

Adapting Inheritance Law to Changing Social Realities: Questions of Methodology from a Comparative Perspective

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Abstract

This article discusses examples of inheritance law reform in different countries all dealing with the current transformations of family structures. The first part analyses discussions in US and English law on the intestate share of spouses in second or subsequent marriages in relation to the share of the children of the deceased. The second part summarises the author's own suggestions for the reform of Swiss inheritance law having regard to empirical social science literature on changing family realities. The examples from the three legal systems reveal that, although the relationship between the "Is" and the "Ought" is fundamentally different depending on the legal tradition, in both the Anglo-American and the continental European context the use of social science knowledge in inheritance law reform is currently predominantly based on a model of social science as a mere adjunct of legal studies. The author argues in the third part of the article that, especially for the complex situation of blended families, genuine transdisciplinary research could be a promising means of developing innovative solutions for inheritance law reform.

Key words

Inheritance law; family; comparative law; law reform; law and social science; transdisciplinarity; England and Wales; United States; Switzerland

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Resumen

Este artículo analiza ejemplos de reformas de la legislación sobre sucesiones en países que tienen en cuenta las transformaciones actuales de las estructuras familiares. La primera parte analiza los debates en el ámbito de la legislación en casos de intestados en Estados Unidos e Inglaterra, sobre la porción correspondiente a las esposas en segundas nupcias o posteriores, en relación a la porción de los hijos del fallecido. La segunda parte recoge las sugerencias de la autora para reformar la ley de sucesiones en Suiza, teniendo en cuenta la literatura empírica de ciencias sociales que trata las realidades cambiantes de la familia. Los ejemplos de los tres sistemas jurídicos ponen de manifiesto que, aunque la relación entre lo que "es" y lo que "deber ser" es fundamentalmente diferente en función de la tradición jurídica, en el contexto angloamericano y en el europeo continental, el conocimiento de las ciencias sociales se usa básicamente como una mera herramienta auxiliar de los estudios jurídicos, a la hora de reformar la legislación sobre sucesiones.

Palabras clave

Derecho de sucesiones; familia; derecho comparado; reforma legislativa; derecho y ciencias sociales; transdisciplinariedad; Inglaterra y Gales; Estados Unidos; Suiza

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1. Introduction

Inheritance law in many countries is confronted with the need to adapt to changing social realities. These changes are, namely, an increased life expectancy, a growing number of divorces and subsequently of complex families (often called “blended families”), the rise and acceptance of cohabitation and childbearing outside marriage, as well as of same-sex families with children (Brashier 2004, Friedman 2009, pp. 11-13, Reid *et al.* 2011, pp. 7-8). The focus of this article concerns questions of methodology when it comes to developing law reform proposals as a reaction to the above mentioned changes. A comparative perspective is taken.

In a first part, an example from the Anglo-American context will be discussed. It concerns the debate around the intestate share of spouses in second or subsequent marriages in relation to the share of the children of the deceased, especially if they are not also the surviving spouse’s children. Both in the United States and in England and Wales law-makers have taken account of empirical studies on attitudes towards inheritance when formulating law reform proposals. A closer analysis of these examples brings to light several methodological challenges when it comes to using social science information in developing reform proposals for inheritance law.

The second part takes the upcoming reform of Swiss inheritance law as a starting point. In 2011, the Swiss Parliament mandated the government to prepare a reform proposal with the aim of adjusting the law to changing social realities (Gutzwiller 2010). As one of the experts involved in preparing the reform proposal, I have developed a series of suggestions which are based on empirical findings from Switzerland and other countries. These suggestions concern the position on intestacy of cohabitants, step-children and children raised in same-sex relationships and, in addition, reform of the forced share, an institution which reserves a part of the estate for certain categories of relatives, having regard to changing family realities.

In the final part of the article, I will reflect on the shortcomings of the dominant model by which social science knowledge is used in developing law reform proposals – from which I do not exempt myself – and formulate a vision in which genuine transdisciplinary research serves as the basis for inheritance law reform.

2. Empirical research as a basis for law reform: an example from the United States and England and Wales

2.1. Anglo-American legal thought and the ideal of evidence-based law reform

The first example to be discussed is drawn from England and Wales and the United States. As will become apparent, in these two legal systems reformers of inheritance law regularly make reference to empirical socio-legal research. This openness to knowledge from other disciplinary sources can be better understood when placed in the wider framework of Anglo-American legal thought. It thus seems appropriate to sketch out the relationship between law and social sciences in the Anglo-American legal tradition.

In both the US and English contexts, the social sciences have a strong position in legal scholarship and the use of social science methodology and knowledge is widely accepted. In the United States, major influences are Roscoe Pound’s sociological jurisprudence (Pound 1911a, 1911b) and legal realism developed by Karl Llewellyn and other authors (Llewellyn 1931). More recent developments are the Law & Society Movement¹ and Empirical Legal Studies.² In British academia, interdisciplinary approaches taking in law and the social sciences are usually termed

¹ See the Law and Society Association (LSA) and the Law & Society Review, <http://www.lawandsociety.org/>

² See the Society for Empirical Legal Studies (SELS) and the Journal of Empirical Legal Studies (JELS), <http://www.lawschool.cornell.edu/SELS/>.

“socio-legal studies” and are very well established (Hillyard 2007). Finally, law reformers in the Anglo-American context commonly refer to empirical information, setting out the ideal of evidence-based legal policy.³ From a theoretical point of view, however, the conceptualisation of the relationship between social science and law is far from undisputed even in the Anglo-American context (Nelken 2008). Moreover, empirical information can be deployed to further quite diverse political and normative agendas, ranging from critical and progressive to neo-liberal (Hunter 2008).

In relation to inheritance law, first empirical studies aimed at informing law reform date back as early as the 1920s. With a view to developing proposals on the reform of the intestacy rules, a committee on inquiry in England commissioned a first study on wills, assuming that wills were an accurate depiction of average preferences.⁴ From the 1960s onwards, surveys have been undertaken, which directly ask respondents from the general population to state their preferences in relation to intestacy rules (Dunham 1963).⁵ These are the empirical studies law-makers commonly refer to when developing law reform proposals. The discussion of specific examples of this use below will, in addition, also illuminate some of the fundamental tensions that appear when law reform seeks an empirical basis. The example taken is the reform of the US Uniform Probate Code (UPC) against the background of the “multi-marriage society” and its current reception in England and Wales.

