

Bridging the Gap Between Civil and Common Law:
An Analysis of the Proposed EU Succession Regulation

by

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Declaration

I, Philip Dennis Bremner, declare that this thesis has been composed by myself; has not been accepted in any previous application for a degree; that the work is my own; that all quotations have been distinguished by the use of quotation marks; and the sources of information have been specifically acknowledged.

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Contents

Summary	5
Introduction	6
Chapter 1: Overview	12
1.1 Background	12
1.2 Green Paper	16
1.3 The Draft Regulation	19
1.4 Domestic Response	26
Chapter 2: Claw-back	32
2.1 Introduction	32
2.2 Overview	36
2.3 Historical Perspective	42
2.3.1 Overview	42
2.3.2 Historical notions of the nature of ownership	49
2.3.3 Early restrictions on the freedom of <i>inter vivo</i> alienations	52
2.3.4 Legal Rights and Claw-back in Scotland	63
2.3.5 Modern-day implications	70
2.4 A possible way forward?	72
2.5 Conclusions	79
Chapter 3: Connecting Factor	80
3.1 Introduction	80
3.2 Reception of Domicile into English and Scots Law	83
3.3 From Domicile to Habitual Residence via Nationality	98
3.4 Habitual Residence: In Search of a Definition	111
3.5 Conclusions	121
Conclusion	122
Bibliography	127

Summary

In October 2009, the Commission of the European Union published its proposal for a regulation dealing with the private international law aspects of succession. Towards the end of last year, the UK Government exercised its right not to opt-in to the Regulation at that stage. This thesis examines the reasons behind the UK's decision not to opt-in and considers the possible ways in which the UK's concerns might be addressed during the course of the on-going negotiations. In doing this, the thesis will discuss the main points of contention in the regulation, which evidence a gulf between the English common law and the civil law of continental Europe, and how this might be overcome.

This thesis attempts to illustrate that the current intransigence of some Member States as regards certain aspects of the regulation shows a disregard for the historical evolution of the civilian legal tradition in those countries. By emphasising the historical development of such civilian concepts as forced heirship and domicile, this thesis suggests that there is greater scope for a compromise solution than has been envisaged until now. By a similar token, domestic reform within the UK indicates that there is room for manoeuvre within the common-law approach to succession. Based on this, the thesis argues for more flexible negotiating positions during discussions relating to the Regulation.

Overall, the conclusion that the thesis draws is that problems relating to claw-back and the connecting factor(s), in particular, are not insurmountable. It asserts that a greater cognizance of history coupled with an increased awareness of the failings of domestic regimes can lead to compromises which would ultimately promote a more acceptable regulation to which the UK would feel more comfortable opting-in.

Introduction

The law of succession has a direct impact on the lives of countless individuals. As a branch of the law of property, it affects a person's patrimony in a number of ways. However, it is also closely related to family law and as a result is greatly influenced by family relationships. In the past, the law of succession has been seen as inextricably linked with the culture and society of a given country because of that legal system's particular conception of family relationships and the central importance of the law of property in that country. Given this perceived inherent cultural component to the law of succession, it was thought that the law of succession was not as well suited to transnational harmonisation initiatives as other areas of law might be.

Whilst this view persists today to a certain extent, the European Union has continually affirmed in recent years its desire to harmonise the private international law rules relating to succession. The harmonisation of private international law rules in no way implies the harmonisation of substantive succession law in the Member States. This is something that the European Commission has been quite clear about and does not see as politically feasible at this stage. In fact, the desire to harmonise the private international law rules relating to succession suggests that a coordinated approach to conflict of laws within the Union will help to alleviate the significant problems, which result from the divergent substantive law rules relating to succession. Despite this, it is questionable whether harmonised private international law rules can succeed in remedying these problems without a degree of harmonisation of substantive law rules.

The European Union, however, is not competent to pass legislation with the aim of harmonising substantive succession law. Therefore, its only option in this regard is to deal with the private international law rules. Nevertheless, the question remains whether political agreement on these rules will be forthcoming given the highly divergent

approaches towards succession law in the Member States and the lack of basic agreement about certain fundamentals such as what falls within the scope of succession law.

The European Commission has proposed a Regulation dealing with the private international law aspects of transnational succession. This is a holistic instrument covering the traditional areas of private international law, namely jurisdiction, applicable law, and recognition and enforcement. In addition to this, it also proposes creating a European Certificate of Succession that would be directly enforceable in the Member States. This is an ambitious and controversial instrument, which has created considerable division within the EU. At the time of writing, negotiations are ongoing within the Council and it remains to be seen what sort of final instrument will emerge and whether the UK (and Ireland) will feel able to opt-in.

The proposed Succession Regulation raises a number of specific issues, a thorough analysis of which would be impractical, given the time and space restraints of this thesis.¹ Instead this thesis will focus on what the present writer considers to be the most pressing and controversial issues presented by the Regulation. Chapter one will provide a general overview of the main provisions of the Regulation and highlight the key challenges that it presents. Chapter two and three will discuss two of the key obstacles that the Regulation presents to the UK opting-in, namely the inclusion of claw-back within the scope of the applicable law and the designation of the appropriate connecting factor. These chapters will situate both of these issues in a comparative and historical context in order to understand the strength of feelings that underlie the various negotiating positions and to explore to what extent there might be room for manoeuvre. Whilst such an analysis could not be comprehensive given the limitations of this thesis, it is illustrative of how the common law and civil law came to have such divergent positions on these issues. The

¹ For a detailed account of the issues raised by the regulation see A Dutta, 'Succession and Wills in the Conflict of Laws on the Eve of Europeanisation' (2009) 73 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 547.

conclusion of the thesis will summarise the discussions of the foregoing chapters and consider the implications of these discussions for the future of the Regulation and the UK's participation in it.

Connecting factor and claw-back are not the only controversial issues that the proposed Regulation raises. There are various other obstacles to the UK's participation. Perhaps one of the most significant of these is the inclusion within the scope of the Regulation of administration of estates. In the UK, and certain other Member States, the actual transfer of property on death forms a separate area of law, called administration of estates, and is not subject to the law applicable to succession. In many continental systems, there is no concept of administration of estates because the property passes directly to the heir upon death. This divergence over such a crucial concept as the proper scope of succession law would seem to demonstrate a fundamental lack of agreement on the basics, which makes the harmonisation of the private international law rules in the area of succession problematic. Other issues include the recognition and enforcement of authentic instruments, the scope and effect of the Certificate of Succession and the classification boundaries with maintenance, matrimonial property and trusts. Whilst these will be discussed to some extent in the following chapter, which is a general overview of the Regulation, it will not be possible to explore these topics in detail.

The decision to focus on claw-back and connecting factor was a strategic choice given that these are the issues that the UK objects to most strongly and are likely to present the most problems in reaching a compromise. The recognition and enforcement of authentic instruments, which will not be discussed in detail, is an important issue because the use of authentic instruments by notaries is often how estates are wound up on the continent. However, recognition and enforcement of these instruments is only likely to be problematic in contentious cases, during which they can be challenged before a court in the

member state where they were issued. As regards administration of estates, this is also an important issue. However, the Regulation does strike a balanced compromise which would protect the UK's procedures for administration of estates and is discussed briefly in the next chapter. The European Certificate of Succession would threaten to undermine this if it were treated as decisive of a broad range of issues. However, as things stand in the Regulation, it would not be treated as such in the UK, given our court-based procedure for administration of estates. Therefore, whilst all these issues deserve detailed discussion during the negotiations, it is unlikely that they will present significant barriers to the UK opting-in, provided that a mutually acceptable interpretation of the Regulation can be agreed on.

In addition to the time and word constraints, this thesis's analysis of certain aspects of the proposed Regulation is limited by the restricted availability of historical and comparative materials in the English language. Given that chapters two and three, on claw-back and connecting factor respectively, attempt to undertake a historical and comparative analysis, the scope and rigour of this study is limited by the present writer's lack of foreign language skills. Therefore, information on foreign legal systems and historical documents, the latter of which are often written in Latin, can only be accessed in summary form in English. As a result, the comparative aspect of the historical research will be limited to comparisons between Scotland, England and France, on which most material is available, with occasional reference to other legal systems, such as that of Germany, where appropriate. In addition, much of the historical analysis is derived from a comparison of secondary sources, where reference to primary material would be impractical.

Despite these various constraints, this thesis attempts to situate current disagreements over certain aspects of the Succession Regulation in their historical context by discussing and comparing the development of these concepts in a number of legal systems within the EU.

One of the main reasons that this thesis adopts a historical and comparative approach is to gain some perspective on Member States' intransigence over these issues and provide some sort of context for assessing the acceptability of any potential compromise solution. The thesis pursues this aim within the confines of its remit and should not be seen as a comprehensive review of the proposed regulation but rather as focussing on two of the thorniest and most divisive issues raised by the proposal.

The analysis in which this thesis engages reveals that the common element that links both the issue of connecting factor and claw-back is that the current doctrinal positions of the Member States seem out of line with the historical development of these concepts. As regards connecting factor, it is ironic that continental legal systems initially preferred to use a more permanent connecting factor such as domicile and then nationality but now support a much more transient connecting factor in habitual residence. This stands in contrast to the common-law systems, which inherited the concept of domicile from the civil law and now stand by, a somewhat modified version of, that connecting factor. Given this historical perspective and how habitual residence operates in practice in the countries that use it, as discussed in chapter three, perhaps the Member States of the EU could be more amenable to the UK's suggestion of having a more well-defined and less easily changeable connecting factor.

As regards claw-back, the historical considerations discussed in chapter two suggests that both the UK and continental legal systems should be open to compromise on this issue. This historical analysis undermines continental legal systems' assertion that claw-back is a necessary corollary of forced heirship; it also reveals that some form of claw-back may have existed in England at one stage. This analysis is not necessarily decisive because, as the chapter points out, different legal systems attach varying degrees importance to the family unit. However, it has the potential to encourage a more flexible negotiating position

that is more open to compromise solutions. Throughout all these chapters, and especially in the following general overview chapter, the thesis attempts to highlight the relevance and significance of this historical and comparative analysis to the current discussions on the Succession Regulation.

1. Overview

1.1 Background

The harmonisation of private international law in civil matters within the European Union (EU) has a long history dating back to the 1968 Brussels Convention.¹ This was adopted at a time when the Member States of the EU were empowered to negotiate conventions to secure the ‘simplification of formalities governing the reciprocal recognition and enforcement of judgments’.² The EU subsequently gained express legislative competence, through the Treaty of Amsterdam,³ to adopt ‘measures in the field of judicial cooperation in civil matters,’⁴ which have ‘cross border implications...insofar as necessary for the proper functioning of the internal market’.⁵ This includes measures relating to jurisdiction, applicable law, and recognition and enforcement.⁶ This resulted in the Brussels I Regulation⁷ and the Brussels II Regulation (later supplanted by Brussels II *bis*),⁸ both of which replaced the Brussels Convention. Subsequently the adoption of private international law instruments in the Council, other than those dealing with family law matters, was facilitated by the change in voting requirements from unanimity to qualified majority voting brought about by the Treaty of Nice.⁹ More recently, the Treaty of

¹ Convention on jurisdiction and enforcement of judgments in civil and commercial matters (Brussels Convention, consolidated version) [1998] OJ C 27/1.

² Treaty establishing the European Community [1992] OJ C224/01, art 220.

³ Treaty of Amsterdam amending the Treaty on European Union, treaties establishing the European Communities and certain related acts (Treaty of Amsterdam) [1997] OJ C 340/1.

⁴ Treaty establishing the European Community (EC Treaty, as amended) [2002] OJ C 325/33 art 61(c).

⁵ EC Treaty (n 4) art 65.

⁶ EC Treaty (n 4) art 65.

⁷ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L 12/1.

⁸ Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II *bis*) [2003] OJ L 338/1.

⁹ Treaty of Nice amending the Treaty on European Union, the treaties establishing the European Communities and certain related acts (Treaty of Nice) [2001] OJ C 80/01.

Lisbon¹⁰ has weakened the internal market requirement for private international law instruments, giving the EU broader competence in this area.¹¹

However, through all of this, wills and succession were excluded from the scope of the Convention¹² and both Regulations.¹³ This was because of the ‘fairly marked differences between the various States on matters of succession...and the very marked divergences between the rules of conflict of laws’.¹⁴ The EU has come a long way since the Brussels Convention and has repeatedly affirmed the need to harmonise private international law rules relating to succession.

This was recognised as early as the Jenard Report on the Brussels Convention, which stated that ‘it was necessary, and would become increasingly so as the EEC developed in the future, to facilitate the recognition and enforcement of judgments given in matters relating to succession’.¹⁵ The EU’s 1998 Vienna Action Plan went even further by setting the goal of examining the possibility of drawing up a legal instrument relating to not only recognition and enforcement of judgments regarding succession but also jurisdiction and applicable law.¹⁶ Despite no specific mention of succession in the European Council’s 1999 Tampere Conclusions,¹⁷ the Tampere Programme that shortly followed them proposed, for the first time, the concrete goal of creating a legal instrument dealing with

¹⁰ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

¹¹ For a more detailed discussion about the changes brought about by the Treaty of Lisbon in private international law see G de Groot and J Kuipers, ‘The New Provisions on Private International Law in the Treaty of Lisbon’ (2008) 15(1) Maastricht Journal of International and Comparative Law 109.

¹² Brussels Convention (n 1) art 1(1).

¹³ Brussels I (n 7) art 1(2)(a); Brussels II *bis* (n 8) art 1(3)(f)

¹⁴ P Jenard, ‘Report on the Convention on jurisdiction and enforcement of judgments in civil and commercial matters signed at Brussels 27 September 1968’ (Jenard Report), [1979] OJ C 59/1, 11.

¹⁵ P Jenard (n 14) 11.

¹⁶ Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice [1999] OJ C 19/1, 10.

¹⁷ Presidency Conclusions, Tampere Council, 15 and 16 October 1999 (Tampere Conclusions) <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm> accessed February 2010.

jurisdiction, and recognition and enforcement of judgments in the area of succession.¹⁸

This was supported in the European Council's 2004 Hague Programme, which called on the Commission to present a green paper regarding private international law aspects of succession,¹⁹ which they duly did in 2005.²⁰

A consultation process followed the publication of the Green Paper during which the Commission received a number of responses. The Commission considered these responses and, in October 2009, published a proposal for a regulation relating to private international law aspects of succession.²¹ In December 2009, following a Ministry of Justice (MoJ) public consultation,²² Jack Straw, the Secretary of State for Justice and Lord Chancellor, announced that the UK Government had decided to exercise its right, under the UK and Ireland's Protocol to the Maastricht Treaty,²³ not to opt-in to the Succession Regulation. He confirmed that the Government still supports the project in principle and intends to engage fully in the negotiations with the hope of being able to adopt the final regulation.²⁴ In the same statement, Mr. Straw emphasised what had already been highlighted by the MoJ's Consultation Document, namely that the major obstacles as far as the UK is concerned are claw-back and connecting factor.²⁵ Each of these will be considered in detail in their respective chapters later in this thesis.

¹⁸ Council of the European Union, 'Draft programme of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters' (Tampere Programme), [2001] OJ C 12/1, 3

¹⁹ Council of the European Union, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union', [2005] OJ C 53/1, 13.

²⁰ Commission of the European Communities, 'Green Paper on Succession and Wills COM(2005) 65 final <http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0065en01.pdf> accessed February 2010.

²¹ Commission of the European Communities, 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession' COM(2009) 154 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0154:FIN:EN:PDF>> accessed February 2010.

²² Ministry of Justice, 'European Commission proposal on succession and wills – A public consultation' CP41/09 <<http://www.justice.gov.uk/consultations/docs/ec-succession-wills.pdf>> accessed September 2010.

²³ Protocol on the position of the United Kingdom and Ireland (UK and Ireland Protocol) [1997] C 340/99.

²⁴ Hansard HC vol 502 cols 140WS – 141WS (16 December 2009).

²⁵ Ministry of Justice, 'European Commission proposal on succession and wills – A public consultation' CP41/09 8 – 9 <<http://www.justice.gov.uk/consultations/docs/ec-succession-wills.pdf>> accessed February 2010

Having outlined the background to the Succession Regulation, the remainder of this chapter will be devoted to an examination of the key documents, namely the green paper and draft regulation, and the responses these have elicited from the major stakeholders, including the report published by the House of Lords EU Select Committee in March 2010.

1.2 Green Paper

The European Commission's Green Paper on Succession and Wills,²⁶ which was published in 2005, raises a number of fundamental questions that need to be answered. Of the various issues that the Commission seeks to address, the most controversial seem to be the scope of the proposed regulation, the most appropriate connecting factor and the recognition and enforcement of non-judicial acts. These points, along with other issues important to the UK, are addressed in the UK Government's response to the Green Paper.²⁷

As regards the territorial scope of the proposed regulation, the Commission seem to take it as read that harmonised conflict rules should operate not only where EU Member States' legal systems are concerned but also in situations involving the legal systems of both Member States and non-Member States:

The universal nature of the future rules should not be in dispute: confining the application of the harmonised conflict rules to strictly "intra-Community" international situations and excluding those in which there is a third-country element would make life more difficult for individuals and the legal professions.²⁸

The UK Government, in their response to the Green Paper, make it clear that they do not consider this a self-evident truth. In fact, they view this statement as premature, stating that 'the question of universal application needs to be addressed properly'.²⁹ There is some support for the Commission's position as it avoids "'double-tracked" rules on the conflict of laws [which] would lead to difficulties in practice'.³⁰ However, it is questionable whether the EU even has competence as regards third countries, or whether this should be

²⁶ European Commission (n 20).

²⁷ Response of the Government of the United Kingdom to the European Commission Green Paper on Succession and Wills <http://ec.europa.eu/justice_home/news/consulting_public/successions/contributions/contribution_uk_en.pdf> accessed February 2010.

²⁸ European Commission (n 20) 4.

²⁹ Response of the Government of the United Kingdom to the European Commission Green Paper on Succession and Wills, Appendix B, 3 <http://ec.europa.eu/justice_home/news/consulting_public/successions/contributions/contribution_uk_appb_en.pdf> accessed February 2010.

³⁰ P Turner, 'Perspectives of a European Law of Succession', [2007] 14 Maastricht Journal of European & Comparative Law 147, 163.

left to the Member States.³¹ This concern resonates with the UK Government's emphasis on the importance of treaty base as a matter of legal principle.³² This point does not seem to have been taken by the Commission, whose proposal states that 'any law specified by this Regulation shall apply even if it is not the law of a Member State'.³³

Whilst the Commission saw the universal territorial application of the Regulation as beyond doubt, it did raise the question of how extensive the substantive scope of the Regulation should be:

What questions should be governed by the law applicable to the succession? In particular, should the conflict rules be confined to the determination of heirs and their rights or also cover the administration and distribution of the estate?³⁴

This, the UK Government seems to find even more clear-cut than the issue of territorial scope. They emphasise that:

...the administration and distribution of the property of the deceased, should fall outside the law of succession...Matters of administration and distribution relating to property should...be governed by the law of the forum.³⁵

This view is strongly supported by the Bar Council of England and Wales which feels that 'the applicable law has no role in relation to [administration of estates]'.³⁶

The Law Society of England and Wales and the Society of Trust and Estate Practitioners are less emphatic about excluding administration of estates from the scope of the Regulation stating that 'at the initial stage we should not seek to deal with the administrative machinery in place to handle estate administration'. This suggests that they may view harmonising the rules relating to administration of

³¹ See Response by the Bar Council of England and Wales, 2 <http://ec.europa.eu/justice_home/news/consulting_public/successions/contributions/contribution_bcew_en.pdf> accessed February 2010;

³² UK Government (n 27).

³³ European Commission (n 21) article 25.

³⁴ European Commission (n 20) 5, Question 1.

³⁵ UK Government (n 27) 3.

³⁶ Bar Council of England and Wales (n 31) 4.

estates as a laudable goal but that they would prefer to adopt a more cautious and gradual approach to harmonisation at this stage. The view taken by the Swedish Government, by contrast, calls for a wide scope of application of the Regulation to include the administration and distribution of the estate. In support of this, they assert that ‘it would simplify matters greatly if the estate could be administered from one country, by one administrator, with one estate inventory and according to only one set of rules’.³⁷ In the end, the Commission was persuaded by this view and included the administration of estates within the scope of the Draft Regulation, subject to the protection of systems that have a separate procedure for administration of estates.³⁸

³⁷ Swedish Ministry of Justice, Comments on Commission Green Paper on Succession and Wills <http://ec.europa.eu/justice_home/news/consulting_public/successions/contributions/contribution_sweden_en.pdf> accessed February 2010.

³⁸ See European Commission (n 21) art 21(2).

1.3 The Draft Regulation

This section will consider the key provisions of the draft regulation and how they have been received. Firstly, as regards scope, the Commission's explanatory memorandum, which is attached to the proposal, explains its decision to include administration of estates in the following terms:

The concept of "succession" must be interpreted in an autonomous manner and encompasses all the elements of a succession, in particular its handover, administration and liquidation.³⁹

This position is contrary to that expressed by the UK Government in its response to the Green Paper but follows the suggestions of the Swedish Government.⁴⁰ This provision is particularly problematic for the UK because although it does apply foreign law to the core issues governed by succession law such as the determination of heirs etc, it does not apply foreign law to the administration of estates as this Regulation would.

The Regulation is not, however, entirely insensitive to legal systems, such as those of the UK, that have a separate, court-based system for the administration of estates. The compromise that the Regulation strikes in this regard is not to prevent the operation of a separate system of administration of estates where property is located in a country that uses such a system.⁴¹ However, it is unclear how far this extends. Under the various laws of administration of estates in the UK, both inheritance tax and debts owing to creditors would be paid before property was transferred to beneficiaries. However, the Regulation only expressly provides for tax to be paid before property transfers and not creditors.⁴² In the interests of legal certainty and to avoid any confusion, the present writer submits that there should be an express provision stating that creditors can be paid, before property

³⁹ European Commission (n 21) 4.

⁴⁰ See above n 30 and 31.

⁴¹ European Commission (n 21) art 21(2)(a).

⁴² European Commission (n 21) art 21(2)(b).

transfers to the beneficiaries, in those countries that have a separate system of administration of estates. The protection of creditors is one of the key reasons for the UK having a separate system of administration of estates. Therefore, it is likely to prove unacceptable for the UK to opt-in to a Regulation that undermines this protection.

Having defined its scope, the Regulation moves on to the rules of jurisdiction. It adopts habitual residence as the default connecting factor, which confers general jurisdiction on a court. According to the explanatory memorandum, habitual residence was chosen because it ‘is the most widespread method used in the Member States...’⁴³ It seems likely that this comment pertains to areas other than succession where harmonised European rules impose habitual residence as the connecting factor.⁴⁴ However, as Professor Matthews notes:

...all the other contexts in which “habitual residence” is used are directed at something to do with the actor, the person concerned, in the short-term, but this use of “habitual residence”, although it is describing something about the deceased, actually has the effect for the purpose of distributing the estate or the succession of deceased, which will affect lots of other people, the heirs and the creditors...⁴⁵

Therefore, one cannot assume that just because habitual residence is commonly found in other contexts, that this connecting factor, especially if left undefined, is appropriate in the context of succession.

⁴³ European Commission (n 21) 5.

⁴⁴ Examples of the use of habitual residence in other contexts include: Brussels II *bis* (n 8) arts 3 and 8 (confers jurisdiction in divorce proceedings and those concerning parental responsibility); Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6 art 4 (determines applicable law governing contracts in the absence of choice); Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40 art 4 (designates the applicable law in certain circumstances governing non-contractual obligations) ; Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation) [2009] OJ L 7/1 art 3 (confers jurisdiction over maintenance claims).

⁴⁵ P Matthews, Minutes of Evidence taken before the Select Committee on the European Union (Sub Committee E), 25 November 2009 in European Union Select Committee, ‘The EU’s Regulation on Succession: Report with Evidence’ HL (2009-10) 75, 19 (Q13).

The problems associated with habitual residence also come into play in the next section of the Regulation, which makes habitual residence the default connecting factor for the choice of applicable law. By using such a transient connecting factor as habitual residence, which could involve a very short period of actual residence, the Regulation raises the problem of a person's personal law changing when they might reasonably expect that it would not. This means that as parties move between Member States, the law applicable to the succession of their estate could also change with the parties being unaware of this. The unintended consequences associated with mutability are somewhat mitigated by the Regulation allowing a degree of party autonomy as regards choice of law. However, despite this, the Regulation's restrictive approach to party autonomy does not quite seem to strike the correct balance. The problems associated with the connecting factor in relation to jurisdiction and applicable law will be discussed more fully in chapter three.

