

## COMPARATIVE LAW

### Legal Systems of the world – an overview

Aperçu sur les systèmes juridiques dans le monde

Rechtskreise im Überblick

Sintesi dei sistemi giuridici nel mondo

Sistemas y familias jurídicos del mundo

CHRISTIAN HERTEL, director German Notarial Institute (DNotI), Würzburg, Germany

Text and Translations	page
English text	128
Traduction en français	142
Deutsche Übersetzung	157
Traduzione al italiano	171
Traducción al español	185

### Legal systems of the world – an overview\*

#### Content

1. Preliminary remarks	128
2. The Common Law legal family	130
3. Code Napoleon legal family	132
4. German legal family	135
5. (Former) Communist-governed states	136
6. Other legal orders in the Romano-Germanic legal family, particularly in East Asia	138
7. Nordic legal family	138
8. Islamic legal family	139

## 1. Preliminary remarks

### 1.1. Why a classification into legal families?

Classification into legal families permits legal orders in different countries that share distinctive common features to be **described in summarised form**. The standard summary facilitates legal comparison – and makes it possible to provide an initial compact survey of particular issues without getting oneself lost in tedious country listings. It is possible to remember the **characteristics of one legal family**, but the characteristics of over 200 legal orders worldwide is scarcely possible<sup>1</sup>.

It is unavoidable with a simplified summary that various details of the individual legal orders do not fit into the generalised scheme of things. To put it another way: a summary of legal families enables the right questions to be asked more quickly, but it does not always give the right answers. Knowledge of the particular characteristics of a legal system therefore does not replace research into the relevant law, but one is better forewarned of the typical dangers.

An example: the notary knows that legal orders based on the Code Napoleon and of the (former) Communist states do not, as a rule, permit any waiver of the right of inheritance and the compulsory portion. If such a waiver of the compulsory portion is to be recorded in relation to a testator who is a national of a Code Napoleon country or of a (former) Communist country, or who has his place of residence there, the notary must either satisfy himself prior to the recording that such a waiver is possible or he must advise the party involved that the waiver will probably not be recognised in the latter's home country or in his country of residence.

### 1.2. Which legal systems are there?

There is no “correct” or even generally recognised classification into legal families. A legal order may, for example, be allocated to a different legal family as regards civil law than as regards administrative law. Even the law of companies may be characterised differently from the general civil law. The following classification is geared towards civil law, in particular **family and succession law**.

Various attempts at categorisation according to civil law have been made<sup>2</sup>. For **practical purposes** I consider a division into **seven legal systems** to be useful, namely:

- the **Common Law** legal family;
- then the subgroup of the Romano-Germanic legal family, namely one of the legal families based on the **Code Napoleon**;
- the **German** (or German-speaking) legal family;
- the (former or still existing) **Communist** governed states;
- **other** legal orders belonging to the Romano-Germanic legal family, in particular in **East Asia**;

\* CHRISTIAN HERTEL, Director, German Notarial Institute (Deutsches Notarinstitut – DNotI), Würzburg.

<sup>1</sup> The attempt to make a classification of legal families is sometimes dismissed as pointless or Eurocentric (cf. P. GLENN, *Comparative Legal Families and Comparative Legal Traditions* in: M. REIMANN/R. ZIMMERMANN, *The Oxford Handbook of Comparative Law*, 2008, pp. 422-440). What this paper wishes to demonstrate is that a simplified categorisation is not pointless but has practical application (cf. also H. KÖTZ, *Abschied von der Rechtskreislehre?*, ZEuP (Zeitschrift für Europäisches Privatrecht: Journal of European Private Law) 6 (1998), p. 493). And anyone who considers it to be “Eurocentric” to mention the influence of European laws on many non-European legal regimes would presumably also have to criticise as “Eurocentric” the mere statement that the English, Spanish and French languages are spoken all over the world in many countries.

<sup>2</sup> footnote 2 see page 129.

- the **Nordic** legal family (which lies between the Common Law and the Romano-Germanic legal family)
- and finally the **Islamic** legal family (since Islamic law is the single religious law that influences a multitude of countries).

I have allocated **mixed systems** to the legal family with which they share most features (so, put simply, whether, as a rule of thumb, one is correct in inferring the influence of English or French legal norms in the civil law)<sup>3</sup>:

- So, for example, I rate South Africa and Scotland as belonging to **Common Law**, as this has eclipsed the Romano-Germanic influence in many influential elements.
- Conversely, I rate Quebec as belonging to the legal family of the **Code Napoleon** because here a comprehensive French-style civil code is the definitive legal basis, despite all Common Law influences. This applies arguably also in respect of Puerto Rico. Louisiana is a borderline case.

Other comparative studies also list **customary law** as a separate group<sup>4</sup> (or as “African Law”<sup>5</sup>). Such a distinction may well make sense if one’s classification system is arranged according to legal sources. In relation to the form of categorisation used here, which is according to the content of the civil law, and primarily family and succession law, classification of a legal order as being influenced by customary law permits very little to be deduced in respect of its content.

### 1.3. Dichotomy between Common Law and Civil Law

We begin with the classic pair of opposites: on the one hand, **Common Law** (or the Anglo-American legal family) and, on the other hand, the Romano-Germanic legal family in the broader sense (or what in the English terminology of the **Civil Law** legal orders would most likely be translated as “codified” legal orders).

It is primarily Anglo-Saxon authors who frequently limit themselves to this two-way division of legal systems (with, possibly, customary law and/or Islamic Law as additional categories)<sup>6</sup>.

We follow this classification only to a partial extent: we do treat the legal orders based on Common Law as a uniform legal family because they have many similarities to each other. Within the Romano-Germanic legal family, however, we distinguish between several legal families because it provides very little insight to lump nearly two thirds of all legal orders together in blanket fashion as Civil Law countries – only because they all attach great significance to written codifications of laws (and, by the way, most law is today also in the Common Law countries made in statutory form) – without recording the considerable differences as regards content between the individual subgroups of the Civil Law countries by means of further subdivision.

Beyond codification there are, of course, also elements which nearly all legal orders in the Romano-Germanic legal family have in common – not least the **office of Latin notary** and consequently, in family and succession

law, in particular the form of the **notarially recorded will** as one possible testamentary form and in most cases the notarial marriage contract (if not, as is the case, for example, in some former Communist states, matrimonial property contracts are forbidden altogether).

### 1.4. Civil Law or Romano-Germanic legal family

Within the Civil Law legal family or the “Romano-Germanic” legal family **two main branches** can be distinguished which I here treat as separate legal families<sup>7</sup>:

- On the one hand there is the “Roman” legal family, here described as the **legal family of the Code Napoleon** after the code on which it is modelled.

<sup>2</sup> The classification used here is broadly similar to the classifications used by K. ZWEIGERT/H. KÖTZ, *Einführung in die Rechtsvergleichung*, 3<sup>rd</sup> edition, 1996, and by R. DAVID/G. GRASSMANN, *Einführung in die großen Rechtssysteme der Gegenwart*, 3<sup>rd</sup> German edition, 1988.

ZWEIGERT/KÖTZ distinguish six legal families namely (1) the Roman, (2) the German, (3) the Anglo-American, (4) the Nordic legal family, (5) the law in the Far East (China and Japan) and (6) religious laws (Islam, Hindu). They viewed the “Socialist” legal family still contained in the 2nd edition as having “almost disappeared from the earth ... with the collapse of Communism” (Foreword p. V) which, from the point of view of civil law, appears to me to be a prediction made about two decades prematurely. The Soviet state structure has disappeared along with the Communist domination of Eastern Europe, but many civil law statutes or at least their characteristics have remained.

DAVID/GRASSMANN distinguish seven legal families, namely (1) the Romano-Germanic legal family (with Western European, Central European and Nordic subgroups), (2) the Socialist legal families, (3) Common Law (England and USA), (4) the Far Eastern legal families, (5) those based on religion (Islam, Hindu, Judaism) and (6) those based on established family (customary law).

<sup>3</sup> Ultimately it is merely a matter of definition as to whether one regards mixed systems, as here, as subgroups within the Common Law or the Romano-Germanic legal family or whether one defines them as a separate legal family with subgroups that are, on the one hand, closer to the Common Law legal family or, on the other hand, closer to the Romano-Germanic legal family. Mitigating against the classification of mixed systems as a separate legal family is primarily the fact that they exhibit few common elements – except that they originate from two dissimilar parents.

