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The dissolution of the matrimonial property regime and the succession rights of the surviving spouse

MARIA ÁLVAREZ TORNÉ

1. INTRODUCTION

These pages are addressed to examining the problems arising from the regulation of the dissolution of the matrimonial property regime on the death of one of the spouses in relation to the determination of the succession rights of the surviving spouse in Private International Law (*from now on*, PIL). I will specifically try to analyse the conciliation difficulties between what is stipulated in each relevant field after the death of one of the spouses. The surviving spouse's situation often depends on the simultaneous effect of the matrimonial property regime and also of Succession Law. In fact, this study deals with a classical problem of PIL which has been subject to recent innovative interpretations and has acquired a new importance.

My research also includes the treatment given to succession rights in cases of homosexual and heterosexual civil partnerships. It is mainly focussed on the German and the Spanish PIL systems, but I will also refer occasionally to legal systems of other EU Member States.

2. GENERAL PIL QUESTIONS

Firstly when we are faced with a PIL case, the elements establishing international jurisdiction have to be examined, given that the adaptation difficulties referred to above, which are centred in the field of applicable law, appear as a result of the choice of law rules of the forum, and the determination of the competent judge always takes place first. In this sense, it is worth highlighting the absence of international conventions concerning international successions in the field of jurisdiction, except for some bilateral conventions and a nordic multilateral convention. The private international law of succession in each jurisdiction is essentially based on national sources. Nevertheless, the "Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons" has been signed by a few countries and is not yet in force but already ratified by the Netherlands.¹

¹ With regard to the text of the Convention, see P. LAGARDE, *La nouvelle Convention de La Haye sur la loi applicable aux successions*, Rev. Crit., 1989, pp. 249 ff. Concerning the ratification of the Convention by the Netherlands, see A. BORRÁS, *La ratificación por Holanda del Convenio de La Haya de 1 de agosto de 1989 sobre ley aplicable a las*

When a conflict of law system has different rules on succession and matrimonial property it may happen that different laws apply at the same time. This may result in allowing the widow or widower to obtain either more or less than would be available under each of the two national systems concerned. This means that the widow or widower can be economically advantaged if both statutes grant him or her succession rights. On the contrary, she or he will be unfairly neglected when each applied legal system provides that the widow or widower has no succession rights. An additional difficulty is that some legal systems, like the French one, adopt the principle of scission of the succession only in relation to the succession statute and not to the matrimonial property regime. This means that we could find a case of renvoi only regarding for example the succession to an immovable.

We can start tackling the difficulty of this kind of international cases referring to a practical case commented by Droz in the *Hague Conference Acts and Documents of the Twelfth Session*:² "A person dies domiciled in the Netherlands. Together with his or her Dutch goods, the decedent leaves a building in England, a bank account in France and a trunk in a Swiss bank. The Dutch court may have jurisdiction on the basis of the decedent's domicile. Jurisdiction may be exercised regarding the entire succession, while an English judge probably has jurisdiction only concerning the liquidation of the English building. In France, a judge could take a decision because of the nationality of one of the parties..." The complexity of this example may increase if this decedent dies leaving a surviving spouse or partner, whose succession rights have to be determined, often by a judge who can choose between applying a conflict of laws rule on succession or a rule on matrimonial property.

A European instrument unifying PIL rules on the law applicable to succession and wills is still not available, awaiting legislative development after the adoption of the Green Paper on Succession Law in 2005.³ In consequence, each autonomous PIL system handles the conciliation difficulties between the law applicable to the succession and the law applicable to the effects of marriage in its own way. Therefore, the national judge has to resolve the possibly incongruous results generated by the application of different laws to closely linked aspects in accordance with her or his own PIL system.

sucesiones por causa de muerte, Revista Española de Derecho Internacional, 1996, pp. 363 f.

² G. DROZ, in *Actes et Documents de la Douzième session*, 1972, t. II, p. 16.

³ Concerning the need for harmonization in the field of conflict of law of Succession in the European Union, see the study written by DNotI/H. DÖRNER/P. LAGARDE, *Les Successions Internationales dans l'UE: Perspectives pour une Harmonisation*, German Notary Institute, Brussels, 2004.

3. DETERMINATION OF THE SUCCESSION RIGHTS OF THE WIDOWED SPOUSE FROM A PIL PERSPECTIVE

Historically we can see a trend in European substantive laws consisting of strengthening the succession rights of the surviving spouse, which of course involves a loss of succession rights of other family members, such as children.⁴ In general, EU legal systems coincide in holding that in order to determine the precise amount of the decedent's estate, it is necessary first to divide the matrimonial property of the spouses.⁵ However, it may happen that a certain PIL system applies different rules to the dissolution of the matrimonial property regime and the law governing succession, so that characterisation problems between the succession and the matrimonial property statute can arise because their regulation is not subjected to the same legal system. European PIL systems in general have no specific PIL rule clarifying unequivocally how to define the succession rights of the surviving spouse. Consequently, the ways of resolving this problem vary according to each particular legal system.