Another highly contentious aspect of the Regulation is the issue of claw-back. This is a practice found in many civil law countries, whereby gifts made during the lifetime of a deceased person can be reclaimed back into that person's estate upon death, in order to satisfy the forced heirs' share of the estate. Although the UK has a similar mechanism for the calculation of inheritance tax, this is only a notional device and does not actually require gifts to be returned, which could conceivably be the effect of the law in many civil law countries. Such a possibility exists in England at the discretion of the court under the Inheritance (Provision for Family and Dependents) Act 1975.⁴⁶ However, it does not seem likely that this is often encountered in practice. If such a doctrine were to be imported into the domestic laws of the United Kingdom, then it could have potentially far-reaching and unsettling consequences on the security of property transfers.

⁴⁶ S 10(5).

Although the Regulation excludes lifetime gifts from its scope,⁴⁷ it provides that ‘the [applicable] law shall govern in particular...any obligation to restore or account for gifts and the taking of them into account when determining the shares of heirs’.⁴⁸ This would be a novel development in both Scots and English law and as Lord Bach stated in his evidence to the House of Lords EU Select Committee, ‘the introduction of [claw-back] into the UK could create major practical difficulties, particularly for the recipients of such gifts, including charities.’⁴⁹ Therefore, it seems highly unlikely that the UK Government would be willing to opt-in to this Regulation until some kind of compromise on this issue had been reached. The issue of claw-back is discussed in more detail in the following chapter.

In addition to applicable law and jurisdiction, the Regulation seeks to lay down rules on mutual recognition and enforcement. The Regulation stipulates that court decisions should be recognised in other Member States without any special procedure and provides a limited list of grounds available to refuse recognition of a court decision.⁵⁰ Whilst this may be uncontroversial and in line with other instruments regarding recognition of decisions in civil matters, the Regulation goes further and requires the recognition of authentic instruments. However, this requirement is not as circumscribed as the automatic recognition of court decisions because there is no list of grounds for non-recognition, and recognition can be refused only on the grounds of public policy. Despite this, recognition of authentic instruments is not a foregone conclusion in the UK.

As well as dealing with the traditional areas of private international law, the Regulation would also create a new legal instrument that is enforceable in any Member State in the form of a European Certificate of Succession. This instrument would be an authoritative

⁴⁷ Commission (n 21) art 1(3)(f).

⁴⁸ European Commission (n 21) art 19(2)(j).

⁴⁹ Lord Bach and O Parker, Minutes of Evidence taken before the Select Committee on the European Union (Sub Committee E), 16 December 2009 in European Union Select Committee, ‘The EU’s Regulation on Succession: Report with Evidence’ HL (2009-10) 75, 46 (Q126).

⁵⁰ European Commission (n 21) arts 29 and 30.

statement of the entitlement of the heirs and the powers of the executors.⁵¹ Such an instrument would seem useful for UK executors who sought to have property located in other EU Member States transferred to beneficiaries. However, it would have to be made clear that this European Certificate of Succession could not be decisive as regards assets in the UK as this would undermine the protection of the separate system of administration of estates.

Many of the objections that the UK raises to the proposed Regulation relate to classification issues. Whilst a detailed discussion of classification is beyond the scope of the thesis, it is worth highlighting, in broad terms, some of the key elements of this issue. The UK seeks to interpret succession narrowly, limiting it to the determination of heirs and their entitlement upon the death of the deceased. The UK government, unlike many continental governments, does not see this as extending to the recovery of lifetime gifts, which will be discussed in more detail in chapter two, nor to the actual administration of the estate. As regards the latter, many civil-law systems do not have a separate mechanism for the administration of the estate, leaving it to the heir to deal with the debts, etc; in the UK, and some other Member States, there is a court-based system of winding up the estate. This is designed to protect creditors and provide a public record of the succession proceedings.

Given the strongly diverging approaches on this issue, perhaps the compromise proposed by the Max Planck Institute⁵² would be a workable solution. They proposed that administration of estates is included within the scope of applicable law unless the law of the location of the assets lays down special rules, in which case they would govern the

⁵¹ European Commission (n 21) art 36.

⁵² Max Planck Institute for Comparative and International Private Law, 'Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession' 90 <http://www.mpipriv.de/shared/data/pdf/mpi_comments_succession_proposal.pdf> accessed September 2010; (2010) 74 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 522.

winding up of the estate. This has the advantage that it would not require separate laws to govern the administration of estates between those Member States which do not lay down a special procedure but would appease those such as Austria and the UK, which does. This differs slightly from the rules proposed in the Regulation by explicitly stating that rights in *rem* cannot be exercised in a Member State where the property is located contrary to the law of that country.

Another issue relating to classification is the division between maintenance and succession. There is a distinction to be made between the legal rights of forced heirs, which exists in civil-law systems, on the one hand, and the discretionary provision for dependants upon death, which exists in England and Wales, on the other. The former properly belongs to the law of succession, whereas the latter is closer in nature to a maintenance claim. On this reading, therefore, there is no contradiction between the UK's opposition to the inclusion of claw-back within the scope of the applicable law and the English courts' discretionary power to reclaim certain lifetime gifts upon death.⁵³ The latter only applies to those dependants who are in financial need and can, thus, properly be said to constitute a maintenance claim. Therefore, this can be distinguished from the continental form of claw-back, which is designed to satisfy forced heirship claims regardless of financial need.

Whilst this may not be how domestic claims under the 1975 Act are viewed by the English courts or the UK Government, it may well be advantageous for them to be considered as such in the international context. Given that the UK does not consider claw-back to form part of the law of succession, it is highly unlikely that the UK would opt-in to a regulation that made claw-back subject to the applicable law. Therefore, if decisions under the 1975 Act were classed as a form of claw-back, they would not be covered by the mutual recognition provisions of any Succession Regulation to which the UK would opt-in. This means that a situation could occur whereby an English domiciled dependant spouse

⁵³ Inheritance (Provision for Family and Dependants) Act 1975.

receives an award from an English court for the value of a gift made by her spouse a number of years before his death to his mistress. However, both her deceased spouse and his mistress were habitually resident in Cyprus, which does not allow any form of claw-back. Therefore, assuming claw-back does not fall within the scope of the Regulation, this decision would be unenforceable under the Succession Regulation. This would be the situation at present without the Succession Regulation being in force.

By contrast, if such an award were classified as a maintenance decision, this could be enforced under the Maintenance Regulation. The relationship between succession and maintenance claims is not explicitly addressed in the Maintenance Regulation, which simply provides that '[t]his Regulation shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity'.⁵⁴ Classifying the 1975 Act claims as maintenance would not only be relevant for the reduction of lifetime gifts, which probably has limited practical relevance in any event. It would also be advantageous for redistribution of the estate and the setting aside of testamentary bequests in response to claims from individuals who would not be forced heirs under the applicable law but were, nonetheless dependant on the deceased. This could occur in situations where the Act covers a broader range of people, such as former spouses, than the forced heirship provisions of the applicable law. In such a situation the estate would have to be distributed in accordance with the applicable law. Therefore, it would not be open to the English court to alter this in favour of a dependant non-forced heir, if the powers under the 1975 Act were classed as succession. However, arguably, if these powers were classed as maintenance, then the English courts could make an order that the maintenance claim be satisfied out of the estate, which would have to be recognised under the Maintenance Regulation. This, however, raises the question of which Regulation would take precedence in the event of a conflict, which should be resolved in the interests of legal certainty.

⁵⁴ Maintenance Regulation (n 44) art 1(1).

1.4 Domestic Response

Based on the foregoing section, it seems clear, therefore, that the Commission's Proposal contains several issues that are highly contentious within the UK. The following section will discuss the reaction to these provisions from various interested parties in the United Kingdom. There has been widespread consultation on the Commission's Green Paper, a Ministry of Justice Consultation and extensive hearings by the House of Lords to gather evidence from expert witnesses on the Draft Succession Regulation. One of the overarching concerns that runs through the majority of the responses from interested parties in the UK is the expansive scope of the proposed regulation.

Scope can be understood in two ways. Firstly, there is the extent of private international law matters that are covered by the Regulation. Whilst this does not evoke quite such strong opinion as the other meaning of scope, there is still some disagreement over the utility of addressing all aspects of private international law. Some, such as the European Parliament, feel that the Regulation should adopt a holistic approach to private international law and lay down harmonised rules for applicable law, jurisdiction, and recognition and enforcement.⁵⁵ Others, such as Shepherd and Wedderburn,⁵⁶ implicitly accept this by arguing for there to be equivalence between the connecting factors that determine jurisdiction and those that determine applicable law. Despite this, there are those, such as Carruthers and Crawford, who argue that harmonising the rules of jurisdiction is unnecessary, whilst still supporting the harmonisation of applicable law.⁵⁷

There seems to be a growing feeling that a piecemeal approach to private international law is inadequate in meeting the aim of legal certainty. In the past, instruments that have

⁵⁵ European Parliament, Report with recommendations to the Commission on succession and wills 16 October 2006 (A6-0359/2206), Recommendation 1.

⁵⁶ See letter dated 29 August 2005, attached to Scottish Parliament response to European Commission Greenpaper 27.

⁵⁷ See J Carruthers and E Crawford, Scottish Parliament response to European Commission Greenpaper, Questions 1 and 22.

focussed solely on applicable law have not been widely ratified.⁵⁸ Recently, the EU Maintenance Regulation adopted a more holistic approach dealing with jurisdiction, applicable law and recognition and enforcement in a single instrument.⁵⁹ Whilst some, such as Carruthers and Crawford,⁶⁰ would argue an exemption for the field of succession, it does not seem that this case has been made out. Rather than question the inclusion of rules of jurisdiction at all, one might argue that these rules have not been extended far enough. Given that the majority of succession cases are non-contentious, and therefore dealt with largely by notaries in continental Europe, it seems inconsistent with the reality of the situation not to extend jurisdictional rules to non-judicial bodies such as notaries. The likelihood of this featuring in the Regulation is, however, slim given the political opposition from countries such as France.

A more evocative issue than this is the area of substantive law that the Regulation designates as being governed by the applicable law. This debate centres on the definition of succession, which is a contentious issue. The regulation itself takes an all-inclusive approach to the definition of succession including all issues relating to the succession from start to finish. This is supported by the European Parliament⁶¹ and Sweden,⁶² amongst others. However, as the chairman of the law and institutions sub-committee of the House of Lords EU Select Committee notes,⁶³ it is likely to be a major stumbling block to the UK's participation in the Regulation. The first point of contention is the potential for the Regulation to unsettle lifetime property transfers. This is a possibility unknown in Scotland and very rare in England, Wales and Northern Ireland and has the potential to affect the stability of land registers as well as trust law. There seems to be a consensus that the core

⁵⁸ For example Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons

⁵⁹ See the Maintenance Regulation (n 44).

⁶⁰ J Carruthers and E Crawford (n 57) 10.

⁶¹ European Parliament (n 55) 11.

⁶² Swedish Ministry of Justice (n 37)

⁶³ European Union Select Committee, 'Green Paper on Succession and Wills: Report with Evidence' HL (2007-08) 12, 5

of succession law is to determine who is entitled to inherit. Beyond that perhaps, as Professor Harris argues in his HOLEUSC evidence,⁶⁴ there should be a distinction drawn, as with the Hague succession and trust conventions, between what is agreed to form part of succession law on the one hand and ancillary matters on the other. The same would apply to the Regulation's inclusion of administration of estates within its scope, which the UK argues should properly be subject to *the lex situs*.

Be that as it may, allowing the applicable law to govern the transfer of immovable property located in another member state is not unknown in the UK, as Professor Harris argues:

we do already have, of course, the Hague Trusts Convention and the Recognition of Trusts Act 1987 in the UK. That applies equally to trusts of land and allows the settlor to choose the governing law applicable to a trust of land, including any powers that they may have to terminate the trust and claim the property. That radical departure from the law of the situs does not appear to have caused practical problems. It is already a major inroad into the law of the situs...⁶⁵

This may, however, not be so straightforward in the succession context given the balancing of interests between creditors and heirs discussed earlier.⁶⁶

As Professor Harris notes, the two concerns regarding substantive scope and coverage of private international law issues are not unrelated. In fact, if the latter were resolved so that the scope of the Regulation excluded anything other than what constitutes the common core of succession, then the coverage of private international law issues would be less of an issue. In other words, courts would be less reticent to apply foreign law if they knew that it did not affect ancillary matters as the Regulation currently purports to do:

⁶⁴ J Harris, Minutes of Evidence taken before the Select Committee on the European Union (Sub Committee E), 10 October 2007 in European Union Select Committee, 'Green Paper on Succession and Wills: Report with Evidence' HL (2007-08) 12, 5 Q 16 .

⁶⁵ J Harris (n 64).

⁶⁶ See text at n 40.

If one can get a very tightly construed regulation that really answers the bald question of who is the heir according to the governing law, is it X or Y, I think I would be less concerned about the range of the regulation in terms of the private international law issues it might cover.⁶⁷

As regards the scope of the proposed regulation, the House of Lords EU Select Committee advocates a cautious approach stating that:

Limiting the scope of the proposal to determining the law applicable to the issue of who is entitled to what asset in any particular succession would result in simpler legislation...It would also permit the continuation of important UK procedures for administering successions...⁶⁸

Based on Professor Harris's evidence to the Select Committee inquiry, the fact that the House of Lords would limit the substantive reach of the Regulation suggests that its private international law scope could remain broad. However, consistent with their cautious approach, the Committee state that:

this is an area for a step by step approach to legislation. However it would have been preferable for the first proposal in this field to have focussed on the issue of the law that should apply to a cross-border succession (the applicable law).⁶⁹

This conclusion resonates well with those who felt that jurisdictional rules were difficult to operate in practice⁷⁰ but does not go as far as those who felt there was no need for such rules.⁷¹

The final issue that many found objectionable is the rules on recognition and enforcement, particularly as they relate to authentic instruments and the European Certificate of Succession. There seems to be little objection to the recognition of court decisions, as is

⁶⁷ J Harris (n 64) 9.

⁶⁸ European Union Select Committee (n 63) [155].

⁶⁹ European Union Select Committee (n 63) [151].

⁷⁰ R Frimston, Minutes of Evidence taken before the Select Committee on the European Union (Sub Committee E), 2 December 2009 in European Union Select Committee, 'The EU's Regulation on Succession: Report with Evidence' HL (2009-10) 75, 32 (Q64)

⁷¹ J Carruthers and E Crawford (n 57).

standard practise in other areas, other than that it may raise certain practical difficulties.⁷² However, there is widespread opposition to the suggestion that authentic instruments, drawn up by notaries, should be recognised and enforced.⁷³ In Professor Matthews's view, given the lack of procedural safeguards that exists in notarial proceedings as opposed to court proceedings, authentic instruments should merely be a piece of evidence that a court considers.⁷⁴ Despite assurances by the Director-General, DG Justice, Freedom and Security of the European Commission that there were sufficient safeguards in place and that notaries were indispensable in overseeing successions in many Member States.⁷⁵ The House of Lords EU Select Committee concluded that:

We consider that the mutual recognition and enforcement of court decisions is likely to be sufficiently non-controversial to be acceptable in principle. However we do not consider that there is sufficient mutual trust at present to justify making authentic instruments recognisable and enforceable.⁷⁶

As regards the European Certificate of Succession, there seems to be a degree of uncertainty and differing views over the actual effect of such as certificate, as summarised in the EU Select Committee Report.⁷⁷ However, there seemed to be a general consensus that the Certificate should not be conclusive, but should rather have evidentiary value, and that it should not be able to bypass domestic procedure for the administration of estates. This prompted the House of Lords Select Committee to conclude that:

We do not support an ECS which overrides national law and practice as a consequence of being automatically recognised in every Member State and treated as conclusive of the matters stated in it. We can, however, see advantages in an ECS which facilitates the operation of national procedures

⁷² See for example Richard Frimston (n 70), 25 (Q 86).

⁷³ European Union Select Committee 'The EU's Regulation on Succession: Report with Evidence' HL (2009-10) 75 [120].

⁷⁴ P Matthews (n 45) 23 (Q 24).

⁷⁵ J Faull and C Hahn, Minutes of Evidence taken before the Select Committee on the European Union (Sub Committee E), 9 December 2009 in European Union Select Committee, 'The EU's Regulation on Succession: Report with Evidence' HL (2009-10) 75, 43 – 44 (Q 118, 122).

⁷⁶ European Union Select Committee (n 73) [123].

⁷⁷ European Union Select Committee (n 73) [128] – [134].

by providing non-conclusive evidence of the salient aspects of a succession.⁷⁸

Overall, therefore, the Commission's Proposal for a Succession Regulation contains several aspects that are difficult for the UK to support. Despite this, certain aspects of the Regulation that might have been thought to prove controversial have been accepted without question. The abandonment of scission, for example, is a considerable step forward. Whilst the UK currently adopts a scission-based system, there has been recent suggestion that this should be reformed at the domestic level.⁷⁹ Therefore, it is not proving to be an obstacle during negotiations on the Regulation with the Justice and Home Affairs Council accepting the abolition of scission as a political goal earlier this year.⁸⁰

There has been wide-ranging consultation by both the Government and the House of Lords in an attempt to identify potential problems and seek potential solutions. Given the potentially disruptive effect this Regulation could have in the UK, the Government was justified not to opt-in at this stage. At the moment, the potential drawbacks of the Regulation seem to outweigh the benefits. However, it is encouraging that the UK Government is still committed to seeking compromise solutions in the negotiations because the Regulation could have significantly beneficial effects in the UK. Hopefully, therefore, a solution can be found during the negotiations that is acceptable to all Member States. The remainder of this thesis will be devoted to analysing the key points of contention of the Regulation from a historical and comparative perspective in an attempt to challenge Member States' current negotiating positions and to encourage them to reconsider their dogmatic stances on the issues.

⁷⁸ European Union Select Committee (n 73) [135].

⁷⁹ Scottish Law Commission, 'Report on Succession' (Scot Law Com 215, 2009) [5.3].

⁸⁰ Council of the European Union, Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession - Political guidelines for the future work 9703/1/10 JUSTCIV 94 CODEC425, [12].

2. Claw – back

2.1 Introduction

Claw-back exists alongside forced heirship provisions in many continental European Member States. It allows an heir to reclaim, or reclaim the value of, gifts made during the deceased's lifetime, in order to satisfy his or her compulsory share of the deceased's property on death. Claw-back is seen as inextricably linked to the protection of forced heirs from disinheritance:

Clawback is part and parcel of the protection of close family members by forced heirship; the deceased shall not be able to devalue the rights of his family members by diminishing his estate before his death.¹

However, this has not always been the case. Roman law recognised a compulsory portion of the estate to be divided amongst forced heirs upon the deceased's death but did not restrict an individual's ability to dispose of his or her property whilst alive.² Therefore, whilst the forced heirship provisions of civil-law Member States may have been derived from and reinforced by the reception of Roman law, claw-back was not.

In contrast to civil-law systems, the common-law Member States recognise neither the notion of claw-back, as it is known in the civil law, nor the concept of forced heirship.³ This dichotomy between common law and civil law can be explained on the basis of the historical development of property law and ownership in these countries coupled with the evolution of the place of the family unit in society. Interestingly, Scotland, a mixed legal system, recognises forced heirship but not claw-back. As will be discussed below, this seems to be on account of pre-existing conceptions of forced heirship being reinforced by

¹ A Dutta, 'Succession and Wills in the Conflict of Laws on the Eve of Europeanisation' (2009) 73 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 547, 583.

² W Gordon, 'Succession' in E Metzger, *A Companion to Justinian's Institutes* (Duckworth, London 1998) 98 – 99.

³ England, Wales and Northern Ireland recognise a limited discretionary power that vests in the court to reclaim certain gifts made during the deceased's lifetime. See below n 50.

the reception of Roman Law in Scotland and restrictions on the freedom of alienation that once existed in Scotland being extinguished through the influence of the English common law.

Claw-back, therefore, has not always been present in civilian legal systems, nor have family restraints on the freedom of alienation of property always been absent from the common law. Despite this, claw-back, or the lack thereof, seems now to be deeply rooted in the society, history and culture of a given Member State. This would appear to be a manifestation of the large cultural component of succession law that comparative lawyers refer to.⁴ Given the inherent link between succession law in general, in particular claw-back, and a society's values, it would be extremely difficult for a legal system to suddenly recognise a power of claw-back, as the Regulation would require the UK to do. It would be similarly difficult for continental legal systems to risk excluding claw-back from the proposed Regulation even just for the common-law countries, as the UK would have it, because of the fear that this loophole might be exploited to exclude the protection from disinheritance that these legal systems afford forced heirs. The degree to which succession law is embedded in a society's culture, however, does not necessitate the conclusion that no transnational solution can be found.

The issue of claw-back in relation to the Succession Regulation is a particularly divisive one because it is a concept that is virtually unknown in the common-law world but is present, in one form or another, in the majority of civil-law countries. The extent of the power of claw-back that exists, including how far back gifts can be reclaimed, whom they can be reclaimed from and what the property implications of this are, varies from one Member State to another. However, it is a commonly held view that some form of claw-back of *inter vivos* gifts is a necessary corollary of forced heirship provisions and is

⁴ A Dutta (n 1) 561.

required in order to render these provisions in any way meaningful.⁵ The implication of this argument is that without claw-back provisions, the forced heirship rights could easily be defeated by disposing of assets by way of lifetime gifts.

At this stage it is tempting to raise the question of how seriously society should take forced heirship provisions for non-dependent adult offspring. However, this discussion is beyond the scope of the current thesis. Although the whole concept of forced heirship is unknown to the law of England and Wales and Northern Ireland, it is not the role of private international law to question the desirability or suitability of foreign substantive law. Despite this, a Member State can quite legitimately question the application of a rule of foreign substantive law, which is manifestly contrary to the public policy of that state. The UK Government does not seek to challenge the application of forced heirship provisions over property situated in the United Kingdom even though this runs contrary to the guiding principle of English succession law namely freedom of testation.⁶ This is partly because this concept is already recognised in Scotland and partly because it does not have a knock on effect in other areas of law but is rather confined to the division of assets upon death. Claw-back, on the other hand, could have considerable implications beyond the law of succession. The recognition of foreign claw-back provisions in the United Kingdom could have the effect of disrupting the security of lifetime transfers, which would have an unsettling effect on the land registries and have a fundamentally detrimental impact on the system of property transfer in the United Kingdom.⁷ On this basis, it seems justified that the UK Government objects, on public policy grounds, to the inclusion of claw-back within the scope of the law applicable to succession.

⁵ A Dutta (n 1).

⁶ See *Nathan v Leonard* [2003] 1 W.L.R. 827 referring to the judgments of Lord Wilberforce and Lord Fraser of Tullybelton in *Blathwayt Appellant v Cawley (Baron) and Others Respondents* [1976] A.C. 397, 426, 442.

⁷ Ministry of Justice, European Commission proposal on succession and wills – A public consultation CP41/09 [18] <<http://www.justice.gov.uk/consultations/docs/ec-succession-wills.pdf>> accessed February 2010.

This chapter aims to explore the divergence in the way claw-back operates between the various Member States in order to illustrate how indeterminate and potentially far-reaching a legal device it is. The chapter will then attempt to situate claw-back in its historical context in an effort to illustrate that forced heirship and claw-back are not as intrinsically linked in their development as is commonly believed. The intention of this historical analysis is to encourage Member States to question their dogmatic negotiating positions so that they might be open to compromise solutions. Finally, the chapter will explore potential options for overcoming disagreements surrounding claw-back in the search for a mutually acceptable outcome in the final regulation.

2.2 Overview

This section will draw heavily on a recent comparative study of claw-back provisions conducted, on behalf of the UK Ministry of Justice, by Professor Paisley at the University of Aberdeen. It will also make considerable use of a recently published book called *International Succession* by Louis Garb and John Wood,⁸ which provides an up-to-date overview of the succession rules of numerous countries including a number of Member States. These comparative works provide an invaluable backdrop for analysing such transnational initiatives as the Succession Regulation because of the relative dearth of material in the English language on the domestic laws of other Member States in this area.

As Professor Paisley notes:

The various provisions of the Civil Codes and relative laws of succession that contain “clawback” are difficult to find in good English translations in the UK or on the web even for enthusiastic academics...In the present state of affairs there would be little information available for practitioners who would wish to give advice within the United Kingdom at the time of the making of an *inter vivos* gift.⁹

To an extent, this is a complication associated with the application of any foreign law and is not peculiar to claw-back. This is an argument that many common-law lawyers, with their inherent preference for *lex fori*, might use to avoid the application of foreign law altogether.¹⁰ However, as Professor Paisley illustrates the “barrier of language” is not in itself an insurmountable problem because governments could pay for official translations of their laws. This is probably something to be encouraged in various contexts, not only succession, and there are initiatives to facilitate the access to foreign law. Although the issue of access to and the application of foreign law *per se* is beyond the scope of this

⁸ L Garb and J Wood, *International Succession* (Oxford University Press, Oxford 2010).