<sup>4</sup> Cf. for example the presentation of legal systems on the homepage of the Law Faculty at the UNIVERSITY OF OTTAWA: [www.juriglobe.ca](http://www.juriglobe.ca) (in various languages).

<sup>5</sup> Thus R. DAVID/G. SAWER/I. SZABÓ/H. AFCHAR/J. D. M. DERRETT/T. K. K. IYER/Y. NODA/K. M'BAYE did in the *International Encyclopaedia of Comparative Law, volume II, The Legal Systems of the World*, Chapter 1, *The Different Conceptions of the Law*, 1975, dealt with six different conceptions of the law: (1) the Western, (2) the Socialist, (3) the Muslim, (4) the Hindu, (5) the Far Eastern and (6) the African conception of the law. This approach is very time-bound in the Cold War era and the independence movement of the 1960s and 70s. Little practical knowledge about the individual legal orders can be gained from this.

The classification used here is close to the division used in chapter 2, *Structure and the Divisions of the Law*: (1) Civil Law system, (2) Common Law system, (3) Socialist Law system, (3) Islamic Law, (4) Hindu Law and (5) African Law (R. DAVID/C. SZLADITS/T. WEIR/V. M. TSCHCHIKVADZE/S. L. ZIVS/C. CHEHATA/J. D. M. DERRETT/T. K. K. IYER/E. COTRAN).

<sup>6</sup> Cf. for example the informative description of legal systems, illustrated with various maps, on the homepage of the Law Faculty of the UNIVERSITY OF OTTAWA: [www.juriglobe.ca](http://www.juriglobe.ca) (in various languages). The Civil Law/Common Law dichotomy and the aggregation of the Civil Law into one uniform legal family is also found in, for example, GLENN, *Legal Traditions of the World*, 2000, or in the *International Encyclopaedia of Comparative Law*.

<sup>7</sup> Like, for example, ZWEIGERT/KÖTZ.

- On the other hand there is the **German** (or Central European) legal family which today primarily consists of the German-speaking countries (in the pre-War period it still, however, also included the major part of Eastern Europe) and was based on the adoption of the Austrian (ABGB), the German (BGB) or the Swiss (ZGB) civil code.
- Many countries that clearly fall to be allocated to the Romano-Germanic legal family but which cannot be allocated to either of the two main branches I designate as another legal order of the Romano-Germanic legal family. This concerns in particular **East Asian countries** (which are sometimes regarded by other authors as a separate East Asian or Far Eastern legal family) – but today also, however, the Netherlands.

The legal family of the **(former) Communist dominated states** may, in the broader sense at any rate, be added to the Romano-Germanic legal family because the Soviet influenced statute books were also legal codes, only in (deliberately) simplified form. And with the collapse of Communist domination or at any rate the declining importance of Communist ideology for civil law even in the Communist states still remaining, a fundamental dividing line vis-à-vis the (other) Romano-Germanic legal regimes no longer exists.

By contrast I would no longer add the **Nordic legal family** to the Romano-Germanic legal family but instead treat it as a separate legal family between Common Law and Civil Law.

## 2. The Common Law legal family

### 2.1. Countries and subgroups belonging to the Common Law legal family

All present day comparative classifications recognise Common Law as being one of the largest legal families<sup>8</sup>. Although Common Law includes almost a **quarter of the countries in the world**, the legal family is characterised by an **astonishing homogeneity** in important features.

The Common Law legal family includes all countries that were formerly (or are still) governed by England, so in particular the Commonwealth countries and the USA (or put simply, the countries in which English is an official language). English as the official language and Common Law are two remaining legacies of the former **British Empire**; both followed where British soldiers came as conquerors, and both remained even after the flag of the Empire had been lowered.

Within the Common Law grouping several **subgroups** can be distinguished:

- **England**<sup>9</sup> is the **mother country** of Common Law and is still today the reference model by means of which most other Common Law legal orders are described. The fact that many Commonwealth countries have a common highest court in the British House of Lords or the Judicial Committee of the Privy Council also contributed to legal unity within the Commonwealth.
- Since the **USA** became the first former colony to become independent and so has developed its law sepa-

ately from English law for more than 200 years, of all the Common Law legal orders the law of the USA differs most profoundly from English law.

- Particular characteristics are also exhibited by **mixed systems** in which earlier existing (but at that time mostly not codified) Romano-Germanic law was eclipsed by Common Law, in particular in **South Africa** and **Scotland**, where the earlier *ius commune* (= adopted Roman law) was overlaid by Common Law.
- Primarily in South and South East Asia but sometimes also in Africa, Common Law and **Islamic law** or in Africa also (other) customary law overlap. In these countries different family and succession laws typically apply depending on religious affiliation (or in the case of customary law, depending on ethnic affiliation).
- **Israel** is a special case. During the time of the British Mandate the earlier Ottoman law was overlaid by Common Law. In the meantime, however, the Common Law regulations continuing in force<sup>10</sup> were in turn overlaid by new laws influenced by Romano-Germanic models of various origin. Israel thus lies between the Common Law legal family and the legal family of other Romano-Germanic countries. The earlier subsidiary validity of Common Law was expressly ended by the legislator; on the other hand there is no comprehensive civil code. Israel is therefore a Common Law country without Common Law or a codified legal system without a code.

### 2.2. Linking of the law applicable to matrimonial property to matrimonial domicile

The Common Law countries determine the applicable matrimonial property law for movable property variably according to the respective **domicile** of the spouses. For immovable property the relevant law of the state where the property is situated is applicable (**splitting of the matrimonial property law**).

- In this regard the **concept of domicile** under Common Law should not be confused with domicile in the sense used in Romano-Germanic legal regimes. Establishing a new (Common law) domicile of choice not only requires that residence is objectively established in another country, it also requires the intention to remain there permanently and not to move back (*animus manendi et non revertendi*).
- In particular English law and the legal orders closely related to it make a lot of the intention to remain in the new country, so that the concept of domicile **under English law approaches that of nationality**.

<sup>8</sup> Only in the context of the 60s or 70s could one summarise Common Law and the various groups of Romano-Germanic legal families as "Western Law".

<sup>9</sup> Cf. A. CLAUDET, *National Report England*, Notarius International 2002, pp. 39.

<sup>10</sup> Thus a different marriage law applies depending on religious affiliation (a characteristic that Israeli law shares both with the South Asian and East African Common Law countries, but also with the Islamic countries), whereas the law of succession is independent of the religion of the deceased.

- In the **USA**, by contrast, although the definition is basically the same, much less is made of the intention to remain. Thus the concept of domicile corresponds more to **habitual residence** or **domicile** in the sense used in Civil Law countries. This differing understanding of the concept can be explained historically by the fact that as colonial power, England was anxious that English law applied directly, for as long as possible, also to English persons resident in the colonies, whereas as an immigrant country, the USA wanted US law to apply as quickly as possible also to immigrants.

If the spouses have a different domicile, conventional understanding is that the **domicile of the husband** is decisive (which is furthermore arguably the case under English law whereas the USA is arguably more likely to apply the last joint domicile of the spouses).

### 2.3. Separation of property the statutory matrimonial property regime

#### 2.3.1. Judicial allocation of assets in accordance with the principle of fairness

In nearly all Common Law countries **separation of property** is the “statutory matrimonial property regime”. Under Common Law marriage has no effect on the spouses’ ownership and power of disposal. The concept of the “matrimonial property regime” is therefore not even known to Common Law.

However, **upon divorce the court** may allocate assets belonging to one spouse to the other spouse in accordance with the principle of fairness. This is regulated procedurally as a power of the court (frequently in a *Matrimonial Causes Act*), not substantively as a rule of matrimonial property law. The court may exercise its discretion on both property and maintenance grounds. In many countries the law does regulate the circumstances to be weighed up in the exercise of the court’s discretion but the scope of the transfer is not specifically stipulated.

For this reason the frequently used description of the Common Law “matrimonial property regime” as separation of property falls short. More pertinent in my view would be to speak of **separation of property with judicial allocation of assets in accordance with the principle of fairness**.

- The share that is awarded by the court to the lower earning spouse or the spouse who runs the household is considerably higher nowadays than in the past<sup>11</sup>. This may well lead to **the division of the assets in half**, as the courts now operate on the basis of the principle that running the household and bringing up children is equal to a professional activity<sup>12</sup>. To this extent the Common Law approach is similar to that of the matrimonial property regime of community of surplus.
- Unlike in the matrimonial property regimes of community of surplus and community of property acquired during marriage, the judicial allocation of assets may, however, also include assets that one of the spouses **brought into the marriage** (which is even comparable in this respect with full community of property).

