Project: ***Succession Law: Challenges and Potential regarding regulating the Transfer of Property on Death in changing Society***

1. Relevance

This is a project of basic legal research. The aim is to *develop the theoretical basis* for the law of succession by *developing new knowledge* about some *practical challenges* currently facing the law of succession. These challenges also amplify the need for legal research in this slightly neglected field of law that affects practically everybody in civil society, insofar it regulates how property of the deceased is to be transferred, and to whom. Moreover, the aim is to *implement* this knowledge in contemporary legal discussions and to *develop* and *strengthen* the Norwegian and thereby Nordic research environments. On 15 April 2011 the Norwegian government appointed a committee to conduct preparatory work on new inheritance legislation. Hence, it is also a goal to *provide knowledge* in the field in order to *optimize the possibilities for legislation based on sound research*.

2. Aspects relating to the research project

2.1 Background and status of knowledge

Succession law is currently facing challenges that arise as societal development partly connected with the increased diversification of value-orientation in the population, partly with the increase in cross-border relations, meets a field of law whose basic principles were formed in a different era.[1] To a large extent, this field of law is today regulated by statute law that basically needs to be statutorily amended, in order to accommodate new rules that can meet legitimate demands imposed by ongoing societal changes or processes. A few keywords can point out some relevant features of development that could impact on the legislation and deserve consideration: Changes in family constellations and patterns of living arrangements (unmarried cohabitation, same-sex marriages and more), the loosening of (psychological) ties of kinship, higher average life expectancy, individualization, growing private and public wealth and the welfare state's role in providing services for some tasks that were originally attended to by the family. For instance, the rules of inheritance based on kinship and marriage and the rules of legitimate portion are, to some extent, historically based on the idea of extending the duty to provide for family members beyond the provider's death (see section 2.3.1, project II for further elaboration). In today's society, the required support or provision is provided by National Insurance scheme, as well as pension funds, social security benefits etc.

The Norwegian government appointed the Inheritance Act committee, mandated to carry out a general and fundamental evaluation, and to promote a proposal for a complete regulation of the issues currently regulated in The Inheritance Act.[2] However, although there have been Ph.D.- and D. jur.-dissertations on or related to the field of succession law in recent years,[3] there have been no in-depth studies on the effects societal developments should have in terms of substantial inheritance rules. And although there certainly are competent researchers amongst the appointed committee members and its secretary, the committee is due to submit its report to the Department of Justice before 1 June 2013. This is a remarkably short period of time, considering that the committee members and secretary are supposed to carry out their tasks in addition to their full-time occupations, and when compared with the

[1] Act of 3 March 1972 relating to inheritance, etc. (The Inheritance Act) is based on a report given in 1962 by a committee appointed in 1954.

[2] Royal decree of 15 April 2011.

[3] There are three from the last decade: Inge Unneberg, *Avtaler om arv: Forhåndsavtaler om fordeling av etterlatt formue,* (University of Tromsø, 2009), John Asland, *Uskifte*, (Oslo, Gyldendal Akademisk, 2008) and Torstein Frantzen, *Arveoppgjør ved internasjonale ekteskap: Studier i norsk internasjonal privatrett med særlig vekt på gjenlevende ektefelles rettsstilling,* (Bergen, Fagbokforlaget, 2002).

eight years the former committee spent drafting the proposal that formed the basis for The Inheritance Act of 1972. Hence, there is a risk that a proposal will be presented on insufficient research basis at least in regard to some important issues.

This research project will not be completed by the time the Inheritance Act Committee will have responded. However, there will be good opportunities to exchange viewpoints and for the research project and the committee to mutually benefit from some sort of reciprocal influence. The leader of the committee, Torstein Frantzen, is a professor of law of the University of Bergen, and two of its members (associate professors Peter Hambro and Inge Unneberg) and its secretary (associate professor John Asland) are cooperating partners from other institutions (see section 2.3.2 for further information). It should also be noted that it will likely take several years after the committee has submitted its report before a bill is passed. This means that the results of the research may still be included in the deliberations of the legislative authorities. In any case, the research results may either serve as a confirmation of value choices upon which the legislation builds, irrespective of whether it is thoroughly supported by research in advance or not, or as a critical corrective to be considered for future amendments.