⁹ R Paisley, ‘A Comparative Analysis of the Succession Laws of Member States of the European Union on the Issue of Clawback’ in Ministry of Justice, *European Commission proposal on succession and wills* (2009) CP41/09 37 [20].

¹⁰ See for example P Ahearn, Minutes of Evidence taken before the Select Committee on the European Union (Sub Committee E), 18 October 2006 in European Union Select Committee, ‘Rome III – Choice of Law in Divorce: Report with Evidence’ HL (2005-06) Q 23.

thesis, the reason for discussing this issue in the present context is to highlight the particular difficulties associated with ascertaining the precise nature of claw-back, given the divergent practices in the various Member States.

Based on Professor Paisley's study, there seems to be a number of variants on the extent of the claw-back provisions. In addition to this, there are certain crucial questions about the relationship between claw-back and other areas of property law that seem not to have been addressed in systems where claw-back operates. As Professor Paisley notes, this makes it very difficult to know exactly what the UK would be opting-in to and the practical effects of allowing claw-back to operate in the UK.¹¹ It may be that the reason these questions remain unanswered in the domestic legal systems of the Member States is that they are very rarely invoked in practice, which suggests that the inclusion of these provisions should not be such an important issue.

The first issue that there is a lack of agreement about on the continent is the effect of claw-back on gifts made by the deceased during his or her lifetime. Some Member States, such as Belgium,¹² Malta,¹³ Portugal¹⁴ and Spain¹⁵ provide for the actual recovery of the gifted asset. Conversely, other Member States, such as The Netherlands¹⁶, only afford the heir a personal claim for recovery of the value of the gift (or a portion thereof). This is the case in Poland¹⁷ and France¹⁸ too. However, Polish law¹⁹ and, since 2006, French law²⁰ expressly grant the possibility for the donee to return the gift rather than pay its value. Other Member

¹¹ R Paisley (n 9).

¹² Belgian Civil Code, art 929.

¹³ Malta Civil Code, art 648 (b).

¹⁴ Portuguese Civil Code, art 2169.

¹⁵ Spanish Civil Code, art 817.

¹⁶ Netherlands Civil Code, art 4:89.

¹⁷ Polish Civil Code, art 1000 § 1.

¹⁸ French Civil Code, art 924.

¹⁹ Polish Civil Code (n 16) Art. 1000 § 3.

²⁰ French Civil Code (n 17) art 924.

States, such as Germany,²¹ Greece²² and Italy²³ strike a similar balance by allowing the donee to opt for paying back the value of the gift rather than returning it.

In addition to variations in the extent of the right of recovery created by the claw-back provisions, there is a high degree of divergence over how far back the provisions apply. There is huge diversity between Member States, some of whom lay down quite restrained and restrictive time periods, whereas others set out a disproportionately long time period or have no restrictions on how far back a claim for recovery can go. In Belgium,²⁴ for example, an heir seems to be able to seek recovery of a gift regardless of how long ago it was made. The action for recovery can also be raised at anytime provided it is within the thirty-year period of negative prescription. This is similar to the position that existed in France until 2006. However, since then an action for recovery prescribes after five years.²⁵ Both Germany²⁶ and Greece²⁷ limit the applicability of claw-back to gifts made up to ten years prior to the deceased's death and subject the action for recovery to a stricter time limit. In the case of Germany, this is 3 years after the heir becomes aware of the donation (up to a maximum of 30 years). In Greece, as in Portugal,²⁸ there is a more straightforward cut-off point of two years after death. The law of the Netherlands²⁹ goes even further still and limits the effect of claw-back to gifts made up to five years prior to death with the right of action expiring five years after death. Of all the systems studied by Professor Paisley, Austria³⁰ seems to have the most restrained approach to the temporal reach of claw-back because it only allows gifts made up to two years prior to death to be challenged.

²¹ German Civil Code (BGB), art 2329(2).

²² Greek Civil Code, art 1836.

²³ Italian Civil Code, art 563.

²⁴ R Paisley (n 9) 30.

²⁵ French Civil Code, art 921.

²⁶ German Civil Code (BGB), art 2332.

²⁷ Greek Civil Code, art 1831.

²⁸ Portuguese Civil Code, art 2178.

²⁹ Netherlands Civil Code, art 4: 90.3.

³⁰ R Paisley (n 9) 44.

Admittedly, however, Austrian law does not specify a time limit after which the right to recover expires.

A further issue relates to whom the gift can be recovered from. Some Member States only allow the heir to pursue an action against the original donee or his heirs. This is the case under German,³¹ Austrian,³² Greek³³ and probably Portuguese law.³⁴ By contrast, under Belgian law,³⁵ if an heir's forced heirship claim cannot be satisfied by the original donee, the heir can raise an action for recovery against a third party acquirer. A similar situation exists in Italy,³⁶ Malta³⁷ and Spain³⁸.

There is also disagreement as to which lifetime gifts are subject to the possibility of claw-back. In some systems, such as Belgium,³⁹ France,⁴⁰ Spain⁴¹ and Malta,⁴² all lifetime gifts are subject to claw-back. In other systems, such as the Netherlands,⁴³ Germany,⁴⁴ Austria⁴⁵ and Greece,⁴⁶ the situation is more complex with certain vague exclusions such as customary gifts that are not excessive, gifts in discharge of a moral debt or by reasons of decency. Some systems, such as Poland⁴⁷ and Portugal,⁴⁸ do, however, provide a circumscribed list of gifts that are to be left out of account, for example gifts made when the deceased had no children, gifts to the deceased's spouse prior to marriage or gifts for children's maintenance and education.

³¹ R Paisley (n 9) 36.

³² R Paisley (n 9) 28.

³³ Austrian Civil Code, art 1836.

³⁴ R Paisley (n 9) 28.

³⁵ Belgian Civil Code, art 930.

³⁶ Italian Civil Code, art 563.

³⁷ R Paisley (n 9) 41.

³⁸ Spanish Civil Code, art 636.

³⁹ R Paisley (n 9) 30.

⁴⁰ French Civil Code, art 920.

⁴¹ Spanish Civil Code, art 818.

⁴² Malta Civil Code, art 648 (b).

⁴³ Netherlands Civil Code, art 4:65.

⁴⁴ German Civil Code, art 2330.

⁴⁵ R Paisley (n 9) 44.

⁴⁶ Greek Civil Code, art 1831.

⁴⁷ Polish Civil Code, art 994.

⁴⁸ Portuguese Civil Code, arts 2110 and 2162.

The implications of accepting claw-back provisions differ depending on how extensive they are and the strength of the UK's opposition to them may similarly vary on that basis. The UK is likely to oppose strongly the possibility of being required to recognise such extensive claw-back provisions as those found in the Belgian Civil Code. This provides that all lifetime gifts, with the exception of life assurance policies, which benefit the beneficiaries, can be physically recovered from the original donee and third parties who subsequently acquired the gift. The recognition of such an all-encompassing and wide-ranging form of claw-back could have a markedly detrimental impact on the security of property transfers in the UK and would, therefore, be difficult to accept.

This stands in stark contrast to the well-balanced approach to claw-back that The Netherlands have adopted. Dutch law recognises that the value of certain gifts, particularly those that are expressly made knowing that it would reduce the assets available to satisfy a forced heirship claim, can be recovered from the original donee, provided that an action is raised within five years of the death of the deceased.⁴⁹ Such a formulation is similar, in essence, to the power that the courts in England and Wales possess.

Although English law seeks to protect the freedom of testation of the deceased, and therefore contains no forced heirship provisions, it does grant the court a statutory power to make discretionary awards to certain family members from the estate of the deceased, if the deceased died domiciled in England and Wales.⁵⁰ Moreover, the court also has the power to order the recipient of a gift, made up to six years prior to death, to pay a sum of money or other property to the deceased's family, up to the value of the gift.⁵¹ This diluted English form of claw-back differs from the continental doctrine in several ways. Firstly, it is a discretionary power that the court possesses in order to prevent the surviving family members from facing financial hardship. In this way, it could be understood as a form of

⁴⁹ See n 29.

⁵⁰ Inheritance (Provision for Family and Dependants Act) 1975 s 2.

⁵¹ N 50. s. 10.

maintenance rather than a succession right. In addition to this, the intention of the deceased in making the gift, as well as a number of other factors such as the donee's financial situation and his or her relationship with the deceased, are taken into account. It is a prerequisite for granting an order for payment that the court is satisfied that the deceased's intention in making the gift was to defeat the requirement for reasonable financial provision for these family members.⁵² Therefore, the nature of this power is very different from the way claw-back operates on the continent. In practice, these types of claims are very rare and English lawyers know how to deal with them.⁵³ The recognition of Continental claw-back, however, would represent a significant upheaval to the security of property transfer in the UK.⁵⁴

Given the lack of commonality in the claw-back provisions of the Member States, it might be more appropriate to consider each system separately rather than to reject them all wholesale on the basis of a doctrinal opposition to claw-back. In this way, perhaps the EU can find a middle ground between the UK's outright rejection of any claw-back and the civil law countries' insistence on including claw-back within the scope of the applicable law. On this basis, it may be possible for the UK to accept a limited form of claw-back, such as that in the Netherlands, which extends back a limited number of years. This observation relates more to domestic law reform in these countries⁵⁵ than it does to a transnational private international law instrument. The problems associated with trying to achieve this in such an instrument are discussed further below.⁵⁶

⁵² n 50 s 10(2)(a)

⁵³ P Matthews, Minutes of Evidence taken before the Select Committee on the European Union (Sub Committee E), 25 November 2009 in European Union Select Committee, 'The EU's Regulation on Succession: Report with Evidence' HL (2009-10) 75, 22 (Q28)..

⁵⁴ N 7.

⁵⁵ This is briefly discussed in text at n 158.

⁵⁶ See below text at n 159.

2.3 Historical Perspective

2.2.1 Overview

The origins of claw-back lie in the historical development of property ownership in Europe from Roman law through feudalism to modern-day rules and civil codes. It seems that the notion of claw-back was not entirely foreign to Roman law. However it appears to have existed in a form closer to that found in England than the more extensive continental version of claw-back. In order to appreciate the significance of this, it is necessary briefly to outline the development of the law of succession in Roman law.⁵⁷ The law of the Twelve Tables confers an absolute power on the testator to dispose of his property freely.⁵⁸ There is, however, some suggestion that this was not always the case.

On the face of it, this unfettered freedom of testation would seem to place more importance on individual freedom than on the 'natural claims of consanguinity'.⁵⁹ However, consideration of the societal context in which this rule operates reveals that this is not necessarily the case. The ancient Roman law adhered to the principle of universal succession whereby the heir stood in the shoes of the deceased and assumed his rights and duties in relation to the family. This seems to have been predicated on a view of society, common to many of the early groups of people and discussed elsewhere in relation to Germanic tribes,⁶⁰ namely that the basic unit within the society is the family rather than the individual. On this interpretation the individual merely acts as the representative of the

⁵⁷ A detailed discussion of this is beyond the scope of this thesis. Therefore, the treatment of this subject will necessarily be cursory. For a more detailed discussion see H Maine, *Ancient Law* (10th edn John Murray, London 1920) Chapter VI.

⁵⁸ 'No matter in what way the head of a household may dispose of his estate, and appoint heirs to the same, or guardians; it shall have the force and effect of law.' Table V, Law I <http://www.constitution.org/sps/sps01_1.htm> accessed 21 July 2010.

⁵⁹ n 58 note [1].

⁶⁰ See text at n 87.

family and the custodian of family property. There appears to be some suggestion that this was the situation in ancient Rome.⁶¹

On that basis, the law of the Twelve Tables can be interpreted very differently. Rather than bestowing the freedom to alienate property outwith the family, it indicates that:

What passed from the Testator to the Heir was the *Family*, that is, the aggregate of rights and duties contained in the *Patria Potestas* and growing out of it...The original Will or Testament was therefore an instrument...by which the devolution of the *Family* was regulated.⁶²

Therefore, the testament, when it was originally instituted under Roman Law, was not conceived of as an instrument to deprive a deceased's family of his estate upon death but rather as an instrument stipulating how the estate would be divided within the family. On that reading of the law of the Twelve Tables, restrictions on the freedom of testation were not necessary because it was not envisaged that a testator would seek to alienate property outside of the family:

In view of the nature of the Roman social organisation at that time, it seems quite as reasonable to suppose that the compilers of the Twelve Tables had simply never contemplated the possibility of a testator overlooking his natural heirs, as to believe that they specially intended to give him the power to do this.⁶³

In any event, the Roman will evidently evolved as a means whereby a testator sought to disinherit members of his family because it subsequently became necessary to adopt a specific remedy to redress this.

The *Querela Inofficiosi Testamenti* was a means by which provisions in a will which purported to disinherit unjustly those who would succeed on intestacy could be set aside.⁶⁴

It is this restriction on the freedom of testation that led to the creation of the legitimate

⁶¹ H Maine (n 57) 196 – 197.

⁶² H Maine (n 57) 203.

⁶³ J Gardner, *The Origin and Nature of the Legal Rights of Spouses and Children in the Scottish Law of Succession* (W. Green & Son, Edinburgh 1928), 11.

⁶⁴ W Buckland, *A Textbook of Roman law from Augustus to Justinian* (3rd edn Cambridge University Press, Cambridge 1975) 328.

portion, whereby children of the deceased were entitled to a certain share of the deceased's estate notwithstanding the testator's wishes. This legitimate portion, as modified by Justinian, forms the basis of the forced heirship provisions in civil-law systems and legitim in Scotland.⁶⁵ The *Querela*, therefore, seems intended to set aside provisions in a will and *mortis causa* gifts but would not generally effect *inter vivos* gifts.⁶⁶ Consequently, this distinguishes the *Querela* from the power of claw-back as it exists, for example, in France and other continental legal systems because not only legacies under the will and *mortis causa* gifts can be set aside under these systems but *inter vivos* gifts can also be reclaimed. This would seem to belie the suggestion that claw-back is an intrinsic aspect of the protection of forced heirship provisions.

Despite this, it is interesting to note that at some stage, Roman law did recognise a form of claw-back, namely when the gift was immoderate or excessive and was intended to defeat the claims of forced heirs. However, in Justinian's time, this seems to have been limited to gifts made to issue.⁶⁷ This sometime existence of a limited form of claw-back notwithstanding, the civil-law systems of continental Europe inherited the concept of forced heirship or legitimate portion from Roman law and the device that the latter chose to protect forced heirs from being disinherited was not extended to include the general power to recover *inter vivos* gifts. This suggests that factors others than the law as it existed in the Roman Empire influenced the reception of this aspect of Roman law in continental Europe and resulted in a more extensive power of claw-back.

Claw-back seems to have its origins in the restrictions on alienation of land that existed in the Teutonic communities of pre-feudal Europe. On the continent, this was modified most markedly by the reception of Roman law, whereas in England it was the development of feudalism that had the most profound impact on these early practises. Although feudalism

⁶⁵ J Gardner (n 63) 12.

⁶⁶ W Buckland (n 64) 329.

⁶⁷ W Buckland (n 64) 331-332.

took hold all over Europe, feudalism in England seems to have been particularly strong and to have taken a divergent course compared to the rest of Europe.

The availability of historical material on European legal systems in the English language is extremely limited. Therefore, this chapter is largely based on Scottish and English legal historians, who nevertheless often adopt a comparative approach in their research, with the occasional reference to what little texts there are in English on the history of European legal systems, particularly that of France. Some of the earliest treatises on English law include Glanville,⁶⁸ Bracton⁶⁹ and Littleton.⁷⁰ Although these books were written in Latin, the English translations have proved invaluable sources of information on early English laws. These can be supplemented with later writers such as Coke⁷¹ and Blackstone⁷² as well as modern legal historians such as Pollock and Maitland.⁷³ As regards Scottish legal history, some of the earliest sources include the *Regiam Majestatem*,⁷⁴ which seems to follow Glanville closely, and Craig's *Jus Feudale*.⁷⁵

The law of succession forms part of the law of property. However, it is heavily influenced by family relationships resulting from family law. Therefore, it is through the law of succession that family relationships may affect the law of property. Whether claw-back forms part of the law of succession or the law of property more broadly, is a matter of classification and is beyond the scope of this thesis. However, this question notwithstanding, in the majority of Member States, family relationships can have an impact upon lifetime transfers of property as well as the property remaining in a deceased's estate after death. This may seem anathema to common-law lawyers nowadays, given the

⁶⁸ J Beams (tr), R Glanville, *Treatise on the Laws and Customs of the Kingdom of England* (A.J. Valpy, London 1812).

⁶⁹ T Twiss (ed), H Bracton, *De Legibus et Consuetudinibus Angliae* (Longman & Co., London 1878).

⁷⁰ E Wambaugh (ed), *Littleton's Tenures in English* (John Byrne & Co., Washington D.C 1903).

⁷¹ E Coke, *The First Part of the Institutes of the Laws of England* (W Clarke & Sons, Dublin 1806).

⁷² W Blackstone, *Commentaries on the Laws of England* (Callaghan and Cockcroft, Chicago 1871).

⁷³ F Pollock and F Maitland, *The History of English Law before the Time of Edward I* (2nd edn The University Press, Cambridge 1898).

⁷⁴ Lord Cooper (tr), *Regiam Majestatem* (The Stair Society, J Skinner & Co., Edinburgh 1947).

⁷⁵ Lord Clyde (tr), *Craig's Jus Feudale* (William Hodge & Company, Edinburgh 1934).

freedom to alienate property and the freedom of testation that English law affords. This, however, was not always the case. In the past, English law allowed family relationships to have a more marked impact on the lifetime transfer of property than the laws of civil-law Member States do now. Similarly, claw-back has not always been seen as intrinsically linked to the protection of forced heirs. In fact, the two legal concepts have very different histories.

The nature of this dichotomy between common-law and civil-law systems relates to the different ways each system views property law and family law, which is informed by the divergent paths the historical evolution of these branches of law took in continental Europe, on the one hand, and England, on the other. In Germany and France, for example, the family unit, as a legal concept, plays an important role. In the civil codes of both of these countries, the notion of family as a group of people has a particular significance in the area of family law. In Germany, for example, there is an express maintenance obligation towards the family as a whole.⁷⁶ This stands in contrast to English legislation governing maintenance, which speaks of separate spousal and child maintenance claims.⁷⁷ Family solidarity in France seems even stronger with spouses being responsible for the 'material and moral guidance of the family,'⁷⁸ and children owing 'maintenance to their father and mother or other ascendants who are in need'.⁷⁹

However, the impact of this conception of the family as a unit extends beyond family law and affects other areas such as the law of property. In Germany, for example, under the law relating to leases, a lessee may object to the termination of a lease and demand its continuation if, *inter alia*, the termination of the lease would be a hardship for him or his

⁷⁶ BGB s. 1360: 'The spouses have a duty to each other to appropriately maintain the family through their work and with their assets'.

⁷⁷ Matrimonial Causes Act 1973 Part II.

⁷⁸ Code Civile art. 213.

⁷⁹ N 78 art. 205

family which 'is not justifiable even considering the justified interests of the lessor'.⁸⁰ This is unknown in England where landlords have the right to terminate a tenancy provided that sufficient notice is given.⁸¹ In France, a person who has the right to enjoy the fruits of a tenement (i.e. usufruct, a concept unknown to the common-law) may demand that both his needs and the needs of his family are satisfied.⁸² As one commentator on French law puts it:

Even if the family is not in itself a legal concept, the law that governs its members treats the family as a coherent community, highly articulated in terms of public policy (regles d'ordre public) and in terms of the fundamental principles that govern both the persons who are connected by a family bond and their property.⁸³

It is this perceived link between a person's family ties and his property that seems to underpin France and Germany's approach to succession in general and claw-back in particular.

In order to be able to understand and explain the opposing approach of the civil and common law to this issue, it is necessary to explore its historical origins. Just as a Member States' modern-day rules of succession are best understood in light of the importance that state attaches to the family unit, the origin of these rules is intrinsically linked with the historical development of the law of property in that state. Property law in Europe has a common heritage dating back to broadly similar customary laws in the various parts of Europe through to the rise of feudal law. As one commentator puts it:

There was nothing extraordinary about Anglo-Saxon customary law; it was not particularly different from the customs of the Franks or, indeed, the Saxons in north Germany ... Feudal law, when established in England by the

⁸⁰ BGB s. 574.

⁸¹ See the Protection from Eviction Act 1977 (as amended). Part II sets out the requirements for a Notice to Quit to be formally valid. Part I sets out when an eviction may be unlawful e.g. where the landlord interferes with the peaceful occupation of the property. There is, however, no mention of protection from eviction on the grounds of family hardship.

⁸² N 78. art. 630

⁸³ C LaBrousse-Riou, 'Family Law' in G Bermann and E Picard (eds), *Introduction to French Law* (Kluwer Law International, Netherlands 2008). 78

Normans, was not very different from feudal law in northern France but it developed in a different way.⁸⁴

Therefore, an understanding of the current divergence over the issue of claw-back lies in the evolution of that concept, in English law and continental legal systems, from the common feudal heritage of medieval times, through the reception of Roman law to the beginning of modernity in Europe.

⁸⁴ O Robinson, *European Legal History* (3rd edn Butterworths, London 2000).

2.3.2 Historical notions of the nature of ownership

A discussion of the development of the concept of ownership and the evolution of claw-back in France reveals the interaction of the various forces that influenced the development of this branch of the law and resulted in the entrenchment of claw-back within the French legal system.⁸⁵ This can be contrasted with contemporaneous developments in England, which had the opposite effect. Due to time restraints and the restricted availability of resources, the following historical analysis will be confined to these two legal systems with occasional reference to German law. This, therefore, cannot be generalised to the entirety of civil-law countries. However, it may well be indicative of the situation in other Member States given that France and Germany represent two of the main civil-law families (Romanistic and Germanic) from which other civil-law systems are derived.⁸⁶ A more comprehensive historical and comparative analysis, whilst desirable, is beyond the scope of this thesis. Nevertheless, the following discussion is relevant when considering how the common law and civil law came to adopt wholly divergent and opposing opinions on the issue of claw-back.

It is interesting to note that the nature of ownership and property in Europe has a common historical origin with the introduction of feudalism in Europe. From this it seems that there was little inherent in the feudal law or the concepts of property and ownership themselves to indicate why the common-law and continental European legal systems took such a divergent approach, over time, to the issue of claw-back. It is rather the way in which property law has developed in these countries that has resulted in modern-day divergences on this issue. This section will attempt to advance a thesis based on the relationship between the family and property ownership in the English common-law and certain civil-

⁸⁵ Given the lack of available historical information on the French legal system in the English language, it is impossible to be dogmatic about the conclusions of this analysis. Therefore, this section merely attempts to advance a credible explanation for the current situation based on what information is available.

⁸⁶ P de Cruz, *Comparative Law in a Changing World* (Routledge-Cavendish, London 2007) 34.

law systems in order to explain these differing approaches. In addition to this, it will attempt to chart these developments in order better to understand current differences.

The current view of the family as a unit in French Law seems to have its origins in ancient traditions that do not appear to exist in England. According to one French legal historian:

The modern family is derived from the old patriarchal family...The ancient family communities were associations of relatives giving one another support and assistance under all circumstances...The immovable belongings of the community are inalienable, indivisible and cannot be disposed of by will...This primitive type of the family community has left traces everywhere. It is as a relic of the primitive community that the Roman law designates children as its heirs.⁸⁷

This implies a concept of family ownership, which is consonant with the conception of the family as a unit, discussed earlier. This is confirmed by the same legal historian who goes on to say:

According to an opinion which was very generally accepted a short time ago which today has many adversaries, the ownership of land must have originated in the tribe and the clan, and then have passed to the family, and finally to the individual. The disagreement on this subject is as to whether the collective ownership of the tribe did or did not precede family joint ownership; but there can be no doubt that the first owner of the soil was not the individual.⁸⁸

This view, whilst readily acceptable as an explanation for the French approach to the law of property does not resonate so well in the context of English legal history. As the pre-eminent authority in this area puts it:

in the present state of our knowledge we should be rash were we to accept 'family ownership', or in other words a strong form of 'birth-right', as an institution which once prevailed among the English in England.⁸⁹

Whilst this may well be true, this thesis aims to illustrate how close, in practice, the law of property in England was to early French property law and that, perhaps as a result of the

⁸⁷ R Howell (tr), J Brissaud, *A History of French Private Law* (Continental Legal History Series, Little, Brown and Company, Boston 1912) 20.

⁸⁸ N 87 30.

⁸⁹ F Pollock and F Maitland, (n 73) Volume 2, 255.

different approaches to family ownership, over time these two systems began to diverge resulting in the seemingly diametrically opposite systems that exist today.