2.2. *The amendments to the UPC as reaction to the “multi-marriage society”*

In 1990, the UPC⁶ was substantially revised and the law of intestacy in particular was adapted to changing social realities. Lawrence Waggoner, the Reporter for the Drafting Committee, explained the rationale for the reform in his article entitled “The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code”. His introduction starts with an overview of societal transformations to which the revision responds (Waggoner 1991, pp. 223-224):

The traditional “Leave It To Beaver” family⁷ no longer prevails in American society. To be sure, families consisting of a wage-earning husband, a homemaking and child-rearing wife, and their two joint children still exist. But because divorce rates are high and remarriage abounds, many married couples have or will end life having children from prior marriages on one or both sides. Families are routinely headed by two adults working outside the home, or by a single parent. Unmarried heterosexual and homosexual couples, sometimes with children, are also unmistakable parts of the American family scene.

And, if you think we live in a multiple-marriage society now, just wait! Marriage may get even more “multiple” with the increasing prevalence in the population of those marriages that are more likely to end in divorce than others – marriages in which one or both partners were divorced before and marriages of couples who cohabited prior to marriage. Inevitably, this transformation has exerted new tensions on traditional wealth-succession laws, as well as on overlapping fields such as family, social security, and pension law.

³ For the United Kingdom, see Genn *et al.* (2006) and Maclean and Eekelaar (2009); for the United States, see White (1997).

⁴ References in Dunham (1963, p. 241).

⁵ Later studies include the following studies of wills: Gibson (1968-1969), Browder (1969), Sussman *et al.* (1970), Price (1975), and Finch *et al.* (1996). Interview studies: Contemporary Studies Project (1978), Fellows *et al.* (1978), Rowlingson and McKay (2005), Brooker (2007), and Humphrey *et al.* (2010).

⁶ In the United States, inheritance law is a matter for state legislation. The Uniform Probate Code (UPC) is a Code aimed at unifying and updating probate law in the states. See Uniform Law Commission 2013.

⁷ In US legal scholarship, the “Leave it to Beaver” image is often used as shorthand to describe the 1950s American ideal of life-long marriage and a clear division of roles between husband and wife. See, for example, Foster (2001). “Leave it to Beaver” was a show centred on a stereotypical family named Cleaver that aired on US television in the 1950s.

The statement is supported by comprehensive footnotes including data from government statistics confirming the demographic transformations cited (Waggoner 1991, pp. 223-224). Waggoner thus (implicitly) acknowledges that social science is the appropriate source of knowledge to substantiate the need for inheritance law reform in view of changing social realities.

Not only were the drafters of the UPC able to rely on demographic information, they also had access to the results of empirical studies on attitudes to the law of intestacy. These studies asked what the donative intent of the “average person” is. Underlying this question is the normative assumption that intestacy law should correspond to the preferences held by the “hypothetical intestate decedent”⁸ (Fellows *et al.* 1978). This norm results from the great importance given to the principle of testamentary freedom in common law countries (Fellows *et al.* 1978, p. 324, Beckert 2007b). In methodological terms, these studies either analysed a large number of wills or relied on population surveys.⁹

The interesting question in our context is: what normative conclusions did the drafters of the 1990 revisions to the UPC draw from the empirical evidence?

The amendments to the UPC introduced in 1990 can be summarised as being based, first, on the assumption that the average divorcee will not intend to bequeath anything to their former spouse if they die after the divorce. The revocation-upon-divorce provision (Section 2-804 UPC) was therefore revised so that divorce not only revokes a will in favour of the former spouse, but also “will substitutes” which have the same function as a will.¹⁰

Second, several amendments are based on the assumption that a distinction has to be made between first and second or subsequent marriages. In the situation of a first marriage, the average intent is assumed to be to grant the entire estate to the surviving spouse, even if the decedent has surviving children. This assumption is based on empirical studies confirming a generally held spousal preference.¹¹ Subsequently, the section concerning the spouse’s intestate share (section 2-102 UPC) was revised to give the surviving spouse a larger portion. If the decedent leaves no surviving descendants and no surviving parent, or if the decedent does leave surviving descendants from the marriage but neither the decedent nor the surviving spouse has other descendants, the surviving spouse is entitled to all of the decedent’s intestate estate. This provision is based on the “conduit theory” which assumes that decedents in the ideal “Leave it to Beaver” family do not see their own children as losing out, but perceive their surviving spouses as “occupying somewhat of a dual role, not only as their primary beneficiaries, but also as conduits through which to benefit their children” (Waggoner 1991, p. 232).

In the situation of remarriage, however, the provisions of the revised UPC are based on the assumption that where either the deceased or the surviving spouse has children from other relationships, the spouse is a less reliable “conduit”. Consequently, section 2-102 confers on children a higher share in the intestate estate and reduces the second spouse’s share (Waggoner 1991, p. 233). It remains to be noted that Waggoner and the comment to the UPC do not cite any empirical

⁸ US and English legal terminology diverge: in US law, the term “decedent” is used to designate the deceased person in matters of inheritance and succession; the term in English law is “deceased”. In the following, the English terminology will be used, unless referring specifically to US law.

⁹ For a comparison between the two methods see Fellows *et al.* (1978, pp. 324–325) and Johnson and Robbenolt (1998).

¹⁰ Waggoner lists the following will substitutes: revocable inter vivos trusts, life insurance and retirement plan beneficiary designations, payable-on-death accounts, and other revocable dispositions made before the divorce or annulment by divorced individuals to their former spouses, see Waggoner (1991, p. 228).

¹¹ See Waggoner (1991, p. 230) and UPC Section 2-102 with comment and references (Uniform Law Commission 2013, pp. 29-31). A series of studies are cited. Wills studies: Sussman *et al.* (1970), Dunham (1963), Browder (1969), Gibson (1968-1969), and Price (1975). Interview studies: Fellows *et al.* (1978), and Contemporary Studies Project (1977-1978).

evidence in favour of this assumption. The basis is presumably “common knowledge” or practitioner experience.

2.3. The reception of “conduit theory” in England and Wales

More recently, the Law Commission for England and Wales published a Consultation Paper (The Law Commission for England and Wales 2009) and a Report (The Law Commission for England and Wales 2011a) on Intestacy and Family Provision Claims on Death. Included in its report are a series of reform proposals concerning the rules applying in case of intestacy. These proposals have now been introduced in Parliament through the House of Lords.¹²

As in the 1990 reform to the UPC, the spouse’s share forms a centrepiece of the reform proposals, surprisingly, however, in a quite distinct way. The position of the spouse has become one of the most contested issues of the reform. The debate centres on the share a spouse should receive on intestacy in the context of a second marriage where the deceased also has children from a former relationship. The Law Commission describes the current legal regime where a deceased is survived by a spouse and children in the executive summary to the 2011 Report as follows (The Law Commission for England and Wales 2011b, paragraph 11):

Current law gives a surviving spouse priority – he or she is entitled to the deceased’s “personal chattels” (which includes most household items) and the first £250,000 in the estate (known as a “statutory legacy”). In practice, fewer than one in ten intestate estates exceed this sum but in those cases the law only gives the surviving spouse a “life interest” in half of anything that is left (this means that the property is held on trust, and the spouse is allowed to use the property and its income until his or her own death).