For instance, the conflict of laws system in England differs from continental legal systems with respect to sources, and also regarding the fact that, when an English judge decides he has international jurisdiction, he will often apply domestic law. In the field of the effects of marriage on property, rights obtained by the husband or the wife dealing with movable property are determined by the law of the matrimonial domicile, when there is no specific contract or settlement. It is not clear if this rule also applies to immovables, because although some decisions of the House of Lords adopt a unitary view applying both to movables and immovables, other decisions consider that the latter depend on the *lex situs*. Changes in the matrimonial domicile, which is also a controversial concept, do not necessarily carry with them alterations in the matrimonial property regime. Coordination disadjustments between the matrimonial property law and the succession law will derive from this fact.⁶ As can also be noted in general in the continental PIL systems, a specific rule establishing the succession rights of the surviving spouse in intestate succession does not exist in English PIL, and the need to reconcile the protection granted as a result of the dissolution of the matrimonial property regime and that conferred by the law of succession is also subject to debate. In legal literature, it is difficult to give a satisfactory answer to this problem given the current configuration of the English rules of the conflict of laws. It has been suggested in this sense that the law of succession in the field of substantive law (as distinct

⁴ W. PINTENS, *Europäisierung des Erbrechts*, ZEuP 2001, pp. 632 f.

⁵ K. H. NEUMAYER, "The surviving spouse" in K. H. NEUMAYER (ed), *International Encyclopedia of Comparative Law*, Volume V Succession, co-published by Mohr Siebeck, Tübingen, and Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster, 2002, p. 45.

⁶ A. V. DICEY/J. H. C. MORRIS/L. COLLINS, *The conflict of laws*, Sweet & Maxwell, London, 2006, p. 1299.

from the rules of conflict of laws) should be changed to subject the succession rights of the widowed spouse to the matrimonial property law.⁷

3.1. THE PARTICULAR CASE OF THE SPANISH PIL SOLUTION: THE PROS AND CONS

3.1.1. *The formulation of article 9.8 of the Spanish Civil Code*

In Spanish PIL there are different conflict of laws rules on succession and the matrimonial property regime. It should also be recalled that Spanish private law is not unified and that we therefore have many conflict situations in cases where there is no international element. Article 9.8 of the Spanish Civil Code (CC) applies to both international and internal situations. The final sentence of the conflict of laws rule contained in article 9.8 CC,⁸ which contains the conflict of laws rule on succession, seeks however to avoid the problem of reconciling the law applicable to matrimonial property and the law applicable to the succession rights of the surviving spouse. This involves, as we have seen, an important exception to the general outlook of the European PIL systems. Article 9.8 CC provides that the succession claim of the surviving spouse is governed by the law applicable to the effects of the marriage under article 9.2 CC, unless there has been a will, not including the legally reserved portions of the descendants. Contractual or testate succession will not be governed by this remission of article 9.8, but rather by the testator's national law or the disponent's national law at the moment of the grant.

This final section of article 9.8 CC was introduced by Law 11/1990 of 15 October, which modified some articles of the Spanish Civil Code. It is a conflictual solution, instead of working on the substantive laws in question by way of adaptation. This solution seeks to be a preventive mechanism, rather than a corrective one.⁹ This article has chosen the so-called formula of "indirect adaptation". For a long time, Spanish legal literature has criticized this adaptation model, insofar as it operates without taking into account if it is really necessary or not. As result of this point of view, this sector of Spanish legal

⁷ A. V. DICEY/J. H. C. MORRIS/L. COLLINS, *The conflict of laws*, Sweet & Maxwell, London, 2006, p. 1300.

⁸ Article 9.8 Spanish Civil Code determines: *Succession by reason of death will be governed by the national law of the deceased at the moment of his death, whatever the nature of the property and whichever country it is in. However, dispositions in the will and successory agreements which are in accordance with the national law of the testator or of the disponent at the moment of their being executed will conserve their validity, although another law may govern the succession, and any legally reserved portions will be in accordance with the latter. The rights that by law are attributed to the surviving spouse will be governed by the same law that regulates the effects of the marriage, save in respect of the legally reserved portions of the descendants.*

⁹ M. E. ZABALO ESCUDERO, *La situación jurídica del cónyuge viudo: Estudio en el Derecho internacional privado y Derecho interregional*, Aranzadi, Pamplona, 1993, p. 107.

literature prefers the technique of direct adaptation, which works on the correction of the material rules when an effective disadjustment is confirmed.¹⁰ Before the modification of Law 11/1990 of 15 October was introduced, the Spanish courts resolved the cases we are examining without unified criteria, sometimes by means of not very technical criteria in order to find a theoretical equity.¹¹ That is why sometimes different legal systems were applied cumulatively or the application of a particular legal system was ruled out in an unjustified way.

