Introduction

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

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

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

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

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

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

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

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

cording to many authors - it is hard to reach a common, uniform inheritance law regulation within the European Union. Despite this fact, and the position according to which for a time it was thought that inheritance law issues lie outside the competence of the European Union, the vision of a uniform European inheritance law has always seemed to be tempting. Therefore, individual legislators, regardless of EU legislative possibilities and theoretical arguments, in recent years, when changing their inheritance laws, generally have done it in the pro-European spirit. The European integration has been one of the most important factors shaping the new law. It can be even declared that in this area the observation of solutions in the foreign states has been of a great importance and served, among others, as a factor initiating the preparation of national normative solutions following the idea of integration. And although until today there have not been any serious efforts to harmonize substantive inheritance law at the European level, the concept of Europeanization of this law is still alive, if only because of the recently adopted Regulation No 650/2012 of the European Parliament and of the Council on succession matters (Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[4]). Undoubtedly, it has to be kept in mind when considering possible changes in the national laws. This new regulation creates indeed many far-reaching effects on the domestic inheritance law. The EU legislator, firstly, allowed to choose the law applicable to succession (Article 22 of the Regulation), and secondly, in the absence of choice of the law resigned from the link to law based on nationality and adopted a link to law based on habitual residence (Article 21 paragraph. 1 of the Regulation). The provisions of the Regulation will relate to all the succession matters (Article 23 of the Regulation), which often in practice, will exclude the application of the national legislation at the expense of other domestic legislation[5]. Paradoxically, the problems of the application of EU succession Regulation, which may and will appear in practice, are related to the lack of uniformity of substantive succession national regulations, and may force the EU legislator to undertake the work in this area, which could become a merit of inheritance law, a discipline considered until recently as the one remaining outside the competence of the European Union, and in fact, it may contribute to the emergence of a uniform European Civil Code. That possibility should not be underestimated, and national legislators should remember it when making any changes to their legislation.

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

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[4] Official Journal L 201 of 27.7.2012.

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

they should be limited to a simple implementation of national needs. In any case, it should be noted that the possible drafting of a new inheritance law should start from a deep discussion on the condition of the current legislation. It is time to start this kind of discussion on a broad scale. Only a fuller analysis of individual institutions could allow making a decision in this regard. It seems, therefore, that the question of a possible future European Civil Code[6] may obtain a new dimension. It happens because of the problems in the adjusting of the new reality to the national succession law regulations. Will it lead to a common European law of succession? It is certainly difficult to make such a judgment today.

As it may be assumed, the idea of a European Civil Code - at least at a philosophical level - seems right and is worth acceptance. As we know, in principle, no works on it have started yet. To this day, it has not been prejudged in any way whether this instrument will ever be created, or whether it will be only the subject of academic disputes, and whether it will include inheritance law. While the adjustment of the principles and concepts of law of succession to one model is a very difficult process, such a regulation is enticing and this is why the European Union should adopt measures to harmonize the law in this area. Is this harmonization possible? Despite many opinions to the contrary[7], I think so. In several critical areas, such as statutory succession, wills, protection of relatives of the deceased, or liability for debts of the deceased, the statutory solutions of individual countries are based, in fact, on similar values and models. The presentation of these solutions, including the values, the standards and the principles underlying the normative regulations, is the central point of my analysis. I consider that despite the cultural, social, or economic differences[8], individual legislators in principle seek to do one thing, namely, to establish the rules of succession after the death of the devisor, with a possibly far-reaching regard to their will as expressed *mortis causa*. This will, as the highest value of law of succession, remains in various legal systems under a special protection[9]. However, it is not absolute and has some limitations related to the protection of people close to the devisor and their creditors. Legislators, using a variety of tools, create solutions that actually lead to achieving in

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

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

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

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

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

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

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

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

While choosing the legal systems for the analysis, I have first tried to use the solutions that have already been a reference for the legislative changes in other countries, and not only in Europe. Because of the cultural or economic discrepancies and the legal traditions, mentioned by many writers, I have tried to present a possibly wide spectrum of the solutions found in the national law systems of the European Union countries, discussing at the same time mainly the systems considered as the canons of the modern civil law. It is not possible to describe in a single work all the systems of inheritance law in the European Union. Thus, my work primarily refers to the law systems of the Germanic region, especially German law, as well as to the Dutch or French regulations. Because of the important role of the United Kingdom in the European structures, related also to a large flow of immigrants, the subject of my discussion is often inheritance law of England and Wales. From my point of view, this is indeed of some additional value as the United Kingdom, Germany and the Netherlands are the countries, where in recent years Poles have migrated most often[10]. Thus, the exploration of the legal systems in the context of the applicability of inheritance law seems important, even if in the future there was no standardization of the rules. The work could not miss as well the reference to the legal systems of the countries that in recent years have carried out the re-codification process of civil law in Europe and enacted new civil codes. The re-codification of civil law is in fact a phenomenon that was intended to adjust the legal systems of the Central and East European states to the modern requirements. Thus, I present, among others, the solutions taken from

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

the Romanian, Czech, or Hungarian legal systems. For obvious reasons I also present the achievements of the Polish legislators, especially because of the fact that recently, Poland has been also a country that has had to deal with the dilemmas of re-codification[11]. Several times, I also recall the law of some non-European countries, especially when the structures encountered there are different from the legal systems of the European countries and for various reasons they deserve an interest of European lawyers. Today, law should not know any borders.

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

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

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

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

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