- For the connecting factor under private international law the applicable law ultimately plays less of a role therefore than **judicial competence** for the divorce proceedings.

#### 2.3.2. Community of property in South Africa

In South Africa and also Namibia, Lesotho and Swaziland, by contrast, **full community of property** in the family of the earlier Dutch law still applies, thus extending even to assets already owned prior to the marriage or acquired through gift or testamentary disposition<sup>13</sup>.

#### 2.3.3. Community of property acquired during marriage in various US federal states

In nine states in the USA the system of community of property acquired during marriage applies as the statutory matrimonial property regime rather than separation of property. These states are primarily, although not exclusively, ones that used to be Spanish or French colonies, namely Arizona, California, Louisiana, New Mexico, Nevada and Texas, but also Idaho, Washington (State) and Wisconsin.

#### 2.3.4. Islamic separation of property in the Common Law countries of South Asia

Primarily in the South Asian Common Law countries (India, Pakistan, Bangladesh), but also, for example, in Malaysia and in various African countries, separation of property in accordance with **Islamic Law** applies for the Muslim population rather than the Common Law model. This means **strict separation of property** without the possibility of an allocation of assets at the court’s discretion.

### 2.4. Splitting of a deceased’s estate

In succession law all Common Law legal orders provide for the **splitting of a deceased’s estate**: succession to movable property is governed by the law of the **deceased’s last domicile**, whereas succession to immovable property is governed by the law of the place where the property is situated.

In this instance too one should not confuse the Common law domicile with the term “domicile” in the Civil Law legal systems<sup>14</sup>.

### 2.5. Substantive succession law

#### 2.5.1. No compulsory portion

Among all the legal families testamentary freedom enjoys the highest importance under Common Law. Con-

<sup>11</sup> Prior to 2000 England was, by contrast, a preferred venue for rich spouses seeking a divorce and wanting to avoid substantial equalisation claims by the less well off spouse.

<sup>12</sup> The leading English decision was the decision of the HOUSE OF LORDS of 26.10.2000 – *White v. White* [2000] 2 FLR 981 (Internet: <http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd001026/white-1.htm>).

<sup>13</sup> Further examples where there is community of property are today only the Philippines and Rwanda, and arguably also Burundi.

<sup>14</sup> See above, paragraph 2.2.

versely the next-of-kin are afforded the least protection. In most Common Law legal regimes the **right to a compulsory portion** is therefore unknown and the next-of-kin only have claims equivalent to maintenance claims.

- In **England** and most of the Commonwealth countries the court may, however, on their application, award the next-of-kin (typically the spouse and children) “**reasonable financial provision**” if they have not been provided for or if they have been inadequately provided for by the testator. The court may in this respect order both a lump sum payment or periodic payments, or also the transfer of particular assets. The main objective is to cover the dependants’ maintenance needs in accordance with their social position. What amount of provision is “reasonable” is not stipulated as a fixed share of the estate but depends also on the income and assets of the entitled party. The time limits for making claims amount, as a rule, to a matter of months.
- In the **USA**, by contrast, in the federal states where there is separation of property, the surviving **spouse** is usually entitled to a **compulsory portion** of between a third and a half of the estate (elective share). In many US states the spouse also has a life-long right of use of the joint matrimonial homestead if this belonged to the deceased. The children, on the other hand, are **not entitled to a compulsory portion** and only have maintenance claims against the estate, if they are still minors. Only if the children were “inadvertently left out” of the will are they entitled to the share to which they would be entitled on intestacy. The legal position has been the same in **Ireland** since 1965.
- **Mixed systems** between Common Law and Civil Law as a rule grant both the **spouse and the children a compulsory share** (legal rights), as is the case, for example, in Scotland and Louisiana, and in Puerto Rico in the USA. South Africa, on the other hand, follows English law in this respect and grants neither the spouse nor the children a compulsory portion.

### 2.5.2. Two-witness will

The ordinary form of will under Common Law is the **two-witness will** (drawn up as a private instrument).

However, wills drawn up in accordance with the **requirements of the law of the place** where they are made are recognised as valid in almost all Common Law countries. Only a few states in the USA require compliance with the local form for wills in relation to dispositions of property located there<sup>15</sup>.

Common Law does not recognise any binding commitment under succession law entered into through a joint will or **contract of inheritance**. But it does allow specific contractual undertakings to make a will or not to make a will. If a contract of inheritance or similar is concluded in ignorance of this where a Common Law succession statute applies, it can probably be reinterpreted as a unilateral testamentary disposition with a concurrent contractual obligation.

### 2.5.3. Administration of an estate by executor or administrator

Under Common Law the estate does not devolve directly upon the heirs but is initially treated as a separate legal entity in respect of which an executor (appointed by the testator) or an administrator (appointed by the court) must, in principle, act.

Thus if the estate or any part of it is located in a Common Law country, as a rule an executor or administrator is a procedural requirement, and this is so irrespective of which substantive law of succession is applicable! In such cases it is therefore advisable to appoint an executor in the will, but it would be sensible to make this subject to the proviso that this is “insofar as the **law applicable in respect of the probate proceedings** requires an executor/administrator”. (This rider also makes it clear that execution of the will in the sense used in Romano-Germanic legal systems is not being instructed.)

## 3. Code Napoleon legal family

### 3.1. Member countries and subgroups

The French Civil Code of 1804, which I will here call the **Code Napoleon** in order to distinguish it from other civil codes, became the most successful codification since Justinian’s *Corpus Juris*. It spread partly through French conquests – firstly in Europe through Napoleon’s soldiers and later through France’s overseas colonies – but also as a result of voluntary adoption as undisputedly the most modern legal code for almost a century.

#### 3.1.1. Adoption of the Code Napoleon

In some countries the Code Napoleon was adopted in its original form:

- The original Civil Code of 1804 continues to apply (naturally with numerous amendments) in Europe in **Belgium** and **Luxembourg** as well as in **France**. In the other areas conquered by France at that time it was, however, later replaced. (Thus it applied in the various Italian territories only until 1814, in German territory west of the River Rhine until 1900, in various French-speaking cantons in Switzerland until 1912, and in parts of Poland – the former Congress Poland – up to the Second World War.)
- In the former French colonies in **West and Central Africa** the French Civil Code continued to apply (in the 1958 version) after independence in most cases, initially at any rate. The majority of Islamic Francophone countries in West Africa however replaced the family law provisions with a *Code des Personnes et de la Famille* (Code of Persons and Family). The sys-

<sup>15</sup> As is the case in Georgia and North Carolina, and arguably also Texas. If necessary a will can be recorded that complies both with the requirements for a two-witness will in accordance with the law of the relevant US state and with the requirements of the notarial recording law in the place where the will is drawn up (cf. HERTEL in: WALZ, *Beck’sches Formularbuch Zivil-, Wirtschafts- und Unternehmensrecht Deutsch-Englisch*, example G. I. 4.; HERTEL in: LIMMER/HERTEL/FRENZ/MAYER, *Würzburger Notarhandbuch*, 2004, part 7 paragraph 879).

tem of community of property acquired during marriage was, in particular, replaced with the Islamic separation of property. In civil law, the **Senegalese Code des Obligations Civiles et Commerciales** (COCC – Civil and Commercial Code), which has been progressively enacted since 1963, has provided a model for other Francophone countries in Africa. In business law the Organisation for Harmonisation of African Business Laws (**OHADA** – *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*)<sup>16</sup> has enacted uniform statutes in the areas of company and commercial law for its current 16 member states.

- In 1895 Belgium enacted a civil code for the **Congo** (Zaire) which corresponded essentially to its own (i.e. French) Civil Code. This was extended after the First World War to Burundi and Rwanda (but replaced in Rwanda by a new civil code in 1988).

