content falls under the term “record”⁶⁹. Thus, the local legislature created a mechanism that allows the practice to uphold digital dispositions of property upon death. Certainly, the practice in this respect will be extremely interesting.

Therefore, looking at the issues of the testamentary dispositions form and possibilities of their harmonization in the future one must admit that before the European legislator there are many dilemmas to resolve. One of them is certainly a dilemma whether to base on the existing instruments found in the different legal systems used in practice quite often, whether to benefit of the Washington Convention, or whether to introduce a completely new instrument, a new European will form. What could be the European innovation in this area?

4.4. New concepts

In the context of possible new developments in inheritance law, it is worth of consideration a postulate - I think - to envisage another form of the ordinary will - a video will. In the era of the advanced technology, the Internet, where basically every household has access to equipment recording video image and sound in a digital form (computer sets, mobile phones, cameras) there is a temptation to use these devices for the purposes of inheritance law and registration of the last

⁶⁸ Judgment of the Supreme Court of the Australian State of Queensland on 6 November 2013 in the case *Re: Yu*, Queensland Law Reporter 2013, No. 48, p. 6-7.

⁶⁹ Cf. G. Behan, *Text Message Wills?*, Mondaq of 10 March 2014, p. 1.

will in this manner. An opportunity to share the last will in this form, addressed to the closest persons, would undoubtedly make the will an act even more personal than ever before, thus allowing a broader justification of the dispositions made in this way. It would also be a possibility of some kind of a more spectacular farewell to the loved persons, leaving unforgettable memories, altering somewhat the ungracious role of a legal act, which is the will. If admissibility of such a construction were accepted, sufficient to produce legal effects could be a video and audio recording (audio-video) registered by means of a technical device, which would leave no doubt about the person of the testator and their will. The testator declaring their will verbally would indicate - as in the case of other wills - who is entitled to inherit, possibly deciding for other testamentary dispositions, for example, making a legacy, giving orders or disinheriting. This form would allow for an unambiguous reading of their will, faithfully presenting the act of testation, which cannot be said of other forms of testamentary dispositions⁷⁰. It would also be the most complete form, allowing the freest expression of the testator, which then could be interpreted properly by the authority applying the law to realize the last will of the testator (*favor testamenti*)⁷¹.

Indicating the essential elements of such a will, beyond a statement of will recorded using a technical device recording picture and sound, I think, it is worth proposing at drafting this form of the will to have that the rules governing it should contain a requirement, according to which such a will should include the date of its preparation, either in a digital form, or indicated by the testator. It would serve achieving two goals. Firstly, it would allow determining whether the testator at the time of the will was capable of testation. Secondly, in the event of preparation of several wills it would allow to determine the order of their creation. It remains to consider whether this requirement should be under the clause of nullity, possibly allowing demonstration of the date by other means of proof. This last solution - as it seems - aims to meet the modern trends of inheritance law, which allow showing the contents of the will by extrinsic evidence⁷².

This concept can be objected that there are ways to falsify the will of the testator, consisting, for example, in forcing a specific statement or fabricating the whole record. Indeed, this could be a practical problem, but nonetheless, even today similar objections can be raised even against the construction of a holographic will. Nevertheless, the authorities applying the law handle this kind of problems, and I believe that the authenticity assessment of the recordings should not be a difficulty for a person holding a special knowledge (an expert). Another issue

⁷⁰ Cf. M. Załucki, *Współczesne tendencje...*, pp. 23-52.

⁷¹ On the application of the principle of *favor testamenti* see, e.g. K. Osajda, *Testamenty...*, pp. 44 et seq.; B. Eccher, *Bürgerliches Recht. Band VI: Erbrecht*, Wien-New York 2010, pp. 53 et seq.

⁷² Cf. M. Załucki, *Współczesne tendencje...*, pp. 23-52.

raised in the doctrine against such a solution is the claim of a little practical interest in a possibility of recording the last will in the form of an audio-video film, due to alleged technical difficulties (necessary equipment), which would occur when trying to make it.⁷³ I do not share these concerns. Today, almost everyone has free access to an audio-video recording device. Hence, I claim that its use does not present any special difficulties, and looking at the development of technology in recent years, I am convinced that in the future this kind of devices will be very popular, which may also apply to this form of wills. Hence, this form of the will is indeed to meet the future needs of the society. As it will certainly provide a clear understanding of the last will of the testator, it will ensure consistency between this will and the way it is reconstructed after their death, and it will emphasize seriousness and importance of testation, so it seems to be a tempting proposition in the discussion on the future shape of testamentary inheritance. Premature, however, is to make appropriate proposals for the future rules governing a video will. Firstly, one should discuss admissibility of such a disposition of assets in the event of death at all and only then, one can consider specific legislative proposals.

I still need to add that none of the modern regulations expressly provides for that kind of the will form. In the Anglo-Saxon systems, however, there operate businesses offering this kind of services, which must mean that in the near future the jurisprudence will face the problem of ascertaining entitlement to inheritance based on a video will⁷⁴. Already today, also under the continental law, it seems admissible in the court proceedings the evidence of audio-video recording to determine the fact of the actual will of the testator, of course, in the event if a person concerned undertakes demonstrating the existence of other important forms of dispositions *mortis causa*.

Some considerations should also be made to wills drawn up entirely in the electronic form, e.g. by email. Availability of email or other electronic means of communication enforces a question about possible effectiveness of this kind of the last will act. Interesting facts about a will made in the electronic form were the subject of a decision in one of the Australian courts. In its judgment of 14 March 2002, the Supreme Court of Victoria State discussed the validity of a property disposition upon the death left by the testator in a file recorded on the hard disk of a computer. The witnesses heard in the case confirmed that the deceased had informed them of his intention of leaving his last will in this way, as well as that the contents of the will played from the hard disk were consistent with the statements that he had made to them. The Court - analyzing the facts in relation to the content of Art. 9 of the local Act on the Wills of 1997 - stated that for the validity of the will and the consequent grant of probate it is necessary to meet three condi-

⁷³ Thus, for example, K. Osajda, *Wpływ rozwoju...*, p. 54.

⁷⁴ See, for example, the possibilities of *YourLastWill* service at: <http://yourlastwill.net/>.

tions: 1) there must be a document; 2) the document must contain the last will of the deceased; 3) the testator at the time of its preparation must have an intention to test. In the opinion of the court, each of those conditions was satisfied in the presented case. Firstly, the file saved on the hard disk could be recreated and reproduced, which gives it a quality of a document. Secondly, the file contained a clear and precise disposition of the testator's assets. Thirdly, the testator, in the court's opinion, preparing the file undoubtedly had an intention to test. Hence, on the computer printout, despite the lack of the testator's signature, the authorization was granted to the executor of the last will of the deceased⁷⁵.

In another Australian judgment, the Supreme Court of Queensland State stated on 19 August 2011 that the file made in the Microsoft Word text editor, called "This is the last will and testament of Karen Lee Mahlo.docx" and saved on the computer disk, was repeatedly forwarded between the testator and her unmarried partner by email; in principle, it could not be a valid will, unless the testator at its preparation had an intention of testation. The Court referred to the regulation of Art. 18 of the Queensland Law of Succession of 1981⁷⁶, according to which the validity of the will and the consequent grant of probate requires the existence of a document that in the intention of the person drawing up this document was to be their last will. In the facts of the case, the only doubt concerned not admissibility of the electronic form of the will, but the intention of testation by the testator⁷⁷. As the court found, the testator before her death drew up also other wills signed by her own hand, which in the opinion of the court was of such importance that she must have been aware that for the validity of the will it was necessary for her to sign it. If the electronic form itself of the left will was not decisive about its invalidity, as the court pointed out that in other circumstances it would have found the effectiveness of such a disposition, but after confronting the left will with the circumstances of the case, indicating the preparation of other wills in writing, which was also confirmed by the witnesses, who were only told by the testator about the written will, the court came to the conclusion that the left file might constitute merely a draft of the will, without the testator's intention of testation⁷⁸.

The above Australian decisions are not the only ones that have considered a possibility of electronic wills. This problem has been also handled by courts in other countries. For example, in South Africa, two colleagues in the absence of other close persons agreed between each other that, in the death event of either of

⁷⁵ See the ruling in the case of *Trethewey* of 12 March 2002. [2002] VSC 83.

⁷⁶ Cf. A.A. Preece, *Lee's Manual of Queensland Succession Law*, Sydney 2013, *passim*.

⁷⁷ B. Cannon, *Is an Electronic Will a Will?*, Australian Estate Law Today of 16 February 2012, pp. 1 et seq.

⁷⁸ The decision in the case *Mahlo v Hehir* of 19 August 2011, [2011] QSC 243.

them, all the assets would fall to the surviving one. In carrying out this intention, the testator sent to the heir selected in this way an email, in which he appointed his colleague as the person entitled to all his assets. The other colleague drew up a will in the form prescribed by law, which the testator knew about. A few months after sending the email containing his last will the testator died, and as it was found he had also left another disposition of property upon death, whose form was prescribed by law, and made three years before sending the email. In the opinion of the court, although pursuant to the provisions of Art. 2 paragraphs 1 and 3 of the Wills Act of 1953, there was a formal requirement of signing a will, in a situation where it was possible to prove that the document contained the last will of the deceased, its effectiveness had to be considered. The formal requirements should not frustrate the true intention of the testator. The main problem of the case facts was therefore to determine whether the existing email was actually made by the testator, and whether at the time of its preparing the deceased had an intention to test. On the grounds of the evidence collected in the proceedings, the court concluded that a will drawn up by an email was valid and capable of producing legal effects provided in it⁷⁹.

The views of the jurisprudence delivered in the presented cases are very important for today's look at the problems of wills, but of course, due to the different normative context they must be considered moderately. One major assertion of a universal character undoubtedly follows from them. The priority of the modern inheritance law is to realize the last will of the testator. This direction in the interpretation of wills should not be strange in the future European solution. The principle of *favour testamenti* should apply not only to the interpretation of a declaration of intention, but also - as shown by foreign examples of judicial decisions - to the interpretation of the statute. The European legislator should keep it in mind as well.

4.5. Conclusions and recommendations

The issues of the will form are an area for a significant analysis of the future international inheritance law. The European Union should keep it in mind if in the future it will be decided to have the institutional harmonization of inheritance law. Today, looking at the trends prevailing in the different national legal systems one can venture to say that at least part of the testamentary inheritance area is the subject of spontaneous harmonization. Many of the solutions are in fact similar to each other. It can be said so, for example, about the form of the will, which is a holographic will, occurring in principle in the majority of the European

⁷⁹ The judgment in the case *Van der Merwe v Master of the High Court & another* of 6 September 2010, [2010] ZASCA 99.

laws. Moreover, as the practice shows, in most systems, it is also the most popular form of wills, most often used by testators. Although some detailed solutions of lawmakers on the form of wills differ from each other, it does not appear that these differences are significant enough to prevent an institutional unification leading to the adoption of a uniform solution in the future. Thus, it appears that at least a holographic will or any of its modern versions could serve as a model for the future single European regulation. Thus, private wills may rather prove to be a path towards the full harmonization for the European legislator.

It also seems that the future European regulation should provide an opportunity to show the last will of the deceased, sometimes even if the testator has not complied with all the formal requirements. As it can be judged, the last will of the deceased is a more important value than the formal requirements of the law. That is why the future European instrument should create a solution that will allow maintaining testamentary dispositions in force, even if such dispositions do not correspond with the will forms provided for by the law, in the event when the testator's will can be reproduced in a precise manner and there is no suspicion of falsifying it

An interesting instrument of international inheritance law in the area of testamentary inheritance is also the international will. Popularization of the Washington Convention Providing a Uniform Law on the Form of an International Will can also be the right way to standardize this part of inheritance law in Europe, long before some institutional decisions are taken in the European Union. Although the provisions of the Convention are not too popular today, there is nothing to prevent a change to this situation in the near future. The Convention deserves that its provisions should begin to be used on a wider scale.

Chapter 5.

The ability to harmonize regulations on the protection of family against testamentary dispositions

5.1. The need to protect persons close to the testator

An impact of the inheritance law standards on personal relations between people is unquestionable. A function to protect the family of the deceased is usually referred to as one of the most important functions of inheritance law in the non-financial sphere. In this way, due appreciation is given, on the one hand, to the role of family relations affecting certain behaviour of the future decedent, and on the other hand, to the need for proper adjustment of the proprietary situation created as a result of their death to the personal relations linking them with family members¹. In fact, the decedent has generally some specific legal and family relations with other persons and for this reason, they may have certain responsibilities, especially to their closest relatives and spouse. The regulations of inheritance law, however, shape the economic and personal situation not only of the persons who are related to the decedent by the ties of kinship, marriage or adoption, and therefore by the bonds of family, but also of the individuals who are in relation to the decedent in some specific close personal relations having no such character². As the doctrine indicates, the feature of such relationships is a spiritual, emotional, or personal community - with a considerable degree of intensity - and it may be based on different kinds of circumstances (kinship, marriage, affinity, concubinage, engagement, adoption, love, friendship, companionship, cohabitation, liking, etc.)³. Therefore, people

¹ J. Biernat, *Ochrona...*, p. 11.

² S. Wójcik, *Ochrona interesów jednostki ...*, p. 175.

³ J. Biernat, *Ochrona...*, pp. 20-28.

who are connected with the decedent in such a relationship should be considered as persons close to them⁴.

The interest protection of such persons and their resulting rights is treated by some lawyers as a natural thing. During the lifetime of the decedent, family law institutions (e.g., maintenance)⁵ execute such a protection. However, after the death, specific functions in this area can be fulfilled by inheritance law⁶. Therefore, in various jurisdictions, in the interest of the persons closest to the deceased, freedom of testamentary dispositions is limited, granting them effective *mortis causa* rights, independent of the testator's will. Determinants of such legislative solutions must now be sought in acts of constitutional status and international conventions that create protection for family members of the deceased, having primarily an economic and social character⁷.