2.3.3 Early restrictions on the freedom of *inter vivos* alienation

The modern-day power that exists in many continental legal systems, which allows a forced heir to recover a gift that the deceased made during his lifetime (claw-back), has its origins in restrictions that existed during feudal times on the power to alienate land. These restrictions existed in both continental Europe and in England. As regards the former, sources in the English language are limited. However, one can discern from the French legal historian already referred to that a landowner's relatives in France had a considerable interest in his property and a considerable say over whether that property could be alienated:

The right of the relatives over the family possessions is not only shown by the power to collect them by means of intestate succession, that is to say, after the death of their actual owner; it is also shown during the lifetime of the latter...It is especially in the institution of the repurchase by a person of the same lineage and the hereditary reservation, which are so widespread, that the rights of the relative come to light.⁹⁰

The right of repurchase, or *retrait lignager*,⁹¹ although it no longer exists in France, seems to be the precursor to claw-back. This illustrates, therefore, the strong rights of heirs in their ancestors property, which appears to derive from the emphasis placed on family ownership.

In order to understand the prominence of claw-back in the Napoleonic civil code, it is necessary to explain the pre-Revolutionary legal situation in France and the impact of Roman and other laws in its subsequent development. In this regard, it is important to highlight the division within France between the northern part of the country, which was governed by customary law, and southern France, which was governed by written law. The former derived from customs of Germanic tribes, whereas the latter was based more on

⁹⁰ J Brissaud (n 87) 624.

⁹¹ For a full discussion of the evolution of the *retrait lignager* in both France and Scotland see D Smith, 'The Retrait Lignager in Scotland', (1924) *Scottish Historical Review* 193.

Roman law. Despite this, Roman law was a persuasive source of law even in the north and was used to fill in gaps in the customary law.⁹² On this reading, therefore, the movement to unify the various competing local laws in France, which resulted in the Civil Code, would have had to reconcile the divergent approaches of customary and Roman law:

[The French Civil Code was] the culmination of centuries of legal history and the interaction of Roman law with the localized and customary laws that evolved in Europe after the fall of Rome.⁹³

This interaction between customary law and Roman law in France is evident in the codifications of customary law that took place in the sixteenth century.

The process of codification was, however, intermixed with law reform so that '*it was difficult to draw a sharp distinction between legislation in the sense of making new law and mere codification or publication of existing custom*'.⁹⁴ During this time of codification Roman law seems to have been used to fill the gaps in, and even modify, the customary law. For example, as a result of feudalism, which formed part of French customary law, primogeniture was the rule that governed intestate succession.⁹⁵ This, however, conflicted with the desire to allow all the children to inherit and was subsequently modified in light of Roman law.

Therefore, the concept of *legitime*, whereby forced heirs are entitled to a compulsory portion of the estate upon the death of the deceased, seems to have become entrenched in French law as a result of the codification of customary law. This cannot wholly be attributed to Roman law because customary law was based on the customs of the Germanic tribes and only indirectly drew on Roman law, as discussed above. Therefore, it seems reasonable to conclude that the inclusion of forced heirship provision in French customary law resulted partly from the influence of Roman law and partly as a residue of family

⁹² J Crabb, *The French Civil Code* (F.B. Rothman, South Hackensack N.J. 1977) 3.

⁹³ J Crabb (n 92) 2.

⁹⁴ J Dawson, 'The Codification of the French Customs', (1940) 38(6) *Michigan Law Review* 765, 781

⁹⁵ J Brissaud (n 87) 635.

ownership that existed in early Germanic tribes, as discussed earlier.⁹⁶

This is important because it relates directly to the development of claw-back in France. In southern France, *legitime* formed part of the law because that was based on Roman law. In Northern France, however, there were varying customs that prevailed in the different regions until they were unified by the 'Parlement of Paris', which established *legitime* as part of the Custom of Paris.⁹⁷ Given that the Custom of Paris was the dominant custom in France, when its protection of the legitimate part was extended to *inter-vivos* gifts (i.e. claw-back) in 1688, this had an influence on other customary laws. So much so that 'by the seventeenth century the *legitime*, as a limitation on the power to disinherit close relatives' and by implication claw-back 'was conceived by most persons to have a secure place in that ideal construct, the "common law of the customs" of France'.⁹⁸ This resulted in royal legislation in 1731, which allowed for the reduction of excessive *inter-vivos* gifts⁹⁹ and subsequently influenced the drafting of the French civil code:

It was taken for granted without debate that if the guarantees were to be effective they could not be restricted to testamentary gifts, as they had been in classical Roman law, but must be carried back to *inter vivos* gifts that brought the owner's total gifts above the disposable quota.¹⁰⁰

Whilst this is only a rough sketch of the situation that existed in France, due to the lack of authority on the matter, this situation is more clearly illustrated by contrast to the history of English law, on which there are a number of readily-available sources.

The position in English law, dates right back to the Norman Conquest and the early history of feudal law in England. At that time, feudal tenure was the dominant interest in land rather than ownership. This meant that a tenant could be in possession (*seisin*) of the land in return for providing services to the lord of the land but was unable to transfer the land

⁹⁶ See text at n 85

⁹⁷ J Dawson, *Gifts and Promises* (Storrs Lectures on Jurisprudence, Yale University Press, London 1980) 41.

⁹⁸ J Dawson (n 97) 42.

⁹⁹ The ordinance of February 1731 on gifts (*L'Ordonnance sur les Donations*) art. 31.

¹⁰⁰ J Dawson (n 97) 48.

either during his lifetime, without the consent of the lord, or by will. In addition, prior to the Norman Conquest, a tenant's heir would not succeed to his ancestor's interest in the land, as a matter of legal right:

Among the Saxons, there is not the least reason to believe, that the grants under the lords were at all hereditary ... Even the law of forfeiture of king Canute, and afterwards of Edward the confessor, so much talked of among lawyers, proves beyond contradiction, that the grants under the lords were not hereditary.¹⁰¹

This state of affairs persisted until the time of the Norman Conquest, where the laws of Normandy were imported into England. This represented a considerable departure from what had gone before because the feudal law of Normandy was more developed at that time than that of England. As a result, '*the whole fiefs*¹⁰² *of the nation*' became hereditary.¹⁰³

As a result of the hereditary nature of feudal tenures, there were two main restrictions on a tenant's ability to alienate the land: the lord's consent and the heirs' consent. As one eighteenth century writer on the feudal law states:

The consent of the lord was absolutely necessary to the tenant's alienation, to prevent the introduction of an enemy or unqualified person into the fief; but the consent of the lord alone was not sufficient, if there were in being any persons entitled to the succession. Thus if A. Is himself the first purchaser of a fee, and hath a son, his alienation, even with the consent of the lord, would hold good only during his own life; but if he had aliened with the consent of the lord before issue had, this should be valid, and bind the issue born afterwards. For here the alienation was made by all the persons in being interested in the land.¹⁰⁴

In the course of the twelfth and thirteenth century, the law changed and became more liberalised in both these regards. There existed a distinction between conquest (purchased

¹⁰¹ J Dalrymple, *An Essay towards a General History of Feudal Property in Great Britain* (4th edn Sarah Cotter, Dublin 1759) 16.

¹⁰² i.e. estates of land.

¹⁰³ J Dalrymple, (n 101) 21.

¹⁰⁴ F Sullivan, *Lectures on the Constitution and Laws of England* (Graisberry and Campbell, Dublin 1790) 144.

lands) and lands acquired by descent (i.e. inherited lands). Under a statute passed during the Reign of Henry I,¹⁰⁵ the former could be alienated without the consent of the heir, which is an implicit power that can be traced back to the The Books of the Feus¹⁰⁶ and Anglo-Saxon law.¹⁰⁷ During the reign of Henry II, this was clarified to extend to only part of the purchased lands, so that the heir could not be disinherited.¹⁰⁸ However, if the purchaser has no children, then he is free to alienate all of his purchased land. Although this was generally also the position in Scotland,¹⁰⁹ the laws of certain boroughs in Scotland made no distinction between whether a purchaser had children or not, preferring instead a more extensive freedom of alienation.¹¹⁰

However, whilst the laws of Henry I gave an express power to alienate part of the purchased lands, it also clarified that inherited lands could not be alienated without the consent of the heir, which was in line with the prevailing customs in England. This right was given more force, during the reign of Henry II, as the common law developed causes of action that would allow the right to be enforced in the common-law courts:

In the case of free tenants, however, these customs rapidly gave way in the twelfth and thirteenth centuries to the certainty of the common law...[which] protected inheritance as a right, by means of the writs of right and assize of mort d'ancestor ...¹¹¹

Therefore, the ancient feudal law was modified by English custom, which was then enshrined by the English common law. The resulting transformation meant that by the thirteenth century, prospective heirs had undergone a legal empowerment. They had gone from having no legal interest in their ancestors' property under the early feudal system to a

¹⁰⁵ Law of Henry 1 no. 70; See J Dalrymple (n 109) 97.

¹⁰⁶ T Craig, *The Jus Feudale, with an appendix containing the Book of the Feus* (W Hodge, Edinburgh 1934) 289.

¹⁰⁷ Law of Alfred no. 41 <<http://www.fordham.edu/halsall/source/560-975dooms.html#The Laws of King Alfred>> accessed September 2010.

¹⁰⁸ See J Beams (tr), R Glanville, *Treatise on the Laws and Customs of the Kingdom of England* (A.J. Valpy, London 1812) book 7 Chapter 1.

¹⁰⁹ See *Regiam Majestatem* (n 74) Book 2 Chapter 20

¹¹⁰ *Leges Quatuor Burgorum* no. 45. See J Dalrymple (n 109) 99.

¹¹¹ J Baker, *An Introduction to English Legal History* (4th edn, Oxford University Press, Oxford 2007) 263.

legal right to inherit, enforceable before a court of law, during the reign of Henry II. At the same time, tenants' freedom to purchase land had also increased.

This combination of the legal interest that the heir had in inherited land and the liberalisation of the tenant's power to alienate purchased land suggests that, at this stage, the property system in England was moving away from the early system of feudal tenure based on mere possession, towards a system closer to full ownership;

At this point we may even dare to say the law has begun to recognise something like ownership in the tenant...In non-feudal language, seisin has become the bare fact of possession, as against the hereditary legal right of the owner.¹¹²

Various suggestions have been advanced for why such a transformation occurred. In one sense, the movement towards a system that resembled property ownership resulted from a change in the economic basis of society. During the lifetime of the feudal system, England has seen a shift from a society of hunters and shepherds, through an economy based on agriculture, where ownership of land took on a new importance, to the rise of commerce, where the freedom to transfer ownership in land is of crucial significance.¹¹³ As discussed above, however, this change did not eradicate pre-existing customs regarding an heir's entitlement to inherit, which were given weight in practice during Henry II's reign and later further enshrined in law, which will be discussed below.

In addition to the change in the economic situation in England, religion played a part in the rise of the freedom to alienate land. As one legal historian comments:

In the reign of William Rufus a particular matter occurred, which opened a way for alienation without the lords consent, and occasioned a prodigious revolution in the landed property of Europe. This was the madness of engaging in crusades for the recovery of the Holy Land...These pilgrims, who affirmed the cross, had no way of defraying the expense, but by the sale of their lands, which their lords, if disinclined, dared not to gainsay, or

¹¹² J Baker (n 111) 266.

¹¹³ See for example J Dalrymple (n 101) 90-93

obstruct so pious a work.¹¹⁴

Whilst the change in economic conditions resulted in the increased sale of land as the basis of commerce, the power of the church resulted in more and more gifts of land. The church seems to have used this power to great effect and is one of the main forces that resulted in the erosion of restrictions on the freedom to alienate property:

The evidence is persuasive that in some early Germanic communities no one had any power at all to give away inherited land ...After their conversion to Christianity, the church exerted strong pressure to overcome such restrictions, considering gifts for pious causes to be an imperative of religious duty.¹¹⁵

By the thirteenth century, therefore, England reached a stage where there were two competing forces at work in the development of property law. On the one hand, there was pressure based on economic considerations and from the church towards a high degree of freedom to alienate land; on the other hand, however, there is the weight of English custom, as protected by Henry II's common-law causes of action, in favour of protecting family inheritance rights. This tension is concisely summarised in the leading treatise on early English legal history:

In course of time, as wealth is amassed, there are purchasers for land; also there are bishops and priests desirous of acquiring land by gift and willing to offer spiritual benefits in return. Then the struggle begins, and law must decide whether the claims of expectant heirs can be defeated. In the past those claims have been protected not so much by law as by economic conditions. There is no need of a law to prohibit men from doing what they do not want to do; and they have not wanted to sell or give away their land.¹¹⁶

This problem was exacerbated by the erosion of the rights of the lord and his ability to prevent the transfer of land by his tenant. Once land had become inheritable, a tenant needed to overcome the additional hurdle of acquiring his heir's consent as well as that of

¹¹⁴ F Sullivan (n 104) 147.

¹¹⁵ J Dawson (n 97) 30.

¹¹⁶ F Pollock and F Maitland (n 73) 249.

his lord. However, during the course of the thirteenth century the latter requirement became less and less, through the practise of subinfeudation, until it was extinguished altogether.

As one commentator explains:

Subinfeudation involved a gift by the donor directly to the donee who, if a layman, thus became tenant of the donor...Thus the donor's right in the land was extinguished, and a lay donee would become the tenant of the donor's lord.¹¹⁷

The elimination of the requirement of obtaining the lord's consent before alienating lands put pressure on removing the final remaining hurdle to the freedom of alienation, namely the heir's consent. However, as a result of the exponential rise in land transfers, that underpinned this pressure, the law had a converse reaction and, in fact, restricted such transfers:

The propensity to alienation even in the military holdings of both nations, grew so great, that in the reign of Henry III it became requisite to restrain it by law. This restraint was contained in a clause of the *Magna Charta* and was afterwards, in the time of William the Lion transplanted into the statutes of Scotland.¹¹⁸

The English translation of the provision of Magna Carta¹¹⁹ provides that '*No Free-man shall, from henceforth, give or sell any more of his land, but so that of the residue of his lands, the Lord of the fee may have the service due to him which belongeth to the fee*'.¹²⁰

This persisted until the reign of Richard I, during which time the *Quia Emptores Terrarum* was enacted, which provides a much more extensive power of alienation:

From henceforth it shall be lawful to every Freeman to sell at his own pleasure his Lands and Tenements, or part of them; so that the Feoffee shall

¹¹⁷ J Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Clarendon Press, Oxford 1994) 174.

¹¹⁸ J Dalrymple (n 101) 99.

¹¹⁹ Cap XXXII: '*Nullus libelr homo det, de caetero, amplius alicui, quam ut de residua terrae possit sufficienter fieri domino feudi, servitium ei debitum.*'

¹²⁰ E Sandoz, *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (Liberty Fund, Indianapolis 2008) Appendix.

hold the same Lands or Tenements of the Chief Lord of the same Fee, by such Service and Customs as his Feoffor held before.¹²¹

It seems to be the case in England that, as part of the growing swing toward the freedom to alienate land, the common-law protection of the heir was thrown out with the bath water along with the consent of the lord. This is partly due to the rise in warranties, which were initially made by the lord and latterly were granted by a tenant and his heirs.¹²² Therefore, whilst the powers of the heir on the continent were becoming more extensive through the *retrait lignager*, mentioned previously, the common-law protection of the position of the heir that once existed was being neglected. The zealous enforcement of these rights by the continental French Courts¹²³ notwithstanding, the common-law courts' indifference to this can be explained with reference to the fact that until the time of death, the identity of a person's heirs cannot yet be known as various events might intercede before that point.¹²⁴ As Glanville puts it, '*Heirs are made by God not man: solus Deus fadt haeredem*'.¹²⁵ In this regard, succession is analogous to bankruptcy; just as debts crystallise upon bankruptcy, so too do inheritance rights only crystallise upon death.

Whilst the rights and powers of the heir during the lifetime of his ancestor were eliminated relatively early on, their rights upon death persisted until sometime later. The first of these was the restriction on the alienation of land by will, established by the Statutes of Mortmain and not abolished until the Statute of Wills 1540. Furthermore, the last vestige of customary legal rights that allocated a fixed share of the deceased's estate upon death to the widow and children was abolished in 1692. Until then, this practise existed in the province of York and continues to do so in Scotland.

¹²¹ 1290 C. 1, 18 Edw 1, s. I

¹²² J Baker (n 111) 300.

¹²³ J Dawson (n 97), 37

¹²⁴ J Dawson (n 97).

¹²⁵ R Glanville (n 108) book 7 Chapter 1.

The discussion so far has focussed on land because that has been the subject of most of the historical analysis and commentary. This corresponds to the relative importance of ownership of land throughout the course of history as compared with moveables or chattels. Moveables, by their very nature, are more easily and readily transferrable than land. There was also not the same dynastic interest in keeping moveables in the family as there was with land. Therefore, the same restrictions on the alienation of chattels did not seem to arise because they were not necessary. As one commentator, discussing the history of the Germanic inheritance system puts it:

The private ownership of chattels evolved earlier than that of land, because chattels were the subject of a more exclusive personal interest. Although private ownership of both chattels and land was derived from the collective ownership...it was difficult to conceive of a complete freedom of ownership of land. Thus there always persisted numerous restrictions on the ownership of land: by reason of vicinage or of lordship, in the interest of the state and in favour of other individuals or group.¹²⁶

There was not, however, complete freedom of alienation of chattels in the early Germanic customs. There still existed a form of legal rights, whereby the children and spouse of the deceased were entitled to a share of his or her estate.

Since these early customs, the restraints, in favour of family members, on the inter-vivos transfer of property has undergone a transformation. In modern-day France, for example, the *retrait lignager*, which, as discussed above, once existed as a right of pre-emption or repurchase of the sale of land has disappeared. This has been replaced by claw-back, which is confined to *inter vivos* gifts and extends to both land and moveables. Extending the family restraints on the alienation of property from land to moveables would seem to have been relatively unproblematic because the majority of land descended, under the law of succession in the same way as moveables. There was not the same tension, as was present

¹²⁶ J Dainow, 'The Early Sources of Forced Heirship; Its History in Texas and Louisiana' (1941-1942) 4 Louisiana Law Review 42, 50.

in English law (and Scotland), between the rise of primogeniture in land and, as discussed below, the customary tripartite division of moveables. As one commentator puts it:

From a very early time there was a great distinction between the French and the Scots law as to succession to heritage, a distinction which has had enormous effect upon the history of the two countries. In Scotland the two cardinal rules of feudal succession - viz. (1), preference for males; and (2), primogeniture, - applied from the first to all heritage. So it did in Normandy (Brissaud, p. 715, note 2) and England. But in far the greater part of France this was otherwise. It was only lands held upon a certain feudal tenure - *terres nobles* - which went to the eldest son. Other lands - *terres roturieres* - did not descend "noblement." They were divided like moveables.¹²⁷

¹²⁷ F Walton, 'The Relationship of the Law of France to the Law of Scotland', (1902) 14 Juridical Review 17, 30.

2.3.4 Legal Rights and Claw-back in Scotland

The concept of *legitime* (or legal rights) in France seems to have its origins in Roman law.¹²⁸ It is viewed as a right of succession, whereby forced heirs are entitled to a compulsory portion of the deceased's estate. This is seen as a mechanism to avoid the possibility of heirs being disinherited. Legitim does not, however, prevent the deceased giving away property during his or her lifetime. In order to take into account this possibility, there exists the power of claw-back in French law, through which a forced heir can raise an action to recover an *inter vivos* gift after the deceased's death in order to satisfy his or her compulsory portion. Given how seriously French law treats the family unit, legal rights and claw-back are seen as inextricably linked as a means of preventing forced heirs from being disinherited, despite the fact that claw-back did not exist in classical Roman law. Therefore, it is interesting that, although the concept of legal rights exists in Scotland, we have no power equivalent to claw-back. The reasons for this lie in the historical evolution of these concepts in Scotland.

It is difficult to determine the precise origin of legal rights in Scotland due to limited historical sources. As a result there are several competing theories as to their possible origin. Any attempt to evaluate these competing theories would require an in-depth analysis of primary historical documents, which, due to time and word constraints, is beyond the scope of this thesis. However, it is possible, on the basis of a critical survey of pre-existing historical analysis, to identify the likely origins of legal rights in Scotland and assess the relevance of this for any discussion about the lack of claw-back in Scots law.

The first theory to rule out is that the concept of legal rights might be indigenous to Scotland. As one writer notes:

¹²⁸J Gardner (n 63) 12.

There does not appear to be any evidence in the early Celtic laws (which seem at one time to have been prevalent in most of Scotland) of a widow and children having any claims on a deceased's estate which would act as restraints on his freedom of testing.¹²⁹

This seems quite plausible considering that the predominant, although not the only, law relating to succession that applied in Celtic Scotland (i.e. the law of Tanistry) 'did not recognise [the widow and children] as successors'.¹³⁰ The Celtic laws in Scotland probably persisted until the mid-tenth century.¹³¹ After which, there began to be a distinct Anglo-Saxon, and subsequent Norman, influence on the law of Scotland.

Despite this, the existence of legal rights in Scotland is clearly evidenced in the early fourteenth century:

When any man in time of sickness wishes to make his will, if he is solvent all his moveables fall to be divided into three equal parts, of which one goes to his heir, one to his wife, and one is reserved to be disposed of by the testator as he pleases.¹³²

This predates the main thrust of the reception of Roman law in Scotland, which influenced such seventeenth century writers as Stair.¹³³ Therefore, whilst such a rule as legal rights may seem to be derived from Roman law as contained in the *Corpus Juris Civilis* and brought to Scotland during the Reformation, it seems more likely that it existed from a much earlier stage and is derived from the canon law or Anglo-Norman law.

Given that legal rights do not seem to be indigenous to Scotland but were in existence before Roman law came to have a profound influence on Scots law it seems likely that these rights were imported from England. As discussed above, legal rights existed at one time in England and persisted in some regions even beyond their abolition in the rest of the

¹²⁹ J Gardner (n 63) 20.

¹³⁰ J Gardner (n 63) 20.

¹³¹ O Robinson (n 84) 155

¹³² *Regiam Majestatem* (n 74) Chapter 37.

¹³³ W Gordon, 'Roman Law in Scotland' in R Evans-Jones (Ed), *Civil Law Tradition in Scotland* (The Stair Society, Edinburgh 1995) 28.

country. The same commentator who discounts legal rights as indigenous to Scotland also argues that they are foreign to pre-Anglo-Saxon England:

It may...be assumed with comparative safety that [this doctrine of reasonable parts] was not in existence in England before the Anglo-Saxon conquest. It was therefore not indigenous to England any more than it was to Scotland, and on that account must have been adopted from some foreign source.¹³⁴

It is questionable, however, whether these rights were imported during the Anglo-Saxon invasion or the Norman Conquest and there are conflicting opinions on the matter. One commentator strongly supports the suggestion that the tripartite division of succession existed in Anglo-Saxon Scotland long before the Norman invasion, as ‘it existed widely in other Germanic races.’¹³⁵ He bases this argument on the division being present in the law of the four burghs, which he contends evidences the Anglo-Saxon law that prevailed all over Scotland prior to its coming into existence in the thirteenth century.¹³⁶ He supports his argument with reference to anecdotal evidence attributed to Bede writing at the end of the eighth century.¹³⁷ This lack of definitive facts to prove an Anglo-Saxon origin of this tripartite division has been criticised.¹³⁸ Therefore, it is difficult to be dogmatic about this given how difficult it is to find conclusive evidence on the matter. However, the strength of the argument is such as to mean that an Anglo-Saxon origin of legal rights in Scotland is at least possible.

A competing argument advanced by another commentator suggests that legal rights were in fact introduced into England by the Norman Conquest:

¹³⁴ J Gardner (n 63) 35.

¹³⁵ D Wilson, ‘Historical Development of Scots Law’ (1896) 8 *Juridical Review* 217, 231.

¹³⁶ D Wilson (n 135). 226.

¹³⁷ D Wilson (n 135) 231.

¹³⁸ W Holdsworth, *A History of English Law* (3rd edn Methuen & Co., London 1922) Volume II, 82.