### 3.1.2. Autonomous new codifications based on the Code Napoleon

Other European countries have enacted codifications that are **autonomous** but strongly based on the French Civil Code:

- This applies in particular in respect of **Italy**<sup>17</sup> (*Codice civile* 1865, replaced by the *Codice civile* of 1942), **Portugal** (1867, now replaced by the Civil Code of 1966) and **Spain**<sup>18</sup> (1889).
- The first civil code of the **Netherlands**<sup>19</sup> of 1838 largely followed the Code Napoleon as regards content. The present day *Burgerlijk Wetboek* (BW), which has been progressively enacted since 1991, is, by contrast, a completely autonomous creation that in relation to the matrimonial property regime is similar to Nordic law, but which otherwise cannot be decisively allocated to any of the legal families of the Romano-Germanic legal families.
- The law of **Poland** was also strongly influenced by the French example up until the Second World War (with German and Austrian law also continuing to apply in parts), as was the law of **Romania** and to some extent also the law of **Czechoslovakia** in the inter-war years.
- As a result of its influence on the civil codes of Portugal, Spain and the Netherlands, the Code Napoleon also had an effect on other **non-European countries**, so for instance the Dutch Civil Code of 1838 was largely adopted in Indonesia through the Civil Code of 1847.
- In the **Portuguese-speaking countries of Africa** the Portuguese Civil Code of 1966 (with amendments) continues to apply after independence in Angola, Guinea-Bissau and Mozambique. Cape Verde, however, replaced it with a new civil code in 1997.
- The **Spanish Civil Code** (of 1889) continues to apply outside of Spain in **Equatorial Guinea**. It was replaced by a new civil code in 1930 in Puerto Rico and in 1950 in the Philippines.

The **Latin American countries** also rank among the countries whose legal systems are based on the legal fa-

mily of the Code Napoleon. As they looked around for models for their **own civil codes** following independence from Spain or Portugal, they primarily used the French Civil Code, either directly or indirectly, as their pattern because, at the time when the Latin American colonies became independent at the beginning of the 19<sup>th</sup> Century, the mother countries, Portugal and Spain, had not yet codified their civil law into a comprehensive, modern codification.

- Civil codes based very closely on the French Civil Code, following it verbatim in many instances, include in particular the Civil Code of Haiti (1825), **Bolivia** (1830, replaced in 1898; it was also followed by the *Código General* of Costa Rica of 1841, replaced in 1888) and of the Dominican Republic (1845/1884).
- The **content** of the Code Napoleon also applied, with restrictions, in respect of the Civil Code of **Peru**<sup>20</sup> of 1852 (replaced by new codifications in 1936 and 1984) and **Mexico**<sup>21</sup> (1870/1884 and 1928/1932).
- The Civil Code of **Chile** drafted by Andrés Bello (1855, new promulgations in 1995 and 2000) represented an autonomous creation. It established a subgroup of its own, as it was essentially adopted by **Ecuador** (1860), **Columbia** (1873) and by various **Central American countries** (El Salvador 1859, Honduras 1906). In addition it exercised considerable influence on the Civil Codes of **Venezuela** (1862) and Uruguay (1868).
- The **Argentinian** Civil Code (1869, substantially drafted by DALMACIO VÉLEZ SANSFIELD) was largely adopted in **Paraguay** (1876, replaced 1985/1987) and exercised considerable influence – along with Chilean law – on the *Código civil* of Costa Rica (1888).
- It was only as recently as 1916 that **Brazil** acquired its own civil code, which harked back to the Civil Codes of France, Portugal, Italy and Switzerland and to the German Civil Code, the BGB. In 2003 it was replaced by a new civil code<sup>22</sup>.

### 3.1.3. Mixed systems where the Code Napoleon predominates

**Mixed systems** with a strong Common Law influence are particularly found in areas originally governed by

<sup>16</sup> The member states of OHADA are Benin, Burkina Faso, Cameroon, Chad, Comoros, Republic of Congo (Brazzaville), Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Ivory Coast, Mali, Niger, Senegal, Togo and the Central African Republic. The accession of the Democratic Republic of Congo (formerly Zaire) has not yet been implemented. Internet: [www.ohada.com](http://www.ohada.com)

Cf. also A. TOURÉ, Regards croisés sur la notion de groupe de sociétés en Afrique francophone (*OHADA*), Notarius International 2005, p. 19.

<sup>17</sup> Cf. E. CALÒ, *National Report Italy*, Notarius International 2001, pp. 151, 165.

<sup>18</sup> Cf. C. PLANELL DEL POZO/S. TORRES ESCÁMEZ, *National Report Spain*, Notarius International 2003, pp. 232, 249.

<sup>19</sup> Cf. K. M. M. DE WITT/A. A. TOMLOW, *National Report the Netherlands*, Notarius International 2002, pp. 8.

<sup>20</sup> Cf. R. FERNANDINI BARREDA, *National Report Peru*, Notarius International 2003, pp. 6, 14.

<sup>21</sup> Cf. J. A. MÁRQUEZ GONZÁLEZ, *National Report Mexico*, Notarius International 2005, pp. 183, 200.

<sup>22</sup> Cf. J. FIGUEIREDO FERREIRA/L. C. WEINZENMANN, *The Notarial Profession in Brasil*, Notarius International 2006, pp. 59, 68.

France, Spain or Mexico which later fell to the British crown or to the USA:

- The French Civil Code was introduced on **Mauritius** as early as 1808. It was retained under English colonial rule (since 1814) so that today on Mauritius the legal system is a mixture of the Code Napoleon and Common Law with Islamic influences.
- **Louisiana** adopted a civil code in 1808 that was strongly inspired by the Code Napoleon. Later legislative drafting and content of laws was, however, primarily influenced by Common Law, so that today one can well argue about which element predominates.
- In 1866 **Quebec**<sup>23</sup> received a civil code inspired by the French Code Napoleon (that was replaced in Quebec by a new codification in 1994; it was, however, adopted in slightly amended form in 1877 in **St. Lucia** where it applies to this day, although a revised version is being drafted).
- On the **Philippines** many parts of the Spanish *Código civil* came into force in 1889. It also remained in force during the US colonial period. In 1950 it was superseded by a new, English language civil code that exhibited considerable Common Law influences in contract and property law (inter alia through the introduction of the trust). In 1988 family law was transferred to its own family law code. For the Muslim minority, a separate Code of Muslim Personal Laws has applied since 1977.
- **Puerto Rico** essentially adopted the Spanish *Código civil* in 1902 (after its transfer to the USA). In 1930 it was replaced by a new codification. Since 1898 the law of the Code Napoleon has in many respects been overlaid by Common Law in United States territories.

### 3.2. Statutory matrimonial property regime of community of property acquired during marriage

In nearly all Code Napoleon countries the statutory matrimonial property regime is **community of property acquired during marriage**.

- Exceptions are, in particular, the Francophone countries of **Africa** with sizeable Muslim populations: in these countries **separation of property** primarily applies as the statutory matrimonial property regime under the influence of **Islamic law**.
- **Separation of property** applies also in some federal states in **Mexico** as well as in several **Central American countries** where the legal system is based on the Code Napoleon (such as Honduras and Nicaragua; in Costa Rica separation of property applies but with apportionment of assets and liabilities).
- While the European and African countries where the legal system is based on the Code Napoleon as a rule permit various choices of matrimonial property regime, some **Latin American countries** where the legal system is based on the Code Napoleon **forbid** any **contractual variation** of the statutory system of community of property acquired during marriage (e.g. Argentina, Bolivia and Paraguay).
- Other countries allow a marriage contract relating to the matrimonial property regime **only prior to the**

**marriage**, but not at all after the marriage (e.g. Ivory Coast, the Philippines) or only with judicial authorisation (e.g. Brazil, the Netherlands and Portugal).

### 3.3. Law applicable to succession: splitting of the estate, law of habitual residence or law of nationality

There is no uniform rule for the law applicable to the succession:

- In **France** a **splitting of the deceased's estate** can be inferred from Art. 3 CC: the law of the state in which the deceased had his last **habitual residence** is applicable in respect of movable property. For immovable property the law of the place in which the property is situated is applicable. This is followed in Europe by **Belgium and Luxembourg**, in Africa by some **non-Islamic Francophone countries** and in Latin America in particular in **Argentina and Bolivia**.
- By contrast, in the other European countries of the Code Napoleon legal family, the connecting factor is the **law of nationality** of the deceased, also in respect of immovable property; this includes, in particular, **Italy, Portugal and Spain**, and also in Africa, the majority of **Islamic Francophone countries**, the Portuguese-speaking countries and the former Belgian colonies.
- Most of the **Latin American countries** apply the law of the place of the deceased's **last habitual residence** in respect of immovable and movable property (in particular Brazil, Chile<sup>24</sup>, Columbia, Peru and Venezuela). By comparison, however, Argentina and Bolivia stipulate a splitting of the estate in respect of immovable property.
- Most of the **Mexican** federal states, **Panama** and **Uruguay** apply the **law of the place where the property is situated** to the whole of the estate, so also in respect of the movable property (and furthermore Guatemala for all assets situated in Guatemala).