Observing the evolution of legislation in this field shows a number of institutions which, in various legal systems have been designed to achieve this goal⁸. Currently, this is generally done through a system of the so-called inheritance reserve (the mandatory part), while in other cases through the system of legitim⁹. However, in many countries, common law confers on the courts the power to correct testamentary dispositions and matching them to the circumstances of the case. This is the system of the so-called discretionary adjustive power of the judge, having a quasi-maintenance character¹⁰. There are also other mechanisms for the protection of the persons closest to the deceased, whose principal purpose is, however, not to counteract the testamentary dispositions. They are dictated by other considerations, such as the protection of the decedent's spouse to alleviate economic and life discomforts, which the surviving spouse is experiencing as a result of the death of their spouse¹¹, counteracting perturbations related to the living conditions for the people who lived with the decedent¹², or meeting the needs associated with the use of marked household appliances¹³. Because they

⁴ M. Załucki, *Wydziedziczenie*..., p. 40.

⁵ J. Gwiazdomorski, *Przesłanki istnienia obowiązku alimentacyjnego*, Warszawa 1974, pp. 5 et seq.

⁶ F. Bydlinski, *System und Prinzipien des Privatrechts*, Wien-New York 1996, pp. 402-413.

⁷ M. Załucki, *Wydziedziczenie*..., pp. 89-123.

⁸ P. Księżak, *Zachówek*..., pp. 23-46.

⁹ Cf. A.L. Verbeke, Y.H. Leleu, *Harmonisation of the Law of Succession*..., p. 468.

¹⁰ Cf., for example, B.L. Stout, A. M. Perry, Jr., *West Virginia Takes a Step Backward in Elective Share Law*, *West Virginia Law Review* 1997, pp. 679-685.

¹¹ Cf. T.P. Gallanis, *Inheritance Rights for Domestic Partners*, *Tulane Law Review* 2004/79, pp. 1 et seq.

¹² Cf. S. Kreiczler-Levy, *The Riddle of Inheritance: Connecting Continuity and Property*, *Social Science Research Network* 2012, Paper No. 1789211, pp. 2 et seq.

¹³ Cf. M. Habdas, *Pozycja prawna małżonka spadkodawcy na tle prawnoporównawczym*, *Rejent* 2006/2, p. 68.

fulfil a different role in inheritance law, they will not be discussed here more extensively¹⁴.

Regardless of the method of protection, each system essentially aims at granting a person belonging to a particular group of the entitled beneficiaries some specific benefits from the inheritance assets, which is done against the will of the testator. However, these rights are generally not absolute. Individual laws are in fact designed in such a way that in case of violation of the bond underlying granting of these special rights in the event of the testator's death to a potential beneficiary, the testator in the testamentary disposition may disinherit such people, thus depriving them of all the benefits of the inheritance estate¹⁵. Usually, however, disinheritance is limited to the grounds specified in the law¹⁶, which include, among others, a conduct against the will of the deceased in a manner contrary to the principles of social coexistence (Art. 1008 item 1 of the Polish Civil Code), attacking the life of the testator or someone close to them (§ 2333 item 1 of BGB), leaving the testator being in need without assistance (§ 768 item 1 of ABGB) or attempting to influence the way the testator will dispose of their estate (Art. 1621 item 5 of the Louisiana Civil Code). All of them relate to the negative behaviour of the beneficiary of the special rights in the event of the testator's death, and are designed to prevent a situation in which the receipt by such a person of any benefits from the inheritance would be immoral¹⁷.

Against this background, one must note that an introduction into different legal systems of restrictions on freedom of testation, especially in the form of reserve or legitim, leads to a reduction in the scope of the testator's will. So long as it is indicated that it is justified by the interest and importance of the family in the society, as well as trends in both the former private law and in modern legal systems, it seems that even greater efforts to liberalize the rules on disposal of assets in case of death can be increasingly observed, which would result *de facto* in a sort of absolutizing the principle of testation freedom.

Despite these views, some tools allowing for interference with the will of the testator are still existent. In order to justify the grounds for their validity three reasons are primarily indicated: security, distribution, and family responsibility. The first is to justify this kind of regulations by the need to provide maintenance for persons close to the deceased and dependant on them, regardless of their will. The second position is motivated by the need for fair and equal distribution of the

¹⁴ Cf., for example, A. Dyoniak, *Ochrona rodziny...*, pp. 19 et seq.

¹⁵ R.F. Croucher, *How Free is Free? Testamentary Freedom and the Battle Between Family and Property*, TC Beirne School of Law Research Seminar Series 2009, pp. 1-14.

¹⁶ W. Zimmermann, *Der Verlust der Erbschaft. Enterbung, Pflichtteilsschmälerung, Erb- und Pflichtteilsunwürdigkeit*, Berlin 2006, pp. 69-84.

¹⁷ Cf., *inter alia*, Ch. Jubault, *Droit civil...*, pp. 2 et seq.; W. Schlüter, *Erbrecht*, pp. 2 et seq.

inheritance estate and preventing a concentration of capital. In turn, the third one is related to the axiom proclaiming the requirement to leave the property in the family and thus to maintain the family ties.

In connection with this type of regulations, there is also raised in this area a question of a possibility to harmonize such solutions on the European scale. Is it, therefore, possible to standardize the rules for protection of persons close to the deceased at the European level? To answer this question at first one needs to see what category of people this type of protection concerns; then to see specific solutions encountered in different legal systems, which may possibly allow finding some common grounds in the context of possible future European solutions.

5.2. The circle of the entitled

The regulations of inheritance law, which form the legal relations in the vicinity of the decedent, must be constructed in such a way to bond and strengthen the family ties. A suitable shape of these standards significantly affects not only the relations of a financial character, but also the behaviour of those around the deceased, their beliefs or personal relations. Consequently, depending on the construction of the inheritance law standards, there may be a different memory about, and relations to the family, friends, or acquaintances of the deceased, concerning both them and each other¹⁸. Hence, the rational legislator would try to balance the rights of the persons concerned not to interfere without a due reason with the freedom to dispose of the assets in the event of death, however, bearing in mind the need to take into account the moral, personal, and emotional aspects of inheritance¹⁹. Such a character of inheritance law²⁰ should, *inter alia*, influence the method of determining the bond that linked the deceased with others.

Different legal systems are not compatible in this respect and distinguish the circle of people to whom they grant appropriate rights on death of the decedent in various ways. The guiding criteria here are equivocal. Often, it is crucial that the deceased and the given person remained in a relationship, which can be described as closeness²¹. As already indicated, the characteristic of such relationships is a community of spirits, emotions, or persons - with a considerable degree of inten-

¹⁸ J. Biernat, *Ochrona...*, p. 21.

¹⁹ S. Cretney, *Succession – Discretion or Whim, Freedom of Choice or Caprice?*, Oxford Journal of Legal Studies 1986/2, pp. 299-303.

²⁰ U. Spellenberg, *Recent Developments in Succession Law*, [in:] *Law in Motion*, eds. R. Blanpain, The Hague 1997, p. 722.

²¹ Cf. D. Bradley, *Marriage, Family, Property and Inheritance in Swedish Law*, International and Comparative Law Quarterly 1990/39, pp. 370-395.

sity. At the core of this community, there may be different kinds of circumstances to which the legal systems most commonly include kinship, marriage, or affinity. It is also possible to have a broader view of the nature of the existing relationship and to take into account such conditions as concubinage, engagement, adoption, love, friendship, companionship, cohabitation, liking, etc.²² One can talk about this kind of people, based on the inheritance law, as persons who are close to each other. This qualification is important, *inter alia*, just in the determination of the class of persons potentially eligible to the reserve, the legitim, or other benefits from the inheritance²³.

The doctrine gives at least four types of criteria that can affect the shape of specific legislation in this area. They are a formal bond, an objective bond, a financial bond, or the will of the testator. The formal nature of the relationships is determined by the fact that the legislator refers here to the specific legal conditions, such as kinship, marriage, or affinity. The objective bond is not dependent on formal ties, only on the existence of actual closeness between the testator and a given person. The material bond is linked to the economic dependence on the testator of a given person. The criterion of the testator's will is based on the assumption that the testator, as the person best qualified to assess personal relationships linking them with other people will choose in the right way the people who are to benefit from the will²⁴.

An analysis of the different legal systems also shows that the system of protection of individual people against testamentary dispositions depriving these people of benefits from the inheritance is related to the rules of statutory succession. These in turn are based primarily on ties of kinship, marriage or affinity²⁵, and therefore on the formal bond. There are also regulations, where a certain role among the heirs is played by those who were dependent on the deceased, or cared for them before their death. Looking at the rules one can conclude *prima facie* that because of inheritance the quality of life of such persons should not worsen. And although not always this observation is confirmed in practice, for instance in connection with the liability for inheritance debts, one can actually try to find this kind of ideas in the regulations entitling a person to obtain a specific benefit from the inheritance, which confer these rights on people who have benefited so far from the inheritance estate²⁶.

²² J. Biernat, *Ochrona...*, pp. 20-22.

²³ S. Cretney, *Law, Law Reform and the Family*, Oxford 1998, pp. 246-248.

²⁴ J. Biernat, *Ochrona...*, pp. 22-28.

²⁵ Cf., for instance, in the Polish reference literature: J. Wierciński, *Uwagi o teoretycznych...*, pp. 83-87.

²⁶ R.H. Havers, *Die Einschränkung der erbrechtlichen Dispositionsfreiheit im Hinblick auf die Bedürftigkeit und die Leistungsfähigkeit im Unterhaltsrecht*, Werne an der Lippe 2001, *passim*.

Following the above guidelines, one should note that the catalogue of the entitled in most of the legislations in the world usually includes the spouse of the deceased (e.g. German, Austrian, French, Italian law). What is particularly interesting, at the turn of the last decades, a general trend could have been observed to strengthen the role of the surviving spouse in the context of inheritance²⁷. For instance, English law is based on the assumption, according to which the so-called matrimonial home that is usually subject to joint tenancy of the spouses becomes the property of the surviving one in total, following the death of the other one of them, just for the reason of surviving the testator (*ius accrescendi*)²⁸. In addition, despite such regulations, significantly strengthening the position of the surviving spouse in the context of inheritance, there is no preclusion for the legislator to provide further rights for the spouse to defy the will of the deceased. This seems to be reasonable, especially when the couple held the estate of the spouses. In general, the fact is that the spouse largely contributes to the inheritance estate, and therefore depriving them of the benefit from the assets in the event of death of the deceased spouse can be evaluated as socially unjust. This rule, however, should allow exceptions and treat differently a spouse being married to the decedent for a short time who has not contributed to the creation of the inheritance estate²⁹.

Traditionally, this catalogue also includes the decedent's descendants, who as a rule, in case of intestate succession (*ab intestato*), are appointed to inheritance in the first place (e.g. Swiss, English, Russian law). In this regard, one must note, however, some demographic changes related to the length of human life that have occurred from the time when the most important codifications of private law were passed to the present times. These changes can affect a perception of the need to protect the descendants of the deceased from their dispositions depriving them of their benefits from the inheritance. If one considers that statistically children reach the age of about fifty at the time of their parents' death³⁰, the need of a social nature for their protection usually does not matter. By this time, the children have managed to become independent of their parents and become independent financially of them. Thus, for example, it is indicated that after the children leave home, their parents go through a kind of "the third life" lasting for about twenty-five years. Therefore, it is very likely that this intensification of marital relations during this period may be a reason - according to many - for the need to grant the descendant's estate firstly to the spouse, and only later, even after

²⁷ W. Zankl, *Entwicklungen im Erbrecht*, [in:] *Festschrift Rudolf Welser zum 65. Geburtstag*, eds. C. Fischer-Czermak, A. Kletecka, M. Schauer, W. Zankl, Wien 2004, pp. 1233-1237.

²⁸ See: R. Card, J., Murdoch, P. Schofield, *Law for Estate Management Students*, London-Dublin-Edinburgh 1994, p. 564.

²⁹ W. Zankl, *Entwicklungen im Erbrecht*, pp. 1235-1236.

³⁰ U. Spellenberg, *Recent Developments...*, pp. 721-722.

their death, to other heirs, including the children of the decedent³¹. A similar view direction is followed by some legal regulations in foreign countries. Interesting in this aspect is, for example, the already mentioned provision of Art. 4: 13 par 1 of the Dutch Civil Code, which provides for the so-called legal division of the estate, according to which upon the death of one of the spouses, the entire inheritance is transferred to the other spouse until their death. It should be recalled that is done in such a way that the surviving spouse is required to pay all the debts associated with the inheritance assets. Each of the children of the deceased is entitled under the law to a claim against the surviving spouse, of a value equal to the value of the child's participation in the inheritance. The child - as a creditor - can demand the performance of the benefit from the surviving spouse - as a debtor - in a situation where: 1) the surviving spouse goes bankrupt (insolvent) or a judicial decision states their indebtedness; 2) the spouse dies; 3) an event indicated in the will of the deceased (e.g. a new marriage of the surviving spouse) has occurred³². This solution means that if an heir is entitled to a claim for legitim against the spouse, admissibility of suing it is generally suspended until the death of the spouse. In this context, this solution deserves a special mention, especially because it allows avoiding disputes with the children and the extended family of the deceased, which could occur at the division of the inheritance. As it is indicated in the doctrine, it has a great importance for the preservation of good relations within the family³³.

The above doubts about the rights of children to challenge the will of the testator and claiming e.g. legitim, associated primarily with a concern for preventing the division of the inheritance property, and designed to prevent situations where acquiring a benefit from the inheritance against the will of the testator may relate to a person independent of the inheritance estate socially, so objections are raised as to the validity of such restrictions on the freedom of testation. These reservations are growing especially in the context of international and constitutional determinants of inheritance law, which guide the legislature to settle the conflict between the freedom to dispose of property in case of death and the rights of the persons close to the deceased that interfere with this freedom, and they indicate rather a respect for the will of the owner than the interest of a future heir³⁴, unless such rights would be of social character. Hence, it appears that such a protection is not justified in case of all the descendants of the deceased, but only of minors and

³¹ J. Gernhuber, D. Coester-Waltjen, *Lehrbuch des Familienrecht*, München 1995, *passim*.