The proposals of the Law Commission not subject to dispute concern the simplification of the law in cases where the estate is larger than the “statutory legacy” reserved for the spouse, especially the abolition of the imposed trust arrangement which confers on the surviving spouse only a “life interest”. Instead, under the Law Commission’s proposals, the spouse would receive half of any balance of the estate outright and the children and other descendants of the deceased would share the other half (The Law Commission for England and Wales 2011a, paragraphs 2.62 to 2.66).

The contested question is whether the spouse’s share should be smaller where the deceased is also survived by children who are not also the children of the surviving spouse. The Law Commission admits that this question is a complex one.

In this context, the Law Commission discusses Waggoner’s conduit theory which is based on the assumption that second spouses are less reliable “conduits” through which to benefit the children of the deceased. The Law Commission refutes the theory, however, by reference to the following arguments (The Law Commission for England and Wales 2011a, paragraph 2.68):

[W]e did not propose reform of the intestacy rules to reflect the concerns of conduit theory. To summarise:

- (1) in many cases there will be no “surplus” for the surviving spouse to pass on to anyone on his or her death, so conduit theory is irrelevant;
- (2) conduit theory paints too simplistic a picture of family relationships: a surviving spouse who is the parent of the deceased’s children will not always be a reliable conduit and a stepparent will not always be an unreliable one;
- (3) it is wrong in principle for the entitlement of one spouse to differ from that of another because of the presence of children from other relationships; and

¹² Inheritance and Trustees’ Powers HL Bill (2013-14) 46, as introduced in the House of Lords on 30 July 2013. See also the Government’s Explanatory Notes to the Bill.

(4) even if the surviving spouse is the parent of the deceased's children, he or she may remarry or cohabit or simply fall out with the children, potentially diverting some or all of the deceased's wealth to a new partner or other beneficiary (for example, a charity) on his or her death.

The first argument implicitly contends that differential treatment of spouses where there are children from other relationships is of very little practical importance as only a small group of people would benefit from it. It is backed by an empirical analysis of the size of estates in England and Wales (The Law Commission for England and Wales 2011a, paragraph 2.6).

The second argument is not really convincing from a logical point of view, as the fact that there is an exception to the rule is not decisive when the aim of the legislator is to find a solution which fits the rule (in the sense of the average intent).

The third argument concerning equal treatment is of a normative nature. The fact that the deceased is survived by children who are not also the surviving spouse's children is not viewed as justifying different treatment. This interpretation of the principle of equal treatment stands in contrast, however, to the general population's attitudes as recorded in an empirical study conducted expressly to obtain up to date information on attitudes to inheritance law (Humphrey *et al.* 2010, Douglas *et al.* 2010, 2011).

Part of the study under the direction of Gillian Douglas and Alun Humphrey was a national survey of a large number of randomly selected respondents in England and Wales, who were presented with a series of scenarios describing different situations involving intestacy (Douglas *et al.* 2010, pp. 1310-1311). The results show that there is a clear difference in attitude concerning the spouse's share on intestacy between first and second marriages. Whereas in a first marriage with adult children, 80 per cent of the respondents would give priority to the spouse, in the situation of a second marriage and if the deceased spouse had children from a first marriage, only 46 per cent would put the second spouse first. The support for the second spouse rose however to 61 per cent if there were children both from the first *and* the second marriage (Humphrey *et al.* 2010, pp. 48-50).

The Law Commission comments on these results by stressing that only where there are *no* children from the second marriage does support for prioritising the second spouse fall below 50 per cent. The Law Commission admits that it would be possible to devise intestacy rules to reflect these preferences and make different provision for the children of the deceased who are not also the children of the surviving spouse. The Law Commission argues, however, that any potential benefits are significantly outweighed by the disadvantages (The Law Commission for England and Wales 2011a, paragraph 2.82).

The disadvantages identified by the Law Commission are mainly practical. The Law Commission again makes reference to the fact that in most cases the estate will not exceed the statutory legacy and, where there is only a relatively small "surplus" or where there are several children, the actual amount that each child receives will not differ greatly (The Law Commission for England and Wales 2011a, paragraphs 2.76 to 2.78). Also the complexity of shares of different amounts depending on the question whether there were children that were not the surviving spouse's children would, according to the Law Commission, unjustifiably add to the burden on administrators and increase the risk of estates being incorrectly administered.

The fourth argument, finally, makes factual assumptions that are not based on empirical evidence. Instead, results from empirical studies suggest that the assumptions made by the conduit theory are indeed accurate even in the case of the surviving spouse's remarriage or re-partnering. The qualitative study by Janet Finch and Jennifer Mason on kinship and inheritance in England has described as a typical reasoning in second marriages or partnerships that both partners' wealth

should be kept separate, in order to make sure that children from former relationships will benefit from the wealth that has been accumulated during the first family unit. The interviewees in that study were particularly troubled by the prospects of the “first marriage” resources passing into the control of the second spouse and thence “out of the family” (Finch and Mason 2000, pp. 35-39).

2.4. Discussion: methodological issues concerning the use of social science knowledge in law

The example from the Anglo-American context is interesting because it directs our attention to general methodological problems concerning the use of social science knowledge in developing proposals for law reform in general and inheritance law reform in particular. I would like to highlight two of these issues:

First, many of the studies used as a basis for inheritance law reform seek to reduce rather than to grasp complexity. The scenarios used in quantitative studies on attitudes to inheritance are formulated such as to direct respondents towards certain predetermined answers. Usually interviewees are asked to put themselves into the position of a testator and decide whom they would want their wealth to go to in case of their death and which personal relationships they would favour over others. The complexity of estate planning especially in blended families – which is typically characterised by conflicts of loyalty between relationships from different periods of life which cannot be easily resolved – is thereby reduced to practical and manageable solutions. This preference for practicality, already inherent in the questions respondents are asked, is a normative predetermination of the issue and does not leave room for the discovery of different normative considerations amongst respondents which, in turn, could inform law-makers.