An attempt is made to overcome the apparent split in the law of succession produced by the wording of article 9.8 CC by adding the final words “not including the legally reserved portions of the descendants”. Nevertheless, in legal literature these final words have been criticized, because they could adulterate at times the reach of the succession rights of the widowed spouse, specifically when these cover the descendants’ legally reserved portion, but the portions are governed by a law of succession which does not allow them to be affected.¹² In this sense, the final words of article 9.8 CC have been branded as excessively inflexible and unconnected with the *favor viduitatis*. Besides, in legal literature it has also been argued that a solution like the one contained in article 16.2 CC, relating to the widowhood right regulated in the Compilation of Aragón, would have been more suitable.¹³ This right resorts to the compensation of succession rights¹⁴ in order to avoid an excessive benefit or damage for the widowed spouse.

3.1.2. *Conflictive interpretations and the characterization dilemma*

Although the aforementioned rule apparently clarifies the situation of how to regulate succession rights of the widowed spouse, there have been certain decisions by the General Directorate of Registers and Notaries (*from now on*, DGRN), an administrative body in the Spanish Ministry of Justice, which have held that when referring to the succession rights of the widow or widower not

¹⁰ N. BOUZA VIDAL, *Problemas de adaptación en Derecho internacional privado e interregional*, Tecnos, Madrid, 1977, p. 92.

¹¹ A. L. CALVO CARAVACA/J. CARRASCOSA GONZÁLEZ/E. CASTELLANOS RUÍZ, *Derecho de familia internacional*, Colex, Madrid, 2005, p. 307.

¹² M. E. ZABALO ESCUDERO, *La situación jurídica del cónyuge viudo: Estudio en el Derecho internacional privado y Derecho interregional*, Aranzadi, Pamplona, 1993, p. 212.

¹³ A. BORRÁS RODRÍGUEZ, *No discriminación por razón de sexo: Derecho internacional privado español*, Anuario de Derecho Civil, 1991, p. 242.

Article 16.2 CC specifically determines that: “The widowhood right regulated in the Compilation of Aragón corresponds to spouses who come under the matrimonial property regime of this Compilation, even if their civil law status has changed later, excluding in that case the legally reserved portion established by the law of succession. (...)” and, in its last section: “The widow’s usufruct also corresponds to the widowed spouse when the dead spouse had Aragonese civil law status at the moment of death”.

all succession rights are meant.¹⁵ From this perspective, only certain personal rights, such as the year of mourning, the domestic trosseau and some advantages under local law follow the law applicable to matrimonial property. In both cases it was intended to designate the applicable law to the succession rights of a widow within the framework of an intestate succession in Interregional Law in which the decedent had Catalan civil law status but the spouses' joint earnings were governed by Spanish Civil Law. Both resolutions of the DGRN were clearly shaped in favour of applying Catalan Civil Law as *lex successionis* to determine the succession rights of the surviving spouse instead of Spanish Civil Law, which governed matrimonial property. This was the confirmation of the notaries' opinion against the one of the registrars, who refused to register the deeds of acceptance and partition of inheritance, and sought a more favourable regime for the widow or widower.

This solution pleases the Civil law academics more than the PIL academics, given that the former consider that these decisions of the DGRN fit better with the principle of *favor viduitatis* and the preferential application of the autonomous regional legal systems before the Civil Code.¹⁶

In the context of Spanish Interregional Law, it is frequent that a court has to examine a case which covers aspects depending on different legal systems. At that point, the court will face characterization problems and it will have to decide if it is necessary to opt for a *lex fori* characterization, or more precisely a *lex iudicii* characterization, or for a characterization of the law governing the merits of the case or *lex civilis litis* characterization.¹⁷ In the opinion of the authors who support the last kind of characterization, only this makes possible uniformity of decisions, because its results would not depend on the diverging characterization of each competent court,¹⁸ but on the characterization carried out by the *lex civilis litis*, which would be the same irrespective of the competent court applying the conflict of laws rule. In both cases resolved by the DGRN, intestate successions governed by the Catalan Law of Succession were analyzed, and the conclusion was reached by means of a *lex causae* or more

¹⁵ Resolution of the DGRN of 11 March 2003 (BOE num. 100 of 26 April 2003) and Resolution of the DGRN of 18 June of 2003 (BOE num. 181 of 30 July 2003).

