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Laws of Succession in Europe and Estonia: How We Got to Where We Are and Where We Should Be Heading^{*1}

1. The historical development of succession laws and current opportunity for harmonisation

1.1. Development of succession laws over time

Generally, succession law does not develop by rapid and radical changes, as for example, does contract law. Usually succession law evolves in long gentle waves, by baby steps, so that profound change may only be appreciated, in retrospect, after long periods have elapsed. This may be due to the fact that succession law does not have to respond to the more usual and more rapid changes of business and economic practices and necessities. Its roots reach deeper into fundamental concepts of justice, morals and society.^{*2}

This does not mean that economic changes never influence succession laws. Of course, inheritance was and had to be organised in quite different ways in an agrarian society, let alone in subsistence economies, as compared to the needs of an industrial society. In Europe, however, those necessary adoptions were already achieved by the great codes and developments of the 19th century.^{*3}

The great codes in Europe are children of the 19th century, the Austrian *ABGB* even to a large extent of the late 18th century. They reflect the social and economic situations of their time. But it does not

¹ Translated by Heikki Leesment.

² U. Spellenberg *et al.* Recent developments in succession law. – Law in Motion. Antwerp: Kluwer, 1997, p. 713; D. Leipold. Wandlungen in den Grundlagen des Erbrechts? – Archiv für die civilistische Praxis (AcP), 1980, 180, S. 211; H. Hetmeier. Grundlagen der Privaterbfolge in der Bundesrepublik Deutschland und in der DDR. Berlin: Duncker & Humblot, 1990, S. 13; J. N. Druey. Grundriss des Erbrechts. 3. Aufl., Bern: Verlag Stämpfli+Cie, 1992, § 2, N 11; P. Varul. Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia. – Juridica International. Law Review. University of Tartu, V, 2000, p. 114.

³ U. Spellenberg (Note 2), p. 713.

seem that the subsequent economic developments were significant enough to impose further fundamental re-orientations in succession law.^{*4}

In Estonia and other so-called developing economies the situation in this respect is entirely different. The changes in the Estonian law of succession that were effected with the passage of the new Law of Succession Act (LSA) on 15 May 1996, are sweeping, particularly as compared to the earlier statutory provisions dealing with rights of inheritance contained in the Civil Code of the Estonian Soviet Socialist Republic (ESSR). Though the changes can be appreciated in purely quantitative terms – whereas the civil code of the ESSR contained 35 sections devoted to succession, the new Estonian statute runs to 174 sections, the changes from the previous law are radical in their substantive provisions as well.

Radical changes of this scope and magnitude in the law of succession are explained by the fact that laws of succession, as they existed in socialist society, were different and unique. They can even be characterised as simplified to the maximum extent possible.^{*5} The absolutely minimal regulation of legal issues of succession is based primarily on the essential fact that property rights of the individual citizen in socialist society were severely circumscribed. Property that was capable of being inherited or passed by bequest, was small and of relatively slight value. In addition, it is important to note that in socialist society inherited property was not viewed favourably, as property received without the individual having to work for it, which encourages egoism and accumulates undue wealth into the hands of a privileged few. It was for these kinds of reasons that, under Soviet law, the designation of persons lawfully permitted to inherit from a deceased's estate was rather limited.^{*6}

In August 1991, following the restoration of Estonian independence, Estonia reasserted as a central feature of its market economy and democratic society, the right to own property, which, by its very nature and from its very origin, implies the right to inherit — “private law has always included succession law”.^{*7} The law of inheritance and succession is, in this respect, as lawful or unlawful as private property itself.^{*8} Through succession and inheritance, private property asserts and achieves its true character, as succession makes private property “perpetual”. Since succession laws permit private citizens to make provisions regarding their property upon death, it provides them complete freedom to exert dominion and control over their property even after death.^{*9}

Under principles of classical liberal thinking, the right to own property is the very foundation of financial independence and true personal freedom of action. Liberalism requires the acceptance of private inheritance and succession, because it ensures the perpetuation of private property even in the event of death.^{*10} For this reason, provisions regarding the protection of private property rights

⁴ *Ibid.*, p. 720.

⁵ C. Trilsch-Eckardt. Das tschechische Erbrecht im Vergleich zum deutschen und Reformüberlegungen. – Zeitschrift für Erbrecht und Vermögensnachfolge (ZEV), 1996, S. 4; G. Niemeyer. Die Verfassungsgarantie des Erbrechts in der Rechtsprechung des BVerfG. – Familie und Recht: Zeitschrift für die anwaltliche und gerichtliche Praxis (FuR), 1998, S. 12–13; J. K. Tolstoi. Nasledstvennoye pravo. Utchebnoye posobie. Moskva: Prospekt, 1999, st. 6.

⁶ E. Ilus. Tsviilõiguse eriosa: Autoriseeritud konspekt E. Ilusa loengute järgi (Special Part of Civil Law: Authorised Conspect based on the Lectures of E. Ilus). Koost. A. Rammul, E. Talvik. Tartu: Akadeemilise Kooperatiivi Kirjastus, 1938, lk. 57 (in Estonian); E. Laasik. Nõukogude tsviilõiguse eriosa (Soviet Civil Law. Special Part). Tallinn: Valgus, 1975, lk. 447–448 (in Estonian); I. Tjutrumov. Pärimise ulatus (Scope of Succession). – Õigus, 1936, nr. 9/1, lk. 436–437 (in Estonian); J. N. Druey (Note 2), § 2, N 6–8; R. Schröder. Abschaffung oder Reform des Erbrechts. Die Begründung einer Entscheidung des BGB-Gesetzgebers im Kontext sozialer, ökonomischer und philosophischer Zeitströmung. Ebelbach: Verlag Rolf Gremer, 1981, S. 2–3; H.-G. Mertens. Die Entstehung der Vorschriften des BGB über die gesetzliche Erbfolge und das Pflichtteilsrecht. Berlin: Walter de Gruyter, 1970, S. 26–27; H. Hetmeier (Note 2), pp. 26–30; D. Leipold. Erbrecht. Grundzüge mit Fällen und Kontrollfragen. 12., neubearb. Aufl., Tübingen: Mohr Siebeck, 1998, Rdn. 51–52; U. Kangas. The Functions and the Order of Inheritance. – Scandinavian Studies in Law. Vol. 29. Ed. by A. Victorin. Stockholm: Almqvist & Wiksell International, 1985, p. 83.