Second, not only do public opinion polls usually imply certain predetermined normative orientations, but, more fundamentally, it has become clear that it is impossible to deduce “neutral” and “objective” normative conclusions from empirical findings (Kennedy 2004, p. 1036, Estermann 2010, Weber 2011). The relationship between the “Is” and the “Ought” is far from self-evident. When as legal scholars we use empirical research to support our arguments for legal reform, we always make value-driven decisions about what kind of information about social reality we use and the normative weight we give to it. In the case of research on attitudes, the norms expressed by the average population may collide with our own agenda (be it conservative, liberal or progressive) or conflict with fundamental principles of law such as human rights or equal treatment.

In our example, the Law Commission has decided to disregard the empirical evidence of a widely-held attitude that spouses should receive less where the deceased is also survived by children who are not the surviving spouse’s children. It based this decision on its own interpretation of equal treatment for all spouses, conceived of as absolute equality, as well as on the notion of legal practicability. The normative choice made by the Law Commission is the preference for a “clean break” model. According to this view, the more a family setting risks creating conflicts, the more a “clean break” on the death of a person makes sense. As the Law Commission’s choice appears to depart from the idea of the law of intestacy representing the intent of the average deceased and from the Anglo-American ideal of evidence-based law reform, it is not surprising that the Law Commission’s proposals have met with strong criticism (Kerridge 2010, pp. 323-324). Aware of this criticism, the Law Commission reflects on the use of empirical data in the introduction to their report:

“We have attached great importance to the empirical data about public opinion, using it to supplement and to set in context what we have learnt from consultation responses. However, even in those cases where we have evidence of majority public opinion – and that is not the case on all the issues addressed in the course of this project – we have not invariably regarded it as determinative of policy. Public

opinion is not always based upon full information about the topic; the empirical data is limited by the form and content of the questions asked and by the impossibility, in the context of a very large-scale survey, of prefacing a question by an explanation. So it will be seen throughout this Report that we have given careful consideration to the empirical data, and have found it a valuable source of information, but have used it with care and with an awareness of its inevitable limitations." (The Law Commission for England and Wales 2011a, paragraph 1.34)

The fact that the Law Commission includes a chapter on methodology, explaining its approach to different sources of knowledge, appears quite remarkable and extraordinary, at least from the continental lawyer's point of view. However, the expectations the Law Commission appears to have as regards collaboration with the social sciences would seem to be of a rather limited scope.

I will argue in the final part of this article that a different model of collaboration between law and social science could be more suited to dealing with inheritance in complex family situations. A future direction could lie in the pursuit of genuinely *transdisciplinary* projects with a view to achieving reform both in legislation and legal practice (see section 4 below).

Before considering this possible future development, I will turn to the current Swiss inheritance law reform, again reflecting on uses of social science knowledge in elaborating legal innovations.

3. Preparing Swiss inheritance law reform

3.1. *Swiss and German legal thought and the dominance of the normative*

In order to grasp the conditions for possible legal reform, it is again important to understand the context of legal thought, this time in Switzerland.

There is no such thing as a distinct "Swiss legal thought". It is safe to say, however, that the larger part of Swiss scholarship is written in German and is strongly influenced by German legal writing. Swiss legal academia, like its German cousins, has been more resistant than its Anglo-American counterpart to attempts to introduce a stronger interdisciplinary orientation to legal studies. Lawyers in the German tradition strongly uphold the idea of the autonomy of law (Lundmark 2012, pp. 101-105). This is all the more surprising given that initial attempts to view legal studies from a social science perspective can be traced back to a scholar writing in German, Eugen Ehrlich. In his ground-breaking work written in the early twentieth century, Ehrlich formulated the foundations of what is today the discipline of sociology of law. Ehrlich was convinced that the evolution of law was driven by society and not the legal system and therefore suggested the use of methods of empirical research on law within its social context, what he called "living law" (*lebendes Recht*).¹³ Around the same time, Arthur Nussbaum developed the method of "research on the facts of law" (*Rechtstatsachenforschung*) (Nussbaum 1914). Ehrlich in particular has had a great influence on the development of US legal realism and sociological jurisprudence (Hertogh 2009). In Germany, however, "black-letter" approaches have remained dominant in legal scholarship. After the dark years of the Nazi era, during which all scholars of sociology of law were forced to emigrate to the United States, thus effectively bringing the field to an end in Germany (Rottleuthner 1989), a new movement to re-establish the social science approach to law appeared in the 1970s,¹⁴ but was not really successful in establishing a stronghold in legal academia. The position that continues to dominate is based on the idea that the primary task of legal science is to approach the world

¹³ See Ehrlich (2002) (originally published as "Grundlegung der Soziologie des Rechts" in 1913) and Hertogh (2009).

¹⁴ Proponents of a sociological approach to law in the 1970s include Rottleuthner (1973) and Lautmann (1971).

from the “strictly legal point of view” (Ernst 2007, p. 15). The idea of legal science as social science has therefore always been a minority position.¹⁵

When it comes to inheritance law reform, the differences in legal thought between the US and English context, on the one hand, and the German and Swiss context, on the other hand, become apparent. Some empirical research on inheritance using social science methodology exists both in Germany and Switzerland, carried out both by sociologists and legal scholars.¹⁶ However, there is not such a close association between law reform and empirical research as in the Anglo-American context. In the latter situation it appears self-evident and without need of further explanation that, if the basis of the law of intestacy is the donative intent of the “average person”, the appropriate methodology to establish this average intent is a survey establishing the attitudes among the general population. In the German context, in contrast, as the legal scholar Anne Röthel puts it, the “average deceased’s intent” is better understood as a “normatively corrected intent of the deceased”, as surveys do not seek to establish the average intent. As an example, Röthel mentions the removal of the provisions of German law that discriminated against “illegitimate children”. This would not have been possible had the only consideration been the average deceased’s intent, as the average man is thought to have disfavoured his illegitimate children (Röthel 2008, p. 99).

Within the tradition of German legal thought, the starting point is therefore the diametrical opposite of the position under Anglo-American legal thought. Whereas in the Anglo-American context normative arguments that deviate from average attitudes have to be justified, the emphasis in the German context is on normative considerations, with information about attitudes to inheritance seen as complementing not justifying the argumentation.

It is important to note that the two approaches, i.e. empirically-based and normatively-based law reform arguments, do not necessarily correspond to particular policy programmes, i.e. more progressive or more conservative agendas. If we take the example of cohabitants’ rights on intestacy, a “progressive” agenda will only benefit from the empirical approach if social reality and generally-held attitudes are more “advanced” than the state of the law, i.e. if attitudes are favourable towards cohabitants’ rights. In this situation, a “conservative” agenda will have to resist law’s adjustment to social realities with purely normative arguments (such as the protection of marriage). On the other hand, if conservative attitudes prevail in the population, then “progressives” will have to argue with normative principles (such as equal treatment, compensation for losses incurred during the relationship etc.).