¹⁶ E. CORRAL GARCÍA, *Los derechos sucesorios del cónyuge viudo en el Derecho civil común y autonómico*, Bosch, Barcelona, 2007, p. 240.

¹⁷ Terminology proposed in Spanish legal literature in the field of Spanish Interregional Law by A. BORRÁS RODRÍGUEZ, *Calificación, reenvío y orden público en el Derecho interregional español*, Servicio de Publicaciones de la Universidad Autónoma de Barcelona, Bellaterra, 1984, p. 34. Also arguing for a *lex civilis litis* characterization in this context, A. BORRÁS RODRÍGUEZ, "Los conflictos internos en materia civil a la luz de la legislación actualmente vigente" in *Conflictos de leyes en el desarrollo del Derecho civil vasco*, Real Sociedad Bascongada de Amigos del País (Comisión de Bizkaia), Bilbao, 1999, p. 80.

¹⁸ A. BORRÁS RODRÍGUEZ, *Calificación, reenvío y orden público en el Derecho interregional español*, Servicio de Publicaciones de la Universidad Autónoma de Barcelona, Bellaterra, 1984, p. 33.

precisely a *lex civilis litis* characterization, which allowed the obtention of the widow's usufruct over the whole inheritance. It is a *mortis causa* right shaped from the perspective of the Catalan Civil Law.

Other authors point out notwithstanding that the problem of accepting this kind of *lex civilis litis* characterization in cases of Interregional Law is that it could protect the case-by-case nature of the decisions,¹⁹ given that they will depend on what is established in each Spanish legal system, a fact which could go against the aim of article 9.8 CC of avoiding this characterization problem. In this sense, these authors do not argue for a *lex iudicii* characterization, but for a characterization according to the system of Interregional Law, i.e. based on the conception contained in its rules.²⁰ This sector of legal literature believes that the characterization procedure has to be closely connected with the interpretation and the delimitation of the conflict of laws rules, without separating the characterization from the rules of the Interregional Law system.²¹ In this case, it would be necessary to characterize what is established in article 9.8 CC, the obvious purpose of which is to get past these difficulties by means of the remission to article 9.2 CC. Whatever the case may be, the observation indicating that the competent court should choose a matrimonial or a successory characterization according to what is more favourable for the surviving spouse²² could also be appropriate, although the more favourable law should also be the limit of the obtainable rights.

On the other hand, although the scope of the rights referred to by article 9.8 CC has been debated for a long time, it has been generally admitted that it includes all the rights which are attributed by law to the widowed spouse when he or she has not been designated as inheritor by his or her spouse, in order to guarantee the continuity of the standard of living enjoyed until the decedent's death.²³ Consequently, these rights would not be only personal rights. Nevertheless, it is worthwhile paying attention to the criticism underlined in the legal literature regarding the formulation of article 9.8 CC remitting to article 9.2 CC.²⁴ When article 9.2 CC refers to the effects of the marriage, it has

¹⁹ A. FONT I SEGURA, *Comentario a la Resolución DGRN de 18 de junio de 2003*, Revista Española de Derecho Internacional, 2003, pp. 994 f.

²⁰ A. FONT I SEGURA, *Comentario a la Resolución DGRN de 18 de junio de 2003*, Revista Española de Derecho Internacional, 2003, p. 995.

²¹ S. ÁLVAREZ GONZÁLEZ, *Derecho interregional: claves para una reforma*, Anuario Español de Derecho Internacional Privado, 2003, p. 52.

In the same sense, S. ÁLVAREZ GONZÁLEZ, *Estudios de Derecho interregional*, Servizo de Publicacións da Universidade de Santiago de Compostela, 2007, p. 102.

²² F. BOULANGER, *Droit international des successions*, Economica, 2004, p. 142.

²³ M. E. GINEBRA MOLINS, *Els conflictes de lleis derivats de la coexistència de diversos ordenaments jurídics civils a l'Estat Espanyol*, La Notaría 4, 1996, on web edition.

²⁴ S. ÁLVAREZ GONZÁLEZ, "Dos cuestiones de actualidad en el reciente Derecho internacional privado" in *Estudios de Derecho civil: Homenaje al Profesor Francisco Javier Serrano García*, Secretariado de Publicaciones e Intercambio Editorial de la Universidad de Valladolid, Valladolid, 2005, p. 142.

to be recalled that article 9.3 CC is the rule which specifically refers to the matrimonial property regime agreements, and this article 9.3 CC remits to article 9.2 CC as a first possible connexion point of the conflict of laws rule. Consequently, if the spouses opt for a matrimonial property regime which differs from the one contemplated by the applicable law for the effects of the marriage under article 9.2 CC, the aim of article 9.8 CC will absolutely fail: the clash between the rights granted to the widowed spouse by the *lex successionis* and the law applicable to the effects of the marriage will appear again. It has been proposed, to avoid this inconvenience, to adopt an interpretation determining that the law applicable to the effects of the marriage has to be understood as the law which is governing effectively the matrimonial property regime.