We have not the materials for determining with certainty the date and manner of the introduction of these rules into Scotland. Probably they were brought to us not very long after the Norman Conquest.¹³⁹

In support of this contention he cites the similarity of Scottish legal rights and those that existed in France. This view is strengthened by another commentator's strong denunciation of the Anglo-Saxon origin theory of legal rights and endorsement of a Normandian origin theory:

The Professor of Dutch Civil Law and Private International Law at Leyden University, Professor E.M.Meyers (who has kindly given the writer permission to quote his views on this subject) is emphatically of the opinion that the scheme of tripartite division of a deceased's estate is not a custom of Germanic origin...This theory of a Normandian origin is emphatically contended by Professor Meyers.¹⁴⁰

Regardless of whether legal rights were introduced by the Anglo-Saxon or Norman invasions, it seems that the various commentators agree that this concept was neither indigenous to England and Scotland nor introduced during the late-medieval reception of Roman law in Scotland. This is supported by one commentator's response to the Roman origin theory:

It seems to be much more probable that the doctrine of legitim was introduced into Scotland from the law of England. For it is a fact that, by the old customary law of England (whether derived from the Normans about the time of the Conquest or handed down from Saxon times is doubtful), a testator, who was survived by wife and children, had his powers of bequest restricted to one-third of his personalty. His widow had a right to one-third of the estate, and the children to another third - such share being called in each case the *rationabilis pars*. So the law is stated in Glanville, and so it existed in the time of Littleton...From Glanville this rule of *rationabilis pars* was copied into the *Regiam Majestatem*...Accordingly, you see, the Scottish doctrine on the subject was virtually the same as that of England down to the time of the Reformation.¹⁴¹

¹³⁹ F Walton, (n 127) 21.

¹⁴⁰ J Gardner (n 63) 41-42.

¹⁴¹ H Goudy, An Inaugural Lecture on Roman Law North and South of the Tweed (H Frowde, London 1894) 31.

Therefore, on the balance of the evidence and analysis available, it seems quite probable that legal rights came to exist in England either at the time of the Anglo-Saxons or shortly after the Norman invasion. If this statement can be accepted, then it seems a plausible next step to contend, as has been suggested, that ‘if this rule did not find its way into Southern Scotland by means of the English sympathies of the sons of Malcolm Canmore...it must almost certainly have crept in not later than the time of David I and very possibly during his reign.’¹⁴²

Having discussed the origin of legal rights in Scotland (and England), it now seems appropriate to discuss in more detail why such rights were extinguished in England but persist to this day in Scotland. Such a discussion will feed into an analysis of why legal rights exist in Scotland but not claw-back. The reason for such divergence, as will be explained below, seems to rest on the differences in succession law that existed between Normandy and the rest of France, and the rise of primogeniture in medieval England.

As discussed above,¹⁴³ Glanvill wrote about a time in England where legal rights existed. The *Regiam Majestatem* confirms this also to be the case in Scotland. However, by the time Bracton was writing, these legal rights had disappeared from the law of England but not that of Scotland. The reason these rights came to be extinguished in England seems to be the rise of primogeniture. This principle existed in Normandy but was not so extensive in the rest of France. In fact, land in the rest of France was divided under succession law in a similar way to moveables.¹⁴⁴ This was largely due to the number of smaller holdings rather than large estates. The same cannot be said of Scotland, however, where primogeniture did take hold.

¹⁴² J Gardner (n 63) 45.

¹⁴³ See text at n 108 and n 125

¹⁴⁴ F Walton (n 127) 30.

Legal rights date back to customs that seek to ensure partible inheritance among all heirs. The main aim of primogeniture, however, was that land should pass undivided to the heir who is most likely going to be able to manage it, namely the oldest son. The reason these rights were not extinguished in Scotland seems to be that the spread of feudalism from England into Scotland was very gradual. Therefore, primogeniture did not come to be the rule in Scotland until much later. By this time, the reception of Roman law was underway in Scotland, which may have entrenched legal rights because they corresponded to the Roman law's legitime. There was no such countervailing influence in England.

This, however, does not explain why legal rights managed to survive in Scotland but there is little trace of claw-back, which is seen as inextricably linked to legal rights on the continent. The reason for this is two-fold. Firstly, the nature of land holding had begun to change in Scotland (and England) from traditional folk land, with all its family restraints on alienation, to book land, which was more freely alienable. As one distinguished nineteenth century historian explains:

The folkland is...land held under the old restrictive common law, the law which keeps land in families, as contrasted with land which is held under a book...modelled on Roman precedents...making for free alienation and individualism.¹⁴⁵

In addition to this, the rise of primogeniture meant that it was incongruous to continue to require the heir's consent to transfer land because this rule was designed to protect a system of partible inheritance where all the heirs shared equally. Furthermore, it seems clear that whilst England and Scotland were moving toward freedom of alienation, the drafters of various continental civil codes enshrined the principle of claw-back in their reform of the law.

¹⁴⁵ P Vinogradoff, 'Folkland' (1893) 8 (29) *English Historical Review* 1, 11.

Overall, therefore, the existence of legal rights in Scotland but not England seems to have resulted from a combination of the slow spread of feudalism and primogeniture to Scotland and the reception of Roman law in that country. Furthermore, the absence of claw-back in Scotland but not on the continent has to do with the divergent routes the evolution of feudalism and land ownership took in these countries with the rise of primogeniture in Scotland and the drafting of continental civil codes as decisive turning points in this evolution.

2.3.5 Modern-day implications

The foregoing analysis has attempted to illustrate the modern-day differences between France and England as regards legal rights and claw-back in terms of their historical evolution in both systems. It now seems appropriate to discuss the reasons why such divergences occurred and continue to exist to the present day. As regards legal share, it would appear to be a combination of the origin of these rules and the political pressures of the day that has resulted in the divergent approaches in both jurisdictions. On the one hand, customary protection in continental Europe was reinforced by the reception of Roman law, which provided similar protection and this was solidified by the enthusiastic enforcement of the codified, written law by the continental European courts. The countervailing situation that existed in England was one where unwritten customary law gave way to the economic pressure resulting from the rise of commerce and pressure from the church to loosen restrictions on both *inter vivos* and *mortis causa* transfers of property.

The divergence regarding claw-back is more complex. Although some sort of right of repurchase existed initially in both France and England, it became far more extensive in the former than it did in the latter. This cannot be attributed to Roman law, which did not recognise a right of claw-back:

Roman law from an early time had adopted the premise that the power of fully capable persons to dispose of their assets by will should be essentially unlimited. So the problems of finding redress for the disinherited were approached in an extremely roundabout way...*légitime* [was included] in the revised text of the Custom of Paris, which was promulgated in 1580. It was somewhat more than a century later, in 1688, that in the Custom of Paris the protection of the heir's "legitimate part" was definitively extended beyond wills to *inter vivos* gifts.¹⁴⁶

This could have numerous explanations. Some attribute it to a quirk of fate or accident

¹⁴⁶ J Dawson (n 97) 39 – 41.

which merely reflects what common-law lawyers and continental lawyers happened to care about.¹⁴⁷ In the present writer's submission, the divergence over both legal rights and claw-back partly results from the difference of opinion, between the English common-law and continental European legal systems, over the conception of the family as a unit, as discussed above.

Overall, some of the differences of opinion on this issue that exist today 'result from decisions made in the distant past and some reflect value judgments that are beyond the reach of argument.'¹⁴⁸ This is understandable because inheritance law is an area which reasonable people disagree over and which involves adopting compromise solutions in order to address a range of competing interests:

... the law had to resolve the conflict between the interests of the living family in an extended sense and the dynastic instinct to preserve the unity of the patrimony in the male line. There was a similar tension between the social desirability of ensuring that land remained freely marketable and the paternalistic concern to restrain the rash prodigality of youthful heirs. The law therefore had to hold a balance between the living, the dead and the unborn.¹⁴⁹

Through the foregoing historical analysis, however, this section has attempted to illustrate that the historical origins of these systems are not so far apart and that, in practise, these systems have not always been so different. Even nowadays, there exists more commonality than is widely believed. Even in the English common-law where freedom of alienation and testation are guiding principles, there is a limited, discretionary form of claw-back vested in the courts.¹⁵⁰

¹⁴⁷ F Pollock and F Maitland (n 73) 355.

¹⁴⁸ F Pollock and F Maitland (n 73).

¹⁴⁹ J Baker (n 111) 307

¹⁵⁰ Inheritance (provision for family and dependants) Act 1975.

2.3 A Possible Way Forward?

The foregoing analysis suggests that both the civil law countries of continental Europe and England's common-law, which came into existence after the Norman invasion, had a similar point of departure on concepts such as the family unit and restrictions on the alienation of property. Despite this, these two systems took divergent paths, with the civil law fragmenting even further as evidenced by modern-day differences relating to claw-back. In common-law England, freedom of alienation grew to the detriment of family rights in property; on the continent, the reverse was true. This was partly due to differences in the patterns of land ownership, partly due to the rise of the common law and partly a mere quirk of fate.¹⁵¹

Scotland's mixed legal system lies somewhere between the common law's freedom of alienation and the civil-law's protection of family members. Having been influenced by the common law, Scotland lost any family restraints on the *inter vivos* transfer of property that may have existed, as was also the case in England. However, the reception of Roman law in Scotland coupled with the slow progression of feudalism ensured that legal rights did not die out as they had done in England.

The system that exists in Scotland was recently reviewed by the Scottish Law Commission, which recommended that the legal rights of spouses should remain intact¹⁵² but should apply not only to moveables but to the entirety of the deceased's estate.¹⁵³ The commission proposed two options for the legal rights of children. These options were either that fixed legal shares for children should remain or that fixed legal shares for adult children should be abolished but that dependent children should be able to claim a capital sum.¹⁵⁴

¹⁵¹ See above at n 147.

¹⁵² Scottish Law Commission, *Report on Succession* (Scot Law Com No 215, 2009) , Recommendation 14.

¹⁵³ Scottish Law Commission (n 152) Recommendation 15.

¹⁵⁴ Scottish Law Commission (n 152) Recommendations 20 and 27.

Ultimately, the Scottish Parliament would have to decide between these two if they came to legislate on the matter. The Commission also considered the desirability of introducing claw-back into Scotland to protect those entitled to legal rights from disinheritance.¹⁵⁵ According to the report, ‘there was almost unanimous opposition to this idea’ and therefore the Commission decided to make no recommendation.¹⁵⁶ There have been similar reform initiatives in other countries regarding claw-back. In France, for example, since 2006 the scope of claw-back has been limited so that it only applies to gifts made within 10 years of death rather than 30 and it no longer requires that the actual gift is restored merely its value.¹⁵⁷ Recent reforms in Germany have meant that the value of a gift that is to be restored reduces proportionately with the amount of time that has passed since the gift was made.¹⁵⁸ It seems that a more limited form of claw-back in these countries, along the lines of the Dutch model, may be more desirable. However, any discussion of domestic law reform is beyond the scope of this thesis.

Nevertheless, it is difficult to see how a compromise solution that would be acceptable to all Member States could be achieved especially in a private international law instrument. Any attempt to limit the scope of claw-back in the Succession Regulation would involve the harmonisation of substantive law, which is beyond the competence of the EU. As one commentator notes:

A provision stipulating a maximum period for claw-back claims is very unlikely to be permitted, and would be difficult to justify, since it would stray beyond the confines of private international law into uniform substantive law.¹⁵⁹

¹⁵⁵ Scottish Law Commission, *Discussion Paper on Succession* (Discussion Paper No 136, 2007) [4.5].

¹⁵⁶ Scottish Law Commission (n 155) [1.20].

¹⁵⁷ R Paisley (n 9) 37.

¹⁵⁸ W Pintens and S Seyns, ‘Compulsory Portion and Solidarity Between Generations in German Law’ in C Castelein, R Foqué and A Verbeke (eds.), *Imperative Inheritance Law in a Late Modern Society* (Intersentia, European Family Law Series, Oxford 2009) 187.

¹⁵⁹ J Harris, ‘The Proposed EU Regulation on Succession and Wills’, *Trust Law International* 2008, 181 – 235, 199.

For that, domestic reform would be required. However, that is a politically infeasible and unlikely prospect.

From the UK's perspective, the most desirable solution would be simply to exclude claw-back from the scope of the applicable law for those Member States that do not recognise such a concept (namely the UK, Ireland and Cyprus). This solution would be similar to that adopted in the Maintenance Regulation, which excluded the entirety of maintenance from the scope of the applicable law for the UK and Denmark which are not party to the Hague Protocol on Applicable Law, because the UK does not apply foreign law to maintenance obligations. In a similar vein, whilst the UK does apply foreign law to succession, it does not apply it to the effect of a person's death on their *inter-vivos* transfers because it views this as falling outside the scope of succession.

Whether this compromise would be a viable option, however, remains to be seen. Civil-law Member States may feel that their forced heirship provisions could easily be avoided if there are no restrictions on gratuitous lifetime transfers when dealing with property in the UK. However, as discussed above, such restrictions were not seen as a necessary corollary of forced heirship provisions in Roman law from which legal rights are derived. This is in line with the Roman maxim that no person is the heir of a living person.¹⁶⁰ Furthermore, in insisting that claw-back is excluded from the applicable law, the UK are representing the interests of major UK-based charities, who are major recipients of lifetime and *mortis causa* gifts and who strongly oppose the inclusion of claw-back within the Succession Regulation.¹⁶¹

¹⁶⁰ See above at n 125.

¹⁶¹ Institute of Fundraising, 'EU Threat to Charities – Respond Now!' <<http://www.institute-of-fundraising.org.uk/pressnews/topstories/EUThreattoCharities>> accessed September 2010; Charities Aid Foundation, 'Response to Ministry of Justice consultation on European Commission proposal on succession and wills' <http://www.cafonline.org/pdf/CAF_%20MoJ_succession%20and%20wills.pdf> accessed September 2010.

Civil-law Member States may be unwilling to make such a blanket exception solely for the UK, Ireland and Cyprus's benefit. However, they may be more amenable to a rule, such as that which the Max Planck Institute has suggested, which could benefit a number of Member States. This would insert article 19a(1) in the following terms:

The restitution of a lifetime gift from a donee can be claimed under the law applicable to the succession according to this Regulation only to the extent that restitution could also be claimed under the law which would have governed the succession of the donor at the time the gift was made by virtue of this Regulation.¹⁶²

This putative applicable law approach is more suited to a private international law instrument than including substantive limits to the reach of domestic claw-back provisions in the Regulation, as discussed above, because a similar effect is achieved through private international law, rather than substantive, means. This rule would operate by way of exception to the general rule contained in article 16, which provides that:

Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be that of the State in which the deceased had their habitual residence at the time of their death.¹⁶³

Therefore, the law of the state of the deceased's habitual residence at the time of death would apply to the restitution of *inter vivos* gifts, unless the law of the state of the deceased's habitual residence at the time of making the gift provided for a less extensive form of claw-back. In such a case, the latter law would apply. This approach would protect the donee's legitimate expectations at the time of receiving the gift, which the Max Planck institute contends 'should not rank behind those of persons entitled to mandatory

¹⁶² Max Planck Institute for Comparative and International Private Law, 'Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession' 84 <http://www.mpipriv.de/shared/data/pdf/mpi_comments_succession_proposal.pdf> accessed September 2010; (2010) 74 *Rechts Zeitschrift für ausländisches und internationales Privatrecht* 522.

¹⁶³ Commission of the European Communities, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession COM(2009) 154 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0154:FIN:EN:PDF>> accessed February 2010.

succession rights'.¹⁶⁴ This is expanded on by one of the coordinators of the working group on international succession law within the Max Planck Institute:

On the choice-of-law level the uncertainties are further increased by the fact that the donee cannot even be assured which law will finally apply to the succession of the donor as the donor, after having made the gift, can change his habitual residence or choose a different law.¹⁶⁵

This approach is not quite as UK-friendly as excluding claw-back from the scope of the applicable law altogether, as discussed above. That regime would essentially be no different from the current situation. Civil-law Member States would continue to consider claw-back as part of succession and would therefore apply foreign law to the restitution of *inter vivos* gifts and the UK would apply the *lex fori* to such gifts and therefore not recognise claw-back claims. This would put the recipients of gifts, including charities, in the United Kingdom in a privileged position as compared with forced heirs because regardless of where the deceased was habitually resident at the time of making the gift or at death, claw-back claims from his heirs will not be recognised by UK courts.

This can be contrasted with the other extreme, which is the regime created by the Regulation. This would allow all claw-back claims that are permitted under the habitual residence of the deceased at death regardless of the legitimate expectations of the recipients of gifts. Both situations create unfairness. The current regime could facilitate the disinheritance of forced heirs through investing in English trust funds, for example.¹⁶⁶ Whereas the regime that the Regulation would create would frustrate the legitimate expectations of the recipients of gifts, which were unimpeachable at the time of receipt, but, due to a subsequent change in the donor's habitual residence, subsequently become subject to claw-back.

¹⁶⁴ Max Planck Institute (n 162) 87.

¹⁶⁵ A Dutta, (n 1) 583.

¹⁶⁶ J Harris (n 159) 199.

The solution proposed by the Max Planck Institute would seemingly strike a middle ground because it would protect the interests of the recipients of gifts, who had no reason to suspect that gifts could be subject to claw-back, from a subsequent change in the deceased's habitual residence. In addition to this, it would also protect heirs from being disinherited by simply setting up an English trust fund. As one commentator puts it:

Another possibility might be to refer to the law of habitual residence of the deceased at the time that he made the *inter vivos* disposition. If, by that law, the transaction was unimpeachable, then the *lex successionis* should not be permitted to 'trump' the *inter vivos* transaction by allowing any form of clawback. This should ensure in most cases parties are unable to avoid forced heirship rules of their 'home' state by simply alienating their property or investing in England.¹⁶⁷

This compromise solution is not entirely unproblematic. A person could still temporarily acquire an English habitual residence for the purpose of creating an English trust fund and subsequently reacquire their original habitual residence. However, this would be a considerable amount of effort to go to simply to disinherit one's heirs. In addition to this, it would mean that the recipients of gifts would have to inquire into the habitual residence of the donor. This would not be especially difficult for larger charities or trust fund managers who keep thorough records and it is gifts made to these organisations, rather than smaller charities and individuals who do not keep such thorough records, that are likely to be challenged.

Therefore, on balance, the Max Planck Institute's solution may be the best way forward. It broadly achieves the ends desired by the UK within the confines of a private international law instrument, without overriding the concerns of civil-law Member States. Moreover, it is beneficial to those civil-law Member States that provide a less extensive form of claw-back than others do because it allows them to preserve their own system of claw-back.

¹⁶⁷ J Harris (n 159).

2.5 Conclusions

Claw-back is an issue that has a long history and is deeply rooted in a society's culture in a similar way to legal rights. Therefore, it evokes a strong emotional response either in support of or in opposition to it. Legal rights seem to cause the same diametrically opposing opinions depending on whether you support adult offspring's intrinsic right to inherit or whether you feel that a person should have the freedom to alienate his or her property. Even those who do not support legal rights can, however, accept and recognise them because, although it is not a value judgment they would make, they can see that it is reasonable to consider that a person's right to dispose of his or her property does not have to outweigh his families need to be provided for. Claw-back, however, involves a more delicate balancing of interests.

Whilst claw-back would enhance forced heirs' protection from disinheritance, for those who value the security of property transfers more highly, this comes at too great a price to protect a value they do not feel needs protecting in the first place. What is more, a historical analysis of the evolution of legal rights and claw-back suggests that these two concepts have not always been linked. Roman law valued the protection of family members from disinheritance but they also valued commerce and the sanctity of property transactions. Therefore, a compromise that seemed to work for them was to have legal rights but not to subject lifetime property transfers to future actions for reduction. This is a system that Scots law, as a mixed legal system, has adopted and one that seems to be a middle ground between the common-law's freedom of alienation and the civil-law's attempt to protect family members comprehensively from disinheritance.

In any event, there does not appear to be a consensus as to whether claw-back forms part of the law of succession. The reason that claw-back forms part of the law of succession for much of continental Europe is due to the way in which customary Germanic and French

law combined with Roman law. Whilst similar powers existed in England in the past, these powers have since died out and it is questionable whether they ever formed part of the law of succession or merely constituted a separate claim.

Given how deeply claw-back seems to be rooted in a given society's culture and the lack of basic agreement as to whether it constitutes part of the law of succession perhaps excluding it from the scope of the Regulation would be the most sensible solution. However, this is likely to meet with considerable opposition from a number of Member States. Therefore, the solution that may emerge is that of the putative applicable law suggested by the Max Planck institute. This, however, is dependent on the measure being proposed and accepted, which is far from a certainty. Perhaps a greater awareness of the historical evolution of claw-back would lead to greater flexibility resulting in an increased openness to compromise solutions.

3. Connecting Factor

3.1 Introduction

The issue of the appropriate connecting factor is one that affects two of the traditional considerations in private international law, applicable law and jurisdiction, and evidences a gulf between the common-law and civil-law approach. The question that the Commission's Green Paper posed in relation to both applicable law and jurisdiction was whether a single connecting factor should apply to the whole of succession and if so what that connecting factor should be.¹ The UK Government's response to this is rather equivocal. They highlight the advantages and disadvantages of the various possible connecting factors but conclude by saying 'there is no immediate obvious answer to the question of what connecting factor should be applied under a harmonised choice of law rule, if such a rule is to be created'.²

The UK Government seem to demonstrate a preference for the concept of domicile by explaining how the concept currently operates in the UK. As they were undoubtedly aware, however, given the drawbacks of domicile, as it is currently used in the UK, and its lack of use in continental Europe, it was unlikely to appear as a connecting factor in the Regulation. In a similar fashion, the French Government, in their response to the Commission's Green Paper show a preference for the concept of Nationality.³ However, they also adopt a realistic view of their preferred connecting factor, concluding that its disadvantages outweigh its benefits in the international context. Both the UK and French Governments seem resigned to the fact that some form of habitual residence would be the

¹ European Commission, Green Paper on Succession and Wills COM(2005) 65 final, questions 1 and 14 <http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0065en01.pdf> accessed February 2010.

² Response of the Government of the United Kingdom to the European Commission Green Paper on Succession and Wills, Appendix B, 5 <http://ec.europa.eu/justice_home/news/consulting_public/successions/contributions/contribution_uk_appb_en.pdf> accessed February 2010

³ Note de la delegation Francaise, 2 <http://ec.europa.eu/justice_home/news/consulting_public/successions/contributions/contribution_france_fr.pdf> accessed February 2010.

most likely connecting factor. However, from the UK's point of view, recognition of the limits of that concept would be necessary.

Unlike the UK Government's response, which attempts to discuss all possible connecting factors objectively, the French Government fails even to consider the possibility of domicile as a connecting factor. This is no doubt due to the fact that, because of political considerations, domicile as a connecting factor would be unpalatable in many continental European Member States and as such is highly unlikely to appear in the regulation. In the present writer's submission, the civilian systems' intransigent opposition to domicile as a connecting factor and the English common law's advocacy of this concept is ironic given its historical evolution.

A number of EU Member States use nationality as their main connecting factor both for choice-of-law and jurisdictional purposes. This stands in contrast to the position in the middle ages where domicile, derived from Roman law, was the main connecting factor. As one commentator puts it:

From the Middle Ages down to the commencement of the modern movement for attaching importance in private law to nationality, domicile was the chief criterion of territorial law and jurisdiction on the Continent.⁴

This section will explore the reasons for the abandonment of domicile in favour of nationality, in France in particular, which had a knock-on effect in much of continental Europe. The conversion from domicile to nationality was not, however, a comprehensive one, at least in France, which left some areas, such as succession, to be determined by domicile. Therefore, this chapter will go on to discuss the persistence of domicile as a connecting factor in specific areas, alongside nationality, and its subsequent revival as a general connecting factor in certain Member States.

⁴ G Lloyd Jacob, 'Nationality and Domicile; with Special Reference to Early Notions on the Subject' (1924) 10 *Transactions of the Grotius Society* 89-114, 105.

Nowadays, habitual residence is the main connecting factor used in transnational initiatives such as Hague Conventions and EU Regulations and it has even taken hold in some national legal systems, the private international law rules of which have recently been reformed.⁵ This chapter will discuss the rise of habitual residence, in both transnational initiatives and domestic private international law, and situate this in relation to developments relating to domicile and nationality. Some Member States have even gone so far as to adopt habitual residence as the main connecting factor for succession in their domestic private international law rules. Through a discussion of the definitions of these concepts, the chapter will attempt to illustrate that, the factual-based, habitual residence can be understood as a revival of the traditional concept of domicile rather than the more legalistic English law doctrine. Despite this, however, the way that habitual residence has evolved in Europe is such that this ill-defined concept has strayed from its legal roots and has lost many of the advantages of domicile. The aim of the following discussion is to illustrate that the current dogmatic adherence to the relatively modern concept of an ill-defined habitual residence in Europe represents the abandonment of a legal concept, which has strong roots in the civil law and is still relevant today. On this basis, a well-delineated version of habitual residence would seem desirable rather than the loosely-defined version of habitual residence that appears in the Regulation. The following section will go on to discuss in some detail the reception of the civilian concept of domicile into the English common law.

⁵ Such as Belgium. See text at n 136.