The following discussion of the need for reform in Swiss inheritance law suggests that the tension between empirical and normative arguments will also be of importance in the Swiss reform context.

3.2. Legislative reform in Switzerland in view of empirical findings

The trigger for the current reform of Swiss inheritance law is a parliamentary “motion” obliging the Federal Council (the Swiss Government) to develop a proposal for the reform of the inheritance law part of the Swiss Civil Code, a motion on which both chambers of the Swiss parliament have voted favourably. The motion is entitled “Update of inheritance law” (*Für ein zeitgemässes Erbrecht*) and has the following wording:

¹⁵ Very recently, however, in its report on the future of legal science in Germany, the German Council of Science and Humanities has highlighted the need to strengthen interdisciplinary perspectives both in legal education and legal research, see Wissenschaftsrat (2012).

¹⁶ Sociological research: Langbein (2002), Lettke (2005, 2006, 2007), Stutz *et al.* (2007), Künemund and Vogel (2008) and Szydlik (2010). Legal research (“Rechtstatsachenforschung”): Bauer (2003), Studhalter (2007), Metternich (2010) and Fankhauser (2011).

“The Federal Council is mandated to reform inheritance law/the law of forced shares, which is more than one hundred years old and outdated, with the aim of rendering it more flexible and adapting it to the changed demographic, familial and social realities. In doing so, the current law should be preserved in its core elements and the family should continue to be protected as an institutional constant (no equal treatment of cohabiting couples with married couples for the purposes of inheritance). Notwithstanding partial reform, the deceased’s existing freedom to bequeath assets to his dependents should be maintained.”¹⁷

Although the text of the motion seems to point into the opposite direction, improvement of the position of surviving cohabitants is a central aspect of the mandate given to the Federal Government. The reasoning accompanying the motion sets out clearly the claim:

“Cohabitants, who under the existing rules are subject to discrimination, should be included in intestacy law and be given a compulsory share of the estate, and be accorded fair treatment, in other words, treatment equivalent to married and registered same-sex couples (subject, if necessary, to certain requirements as regards the equivalence of the partnerships and the responsibilities involved)”.¹⁸

The phrase in parentheses concerning “*the equivalence of the partnerships and the responsibilities involved*” was introduced by both chambers on the initiative of the National Council’s Committee for Legal Affairs. The preparatory report by the Council of States’ Committee for Legal Affairs, while embracing the addition, clarifies that it is not intended to exclude any improvement in the position of unmarried partners, but that the intention was to exclude the full equalisation of a cohabitant’s legal position in relation to married couples (Swiss Council of States’ Committee for Legal Affairs 2011).

In the light of this mandate, the Federal Office of Justice is now responsible for drawing up a reform proposal, and in preparation has commissioned several expert opinions. As the author of one of the expert opinions, I identify two larger issues for legislative reform. First, the rules of intestacy need to be revised in order to better reflect current family realities. Second, the concept of the forced share (German: *Pflichtteil*, French: *réserve*) needs to be reviewed.

3.2.1. Adapting the rules of intestacy to changing family realities

The Swiss rules of intestacy underwent several profound changes in the latter half of the twentieth century (Wolf and Genna 2012, pp. 8-10). In 1973 full adoption was introduced and the adoptive child acquired the full rights of a child of the deceased for the purposes of inheritance. In 1978 the discrimination in relation to children born out of wedlock was removed and since then all children of the deceased inherit equal shares. The reform of marriage law in 1988 increased the spouse’s share on intestacy. At the same time, to reflect the weakening in the societal importance attached to the extended family, the group of relatives entitled under intestacy was reduced to the generation of the grandparents of the deceased and their descendants. Finally, in 2007, a registered partnership for same-sex

¹⁷ Author’s translation. Original wording: „Der Bundesrat wird beauftragt, das über hundertjährige, nicht mehr zeitgemässe Erb-/Pflichtteilsrecht flexibler auszugestalten und es den stark geänderten demografischen, familiären und gesellschaftlichen Lebensrealitäten anzupassen. Dabei soll das geltende Recht in seinem Kerngehalt bewahrt und die Familie als institutionelle Konstante auch weiterhin geschützt werden (keine erbrechtliche Gleichstellung der Konkubinatspaare mit den Ehepaaren). Trotz Teilrevision soll es dem Erblassenden weiterhin freistehen, die Angehörigen im bisherigen Ausmass zu begünstigen (Gutzwiller 2010).

¹⁸ Author’s translation. Original wording: „dass die bisher diskriminierten unverheirateten Lebenspartnerinnen und -partner in das gesetzliche Erb- und Pflichtteilsrecht mit einbezogen werden und dadurch eine im Vergleich zu den verheirateten sowie den eingetragenen gleichgeschlechtlichen Partnern faire, d.h. gleichwertige Behandlung erfahren (allenfalls unter bestimmten Voraussetzungen hinsichtlich Gleichwertigkeit der Lebens- und Verantwortungsgemeinschaften) (Gutzwiller 2010).

couples was introduced,¹⁹ which puts the registered partner in the same position as a spouse for the purposes of intestacy.²⁰

Swiss intestacy rules have thus been continuously adapted to changing family realities. However, there remains one major shortcoming. The law of intestacy is still entirely based on a status model. Only persons related to the deceased who are in a status relationship recognised by the provisions of family law (spouses, registered partners, descendants) are included in the list of beneficiaries of the intestate estate (Articles 457 to 462 Swiss Civil Code). A number of persons living in social relationships with the deceased are completely excluded, namely, cohabitants, step-children and, in relation to their second parent, children growing up in same-sex relationships. The Swiss Civil Code needs to be adapted to include these kinds of relationships for the purposes of intestacy.

a. Cohabitants

Cohabitants, i.e. couples of the same or the opposite sex living in a relationship which is not formalised by marriage or registered partnership, have no rights under the Swiss law of intestacy. This means that they only inherit from their partner's estate if they are included in a will or inheritance contract.

The lack of legal protection stands in contrast with social reality. Switzerland has experienced – although later than most other European countries – a growth in the number of couples living together in a long-term, non-formalised relationship (Fux 2005, p. 45). For opposite-sex couples this trend can be deduced from a weakening of the previously very pronounced pattern of “child-oriented marriage”, i.e. marriage at the birth of the first child. Whereas in 1990 only 6 per cent of all mothers giving birth were not married, this number has risen to 20 per cent in 2012 (Swiss Federal Statistical Office 2014b). Sociological studies also observe an increase in the number of cohabiting couples in old age (Höpflinger *et al.* 2011, p. 26). In relation to the number of same-sex relationships not formalised in the form of registered partnership, there is, however, a complete lack of data.²¹

Attitudes towards legal recognition of cohabitation have changed. A survey published in 2007 showed that 75 per cent of the Swiss population favoured equal rights for cohabitants and spouses on intestacy and that nearly half of the respondents had the wrong impression that, under Swiss law, cohabitants were already entitled to a certain share of their partner's estate on intestacy (Stutz *et al.* 2007, pp. 215, 223).