In both decisions analyzed of the DGRN, application of the remission of article 9.8 CC to article 9.2 CC was avoided, justifying this decision as a harmonizing interpretation of both articles in order to preserve the unity of the succession contained in Spanish Succession Law, which could be theoretically threatened if various aspects of the succession depend on different laws. Nevertheless, the aforementioned reason does not seem to be enough to reject the exceptional fragmentation of the succession against the principles of unity and universality of the succession upheld in the Spanish PIL, as is admitted by article 9.8 CC, in order to avoid adaptation problems.²⁵ However, the DGRN has kept defending the aforementioned point of view of the analyzed decisions in other recent decisions.²⁶

3.2. THE GERMAN ANSWER TO THESE COORDINATION DIFFICULTIES

The aforementioned problem of an unequal sharing of the estate may also take place in German PIL through application of article 15 EGBGB concerning law applicable to matrimonial property and article 25 regarding law of succession. The goal is that the widow or widower does not obtain less than what they would obtain if only one legal system were applicable. German PIL tries to resolve the possible incompatibility between statutes through the mechanism of adaptation (*Anpassung* or *Anpassung*), which however entails legal insecurity and possible unjust results.

The characterization dilemma also appears in German PIL. § 1371.1 BGB assigns the surviving spouse, in cases where the spouses lived under the

²⁵ J. C. FERNÁNDEZ ROZAS/S. SÁNCHEZ LORENZO, *Derecho internacional privado*, Thomson–Civitas, 3rd ed., Madrid, 2004, p. 432.

²⁶ RDGRN of 5 February 2005 (BOE num. 82 of 6 April 2005): “This article (9.8 CC) leads to the decedent’s national law at the moment of death, including in its applicational field, as has been established by this Directorate, the succession rights of the surviving spouse.”

German statutory marital property regime of deferred community (*Zugewinnngemeinschaft*), an automatic increasing of his or her statutory share of one quarter of the estate. A doubt arises concerning the characterization of the increase as successory or as a matter of the matrimonial property regime.²⁷ If we opt for a successory characterization, it is doubtful if it is possible to grant this right when the succession is governed by a foreign legal system. The same problem arises with a characterization as a question of the matrimonial property regime when the law applicable to the matrimonial property regime is a foreign law.

According to the theory of double characterization (it is called *double* because it means a simultaneous characterization as successory and as a matter of the matrimonial property regime), it is not possible to grant this right in such international cases, because the rule only operates if both succession and matrimonial property regime follow German law, to prevent adaptation problems.²⁸ Nonetheless, according to both the majority of the legal literature and the case law, § 1371.1 BGB may apply as well if the succession follows a foreign legal system, appealing to the mechanisms of *Angleichung* or *Anpassung*. This will not be possible if the matrimonial property regime is governed by a foreign law, given that § 1371.1 BGB is originally a German material rule only applicable if German Law governs the matrimonial property regime.²⁹ This perspective agrees with a characterization as a matter of the matrimonial property regime.

During the process of reform of German PIL, the Spanish solution was taken under consideration but finally rejected. One of the reasons was that the law applicable to testamentary dispositions would be pending at the time of drawing up one's will,³⁰ since the matrimonial property regime can change until the death of one of the spouses. It would make no sense for the succession of the surviving spouse to follow a matrimonial property regime which was changed after the will was drawn up.

²⁷ M. E. VÖLKL, "Kommentar zu Art. 25 EGBGB" in Deutsche Gesellschaft für Erbrechtskunde (ed), *Deutscher Erbrechtskommentar*, Carl Heymanns Verlag KG, Köln/Berlin/München, 2003, p. 1477.

²⁸ P. MANKOWSKI, "Kommentar zu § 1371.1 BGB" in J. von Staudingers *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Sellier-de Gruyter, Berlin, 2003, Rn. 343 f.

²⁹ K. SIEHR, "Kommentar zu § 1371 BGB, Güterstand" in Rebmann/Kurt and Säcker/Franz Jürgen and Rixecker/Roland (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 10, C.H. Beck, München, 2006, Art. 15, Rn. 114 ff.