⁷ J. N. Druey (Note 2), section 1, paragraph No. 1; AK-BGB Däubler, Einl. Rdn. 2. – Alternativkommentare: Kommentar zum Bürgerlichen Gesetzbuch. Bd. 6. Erbrecht (bearb. v. Buchholz, Däubler, Derleder, Dubischar, Finger, Pardey, Schaper, Teubner, Wendt). Neuwied: Luchterhand, 1990.

⁸ AK-BGB Däubler (Note 7), paragraph No. 3.

⁹ K. Zalán. Hauptprobleme des Erbrechts im ungarischen Zivilgesetzbuch. – Das ungarische Zivilgesetzbuch in fünf Studien. Herausgegeben vom Redaktionskollegium der fremdsprachigen Zeitschrift für Rechtswissenschaften der Ungarischen Akademie der Wissenschaften Acta Juridica. Unter Vorsitz von Gy. Eörsi. Red. F. Mádl. Budapest: Verlag der ungarischen Akademie der Wissenschaften, 1963, S. 319; H. Koziol, R. Welser. Grundriss des bürgerlichen Rechts. (Manzsche Kurzlehrbuch) Bd. 2. Sachenrecht, Familienrecht, Erbrecht. 10., neu bearb. Aufl., Wien: Manz, 1996, S. 285.

¹⁰ H. Brox. Erbrecht. 18., neubearb. Aufl. 2000, Rdn. 19; H. Hattenhauer. Zur Dogmengeschichte des Erbrechts – Jura (Juristische Ausbildung), Berlin, New York: de Gruyter, 1983, S. 71–72; W. Krug. Erbrecht: Examenkurs für Rechtsreferendare. 2. Aufl. München: Beck, 1998, S. 1; H. Koziol, R. Welser (Note 9), S. 285.

and succession rights are usually found in close proximity to one another in the constitutions of democratic countries.*¹¹

Accordingly, in 1992, when Estonia prepared its draft law on succession and inheritance, law-makers embarked on this effort with the above noted axiom clearly in focus — that the law of succession, like the law of property, should remain relatively static. For this reason, lawmakers relied upon the draft Civil Code of the former Republic of Estonia, dating back to 1940, as source material for preparation of both the new law of property as well the law of succession. The law of succession contained in the 1940 draft Civil Code was largely influenced by the German *BGB*, but also by the Swiss, Austrian and Italian civil codes. A great deal was also borrowed from the Baltic Private Law Code (BPLC).^{*12}

On the one hand, a return to laws that existed prior to the incorporation of Estonia into the Soviet Union is entirely understandable and logical. After the fall of communism, many Central and East European countries felt the strong desire to restore the legal systems and traditions that existed before World War II, as the starting point for development of current bodies of private law.*¹³ One such example would be Latvia, which, in 1992, re-enacted the complete civil code from 1937, *i.e.* from before World War II.*¹⁴ Thus, though the succession laws of both Baltic countries originate from the same legal foundation (BPLC) and were first enacted in similar time frames, their substantive provisions are markedly different in many respects.

On the other hand, it is not possible to consider such complete restoration of pre-World War II era civil codes as being a shining success in the development of law. Though succession laws in the countries of Western Europe have changed relatively little during the post-war period, they have not remained altogether stagnant. On the contrary, the last few decades have seen the incorporation of many needed changes as part of the reform of succession laws, in Europe as well as in the rest of the world.

Reforms in the last half-century in Europe have concentrated on increasing the inheritance rights of the surviving spouse and on placing children born outside of marriage on an equal legal footing with children born of marriage. These changes, for example, are the main subjects of the Austrian statute of 1989, the French draft bill of 1995, the German Acts of 1969 and 1973, the Swiss Act of 1984*¹⁵, and the Finnish Acts of 1965 and 1983.*¹⁶

Probably the one overriding common tendency in the development of succession law during the last decades is the establishment of equal rights for children born outside of marriage. An often-used argument is or was that children should not be forced to bear the consequences of their parents' actions. As informal family structures, especially non-marital cohabitation, become a more accepted way of life, there will be less need and opportunity for society to make distinctions between married and unmarried couples.*¹⁷

¹¹ O. Palandt. Bürgerliches Gesetzbuch. 58., neubearb. Aufl. München: Beck, 1999, Einl. vor § 1922, Rdn. 4; Soergel – Stein, Einl. Rdn. 5. – Soergel. Bürgerliches Gesetzbuch. Bd. 9. Erbrecht (bearb. v. Damrau, Dieckmann, Harder, Loritz, Müller, Stein, Wolf). 12., völlig neubearb. Aufl. Stand: Frühjahr 1992. Stuttgart, Berlin, Köln: Kohlhammer, 1992.

¹² P. Varul (Note 2), pp. 106–114; E. Silvet. Pärismiseaduse eelnõu põhijoontest (Commentary on the draft of the Law of Succession). – Juridica, 1995, nr. 7, lk. 282 (in Estonian). The Baltic Private Law applied from the year 1865, when Estonia was part of Tsarist Russia. The author of the law was Professor Georg-Friedrich Bunge of the University of Tartu. The Baltic Private Law is a code based on the pandect system, containing the general part, property law, family law, law of succession and law of obligations parts, and can be classified as belonging to the Germanic family. The Baltic Private Law also applied in Estonia in 1919–1940 when Estonia was an independent state. The preparation of Estonia's own civil code began at the beginning of the 1920s. The civil code was ready for adoption in 1940, but was not passed. The draft civil code belongs to the Germanic family of law and is mainly based on the norms of the Baltic Code of Private Law, *BGB*, the Swiss civil code and the Austrian civil code. A leader in the preparation of the draft civil code, Professor Jüri Uluots, has pointed out the special influence of the Swiss civil code (see P. Varul (Note 2), p. 108). For more about the Baltic Private Law Code see in: M. Luts. Private Law of the Baltic Provinces as a Patriotic Act. – Juridica International. Law Review. University of Tartu, V, 2000, pp. 157–167.