Finally, research findings from other countries concerning the motives for choosing cohabitation instead of marriage are presumably valid in the Swiss context too. English studies show that the decision not to get married is in many cases not based on a conscious, rational and autonomous choice. Instead, the reason why a couple does not marry is more likely to be a lack of knowledge as regards the legal position or a reluctance to talk about issues which are perceived as difficult, such as mutual claims in the case of a separation, or the possibility of a partner's death (Douglas *et al.* 2009, p. 36, Barlow and Smithson 2010). Also there is the danger that the economically stronger partner refuses to enter marriage because of albeit

¹⁹ In Swiss law, registered partnership is only available for same-sex couples, whereas marriage is reserved for opposite-sex couples.

²⁰ However, property law in registered partnerships does not correspond to matrimonial property law. Whereas for registered partners the default regime is separation of property (Articles 18 to 25 Swiss Law on Registered Partnership), the default regime in matrimonial law is participation in acquisitions (Articles 196 to 220 Swiss Civil Code), which basically means that the property accrued during the marriage is distributed equally between the spouses on dissolution by divorce or death, see Schwenzler and Bock (2008). Therefore, where a deceased registered partner has accumulated greater assets during the relationship than the surviving partner, the latter will receive a smaller share in the estate of the deceased than a surviving spouse would in the same situation.

²¹ The Swiss Federal Statistical Office only uses one category “same-sex couples” and does not distinguish between registered and non-registered partners, whereas heterosexual relationships are divided into married and unmarried couples, see Swiss Federal Statistical Office (2014c).

rational, but also selfish, reasons, to the detriment of the economically weaker party who most of the time is the one responsible for unpaid work such as child-rearing, household activities or care of the elderly.

This imbalance of bargaining positions is currently defined in gender specific ways, in Switzerland as elsewhere. Among cohabiting opposite-sex couples with children, in comparison with their married counterparts, women are more likely to work full-time,²² but, all the same, a majority of cohabiting mothers are not in paid employment or work only part-time (Fux 2005, pp. 52-58). Also, elderly men are more often taken care of by their (on average younger) female partner, than the other way round (Höpflinger *et al.* 2011, p. 7). Finally, unpaid care of elderly parents or other relatives is mostly provided by women (Stutz and Knupfer 2012, p. 38).

The motives for same-sex couples are thought to be different. Specialist organisations assume that many lesbian and gay couples opt not to register their partnership out of fear for the compulsory “outing” that results from the legal obligation to inform an employer of the change of civil status (“living in registered partnership”).²³

From the perspective of law reform, the issues that will have to be answered are which conditions are necessary to trigger intestacy rights (minimum duration of relationship, fulfilment of other conditions, etc.), how large the cohabitant’s share will be (assuming that it will be smaller than a surviving spouse’s share) and if a property regime should be introduced as already exists under matrimonial law, meaning that all property accrued during the relationship would be distributed equally between the partners on death. In that situation, the partner’s share would be deducted from the estate before the division between the heirs (of which the partner again would be part).²⁴

In drafting new provisions to improve the situation of cohabiting partners in inheritance matters, Switzerland will be able to rely on experiences from other countries which count cohabiting partners among the heirs on intestacy²⁵ or which at least protect the family home.²⁶

b. Step-children

The second group that should be included in the reform of the law of intestacy are step-children. Step-children are not considered descendants in terms of Swiss inheritance law (Article 457 Swiss Civil Code) and therefore only benefit from their step-parent’s estate if they have been included in a last will or inheritance contract. However, the forced shares strongly limit the step-parent’s testamentary freedom in this respect (see below (2)). A step-parent has also the possibility to adopt the step-child (Article 264a Swiss Civil Code), which will put the step-child in the position of a descendant also for the purposes of inheritance.

What do we know about the social reality of step-children in Switzerland? Population data show that 6 per cent of all family households in Switzerland today are blended families (Swiss Federal Statistical Office 2013). Also, it is interesting to note that step-child adoptions have decreased dramatically. Whereas in 1980 the Swiss Federal Office of Statistics counted 793 adoptions by a step-father and 49 by a step-mother, by 2012 these numbers had dropped to 247 step-father adoptions and 2 step-mother adoptions (Swiss Federal Statistical Office 2014a). Given the

²² This pattern has been observed in other countries as well, see e.g. Bowman (2010, pp. 143–146).

²³ See the information provided by the organisation Pink Cross: <http://www.pinkcross.ch/de/gesellschaft/arbeitsplatz>

²⁴ See above note 20.

²⁵ E.g. Catalonia: Articles 442-3 to 442-7 and 452-1 to 452-6 Codi Civil de Catalunya, see Ferrer i Riba (2009, p. 200), New Zealand: Section 77 Administration Act 1969 (NZ)

²⁶ E.g. Sweden § 18 Sambolag (2003:376), see Jänterä-Jareborg (2009, pp. 223-224), Lund-Andersen (2011, pp. 1130-1133).

legal situation described above, this means that even more step-children are excluded from inheriting from their step-parent's estate.

However, no research exists which could shed light on the inheritance preferences among blended families in Switzerland, and, hence, it is necessary to draw on research from other countries. Research from Germany, which has a similar inheritance law, shows that parents in a blended family intend to bequeath the same amount to their children and step-children (Lettke 2006, p. 3837). Also, only 34 per cent of all respondents in this German study were aware of the fact that step-children do not inherit on intestacy (Lettke 2004, p. 288).²⁷ A look at the patterns of actual bequests paints quite a different picture. The German study showed that less than half of the step-children were actually included as beneficiaries of their step-parent's estate, whereas the parents' own children were always specified as beneficiaries (Lettke 2006, p. 3838).

In order to understand these differences between affirmation of the principle of equality of treatment and the differential treatment actually accorded to step-children, it is useful to refer to Finch and Mason's findings. They found, first, that relationships between step-parents and step-children can vary a lot, depending on the circumstances of the formation of their relationship. Where the child was still very young at the time of the second marriage and was brought up in part by the step-parent, the step-child would be perceived as a "full child" and therefore more likely to be treated like a "full child" in inheritance (Finch and Mason 2000, pp. 47-53). Finch and Mason also discovered a quite refined concept of equality, in that parents in complex families want to treat their children equally when it comes to inheritance, but that equality of outcome was more important than equality of treatment. This means that these parents also take account of what their children expect to inherit from their other natural parent, the one who does not live with them anymore (Finch and Mason 2000, p. 45). From an internal perspective, therefore, the children in a blended family might all be treated equally, but, from the outside, the treatment may appear unequal because only the relationship between step-child and step-parent is being considered.