³⁰ Article 26 EGBGB (on the form of testamentary dispositions) applies to article 25 EGBGB concerning the content of the will: "(5) Notwithstanding the foregoing provisions the validity of the testamentary disposition and the binding effect of such a disposition underlies the law applicable to successions. (...)"

3.3. PROPOSALS MADE TO SOLVE THIS PROBLEM

It has been proposed to admit *professio iuris* to determine the *lex hereditatis*, just as was provided by article 5 of the “Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons”. This would enable a testator to choose the law of a state as the applicable law, whenever this person holds the nationality of that state or has her or his habitual residence in it at the moment of the choice or at the moment of death. With this possibility of election, it would be easier to coordinate the law applicable to the matrimonial property regime and the law applicable to succession,³¹ avoiding the necessity of later adjustments.

However, there are also critical voices against the admission of the possibility of election of the applicable law by the *de cuius*.³² In this sense, it is maintained that the essential difference between the possibility of election of the applicable law in the matrimonial property regime field and in the succession field consists of the fact that in the former the spouses dispose solely in relation to the interests of them both. On the contrary, the election of the applicable law by the decedent can affect other people who have an interest in the inheritance.

Notwithstanding, more recent opinions in legal literature³³ point out rightly that it would be enough to protect the potential inheritors who could be harmed to formulate a rule similar to article 24 1 d) of the “Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons”, which establishes: “Any State may, at the time of signature, ratification, acceptance, approval or accession, make any of the following reservations – (...)

that it will not recognize a designation made under Article 5, if all of the following conditions are met – (...)

– the application of the law designated under Article 5 would totally or very substantially deprive the spouse or a child of the deceased of an inheritance or family provision to which the spouse or child would have been entitled under the mandatory rules of the law of the State making this reservation,” (...)

Without entering on further discussions on the convenience of admitting the *professio iuris* in the field of international succession, the criticism does not seem to be a sufficiently well-founded reason against the election, at least, of the law

³¹ M. REVILLARD, *Note à la decisión de la Cour d’appel de Versailles, première chambre, 20 décembre 1990*, JDI (Clunet) 1, 1992, p. 113.

³² M. GORÉ, “<<De la mode...>> dans les successions internationales: contre les prétensions de la *professio iuris*” in *L’internationalisation du droit, Mélanges en l’honneur de Yvon Loussouarn*, Dalloz, Paris, 1994, p. 196.

³³ E. VASSILAKAKIS, “La *professio iuris* dans les successions internationales” in *Le droit international privé: esprit et méthodes*, Dalloz, Paris, 2005, p. 814.

applicable to the succession rights of the widowed spouse, because there are sure ways to protect the interests of other potential inheritors.

In fact, Finnish PIL already admits at present that when a married person draws up a will, she or he can establish that the succession rights of his or her spouse are governed by the law applicable to matrimonial property. According to Chapter 26 Section 6 of the Finnish Code of Inheritance the deceased may designate the law applicable to inheritance with some limitations. Paragraph 3 of Chapter 26 establishes: "Moreover, if the decedent is married at the time of the designation, it may be provided that the applicable law is the law of the state applicable to matrimonial property matters." However, this solution does not guarantee coordination, because it depends on good legal advice in each specific case.

In this sense, German legal literature has been emphasising for a long time that the formulation of a clause of election avoiding friction problems between matrimonial property regime and law of succession could be shaped skirting easily the aforementioned difficulties.³⁴ It would mean choosing the law applicable to the matrimonial property regime of the couple by using the same law which will govern the succession of the decedent. The election would have retrospective effects to the day before the day of the death of the spouse, and the settlement of the matrimonial property regime would be governed by the new matrimonial property regime, avoiding the well-known adjustment problems.

4. THE SITUATION IN CASES OF NON-MARRIED COUPLES: A QUICK LOOK AT EUROPE

Only Spain, Belgium, South Africa, the Netherlands, Canada and the state of Massachusetts in the USA recognize same-sex marriage. In these systems, the widowed spouse enjoys the same succession rights regardless of whether the marriage is same or different sex. In case marriage is not available to same-sex couples, some legal systems establish civil partnerships which may or may not grant succession rights to the surviving partner. Consequently, the protection level for the surviving partner can be very limited, which different States have tried to avoid by adopting regulations more and more assimilated to the ones governing married couples.

For PIL the main problem is that succession rights of a same-sex spouse, a registered partner or a cohabitee are not universally known. This fact entails important problems of recognition and enforcement of foreign judgments.

³⁴ P. MANKOWSKI/W. OSTHAUS, *Gestaltungsmöglichkeiten durch Rechtswahl beim Erbrecht des überlebenden Ehegatten in internationalen Fällen*, Deutsches Notar-Zeitschrift 1, 1997, pp. 26 f.