³² R. Zegadło, *Czy polskie prawo zapewnia wystarczającą ochronę prawną małżonka po śmierci współ-małżonka*, [in:] *Księga Jubileuszowa Profesora Tadeusza Smyczyńskiego*, eds. M. Andrzejewski, L. Kociucki, M. Łączkowska, A.N. Schulz, Toruń 2008, p. 441.

³³ *Ibidem*.

³⁴ Cf. B. Akkermans, *European Union Constitutional...*, pp. 3 et seq.; S. van Erp, *New Developments...*, pp. 14 et seq.

the unable to work. This is because these people are usually associated materially with the inheritance estate, and the testator's death should not cut them off from this estate.

There are also legal systems, where specific rights in the event of the testator's death, contesting the testamentary disposition are vested on the parents of the deceased (e.g. German, Swiss, Spanish law). They result from the acceptance of the concept, according to which if the parents have contributed to the child's property, even through upbringing and provision of education, they should also receive some benefits from the inheritance covering the child's assets. Some legislators, however, provide that the protection of this kind would be granted only if such persons were covered by the maintenance obligation of the testator³⁵.

Rights of other family members are protected by the legislature much less frequently. Siblings belong to the group of the entitled, *inter alia*, in Serbia, Slovenia, and Montenegro, but only in the event of their incapacity to work and paucity³⁶. On the other hand, in principle, perhaps only in Slovenia, this group also covers cohabitants. In turn, for example, in England the relevant rights are also vested on former spouses. Thus, such regulations are exceptional and they derive rather from the tradition of the legislation, than any prevailing world trend in this respect.

As it can be seen, the circle of persons protected against the testator's dispositions consists primarily of the people who are in a way dependent on the deceased. It is a rule of the modern systems of inheritance law. One can discern in it an analogy with the maintenance obligation present in family law. Moreover, it seems undisputed that the regulations shaping inheritance law should keep in mind the existing wording of the provisions of family law, as well as assumptions associated with it. It would be an inaccurate remedy in principle if for a given person there was no specific financial protection exercised by the testator during their lifetime and this protection would be generated only because of the testator's death³⁷.

Taking into account the circle of the eligible for maintenance, defined in such a way, a group of people established according to the criterion of the dependence on the testator could become a common denominator for the future single European solution. This circle of the eligible should result from the adoption by the legislature of the idea that it is these people, in a typical situation, that are the closest family of the deceased, related to them by particularly intense personal

³⁵ Cf. A.A. Preece, *The Impact of the Law of Inheritance on the Family*, [in:] 7th Australian Institute of Family Studies Conference, Sydney 24-26 July 2000, p. 18 (conference materials).

³⁶ A. Bauer, *Die innere Rechtfertigung des Pflichtteilrechts. Eine rechtsgeschichtliche, rechtsvergleichende und soziologische Betrachtung*, Bielefeld 2008, p. 74.

³⁷ M. Załucki, *Wydziedziczenie...*, pp. 321-322.

and emotional ties. Such a regulation would cover in a large extent the circle of individuals burdened with the maintenance obligation *inter vivos*³⁸, which means that one can try to talk about this institution as a continuation of maintenance obligations after the death of the obliged person. With this concept, a problematic possibility of suing for legitim by persons independent of the inheritance estate socially, which often arises in connection with such solutions, would cease to be a problem.

Against this background, interesting is a postulate to cover by this protection also the people who cared for the decedent before their death, sometimes sacrificing their career, and professional or family life³⁹. As an example of such a solution for the European countries could serve a claim occurring in the legislation of the U.S. State of Illinois, where a close family member (a spouse, a parent, a sibling, a child) of a person with a disability, who has devoted themselves to the care of that disabled person, living with such a person and tending them every day for at least three years, is entitled to request to obtain from the inheritance estate an adequate amount of money under § 5/18-1-1 of the Illinois Compiled Statutes. The court deciding in the case should take into account, *inter alia*, circumstances of such a care, the possibility that the person performing the care may have lost other work, not participated in their normal life, lost opportunities for fun and suffered stress associated with care⁴⁰.

5.3. The nature of individual rights

5.3.1. Reserve

Turning to the discussion of the juridical nature of various solutions that protect people close to the decedent we must indicate that the most common in the world among them is the reserve system. Its most important feature is the fact that the entitled person has the status of a statutory successor, referred to as the heir-at-law. They come to inheritance, regardless of the will expressed by the testator, unless the heir has been disinherited, if the system provides for such an institution. The thing to be emphasized in the reserve system is the fact that disinheritance occurs very rarely as a separate legal institution. Generally speaking, in the legislations, having reserve there appears only an institution of unworthiness to inherit, which is probably due to a belief that with the mandatory part of the estate, which is granted by law, it is also the legislator that should decide about

³⁸ Cf. F. Burns, *Key Aspects...*, p. 26.

³⁹ J.C. Tate, *Caregiving and the Case for Testamentary Freedom*, University of California Davis Law Review 2008/42, pp. 181-193.

⁴⁰ *Ibidem*, p. 184.

taking it away⁴¹. In this case, unworthiness to inherit plays a double role. Firstly, it prevents a situation in which the inheritance would fall to the heir who has committed an act against the freedom of testation. Secondly, it is aimed at preventing offences by heirs against the testators and their closest persons.

This system is distinctive mainly for the countries with Romanesque traditions. A model example of the legislation, where the inheritance is divided into two parts is Swiss law. As that doctrine shows, the fundamental objective of reserve is to provide a financial protection of the family members in the death case of persons belonging to this circle⁴². Within this community, its individual members have certain responsibilities towards others and their failure due to the death of one of them can significantly destroy the prevailing relationships⁴³. That is why the entitled, if only to ensure their continued existence, have the appropriate rights *mortis causa* as well. Hence, according to ZGB, the free disposition of the property by will applies only to that part of the inheritance, which does not fall in kind to the people indicated in the law. As the right of the immediate family members, reserve is that part of the inheritance, of which the testator - in principle - cannot deprive an heir. This means that some parts of the statutory inheritance shares entitled for reserve will be inviolable and their deprivation can occur only under conditions of disinheritance, unworthiness to inherit or disclaimer of inheritance⁴⁴. With opening of the inheritance, heirs-at-law inherit the statutory mandatory part, regardless of the disposition of the will (Art. 470 of ZGB⁴⁵). According to Swiss law, the persons entitled for reserve are therefore the real heirs of the deceased. They get the part of the inheritance intended for them as statutory heirs and their share is in kind. They are subject to the joint property of inheritance and participate in the management of these assets. As a result, they are responsible for inheritance debts, similarly as other heirs are.

It should be emphasized, however, that the Swiss judicial decisions allow settlements of the property (financial) between the reserve holder and heirs appointed to inherit. This may be particularly the case if the reserve holder will be sufficiently rewarded by the testator, for example, by a bequest or a donation made during the testator's lifetime on their behalf. In this case, by the disposition of property upon the death, the heir protected by the reserve system should therefore be able to be excluded from the circle of heirs. The legal protection of the person is then re-

⁴¹ Cf. J. MacLeod, R. Zimmermann, *Unworthiness to Inherit, Public Policy, Forfeiture: The Scottish Story*, Tulane Law Review 2013/87, pp. 741-785.

⁴² M. Gubster, *Strafenterbung de lege lata – de lege ferenda*, Zürich 2001, p. 63.

⁴³ E. Stadler, *Die Enterbung im Schweiz*, Zürich 1910, p. 40.

⁴⁴ Cf. G. Ryffel, *Repetitorium des schweizerischen Erbrechts*, Zürich 2004, pp. 10-19.

⁴⁵ H. Marty-Schmid, *La situation patrimoniale des concubins a la fin de l'union libre*, Genève 1986, pp. 91-92.

duced only to a financial claim. Therefore, in this system, reserve does not always mean a share in kind in the inheritance⁴⁶.

The reserve system has also been provided for under Italian law⁴⁷. There, as well, reserve is in principle in kind (property); however, in case of certain eligible persons (e.g., the spouse) it only takes the form of usufruct (Art. 537-546 of the Italian Civil Code)⁴⁸. The rights of the spouse may, however, be met by the heirs; then they lose the ability to use the portion attributable to them from reserve. This is met in case of providing them with life annuity or transferring benefits derived from ownership of a property or the inheritance estate. Rules as to meeting the spouse's rights are established contractually, or in the absence of agreement by the court (Art. 547 of the Italian Civil Code)⁴⁹. As a rule, also in Italy, the reserve holder will be subject to the joint property of inheritance, and they will be involved in the management of this property and responsible for inheritance debts. From this rule, exceptions are possible (the spouse). The doctrine indicates that the fundamental idea underlying the provisions of the Italian reserve system is to contribute to ensuring the maintenance for the deceased's closest people⁵⁰, which may justify some variations of the rights.

With the reserve system is also associated the French legislation, as the legislation from which the system originates. Similarly, the French Civil Code provides for regulations concerning the compulsory part of the inheritance, which must be granted to heirs specified by the statute (Art. 913 et seq. of the French Civil Code)⁵¹ - as indicated by the doctrine - in order to ensure fair and equal distribution of the inheritance estate⁵². Therefore, also in that law, there are two types of assets in the event of death: a disposable part and a compulsory part⁵³. The persons entitled to the mandatory part of the inheritance, in principle, under the law, become heirs because of the inheritance opening⁵⁴. However, according to Art. 913 of the French Civil Code, the testator may, by a donation to the living, or by a will, dispose of the fractional part of their assets, and the amount of this fraction depends on their legal family status (children, marriage). The remaining

⁴⁶ P. Weimar, *Berner Kommentar. Das Erbrecht, die Erben: Die gesetzlichen Erben, Die Verfügungsfähigkeit, Die Verfügungsfreiheit*. Art. 457 – 480 ZGB, Bern 2000, Art. 470 ZGB.

⁴⁷ Cf. A. Baldassari, *Codice civile annotato con la giurisprudenza*, Milano 2007, pp. 590-601.

⁴⁸ Cf. G. Alpa, V. Zeno-Zencovich, *Italian Private Law*, New York 2007, pp. 72-74.

⁴⁹ *Ibidem*.

⁵⁰ A. Fusaro, *Freedom of Testation in Italy*, [in:] *The Law of Succession...*, p. 195.

⁵¹ Cf. A.M. Bell-MacDonald, *French Laws...* pp. 415-427.

⁵² Cf. J. Carbonnier, *Droit Civil*, Paris 1974, p. 10; H. Dyson, *French Property and Inheritance Law – Principles and Practice*, Oxford 2003, p. 261.

⁵³ R. Oldiges, *Testamente in Deutschland und Frankreich*, Bülh 1988, p. 100.

⁵⁴ Ch. Jubault, *Droit civil...*, pp. 2 et seq.

part of the inheritance at the free disposal may be up to half of the total assets of the testator and its value must be at least a quarter of the total. The mandatory part, due to the inheritance opening, will be divided between the entitled to it⁵⁵. It must be noted, however, that since January 2007, the heir-at-law has been entitled, in principle, to a claim for monetary compensation of their mandatory part⁵⁶, and not a right in rem as it is generally the case in the reserve systems. Only when it concerns things that the testator disposed of during their lifetime, and they still exist and are not encumbered, the entitled has a choice and opportunity to request compensation in kind (Art. 924 of the French Civil Code). Despite the essential characteristics of reserve, the system is going rather in the direction of the legitim systems⁵⁷. However, it must be added that in case of the heirs, acquisition of benefits from the inheritance occurs by operation of law at the time of the inheritance opening (Art. 724 of the French Civil Code). These individuals are responsible for inheritance debts on the terms specified by the statute (cf. Art. 785, Art. 873 of the French Civil Code).

The basic features of reserve, highlighted against the background of the specific legal systems are common for the legislations adopting this kind of rights of the persons close to the testator in the event of their death. Despite looking at them slightly differently in specific provisions, it is crucial for the legal nature of reserve that the entitled usually acquire the guaranteed part of the inheritance as statutory heirs, regardless of the will expressed by the testator, which is to provide them mainly with the specified social security after the death of the testator, of the person closest to them, which must be recognized as the system that has to implement particularly the securing feature. The entitled for reserve, in connection with it, are subjects to the joint property of inheritance, involved in the management of this property and responsible for inheritance debts, getting appropriate shares of the inheritance. It also supports the other feature of reserve - the distribution function - to prevent a concentration of the property in one hand. Reserve can also show the idea of family solidarity, because this right is indicated by law and belongs to the persons who by virtue of formal ties are bound to the testator. Other circumstances, such as cohabitation with the decedent, contribution to the creation of the inheritance estate or dependence on such an estate, have no relevance for granting of this right. All this proves that reserve is a far-reaching restriction on the freedom to dispose of the property in case of death, not neces-

⁵⁵ F. Ferrand, *Familienerbrecht und Testierfreiheit: Das französische Recht*, [in:] *Familienerbrecht und Testierfreiheit...*, pp. 106-107.

⁵⁶ Cf. The new french legislation: *Loi n°2006-728 du 23 juin 2006 portant réforme des successions et des libéralités*.

⁵⁷ Cf. L. Meissinnier, *La loi portant réforme des successions et des libéralités du 23 juin 2006, une réforme manquée?*, Petites Affiches of 25 June 2008, pp. 7-9; Ch. Blanchard, *Présentation de la réforme des successions et des libéralités*, Droit et Patrimoine 2006/11, pp. 24-28.

sarily adapted to the current needs of the society, where the right of the testator to dispose of their estate in the event of death is emphasized as the core value⁵⁸. It seems, however, that in the countries with a provision of reserve in their law one can already see a tendency to liberalize the system. People, who once absolutely had property rights in the inheritance, today should not necessarily continue to be referred to as “heirs-at-law” because their rights are increasingly losing the nature of rights in rem.