¹³ M. A. Glendon, M. W. Gordon, C. Osakwe. Comparative legal traditions: text, materials, and cases on the civil and common law tradition, with special reference to French, German, English and European law. 2nd ed. West Publishing Co: St. Paul, Minn., 1994, pp. 435–436; H. Köhler. Transformationsprozess in Zentral- und Osteuropa: Bedeutung der Rechtsreform. Erste Seite. – Europäisches Wirtschafts- & Steuerrecht (EWS), Heft 4/2000.

¹⁴ Latvijas Republikas Augstākās Padomes un Valdības Zinotājs, 1992, nr. 4/5, art. 51; nr. 29/31, art. 417; R. Krauze. Mantojuma tiesības. 2. papildinātais izdevums. Rīga: KIF “Biznesa kompleks”, 1997 (in Latvian); U. W. Schulze. Lettland. – Ferid/Firsching/Dörner/Hausmann. Internationales Erbrecht. Quellensammlung mit systematischen Darstellung des materiellen Erbrechts sowie des Kollisionsrechts der wichtigen Staaten. Begründet von M. Ferid, K. Firsching. Fortgeführt von M. Ferid, P. Lichtenberger. Stand: Lieferung I-XL Band I-VII, München: Beck (1997), Rdn. 1.

¹⁵ U. Spellenberg (Note 2), p. 720; J. N. Druey (Note 2), section 2, N 11.

¹⁶ U. Kangas (Note 6), p. 93.

¹⁷ U. Spellenberg (Note 2), p. 728.

It is clear, however, that Estonian law poses no problem with regard to children born outside of marriage. The right of Estonian children born outside of marriage to inherit equally with those born of married parents was guaranteed under Soviet law, as it was in other socialist countries, and the same provisions were incorporated into the current Estonian law of succession.^{*18}

Among the current issues, in the further development of Estonia's succession law, is the matter of protecting the legal rights of the surviving spouse. Jurists from the University of Amsterdam arrived at that conclusion, following their expert review and critique of the Estonian draft law. Their analysis of the Estonian provisions for protection of the surviving spouse, led them to conclude that the law does not guarantee the surviving spouse the necessary standard of living, and, if the married couple has not made suitable arrangements in the event of the death of one spouse, the survivor can be left destitute. The debate among legislators considering the draft law in the Estonian parliament did not particularly focus on this aspect of the statutory scheme, and they did not revise the draft law before passage, despite the critique provided by the Dutch experts.

This lack of concern is even more surprising considering that in the preparation of the draft law, the drafters had the clear intent to create for the surviving spouse generous provisions regarding inheritance. Following the adoption of the current law of succession, one of the primary authors of the statute, E. Silvet, as well as the counsel to the Parliamentary Legal Affairs Committee, H. Reinberg-Rits, stressed on several occasions that the Estonian succession law provides many advantages to the surviving spouse.^{*19} Unfortunately, this is true only to the extent that one directly compares the current law of succession with the statute that was operative before 1940, *i.e.*, with the BPLC and the state of succession law in Europe before World War II. This means that, in reality, the Estonian law of succession has remained unchanged in its provisions for protection of the surviving spouse since 1940. Though the German *BGB* provided the foundation for the Estonian draft in 1940, at the present, the *BGB* has undergone periodic review and development over the ensuing post-war years, and the Estonian succession law has not kept up with that development.

1.2. Harmonisation of the law of succession in Europe

It is not possible, neither at the present moment nor in the near future, to speak of a unified European Union law of succession, common throughout the Community. Thus, the above title might seem somewhat strange to lawyers. Indeed, it must be recalled that the goal of the European Community was to promote a vibrant common market and "economic activities" throughout the Community, not to promote uniform succession laws.^{*20}

Some authors even warn against excessive unification of family law and law of succession. Basically, they invoke two arguments.^{*21}

- (1) In federal countries, family and succession law are a State jurisdiction. This in fact is the case in some federal countries such as Canada and the United States of America.^{*22} With regard to Europe, it is possible to cite Spain^{*23} and the former Yugoslavia as examples. In other federal countries, such as Germany and Switzerland, it is a matter of federal jurisdiction.
- (2) Private law, especially family law and law of succession, are deeply rooted in our culture and express our way of life. The practising lawyer has to save and protect law, just as we protect our language, our monuments and landscapes. Only then can we prevent our cultural heritage from being destroyed by the all-levelling urge for unification.

¹⁸ *Ibid.*

¹⁹ E. Silvet. Eesti Vabariigi esimene oma pärimisseadus (Republic of Estonia's own Law of Succession). – Sõnumileht, 11. juuni 1996 (in Estonian); H. Reinberg-Rits. Uuest aastast jõustus pärimisseadus (Law of Succession effective from New Year). – Postimees, 3. jaanuar 1997 (in Estonian).

²⁰ W. Pintens, J. Du Mongh. Family and Succession Law in the European Union. – International Encyclopaedia of Laws. Vol. 1. R. Blanpain (general ed.). Family and Succession Law – Suppl. 1 (May 1997). The Hague-London-Boston: Kluwer, 1997, European Union – 11.

²¹ W. Pintens, J. Du Mongh (Note 20), European Union – 75.

²² At the same time, the USA is cited as an example for Europe, with the wide acceptance by a majority of the States of uniform legislation. "A greater and more successful and effective unification has been realized by the American Uniform Probate Code 1990 (amended in 1993) unifying the rules of transfer of succession. This should be set as an example for Europe, without forgetting, however, that the conditions in Europe are not as favourable as in the United States, where unification takes place within one federation". (See in: A. Verbeke, Y.-H. Leleu. Harmonization of the Law of Succession in Europe. – Towards a European Civil Code. The Hague: Kluwer, 1998, p. 187.

²³ C. T. Ebenroth. Erbrecht. München: Beck, 1992, Rdn. 72.