### 3.4. Compulsory right of inheritance with right of action for reduction

#### 3.4.1. Only one third freely disposable share

Under the Code Napoleon the right to a **compulsory portion is a real right**, meaning a share in the estate as co-heir, which must, however, be claimed by **application to the court for reduction** of the dispositions made by the will.

- The compulsory rights of inheritance frequently amount to **two thirds** of the estate, so that a freely dis-

<sup>23</sup> Cf. Y. PEPIN/M. LACHANCE, *National Report Québec*, Notarius International 2003, pp. 157, 176.

<sup>24</sup> Chilean private international law – and following it that of Ecuador, Honduras and Columbia – provide for two exceptions: the law of succession of Chile (or Ecuador, Honduras or Columbia) applies if the deceased and his or her spouse and the relatives entitled to succeed are nationals of Chile (Ecuador etc.). If only the statutory heirs but not the deceased are nationals of Chile (Ecuador etc.), the heirs are entitled to an anticipated claim to the estate situated in Chile (Ecuador etc.), i.e. they receive at least from the estate situated there as they would receive if the law of Chile (Ecuador etc.) were applied. The anticipated right also applies in El Salvador and Nicaragua.

posable share (*quote disponible*) of one third of the estate remains.

- The **time limits** for claiming differ greatly, from 2 years under Portuguese law, to 10 years under Italian law, to up to 30 years under the former French law (since 2007 also 10 years).

It will generally be mentioned in a **certificate of inheritance** or other attestation regarding the right of inheritance if the possibility of this type of action for reduction exists and if the person entitled to a compulsory portion has not yet declared whether he/she is claiming his/her rights.

### 3.4.2. No waiver of the right to succeed or to a compulsory portion possible

Under the Code Napoleon a **waiver** of the right to succeed or to a **compulsory portion** is **not possible** during the lifetime of the testator.

### 3.5. Prohibition on joint wills and contracts of inheritance

Most Code Napoleon legal regimes prohibit joint and mutual wills and contracts of inheritance. They do sometimes recognise contracts of inheritance etc. that were entered into between foreigners.

If it is not certain whether a joint will or contract of inheritance will be recognised, an **individual will** can also be drawn up as a **precautionary measure**.

## 4. German legal family

### 4.1. Member countries and subgroups

The three German-speaking countries have each developed independent codifications that are, however, based on common roots so I am combining them as the **German (or German-speaking) legal family** (sometimes also described as the Central European legal family)<sup>25</sup>.

Three subgroups can be distinguished within the German legal family, which are embodied in three key codifications:

- The oldest codification still applicable in the German-speaking legal family is the **Austrian ABGB** (*Allgemeines Bürgerliches Gesetzbuch: General Civil Code*)<sup>26</sup> (1811), which at that time applied in the whole of the Austrian half of the Austro-Hungarian Empire. Following the collapse of Communism, the influence of the common legal family is again showing itself strongly in Slovenia, Slovakia, the Czech Republic, but also to some extent in Hungary. Liechtenstein, which initially belonged to the Austrian subgroup, has in recent years based many new laws more on Swiss models.
- The **German BGB** (*Bürgerliches Gesetzbuch: Civil Code*)<sup>27</sup> (1900) was largely adopted by **Greece**<sup>28</sup> (1940) and by the Republic of China (in 1929 – this version is still valid today in **Taiwan**, which could thus also be counted as belonging in the broader sense to the German legal family).

- The third subgroup comprises **Switzerland** whose Civil Code (**ZGB**) of 1907/1912 was in essence adopted by **Turkey** in 1926. That Swiss law continues to be adopted in Turkey is illustrated by the fact that, for example, in the recent reform of its civil code, Turkey also followed the reform of the statutory matrimonial property regime (to community of property acquired during marriage) which had in the meantime been implemented in Switzerland.

### 4.2. Common nationality the connecting factor for the law applicable to the matrimonial property

Most countries in the German legal family link the law applicable to the matrimonial property regime by means of Kegel's cascade system of connecting factors to, in the first place, the **common nationality** of the spouses and, in the second place, to their joint country of habitual residence (in each case at the time of the marriage).

Only in **Switzerland** is the reverse the case, with the connecting factor being, in the first place, the (prevailing) **joint habitual residence** and only in the second place their common nationality.

### 4.3. Separation of property with statutory equalisation claim

The statutory matrimonial property regime in all the countries is a form of separation of property with a **statutory equalisation claim** – albeit that the statutory description may at first glance be misleading:

- In Germany, Austria<sup>29</sup>, Greece and Taiwan the **matrimonial property regime of community of surplus** is the statutory matrimonial property regime: on termination of the matrimonial property regime the surplus (= increase in value) achieved by each spouse during the period of the regime is calculated. The spouse who achieved a larger surplus must make a monetary payment of half of the surplus amount (in Greece: one third) to the other spouse.
- **Participation in acquisitions** is, by contrast, the regime that applies in Switzerland (since 1986) and Turkey (since 2002). This too is a form of separation of property with a statutory claim to half of the differ-

<sup>25</sup> Like ZWIEGERT/H. KÖTZ, *Einführung in die Rechtsvergleichung*, 3<sup>rd</sup> edition, 1996.

K. H. NEUMAYER in: R. DAVID/G. GRASSMANN, *Einführung in die großen Rechtssysteme der Gegenwart*, 3<sup>rd</sup> German edition, 1988, on the other hand, speaks of the "Central European subgroup" of the Romano-Germanic legal family. He includes in it also the Eastern and South Eastern European countries (with the exception of Romania) which here are numbered among the (former) Communist countries.

<sup>26</sup> Cf. T. ANTENREITER, *National Report Austria*, Notarius International 2002, pp. 119, 134.

<sup>27</sup> Cf. C. HERTEL, *National Report Germany*, Notarius International 2001, p. 20.

<sup>28</sup> Cf. S. MOURATIDOU, *National Report Greece*, Notarius International 2001, pp. 94, 104.

<sup>29</sup> The ABGB does in fact use the term "separation of goods" (section 1387 ABGB). Section 81 et seq. of the Marriage Act (Ehegesetz: EheG) has since 1978, however, provided for a division of the "matrimonial consumable property" and the "matrimonial savings", i.e. as the outcome of an equalisation of any surplus.



ence in the surplus. In contrast to the community of surplus, a mere increase in the value of the original assets does not have to be compensated<sup>30</sup>.

#### 4.4. Law applicable to succession in accordance with the law of nationality

Most states in the German legal family also link the law applicable to the succession to the **law of nationality** of the deceased – again with the **exception of Switzerland** where the connecting factor here also is the place of habitual residence.

#### 4.5. Binding contractual commitment possible in succession law

##### 4.5.1. Contract of inheritance and joint will

Contractually binding testamentary dispositions are essentially only found within the German legal family but even here, however, not to the full extent in all legal orders:

- German law permits both the contract of inheritance (between living persons) and the joint and mutual will (only between spouses). The contract of inheritance is binding, while the joint will can only be revoked during the lifetime of the other testator.
- In Switzerland and Turkey contracts of inheritance are permitted. In respect of the joint will there is, however, no regulation.
- Austria permits the contract of inheritance, but only between spouses and only with binding effect in respect of three quarters of their assets (not in relation to the “free quarter”) and only in favour of the other spouse (not, however, in favour of joint children). Joint wills are a permitted form of will but may be revoked unilaterally at any time.
- Greece, finally, forbids both the contract of inheritance and the joint will, as does the law of Taiwan.

##### 4.5.2. Waiver of the right to succeed or to a compulsory portion

Most countries in the German legal family also permit a waiver of the right to succeed or to a compulsory portion during the lifetime of the testator – again with the **exception of Greece** (the influence of the Code Napoleon also being shown here) and Taiwan.

### 5. (Former) Communist-governed states

#### 5.1. Member countries and subgroups

Another clearly defined special group that could be distinguished, at any rate until around 1990, were the Communist or Socialist legal orders<sup>31</sup>. In my view, even after the introduction of the market economy and democracy in most of these countries, it is still useful to treat the **(former or still) Communist-governed states** – at least for the time being – as a separate legal family<sup>32</sup>. This is because many of the characteristic similarities in the law of these countries can only be understood as a result of the barely 50 years of Communist rule, if, at all events, one wishes to distinguish separate subgroups within the Civil Law family.