5.3.2. Legitim

The systems of legitim, in turn, are the regulations used much less frequently than reserve. They are characteristic mainly for countries with Germanic traditions⁵⁹. In general, the legislations, which provide for the statutory regulation of legitim, also regulate the institution of disinheritance constituting a separate legal concept from unworthiness to inherit, regulated precisely by the binding law.

Primarily the German legal system is indicated as the model solution of legitim. According to the wording of § 2303 items 1 and 2 of BGB, the entitled to legitim, who have been excluded from inheriting by a disposition of the property upon the death, may demand legitim from an heir, which is the result of mutual responsibility of family members for each other, present in that system, and aimed at maintaining family solidarity⁶⁰. They acquire a monetary claim with respect to the inheritance estate, and thus they have a legally reserved right to seek payment of a certain sum of money from the heirs, which is a fractional reflection of their potential participation in the inheritance, i.e. the one which they would inherit if they were statutory successors⁶¹. The person, whose participation in the inheritance due to the fact that the inheritance has not been according to the statutory order of succession, it has been reduced or abolished, is entitled to legitim. Other people who would not inherit under the statute together with the entitled, despite their formal right to legitim, will not have a material right to demand that⁶². Hence, it can be concluded that the right to legitim under German law, following the inheritance opening and the fulfilment of the prerequisites for granting of legitim, is concretized taking the form of a claim. This claim should be directed against the heirs. It is a demand based on which the entitled demands a pecuniary performance. It arises with the death of the testator (§ 2317 Sentence 1 of BGB).

⁵⁸ S. van Erp, *New Developments...*, pp. 12-14.

⁵⁹ D. Olzen, *Erbrecht*, pp. 354 et seq.

⁶⁰ Cf. The judgement of German Federal Constitutional Court of 19.04.2005, 1 BvR 1644/00 and 1 BvR 188/03, *Zeitschrift für das Gesamte Familienrecht* 2005, p. 872.

⁶¹ Cf. B. Dauner-Lieb, *Pflichtteilsrecht und Pflichtteilsentziehung auf dem Prüfstand*, *Forum Familienrecht* 2001/3, p. 79.

⁶² Cf. W. Zimmermann, *Der Verlust der Erbschaft...*, p. 69.

It can be inherited and is transferable (§ 2317 Sentence 2 of BGB). As a property claim, it is limited. The entitled is not responsible for inheritance debts, and they have the position of a creditor in relation to the inheritance estate⁶³. The testator may disinherit the eligible, depriving them of legitim (§ 2333 of BGB). Another well-known system regulating legitim is Austrian law. It also introduces this construction as one of the rights of persons closest to the testator. As that doctrine shows, the right to legitim prevents the testator to dispose freely of their entire property, which in turn restricts the freedom of testation and is designed to ensure the legal security for the family⁶⁴. The person entitled to the right to the legitim, who in ABGB has been described as the heir-at-law, is guaranteed a minimum share of the inheritance, which might suggest approximation to the reserve system. In case of the Austrian legitim, it is not an inheritance share (in kind), but similarly to German law, it is only obligatory monetary claims that until the moment of the inheritance transfer to the heirs under a relevant judicial decision (declaration of inheritance acquisition) is directed against the whole estate. Only after the rights to the inheritance have been stated the claim is addressed against the heirs (§ 764 of ABGB)⁶⁵. The entitled is therefore in the position of a creditor; they are not liable for inheritance debts⁶⁶. The testator may disinherit them.

A similar model of legitim also occurs in Polish law, where it is argued that the primary objective of this solution is to strengthen the family and protect the interests of its members⁶⁷. Also in our legislation, as well as, e.g., in Germany or Austria, legitim is in the form of money. According to the wording of Art 991 § 2 of the Civil Code, if the entitled has not received legitim due to them either in a form of a donation made by the testator, or in a form of appointment to the inheritance, or in a form of a legacy, they are entitled to a claim against an heir for payment of a sum of money needed to cover the legitim or to complement it. The institution of legitim has been designed as a claim, i.e. a claim for payment of a sum of money, which is a relative right. A successor entitled to legitim is a creditor of an heir⁶⁸. Additionally, legitim should be considered a little more comprehensively than just a claim for payment of an appropriate sum of money, which is legitim as a rule. It should be indicated that the right to legitim should be distin-

⁶³ K. Agel, *Das Pflichtteilsrecht*, München 2001, p. 7.

⁶⁴ B. Jud, *Reformbedarf im Erbrecht*, [in:] *ABGB 2011. Chancen und Möglichkeiten einer Zivilrechtsreform*, eds. C. Fischer-Czermak, G. Hopf, G. Kathrein, M. Schauer, Wien 2008, pp. 245-246.

⁶⁵ L. Giesinger, [in:] *Grenzen-loses Erbrecht. Grenzen des Erbrechts*, ed. M. P. Oesch, Köln 2004, pp. 178 et seq.

⁶⁶ R. Welser [in:] *Kommentar zum Allgemeinem bürgerlichen Gesetzbuch*, ed. P. Rummel, Wien 2000, p. 970.

⁶⁷ J. Gwiazdomorski, A. Mączyński, *Prawo spadkowe w zarysie*, Warszawa 1985, p. 255.

⁶⁸ Cf. M. Pogonowski, *Roszczenie z tytułu zachowku i jego realizacja*, *Monitor Prawniczy* 2008/16, p. 586.

guished from a claim for legitim⁶⁹. The latter follows from the right to legitim⁷⁰, which can sometimes result in other claims, such as demand to reduce legacies and to have appropriate orders in their favour⁷¹. It must also be added that the entitled to legitim is not responsible for inheritance debts. In the Polish system as well, the testator can deprive an heir of legitim (Art. 1008 of the Civil Code)⁷².

In the above context, it must be indicated that the basic features of legitim are similar in the different legal systems. This right is primarily in the form of cash, the entitled person is a creditor in relation to the estate (heirs), but cannot demand admission to succession. Legitim is thus a restriction on the freedom of testation, which serves primarily the social protection of persons close to the testator (a protective function), indirectly implementing other functions, including the idea of preserving the assets of the family and the solidarity of its members⁷³. Is often referred to as the economic limit, because although formally the testator can freely dispose of their property *mortis causa*, the later claims directed to the heirs undermine this freedom, sometimes depriving the heirs of significant benefits from the inheritance. Legitim is independent of such circumstances as the economic status of the obliged and the entitled, the extent of contribution by the entitled to the creation of the inheritance estate, or the scope of that person's dependence on the inheritance estate. The statutes provide that after meeting the criterion of formal ties, a given person has a right to legitim - as a rule - regardless of other circumstances⁷⁴.

With this concept, characteristic also for the reserve system, important questions are raised by a possibility of claims brought by persons independent socially of the estate. In case of these solutions in terms of an economic impact, the testator at the elderly age may not, *inter alia*, dispose of their small estate in the event of death in such a way that the whole of this property will be transferred to a minor child from the last relationship, because an adult child, for example, from a previous relationship, independent of him financially, having a property that is much greater than the testator's assets, for whom the inheritance is unimportant, will also be eligible for contesting the decedent's will. For this kind of interference with the freedom to dispose of the property upon death, it is difficult to find a convincing justification. Therefore, I believe, it is currently the primary disad-

⁶⁹ See, for example, A. Doliwa, *Prawo do zachowku*, Edukacja Prawnicza 2008/4, p. 26.

⁷⁰ M. Pogonowski, *Roszczenie z tytułu zachowku...*, pp. 586 et seq.

⁷¹ B. Kordasiewicz, [in:] *System prawa prywatnego...*, pp. 973 et seq.

⁷² M. Załucki, *Wydzielczenie...*, pp. 354 et seq.

⁷³ N. Papantoniou, *Die soziale Funktion des Erbrechts*, Archiv für civilistische Praxis 1973, p. 396; M.J. de Wall, *The Social and Economic Foundations of the Law of Succession*, Stellenbosch Law Review 1997/8, p. 162.

⁷⁴ Cf. D. Olzen, *Erbrecht*, pp. 354 et seq.; J. Carbonnier, *Droit Civil...*, pp. 10 et seq.

vantage of these systems, allowing for too advanced “meddling” in the will of the testator. The use of only the criterion of formal family ties to determine the entities entitled is not correct and does not lead to the desired solutions in practice, unless at the same time this criterion is accompanied by an objective and material criterion. Only someone really close to the testator, dependent on their property before their death should have the right to bring such claims against the inheritance estate, if the testator has not provided for them a benefit from the estate. I do not think that it is justifiable to bring such claims by those persons that formally belong to the family circle, but who, for example, over the last few years before the testator’s death did not have any contacts with them.

5.3.3. The quasi-maintenance system

Quite different from the systems of reserve and legitim is the Anglo-Saxon system. An example of an application of this type of solution is, e.g., English law, which, under the provisions of the *Inheritance (Provision for Family and Dependents) Act 1975* provides, based on the discretionary power of the judge, a possibility of interference of the court in the fate of the inheritance estate after the death of the testator. The entitled person may demand here that the probate court interferes with the last will of the testator or - which should be stressed – an appointment to the inheritance resulting from the statute. It is a claim for the so-called *family provisions*⁷⁵.

The essence of the statutory right lies in the fact that in case of the testator’s death a given person survives the deceased and belongs to the circle of their closest persons, they may request the court to issue its ruling serving their financial provision with the deceased’s estate, if the testator has made a disposition of their property by will or when intestacy occurs, or combination of both, the will and the law, and the effect of the inheritance does not provide the proper provision for that person (Art. 1 Par. 1 of the Act)⁷⁶. The decisive factor - beyond being in the circle of the closest persons - is, therefore, the fact of not receiving the proper provision⁷⁷.

This premise depends on the circumstances of the case and requires a test (check) whether a person, due to the testator’s death and adverse to their testamentary dispositions or the statutory inheritance construction, has lost the possibility of existence, as well as how much their life level deteriorated following the death of a close relative. The law in this area introduces two standards: the stan-

⁷⁵ I. Johnson, *Conditions not to Dispute Wills and the Inheritance (Provisions for Family and Dependents) Act 1975*, Liverpool Law Review 2004/25, pp. 71-77.

⁷⁶ Cf. R. Frimston, *Inheritance (Provision for Family and Dependents) Act 1975, the EU Succession Regulation and the Inheritance and Trustees’ Powers Bill*, Private Client Business 2013, pp. 192 et seq.

⁷⁷ G. Miller, *Developments in Family Provision on Death*, Family Law Week of 11 March 2007, p. 1.

dard of the surviving spouse and the standard of maintenance⁷⁸. The first one is of course related to the role played by their spouse in the life of the testator and it means such a provision, which a husband or wife should receive, and which would be reasonable taking into account all the circumstances of the case, regardless of whether such a provision is necessary or not to maintain the entitled. The second standard concerns all other entitled persons and means such a financial provision as it would be reasonable taking into account all the circumstances of the case, and which is necessary for the maintenance of the applicant (Art. 1 Par 2 of the Act)⁷⁹. The spouse is entitled, therefore, the right to adequate provision, and the remaining ones to a provision reasonably required for their maintenance⁸⁰.

In determining whether the entitled persons are duly provided, the court must take into account a number of circumstances. Great importance is attributed to the nature of the bond between the deceased and a given person, the level of family life, the attitude of the entitled, or an impact of a settlement on the rights of others. It should be considered whether the effects of the disposition of property upon death or statutory rules are reasonable and fair in this case⁸¹. The Act indicates here that if the court is satisfied that the person entitled has not received an adequate provision, with the decision to intervene in the inheritance and the succession process it should keep in mind the following general conditions for the use of the discretionary power: the resources and the financial needs of the applicants and the beneficiaries of the estate, both present, and future; the responsibilities which the deceased had in relation to the applicants and the beneficiaries; the size and the nature of the inheritance estate; any physical and mental disability of the applicants and the beneficiaries; all other issues, including the conduct of the applicant or other persons, which in the circumstances of the case the court may consider relevant (Art. 3 Par. 1 of the Act).

For certain categories of the entitled persons, some additional premises have been provided. For example, if a claim for family provisions is brought by the spouse, in addition to the above premises - in accordance with the applicable provisions of the Art. 3 Par. 2 of the Act - the court should also take into account the age of the applicant and the duration of the marriage with the deceased. In this context, it is also important whether the applicant has contributed to the family property, even by looking after the home or caring for the family⁸². Assessment is

⁷⁸ R. Kerridge, *The Law of Succession*, London 2002, p. 159.

⁷⁹ H. Hiram, *New Developments in UK Succession Law*, Electronic Journal of Comparative Law, 2006/12, p. 9.

⁸⁰ *Ibidem*.

⁸¹ S. Ross, *Capitalisation of Income Needs in Inheritance Act Claims: Duxbury Or Ogden?*, Family Law Week of 12 March 2009, p. 2.

⁸² P. Reed, *Inheritance Act Claims After White & Miller*, Family Law Week of 22 January 2007, p. 1.

also made to the type of marital relations linking the applicant and the deceased⁸³. However, if the claim for family provisions is made by the deceased's child, in addition to the general prerequisites, the court must take into account the child's attitude and the ability to get education (Art. 3 Par. 3 of the Act). When the applicant under the Act is a person who immediately before the death of the deceased was maintained, wholly or partly, by the deceased, the court, in addition to the general premises, must consider the motives for the deceased to have believed to be responsible for maintenance of such a person, as well as the length of this responsibility discharge (Art. 3 Par. 4 of the Act).

The court considering a case has a very wide range of possible decisions to make, in the exercise of its discretionary power. The court may decide: 1) to grant out of the deceased's estate certain periodical payments for the term specified in the order; 2) to make payment of a lump sum of money; 3) to transfer ownership of certain assets comprising the estate; 4) to award appropriate specific benefits out of the assets comprising the estate; 5) to make changes in the ownership of another kind in the assets of the estate, to encumber certain assets of the estate or to establish a trust; 6) to make a change in the pre-marital or post-marital settlements in which one party was the deceased, and this change may be for the benefit of the other spouse, each child of the marriage, or a person who was treated by the deceased as a child of the family (a stepchild) in relation to the marriage.