Despite these arguments for retaining national individuality in succession laws, it is generally considered necessary, in the further development of European Union legal standards and requirements, that national laws of succession also be harmonised among Member States. In the interest of promoting uniformity, it is necessary to be much more careful and sensitive, than, for example, in the case of contract law. Perhaps the law of succession, even more than family law, is a field reserved to local rules and customs, an area in which the desire or need for unification seems to be, at best, moderate.*²⁴

It has even been referenced in publications in the field that the need to standardise laws of succession among European Union Member States is dependent upon:

- (1) clearly defined economic justification and
- (2) the requirements of the European Convention on Human Rights.*²⁵

In a recommendation dated 7 December 1994, the European Commission requested the Member States of the European Community to facilitate the succession of small and medium companies in order to avoid their liquidation in probate, and as one response to growing unemployment in the EU. This would not only require the passage of remedial measures in company and tax laws, but also in the field of family and property law, in particular concerning restrictions on transfers between spouses, prohibition on contracting as regards a succession which has not yet occurred and the exercise of forced share (*legitima portio*) property rights to specific hereditary assets rather than to comparable value or worth in terms of money.*²⁶ The stifling impact of inheritance taxes on the development of a true common market throughout Europe, and their regressive effect on beneficiaries, are two major criticisms directed currently at European succession laws.*²⁷ Neither Estonia nor Latvia has so far imposed any estate or inheritance taxes. If Estonia were to consider enacting estate and inheritance taxes in the future, it should seriously analyse their effects and problems created in other countries, especially countries of the European Union. In addition to economic problems, among which widely reported are the bankrupting effects of inheritance taxes on small- and medium-sized businesses and the resulting contribution to unemployment, there is also the perceived negative impact of the law of succession itself. It is particularly damaging in reciprocal wills between spouses. In this respect, the tax law has been identified in the legal literature as a restriction on testamentary freedom.*²⁸

The adoption of the European Convention on Human Rights by Member States has resulted in equal rights of succession and inheritance by both children born of marriage and those born outside of marriage. Beyond ratification of the Convention by Member States, its provisions have assumed the force of substantive law in the European Union with the adoption of the Treaty of Amsterdam.*²⁹ In addition, it would also be appropriate to identify an act, though not directly an act of the European Union, that nevertheless has influenced in several ways, the future development of successions laws in practically all European nations — namely, on 16 October 1981 the Council of Europe accepted recommendation No. R (81) 15, as a result of which Member States are urged to establish in the national law of each country provisions which will permit the surviving spouse to continue to reside in the marital home following the death of one spouse.*³⁰ On the one hand, this act may be viewed by the Council of Europe as support for the development of this body of law in the indicated direction. However, for those Member States that have not enacted the necessary reforms in succession laws, this act is a further indicator of the thrust of future development in the law.

Accordingly, approaching the issue of further development of the Estonian law of succession in light of principles accepted by the majority of European states, it would be appropriate to focus on the issue of protecting the legal rights of the surviving spouse.

²⁴ W. Pintens, J. Du Mongh (Note 20), European Union – 76–77; A. Verbeke, Y.-H. Leleu (Note 22), p. 175.

²⁵ A. Verbeke, Y.-H. Leleu (Note 22), p. 173.

²⁶ *Ibid.*, p. 182.

²⁷ See N. Dautzenberg, Die Bedeutung des EG-Vertrages für die Erbschaftsteuer. – Europäisches Wirtschafts-Steuerrecht (EWS), Heft 3/1998, S. 86–93.

²⁸ U. Spellenberg (Note 2), p. 717.

²⁹ A. Verbeke, Y.-H. Leleu (Note 22), p. 182.

³⁰ W. Zankl, Das gesetzliche Vorausvermächtnis des Ehegatten. Österreichisches Rech und Rechtsvergleichung. Wien: Manz, 1996, S. 101–102; D. Heinrich, D. Schwab, Der Schutz der Familienwohnung in Europäischen Rechtsordnungen. Bielefeld: Verlag Ernst und Werner Gieseking, 1995, S. V.

2. Ensuring the right of the surviving spouse to inhabit the matrimonial domicile in inheritance

2.1. Reasons for strengthening the rights of the surviving spouse under succession law

It must generally be considered that the spouse, as a rule, is the person closest to the deceased and therefore, the protection and enhancement of the interests of the surviving spouse is fully understandable and entirely appropriate. In doing so, it is also necessary, however, to consider the perspective of surviving children and other close relatives, who likewise have an interest in having the inheritance estate remain in the family. Accordingly, several conflicting interests and perspectives converge in this question, and reaching a resolution fair to all parties is not an easy task.^{*31}

In every society the fundamental choices within inheritance law must be such that they are acceptable to the majority of the population. Also, they must not have unreasonable social consequences.^{*32}

The determination of which orientation should be taken in the further development of succession laws depends on two considerations. Initially, the following proposition can be found in the literature on succession laws, particularly analyses published in English: intestate succession law is the body of law that determines how property will be distributed if a person did not make other arrangements or if the arrangements attempted were not legally valid. In Western liberal democracies, the purpose of such rules is essentially to carry out the desires of the typical decedent. That is, intestate succession law is not designed to promote any specific social aim, such as redistribution of wealth; rather, it is the legislature's attempt to draft the will that the average person would have made.^{*33}

German legal specialists have proposed an entirely different reason as the foundation for future development of succession laws. The majority of German authors are not in agreement with the above proposition for the following reason. If the consequence of family succession laws were grounded in attempting to effect the hypothetical will of the deceased, then the law should provide maximum protection to the total freedom of the testator in determining his or her heirs, but that is not what succession laws actually provide (at least not on the European continent). The rights of family members to insist upon their forced share or minimal statutory share of the deceased's estate greatly limit the testator's freedom of action. Thus, the very foundation of succession law in countries such as Germany and France is not the hypothetical testamentary wish of the deceased, but rather a reflection of societal values of what the law should be.^{*34}

Since English law provides virtually unbounded testamentary freedom, the discernment of the assumed intent of the testator lies at the heart of English succession law and its future evolution. Principles of family succession rights and statutory shares for either the surviving spouse or other family members are rarely mentioned. This reflects the differing attitudes reflected in English and German legal literature on the regulation of deceased's estates and rights of family members under succession laws. For this reason, lawmakers in England, for example, pay greater attention to sociological research when considering reforms in succession laws than do their counterparts in Germany.^{*35}

³¹ H.-G. Mertens (Note 6), p. 64; T. Kipp, H. von Coing. *Erbrecht: ein Lehrbuch / auf d. Grundlage d. Bearb. von T. Kipp, fortgef. von H. Coing*. 14. Bearb. Tübingen: Mohr, 1990, S. 38; S. Buchholz. *Gestaltungsprobleme des Ehegattenerbrechts: Teilungsprinzip oder Nutzungsprinzip*. – *Monatschrift für Deutsches Recht (MDR)*, 1990, S. 375; D. W. Belling. *Einführung in das Recht der gesetzlichen Erbfolge*. – Jura, 1986, S. 584; M. A. Glendon. *The Transformation of Family Law. State, Law and Family in the United States and Western Europe*. Chicago, London: The university of Chicago Press, 1996, p. 239.