Within the (former) Communist-governed states primarily **three subgroups** can be distinguished:

- In **Russia** and the other **CIS states**, provisions that are identical in content generally apply in family and succession law and in the associated private international law statute; these sometimes still date from the Soviet era or are based on provisions dating from this time.
- The other **Eastern European states**<sup>33</sup> (including the Baltic states) differ from the CIS states in particular in private international law, generally also as a result of the tendency towards greater freedom of legal arrangement in matrimonial and succession law. When carrying out reforms many of the states are again linking into their law from the pre-War era so that in a couple of decades they may again fall to be allocated to the other Romano-Germanic legal families (in particular to the legal family of the Code Napoleon and the German legal family).
- The third subgroup is composed of the **East and South East Asian countries**. The civil law of, in particular, the **People’s Republic of China**, has always exhibited considerable differences vis-à-vis Soviet law<sup>34</sup>, whereas, the (previous) civil law of Mongolia<sup>35</sup> or Vietnam, for instance, followed the Soviet model closely.
- A special case is **Cuba**, the sole Latin American country in (what is still in this respect) the Communist legal family. The substantive matrimonial and succession law of Cuba is close to that of the previous Soviet Union, whereas its private international law is still influenced by the Latin American family.

#### 5.2. Connecting factor for the law applicable to the matrimonial property

In private international law the CIS states on the one hand and the (other) Eastern European states on the other hand differ considerably. In the CIS states the connecting factor favoured both in respect of matrimonial property law and succession law is the law of the place of habitual residence whereas it is the law of nationality in the Eastern European states.

- In Russia and the other **CIS states** the law applicable to the matrimonial property is determined in accordance with the **prevailing joint habitual residence** of the spouses.
- By contrast, most **Eastern European legal orders** stipulate a cascade system of connecting factors: in

<sup>30</sup> The difference relates to real increases in value e.g. of real property or an increase in the price of shares. Increases in value that are merely due to inflation do not represent surpluses in any legal order.

<sup>31</sup> See, for example, DAVID/GRASSMANN or the *International Encyclopedia of Comparative Law*.

<sup>32</sup> The UNIVERSITY OF OTTAWA: [www.juriglobe.ca](http://www.juriglobe.ca) has a different approach. ZWEIFERT/KÖTZ do not deal with the (former) Communist states at all, GLENN only marginally.

<sup>33</sup> Cf. E. BRANISELJ, *National Report Slovenia*, Notarius International 2004, pp. 153, 169.

<sup>34</sup> Cf. WANG JIAN, *The Notariat System in China*, Notarius International 2003, pp. 149, 150.

<sup>35</sup> Cf. DAMBADARJAA YANJINKHORLOO, *National Report Mongolia*, Notarius International 2004, pp. 17, 28.

the first place the **common nationality** of the spouses applies, in the second place (i.e. in the case of mixed nationality marriages), the law of the place of joint habitual residence, and in the third place, in general the law with which the spouses are otherwise most closely connected. The connecting factor is, in most cases, **changeable**, i.e. the law applicable to the matrimonial property changes (in the case of mixed nationality marriages) with a change of habitual residence (as in the CIS states), or, if applicable, also with a change of nationality.

### 5.3. Statutory matrimonial property regime of community of property acquired during marriage

In all (former) Communist states the statutory matrimonial property regime is that of **community of property acquired during marriage**, which is comparable with the legal orders based on the Code Napoleon. Therefore in by far the most countries, the statutory matrimonial property regime applicable is that of community of property acquired during marriage.

There is, however, less **freedom of matrimonial contract** than in most Code Napoleon countries. Many (former) Communist states permit neither a choice of matrimonial property regime nor modifications within the statutory matrimonial property regime.

### 5.4. Law applicable to succession: splitting of the estate in Russia and the CIS; law of nationality in Eastern Europe

The relevant connecting factor for the law applicable to succession is also regulated differently in the CIS states than in (the remainder of) Eastern Europe:

- In Russia and the other **CIS states a splitting of the estate** takes place (as also happens in France and Belgium, for example): the movable property is passed on in accordance with the law of the place of the deceased's last habitual residence, while immovable property passes in accordance with the law of the place where it is situated. The same applies in East Asia in respect of China, Mongolia, Cambodia and Vietnam.
- In most **Eastern European legal orders**, by contrast, the connecting factor is the **law of nationality** of the deceased both in respect of movable and immovable property<sup>36</sup>.

### 5.5. Restriction on options for legal arrangements under succession law

Soviet succession law was very rigid and restricted testamentary freedom to a large extent. This influenced the whole of the Communist legal family as it then existed. Since 1990 the law of succession has been reformed in many countries and in the course of this most have broadened the legal arrangements open to the testator. Nevertheless, a **close restriction on testamentary freedom** continues to characterise the (former) Communist states.

#### 5.5.1. Compulsory right of inheritance

In the (former) Communist states the compulsory portion takes the form of a **compulsory right of inheritance**, i.e. a real right to participate in the estate as co-heir.

- In most **Eastern European countries** the entitled party must claim his compulsory right of inheritance by **action for reduction** within a specific period of time<sup>37</sup>.
- By contrast, in Russia and the other CIS states and also in China, the person entitled to a compulsory portion becomes a co-heir irrespective of whether he also claims his or her right.

In a number of countries the **need of the entitled party** – his inability to support himself (particularly through his own work or his own means) – is a requirement, in some cases generally for the compulsory right of inheritance, and in some cases only for the compulsory right of inheritance of certain entitled parties (e.g. the parents of the deceased).

The **level** of the compulsory right of inheritance varies. However, issue usually receive at least one half of the value of the statutory share they would have received on intestacy, sometimes considerably more<sup>38</sup>. Other countries such as China do not stipulate fixed shares but assess entitlement to a compulsory portion according to need.

#### 5.5.2. Prohibition on waiver of the right to succeed or to a compulsory portion

The (former) Communist states typically **forbid** a waiver of the **right to succeed or to a compulsory portion** during the lifetime of the testator. The compulsory right of inheritance can be waived (or not claimed within the specified time for filing an action) only after the death of the testator

#### 5.5.3. Prohibition on the joint will and contract of inheritance

In the (former) Communist states the joint will and the contract of inheritance are generally **forbidden** and invalid. Exceptions are the Baltic states and Hungary which in this respect exhibit the influence of the German legal family (or their affiliation to the "Central European" legal family up to the Second World War).

<sup>36</sup> Exceptions are the Baltic states and Bulgaria. Bulgaria and Lithuania, like the CIS states, provide for a splitting of the estate, with law of the place of habitual residence applying in respect of the movable property. In Estonia the law of the place of habitual residence applies to the whole estate (so also in respect of real property); in Latvia the law of the place where the property is situated arguably applies in relation to the whole estate (so also in respect of movables).

<sup>37</sup> A compulsory right of inheritance with the requirement to raise an action does, however, apply in Bulgaria, Lithuania, Slovakia and the Czech Republic.

<sup>38</sup> In Bulgaria the compulsory right of inheritance can amount to up to 5/6 of the estate if the deceased leaves a spouse and three or more children (section 29 of the Succession Law). In Slovakia and the Czech Republic the compulsory right of inheritance can even amount to 100% of the estate if the deceased leaves only minor children but no wife (section 479 ZGB [Civil Code]).

#### 5.5.4. Content of the will

In the (former) Communist states the creation of **prior and revisionary heirs** is very largely **forbidden**.

The restrictive tendency of the (previous) Communist civil law is very apparent in, for instance, the example of the Czech and Slovak law of succession which only allows the testator to appoint heirs but not, however, to make directions regarding legacies or **execution of a will**. Many other countries permit only such execution as is necessary to wind up the estate but not extended execution of the estate (*Dauervollstreckung*).

### 6. Other legal orders in the Romano-Germanic legal family, particularly in East Asia

Although belonging to the Romano-Germanic legal family, some countries cannot be decisively allocated to any of the three main subgroups mentioned (Code Napoleon, German legal family, former Communist states) because they have drawn upon various civil law families.

#### 6.1. East Asia

This applies above all in respect of the non-Communist countries of East and South East Asia:

- **Japan**<sup>39</sup> absorbed important ideas from both French and German law because when Japan codified its law in 1900, the Code Napoleon was no longer unrivalled but had gained a powerful modern competitor in the shape of the German Civil Code. The East Asian countries could therefore draw upon the two main sources from the Romano-Germanic legal family existing at that time for their codifications.
- The appeal of the German Civil Code at the time around 1900 is also particularly apparent in the extensive adoption of the German Civil Code by **China** in 1929; with amendments this code is still applicable today in **Taiwan**.
- For its part Japanese law – along with German law – influenced the law of **Korea** (South Korea) and **Thailand**.
- Indonesia and the Philippines, on the other hand, were more strongly influenced by the **Code Napoleon** and they therefore count as belonging in the broader sense to this legal family. In **Indonesia** the Civil Code of 1847 largely adopted the former Dutch Civil Code of 1838; Islamic law also played an important role. In the **Philippines** the Spanish *Código civil* was introduced in 1889; since US colonial times there has also been the influence of Common Law.