The probate court may therefore change the last will of the deceased made in case of death by will or interfere with the statutory rules of succession. This can be done in such a way that in the opinion of the court is just and appropriate in the circumstances of the case. Taking into account the legitimate interests of the entitled the court should take into account the rights of others, including others bringing claims for family provisions and the beneficiaries of the deceased's estate entitled to inherit under the title of inheritance, which is to be changed. It should be also noted that the claim for family provisions is strictly personal. Therefore, its alienation is not possible, as well as the claim is not subject to inheritance. It can therefore be examined by the court only if the applicant of this claim is alive.

The idea of this type of legal constructions is based on the assumption that each case of claims made against the will of the testator, and therefore contesting the will should be tested individually, relying not only on formal ties linking the deceased with a given person, but also on other grounds, especially on the social situation of the entitled. This solution allows for equitable balancing of interests worthy of legal protection: the will of the deceased and the living conditions of the people omitted by the testator in their disposition⁸⁴. In an extreme situation,

⁸³ See also A. Chandler, *What is the Measure of Maintenance? How Does the Court Quantify Spousal Periodical Payments?*, Family Law Week of 16 March 2009, p. 1.

⁸⁴ M. Załucki, *Wydzielniczenie...*, p. 272.

it could happen that the interference of the court would be here more severe for the will of a testator than in the systems of reserve or legitim. However, because this intervention would be dictated by other important values, one cannot deny its correctness.

5.3.4. Development trends

An evaluation of all three systems, and a confrontation with the current trends of inheritance law development, manifesting primarily in a quest to extend the principle of testation freedom and implementation of the testator's last will, is not an easy task. An overview of advantages and disadvantages in relation to a particular solution depends primarily on the role that should be assigned to the autonomy of the testator's will, thus reflecting the concept of the legislator. An analysis of the individual systems can lead to a conclusion that, in principle, only in the maintenance system it is possible to assess the validity of interference in the last will of the testator *ad casum*. Although the systems of reserve and legitim provide for some solutions depriving some persons of their rights in the event of death of the testator when the benefits received from the estate would be immoral (unworthiness to inherit, disinheritance), it is only in the maintenance system, where the court in each case examines whether the alleged claims are justified; the assessment can be based not only on the findings aimed to demonstrate formal ties, but also made based on the actual needs of a person maybe to protect them socially, which is after all the primary purpose of the special rights of persons close to the deceased in the event of their death granted to persons in need, implementing by means of inheritance law the protective function for persons close to the deceased.

It should be also noted that these days, the times of the free market economy, where a natural person, in principle, arbitrarily allocates their assets *inter vivos*, with the modern challenges of the market and the changing functions of the family, enforce such solutions in inheritance law, which will duly allow for implementation of the last will of the deceased, often at the expense of other values, even such as formalism of regulations or the status of other people⁸⁵. Changes made in recent years in some jurisdictions⁸⁶, as well as postulated changes⁸⁷ that have not yet been considered by the legislators, seem to suggest a departure from the far-reaching restrictions on the freedom of testation, liberalizing and at the same time legitimizing such dispositions of property upon death, which do not take into

⁸⁵ S. van Erp, *New Developments...*, pp. 2-6.

⁸⁶ Cf. W. Beemhaar, *Familiäre Bindung und Testierfreiheit im neuen niederländischen Erbrecht*, [in:] *Familienerbrecht...*, p. 147.

⁸⁷ See, for example, R. Kerridge, *Reform of the Law of Succession: the Need for Change, Not Piecemeal Tinkering*, *Conveyancer and Property Lawyer* 2007/71, pp. 47-69; R. Welser, *Die Reform des österreichischen Erbrechts: Gutachten*, Wien 2009, pp. 1 et seq.

account the interests of the testator's closest persons. In the opinions of some authors it can be even noted a kind of return to the absolutization of the idea of the freedom to dispose of one's estate in the event of death⁸⁸. All this means that for some time now, there has been a growing need to re-consider the appropriateness of the existing mechanisms in this respect and targeting them towards a respect, greater than ever, of the will of the testator. Out of the three basic functions in the exercise of these mechanisms, namely a protecting function (providing means of subsistence), a distribution function (a fair, equal division of the inheritance estate, preventing the concentration of capital) and a function of a family responsibility (leaving the property in the family and thus maintaining family ties), only the first one appears to be justified⁸⁹. Today, there is no place for the idea of the estate concentration prevention, or the idea of leaving the property in the family at the expense of the testation freedom. Such systems are based largely on the theory advocated, among others, by Friedrich Georg Wilhelm Hegel in the 19th century, as well as the ideas of the French Revolution, pointing to the need for equal treatment of all heirs; today do not seem to reflect the needs and expectations of the society. The thought of Hegel, which underlay the solutions providing for protection of the family in inheritance law of the systems belonging to the Franco-Germanic traditions, was justified at a time when the inheritance estate had the nature of the family property⁹⁰. Today, property relations are much more complicated than then, and the inheritance estate is now rather a result of own work than an effort of the family. The family is not a community of production any longer, but rather a community of education and consumption, thus it cannot be argued that there is still an unconditional obligation *mortis causa* to transfer by an individual their assets accumulated during their lifetime to family members. In turn, the idea of the French Revolution, which is after all an origin of the reserve system, and which was to prevent the accumulation of large estates, so as to weaken private entities and prevent them from contesting the authorities⁹¹, for obvious reasons, today is not up to date. Both of these assumptions in modern times do not seem to be adequate to the prevailing relations, which appear to be more suited to a complete freedom to dispose of the property upon death. Today, more "by force", one should justify the restriction of such freedom, than think about solutions that protect people close to the deceased as if "*ex officio*". In a typi-

⁸⁸ Cf. T.L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death (Or How I Learned to Stop Worrying and Start Loving the French)*, Brandeis Law Journal 2006/44, pp. 737 et seq.

⁸⁹ I. Kondyli, *La protection de la famille par la réserve héréditaire en droits français et grec comparés*, Paris 1997, *passim*.

⁹⁰ J. Beckert, *The Long Durée of Inheritance Law. Discourses and Institutional Development in France, Germany, and the United States since 1800*, European Journal of Sociology 2007/1, p. 96.

⁹¹ *Ibidem*, pp. 93-96.

cal situation of inheritance in the family, persons belonging to the circle of the closest persons usually achieve a financial and economic independence in relation to the assets of the estate, so they can maintain themselves after the death of the testator. In such a case, a restriction on the freedom of the testator's testation is not sufficiently justified⁹². The prevailing social relations no longer require such a far interference by the legislature in the will of the deceased, as it was the case when the binding regulations in this respect were introduced to the individual codes of law. What is more, in many cases, such interference must be considered excessive and therefore encroaching on the constitutionally regulated rights of the testator. Therefore, only such a system to protect those close to the deceased, which will allow for a rational respect for the most important value in inheritance law - the will of the testator - meets today's needs. At the same time - it should be stressed - a choice of the protection system itself does not determine everything yet. Equally important is to determine the circle of eligible beneficiaries, the type of benefits intended for those persons, and other detailed rules that may affect the real importance of this institution.

5.4. Conclusions and recommendations

The analysis of the different systems protection of the deceased's close persons shows, first of all, that recently the differences which allowed an unambiguous distinction of these systems from each other have been blurring, as seen especially in the case of reserve and legitim. I think this is the result of the global trends, *inter alia*, to liberalize all restrictions on the freedom of testation. In modern times, the conditions that justified the initial shaping of these solutions have changed, and individual legislators are moving away from some concepts that a few years ago seemed to be undisputed.

In the context of the arguments and observations that currently only the protective function of the specific rights of persons close to the deceased in the event of their death appears to be compatible with the guiding principle of inheritance law, which is the freedom of testation, I believe that the different legal systems in the future will go towards the protection of only the people who have not yet achieved financial independence and, therefore, are minors or incapacitated for work. In relation to them, it is reasonable to maintain certain specific rights encumbering the assets of the testator in the event of their death. These regulations should provide protection of financial nature, to ensure maintenance means for the closest family members. This cannot be, however, the protection granted to such persons only for this reason that they belong formally

⁹² F. Zoll, *Das polnische Erbrecht im Wandel – die geplanten Reformen*, [in:] *Erbrechtsentwicklung in Zentral – und Osteuropa*, ed. R. Welser, Wien 2009, p. 169.

to the circle of people closest to the testator. The laws need to be shaped in such a way to enable the court examination of the real needs of the beneficiary and thus evaluate the circumstances of each case separately. One has to bear in mind that in a typical situation it is the testator who is the person most qualified to assess the relationship with the other people and this is their will that should be crucial in determining who of the close persons should be tested, and who omitted. Only in extreme cases, the legislature should interfere with the will, if only because the weaker persons should be protected. This intervention must, however, be prudent, as if the testator may dispose of their assets, in principle, freely during their lifetime, it is hard to accept far-reaching restrictions in this regard only in the event of death. It must be also remembered, that even with free dispositions of property *inter vivos* every individual may have certain maintenance obligations during their lifetime whose observance is firmly rooted in the European legal traditions, and the violation of which is generally assessed by the public as immoral. Hence, the idea that the regulation of inheritance law should become a kind of extension of these duties for a period after the death of the obliged⁹³ seems interesting. Undoubtedly, in this way it is possible to secure appropriately financial interests of the closest persons, which will generally take place with a small - compared to reserve or legitim - interference with the will of the testator.

I am of the opinion that a proper assessment of the individual's needs and possibly granting them certain benefits from an inheritance estate at the cost of other people can take place only if the circumstances of the case will be examined. Only after determining that the person that actually needs it, the benefit from the estate granted to them should be realized by the security function. Otherwise, as it is the case in the formal protection systems that are independent of the circumstances of the case, there is a high probability that the primary function of the protection of persons close to the deceased will not be realized, because the benefit granted to them from the inheritance estate will be only enrichment at the expense of people for whom a benefit from an inheritance estate was predicted by the testator. Such a situation would cause, in my opinion, an excessive interference of the legislature in the will of the testator. Thus, granting of certain benefits from the estate only based on formal criteria, even when accompanied by expressed by their authors concern about the equitable distribution of the inheritance between eligible family members⁹⁴, does not seem to be justified any longer. Besides, it is difficult to make allegations for other systems, especially the maintenance system, that it is not a fair system, since it examines the circumstances of each inheritance a lot more accurately than it is in the case of legitim claims.

⁹³ Cf. M. Załucki, *Wydzielnictwo...*, pp. 452 et seq.

⁹⁴ However, cf. P. Księżak, *Zachowek...*, pp. 23 et seq.

Having this in mind, I am of the opinion that it is possible to form inheritance law in different European countries in such a way as to grant the system of rights for persons close to the deceased in the event of their his/her death the nature of the maintenance, and to synchronize it with provisions related to maintenance obligations regulated by family law. Such a formation of the system, following the model of Anglo-Saxon countries, seems interesting for a possible future of the European inheritance law. Despite the current differences, it seems that little effort is needed to harmonize these solutions at the European level. In this way, the two major drawbacks of the formal regulations, prevailing today in Europe, would be eliminated. Firstly, the new rights will be applicable only to persons classified as belonging to the circle of persons covered by a maintenance obligation. Secondly, they will be dependent on not only formal prerequisites, but also on objective and financial ones. According to this solution the testator could be, in principle, free to dispose of their estate in the event of death, and persons previously dependent on that property, could still use it if they remained in a group of the entitled to request provision of maintenance and education, determined on the basis of the relevant provisions of family law, where they would be in scarcity.

The indicated proposal will allow, on the one hand, to ensure the testator in an appropriate way implementation of the freedom to dispose of the property on their death, granted to them constitutionally, and on the other hand, it will grant an adequate social protection for persons associated with them by a family bond that could be adversely affected, due to their omission in the disposition of property upon death. The advantage of the introduction of such a solution would be to make such rights of persons close to the deceased dependent on their actual existential needs, which currently seems to be legitimized in the various constitutional laws and desirable.

Chapter 6.

The ability to harmonize legislation on liability for inheritance debts

6.1. The nature of liability for inheritance debts

The standards of inheritance law should provide some protection of long-lasting proprietary relationships and the safety of the parties to the relationships, in which the deceased remained during their lifetime. They must also guarantee the proprietary security of the entities taking over the rights and obligations of the testator after their death. The essence of inheritance law is an indication of the legal successors of the deceased, who, after all, not only will benefit from their wealth, but will also continue the matters started by the testator before their death¹. Hence, today the inheritance model assuming continuation of the deceased's relations regulated by private law is not substantially disputed, though of course there are some differences in this area. As a rule, however, the financial obligations of the testator do not expire with their death, which is a kind of a guarantee of the conduct stability of legal transactions². The norms of inheritance law must therefore indicate and they usually do, who and on what grounds will be liable for any inheritance debts.

Liability for inheritance debts arises from the moment of the inheritance opening, so the event, from which the liability arises, is the death of an individual. If in particular jurisdictions were not such regulations, the death of a man would cause a long-term uncertainty of such transactions. Therefore, a determination of the rules according to which an indication of the person who will be held liable for the inheritance obligations with their assets is now part of any modern

¹ Cf. G.A. Pelletier, Jr., M.R. Sonnenreich, *A Comparative Analysis...*, pp. 323 et seq.; H. Lange, K. Kuchinek, *Erbrecht*, pp. 1182 et seq.; D. Olzen, *Erbrecht*, pp. 307 et seq.

² F. Longchamps de Bérrier, *Law of Succession...*, pp. 133 et seq.

legal system³. The preservation of the inheritance estate identity and allowing the inheritance creditors to satisfy their claims is now a solution so natural that it is impossible to imagine any modern inheritance law without any regulations in this area. Today, therefore, inheritance debts and the associated liability are the structural components of the inheritance law system, as common as statutory succession or testamentary inheritance.