³² U. Kangas. *The Myth of Uniform Family and Inheritance Law. – An Introduction to Finnish Law*. Ed. by J. Pöyhönen. Helsinki: Finnish Lawyers' Publishing, 1993, p. 214; M. A. Glendon (Note 31), p. 238.

³³ M. A. Glendon (Note 31), p. 239. See also: A. Ehrenzweig, A. Ehrenzweig. *System des österreichischen allgemeinen Privatrechts*. 3., vollkommen Neubearb. u. erw. Aufl. 4. Buch. *Das Erbrecht*. Bearb. von W. Kralik. Wien: Manzsche Verlags- und Universitätsbuchhandlung, 1983, p. 3.

³⁴ MünchKomm – Leipold, Einl. Rdn. 10. – *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. Bd. 9. *Erbrecht: §§ 1922–2385; §§ 27–35 BeurkG*. – G. Schlichting (Red.) (bearb. v. Brandner, Burkart, Dütz, Frank, Grunsky, Leipold, Musielak, Promberger, Schlichting, Siegmann, Strobel). 3. Aufl. München: Beck, 1997; Palandt – Edenhofer, 1999, Einl. vor § 1922, Rdn. 3; J. N. Druey (Note 2), § 4, N 13; F. Gschnitzer. *Österreichisches Erbrecht*. Zweite, Neubearb. Aufl. von Christoph Faistenberger. Wien, New York: Springer-Verlag, 1983, S. 2–3.

³⁵ The Law Commission's Report, *Distribution on Intestacy* (Law Com. No. 187, 1989) (see in: A. Borkowski. *Textbook on Succession*. London: Blackstone Press Limited, 1997, p. 3).

It has been observed that the differences between the approach employed by legal scholars in continental Europe and England result from basic differences in their legal traditions and contrasting legal philosophies underlying the two legal systems. While on the continent lawyers think abstractly, in terms of institutions; in England lawyers weigh things concretely, in terms of cases, the relationship of the parties' "rights and duties". Continental traditions place more reliance upon legal methodology, while the English common law tradition is grounded in precedent and the application of legal principles and societal norms in actual cases and controversies.^{*36}

The development of succession laws in continental Europe is, however, certainly influenced by the substantive provisions of English succession law and changes that have been carried into effect. Thus, Germany, for example, has recently compiled and analysed statistical data concerning problems of the surviving spouse.^{*37} Elsewhere on the continent, as in the Netherlands, for example, discussions concerning provisions for the surviving spouse have been going on for decades. Notarial professors of the Netherlands have even submitted a proposal for amendment to the law to the Secretary of Justice. This proposal is based on standard notarial practice of many decades regarding wills, in which spouses who have wills drawn up, appoint each other as sole heir and grant their descendants a claim to the estate of the surviving spouse, payable at the time of death of the surviving spouse.^{*38}

In one sense, it is thus possible to take a middle position on the issue of succession laws, because, when one considers succession laws from the viewpoint of those advocating for testamentary freedom of choice by the testator, then the rules applicable to succession and inheritance under operation of law are seen not so much as an ideal solution, as they are a necessary expedient to be employed in circumstances where the testator has not expressed his or her testamentary intent, in which event the operation of succession law should proceed from the viewpoint of the assumed intent of the average testator.^{*39}

As an historical observation, it should be noted that practically until the beginning of the twentieth century, rights of succession by family members under the laws of intestacy meant the application of Roman legal principles dating back to Justinian notions of justice.^{*40} For instance, in Austria laws providing for intestate succession for the surviving spouse were enacted by legislation by Emperor Josef II in 1786.^{*41}

Some of the main justifications for enhancing and enlarging the succession rights of the surviving spouse may be summarised as follows.

For most people it is a serious economic burden if their spouse dies and in connection with this a division of the estate is required amongst the children of the deceased. In many cases the surviving spouse will have the option to decide whether or not to remain in possession of the estate, which means that the spouse can keep the estate as a whole.^{*42} The hereditary succession of the surviving spouse serves a specific purpose: it is not only to distribute the estate but also to maintain and to support her. Therefore firstly the poor widow without dowry enjoys the inheritance in common with the children (since 1786 in Austria). The condition that the surviving spouse must be "without dowry" was set aside by later legislation, but until then the surviving spouse was only entitled to a life estate, while property devolved to her or him in the case of no surviving descendants.^{*43}

This altered the position of the wife, since it is a common fact that in the majority of cases, the surviving spouse is the wife. Thanks to the efforts of individuals and organisations who have championed women's issues starting in the 1920s and particularly since the middle of the last century, the status of the wife has been elevated to a position of eminence. The literature describes the middle

³⁶ K. Zweigert, H. Kötz. *Introduction to Comparative Law*. 2nd, rev. ed., translated from the German by T. Weir. Oxford: Clarendon Press, 1992, pp. 70–71.

³⁷ D. Leipold (Note 2), pp. 160–237.

³⁸ G. van der Burght, M. Franssen. *The Netherlands*. – *International Encyclopaedia of Laws*. Vol. 2. R. Blanpain (general ed.). Family and Succession Law (January 1997). The Hague-London-Boston: Kluwer, 1997, The Netherlands – 145.

³⁹ H. Koziol, R. Welsch (Note 9), p. 286.