In view of these insights, it would appear most appropriate for future legislation to include step-children in the group of intestate heirs, subject to the proviso that step-parent and step-child lived together in the same household for a certain period, e.g. for five years, while the child was under the age of 18. In order to facilitate the achievement of equality of outcome, step-children should however not be entitled to a forced share, if the concept of the forced share is upheld (see below (2)).

c. Children in same-sex relationships

The third group are children raised in same-sex relationships. Although reproductive medicine is not accessible to same-sex couples in Switzerland,²⁸ informal insemination in Switzerland or the use of reproductive medicine abroad are common practices (Nay 2013). The current law does not allow for the establishment of parentage towards two parents of the same sex, but the Swiss parliament has recently mandated the Federal Government to develop a bill introducing step-child adoption.²⁹ Although step-child adoption is presented as a solution to the current impossibility for a second, non-biological parent to establish a legal tie to their child, it still means that the second parent has to go through a lengthy procedure including a close examination of their parental capacities and their family life until the adoption can take place. This is not consistent with the reality of the child who is born into the relationship of two women after

²⁷ Almost the same result (37 per cent of respondents) was achieved in the Swiss study by Stutz *et al.* (2007, p. 223).

²⁸ Article 3 Swiss Reproductive Medicine Act and Article 28 Swiss Partnership Act.

²⁹ Motion 11.4046 "Adoptionsrecht. Gleiche Chancen für alle Familien" (Adoption. Equal opportunities for all families).

insemination. Surveys among lesbian mothers have shown that the lack of protection for the child in the event of one partner's death can be a source of anxiety (Green 2006, p. 14).

An appropriate solution appears to be the application of the presumption of parentage when the registered partner is in agreement with the insemination, or the possibility of recognition of parentage by the second mother. In both cases, the second parent is recognised at the moment of the child's birth. This solution already exists in several European and North American jurisdictions (Lowe 2011). This would mean that, also for the purposes of inheritance, the child would be recognised as the descendant of the non-biological parent from the moment of birth (Article 457 Swiss Civil Code).

This change would presumably be supported by public opinion, as attitudes towards same-sex families are currently positive. A survey among the Swiss population from 2010 showed that 86.3 per cent of the respondents recognised the necessity to provide a legal framework for these families, 65.8 per cent favoured the introduction of step-child adoption for same-sex partners and 53 per cent the possibility to adopt an unrelated child (Lesbenorganisation Schweiz LOS, PINK CROSS 2010).

3.2.2. Reform of the forced share

A central characteristic of Swiss inheritance law is the institution of the forced share. As in most other continental European countries, testamentary freedom is limited in the sense that a certain part of the estate is reserved for certain categories of relatives. This means that, if the deceased in his or her will or in an inheritance contract leaves less to the protected beneficiaries than the share they are entitled to under the law, they can bring a claim in the civil courts to enforce their portion of the estate. In Swiss law, beneficiaries of the forced share are descendants, spouses, registered partners and parents (the latter only in the absence of descendants, see Articles 470 and 471 Swiss Civil Code) and the forced share is calculated as a proportion of the share on intestacy.

The forced share of children is especially high at three quarters of the share on intestacy, which amounts to three quarters of the estate if there is no surviving spouse, and to three eighths next to a surviving spouse (Articles 457, 462 and 471 Swiss Civil Code). This strong position of children (which is different from the very weak position in the Anglo-American context) is under attack because of the problems it creates in the context of ensuring the future of family businesses (Eitel 2003), and because of the limits it places on testamentary freedom for very wealthy testators who would like to use a larger part of their estate for charitable purposes (Breitschmid and Künzle 2005). Most importantly, in our context, the forced share is called into question because it is based on a formal definition of family relationships to the detriment of meaningful social relationships (Breitschmid 2007).

In the context of cohabitation, for example, the children's forced share strongly limits the freedom to benefit a cohabiting partner. In blended families it is an impediment to equal treatment of all children. If a Swiss parent wants to treat his or her children and step-children equally, his or her "legal" children will have to waive a part of their rights (they can do this in an inheritance contract or by accepting a will which partly disinherits them) in favour of their step-brothers and step-sisters. However, it is important to keep in mind experiences from other countries, which make clear that the ideal of children's equal treatment is more fragile in the post-divorce situation. The US example shows that complete testamentary freedom in relation to children can result in undesired outcomes (if we consider the principle of equal treatment as legitimate). Especially fathers who after divorce have lost contact with their children are more likely to disinherit them. A number of US scholars have therefore advocated a limitation on testamentary

freedom that provides for the protection of and the provision for a testator's children (Shaw Spaht 1996, Brashier 2004, Scalise 2006, p. 112). The Swiss reform will have to find a balance between increased testamentary freedom and the protection of children.

Another development of relevance in this context is the growing awareness of the absence of financial compensation and social security for informal carers. As unpaid care work, such as care for children and the elderly, is still mainly performed by women, the lack of payment for informal carers constitutes an issue of equality between women and men. A study commissioned by the Swiss Federal Office for the Equality of Women and Men produced several recommendations on improving the situation of informal carers, mainly focussing, however, on amendments to the social security system (Stutz and Knupfer 2012). The upcoming reform of inheritance law provides an opportunity to introduce a private law mechanism to equalise the costs of informal care between family members, especially among siblings where care has been provided for an elderly parent. Under the current system, Swiss law does not offer any such protection (Leuba and Tritten 2006, Baumann 2011).

A model seemingly more adapted to current family realities than the forced share appears to be the common law model of family provision,³⁰ first developed in New Zealand and subsequently introduced in Australia, most Canadian provinces and England and Wales (Peart and Borkowski 2000, Kerridge 2009, paragraphs 8.01 to 8.04, Peart 2010).