The death of the testator causes, amongst others, that another entity is liable for the obligations whose subject was the deceased⁴. In addition, with the opening of the inheritance, the statute also links creation of other obligations whose subject becomes this new entity. All these obligations are encompassed by the term of “inheritance debts”⁵. Within the responsibility for inheritance debts, it may be important just to clarify this concept, i.e. inheritance debts. Speaking of the debts, therefore, one should take into account an existence of the performance obligation, and at the same time, in relation to it, one should distinguish at least two major groups of responsibilities incumbent upon the responsible persons. The first group includes financial obligations imposed earlier on the deceased, which did not expire on the death of the debtor, but they passed on to their successors. The second group is the remaining obligations related to the succession, which were not incumbent previously on the deceased but they encumber their successors⁶. The first group of the inheritance debts includes all the obligations whose subject was the deceased and which they would have to fulfil at the expense of their wealth if they remained alive⁷. The second group includes the obligations that were not incumbent on the testator, but they arose in connection with the inheritance opening (e.g. the expenses of the deceased’s funeral)⁸.

Thus, the opening of the inheritance is the moment that gives rise to the responsibility for inheritance debts of an entity other than the testator. The law-makers in various solutions provide for the framework of that responsibility, among others, solving the dilemmas of the inception of such a liability, the liable persons, the shared liability with other liable entities or the extent of the liability. The legal status of the legal successor of the deceased is therefore also associated with the normative ability to satisfy the inheritance creditors, emerging at the time of the inheritance opening. It consists in the fact that the assets of such an

³ E. Macierzyńska-Franaszczuk, *Odpowiedzialność za długi...*, pp. 41-81.

⁴ Cf. H. Mazeaud, L. Mazeaud, J. Mazeaud, F. Chabas, *Leçons de droit civil. Introduction à l'étude du droit*, vol. 1, Paris 2000, pp. 421 et seq.

⁵ Cf. J. Sahadi, *Can You Inherit Your Dead Parent's Debts?*, CNN Money of 19 June 2014, p. 1.

⁶ Cf. E. Skowrońska-Bocian, W. Borysiak, [in:] *System prawa prywatnego...*, p. 613-617.

⁷ L. Michalski, *BGB-Erbrecht*, pp. 16 et seq.

⁸ Cf. Ch. Von Bar, *Non-Contractual Liability Arising out of Damage Caused to Another*, Munich 2009, pp. 406-414.

entity or part of the assets become a guarantee of the fulfilment of a performance by them, and thus, in the event of non-performance, they can be used to satisfy the creditor. This is a result of the acceptance of a view, according to which the death of the testator should not change much the legal position of their creditors, which nowadays is generally realized by individual legislators. At the same time, the responsible person will generally be the heir. The responsibility of this kind can be borne also by other entities. What is more, one can also meet such constructions, where the inheritance assets themselves acquire the legal personality on the death of the testator, and then this property already as a legal entity (a legal person) becomes responsible.

In the world one can distinguish three main models of the liability for inheritance debts: 1) the unlimited liability (the liability related to the entire property), 2) the liability limited to a particular asset (*cum viribus patrimonii*, *cum viribus hereditatis*), and 3) the liability limited to a specified value (*pro viribus patrimonii*, *pro viribus hereditatis*)⁹. Some significance for the apportionment of the liability may also have the status of the person who possibly is responsible in relation to the inheritance, i.e. whether one considers the question of the liability in the period before the acceptance of the inheritance, whether in the period after the acceptance of the inheritance until the division of the estate, or whether in the period after the possible division of the estate. They are the factors that can shape the legal position of the person responsible to the creditors of the estate. In this context, it must be emphasized that the system of responsibility for inheritance debts is a kind of a derivative of the concept of the inheritance acquisition¹⁰. It is possible to distinguish some legal systems, in which after the death of the testator, the inheritance estate passes to their legal successors, in accordance with the principles of the universal succession, and some systems in which the inheritance estate is not immediately transferred to the testator's successors, but it retains a complete separation from their property and is subject to a special liquidation procedure. Such a criterion can be the basis to distinguish three concepts of the inheritance estate transfer to the legal successors of the deceased, associated with a different approach to the problem of responsibility for inheritance debts: 1) the concept of *le mort le vif saisit*, 2) the concept of *hereditas iacens*, and 3) the concept of the inheritance estate administration¹¹. *Le mort le vif saisit* is a French phrase meaning, "the dead seizes the living". According to this doctrine, the heir is considered as having succeeded to the deceased from the instant of their death.

⁹ Cf. E. Macierzyńska-Franaszczyk, *Odpowiedzialność za długi...*, pp. 64 et seq. See also T. Kipp, H. Coing, *Erbrecht...*, pp. 159 et seq.

¹⁰ A.L. Verbeke, Y.H. Leleu, *Harmonisation of the Law of Succession...*, pp. 463-466.

¹¹ Cf. Y.H. Leleu, *La transmission de la succession en droit compare*, Revue du Notarial Belge 1996/122, pp. 46 et seq.

Hereditas iacens is a Latin phrase meaning “lying inheritance” or “recumbent inheritance”, which is an inheritance in abeyance (not taken), despite the appointment of heirs. In turn, the inheritance administration system is the system where the inheritance administrator plays a leading role, and the inheritance estate is transferred to them from the moment of its opening¹². In the first two cases, the issue of responsibility for inheritance debts affects the personal assets of the deceased’s legal successors, while in the third case liability for inheritance debts is not assigned to the deceased’s legal successors and concerns only the inheritance estate, and is associated with the responsibility of other persons.

In this context, one should look at some possible models of the liability through the prism of the solutions in the European countries and, also in this regard, consider whether there are common characteristics of the responsibility for inheritance debts in the different legal systems, so that in the future some uniform rules in this area could be introduced, and thus the institutional harmonization could be achieved.

6.2. Models of liability for inheritance debts

6.2.1. Unlimited liability

The responsibility for inheritance debts, which is an unlimited liability, is a kind of a personal liability under private law in which the debtor (the heir) is responsible in a way allowing directing the execution by a creditor in relation to any asset of the debtor. This kind of the responsibility for inheritance debts dates back its roots to the ancient times where using the construction of the universal succession, the inheritance estate became the property of the heir creating one estate. The liable entity in this concept is held responsible in relation to their all assets, both present and future¹³.

The existence of such a liability depends, therefore, on the adoption by the legal system of the concept according to which the heir takes over all the rights and obligations of the deceased, becoming their legal successor, and continuing the existing legal relations. Traditionally it is justified by the view according to which if the testator were to satisfy their creditors from all their personal assets, so entering of the heir into the testator’s property situation should not change this¹⁴. The debts of the testator should therefore continue to be met with the personal property, but this time with one that is formed by the combination of the assets of the deceased and the assets of the heir.

¹² Cf. D.R. Hower, P. Kahn, *Wills Trusts and Estate Administration*, New York 2012, pp. 406 et seq.

¹³ F. Longchamps de Bérrier, *Law of Succession...*, pp. 113 et seq.

¹⁴ E. Macierzyńska-Franaszczyk, *Odpowiedzialność za długi...*, p. 64.

Today, this kind of the model of liability for inheritance debts, however, usually has some mechanisms allowing certain groups of entities for some limitations of their liability¹⁵. According to the view more commonly found today, the overall responsibility for inheritance debts could prove to be overly strict in practice. When it takes place by the operation of law, according to many writers, it places in the privileged position the creditors of the deceased, and thus it can harm the heirs who entering into the legal situation of the testator also risk responsibility with their existing assets¹⁶. The overall responsibility for inheritance debts is moved to the heir due to the legal consequences of the inheritance opening. In this system, their property is also encumbered with the debts, which do not arise from their own acts, as well as they often do not result from acts performed by the testator. The most important in this area is the protection of the creditors. As it seems, this is the common denominator of the legal systems providing for the unlimited liability for inheritance debts¹⁷.

Theoretically, among the three main concepts of the inheritance acquisition encountered in Europe, namely, 1) the concept of *le mort le vif saisit*, 2) the concept of *hereditas iacens*, and 3) the concept of the inheritance administration, the unlimited liability is characteristic especially for the first one. The effect of the acquisition of the deceased's assets, from the moment of the inheritance opening, characteristic for the theory of *le mort saisit le vif*, corresponds to the assumption of the testator's legal situation continuation by their heirs. This construction allows for assigning the responsibility for inheritance debts already at the time of the inheritance opening. In principle, however, it is only temporary. This temporality is manifested in the fact that the laws provide for a kind of a legal fiction according to which the heir, already on the death of the testator, takes over their rights and obligations, and then for a reasonable period of time, specified in the statute, may take some acts that will result in the rejection of the inheritance or possibly a limitation of their liability, for example, to the value of the inheritance estate (*pro viribus hereditatis*). Only in case of the passage of time and the absence of this activity on the part of the heir, their succession to the rights and obligations of the deceased becomes final¹⁸.

The unlimited liability for inheritance debts may also be present in the system relevant for the concept of *hereditas iacens*. This system does not know the direct transition of the estate to the heirs. With the opening of the inheritance, there arises only an appropriate right of the heirs to the inheritance, and the inheritance

¹⁵ Cf., for example, T. Kipp, H. Coing, *Erbrecht*, p. 522; K.H. Gursky, *Erbrecht*, p. 94.

¹⁶ See, for example, B. Kordasiewicz, *Przyjęcie i odrzucenie spadku*, *Studia Prawa Prywatnego* 2006/2, p. 60.

¹⁷ E. Skowrońska-Bocian, W. Borysiak, [in:] *System prawa prywatnego...*, pp. 606 et seq.

¹⁸ A.L. Verbeke, Y.H. Leleu, *Harmonisation of the Law of Succession...*, p. 464.

acquisition can take place only on the moment of the inheritance acceptance. Before this, the inheritance remains a separate estate. When the inheritance acceptance takes place, then the responsibility of the heirs for inheritance debts arises, and this may be the unlimited liability¹⁹.

The model of the unlimited liability for inheritance debts, as a rule, is present, for example, in French, German, or Austrian law. The French legislature has foreseen, for example, that the transfer of the inheritance to the heirs according to the concept of *le mort le vif saisit* occurs on the testator's death²⁰. This moment defines arising of the liability for inheritance debts. The inheritance, according to Art. 768 of the French Civil Code, may be rejected or accepted, unreserved or with the limited liability. The unreserved acceptance of the inheritance results in the personal, unlimited liability for inheritance debts. No activity of the heir means the unreserved acceptance of the inheritance. Also in Germany, the inheritance is subject to the principle of the universal succession. On the death of the testator, the heir may accept or reject the inheritance, and the lack of their activity means the inheritance acceptance. It is synonymous with the unlimited liability for inheritance debts by the heir (§ 1942 of BGB)²¹. This responsibility may, however, be modified. An heir may therefore be responsible for inheritance debts to the value of the inheritance assets or to the objects of the inheritance estate²².

In turn, under Austrian law, accepting the concept of *hereditas iacens* (§ 797 of ABGB), the responsibility for inheritance debts arises only upon a formal grant of the inheritance by the court, referred to as *Einantwortung*²³. The Austrian system recognizes two types of the inheritance acceptance, namely, 1) the unconditional acceptance without any limitation of the liability for inheritance debts, and 2) the acceptance with the limited liability. The heir may also reject the inheritance (§ 805 of ABGB)²⁴. As a result of the inheritance, ABGB indicates just the legal succession under the general title, when the heir enters into all the rights and obligations of the testator (§ 531 et seq. of ABGB). The specificity of Austrian law is expressed in the fact that after the death of the testator, before the heir assumes the proprietary rights and obligations of the deceased, first there are special

¹⁹ *Ibidem*.

²⁰ Cf. A.M. Bell-MacDonald, *French Laws...*, pp. 416-427.

²¹ See W. Krug, [in:] *Grenzen-loses Erbrecht...*, p. 263.

²² K. Muscheler, *Erbrecht*, Tübingen 2010, pp. 1831-1835.

²³ See P. Apathy, [in:] H. Koziol, P. Bydlinski, R. Bollenberger, *ABGB Allgemeines Bürgerliches Gesetzbuch. Kommentar*, Wien 2007, p. 513.

²⁴ See F. Linder, [in:] M. Gruber, S. Kalss, K. Müller, M. Schauer, *Erbrecht und Vermögensnachfolge*, Wien 2010, p. 322.

probate proceedings *ex officio*, the so-called *Verlassenschaftsverfahren*²⁵. According to the principle laid down in § 797 of ABGB nobody is allowed to take the inheritance arbitrarily. This can be done only by a court decision preceded by judicial proceedings. At the initial stage of the proceedings, the so-called judicial commissioner, who is usually a notary public, makes the first assessment of the property value, and ascertains, *inter alia*, whether the inheritance is encumbered with debts and notifies all (future) heirs of the initiation of the probate proceedings. Only later, the acceptance of the inheritance takes place²⁶.

The solution, where the rule is the unlimited liability for inheritance debts, has also been adopted in Polish law, where the rights and obligations of the deceased are taken over in accordance with the concept of *le mort saisit le vif*. According to Art. 1012 of the Polish Civil Code, the heir may accept the inheritance without any limitations of the liability for the debts (the unreserved acceptance) or accept the inheritance with a limitation of the liability (the acceptance with the benefit of inventory) or reject the inheritance²⁷. In turn, according to Art. 1015 of the Polish Civil Code, the declaration of acceptance or rejection of the inheritance can be filed within six months from the date on which the heir learned about the title of their entitlement²⁸. The lack of the statement submission by the heirs within the above period is synonymous with the unreserved acceptance of the inheritance. In the event of the unreserved acceptance of the inheritance, the heir is liable for inheritance debts without any limitations. In the event of the acceptance of the inheritance with the benefit of inventory, the heir is liable for inheritance debts only to the value of the inheritance assets calculated in the inventory (Art. 1031 of the Polish Civil Code)²⁹.

A similar solution has been provided for also by the Dutch legislator. According to Art. 4:190 Par. 1 of the Dutch Civil Code, an heir may accept or reject an inheritance. An acceptance may be done unconditionally or under the privilege that first an inventory of the estate of the deceased has to be made in order to assess whether the value of the assets of the estate exceeds the debts of the estate. When the concerning time period has expired while the involved heir has not made a choice in the meantime, the heir is considered to have accepted the inheritance unconditionally (Art. 4:192 Par. 3 of the Dutch Civil Code)³⁰.