3.2 Reception of Domicile into English and Scots Law

According to the leading writers of private international law in England⁶ and Scotland,⁷ the law of the domicile applies to succession in both English and Scots law. As authority for the former, the following cases are cited: *Pipon v. Pipon*;⁸ *Thorne v. Watkins*;⁹ *Bruce v. Bruce*;¹⁰ *Balfour v. Scott*;¹¹ *Somerville v. Somerville*.¹² The cases that are cited as authority for Scots law are: *Brown v. Brown*;¹³ *Bruce v. Bruce*;¹⁴ *Hog v. Lashley*;¹⁵ and *Balfour v. Scott*.¹⁶ It is noteworthy that some of these cases are authority for both Scots and English law and have citations that refer to both Scottish and English case reports. This suggests that Scottish and English case law has had a mutual influence in shaping each of these legal systems as regards the appropriate connecting factor in private international law of succession. The following section will explore this interaction in an attempt to explain the process through which the civilian concept of domicile came to be used in common-law England and Scotland's mixed jurisdiction.

The origin of the use of domicile as a connecting factor in English succession law goes right back to the very development of private international law in England. At the time Joseph Story wrote his comparative work on conflict of laws in 1834, private international law was a subject that had 'never been systematically treated by writers on the common law of England; and, indeed, seems to be of very modern growth in that kingdom.'¹⁷

⁶ Dicey, Morris and Collins, *Conflict of Laws* (14th edn, Thomson Reuters, London 2008) 1236..

⁷ Anton, *Private International Law: A Treatise from the Standpoint of Scots Law* (2nd edn, Green, Edinburgh 1990) 677-8.

⁸ (1744) 27 E.R. 507; Amb. 26.

⁹ (1750) 28 E.R. 24; 2 Ves.Sen. 35.

¹⁰ (1790) 2 E.R. 1271; 6 Bro. P.C. 566.

¹¹ (1793) 2 E.R. 1259; 6 Bro. P.C. 550.

¹² (1801) 31 E.R. 839.

¹³ (1744) Mor. 4604.

¹⁴ (1790) 3 Paton 163; 2 Bos. & Pul. 229n; 6 Bro P.C. 566.

¹⁵ (1792) 3 Paton 247; 6 Bro. P.C. 577.

¹⁶ (1787) Mor. 4616; (1793) 3 Paton 300; .

¹⁷ J Story, *Commentaries on the Conflict of Laws* (1st ed. Hilliard, Gray and Co, Boston 1834) 13.

Therefore the concept of domicile was not native to English law but rather derived from Roman law¹⁸ as expounded by the medieval and early modern continental jurists¹⁹:

The word domicile is not found in Viner's Abridgment, Bacon's Abridgment, Comyn's Digest, or in any of the law books from Bracton down to Blackstone, so that it must be comparatively new to the English law. It was in fact borrowed from the continental usage and after it had there become the determining factor in questions of law. When we borrowed the notion of personal law, we found that domicile was established as its criterion.²⁰

Despite this, by the time of Lord Campbell's dicta in an 1845 House of Lords case, the concept of domicile was firmly a part of English law:

[T]he doctrine of domicile has sprung up in this country very recently, and...neither the Legislature nor the Judges, until within a few years thought much of it; but it is a very convenient doctrine, it is now well understood...²¹

The origin of the recognition of foreign laws in English courts dates back to the fourteenth century and the early days of the High Court of Admiralty in matters relating to mercantile contracts.²² However, apart from in the mercantile courts, the rules designating the applicable foreign law 'were almost unknown in the English [common-law] courts, prior to the time of Lord Hardwicke and Lord Mansfield.'²³ This is supported by comments to that effect in Scottish case law.²⁴

Both of these eminent judges played a decisive role in the development of private international law in England. Despite the fact that the influence of continental jurists on

¹⁸ Codex, L. X. tit. xxxix., s. 7. See also G Lloyd Jacob (n 4) 94.

¹⁹ See for example E Cathcart (tr), F von Savigny, *The History of Roman Law During the Middle Ages*, Volume 1 (A. Black, Edinburgh 1829) 99 – 104.

²⁰ G Lloyd Jacob (n 4) 104.

²¹ *Thomson v Advocate-General* (1845) 12 Clark & Finnelly (House of Lords) 2, 28; 8 E. R. 1294, 1305.

²² D Llewelyn Davies, 'The Influence of Huber's *De Conflictu Legum* on English Private International Law', (1937) *British Yearbook of International Law* 49, 51.

²³ O Holmes (ed), J Kent, *Commentaries on American Law*, Volume 2 (12th ed, Little Brown, Boston 1873) 455.

²⁴ *Cochran v. Earl of Buchan* (1698) M. 4544; *Goddart v. Swynnton* (1713) M. 4533, 4534.

English law has been attributed to Story,²⁵ it seems to be the case that these learned judges were aware of the continental writings and considered them as persuasive in deciding cases that came before them. In the 1760 case of *Robinson v Bland*,²⁶ for example, Lord Mansfield cited Huber and Voet in order to resolve the question of which law governs the recovery of a gambling debt incurred in Paris:

The parties had a view to the laws of England. The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed. Huberi Praelectiones, Lib. 1 tit. 3, pa. 34 is clear and distinct..Voet speaks to the same effect.²⁷

The significance of Lord Mansfield's reference to the works of continental jurists is not diminished by the fact that the law of France and England were deemed to be the same on this point and therefore the determination of the applicable law was not necessary.

There is a footnote in the case report, where the editor refers to Lord Hardwicke's judgment in the 1744 case of *Pipon v. Pipon* as authority for the proposition that 'A man's personal estate, is distributable according to the laws of that country, where he dwells.' As discussed below,²⁸ the reasoning that prompted Lord Hardwicke to reach this conclusion is not clear and there is no reference to foreign jurists in the case report of *Pipon*. Therefore, it is difficult to know whether Lord Hardwicke would have been aware of the writings of continental jurists and have been influenced by them even though he did not explicitly refer to them. On the one hand, given Lord Mansfield's knowledge of continental jurists, it may seem reasonably likely that Lord Hardwicke's knowledge of their writings lead him to apply the law of the domicile. On the other hand, however, Lord Mansfield's familiarity with continental legal writings may have resulted from his practice in Scottish appeals

²⁵ J Beale, *A Treatise on the Conflict of Laws*, Volume 3 (Baker, New York 1935), 1904; See also A Anton, 'The Introduction into English Practice of Continental Theories as to the Conflict of Laws' (1956) 5 ICLQ 534, 534.

²⁶ (1760) 97 E.R. 717; 2 Burr 1077.

²⁷ *Robinson v. Bland* (1760) 97 E.R. 717, 719.

²⁸ See text at n 38.

before the House of Lords and his familiarity with Scots law.²⁹ Therefore, this awareness of continental doctrine may not have been shared by Lord Hardwicke and other judges:

It is evident that the English judges were not at this time familiar with these discussions, for Dennison J. declared that this case and the law upon it were quite new to him, and that he could form no opinion upon it.³⁰

Occasional references to continental jurists from the bench notwithstanding, it seems that it was far from common in the English courts to consider these writings as any kind of authority:

I am not aware that the works of these eminent jurists have been cited at the English bar; and I should draw the conclusion that they are in a great measure, if not altogether, unknown to the studies of Westminster Hall.³¹

This stands in contrast to the position in Scotland, where courts demonstrated a willingness early on to hear arguments based on the citation of continental jurists.³²

This contrast between the approaches of the Scottish and English courts can be seen in the early cases in each jurisdiction, which decided that the law of the domicile governs succession to moveable property. As mentioned above, the relevant English case is that of *Pipon v. Pipon*³³ in 1744 and the earliest Scottish case on the matter seems to be the contemporaneous case of *Brown v. Brown*.³⁴ *Brown* serves as an illustration of the Scottish Courts' willingness to fill the gaps in Scots law with reference to continental legal thinking.³⁵ *Pipon*, on the other hand, demonstrates the corresponding lack of a well-articulated, principled approach to the issue in the English courts.

²⁹ C Fifoot, *Lord Mansfield* (Clarendon Press, Oxford 1936) 35.

³⁰ D Llewelyn Davies (n 22) 55.

³¹ J Story (n 17) 12.

³² See Morison's Dictionary of the Decisions of the Court of Session under the headings "foreign" and "*forum competens*" and A Dewar Gibb, 'International Private Law in Scotland in the Sixteenth and Seventeenth Centuries' (1928) 39 Juridical Review 369; A Anton (n 25) 535.

³³ N 8.

³⁴ N 13.

³⁵ Lord Kames, *Principles of Equity* (3rd edn, T Cadell, London 1778) Volume 2 esp 310, 333 and 342.

Brown concerned a Scottish domiciled deceased who owned Irish government debentures. Under the terms of the debenture, the money was to be repaid to the deceased, his executors, administrators or assignees. By the law of Scotland, this passed to the deceased's brother as his next of kin. This, however, was challenged by the deceased's nephew, who claimed that by the law of Ireland, he was entitled to a share. In deciding the case, the judges of the Inner House of the Court of Session recognised that it was to be decided on the basis of what it called "the law of nations" and by that law, the law of the domicile of the creditor governs the succession of such debts which are moveable. Therefore, Scots law was applied and the contention that the *lex situs*, which applies to immoveables, should govern moveables instead of the *lex domicillii* was implicitly rejected. This, therefore, is the origin of the scission system that persists to this day.

Unlike *Robinson v Bland*, where Lord Mansfield clearly states the reasoning that he found persuasive, there is no indication in the case report of *Brown* of the reasoning that supports the judges' conclusion in that case. However, unlike *Pipon* counsel cite continental jurists (such as Voet) in their pleadings. Therefore some indication of the reasons supporting the Court's decision can be discerned from this. This suggests that it was established practice in the Scottish courts not just for the judges to be cognisant of foreign legal doctrine, as the English judges seem also to have been, but also that foreign jurists were cited as persuasive authority, which seems to have been alien in the English courts.³⁶

This is illustrated by *Pipon* which not only illustrates the lack of reference to foreign jurists in counsel's pleadings but also seems to suggest a reluctance on the part of Lord Hardwicke to discuss continental legal thinking, even though he may well have been aware of it. In *Pipon* the Court of Chancery acknowledged the potential for enunciating a general rule but deliberately shied away from that, opting instead to dispose of the case on

³⁶ P Beaumont and P Bremner, 'Inter-regional conflicts within the United Kingdom relating to Private International Law of Succession – The development of the applicable law rule' (2010) 54(2) *Revista Valenciana d'Estudis Autonomics* 245, 252.

pragmatic grounds that could not be broadly generalized. The intestate deceased was a native inhabitant of Jersey, where he had considerable personal estate as well as one debt owing in England. The plaintiffs were his nephews and nieces and the defendants were his sisters. The dispute concerned whether the debt that had been collected in England was distributable according to the law of Jersey (which excluded the nephews and nieces) or the law of England (which did not). The plaintiffs' action was to have the distribution of the debt done in England according to English law. The court dismissed the case stating that the plaintiffs were not entitled to seek distribution of a particular part of the estate but only to hold the general administrator to account for the whole estate. Therefore, as the general administrator was not present, the case was dismissed.

As indicated above, it seems, on reading the case report, that any decision regarding which law governs succession was *obiter* and that the true ratio of the case was simply that an action for the distribution of a particular part of an intestate's estate is inadmissible. However, the editor of the case report of *Robinson v Bland* seems to disagree and Lord Hardwicke himself stated in a subsequent case³⁷ that he had decided in *Pipon* that the law of the domicile applies. In any event Lord Hardwicke's comments in *Pipon* are certainly relevant to the current discussion:

I am unwilling to decide the general question in this case...therefore I choose to determine the case without entering into it. If I was to enter into the general question, I should think that a man's personal estate is supposed to follow his person, wherever he is and is distributable according to the law of that country where his person is...[Here] the question is whether [the debt in England] shall be considered as part of the bulk of his personal estate to be accounted for according to the laws of the place where he is resident or whether any persons not resident in England, but inhabitants of a foreign country, who by the laws of that foreign country, have no right to any part, but would have a right by the laws of England, can come into this Court, and, by reason of the taking out administration here, can compel that administrator to account to them for this part of the personal estate, abstracted from the residue of that estate. If that was the mere question

³⁷ *Thorne v. Watkins* (n 9).

before me, I should incline to think (but I do not mean to give an opinion to bind me) that it could not be done...³⁸

Regardless of whether Lord Hardwicke's comments were *obiter* or ratio they have been treated as reflecting the law of the land in subsequent cases,³⁹ and as such have been converted into binding precedent. However it is noteworthy that, unlike in *Brown*, no reference was made to continental scholars either in the judgment or in the pleadings of counsel.

Lord Hardwicke's position as regards the law of the domicile governing succession is clarified in the subsequent case of *Thorne v. Watkins*,⁴⁰ and the suggestion that he is aware of foreign legal doctrine is strengthened by his comments in that case. In *Thorne* Lord Hardwicke, again sitting in the Court of Chancery, adopts a clear preference for the *lex domicilii*. The case concerned a man who resided in Scotland, but was domiciled in England, at the time of his death leaving the residue of his personal estate in his will to his nephews and nieces. One of the nephews entitled to a share of the estate and residing in England died there. The defendant was one of the executors to the uncle's estate and because he was a relative of the nephew obtained letters of administration in England to William's estate too. The executor contended that the part of the nephew's estate, which came from his uncle in Scotland should be distributed according to the law of Scotland. This was challenged by a half-blood relative of the nephew who would not stand to inherit if the law of Scotland applied.

In answering the question whether the part of a domiciled Englishman's estate that includes debts due in Scotland should be governed by Scots law, Lord Hardwicke states the following:

³⁸ *Pipon v Pipon* 27 E.R 507, 508

³⁹ Such as *Somerville v. Somerville* (n 12).

⁴⁰ N 9.

That never was thought of, and would create confusion. And this question relates not to the articles of union, which indeed preserve the laws of the different countries, the jurisdiction, *forums*, and tribunals of each country; but this question would be the same after as before the union of the two crowns, and would be the same on a question of this sort arising in France or Holland; whether to be distributable according to the laws of those countries, or of England. The reason is that all debts follow the person, not of the *debtor* in respect of the right or property, but of the *creditor* to whom due.⁴¹

Whilst this clarifies any doubt that may have remained after *Pipon*, there is equally little indication of the reasoning that supports this conclusion and the role that foreign legal thinking might have played in coming to that decision.

These early cases, in both Scotland and England, are useful indications of the state of the law in this area at that time. However, they do not convey the complete picture. *Robinson* indicated that English judges at that time were at least aware of continental legal writings. *Pipon* and *Thorne*, however, do not shed much light on how influential they were in deciding that the law of the domicile applies to succession. In Scotland, *Brown* illustrates that the established practise was that continental legal writings were cited as persuasive authority where there was a lacuna in Scots law. However, as a result of inadequate case reports, we do not know how persuasive the Scottish judges found these arguments. Indeed for a period after *Brown* the Scottish courts took a divergent approach, applying the *lex situs* rather than the *lex domicilii* to the succession of moveables.⁴²

There could be various explanations for this anomaly. Perhaps, as has been suggested, the system of precedent simply was not as firmly established then as it is now.⁴³ The Court of Session may, therefore, have considered the matter not to have been definitively decided. This seems reasonable because, although the subsequent case of *MacHargs v. Blain*⁴⁴ supports the decision in *Brown*, the institutional writers were divided on the issue: some

⁴¹ *Thorne v. Watkins* 28 E.R. 24, 25.

⁴² *Davidson v. Elcherson* (1778) Mor. 4613; *Henderson v. M'Lean* (1778) Mor. 4615; *Morris v. Wright* (1785) M. 4616.

⁴³ Anton (n 7) 12.

⁴⁴ (1760) M. 4611.

rejected distribution according to the law of the domicile;⁴⁵ whilst others contended that the *lex domicilii* applied.⁴⁶

Various other suggestions have been made. In *Hog v. Lashley*,⁴⁷ for example, it was argued that the Court in these cases had misunderstood English law on the matter. Support for this can be drawn from one commentator, who, when discussing an earlier English case, suggests that the then Attorney-General made a statement indicating that effects situated in England were governed by the law of England.⁴⁸ This, however, does not seem a very credible explanation for three reasons. Firstly, the Attorney General was most likely referring to the administration of estates rather than the succession of moveables. Secondly, there was clear English authority that the law of the domicile applied and thirdly, not all of the cases concerned a Scottish/English conflict. For example, *Davidson v. Elcherson*⁴⁹ in 1788, the first of these cases, concerned the property of a Scotsman that was situated in Hamburg. It was held that the law of Hamburg applied in that case and that no action for distribution was competent before the Court of Session. This case could, however, have been a decision on jurisdiction rather than choice of law and the Court may simply have declined jurisdiction because there was already a case before the courts in Hamburg.

An additional explanation, which Beaumont and Bremner suggest, that may explain some of the cases decided by the Court of Session between *Brown* and *Bruce* is that they may have been based on the inference of an implied choice of law:

This suggestion is highly speculative and difficult, if not impossible, to confirm given the lack of judicial reasoning recorded in the early case reports. However, it does at least present a possible explanation, which is consistent with an analysis of the skeletal case reports that exist. In

⁴⁵ Stair, *Institutions of the Law of Scotland* Volume 3 (Andrew Anderson, Edinburgh 1681) 8.35; Bankton, *An Institute of the Laws of Scotland* Volume 3 (R Flemming, Edinburgh 1751) 8.5.

⁴⁶ Erskine, *An Institute of the Law of Scotland* Volume 3 (John Bell, Edinburgh 1773) 9.4.

⁴⁷ N 15.

⁴⁸ D Robertson, *Law of Personal Succession* (Thomas Clark, Edinburgh 1836) 103.

⁴⁹ N 42.

Davidson, it was argued that, unlike when dealing with testate succession, the will of the deceased is irrelevant in intestate succession because it occurs by operation of law. The inference there seems to be that when there is a will one looks at the intention of the parties.

Although we do not have a record of the judicial reasoning in the case of *MacHargs v. Blain* it seems reasonable to infer that such a principle was applied there. In that case, a Scotsman created a will in Scotland that conveyed property in Antigua and it was held that the Antigua property passed according to Scots law. Similarly, in the case of *Henderson v. Mclean*, a Scotsman created an Indian will transferring property in India and it was held that the property was to pass according to the law in force in India, which, at that time was English law. Therefore these cases, whilst seemingly contradictory, with the former favouring the *lex domicilii* and the latter the *lex situs*, could be explained on the basis that the court was honouring the principle of party autonomy as indicated by an implied choice of law by the parties in the creation of a will in a particular legal system.⁵⁰

In any event, whatever the reasons may have been for the divergent course that the Court of Session took after *Brown*, the matter was rectified by the subsequent House of Lord case of *Bruce v. Bruce*.⁵¹

Bruce, decided in 1790, was a Scottish appeal where the House of Lords definitively decided that the *lex domicilii* governed the succession of moveable property. The case concerned a Scotsman who died in India, whilst working for the English East Indian Company, leaving property in England, India and on the sea. It was determined that the deceased had an English domicile at the time of his death and therefore the succession to his moveable property was governed by the law of England. As a result of this, a half-blood relative was allowed to inherit, which would not have been the case under Scots law. The whole-blood relations appealed the Court of Session's decision to the House of Lords, who quashed the appeal.

Bruce seems to support the suggestion that the House of Lords, as the common court of last instance for both England and Scotland, was instrumental in the development of

⁵⁰ P Beaumont and P Bremner (n 36) 251 - 2.

⁵¹ N 14.

principled and well-articulated conflict of laws rules in this area.⁵² Although the case was before the House of Lords, as it was a Scottish appeal, the Scottish practice of citing continental jurists seems to have been allowed. Counsel for the appellants, for example, acknowledged that the case law in this area was lacking, cited Erskine and Kame in support of their appeal and reinforced their argument with reference to Vattel, Voet and Villius. Having cited these authors, counsel for the appellant is reported as stating ‘upon these principles, the English law is established’. This seems a stark contrast to the English case reports previously mentioned, which contain no reference to continental legal scholars. What is more, although *Bruce* was a Scottish appeal, it became ‘naturalized’ as part of English law⁵³ and led to the citation of continental jurists being common place in the English courts.

An example of this is the later English case of *Somerville v. Somerville*,⁵⁴ in 1801 by which stage the law of the domicile as the law applicable to the succession of moveables seems to have been completely resolved. In *Somerville*, the deceased died intestate with real estate in both Scotland and England and personal property in England. It was decided that succession to the personal estate of an intestate is regulated by the law of his domicile at the time of his death i.e. Scotland. Although counsel for the appellant discussed the case law that established the rule that the law of the domicile applies, most of the discussion centred on where the appellant’s domicile was rather than which law applied. The interesting aspect of the case is the routine manner in which counsel for the appellant cites continental jurists (Hubert and Denisart) and even foreign legal cases as authority for the application of the law of the domicile. Not only does this case illustrate that citation of continental legal writers had become a matter of course in the English courts but it also

⁵² J Westlake, *A Treatise on Private International Law* (7th edn Sweet & Maxwell, London 1925) 8.

⁵³ A Anton (n 25) 540.

⁵⁴ N 12.

presents a clear statement by the Master of the Rolls in the Court of Appeal that this was perfectly proper and that he would take them into consideration.

This, therefore, seems to illustrate the positive effect that Scots law had on the evolution of English law in this area through the House of Lords as the common court of appeal for both jurisdictions.⁵⁵ As *Somerville* illustrates, the effect of the House of Lords' decision in *Bruce* was to introduce the routine citation of foreign legal authorities into the English courts and encourage the explicit recognition by the judges that these authorities were at least of persuasive value. The harmonising effect of the House of Lords was not, however, one sided. As discussed above, the Scottish courts had strayed from their original conviction in *Brown* and were leaning towards the *lex situs* rather than the *lex domicilii* as governing the succession of moveables. This is clearly illustrated by Lord Thurlow's comments in *Bruce*:

In one case it was clearly...decided in the Court of Session, [that the *lex domicilii* applied] and in the other cases which had been relied on as favouring the doctrine of *lex loci rei sitae*,...But to say that the *lex loci rei sitae* is to govern though the *domicillium* of the deceased be without contradiction in a different country, is a gross misapplication of the rules of civil law and *jus gentium*, though the law of Scotland on this point is constantly asserted to be founded on them.⁵⁶

Therefore, the House of Lords clarified what had until then been a strong, if rather unprincipled, conviction, poorly articulated by the lower courts, that the law of the domicile applied. It took this countervailing influence of English law, as applied by the House of Lords, to set Scots law back on course.

This sentiment is reflected in Lord Chancellor Loughborough's judgment in the English case of *Bempde v. Johnstone* in 1796 by which stage the law applicable to the succession of moveables was firmly fixed on the law of the domicile:

⁵⁵ P Beaumont and P Bremner (n 36) 253.

⁵⁶ *Marsh v. Hutchinson* (1800) 2 Bos & Pul. 226 n.

... in the case of a person dying intestate, having property in different places and subject to different laws, the law of each place should not obtain in the distribution of the property situated there. Many foreign lawyers have held that proposition. There was a time, when the Courts of Scotland certainly held so. The judgments in the House of Lords have taken a contrary course; that there can be but one law: they must fix the place of the domicile; and the law of that country, where the domicile is, decides, wherever the property is situated. That I take to be fixed law now. The Court of Session has conformed to those decisions; according to which the Courts of Great Britain, both of Scotland and England, are bound to act.⁵⁷

Based on the foregoing analysis, it seems to be the case that the effect in this area of English law on Scots law was to correct the erroneous interpretation of the law that the Scottish courts had adopted. The corresponding influence of Scots law on English law was to encourage the English courts to adopt a more robust and rigorously reasoned defence of the law of the domicile than they had until this point. The importance of this can be seen in the case of *Hog v Lashley*⁵⁸ in 1792.

Hog was a Scottish appeal before the House of Lords concerning, amongst other things, the reach of Scottish legal rights over moveables situated in England. The facts of the case were as follows: Hog was born in Scotland but relocated to London at an early stage, at which point he became domiciled in England. Eventually he retired to Scotland, where he married and reverted back to his Scottish domicile. After he died leaving moveable property in both England and Scotland, one of his daughters, Mrs. Lashley, dissatisfied with the provisions that her father had made for her in his will, tried to claim her legal rights from both the Scottish and English property. In deciding the case, the House of Lords affirmed the interlocutor of the Court of Session that ‘the claim of [legal rights] reaches to the English effects as well as the Scotch, notwithstanding the will’.

In the present writer’s submission, the importance of this case lies in the seemingly unhesitating nature with which the court recognised that Scottish legal rights extend to

⁵⁷ *Bempde v. Johnstone* 3 Ves. Jun. 199, 200.