⁴⁰ R. Dietz. *Erbrecht*. Ein Grundriss. Bonn: Humboldt-Verlag, 1949, S. 29; K.-H. Gursky. *Erbrecht*. 2., neubearb. Aufl. Heidelberg: Schaeffers Grundriß C. F. Müller Juristischer Verlag, 1994, S. 19; U. v. Lübtow. *Erbrecht*. Ein systematische Darstellung. 1 Halbband. Berlin: Duncker & Humblot, 1971, S. 1–2; W. Brauner. Different ways of succession by customary law in Austria. – *Actes à cause de mort – Acts of Last Will*. Deuxième partie – Second Part. Europe médiévale et moderne – Medieval and Modern Europe. Bruxelles: De Boeck Université, 1993, p. 300.

⁴¹ W. Brauner (Note 40), p. 300.

⁴² S. Storm, H. V. G. Pedersen. *Denmark*. – *International Encyclopaedia of Laws*. Vol. 1. Family and Succession Laws – Suppl. 7 (October 1998). The Hague-London-Boston: Kluwer Law International, 1998, Denmark – 147.

⁴³ W. Brauner (Note 40), p. 300.

of the twentieth century as the “happy period” in the development of family law^{*44}, which continues in many respects up to the present.

Owing to the increasing recognition of individual rights by the society, which has itself brought about changes in family structures, the estate has been recognised as the joint achievement of the labour and industry of both spouses, and not as hereditary family property to be passed on at death from generation to generation. Moreover, it is customary for large family fortunes to pass inter-generationally through *inter vivos* transfers.

The matrimonial home and its contents are used by the entire family, though they undoubtedly have particular importance to the surviving spouse as a major asset that may largely determine her standard of living in widowhood. Thus, to the extent that the application of succession law and the preferences it provides to the surviving spouse help ensure the perpetuation of the same living conditions as those that existed prior to the death of the intestate spouse, they provide stability and security not only in the financial sense, but also spiritually and emotionally.^{*45}

Average life expectancy has increased substantially, which has also meant that in most instances, the death of the intestate occurs when his or her children are largely middle-aged and financially secure with their own homes and families. Thus, surviving children are not likely to depend on the matrimonial home and contents for their own habitation, which will, however, continue to be of vital importance to the surviving spouse. This fact has been stressed in the reform of succession laws in Austria, Switzerland, and England, and recognised in legal scholarship in Germany.^{*46}

The question arises why it is not possible to ensure the perpetuation of the matrimonial home for the support of the surviving spouse. Though this may be possible as a theoretical proposition of law, in practical reality, the ability of surviving children to claim their forced share under law may present insurmountable complications. For example, if the testamentary estate is comprised entirely of the matrimonial home, then the assertion of rights by children to their forced share will bring with it problems rather than solutions. The prevailing problem is that in such circumstances, there is nothing for the surviving spouse to sell in order to satisfy the demands of children for their share, and if the income of the surviving spouse is inadequate, she will have no opportunity to obtain bank financing. Often, in the writing of the will, inadequate attention is paid to whether the surviving spouse will have sufficient resources to satisfy demands for forced shares. It is incumbent on legal counsel to alert their clients specifically to these considerations when reviewing estate plans.^{*47}

Under Estonian succession law, the number of persons legally entitled to claim a forced share of the deceased’s estate is “fortunately” severely limited, particularly as compared to the rest of Europe. Pursuant to the model of Soviet succession law, persons entitled to claim a forced share under Estonia’s current law are the closest lawful relatives who are themselves unable to work. It is important to note, in this respect, that Estonia remains one of the few former Soviet republics to retain the anomalous provision respecting forced share for invalid relatives of the testator.

2.2. Proposed solutions

Recent reforms intended to enhance the position of the surviving spouse, both in Europe as well as in the rest of the world, have enlarged the forced share provisions under operative law, often resulting in the surviving spouse being the sole inheritor, particularly in the case of small estates. This has proven to be true, despite the fact that the institution of marriage has become increasingly temporary and unstable as compared to the previous century. Considering the frequency of divorce and the position of the spouse under succession law, commentators have expressed the opinion that the ideal marriage lasts until the death of one spouse. Yet, in the case of relatives inheriting by intestacy, no consideration is given to the length of time that they were related, nor to the closeness of their relationship during the life of the deceased.

⁴⁴ Danish Law in a European Perspective. Ed. by B. Dahl, T. Melchior, L. A. Rehof, D. Tamm. Copenhagen: GadJura, 1996, p. 168.

⁴⁵ MünchKomm – Leipold (Note 34), preliminary remark to paragraph No. 10, section 1931, paragraph No. 1; U. v. Lübtow (Note 40), p. 20.

⁴⁶ E. Feil. Pflichtteilsrecht. Kurzkommentar für die Praxis. 2. Aufl. Wien: Linde, 1998, Rdn. 23.20; H. Koziol, R. Welser (Note 9), p. 309; W. Zankl (Note 30), pp. 103–104; M. Näf-Hofmann, H. Näf-Hofmann. Schweizerisches Ehe- und Erbrecht. Die Wirkungen der Ehe im allgemeinen, das eheliche Güterrecht und das Erbrecht der Ehegatten. Eine Einführung für den Praktiker. Zürich: Schulthess Polygraphischer Verlag, 1998, No. 2421; C. H. Sherrin, R. C. Bonehill. The Law and Practice of Intestate Succession. London: Sweet & Maxwell, 1987, p. 216; D. Leipold (Note 2), pp. 176–177; H. A. Weirich. Erben und Vererben. Handbuch des Erbrechts und der vorweggenommenen Vermögensnachfolge. 3., neubearb. Aufl. Herne/Berlin: Verlag Neue Wirtschafts-Briefe, 1991, Rdn. 35.

⁴⁷ H. Klingelhöffer. Pflichtteilsrecht. München: Beck, 1996, Rdn. 73.