²⁵ W. Sonnleitner, *Erben und erben lassen. Richtig vorsorgen. Rechtzeitig schenken. Sicher vererben*, München 2006, p. 113; W. Kilian, M. Gall, A. Tschugguel, *Vorsorge für den Todesfall*, Wien 2013, p. 93.

²⁶ Cf. S. Verweijen, *Verlassenschaftsverfahren: Handbuch*, Wien 2014, *passim*.

²⁷ Instead of many sources cf. E. Skowrońska-Bocian, J. Wierciński, *Kodeks cywilny. Komentarz*, Warszawa 2013, pp. 260 et seq.

²⁸ E. Macierzyńska-Franaszczyk, *Odpowiedzialność za długi*..., pp. 184 et seq.

²⁹ K. Osajda, [in:] *Kodeks cywilny. Komentarz*..., pp. 997-1002.

³⁰ Cf. S. van Erp, *The New Dutch Law*..., pp. 193 et seq.; E. Macierzyńska-Franaszczyk, *Odpowiedzialność za długi*..., pp. 99-101.

The circumstance of some importance in the context of the regulations concerning the liability for inheritance debts in the unlimited liability regimes is the moment of the inheritance reception, which occurs either as a result of a declaration of will by an heir or by the operation of law (*ipso iure*). Until that time, in spite of the regulations according to which the succession to the rights and obligations of the testator takes place by the operation of law, usually in different jurisdictions, there are some solutions mitigating this kind of responsibility according to which the responsibility for inheritance debts by the heirs, until the acceptance of the inheritance, is limited to the objects belonging to the inheritance estate. This solution is provided for, *inter alia*, by the provision of Art. 1030 of the Polish Civil Code,³¹ according to which until the acceptance of the inheritance an heir is liable for inheritance debts only from the inheritance estate. Since the acceptance of the inheritance, they are liable for the debts from all their property. In this respect, the responsibility for inheritance debts in such systems is differentiated, depending on the period in which the heir realizes the obligations that encumber them and the method of the inheritance acceptance³². From the viewpoint of the responsibility for inheritance debts, until the acceptance of the inheritance, there are two distinct estates, i.e. the inheritance estate and the personal property of the heir, but the execution can be directed only to the assets of the inheritance estate. This solution has been designed to protect the personal property of the heir, who despite the formal acquisition of an inheritance from the moment of its opening, has not become the definitive universal successor.

Essentially, the modern individual statutory solutions in this group can be called a model that favours the unlimited liability for inheritance debts. The individual laws know the mechanisms to improve the legal situation of the heir, who by their acts can lead to a condition in which they will be responsible for inheritance debts to a limited extent, or not at all. This is, as one may think, a consequence of the liberalization of the rules of the universal succession, where the existence of a rule according to which the heir would be responsible for inheritance debts with all their assets, present and future, without any modification, would interfere too far with their legal situation, and it would be unfair for them. Thus, there appear some legal regulations allowing to restrict the responsibility or even to reject the inheritance³³. These instruments reinforce the protection of the heir's property, who essentially is still liable for inheritance debts, but this responsibility has certain limits. Among these regulations, alongside those ones arising from the autonomous powers of the heir (the acceptance of the inheritance with the limited liability or the rejection of the inheritance) one should distinguish primarily

³¹ B. Kordasiewicz, *Przyjęcie i odrzucenie...*, pp. 45 et seq.

³² E. Skowrońska-Bocian, W. Borysiak, [in:] *System prawa prywatnego...*, pp. 620 et seq.

³³ Cf. K. Muscheler, *Erbrecht*, pp. 1831 et seq.

some procedures, found in some countries, allowing for determining the amount of the inheritance debts or the separation of the inheritance estate from the personal property of the heir. In conjunction with the principles of the repayment of the debts, established normatively, the framework is created for the realization of the limited liability for inheritance debts, and thus aiming at increasing the protection of the heirs at the expense of the inheritance creditors. The procedures for determining the inheritance debts consist in calling the inheritance creditors within a specified period to indicate their claims, which after the expiry of that period allows to determine the final list of inheritance debts, and thus to award a broader protection for the heirs, implementing the principle of the legal relations certainty³⁴. One can venture to say that the systems of the unlimited liability for inheritance debts create a number of mechanisms to reduce this liability, whereby they are approaching the limited liability systems. Some differences in the various legislative solutions that occur are not - as one can think - the result of different cultural or social approaches in the individual legal systems to the issue of the liability for inheritance debts. They are rather some various attempts of legislators to solve the problem of value conflicts that occurs against the background of the relationship between the creditor of the inheritance estate and the heir. This is an expression of their common foundation.

6.2.2. Limited liability

The responsibility for inheritance debts, which as a rule is a personal responsibility, may be restricted, like the responsibility for secured debts, and which in essence allows the creditor merely to satisfy their claims only with the specific encumbered objects. A limitation of the personal liability to some specific assets is also possible. This is when the liable entity is responsible for debts either in a way limited to some particular assets (*cum viribus patrimonii*, *cum viribus hereditatis*), or to a specified value (*pro viribus patrimonii*, *pro viribus hereditatis*)³⁵. In inheritance law, one can frequently encounter some solutions according to which a debtor responsible for inheritance debts is liable only in relation to those objects that make up the separate estate constituting the inheritance or in relation to all the items at their disposal, but to the value of the inheritance that they have previously acquired. The restriction applies to the property that is the object of claims against the debtor. The creditor in such a system cannot direct the execution to the inheritance debtor's all assets, but only to the inheritance estate, or

³⁴ See, for example, T. Kipp, H. Coing, *Erbrecht*, p. 539; F. Linder, [in:] M. Gruber, S. Kalss, K. Müller, M. Schauer, *Erbrecht...*, p. 332.

³⁵ Cf. M. Puelinckx-Coene, *La protection des différents membres de la famille par le droit familial patrimonial en Europe*, *European Review of Private Law* 2004/2, pp. 143-166; Y.H. Leleu, *Nécessité et moyens d'une harmonisation des règles de transmission successorale en Europe*, *European Review of Private Law* 1998/6, pp. 159-163.

possibly their claim is limited to the value of the inheritance. The construction of such a liability limitation is closely associated with the very appropriation of the inheritance assets to meet the claims of the inheritance and the responsibility ends either with the exhaustion of the acquired assets or when the sum of the total claims reaches the equivalent of the inheritance estate value.

A characteristic feature of such systems is the need to establish the status of the inheritance estate and the inheritance debts. The most frequently, such an instrument, which in individual countries serves this purpose, is an inventory³⁶. This list covers the whole of the inheritance estate to determine its composition and value, acting at the same time as the basis for the heirs' limitation of the liability for inheritance debts. In practice, there are either public or private inventories, which fulfil a similar function. In some systems, there is also the administrator of the inheritance estate who watches over the separated property and the use of its assets to satisfy the inheritance debts. The idea of such solutions is a kind of separation of the personal property of the heir from the inheritance estate. Even in the event, when the estates are combined, and therefore when the heir is liable to a specific amount of money, the possibility of the heir's victimization is limited. As a rule, it is a solution when the authoritative moment for establishing the liability is the moment of the inheritance opening. For that time, the status of the inheritance estate is determined and the creditor may direct their claims to the assets established like that³⁷.

The solutions for limiting the liability of the heirs for the inheritance debts are known in several European countries, especially in these jurisdictions where inheritance laws have been enacted recently. As a rule this principle is binding e.g. in Croatia (Inheritance Law from 2003.), in Hungary (Inheritance Law enacted in 2013.)³⁸, and in the Czech Republic (Inheritance Law enacted in 2012.). Some specific solutions are also provided for by the English legislature, which is often known to adopt solutions that deviate far from the traditional ones.

According to the Croatian Inheritance Law, the transmission of an estate is done independently of the heir and without their knowledge. The estate is transmitted ipso jure pursuant to a valid decision on inheritance issued by the competent authority (Art. 232 of the Croatian Inheritance Law). An explicit acceptance of the inheritance is not required. The estate accrues to the heir even without their acceptance, unless the heir renounces the inheritance within the statutory delay (Art. 130 of the Croatian Inheritance Law). If, however, the heir acquires the inheritance, then their responsibility for the inheritance debts is limited. Heirs are

³⁶ G.A. Pelletier, Jr., M. R. Sonnenreich, *A Comparative Analysis...*, p. 326.

³⁷ E. Skowrońska-Bocian, W. Borysiak, [in:] *System prawa prywatnego...*, pp. 629-633.

³⁸ Instead of many sources, cf. E. Macierzyńska-Franaszczyk, *Odpowiedzialność za długi...*, pp. 89 et seq.

with solidarity liable for the testator's debts up to the value they have inherited (Art. 139 of the Croatian Inheritance Law)³⁹.

A similar solution is also provided for in the new Hungarian Civil Code. Pursuant to Art. 7:96 of the Hungarian Civil Code, since the opening of the inheritance the responsibility of the heirs for inheritance debts is limited to the assets of the inheritance estate (*cum viribus hereditatis*)⁴⁰.

In turn, in the new Czech Civil Code the legislature adopted a solution according to which the limitation of the liability for inheritance debts is conditioned on the preparation of the inventory. Each of the heirs, within one month from discovering that they are entitled to inherit, can reduce their responsibility for inheritance debts (to the value of the inheritance assets). If the inventory has not been made, then the heir is responsible for inheritance debts to their full amount (§ 1704 of the Czech Civil Code)⁴¹.

However, according to English-Welsh law, the responsibility for inheritance debts is not attributed to the successors of the deceased. It is confined to the inheritance estate, which retains its separateness. Here the heirs do not acquire the inheritance as all the rights and obligations of the deceased. The inheritance property is separated from the property of the heirs. The rules relevant in this respect are set out in the *Administration of Estates Act 1925*⁴². At the time of the inheritance opening, for a transitional period, the inheritance passes to the personal representative based on the grant of representation. The administrator is either the Executor appointed by the testator and approved by the court (grant of probate) or the Administrator appointed by the court (the grant of letters of administration). Their task is mainly the repayment of the inheritance debts and then the distribution of the inheritance remainder to the heirs⁴³.

This kind of the regulations concerning the administrator of the inheritance is an interesting solution present in some jurisdictions. The role of such a person is related just, *inter alia*, to the issue of repayment of inheritance debts. In this regard, there are all sorts of constructions, ranging from the administrators indicated by the testator in the will (the will executor) to the administrators appointed by the court⁴⁴. The appointment of such an administrator is a practical way to improve the transition of the inheritance estate to the legal successors of the deceased. The main functions of such an entity, regardless of the source of the

³⁹ Cf. I. Kunda, [in:] P. Šarčević, T. Josipovic, I. Gliha, N. Hlaća, I. Kunda, *Family Law in Croatia*, Alphen aan den Rijn 2011, pp. 205 et seq.

⁴⁰ Cf. <http://net.jogtar.hu/ptk/>.

⁴¹ Cf. <http://www.czechlegislation.com/en/89-2012-sb/>.

⁴² A. Borkowski, *Succession*, pp. 3 et seq.

⁴³ R. Kerridge, [in:], *English Private Law*, ed. A. Burrows, Oxford 2013, p. 422.

⁴⁴ Cf. S. Wójcik, F. Zoll, [in:] *System prawa prywatnego...*, pp. 449-453.

legitimacy, are reduced to the inheritance administration after the death of the testator, which aims, among others, at the repayment of inheritance debts, the execution of the will dispositions and the transfer of the inheritance estate to the heirs. Such a solution is characteristic also for the systems where the responsibility for inheritance debts by the heirs is in principle unlimited⁴⁵.

The basis of the systems providing for the limited liability for inheritance debts is the protection of the heirs against some excessive overload with the inheritance effects. The solutions, which protect the heirs and at the same time allow the inheritance creditors for the satisfaction of their claims, at least in part, seem to be a reasonable compromise of two opposing values. On the one hand, inheritance law should realize the protection functions of the deceased's creditors, but - as one can think - it should not be done at all costs, without an adequate protection for the persons close to the deceased. In addition, in these systems, which prefer the model of the limited liability for inheritance debts, there are some differences in the specific approach to this field in the statutory solutions. Some differences in the various legislative solutions that occur, and are not - as in the event of the systems preferring the model of the unlimited liability for inheritance debts - the result of different cultural or social approaches in the individual legal systems to the issue of the liability for inheritance debts. They are the result of the legislator's reactions to the need perceived the legislature to resolve the conflict of values that occurs against the background of the relationship between the creditor of the inheritance estate and the heir. Moreover, as in the event of the unlimited liability systems, this is their common foundation. Only an evolution of the solutions in the different systems is the result of different concepts of the legislature, which, however, are based on the same base.

6.3. Development trends

In the particular legal systems, there are legal solutions that have been implemented to satisfy the creditors' claims related to inheritance debts. Irrespective of the specific solutions of the legislature, the essence of this kind of regulations is to identify who and on what terms is responsible for inheritance debts. Typically, this entity is the heir whose liability arises with the acceptance of the inheritance. The latter can be done with their consent, or be the result of the adoption by the legislature of a legal fiction that the inheritance has been accepted due to the heir's inactivity. The legal systems by their regulations on the liability for inheritance debts form the protection of two values: 1) the autonomy of the heir, 2) the inheritance creditor's rights. Each of them deserves an appreciation and a settlement of the conflict that occurs between these values is a challenge for the modern legislator.

⁴⁵ Cf. E. Cashin Ritaine, *National Succession Laws...*, pp. 149 et seq.

It seems that now in Europe, there is a tendency for a stronger protection of any heirs. The idea that guides individual legislators is associated with the desire to remedy the situation in which an oblivious heir would acquire an inheritance consisting solely of liabilities, which in turn may result in the deprivation of such an heir of their own personal property. Thus, in the legal systems one can identify at least two already mentioned institutions that are intended to protect heirs. Both of these institutions may be interesting for the future single European solution. These are the separation of the assets and the liquidation of the inheritance estate⁴⁶, which is preceded by the convocal proceedings⁴⁷. The separation of the estates is to extract all of the assets belonging to the inheritance estate, which will be used to satisfy the creditors.