⁵⁸ N 15.

moveables in England. Given how foreign a concept this is to the law of England one could imagine that this might have met with some resistance and that the Court would have been persuaded by the arguments of counsel for the appellant. This may well have been the outcome if all the court had to go on were the bald, unsupported statements of the law in the earlier English cases such as *Pipon* and *Thorne*. However, the court had before them the previous Scottish appeal, decided by the House of Lords, of *Bruce*, which incorporated well-articulated reasoning based on continental legal writings to support the application of the law of the domicile. Whilst it is unclear from the case report why the House of Lords decided the case the way they did, it seems likely, based on the pleadings of counsel, that they would have been influenced by this previous case and continental doctrine.

Overall, therefore, it is difficult to determine precisely where the English Court's preference for the law of the domicile in private international law of succession derived from in the early English cases. However, there is some suggestion that certain judges had a degree of awareness of continental legal writings. Indeed this would appear to be the source of this rule in Scotland. It is through the House of Lords, as the common court of appeal for both England and Scotland, that this rule became entrenched in both jurisdictions and that it came to be explicitly supported by arguments based on the works of continental jurists. It is this rigorous and well-articulated defence of the law of the domicile that has made it a resilient doctrine, which has stood the test of time and allowed it to overcome resistance to its application, for example, in extending the recognition of legal rights as part of the law of the domicile.

Therefore, in the early days of the development of private international law in Scotland and England, the nascent concept of the law of the domicile governing succession grew and became entrenched in the law of these countries as a result of its widespread use and defence in continental Europe. Since then the English common-law and the jurisdictions of

continental Europe have taken a divergent course. Domicile, as it has developed in English case law, has strayed considerably from the original civilian doctrine. At the same time, in much of continental Europe, the presence of domicile as a connecting factor has diminished considerably and has been replaced by nationality. The following section will attempt to chart the rise of nationality on the continent and also discuss the subsequent revival of domicile of which the rise of habitual residence as a connecting factor seems to be a manifestation.

3.3 From Domicile to Habitual Residence via Nationality

Whereas domicile is the main connecting factor in common-law/Anglo-American jurisprudence, nationality is seen as the most prevalent connecting factor in continental Europe. As discussed in the previous section, domicile came into the common-law world through the influence of continental scholars on the laws of Scotland and England. However, shortly after this, domicile became supplanted as the main connecting factor in private international law by the new concept of nationality. This shift occurred at the time of the adoption of the Napoleonic Code and subsequently gained support in Italy, and throughout Europe, through the teachings of Mancini. Despite this, the move from domicile to nationality, in France in particular, was not comprehensive and may have even been unintentional. As a result domicile remained as a connecting factor alongside nationality and enjoyed a subsequent revival in later reform initiatives. This section attempts to chart the development from domicile to nationality and explores the revival of domicile which resulted in the relatively recent concept of habitual residence.

As a leading scholar in the field of comparative private international law noted when referring to domicile and nationality, ‘the contrast between the two systems of determining personal status is deeply rooted in traditions and policies and the near future holds no prospects of its elimination.’⁵⁹ Indeed domicile dates back to ancient Roman law and its revival in Europe during Medieval times. As Burge states, ‘in the Middle Ages, during the supremacy of the Holy Roman Empire...domicil was the accepted juristic basis of the personal law’.⁶⁰ Given space and time constraints, a detailed discussion of the evolution of

⁵⁹ E Rabel, *The conflict of laws: a comparative study* Volume 1 (2nd edn, Michigan legal studies University of Michigan Law School, Ann Arbor 1958), 168.

⁶⁰ A Renton and G Phillimore (eds), G Burge, *Commentaries on Colonial and Foreign Laws*, Volume 2 (Stevens & Sons Ltd, London 1908) 25.

the concept of domicile is beyond the scope of this paper.⁶¹ However Roman law recognised a form of domicile similar to that which exists today:

Domicillium was held in the place of permanent residence and was where the centre of the private life and business activities of the person in question was to be found.⁶²

However, it is unclear what relationship the law of the domicile had with the *ius originis* which some equate with nationality but which the postglossators in the fourteenth century treated as a form of *domicillium*.⁶³ In any event:

As from the 14th century a pronounced preference for the *actual* place of residence appears to have existed. This view is shared by the French and Netherlands' learned authors of the 16th and 17th century.⁶⁴

This persisted into the eighteenth century as is evidenced in several of the civil codes found in continental Europe at the time.⁶⁵

Although the concept of nationality is not so deeply rooted in history as that of domicile, it resulted from the strong revolutionary sentiment of the Napoleonic Civil Code and therefore has considerable cultural significance. The French Civil Code does not contain many articles relating to private international law. It does, however, contain an early embodiment of the nationality principle:

The laws relating to status and the capacity of persons are binding upon French subjects even when residing abroad.⁶⁶

This provision was subsequently interpreted by the French courts as meaning that foreigners are also governed by their national law.⁶⁷ Whilst this may seem like a

⁶¹ A more detailed discussion can be found in L de Winter, 'Nationality or Domicile: The present state of affairs', (1969) 128 *Receuil* III,346

⁶² L de Winter (n 61) 361.

⁶³ L de Winter (n 61) 363.

⁶⁴ L de Winter (n 61) 364.

⁶⁵ See Prussian Code of 1794 ss. 23 and 26; Austrian Civil Code of 1811 art 34.

⁶⁶ French Civil Code Art 3(3).

⁶⁷ G Delaume, 'The French Civil Code and Conflict of Laws: One Hundred And Fifty Years After' (1956) 24 *George Washington Law Review* 499, 504.

revolutionary change and a break from the past, there is some doubt as to whether the drafters of the civil code in fact intended to supplant domicile with nationality. The drafters of the civil code may have merged in their minds the concepts of nationality and domicile because under the original Napoleonic code a Frenchman who had a settled residence abroad without any intention of returning lost his French nationality.⁶⁸ As one commentator, discussing the views of the eminent French scholar Niboyet, notes:

[T]he authors of the Code civil probably did not mean to break with the principle of domicile. They were aware of the distinction between 'le domicile et la residence'. Section 3 (3) merely stated that a Frenchman should be subject to French law even though he had taken up his residence abroad. It was postulated that he had still the intention of returning and thus had his domicile in France.⁶⁹

The intention of the original drafters notwithstanding, the reference to nationality in the French Civil Code had a knock-on effect throughout Europe and played a decisive role in establishing nationality as the main connecting factor in private international law. For example the fourth paragraph of the Austrian Civil Code, as originally enacted in 1811, contained a similar provision,⁷⁰ as did article 6 of the 1829 Act on Provisions of Legislation for the Kingdom of the Netherlands.⁷¹

However, in each of these cases there was some doubt, as was the case with the French Civil Code, whether nationality was intended to replace domicile. Savigny, for example, was of the opinion that domicile remained the main connecting factor in the Austrian Civil Code.⁷² Despite this, each of these codes came to be interpreted as expressing the principle of nationality, thanks in large part to the teachings of the eminent Italian professor

⁶⁸ French Civil Code s. 17 repealed in 1889.

⁶⁹ F Schmidt and G Cheshire, 'Nationality and Domicile in Swedish Private International Law', (1951) 4 *International Law Quarterly* 39, 40.

⁷⁰ F Schmidt and G Cheshire (n 69)

⁷¹ A Haandrikman, 'Nationality in Private International Law' (1982) *Netherlands International Law Review* 108.

⁷² W Guthrie (tr), F von Savigny, *Private international law and the respective operation of statutes a treatise on the conflict of laws and the limits of their operation in respect of place and time* (T Clark, Edinburgh 1880), 114.

Mancini. As one commentator notes when discussing the effect Mancini had on the interpretation of the abovementioned Dutch legislation:

The term “the Dutch” originally was deemed to refer to persons domiciled in the Netherlands. During the nineteenth century this definition gradually but irresistibly changed in case law, under the influence of Mancini’s nationality doctrine to apply to persons having Dutch nationality.⁷³

Just as the inclusion of nationality in the French Civil Code was a product of the strong national sentiment resulting from the French Revolution, so too did the widespread acceptance of Mancini’s nationalism result from the unification movement that was ongoing in Italy and elsewhere:

The success of the nationalists is accounted for by various factors...The emotional aspects seem, however, to have been decisive. The principle of nationality was in keeping with the political movements of a period when Italy and Germany accomplished national unification.⁷⁴

Therefore, unlike the reception of domicile into English law, which resulted from reasoned argumentation, nationality came to supplant domicile in many civil law systems without any detailed discussion about their respective pros and cons. Indeed the adoption of nationality as a connecting factor resulted from changing political ideology rather than well-informed law reform:

The astounding influence exercised by Mancini’s ideas, in and also outside Italy, should, in my opinion, be attributed to the circumstances that his creed conformed to the leading political and spiritual trends of the 19th century...Mancini’s principle of nationality was a political tenet dressed up and displayed as a rule of the law of nations. One can hardly assume that the author in shaping his revolutionary ideas ever thought of Private International Law.⁷⁵

⁷³ A Haandrikman (n 71) 108.

⁷⁴ F Schmidt and D Cheshire (n 69) 42.

⁷⁵ L de Winter (n 61) 372.

In spite of its origins, however, the principle of nationality did enter private international law and subsequently became deeply entrenched in both domestic and international conflict of laws rules.

As Burge notes,⁷⁶ this change is present in many of the civil codes that were subsequently adopted such as the Italian Civil Code of 1865 and the German Civil Code of 1900. In terms of national private international law, 'the nationality principle was embodied in the codes of many countries including Romania, Portugal, Germany, Spain, Turkey, Poland, Finland...the Netherlands and Belgium.'⁷⁷ In this way, domicile, the predominant connecting factor for the designation of personal law in Europe since the time of the Roman Empire, had been replaced with the more political concept of nationality in the domestic laws of much of continental Europe.

Beyond this, however, nationality played a decisive role in early international conventions relating to private international law especially those concluded under the auspices of the Hague Conference on Private International Law. The four early conventions that relate to family law, concluded shortly after the Hague Conference was established, all refer to nationality.⁷⁸ These are namely the conventions on marriage,⁷⁹ divorce,⁸⁰ guardianship⁸¹ and effects of marriage.⁸² These conventions ensured that nationality as a connecting factor gained a prominent place in multilateral and domestic private international law rules.

⁷⁶ G Burge (n 60) 26.

⁷⁷ G Burge (n 60) 373.

⁷⁸ See the 'old' conventions from 1902-1905 <http://www.hcch.net/index_en.php?act=text.display&tid=12> accessed February 2010.

⁷⁹ Hague Convention of 12 June 1902 relating to the settlement of the conflict of the laws concerning marriage.

⁸⁰ Hague Convention of 12 June 1902 relating to the settlement of the conflict of laws and jurisdictions as regards to divorce and separation.

⁸¹ Hague Convention of 12 June 1902 relating to the settlement of guardianship of minors. For the importance of this convention on the development of the concept of habitual residence at the Hague Conference see n 99 below.

⁸² Hague Convention of 17 July 1905 relating to conflicts of laws with regard to the effects of marriage on the rights and duties of the spouses in their personal relationship and with regard to their estates.

Despite the rise in prominence of the nationality principle, it never quite managed to extinguish domicile as a connecting factor, particularly not in the field of succession. Domicile, for example, was retained as the main connecting factor in relation to succession in the Napoleonic code. This is due to the fact that apart from a limited number of provisions in the Civil Code, the majority of private international law remained uncodified.

As one commentator observes:

Because of the limited scope of the French codification in this field...most of the rules have been inherited from the pre-Code law. Since nationality as a factor of determination was a concept foreign to the French scholars of the eighteenth century, it follows that in those uncodified branches of conflict of laws, such as successions, donations and contracts, factors other than nationality are ordinarily decisive.⁸³

This would seem to be in line with the suggestion made earlier that reference to nationality in the French civil code was not an attempt to systematically replace domicile with nationality as a connecting factor in private international law. The retention of domicile in the private international law of succession was, until recently, also echoed in Belgium⁸⁴. However a number of other countries have replaced domicile with nationality even as regards private international law of succession e.g. Germany⁸⁵ and Italy.⁸⁶

Regardless of the degree to which nationality penetrated the private international law rules of individual countries, a general resurgence in the popularity of domicile occurred largely as a result of later Hague Conventions. In the 1925 and 1928 discussions on the draft Succession Convention, there was clear division over whether domicile or nationality should be used as the connecting factor, both for the designation of applicable law and for conferring jurisdiction. This resulted in a compromise that referred to both domicile and nationality. However this proved to be unworkable and was not ratified.⁸⁷ At about this

⁸³ G Delaume (n 67) 500.

⁸⁴ L Garb, *International Succession* (Kluwer, Hague 2004) 60.

⁸⁵ EGBGB (German Code on the Conflict of Laws) Art. 251.

⁸⁶ Law 218/95 Art. 46.

⁸⁷ See L de Winter (n 61) 380 for a fuller discussion.

time, the use of nationality as a connecting factor in transnational private international law instruments began to decline. This was as a result of the criticism that nationality in private international law attracted from various quarters after the First and Second World Wars. Whilst a detailed discussion of the strengths and weaknesses of nationality is beyond the scope of this thesis,⁸⁸ it became clear that stateless people and people with dual nationality presented significant problems that necessitated the use of domicile as an additional connecting factor.

The various problems presented by the use of nationality in private international law prompted the suggestion that domicile should be revived as a connecting factor, at the national as well as international level:

During the past few decades a body of opinion favouring a return to the principle of domicile can be observed...A number of authoritative jurists in France expressed a distinct preference for subjecting personal status to the law of the domicile.⁸⁹

Early attempts at codification of French private international law attempted to address the problems associated with nationality by reviving domicile as a connecting factor:

In supporting a draft decree-law proposed by Prof. Niboyet in 1939...which would have amended article 3 (3) of the Civil Code to make the law of the domicile, rather than the national law, the law governing status and capacity of persons, the Executive Council of the Société de Législation Comparée pointed to the presence in France at that time of more than two million resident aliens.⁹⁰

Unfortunately, these draft codifications were not successful despite subsequent alterations limiting reference to domicile. It would appear that the lack of success with which these initiatives met had less to do with opposition to the inclusion of domicile as it did with the

⁸⁸ See L de Winter (n 61) for a fuller discussion.

⁸⁹ L de Winter (n 61) 405.

⁹⁰ K Nadelman, 'Codification of French Conflicts Law', (1952) 1 American Journal of Comparative Law 404, 413 n 29.

fact that they probably would not have greatly contributed to strengthening the coherence of French private international law rules.⁹¹

The resurgence of domicile as a connecting factor is particularly evident in the law of succession:

Meijers, the champion of the nationality principle, in a well-known paper even in 1936 advocated the application of the domicile of the deceased to the administration, settlement and distribution of the estate, on the grounds that the nationality of the deceased is not relevant to these matters...⁹²

Indeed, this is the position that has persisted in France throughout the rise of nationality as a connecting factor in other areas of private international law. Given the political entrenchment of nationality as a connecting factor and the fact that systematic attempts to revive domicile had failed, national courts sought a more practical solution. In the Netherlands, for example, prior to 1996, the law of the nationality applied to succession.⁹³ Despite this, '[c]ourts often made exceptions to this rule...This happened when a real connection with the national country was lacking'.⁹⁴ This resulted in the law of the domicile or last residence being applied.⁹⁵ Since 1996, the Dutch private international law rules of succession have been reformed to be more in line with these court decisions. This was affected through the wholesale adoption of the 1986 Hague Convention on the Law Applicable to Succession of the Estate of Deceased Persons, which has resulted in an increased emphasis on habitual residence rather than nationality, although the latter still plays a reduced role.⁹⁶ The Dutch legislature's decision to make the transition from nationality to habitual residence rather than adopt the French rule of domicile is indicative

⁹¹ A Fiorini, 'The Codification of Private International Law in Europe: Could the Community Learn from the Experience of Mixed Jurisdictions?' (2008) 12.1 Electronic Journal of Comparative Law 1, 6.

⁹² L Winter (n 61) 472.

⁹³ R Kollewyn, *American-Dutch Private International Law* (Bilateral Studies in Private International Law No. 3, Oceana Publications, New York 1955) 36.

⁹⁴ E Henriquez, 'Maintenance; Matrimonial Property; Succession (Including Jurisdiction and Foreign Judgments)' (1980) 28 *Netherlands International Law Review* 244, 247.

⁹⁵ See for example a discussion of case law in L Winter (n 56) 474.

⁹⁶ See text at n 112.

of the decline of nationality in favour of a residence-based connecting factor but also highlights the problems associated with the concept of domicile.

A comprehensive discussion of the strengths and weaknesses of domicile as a connecting factor is beyond the scope of this thesis.⁹⁷ However some appreciation of the attraction and difficulties associated with domicile in private international law is necessary in order to understand the shift from nationality to habitual residence in Europe. Nationality was increasingly criticised as not providing a meaningful connection in private international law because of its inflexibility. There was no scope for people to change their personal law by leaving their country of origin and making a life elsewhere. This seems particularly lamentable in light of the free movement of persons within the EU. In addition, nationality became an increasingly untenable connecting factor, as it did not address the problem of the large number of stateless people following the Second World War. Domicile, on the other hand, was seen as reflecting an implicit choice that a person has made by settling down in a different country.⁹⁸ In addition, in theory, a person's domicile should be where they are most culturally and socially integrated and where they feel most part of a community.

However, despite these advantages, one of the main obstacles to applying the law of the domicile is the widely differing conceptions of what domicile actually is. This can be seen most markedly when comparing the concept of domicile in the UK with that of continental Europe. Without entering into a detailed discussion about the respective definitions of domicile, there is a gulf between how domicile has come to be used in the United Kingdom and how it is understood in France, for example. Both under Roman and French law, domicile is seen as reflecting the centre of a person's affairs.⁹⁹ Whilst this is also the case in the United Kingdom, the possibility that the domicile of origin can revive to prevent a

⁹⁷ For a fuller discussion see L Winter (n 61) 407.

⁹⁸ L Winter (n 61) 407.

⁹⁹ R Phillimore, *The Law of Domicile* (T & J W Johnson, Philadelphia 1847) 16 – 17.

person from being without a domicile at any point can artificially skew this notion. This makes the use of domicile in the United Kingdom more akin to the continental European concept of nationality because it is more concerned that there is always a law that determines a person's civil status rather than where the centre of a person's affairs is.¹⁰⁰

Many of the criticisms relating to nationality on the continent can be levelled against the definition of domicile in the UK, not least of which is that it is out of step with reality:

In the particular and fundamentally important matter of domicile the law has considerably developed during the last fifty years, but it may be doubted whether the development has been wise and whether even now matters are not being made worse. Only too often does it happen that the legal domicile bears a very remote relation to what in fact is the permanent home of the *de cujus*.¹⁰¹

Therefore, as a result of the manifest failings of nationality as a connecting factor, there was a growing movement towards the use of a more residence-based connecting factor such as (the continental European version of) domicile. However, the often absurd outcomes that resulted from the English conception of domicile prevented widespread support for its revival.¹⁰² Instead, the new connecting factor of habitual residence was adopted.

The concept of habitual residence seems to have entered European private international law through the early work of the Hague Conference on Private International Law. It is difficult to chart precisely the evolution of habitual residence within the Conference given the lack of record of these early sessions in the English language. However, it is possible to describe briefly how habitual residence came to be used as the main connecting factor in

¹⁰⁰ A Dyer, 'The Internationalization of Family Law' (1996) 30 U.C. Davis Law Review 625, 626

¹⁰¹ G Cheshire, 'Plea for a Wider Study of Private International Law' (1947) 1 The International Law Quarterly 14, 17.

¹⁰² For more on the difficulties associated with the UK's conception of domicile and the potential for reform see J Fawcett, 'Law Commission Working Paper No. 88: The Law of Domicile' (1986) 49 Modern Law Review 225; Law Commission and Scottish Law Commission, 'Private International Law: The Law of Domicile' (Law Com Working Paper 88, 1985)/(Scot Law Com Consultative Memorandum 63, 1985) [5.2]

European private international law through the accounts of various delegates to the Hague Conference.

The concept, seemingly derived from German law, was chosen over domicile because it was more factually based and less technical.¹⁰³ It seems to have first appeared in the Convention on Guardianship of 1902¹⁰⁴ and the Interdiction convention of 1905.¹⁰⁵ However, it was not until the post-war conventions such as the 1956 Child Maintenance Convention,¹⁰⁶ that habitual residence became firmly established as a principal connecting factor in its own right.¹⁰⁷ In the years immediately following this, habitual residence featured in an increasing number of conventions¹⁰⁸ and has now become an accepted part of Hague Conventions and EU Regulations dealing with private international law.

Habitual residence was seen as being the true essence of domicile without any of the complications resulting from a legalistic interpretation:

Either the habitual residence coincides with the domicile, and in that event identification is warranted and justified *or* they do not coincide, and then we must admit that the domicile becomes a less adequate element, which – so to say – has something fictitious in it.¹⁰⁹

The suggestion that habitual residence is, in fact, the true manifestation of domicile is supported by the discussions leading up to the draft Convention to determine conflicts between national law and the law of domicile. The drafting committee's recommendation that domicile for the purposes of that convention should be construed as habitual residence

¹⁰³ K Nadelmann, 'Habitual Residence and Nationality as Tests at the Hague: The 1968 Convention on Recognition of Divorces' (1968) 47 Texas Law Review 766, 767.

¹⁰⁴ N 81.

¹⁰⁵ Hague Convention of 17 July 1905 relating to deprivation of civil rights and similar measures of protection.

¹⁰⁶ Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children.

¹⁰⁷ D Cavers, "'Habitual Residence': A Useful Concept?" (1971) 21 American University Law Review 475, 478.

¹⁰⁸ Such as Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children; Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions; Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions.

¹⁰⁹ L de Winter (n 61) 425.

was subsequently adopted.¹¹⁰ In addition to this, the 1955 Convention Relating to the Settlement of the Conflicts between the Law of Nationality and the Law of Domicile defined domicile as the place where a person habitually resides.¹¹¹

Therefore, despite this early use of nationality as the principal connecting factor, the post-war conventions utilise the concept of habitual residence rather than nationality.¹¹² This represents a further shift in the connecting factor of choice for much of continental Europe. As one commentator puts it, “habitual residence” is a term, generally unknown to the common law, which is much in vogue on the Continent’.¹¹³ Nowadays, habitual residence is as dominant and prevalent a connecting factor in continental Europe as nationality ever was:

This comparatively new phrase is much in use not only in domestic legislation but also in various Hague Conventions on the reform of private international law and it is in widespread use by the European Commission.¹¹⁴

Therefore, whilst the common law retained domicile, which it inherited from the civil law, as its main connecting factor, the civilian legal systems of continental Europe abandoned this, at first for nationality and later for habitual residence, which remains dominant in Europe today.

The Hague Conference has, throughout, resisted calls¹¹⁵ to define habitual residence given that it is to be determined on the facts of a case, preferring, instead, that the concept retain

¹¹⁰ L de Winter (n 61) 425

¹¹¹ Article 5. See also K Nadelmann (n 98) 767.

¹¹² See for example the 1955 Convention on the Law Applicable to the International Sale of Goods <http://www.hcch.net/index_en.php?act=conventions.pdf&cid=31> accessed February 2010.

¹¹³ W Reese, ‘The Hague Conference on Private International Law: Draft Convention on the Recognition of Foreign Divorces and Legal Separations’, (1965) 4 American Journal of Comparative Law 692-700, 693.

¹¹⁴ P Rogerson, ‘Habitual Residence: The New Domicile?’, (2000) 49 International & Comparative Law Quarterly 86-107, 86.

¹¹⁵ L Silberman, ‘Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence’ Institute for International Law and Justice Working Paper 2005/5 (2005), 15 <<http://ssrn.com/abstract=723161>> accessed September 2010.

its inherent flexibility. Some have suggested that a minimum period of residence is required in order to establish a habitual residence:

Habitual residences always vouch for a certain measure of duration, of continuity of the legal situation of the individual concerned.¹¹⁶

Despite this, any attempt to set a definitive minimum period of residence would remove the factual element of habitual residence and convert it into an inflexible legal doctrine similar to domicile, thus losing one of the advantages of using habitual residence as a connecting factor.

The 1989 Hague Convention on the Law Applicable to Succession to the Estate of Deceased Persons¹¹⁷ tried to strike some sort of balance between a durable connecting factor such as nationality and the more changeable habitual residence by allowing habitual residence to operate in a limited number of circumstances. These are, namely, when habitual residence and nationality coincide or where the deceased had been resident in that state for at least five years prior to death, provided that there is not a manifestly closer connection with their national law. In all other circumstances national law applies unless there is a manifestly closer connection with another state, in which case the law of that state applies. This definition would seem to address the concerns of those who call for a minimum residence requirement as part of the definition of habitual residence. In the present writer's submission, however, these rules create an overly complex and uncertain system that undermines the very flexibility and fact-centred focus of habitual residence that gave it the advantage over both domicile and nationality. Perhaps, rather than a minimum period of residence, it would be sufficient to suggest that a degree of social integration or durable connection is required. The following section will discuss how such a solution has been reached in Belgium's domestic private international law.