#### 6.2. Africa

In Africa, **Ethiopia** and **Eritrea** cannot be allocated to any particular legal family of the Romano-Germanic legal family. The Ethiopian Civil Code of 1960, for example, is strongly influenced by the French Civil Code but also by the Swiss Civil Code.

### 6.3. The Netherlands

Today the Netherlands<sup>40</sup> too can no longer be allocated to the legal family of the Code Napoleon to which its Civil Code of 1838 belonged.

## 7. Nordic legal family

### 7.1. Intermediate position between Common Law and Civil Law

The **Nordic countries**<sup>41</sup> are frequently regarded as merely a subgroup within the Romano-Germanic legal family<sup>42</sup> as they are closer to the latter than to the Common Law legal family and also because they have codified laws, albeit not in the form of one comprehensive civil code<sup>43</sup>.

I would sooner regard them as lying outside the Romano-Germanic legal family<sup>44</sup> as they have not adopted Roman law – unlike the legal family of the Code Napoleon and the German legal family and the laws of the Eastern European and East Asian countries influenced by them. In any event the Nordic countries form their own legal family with typical common characteristics.

### 7.2. Member countries and subgroups

The countries belonging to the Nordic legal family are Denmark, Finland, Iceland, Norway and Sweden.

The uniformity of the legal family is also based on strong **inter-Nordic coordination**, which is expressed in part in treaties between the Nordic countries<sup>45</sup> but also in part in parallel legislation<sup>46</sup>.

Nevertheless, two **subgroups** can be distinguished – in each case due the countries being unified at points in their history:

- the first subgroup comprises **Denmark**, Norway and Iceland,
- the other subgroup **Sweden** and Finland.

### 7.3. Law applicable to the matrimonial property according to habitual residence

In the Nordic states the law applicable to the matrimonial property is determined in accordance with the

<sup>39</sup> Cf. K. YAMAMOTO, *National Report Japan*, Notarius International 2003, p. 37.

<sup>40</sup> See above, paragraph 3.1.2.

<sup>41</sup> The term “Nordic” is more precise than “Scandinavian”, as along with Norway and Sweden, the legal family also includes Denmark, Finland and Iceland.

<sup>42</sup> See, for example, DAVID/GRASSMANN.

<sup>43</sup> In the 17th and 18th Centuries comprehensive codes were, in fact, enacted (in Denmark the *Danske Lov in 1683*; in Norway the *Norske Lov in 1687*; and in Sweden the *Sveriges Rikes Lag in 1734*). These, however, scarcely play any role today; they do continue to apply formally but in most areas their content has been replaced by newer individual laws.

<sup>44</sup> Like, for example, ZWEIGERT/KÖTZ.

<sup>45</sup> Like, for example, the Nordic Family Law Convention of 6.2.1931 and the Nordic Estate Convention of 19.11.1934.

<sup>46</sup> The applicable matrimonial and matrimonial property law is based on legislation agreed in the 1920s, which is why the content of the regulations in the Nordic states is largely similar.

**habitual residence** of the spouses directly after their marriage (or in Denmark and Iceland, in accordance with the habitual residence of the husband at the time of the marriage).

#### 7.4. Deferred community property regime

In the Nordic states the statutory matrimonial property regime is the “**deferred community property regime**”, also described as separation of property with entitlement to a proportion of the other spouse’s share:

- During the marriage there is **separation of property**. Each spouse has sole right of disposal over his/her assets. The consent of the other spouse is only necessary in relation to dispositions relating to the matrimonial home (and sometimes also other real property).
- Assets only acquire the nature of joint property or entitlement to a proportion of the other spouse’s share only takes effect upon **termination** of the matrimonial property regime (whether through divorce or death); there then follows an equalisation of the matrimonial property.
- Assets **already owned at the time of the marriage** together with **assets acquired by gift or by inheritance** are, in principle, also included in the equalisation (which is comparable in this respect with community of property but also with judicial equalisation under Common Law) if these were not expressly excluded from the joint property when the grant was made or if the spouses did not agree otherwise in respect of the original assets by marriage contract<sup>47</sup>.

The statutory matrimonial property regime is exactly the same in the **Netherlands**.

Owing to the strange mixture of elements of separation of property and community of property, what consequences the deferred community property regime has for ownership and how a spouse living under the statutory matrimonial property regime should be registered as owner in the **land register** are hotly disputed.

#### 7.5. Law applicable to succession

The two subgroups in the Nordic legal family differ in the connecting factors determining the law applicable to succession:

- In Denmark and Norway the connecting factor is the deceased’s last habitual residence;
- In Sweden, on the other hand, the connecting factor is the deceased’s nationality.
- In Finland the law of the place of habitual residence applies if the deceased had lived there for at least five years; otherwise the deceased’s nationality is the connecting factor.

#### 7.6. Intestate succession and right to a compulsory portion

##### 7.6.1. Surviving spouse’s comprehensive right of use

In the Nordic states the **surviving spouse** can in the first instance retain the entire estate for his or her use.

- In **Sweden** the spouse becomes sole heir. The issue do, however, have a “**deferred right of succession**”. (The new law of succession in the Netherlands is similar to this.)
- In the other Nordic states the surviving spouse can opt for **continuation of community property**. The surviving spouse remains entitled to use and also to a large extent to dispose of the estate.

##### 7.6.2. Compulsory right of inheritance restricted in terms of amount

In the Nordic states the compulsory portion is a **compulsory right of inheritance**. It generally amounts to half of the intestate share but is restricted to certain **maximum amounts**. A waiver of the right to succeed or to a compulsory portion is permitted, but sometimes only in return for a reasonable payment<sup>48</sup>.

#### 7.7. Two-witness will and testamentary contract

The ordinary form of will in the Nordic states is the **two-witness will** (drawn up as a private instrument). Here Nordic law is close to Common Law.

Denmark and Norway recognise the **testamentary contract** (i.e. permit a contractual obligation to draw up or not draw up a particular will) – also in this respect like Common Law. As under German law they also recognise a joint will by spouses that can no longer be revoked after the death of one of the spouses.

The joint will is found in Sweden and Finland but it has no binding effect.

#### 7.8. Compulsory portion as compulsory right of inheritance

In line with the Romano-Germanic legal family the Nordic states grant the next-of-kin a compulsory portion, which is actually a **compulsory right of inheritance** (sometimes with the requirement of an action for reduction to assert the claim). However, the compulsory portion is **restricted in terms of value**, which gives it a maintenance-related element (making it comparable in this respect with Common Law).

A waiver of the right to succeed or to a compulsory portion is possible during the lifetime of the testator (as in the German legal family).

### 8. Islamic legal family

#### 8.1. General matters

##### 8.1.1. Why limit religious laws to Islamic law?

**Religious laws** do not fit into the two-way division into Common Law and Civil Law. In many comparative studies they are therefore either combined into a group of

<sup>47</sup> In Norway, upon divorce the original assets as well as acquisitions through gift or inheritance are excluded from the equalisation. Upon the death of one of the spouses these assets are, however, also subject to equalisation.

<sup>48</sup> This is the case in Finland.

religious laws or each religion is investigated separately in relation to its legal concepts<sup>49</sup>.

This may make sense if one is interested in the philosophical basis of the law. But as far as the application of foreign law is concerned, very little useful knowledge can be gained from this. For **practical purposes** we are therefore interested in religious law only insofar as its claim to validity is recognised by countries and its application is therefore of concrete importance.

- For our purposes we are limiting ourselves to **Islamic law** as it has formed a whole legal family involving a number of countries.
- Applicable (family and succession) laws also sometimes include **Hindu law** (in India, and sometimes also for Hindus in South East Asia or East Africa) and the **Jewish religious law** (for Jews in Israel – concerning only the law of marriage – and the Islamic legal family). In India and Israel, religious law has not, however, influenced the other law, let alone influenced an entire legal family.

### 8.1.2. Member countries and defining characteristics

I count all countries in the Near and Middle East **from Morocco<sup>50</sup> to Afghanistan** as belonging to the Islamic legal family, so all Arabic states plus Iran and Afghanistan.