The next step is the liquidation of the inheritance, which is preceded by the convocal proceedings - or the convening of all the inheritance creditors in order to determine which claims the heir is bound to satisfy. In the event when this construction is used, the failure to present their claims by the creditor will cause the loss of the possibility to realize subsequently the attributable rights by such a creditor. The solutions of this type are present, for example, in Dutch law (Art. 4:214 of the Dutch Civil Code), in German law (§1970 et seq. of BGB), in Austrian law (§ 812 et seq. of ABGB), in English law (Sec. 27 of the Trustee Act 1925), or in French law (Art. 878 of the French Civil Code). Moreover, although these solutions differ in the details, they are underpinned by one keynote, i.e. the predictability and the certainty of the legal relations⁴⁸.

The regulation in which the liability of the heirs depends on certain acts of care obliging the creditor seems an interesting element of inheritance law. Today, in the systems preferring the model of the unlimited liability for inheritance debts there often begin to appear some problems already signalled where the heir accepting the inheritance unreservedly risks all their existing assets, in principle, not having mechanisms to assess this risk, to check the status of inheritance debts⁴⁹. Moreover, in many jurisdictions, the creditors have a right to request a judicial assignation of a deadline for the heir to accept or reject the inheritance (e.g. Art. 4:192 of the Dutch Civil Code, Art. 771 of the French Civil Code). This is obviously beneficial to the creditors, however, from the viewpoint of the heirs, not conducive to their interests. On the other hand, such possibilities seem to be exceptions, and the legislators should rather go away from them in the future.

⁴⁶ Cf. F. Linder, [in:] M. Gruber, S. Kalss, K. Müller, M. Schauer, *Erbrecht...*, p. 339.

⁴⁷ Cf. T. Kipp, H. Coing, *Erbrecht...*, p. 539.

⁴⁸ Instead of many sources, cf. E. Macierzyńska-Franaszczyk, *Odpowiedzialność za długi...*, pp. 107 et seq.

⁴⁹ K. Muscheler, *Erbrecht*, pp. 1765 et seq.

A proposal to change the system of the responsibility for inheritance debts has been recently submitted to the Polish legislature. The government bill proposes a departure from the principle of the unlimited liability for inheritance debts in favour of the principle of the limited liability⁵⁰. As indicated in the explanatory memorandum, the previous regulation of the responsibility for inheritance debts requires a fair balancing of the opposing rights and interests of the inheritance creditors and the heirs. Under the conditions of a relatively low legal awareness in the society, there are not uncommon cases when someone falls unconsciously into debts because they are not aware of the consequences of their inaction with regard to the submission of a declaration of acceptance or rejection of the inheritance. Hence, the document proposes to amend the provisions on the liability of the heirs for inheritance debts by introducing the principle of the responsibility with the so-called benefit of inventory (i.e., to the value of the inheritance estate). According to the drafters, in case of the heirs' liability for inheritance debts it is essential to determine fairly the status of the inheritance estate. Thus, it was proposed, among others, to introduce a private valuation of the inventory, which will be attached to the probate case files, and - as long as no one contests it - it will be the basis for the valuation of the inheritance estate.

Such suggestions seem to meet the social expectations. On many occasions, the inheritance debts may exceed the value of all the proprietary rights of the testator. The recognition that the heir should be responsible for these debts without any limitation, with all their assets is unfair to that entity, because then the inheritance value will be negative for them and will cause the depletion of their assets. Today it does not seem to be still up-to-date the thought that it is the heir who should bear the consequences of the bad economy or the recklessness of the testator⁵¹. Hence, the regulations aimed at their protection seem to be more desirable today than the regulations to the contrary. In this context, some attention should be paid to these legal systems, which allow the separation of the inheritance assets from the estates of the heirs. As one can believe this is one of the fairest systems, because it allows for the maximum possible protection of the inheritance creditors without prejudice to the wealth of the potential heirs. If the inheritance estate satisfies the creditors, then the remainder will be acquired by the heir. If the creditor is not satisfied in full, then the assets of the potential heir will not be enriched; it will remain neutral, and the relationship between the creditor of the deceased and the deceased will still remain within these two estates (of the creditor and of the deceased). Thus, the situation will not change in relation to the hypothetical situation as if the deceased were still alive.

⁵⁰ The bill was adopted on the 12 August 2014 by the Council of Ministers and forwarded for further works. It was enacted on the 20 March 2015 and will enter into force after six months from the announcement. Cf. *Projekt ustawy o zmianie przepisów o przyjęciu spadku*, Kwartalnik Prawa Prywatnego 2013/3, pp. 773 et seq, Dziennik Ustaw 2015, Item 218.

⁵¹ See E. Macierzyńska-Franaszczyk, *Odpowiedzialność za długi...*, p. 328.

Some different rules may apply to the situation where the testator during their lifetime gets rid of the property (e.g. by means of donations), which may aim to impede the satisfaction of their creditors. In so far as the different legal systems in their legal solutions provide for some mechanisms for the protection of the creditors (e.g. *actio pauliana* or fraudulent conveyance), the rule in inheritance law is that for inheritance debts - if the inheritance estate is not sufficient - are also liable those who have acquired some assets for free at the expense of the estate. Typically, they can be released from such liability when they give back the benefit that they have received at the expense of the inheritance estate. This type of regulations is characteristic of many European systems. Moreover, they also apply to such instruments, which have been designed in order to dispose of the property upon death, but they do not cause the universal succession, but only a singular succession - e.g., a vindication legacy.

6.4. Conclusions and recommendations

It follows from the above that the system of the liability for inheritance debts, regardless of the specific approach of the legislature, seeks to protect two fundamental values such as the protection of the creditor of the inheritance estate and the protection of the heir and their property⁵². These values, seemingly difficult to reconcile, reflect the desire of the legislators to ensure the legal certainty. Thanks to the regulation concerning the liability for the inheritance debts, the existence of the legal relationship between the deceased and another entity is not neutralized. The relationship may continue, but in a different appearance, and among other entities. This is the meaning of this kind of regulations.

Among the emerging models of the responsibility for inheritance debts, the optimal seems the one that is able to reconcile two opposing solutions: the protection of the creditor and the protection of the debtor's heir. It seems that each of the individual European solutions is naturally based on this foundation and is an attempt to reconcile the two conflicting values. Hence, as one may think, there are no major obstacles as to the merits for the adoption of a future uniform regulation in this area. The issue whether the European legislator should prefer the model of the unlimited liability for inheritance debts or the limited liability model is now secondary. Even assuming the unlimited liability model, it will be necessary to create some mechanisms for the liberation from such a far-reaching responsibility. The rules of both systems intermingle with each other. An obstacle in the removal of the differences may seem to be different conceptions of the inheritance estate acquisition, and therefore resulting in arising of the liability for the inheritance debts.

⁵² Cf. T. Kipp, H. Coing, *Erbrecht*, p. 517.

Those appearing differences in the mechanism of the inheritance acquisition, however, should not obscure the possibility of harmonizing the rules governing the liability for the inheritance debts⁵³. The system of the inheritance acquisition seems to be of secondary importance and it is not excluded that there should arise, e.g., another European system of the inheritance acquisition. This could even be desirable, and facilitate the cross-border implementation of the responsibility for inheritance debts in practice. Perhaps in this respect a solution analogous to the European order for payment should be adopted, enabling the creditors to vindicate claims under inheritance law. Certainly, it is worth thinking about it before indicating that due to many differences an access to a common solution in this area is not possible.

⁵³ Cf. A.L. Verbeke, Y.H. Leleu, *Harmonisation of the Law of Succession...*, pp. 463 et seq.

Concluding remarks

The presented solutions in the selected EU Member States in the area of the key elements of inheritance law, to which I primarily include statutory and testamentary inheritance and the protection mechanisms of the people close to the deceased and their creditors, have been mostly closed with my end conclusions that evidence, in my opinion, the unification possibility of this law in the future. Obviously, it is a long way to this single European inheritance law, but even today, it is a feasible dream. Some claims that this is not possible, if only because of the social, cultural or economic differences in the individual Member States - as it is sometimes recalled - seem to be a myth that has no basis in the reality. Despite some differences, sometimes even essential ones when it comes to some concrete statutory solutions, the foundations of inheritance law seem to be based on the same principles and values. Even the different understanding of some of the functions of inheritance law or the different priorities in terms of the objectives of the inheritance law norms does not seem to be an insurmountable obstacle. The future single inheritance law in Europe is therefore possible. Is it needed?

A few years ago, when in the European Union there were no harmonized conflict rules of international inheritance law (which happened only because of Regulation No 650/2012) it was repeatedly pointed out that the differences in the various legal systems concerning indicating substantive law applicable to the assessment of the given relation under inheritance law are far from desirable. This gave rise to undertake work on the harmonization of these rules. As one can judge, the unification of the rules on the conflict of law is generally the first and necessary step to harmonize substantive law. I believe that this time it will happen like this as well. The harmonization will take place if only because of the difficulties that will arise in connection with the application of Regulation No 650/2012 in practice. A different approach of some legislators to the same issues (e.g. a different order of statutory succession) will cause in fact – as one can imagine (the Regulation has not been applied yet) – a significant imbalance to the stable national regulations. For, if a statistical citizen learns that all the assets of their ancestors located in the country of their birth, where they have spent much of their life and whose inheritance law regulations they may have known, will be subjected to the

rules contained in the law of a foreign country that a few years before the death of the testator became the place of their habitual residence, they will certainly be confused. Subjecting all of the succession matters to the foreign law regime in the early years of the regulation application may therefore prove to be a big social problem and accordingly, become the driving force behind some changes towards some standardization of the substantive law regulations. Paradoxically, therefore, the harmonization in one field (of the conflict of laws) will cause difficulties in the application of the other (of substantive law), perhaps being at the same time an inflammatory spark for some far-reaching changes. Thus, how to change substantive inheritance law in Europe? How to achieve the uniformity in terms of the future European inheritance law?

Certainly, one should start again a wide-ranging discussion in this matter. The scientific discourse has repeatedly stood behind the legislative changes and it must be the case this time as well. An excellent idea, as one can believe, would therefore be the establishment of a European institution modelled on the Commission on European Family Law (CEFL), fulfilling similar tasks, but for inheritance law. The main objective of this organization would be to launch a pioneering theoretical and practical exercise in relation to the harmonization of inheritance law in Europe. This could be achieved through surveying the current state of comparative research on the harmonization of inheritance law in the European countries and searching for the common core for the solution of several legal problems based on comparing the different solutions provided by succession laws of the various European jurisdictions¹. One of the main challenges of such a body should be the development in the future of the Principles of the European Inheritance Law that will be thought to be the most suitable for the harmonization of inheritance law within Europe.

Such a body should be composed of some representatives (experts) of the Member States of the European Union and be essentially academic in nature. The work of this body should be cyclic. In this research, it should observe the prevailing trends of the changes to the reality of inheritance law in not only the individual European states, but also the global trends. It also seems necessary to use the research on the behaviour and the needs of the society, using some mechanisms from outside the legal sciences. Moreover, careful attention should be paid to the judicial decisions of the various constitutional courts, the ECHR and the ECJ. Only after this kind of analysis that body should develop a document in the form of the Principles of the European Inheritance Law, which would open some further detailed consultations. The standards developed in this way would allow then to formulate some legislative proposals for the future single European inheritance law.

¹ The tasks would be the same as the CEFL tasks. See: <http://www.ceflonline.net/history/>.

Today, as one can believe, the most appropriate way to achieve this purpose (the uniform inheritance law) is the work of an international team of scientists.

An open matter is the choice of an instrument allowing for introducing this type of legislation (the uniform inheritance law) into the EU law in the future. Due to the increasingly perceived autonomy of the will in the area of inheritance law, which is manifested, e.g. in the form of regulations allowing the choice of the law applicable to succession by the testator, perhaps the future European inheritance law should be an optional regime, at least for the first period of its validity. A testator would have a choice then; the European regime could be one of the options for the determination of a succession case.

This construction, although not perfect, would allow for retaining (at least for some time) of the national regulations, which may be postulated by the persons advocating the position of the cultural, social or economic diversity in the individual national regulations as an obstacle to their unification. Surely, this is not the way to the full harmonization; however, due to a happy confluence of circumstances and a potential popularity of a new instrument of inheritance law, the practical application of the national regulations could thereby be superseded. This certainly should be expected, or at least such a possibility cannot be ignored.

Perhaps a more appropriate solution would be a respective directive, or another regulation on succession. The advantages and disadvantages of each of these instruments are very well known and each of them could meet the right role, depending on the expectations that would be the result of the international discussion. Certainly, the choice of an instrument introducing a uniform regulation of inheritance law in Europe is today a premature task. This should be done only after an extensive discussion concerning, *inter alia*, the scope of such legislation and its relation to the national regulations.

Moreover, although there is no doubt that the issue of a possible unification of inheritance law will raise some controversy in the future, it is worth taking it, despite the fact that the question of approximation or harmonization of private law in the EU has raised a considerable excitement for a long time. As it is known, the extreme ideas on this subject vary from the farthest-reaching postulate to introduce a common European Civil Code to a moderate idea to stop at making some recommendations to the Member States on common directions of the changes in the national legislations. The questions whether a European inheritance law will be created and whether it will be part of the European Civil Code cannot be answered today. While there are some supporters of such a tempting idea, it seems that equally strong are the advocates of the opposing positions. In addition, while the latter use some arguments that in the light of the presentation made in this book do not seem to be reasonable, the reality and the politics may not allow for fulfilling the dreams.

Realizing some dreams one should remember that the future reality of inheritance law would pass a real test only in a few decades. Some solutions of inheritance law, due to the length of human life, can be checked out only in the third generation or maybe even in the fourth. Hence, now all the changes should be approached just with this reservation; also, those ones that can create a future reality and today remain a dream.

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