¹¹⁶ L Winter (n 61) 424.

¹¹⁷ Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons.

3.4 Habitual Residence: In Search of a Definition

Habitual residence as a connecting factor in private international law can be found in EU legislation dealing with a variety of different areas. The concept is usually left loosely defined and there tends to be very little guidance as to the degree of actual residence required to constitute habitual residence. Whilst a detailed discussion of the definition of habitual residence is beyond the scope of this thesis, it is necessary to give an outline of the current approach in order to appreciate some of the concerns discussed below.

Habitual residence is a familiar concept in both continental Europe and the United Kingdom. As regards the latter, habitual residence has appeared in a number of UK statutes and its interpretation has resulted in a large body of case law.¹¹⁸ Despite this, the European Court of Justice made it clear in *Swaddling*¹¹⁹ that habitual residence, as used in EU regulations, bears an autonomous meaning. This conclusion is supported by the subsequent English High Court decision in *Marinos v. Marinos*.¹²⁰

The ECJ gave some guidance as to the definition of habitual residence in the *Swaddling* Case,¹²¹ which was concerned with EU social security legislation. In that case, the ECJ held that ‘the length of residence in the Member State...cannot be regarded as an intrinsic element of the concept of [habitual] residence’.¹²² Therefore, an extended period of actual residence is not required for a person to acquire an habitual residence. As Lamont notes, ‘The definition of habitual residence in *Swaddling* is suitable for the EC Social security

¹¹⁸ For a detailed discussion of case law see J Fawcett, P North and J Carruthers (eds), *Cheshire, North & Fawcett: Private International Law* (14th edn, OUP, Oxford 2008) 182-196 and E Clive, ‘The Concept of Habitual Residence’ [1997] *Juridical Review* 137.

¹¹⁹ Case C-90/97 *Swaddling v. Adjudication Officer* [1999] ECR I-1075.

¹²⁰ [2007] EWHC 2047 (Fam).

¹²¹ *Swaddling* (n 119)

¹²² *Swaddling* (n 119) [30].

context in which it was developed...but it is odd to call residence “habitual” immediately, or very shortly after, arrival’.¹²³

Although in *Swaddling* the ECJ laid down a community-wide definition of habitual residence it is one that is limited to its specific legislative context.¹²⁴ A more recent ECJ decision in the case of *A*¹²⁵ concerning jurisdiction in relation to parental responsibility under Brussels II *bis*,¹²⁶ reaffirms that an autonomous EU definition of habitual residence must be used and that a definition that works in one area of law cannot necessarily be transposed into another. Despite this, the ECJ makes clear that, at least in the context of parental responsibility, habitual residence:

Must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.¹²⁷

Given the diversity of topics which involve some use of habitual residence in EU law, it would be extremely difficult to lay down one uniform definition applicable to every context. Indeed, it may be advantageous to have different definitions for each context in which habitual residence is encountered. It may also be advantageous, in certain contexts, for habitual residence to be loosely defined. In legislation concerning child custody/abduction the sensitive and complex nature of these cases may warrant a fluid

¹²³ R Lamont, ‘Habitual Residence and Brussels II *bis*: Developing Concepts for European Private International Family Law’ (2007) 3(2) JPIL 261, 265-266.

¹²⁴ *Swaddling* (n 119) [28].

¹²⁵ Case C-523/07 *A*, judgment of 2 April 2009.

¹²⁶ Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II *bis*) [2003] OJ L 338/1.

¹²⁷ Case C-523/07 *A* (n 125) [44].

definition. However, as Professor Matthews highlights in his oral evidence to the House of Lords EU Select Committee:

the whole thrust of the use of “habitual residence” in this draft regulation to choose an applicable law is completely different from the context in which you see it elsewhere. So my view would be that unless you can get some kind of definition of what you mean, this is a recipe for litigation and uncertainty until the litigation is resolved by the European Court of Justice.¹²⁸

Therefore, rather than promoting legal certainty, as the Regulation aims to do, it might be jeopardising it.

This lack of a precise definition of habitual residence, whilst tolerable and even desirable in other areas, seems to be a major obstacle to the UK’s participation in the regulation. As Oliver Parker, speaking on behalf of the UK Government, highlights in his evidence to the House of Lords EU select committee:

The primary reason for the Government’s concern that the regulation uses the undefined connecting factor of habitual residence is that the deployment of such a concept on its own would be liable to subject the estates of individuals, either on short-term employment secondments overseas or otherwise without an adequately substantial connection to a particular legal system to that system’s law of succession.¹²⁹

If this were to be the effect of the regulation, it would not only frustrate legal certainty, but it would also offend against the principle of legitimate expectations. It seems, from Mr Parker’s evidence,¹³⁰ that the UK Government has given some consideration to various solutions to this problem including defining the concept of habitual residence and a Hague-like solution¹³¹ of combining an undefined habitual residence with a minimum factual residence requirement. Whilst the House of Lords has made it clear that in the English

¹²⁸ P Matthews, Minutes of Evidence taken before the Select Committee on the European Union (Sub Committee E), 25 November 2009 in European Union Select Committee, ‘The EU’s Regulation on Succession: Report with Evidence’ HL (2009-10) 75, 19 (Q13).

¹²⁹ Lord Bach and O Parker, Minutes of Evidence taken before the Select Committee on the European Union (Sub Committee E), 16 December 2009 in European Union Select Committee, ‘The EU’s Regulation on Succession: Report with Evidence’ HL (2009-10) 75, 49 (Q135).

¹³⁰ Lord Bach and O Parker (n 129).

¹³¹ See n 117.

conception of habitual residence there must be an appreciable period of actual residence,¹³² the English courts have shown a reluctance to set down a minimum period of residence.¹³³

A further mechanism to alleviate the unintended consequences of a changing habitual residence could be a more extensive ability for parties to designate the applicable law. This issue warrants detailed discussion. However due to space and time constraints the treatment of the topic in this paper will be somewhat cursory.¹³⁴ The regulation only allows a very limited freedom to choose the applicable law and makes no provision for prorogation of jurisdiction. This is lamentable given party autonomy's potential to remedy perceived defects in the regulations. As the European Parliament highlights:

It would be appropriate to allow the testator to choose which body of law should govern the succession, the law of the country of which he is a national or the law of his habitual residence at the time the choice is made.¹³⁵

This suggestion is far from unrestricted freedom to designate the applicable law. This would be undesirable because it could result in the applicability of laws which have no connection to the deceased. It may, however, not go far enough. It seems desirable that parties are allowed to also designate prior habitual residences provided they have some substantial connection to that country. This is the approach favoured by the UK government. However, a number of Member States are concerned that this would lead to evasion of their system of legal rights. As a result, the Commission chose to adopt an even more restrictive freedom of choice, limiting it to the country of nationality. This seems to be a missed opportunity on their part. Party autonomy could be used as an additional

¹³² *Nessa v. Chief Adjudication Officer* [1994] 4 All ER 677, 682.

¹³³ See for example *L-K v K* (No 2) [2007] 2 FLR 729.

¹³⁴ For a fuller discussion of party autonomy in succession see C Roodt, 'Party autonomy in international law of succession: A starting point for a global consensus?' (2009) 2 *Tydskrif vir Suid-Afrikaanse Reg* 241-263.

¹³⁵ European Parliament Committee on Legal Affairs, *Report with Recommendations to the Commission on Succession and Wills* of 16-10-2006 (2005/2148(INI)) (Gargani Report) 9.

connecting factor to mitigate the shortcomings of using the deceased's last habitual residence in the succession context.

Whilst an increased focus on party autonomy could mitigate the harshness of the unintended consequences associated with a changeable connecting factor like habitual residence, it would only be effective where people actually make a choice. Therefore, it does not remove the need to find a suitable definition for habitual residence. Given that a prescribed minimum period of residence may lead to a certain undesirable inflexibility, the solution adopted in Belgium as a result of recent reform may be preferable.

According to Belgium's 2004 Code of Private International Law, the Belgian courts have general jurisdiction to hear cases 'if the defendant has his domicile or habitual residence in Belgium when the action is introduced'.¹³⁶ In the case of succession, however, the Belgian courts have jurisdiction if 'the deceased had his habitual residence in Belgium at the time of his death or the claim relates to assets that are located in Belgium when the action is introduced'.¹³⁷ Therefore, the general grounds of jurisdiction have been modified to the extent that domicile has been removed as a connecting factor for succession and the location of the assets has been inserted.

This is a modification of the pre-2004 situation, which is outlined in the Belgian national report contained in the previous (2004) edition of Garb's *International Succession*. The report states that, '[i]n terms of Article 635, 4 of the Judicial Code (hereafter BJC) a Belgian court would...have jurisdiction...if the proceedings were commenced in Belgium'.¹³⁸ As the Belgian National Report annexed to the German Notary Institute's

¹³⁶ *Loi du 16 juillet 2004 portant le Code de droit international privé* Art 5(1)é, *Moniteur Belge* 27 July 2004, ed 1, 57344-57374. Any reference to the code in this paper will be based on the following English translation, C Clijmans and P Torremans (trs), *Law of 16 July 2004 Holding the Code of Private International Law* <<http://www.ipr.be/data/B.WbIPR%5bEN%5d.pdf>> accessed May 2010.

¹³⁷ N 136 Art 77.

¹³⁸ Miller, Bolle & Partners Lawyers, 'Belgium' in L Garb (n 84) 61.

2002 study¹³⁹ states, this has to be interpreted in light of article 110 of the Belgian Civil Code, according to which ‘a succession falls open in Belgium if the deceased has his last domicile in Belgium’.¹⁴⁰ The report goes on to explain that by virtue of articles 624 (1) and 635 (2) and (10) of the Belgian Judicial Code, the Belgian courts may exercise jurisdiction if one of the heirs is domiciled in Belgium and by virtue of 625 (1) they may exercise jurisdiction over immovable assets situated in Belgium. Furthermore, article 15 of the Belgian Civil Code provides a broad ground of jurisdiction based on Belgian citizenship. As the report highlights, ‘[t]his article can justify competence for a Belgian court to judge liquidation and distribution of movables of a succession fallen open abroad’.¹⁴¹

Therefore, whilst assets being located in Belgium remains a connecting factor conferring jurisdiction on Belgian courts over those assets, they no longer exercise jurisdiction as regards succession on the basis of domicile but rather habitual residence. These specific connecting factors also seem to have the effect of excluding the more general jurisdictional basis of Belgian citizenship contained in the Belgian civil code. As one commentator notes:

The Code...constitutes a watershed in the development of Belgian law. The general Belgian principle of law that allowed a claimant to bring a civil or commercial matter before a Belgian court, based solely on the fact that the claimant was a Belgian national, now appears to be well and truly defunct.¹⁴²

¹³⁹ Deutsches Notarinstitut, *Etude de droit compare sur les règles de conflits de juridictions et de conflits de lois relatives aux testaments et successions dans les Etats membres de l’Union Européenne* (November 2002) <http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm> accessed May 2010. The study is available in French and German with an executive summary in English.

¹⁴⁰ A Verbeke, *Belgique European Commission National Report* <http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/report_conflits_belgique.pdf> accessed May 2010, 149.

¹⁴¹ (N 140) 150.

¹⁴² P Hermant, ‘Belgian Code on Private International Law’ (14.01.05) <http://www.twobirds.com/Swedish/NEWS/ARTICLES/Sidor/Belgian_Code_on_private_international_law.aspx> accessed May 2010.

As regards applicable law, the law that governs succession has similarly changed from that of the last domicile of the deceased¹⁴³ to that of the deceased's habitual residence at the time of death.¹⁴⁴ However, the code does confirm that the *lex rei situs* will continue to govern the succession of immovable property.¹⁴⁵ It is noteworthy that, despite the fact that the code does not allow the general application of *renvoi*,¹⁴⁶ it will accept *renvoi* as regards immovable property where the conflict rules of the *lex situs* designate the law of the habitual residence as the applicable law.¹⁴⁷

This recent codification, whilst illustrating the move from domicile and nationality to habitual residence in Belgian private international law relating to succession, also provides an opportunity to examine the definition of these connecting factors. Initially, Belgian law seemed to define domicile in similar terms as the common law:

The domicile is, according to Article 102 BCC, the place where the person has at the same time, situated his residence, the centre of his affairs, the seat of his wealth and the affection of his family. It is not necessarily the place where the deceased lived at the time of death.¹⁴⁸

This is seen as an explicit rejection of a more formalistic conception of domicile:

The concept of domicile must be determined according to the *lex fori*. In this context reference is not made to article 36 Judicial Code (place of registration in the population register) but to article 102 Civil Code defining the domicile as the principal establishment. This obviously is a question of fact.¹⁴⁹

However, this position has been completely reversed in the recent code which provides that domicile means 'the place where a natural person has his main residence according to the civil register of the population, the register of foreigners or the "waiting register"'.¹⁵⁰ In the

¹⁴³ Miller *et al* (n 138) 61.

¹⁴⁴ N 142 art 78(1).

¹⁴⁵ N 142 art 78(2).

¹⁴⁶ N 142 art 16.

¹⁴⁷ N 142 art 78(2).

¹⁴⁸ Miller (n 138) 65.

¹⁴⁹ A Verbeke (n 140) 149.

¹⁵⁰ N 142 art 4(1)(1).

present writer's submission, this renders domicile a question of status, which can be resolved on the basis of official documentation, in a similar way to nationality. This stands in stark contrast to the original definition of domicile which turned on the particular facts and circumstances of the case. However, it seems that the Belgian legislature has defined habitual residence in such a way that it closely resembles the former definition of domicile:

For the purpose of the present statute, habitual residence means...the place where a natural person has established his main residence, even in the absence of registration and independent of a residence or establishment permit; in order to determine this place, the circumstances of personal or professional nature that show durable connections with that place or indicate the will to create such connections are taken into account.¹⁵¹

Indeed, this detailed description of what constitutes habitual residence seems more akin to the common-law concept of domicile because it not only contains the notion of a lasting connection but it also includes an element of intent which would be lacking from bare residence. Therefore, under this definition, it seems that habitual residence can be acquired through something more than mere transitory residence and would be greatly facilitated by some evidence of an intention to make the place of residence a long-term centre of affairs. Such a conception of habitual residence would seem instinctively more palatable to common-law lawyers than a completely undefined and vague notion of habitual residence. Although this definition does not contain any kind of minimum residence requirements, it does indicate that a lasting, rather than fleeting, connection with the place of residence is required.

The conception of habitual residence contained in the Belgian Code of Private International Law gives some indication of what factors are to be considered when determining habitual residence. This stands in contrast to the proposed Regulation's complete lack of definition of habitual residence. Despite this, the Belgian code provides little guidance on how much weight should be given to duration and intent or what is

¹⁵¹ N 142 art 4(2)(1).

sufficient to establish a lasting connection in the succession context. These are questions that will ultimately be decided by the ECJ and a detailed discussion of the various possible factors are beyond the scope of this thesis. However, it seems that the proposed Regulation could be guided by the Belgian code, at least to indicate that a durable connection and intent is required and perhaps even to go further to list certain factors that might be taken into account (e.g. actual residence of a certain length, location of assets etc).

In the present writer's submission, such a definition would be commensurate with the factual nature of habitual residence. By highlighting the factors to be taken into account, the regulation would be providing a level of guidance that means people can reasonably expect to be able to determine their habitual residence. It seems unnecessary to go further than this and prescribe a minimum period of residence, which is one of the options the UK is considering.¹⁵² This might undermine the discretionary and fact-based nature of habitual residence by preventing people who have a genuine, durable connection to a State from acquiring a habitual residence there merely because they do not meet the actual residency requirements.

One of the main concerns that the UK sees a minimum period of actual residence addressing is the risk that temporary workers abroad would unwittingly acquire a new habitual residence during their secondment. This problem, at least for foreign diplomats, was identified and addressed in Belgium under the old concept of domicile:

A special problem arises for diplomats and officials of various international organisations working in Belgium. Unless they have the Belgian nationality, diplomats will be considered to have maintained their domicile abroad, insofar as they were not domiciled in Belgium before they were posted to Belgium. Members of permanent delegations with the Council of NATO and with the EU, as well as certain high officials in NATO, the Belgian-Luxembourg Economic Union, the OECD, and the International Cotton Institute have diplomatic status as well. Members of foreign consulates,

¹⁵² Ministry of Justice, European Commission Proposal on Succession and Wills – Response to Public Consultation CP(R) [41/09] < <http://www.justice.gov.uk/consultations/docs/response-european-succession-wills.pdf>> accessed September 2010.

have a similar status insofar as they do not pursue any commercial activities in Belgium.¹⁵³

Therefore, perhaps a compromise solution, similar to that found in the Belgian Code of Private International Law, namely a list of factors to be taken into account in determining habitual residence combined with a specific exception for workers seconded abroad, especially for a finite period, could be adopted in the Succession Regulation. This would avoid the need to stipulate minimum actual residence requirements which could result in inflexibility and harsh results. It could be called the Belgian Compromise (!)

¹⁵³ A Verbeke (n 140) 161.

3.5 Conclusions

This chapter has been an attempt to highlight certain concerns with the proposed Regulation's use of habitual residence as the main connecting factor. It has tried to set the discussion surrounding the most appropriate connecting factor in a historical context. By charting the reception of domicile into the law of Great Britain and its abandonment in the civil law, the irony of Member States' current positions regarding domicile and habitual residence can be seen. The English common law initially used residence as determining personal law but due to the influence of the civil law, latterly changed to domicile; by contrast, the civil law countries started with domicile but now favour habitual residence via a long utilisation of nationality.

Domicile and habitual residence represent the two ends of the spectrum; the former represents a durable connection that changes infrequently, whereas the latter is a more changeable and transient connecting factor. A person can travel abroad extensively, living in several different Member States, and never change their domicile, provided they always retain the intention of returning home. Such a person's habitual residence, however, is likely to change rather frequently. Neither the traditional concept of domicile, as it currently stands in the common law, nor a completely undefined habitual residence, is likely to prove acceptable to all states. However, given the opposition by many continental European Member States and the effect it may have to the concept in other areas, a strict definition of habitual residence may be difficult to negotiate. Therefore, in order to secure a workable compromise solution it may be necessary to think more creatively and rely more on other devices such as requiring a significant connection to the Member State and a more flexible approach to party autonomy.

Conclusion

The law of succession is not widely viewed as an area of law that is particularly suitable for harmonisation due to its inherent cultural component:

Succession law is traditionally conceived to be more deeply rooted in the legal culture of a country than other areas of law... interrelation between the culture of a country and its succession law cannot be denied.¹

Despite this, resistance to the harmonisation of succession law does not always go unchallenged:

The social problem to be solved by the law of succession .. is of a morally and culturally more delicate nature than contract law. Perhaps even more than family law, the law of succession is a field reserved to local rules and customs, a field in which the desire or need for unification seems to be, at best, moderate ...Because of its deep roots in the fundamental social and cultural values of a society, it is argued that family and succession law should remain national (or regional in a federal system) legal matters. However, this traditional view should be reconsidered.²

This thesis is, however, not concerned with the harmonisation of substantive succession law, which is not within the competence of the European Union. Instead, the foregoing chapters have discussed the proposed Succession Regulation, which attempts to harmonise private international law matters relating to succession.

In this regard, the above considerations are, nevertheless, relevant because a lack of basic agreement about what constitutes the underlying substantive law of succession can present problems to attempts to harmonise conflict of laws rules. As the previous chapters have attempted to illustrate, there are some considerable differences in the substantive succession laws of the Member States and these 'existing differences of the succession laws are to some extent caused by different culturally formed perceptions of the political

¹ A Dutta, 'Succession and Wills in the Conflict of Laws on the Eve of Europeanisation' (2009) 73 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 547, 561.

² A Verbeke and Y Leleu, 'Harmonisation of the law of succession in Europe' in A Hartkamp and E Hondius (eds), *Towards a European Civil Code* (3rd edn, Kluwer Law International, Nijmegen 2004) 337.

actors.’³ The main argument of this thesis is that a greater awareness of the historical evolution in the various legal systems of these problematic aspects of succession law and private international law will help increase understanding of the reasons why these differences exist and how they might be overcome. This in turn could lead to more flexible negotiating positions as Member States realise that the reasons why these areas became so culturally rooted may no longer be as relevant today.

An important illustration of this is the issue of claw-back. Chapter two showed that family restrictions on the alienation of property can be traced back to French customary law and that of the Germanic tribes that overran the Roman empire. Moreover, these customs existed in Britain as well as in France and Germany. In Britain, however, they died out thanks to the freedom of alienation of land that resulted from the rise of commerce and the decline of feudalism and came to be protected by the common law courts. By contrast, in France, as a result of the co-existence of written and customary law, claw-back became entrenched alongside the protection of legal rights during the reception and revival of Roman law.

Another salient issue that was explored in chapter three was the choice of an appropriate connecting factor in private international law of succession. An analysis of early cases and legal writing reveal that domicile was adopted in Scotland and England as the principal connecting factor to determine which law governed the succession of moveables before it was being replaced by nationality in much of the rest of Europe. However, unlike the rise of nationality on the continent, which was more a result of political ideology than well thought out law reform, the use of domicile became entrenched in the UK as a result of well-reasoned argumentation based on continental legal writings.

³ A Dutta (n 1) 561.

This historical approach to some of the issues raised by the regulation enhances our understanding of the evolution of some of the most culturally entrenched elements of succession. It can lead to the conclusion, as with the issue of claw-back, that countries can take divergent paths on ideas they once held in common for no particular reason other than the different evolution of law in these respective countries. It can also indicate, as with the issue of the appropriate connecting factor, that the evolution of law can be heavily influenced by unrelated political and cultural factors. The realisation that results from this historical analysis is that, even in an area as culturally rooted as succession, the common law and civil law have similar origins but grew apart over time because of circumstances rather than as a result of conscious law reform in response to systemic differences.

Whilst this may be comforting to the extent that it suggests that the obstacles presented by the regulation are not insurmountable, it is of limited use in suggesting potential solutions. Therefore, throughout, this thesis has adopted a comparative law approach in addition to its historical analysis. Through this, potential solutions have emerged to some of the key issues that have been highlighted. One example of this is in the designation of the most appropriate connecting factor.

Despite a revival of the idea of a connecting factor based on residence on the continent, the common-law notion of domicile, skewed from its original meaning as it has become, seems rather undesirable. As a result, habitual residence has emerged as the most likely connecting factor. Whilst this modern concept is more reflective of reality than nationality and lacks the legalistic complications associated with domicile, it is not without its problems. It currently lacks any firm, European definition and as a result creates a great deal of uncertainty, which could lead to undesirable and unintended changes in people's legal position as they move between Member States.

Ultimately the definition of habitual residence in the Regulation will depend on the European Court of Justice's interpretation. Despite this, there have been calls for the inclusion of a minimum period of residence in order to create a more closely defined concept. This runs the risk of transforming habitual residence into a legalistic concept like domicile with all the drawbacks this entails. Perhaps a more acceptable solution, which results from a comparative analysis in chapter three of how habitual residence operates both domestically and internationally, is an explicit statement in the definition of habitual residence that a durable connection is required without having to stipulate a minimum period, similar to the situation in Belgium. This would effectively be a codification of the ECJ's case law in other areas but it would serve to highlight the particular significance in the area of succession that there must be a substantial connection to the Member State.

Another area where a comparative law analysis proved useful is on the issue of claw-back. One solution that was suggested to overcome the problem of claw-back is to subject the *inter vivos* transfer of gifts to the putative applicable law at the time of making the gift. Whilst this solution, adopted by Swedish law,⁴ does not go as far as the UK would like, it does represent a credible compromise solution. Whether this solution will be adopted depends on whether it is suggested and accepted by Member States during the ongoing negotiations.

Despite the utility of this thesis's historical and comparative law approach, it is difficult to gauge the political feasibility of the potential solutions this has produced. Their practicability largely depends on what compromises can be reached during negotiations. Therefore, this thesis has, in no way, attempted to suggest what form the final regulation should take, even as regards the limited number of issues that have been covered, as it would be futile to second-guess political negotiations on such a moving target as the

⁴ See Chapter 1, Section 8, of the Act on International Legal Relationships in respect of the Estates of Deceased Persons (1937:81). This provision is explained at <http://ec.europa.eu/civiljustice/applicable_law/applicable_law_swe_en.htm> accessed June 2010.

proposed Regulation. Instead, this thesis has been an attempt to situate current divergences and differences in their historical context and to flag up potential solutions to these problems that a comparative law analysis reveals.

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