I do **not**, however, include countries in which the influence of Islamic law is limited to family and succession law and where the civil law essentially follows Common Law or a Romano-Germanic law:

- The majority of **Muslim states in South Asia and South East Asia (Pakistan, Bangladesh and Malaysia)** combine elements of Common Law and Islamic law. I count these here as forming a particular subgroup in the Common Law legal family, as Common Law predominates: not only are contract law and private international law based on Common Law but also many elements of the substantive family and succession law.
- **Indonesia** belongs to the Romano-Germanic legal family and within this lies closest to the legal family of the Code Napoleon (primarily on the grounds of its extensive adoption of the Dutch Civil Code in 1847).
- Islamic influences on family and succession law can also be observed in various **sub Saharan African** countries. This, for example, explains why in some Francophone countries in West Africa their civil law is based on the Code Napoleon but the **Islamic separation of property** applies as the statutory matrimonial property regime and not community of property acquired during marriage.
- The majority of **CIS Islamic states in Central Asia** belong to the legal family of the (former) Communist states. Islamic law either plays no role or only a minor role here.

### 8.1.3. Subgroups

The source of all Islamic family and succession law is the **Koran**, albeit that in most countries family and succession law have now been codified. As a result, largely uniform family and succession laws apply within the Islamic legal family.

Nevertheless there are differences in how the religion is understood:

- **Sunnis and Shi'ites** differ also in relation to some issues of family and succession law.
- Within the Sunni branch there are historically four different **legal schools** (the **Hanafi**, the **Maliki**, the **Shafi'i** and the **Hanbali**) with different legal schools dominating in the individual countries.

Further differences came along as a result of **codification**. Codification also provided the opportunity for **conscious reforms** and amendments to the traditional law. In many countries polygamy was repressed, divorce by repudiation was restricted and many aspects of the legal position of women were improved.

In the Islamic states the law of contract and private international law are essentially based on the **Egyptian Civil Code of 1948** primarily drafted by AL-SANHURI (which for its part adopted many ideas from the Code Napoleon).

- The Egyptian Civil Code of 1948 was the definitive source for new codifications in numerous (in particular) Arab countries, including the civil codes of **Iraq** (1951), **Libya** (1953), **Qatar** (1971 – now replaced by a new codification dating from 2004), **Sudan** (1971), **Somalia** (1973), **Algeria** (1975), **Jordan** (1976) and **Kuwait** (1980).
- The strong direct influence of the **Code Napoleon** can be observed in the **Maghreb**: Algeria adopted the French Civil Code in 1834 (in 1975 there was, however, a new codification based on the Egyptian model). In the *Code des obligations* **Tunisia** (1906) and **Morocco** (1913) essentially adopted the French law of contract (while religious family and succession law was only codified later).

### 8.2. Splitting of the applicable family and succession law on a personal basis according to religious affiliation

The legal orders in the Islamic legal family apply religious family and succession law. This means that, depending on the religious affiliation of the person concerned, either Islamic law, the law of the relevant Christian confession or Jewish law applies<sup>51</sup>.

This type of splitting of the law on a personal basis is still found today primarily in the Common Law countries of South and South East Asia, as well as in East Africa and also in Israeli matrimonial law.

In relation to parties from these countries, therefore, in order to determine the applicable matrimonial property law or succession law, in addition to establishing the nationality of the parties (and, if applicable, their domicile/permanent residence) it is also necessary to enquire as to their religious affiliation.

<sup>49</sup> In *Legal Traditions of the World*, 2000, P. GLENN investigates various legal traditions in this way, namely the legal tradition of (1) customary law, (2) the Talmud (Judaism), (3) Civil Law, (4) Islam, (5) Common Law, (6) Hinduism and (7) Asia. He sees all these legal traditions as being ultimately based on a particular (legal) philosophy.

<sup>50</sup> Cf. H. SEFRIQUI, *National Report Morocco*, Notarius International 2005, pp. 33, 49.

<sup>51</sup> Cf. H. SEFRIQUI, *National Report Morocco*, Notarius International 2005, pp. 33, 49, and 55.

### 8.3. Law of nationality of the husband the connecting factor for the law applicable to the matrimonial property

In the Islamic states the connecting factor for the law applicable to the matrimonial property is generally the **law of nationality of the husband**.

However many countries apply their own law even where only one of the spouses is one of its own nationals<sup>52</sup>. (This means, for example, that Egyptian or Syrian courts etc. will respectively apply Egyptian or Syrian matrimonial law even if only the wife is an Egyptian or Syrian national).

### 8.4. Separation of property as the statutory matrimonial property regime

In the Islamic states **full separation of property** is the statutory matrimonial property regime. If the marriage is dissolved no division of assets takes place. The wife merely has a claim to *mahr*.

Agreement on mahr is frequently a condition for the validity of the marriage. It is frequently agreed that half of the mahr is payable upon marriage and the other half in the event of divorce.

The wife also only has claims to maintenance during the **waiting period** (*idda*) of three menstrual periods, during which she is forbidden from entering into a new marriage.

### 8.5. Linking of the law applicable to the matrimonial property to nationality and religion

In the Islamic states the connecting factor for the law applicable to successions is generally the **law of nationality of the deceased**.

However some countries apply the Islamic law to all Muslim deceased - irrespective of the nationality and the residence of the deceased.

### 8.6. Substantive law

#### 8.6.1. Statutory succession

In most countries intestate succession has now been regulated by statute. But it is based on the Islamic religious law of succession. Various rules are already to be found in the Koran. These have been built up into a system by Islamic jurisprudence. In the individual countries the law of succession therefore has largely the same content.

The Islamic law of succession distinguishes at least **two types of statutory heirs**<sup>53</sup>:

- the **qur'anic heirs** (*fardh* heirs) are allocated fixed fractional shares of the estate (which may, however, vary in size depending on how many other heirs there are).
- the estate remaining after deduction of the shares of qur'anic heirs is divided among the **residual heirs** (*asaba* heirs). (These are relatives of the deceased in the male line, also therefore known as "agnate heirs".)
- some heirs can be either qur'anic heirs or residual heirs (sometimes even both cumulatively). So, for example, the daughters are qur'anic heirs if the deceased

leaves no sons, but they are residual heirs next to the sons if the deceased also leaves sons.

- **substitute heirs** are sometimes regarded as a further group; these are relatives only in the female line who are only appointed if there are neither qur'anic heirs nor residual heirs.

Some additional typical features of Islamic succession law are:

- **Ascendants and siblings** of the deceased inherit even if the deceased leaves issue. Thus the father and mother of the deceased each inherit 1/6 of the estate as qur'anic heirs if the deceased leaves children.
- **No representation** of predeceased heirs by their issue takes place.
- **Female heirs** in principle **only receive half** of what male heirs of the same degree of kinship would receive. So, for example, sons of the deceased inherit twice as much as daughters etc.<sup>54</sup>.
- **Difference in religion** is an impediment to inheritance. Sometimes Muslims can inherit from non-Muslims but not the other way round, and sometimes Muslims cannot inherit from non-Muslims<sup>55</sup>.

In order to determine succession to an estate in accordance with an Islamic law it must therefore also be ascertained whether the deceased had siblings and ascendants who are still alive and, in addition, the religious affiliation of the heirs.

#### 8.6.2. Only one third freely disposable share

It is important for will drafting that according to Islamic law the testator can only freely dispose of one third of his estate. **Two thirds** of the estate is subject to the mandatory application of the rules of **statutory succession**. If dispositions go beyond the free third they are invalid.

The statutory heirs can, however, **consent** to dispositions by the testator which go beyond the free third of the estate.

- According to Sunni teaching this waiver can only be declared after the death of the testator.
- According to Shi'ite teaching (and, for example, also according to Iranian law), however, the consent of the heirs during the lifetime of the testator is also possible.

<sup>52</sup> In particular Afghanistan, Algeria, Egypt, Iraq, Jordan and Syria.

<sup>53</sup> Cf. Examples by H. SEFRIQUI, *National Report Morocco*, Notarius International 2005, pp. 33, 49, 57 et seq.

<sup>54</sup> When Islamic succession law is applied in Western countries this is usually corrected as contrary to public policy and the inheritance share of the female heirs is correspondingly increased, if there are sufficiently strong links to the Western country where the case is being decided.

<sup>55</sup> This is also generally not observed in Western countries, as it is contrary to public policy, if there are sufficiently strong links to the Western country where the case is being decided.