In Germany, with the coming into force of the Law of civil partnerships (*Lebenspartnerschaftsgesetz*) for same-sex couples, a new PIL rule was adopted with article 17b EGBGB. Civil partnerships are governed by the law of the state of registry. The succession rights of the surviving partner are however determined by the general rule applicable to succession according to the national law of the deceased in article 25 EGBGB. With this remission it is intended to preserve the interests of third parties who could demand inheritance rights.³⁵ The conflict with the widowed spouse's interests appears again. However, article 17b EGBGB provides that if the surviving partner does not obtain succession rights through the connecting factor of article 25 EGBGB, the law of the place of registry will apply. It is a remission to the material rules (a so-called *Sachnormverweisung*), which tries to avoid subsequent renvoi. It has to be emphasized that the resort to the law of the place of registry only operates when the law applicable to succession does not recognize succession rights for civil partnerships in general or when it does not provide them in the particular case.³⁶ At this point, it is not clear what could be the extent of the obtainable rights for the surviving partner. It will be necessary to resort, for the time being, to the aforementioned mechanisms of *Angleichung* or *Anpassung* in order to look for a reasonable balance of interests.

German legal literature has also considered the difficulties which can arise from cases in which a German couple dissolve their union abroad by means of a private act or a marriage, without any judgment. In these cases preliminary questions may arise, which concern how to deal with the coexistence of claims for succession rights of both the widowed spouse and the partner, if the subsistence of the partnership created in Germany is admitted. Should only the widowed spouse or only the partner inherit? It is not clear whether these preliminary questions have to be solved by means of the *lex causae* or the *lex fori*.

On the other hand, it is doubtful if an unmarried couple registered in a foreign country could be governed by the material rules of the German *Lebenspartnerschaftsgesetz* in order to determine the succession rights of the partner. In principle, this would depend on the possibility of replacing the concept of the foreign couple with the German one with the same value. This substitution would be problematic if the foreign law does not provide for succession rights for the partner.³⁷

As another example of legal provisions in these cases, the PIL system in Belgium also provides that if the surviving partner does not obtain succession rights through the law applicable to non-marital registered partnerships, the *lex*

³⁵ R. WAGNER, *Das neue Internationale Privat- und Verfahrensrecht zur eingetragenen Lebenspartnerschaft*, IPRax 2001, p. 291.

³⁶ M. FORKERT, *Eingetragene Lebenspartnerschaften im deutschen IPR: Art. 17b EGBGB*, Mohr Siebeck, Tübingen, 2003, p. 230.

³⁷ D. HENRICH, *Kollisionsrechtliche Fragen der eingetragenen Lebenspartnerschaft*, FamRZ 3, 2002, p. 143.

loci registrationis should be applied.³⁸ On the other hand, the Netherlands has chosen another way to avoid these possible imbalances when such cases arise, which involve the concurrence of various legal systems. Instead of applying PIL rules, the Dutch authorities aim to provide good legal advice to couples who intend to register, in order to convince them of the advantages of drawing up a will. This written will would certainly prevent problems by determining the applicable law. France, on the other hand, does not have PIL rules to define the succession rights of registered partners, and there are different possibilities which the judge has to examine in different ways.³⁹ This way, the solution will not be the same when the *lex successionis* does not recognize succession rights for the surviving partner but the law of the register does or the other way around, or when the *lex successionis* recognizes these succession rights but the *lex fori* does not. Faced with each specific situation, the French competent judge will have to appeal to different resolution techniques, from adaptation mechanisms of the material laws present to the replacement of foreign legal concepts in order to check if they are assimilable to the French ones.

In Sweden, the Registered Partnership Act, which regulates same-sex couples as well as different-sex ones, in its Preamble assigns to the Swedish judge the function of applying any foreign rules providing succession rights to maintain the surviving partner if foreign Succession Law is applicable when the decedent dies and it does not provide for these succession rights.⁴⁰ It has to be recalled that the Swedish Registered Partnership Act was enacted in 1995, when the Scandinavian countries were pioneers in legislating in the field of civil partnerships. Since then, new forms of coexistence, like cohabitation, have appeared, which would not fit the Swedish solutions for models similar to married couples.⁴¹

Denmark was the first country in the world to regulate civil unions in 1989 by introducing a law on registered partnership for persons of the same sex, also called the Registered Partnership Act. Apart from a few exceptions, the conditions are precisely the same as for heterosexual marriages, so this would include succession rights of surviving partners. Nevertheless, no PIL rules are provided in this act, so international cases like the ones we have analyzed would not receive a uniform treatment by the Danish legal system.