At the same time, the law has reduced the circle of relatives able to share in the deceased's estate with the surviving spouse. The most far-reaching changes in this regard have been carried out by Finland, Sweden, Belgium, Luxembourg, and the Netherlands, where, in the absence of any descendants, the surviving spouse will receive the entire estate, to the exclusion of the parents, siblings and other more distant relatives. Often, the law provides, in the case of descendants, the opportunity for the surviving spouse to retain intact the property of the estate during her lifetime, with the children obtaining control and ownership only upon the death of the surviving spouse.^{*48}

Special provisions can be found in the succession laws of almost all nations, regarding the marital home and its furnishings, which guarantee the right of the surviving spouse to continue to live in her familiar surroundings. Often this right is set forth as an imperative, which means that the testator has no ability to affect this outcome through anything he may try to do in his lifetime. Succession laws can be, and have been used for a great many years, as one means of ensuring that the surviving spouse has the opportunity to obtain housing and the necessary furnishings following the death of the other spouse. As early as the first decade of the 1800s, Matthias Calonius emphasised the housing policy function of inheritance.^{*49}

In addition to enlargement of the intestate share of the surviving spouse, many European countries have recently included special provisions which ensure the right of the surviving spouse to continue to inhabit the marital abode included in the deceased's estate. Since the problems are complicated and extensive, it is not possible within the scope of this article to deal with the presenting issues at greater length. This question certainly requires more careful detailed examination and analysis, both in the interests of developing the Estonian law of succession, as well as the harmonisation of Estonian law with the principles accepted throughout Europe. Briefly stated, the problem of how to guarantee the ability of the surviving spouse to continue to inhabit the marital home is addressed in two ways.

One group of countries, including the European countries of Austria, Italy and Finland, grant the surviving spouse the right to use and occupy the marital home. Other countries, such as England, Ireland, and Scotland, in contrast, grant ownership of the marital home to the surviving spouse. Switzerland employs a mixed approach, which provides the surviving spouse with several options to choose among.^{*50}

Under Swiss law, pursuant to *ZGB* article 612a the surviving spouse may demand the house or apartment in which they cohabited, either by transfer to her ownership, or a life estate, which is protected as a property right (*Nutzniessung*), or simply the ability to reside in the marital abode without any accompanying property right (*Wohnrecht*).^{*51} Swiss law appears, in this respect, to be particularly flexible, which not only provides for the ability of the surviving spouse to continue to live as before, but also considers the interests of other inheriting parties.^{*52} For this reason, Estonia should primarily consider the example provided by Switzerland in the further refinement of her succession laws.

With regard to property contained within the matrimonial home of the family, German law provides for the surviving spouse receiving all such furnishings without it being calculated as part of the inheritance share. Estonian law (LSA section 17) in this respect is identical to that of Germany (*BGB* section 1932) and the usual furnishings of the marital home which are not part of the real property included in the deceased's estate pass to the surviving spouse.

It bears mention that Soviet succession law contained special provisions regarding furnishings of the deceased's home. Section 538 of the Civil Code provided that the usual furnishings, along with housekeeping appliances and utensils, were not to be included as part of the deceased's estate, but were received by family members, in addition to their interest in the estate, if said heirs resided with the deceased in the same domicile for at least one year.

Legal recognition of this additional benefit (the "*eełosa*" which may be translated as the "preferential legacy") as something that is received by the surviving spouse without it being calculated as part of the statutory share has long been part of German legal tradition ("*der Voraus*"), though it is not recognised under French law. It is intended to provide the surviving spouse the ability to maintain

⁴⁸ M. Savolainen. Finland. – International Encyclopaedia of Laws. Vol. 1. Family and Succession Laws – Suppl. 3 (December 1997). The Hague-London-Boston: Kluwer Law International, 1998, Finland – 113; G. van der Burght, M. Franssen (Note 38), pp. 162–163. See also B. Dostal. – Ferid/Firsching/Dörner/Hausmann. Internationales Erbrecht. Hinweise Frankreich. München: Beck, 2000.

⁴⁹ U. Kangas (Note 6), p. 93.

⁵⁰ W. Zankl (Note 30), p. 17.

⁵¹ *Ibid.*, pp. 33–34.

⁵² *Ibid.*, p. 49.

herself in the same manner and at the same economic level as before the death of her spouse.^{*53} This provision appeared in this format in the Prussian ALG, which established, in this respect, a standard for the drafters of the BGB to follow.^{*54}

Originally, the “*Voraus*” was intended to provide protection to the surviving spouse in the event that relatives of the second and third degree asserted their succession rights. The invocation of the “*Voraus*” provisions of the law reflected the realisation that furnishings and property constituting the “*Voraus*” are specifically related to the joint housekeeping that the spouses established and enjoyed during their years together, and which lie at the foundation of married life. Were that to be destroyed, the sense of loss would be especially hard for the surviving spouse to endure, since the resulting emptiness, both emotional and physical, would be compounded and even harder to suffer. The provision of the “*Voraus*” was also based on the premise that it is closer to the will of spouses that the property and furnishings contained in the matrimonial home pass to the surviving spouse, rather than being divided among more distant relatives.^{*55}

In the second half of the 19th century when the *BGB* was being finalised, the German drafters considered the inclusion of a “*Voraus*” exclusively for the benefit of the surviving spouse to be excessive, if there were also children of the marriage. The surviving spouse with children did not obtain the right of the “*Voraus*” under the *BGB* until 1958, when statutory provisions providing men and women with equal rights was enacted into law — *Gleichberechtigungsgesetz*. Until very recently, German law assumed the concept of the homemaker marriage, where the wife did not work. From this orientation, the German law provided that in the event of descendants, the surviving spouse receives the “*Voraus*” only to the extent that she has true need for it. No importance was attached to whether the inheriting descendants, in the particular case, continued to live in the matrimonial home or not.^{*56}

It can be said that, to some extent, German law-makers followed the lead of Austria in this area of law, though Germany itself provided the example for Austria in its reform of the *ABGB* in 1914. Namely, the “*Voraus*” was incorporated into the Austrian *ABGB* with the *Novelle* of 1914, following the model provided by the *BGB* in 1900. However, in contrast to the original German *BGB*, under Austrian law the surviving spouse enjoyed the right of “*Voraus*” even in the presence of descendants, but only to a limited extent, *i.e.* only when the surviving spouse could demonstrate true need.^{*57}