The first advantage of the family provision model is that it is not based on the existence of formal family relationships, but on the responsibility the deceased has assumed in formal or factual family relationships during his or her lifetime. This responsibility can both be based on status (spouse or registered partner, children) or a social relationship (cohabitant, step-child, foster child, god-child, etc.).³¹

Its second advantage, but also its weakness, is discretion. According to the Inheritance (Provision for Family and Dependants) Act 1975, which in England and Wales regulates family provision, the court needs to establish whether the deceased's will or the intestacy rules made "reasonable financial provision" for the applicant. The law lists a number of factors the court needs to take into account, including the financial needs of the applicant and other beneficiaries but also the conduct of the applicant towards the deceased.³² Instead of being restricted by rigidly defined compulsory portions, the court deciding on family provision claims has discretion in establishing the amount of the share of the estate the applicant is entitled to, and can thereby take into account how the individual family itself defined the meaning of their relationships and the norms they shared (see the contribution by Gillian Douglas in this issue).

³⁰ This preference is also expressed by many authors in the comparative law literature, see Foqué and Verbeke (2010, pp. 219-221), Pintens (2011, pp. 12-17).

³¹ Taking England and Wales as an example, family provision is available for the following persons (Section 1 Inheritance (Provision for Family and Dependants) Act 1975): spouses and civil partners; former spouses and civil partners who have not remarried or entered a new civil partnership; cohabitees; children; persons treated as children of the family in a marriage or registered partnership (step-children, foster children); dependants, defined as any person who, immediately before the death of the deceased, was being maintained, either wholly or partly, by the deceased.

³² The court must take into account the following factors (Section 3 Inheritance (Provision for Family and Dependants) Act 1975): the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future; the financial resources and financial needs which any other applicant has or is likely to have in the foreseeable future; the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future; any obligations and responsibilities which the deceased had towards any applicant or towards any beneficiary of the estate of the deceased; the size and nature of the net estate of the deceased; any physical or mental disability of any applicant or any beneficiary of the estate of the deceased; any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

Unlike the forced share, which is always only a fraction of the share on intestacy, family provision also allows for attribution of a share which is larger than the portion defined by intestacy rules. This is why it is conceivable that the family provision model can be developed in order to support, encourage or reward care provided by adult children to a care recipient within the family as Brian Sloan suggests (Sloan 2011, p. 275).

4. Towards a transdisciplinary model of cooperation between law and social science

As the examples from the United States, England and Wales and my own suggestions for Switzerland have shown, the use of social science knowledge in inheritance law reform is currently predominantly based on a model of social science as a mere adjunct of legal studies (Webb 2006, p. 91). The role of social science is restricted to delivering demographic data about changing family realities or information on average attitudes established using mainly quantitative research designs, thereby necessarily simplifying the complex situations in which individuals have to take decisions about inheritance. In this model, legal scholars involved in law-making take on the role of (re-)introducing complexity by adding additional levels of normative considerations, such as the equality and practicality arguments advanced in the reasoning of the Law Commission for England and Wales discussed above, or considerations of equality between social and status-based family ties or of fairness when it comes to compensation for unpaid care work that I have put forward in my own reasoning in the Swiss context.

The limitations of this approach become visible in relation to the complex situations in blended families. Is a "one size fits all" solution for the inclusion of step-children in the rules of intestacy adequate given the diversity of step-family relationships? How can the conflicts of interest between a spouse or partner and the children from a previous relationship, which can vary widely depending on the individual financial and personal situation of the different family members, be resolved in a general way? Given the difficulty of designing a new inheritance law based on existing legal instruments and which fits the increasing plurality of situations, some voices in the literature suggest broadening testamentary freedom, and leaving it to the deceased to define unilaterally the scope and meaning of his or her close relationships (Foster 2001, Beckert 2007a). Such a reliance on the deceased's intent contrasts however with the observation from several studies that there are a number of general reasons why people do not write wills. These reasons are exacerbated in complex families because of unresolvable conflicts of loyalty, namely, towards a partner and children from this current relationship and, at the same time, children from former relationships (Gary 2012).

In view of these problems I would like to suggest genuine *transdisciplinary* research as a means of developing innovative solutions for complex families in inheritance matters. Transdisciplinarity starts from a real life problem and brings different disciplines together with the goal of solving the problem. According to Gibbons et al., transdisciplinarity is already an essential element of a new form of knowledge production, which these authors label as "mode 2". This form is characterised by being context-driven, problem-focused and bringing together multidisciplinary teams, as opposed to "mode 1", which is academic, investigator-initiated and discipline-based (Gibbons *et al.* 1994, pp. 27-31). Jürgen Mittelstrass suggests that transdisciplinarity goes a step further than interdisciplinarity. Whereas interdisciplinarity implies a specific cooperation for only a limited period, transdisciplinarity means that such cooperation results in a lasting and systematic order that alters the disciplinary order itself (Mittelstrass 2000, 2003, p. 9).

The transdisciplinary approach appears especially promising in the search for adequate answers to the complex situation of blended families in inheritance matters. An existing setting which could serve as a starting point can be found in

the practice of inheritance mediation, a method which has been developed relying on psychological approaches to conflict resolution. Mediation was first used in inheritance conflicts “post-death” (Madoff 2003-2004, Brandt 2010) and is now making its way into estate planning at the “pre-death” stage as a conflicts avoidance tool (Allen and Ford 2011). Mediation is recommended by estate planning practitioners especially in situations where the potential for conflict is high – which is true in particular for blended families. Mediation consists in bringing all parties who could potentially be involved in a “post-death” dispute together in one room and involving them in a process that aims at bringing out possible differences and conflicts and finding solutions which are acceptable to all parties involved (Gage *et al.* 2004-2005, p. 529, Allen and Ford 2011).

Moreover, moves towards an increased reliance on mediation could be indicative of changes in the normative basis for family inheritance law in general. The paternalistic model of parents who dispose of their wealth with wisdom but without including their children in the decision-making process is possibly being replaced by a new ideal. In line with developments in other fields of family-related law, this new normative approach is characterised by participatory and egalitarian parent-child relationships, and a replacement of the goal of perpetuating family property by the goal of maintaining good family relations (Cottier 2010, pp. 218-221).

Given these observations, the basis for transdisciplinary solutions to problems of inheritance in complex families could be laid by empirical studies investigating the values, needs and interests expressed by different members of blended families on questions of inheritance, as well as the values and professional ethics upheld by mediators and legal practitioners and their techniques in dealing with complex situations. The studies should not be restricted in their design by questions which are predetermined by existing disciplinary concepts but, instead, should be explorative in nature. Based on the results of these empirical studies, new instruments could be developed, addressing either legislation, legal practice or the practice of non-legal professionals such as mediators or estate planners.

In contrast to the dominant “social science as adjunct” model of collaboration between law and social science in inheritance law reform, the transdisciplinary approach would require legal studies to renounce its position of lead discipline in the reform process and be open to transformation of internal disciplinary concepts which today seem self-evident and immovable (Cottier 2011, p. 363). This requirement appears challenging, but not impossible to fulfil.

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