In Spain there are different partnership laws in different Autonomous Regions. The Catalan statute on unmarried couples, which came into force in 1998, grants succession rights to homosexual couples, but not to heterosexual ones. From a PIL perspective, specific rules are lacking. In legal literature, the

³⁸ Art. 60 (3), second sentence, Belgian Code of Private International Law.

³⁹ G. KESSLER, *Les partenariats enregistrés en droit international privé*, Librairie Générale de Droit et de Jurisprudence, Paris, 2004, p. 347.

⁴⁰ M. BODGAN, *IPR-Aspekte der schwedischen Eingetragenen Partnerschaft für Homosexuelle*, IPRax 1995, p. 57.

⁴¹ C. GONZÁLEZ BEILFUSS, *Parejas de hecho y matrimonios del mismo sexo en la Unión Europea*, Marcial Pons, Barcelona, 2004, p. 181.

German solution has been favoured. In this sense, a flexible interpretation of article 9.8 CC has been suggested.⁴² It would make it possible to consider that the effects of the registered partnership (instead of the “effects of the marriage” mentioned in article 9.8 CC) have to be governed by the law of the register, which would also determine the succession rights of the surviving partner. In this way, the succession rights of the surviving partner would be clearly set, entailing the same treatment as that given to the widowed spouse.

It has to be underlined that in the aforementioned European process for the adoption of a European instrument relating to successions, account has been taken of the possibility of having to resolve as a preliminary question the validity not only of a marriage but also of a non-marital registered partnership.⁴³ It should be determined what has to be the law applicable to these incidental questions.

In general, from a PIL perspective, we can state the difficulty of classifying a non-marital registered partnership when, as is frequently the case, there is no available specific conflict of laws rule for this purpose. This generates an obvious legal uncertainty. Some authors opt for considering these couples as personal relationships, which justifies giving them the same treatment as married ones. Other authors in legal literature think they are patrimonial relationships to be placed in Obligations Law in PIL. However, specialized treatments of this complex subject recommend conferring a special dimension on these couples by combining personal and patrimonial elements.⁴⁴ This way, when nowadays specific rules in this field are lacking, although having them is always the best solution and the aim we should aspire to, it will be necessary to combine different PIL techniques to solve each particular case. Sometimes, the law of the country with which the case is most closely connected shall be applied, other times an analogical application of conflict of laws rules could be necessary and, ultimately, an adaptation in the field of what is stipulated by the material rules could be suitable.

5. CONCLUSIONS

Adjustment problems between succession and matrimonial property when dealing with succession rights of widowed spouses should be dealt with in the future European instrument, which intends to unify the law applicable to succession. Despite the widespread acceptance of the proposal of including the *professio iuris* in order to allow choice of the law governing matrimonial property as the law applicable to the succession rights of the surviving spouse

⁴² C. GONZÁLEZ BEILFUSS, *Parejas de hecho y matrimonios del mismo sexo en la Unión Europea*, Marcial Pons, Barcelona, 2004, p. 185.

⁴³ I. CURRY-SUMNER, *All's well that ends registered? The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe*, Intersentia, Antwerp-Oxford, 2005, p. 493.

⁴⁴ O. VAN CAILLIE, *La protection du partenaire survivant dans le cadre des lois européennes sur la cohabitation non-maritale*, Schulthess, Geneva, 2005, p. 190.

or partner, this does not solve the problems which arise in the majority of cases when parties are unaware of this kind of difficulty and do not foresee this necessity of election.

A conflict of laws rule similar to the one contained in article 9.8 of the Spanish Civil Code (CC), which would directly point to the law applicable to this field, could manage to avoid the analyzed problems. Nevertheless, as we have seen, the formulation of article 9.8 CC is neither the object of unanimous interpretation, nor a flawless solution. That is why a better formulation of such a rule would be desirable. In this sense a clear determination of what specific law is expected to govern the succession rights of the widowed spouse would be necessary, without allowing any misunderstandings and subsequent adjustments, which always run the risk of being arbitrary.

Regarding the situation of the surviving non-married partner, we have to take into account that the regulation of non-marital coexistence forms has just begun to be developed in most EU countries. Consequently, the determination of the succession rights of the surviving partner has to overcome extra difficulties compared to the widowed spouse, because of the lack of universal acknowledgment of their existence.

It would be suitable to include the legitimate expectations of the surviving non-married partner in the aforementioned rule of the future European instrument, providing a particular clause for all those States which do not admit for the time being the legal existence of alternative models of families beyond the traditional forms. The reason for this admission of exceptions is that an instrument on Succession Law is not the appropriate setting to impel the evident necessity of regulating new relationship forms, a challenge which other EU projects should overcome successfully.

At least, it deserves further consideration.