Accordingly, section 1932 of the *BGB* currently provides that the spouse has the right to receive the “*Voraus*”, despite the presence of children and other descendants, to the extent that is necessary to maintain himself or herself in same manner as before the death of the spouse. This means that in the case where the deceased’s estate is small, none of it passes to the descendants. Legal scholars debate whether the family automobile should properly be included as part of the furnishings and personal property of the matrimonial home. In the case of relatives of the second and third degree, the surviving spouse receives as part of the “*Voraus*” all property and furnishings contained in the home and jointly used by the couple, regardless of whether it is necessary for the maintenance of her prior lifestyle. Thus, the law draws a distinction between the minor “*Voraus*” and the major “*Voraus*”, depending on the nearness or remoteness of relatives.^{*58}

As of the present time, Austria is again a step ahead of Germany. Namely, starting in 1989 with the enactment of *ErbRÄG* (Inheritance Law Amendment Act 1989), the family’s living accommodations are included within the “*Voraus*” and the distinction between the “minor” and “major” “*Voraus*” was deleted. Although up until that time, the right of the surviving spouse to his or her “*Voraus*” largely went unnoticed, with the 1989 amendment to the law, it became of utmost importance to the surviving spouse and his or her rights under succession law. Since the matrimonial home constitutes, in the majority of cases, the most significant asset of the estate, the rights of the surviving spouse have become paramount and effectively exclude all other parties from inheriting from the estate. Thus, the era when the “*Voraus*” was relatively unimportant in economic terms is now ended in Austria with the passage of the new law.^{*59}

⁵³ U. v. Lübtow (Note 40), p. 80; W. Zankl (Note 30), p. 101; G. Boehmer. *Vorschläge zur Neuordnung der gesetzlichen Erbfolge* (BGB §§ 1924–1936). Berlin: Walter de Gruyter, 1938, S. 137.

⁵⁴ W. Zankl (Note 30), p. 101.

⁵⁵ H.-G. Mertens (Note 6), p. 73; G. Boehmer (Note 53), p. 138.

⁵⁶ MünchKomm – Leipold (Note 34), section 1932, paragraph No. 2.

⁵⁷ G. Boehmer (Note 53), p. 138; W. Zankl (Note 30), pp. 13, 101.

⁵⁸ C. T. Ebenroth (Note 23), paragraph No. 157; H. Rohlfing. *Erbrecht in der Anwaltlichen Praxis*. 2. Aufl. Bonn: Dt. Anwaltverl, 1999, § 2, Rdn. 151.

⁵⁹ W. Zankl (Note 30), p. III, 1.

The major change in the Austrian law with passage of the *ErbRÄG*, which also sets it apart as compared to German law, is the provision providing to the surviving spouse the entire furnishings and contents of the matrimonial home, even if there are lawful descendants. Thus, in the typical example, where the deceased's estate is comprised entirely of the matrimonial home and its contents, descendants are not able to inherit anything during the lifetime of the surviving spouse.^{*60}

The eradication of the distinction between the "major" "*Voraus*" and the "minor" "*Voraus*," and the resulting enhanced position of the surviving spouse, did not occur in Austria without controversy. One argument against this change in the law was precisely the assertion that, in many cases, it will result in the surviving spouse being the only beneficiary of the estate, with children of the marriage being left with nothing.^{*61}

A third change in Austrian succession law, also considered rather radical, particularly as compared to German law, is the provision that it does not matter whether the spouse's inheritance entitlement is based on a contract, a last will, or simply statutory intestate rules, or even in the case that the spouse is not a designated heir of the predeceased spouse, the surviving spouse is entitled to the statutory preferential legacy ("*gesetzliches Vorausvermächtnis*") (section 758 *ABGB*). This entitles the surviving spouse to obtain the chattels belonging to the matrimonial household and also includes the right to continue living in the marital home. Such entitlements can only be avoided by a valid disinheriting disposition by the other spouse, for a cause, and based on the most egregious grounds.^{*62}

By way of summarising the above analysis, it is fair to conclude that the future development of Estonian law of succession requires attention to specifically the preferential legacy provisions applicable to the surviving spouse, and in that regard, Estonia should first of all consider the law reforms carried out by Austria.

3. Conclusions

Although the law of succession is generally considered rather fixed and static, especially as compared to contract law or even family law, the last fifty years have seen many important changes in this body of law. Were one to evaluate the current state of the law from the perspective of whether Estonian law of succession has considered the thrust of current developments throughout the world, one would have to answer both affirmatively and negatively. In general, the Estonian law of succession is consistent with the accepted European principles and in some respects, on the cutting edge of legal developments, such as the Estonian provisions granting equal rights to children born of marriage and to those born outside of marriage.

The same cannot be said, however, for the provisions protecting the interests of the surviving spouse, where Estonian succession law remains far behind many European countries in its development. This is one area of succession law where the wish of European nations to harmonise their various statutes is particularly evident. One indicator of a unified direction for development of these laws is the recommendation of the Council of Europe, which would require Member States to implement appropriate solutions for ensuring the maintenance of the surviving spouse in the accustomed manner following the death of the other spouse. Since Estonia is already a member state of the Council of Europe, it would be only natural in this regard that our succession laws consider the direction of development accepted in Europe as the model to follow.

⁶⁰ *Ibid.*, S. 2; AK-BGB – Däubler (Note 7), preliminary remark to paragraph No. 50; Schwimann – Eccher, § 758, Rdn. 18. – Schwimann. Praxiskommentar zum ABGB samt Nebengesetzen. 2., neubearb. u erw. Aufl., herausgegeben von Michael Schwimann, Band 3, §§ 531–858 ABGB, AnerbG, KärntnerG, Tiroler HöfeG, bearbeitet von B. Eccher, B. Eggemeier, H. Hofmeister. Wien: Orac Verlag, 1997. The same outcome is, in reality, achieved elsewhere. For example, research conducted in England in 1972 revealed that in only five percent of cases did the probate estate of married couples exceed in addition to the marital home more than 10,000 pounds in money or securities. (See in: C. H. Sherrin, R. C. Bonehill (Note 45), p. 216).

⁶¹ W. Zankl (Note 30), p. 102.

⁶² Austria. – European Succession Laws. Ed. by D. Hayton. Chichester, New York, Brisbane, Toronto, Singapore: John Wiley & Sons, 1991, Uptate 4 – January 1996, paragraph No. 12.13; E. Feil (Note 46), paragraph No. 23.20; H. Koziol, R. Welser (Note 9), p. 309.