Although there are competent researchers in the field of succession law in Norway and the other Nordic countries, the research environments are small, with perhaps only one or two researchers per institution. The disproportionality between the sizes of the research environments and the impact the mechanisms of the law of succession have or might have in the future for the distribution of property in society, is remarkable. Furthermore, as opposed to nearly every other field of law, inheritance is a matter that affects us all. Distribution of a deceased's estate and his (or hers) dispositions relating to his property are also matters which unfortunately often create or increase conflicts within the family. It is therefore difficult to exaggerate the importance of rules which ensure that carefully considered ends are achieved. Hence, there is an urgent need to accelerate the establishment, development and evaluation of the research-based knowledge of succession law.

2.2 General remarks on approaches and method

There is no generally recognized method in today's paradigm of legal science, and it is not necessary to approach the subject in a specific way in order to call the research result legal science. This is partly due to tradition, as it is common to view not only papers and theses in which the so-called strict legal dogmatic method is applied as legal science; the concept also includes legal politics, legal history, legal philosophy, sociology of law and (more recently) anthropology of law. There are no clearly defined borders between the different approaches, and in several of them, including legal dogmatics, the method employed is basically of an argumentative nature. However, in legal dogmatics the argumentation must be anchored in the sources of law. This is a quite distinct feature of legal dogmatics, and it is also a feature which has led to the direct use of research results in the practice of law, such as when lawyers and judges refer to (the argumentation in) doctoral dissertations and other theses or papers when arguing for or giving reasons to support a certain outcome in the case.

In this project several modes of approaches will be used. Although legal dogmatics can be seen as the core of the projects, they will, to varying degrees, also adopt other approaches such as legal history, legal politics, sociology of law and comparative perspectives. Although the law of succession is a national field of law, comparisons with the corresponding fields in other jurisdictions can be used as a tool of argumentation from both a legal dogmatic and a legal politics perspective. See further remarks on approaches and method under the description of the projects (2.3.1).

2.3 The project plan, project management, organization and cooperation

2.3.1 The project plan: Description of planned individual projects

Project I (research leader): *Influence and pressure from societal development on the Law of Succession*

At a general level, the national laws and judicial systems are influenced by different aspects of changes in society, caused by, *inter alia,* alterations in the population as well as an increase in cross-border relationships. For instance, well-developed western countries have seen an increase in migration in the last decades. The increase is not only due to immigration from less-developed countries, but stems also from co-operation between states. Such co-operation facilitates and, to some extent, encourages mobility among citizens, on a temporary or permanent basis. From a European perspective the legislative and rule-based co-operation between the member states of the European Union should be mentioned, as should EFTA. Among other things this development has led to an increase in ownership of property, including immovables (secondary homes etc.), belonging to citizens of another country. It has also led to more diversity in the population of these countries in terms of religious beliefs and culture, including culture and traditions regarding law and legal matters.

The aforementioned diversification includes the individual's freedom to choose intertwined with a personal liberation from traditional norms and customs. One can mention the loosening of ties between members of the family (in a wider sense) and choosing other forms of living together than the traditional heterosexual marriage. A few keywords to the latter trend are gay marriages, (unmarried) cohabitation and polygamy or cohabitation with more than one partner. At the same time, persons' status and/or relations as spouses or family members are defining criteria for inheritance rights due to the intestate laws of probably most – if not all - jurisdictions. However, a cohabitant will have some minor inheritance rights in some cases, due to amendments in the Norwegian succession law that took effect on 1 July 2009, but this is not so for all cohabitants.[4] On the other hand, the position regarding inheritance rights of a spouse is by far superior to the position of a cohabitant. Furthermore, by granting cohabitants inheritance rights, there is a risk that Norwegian law can be a source of problems in cases which involves other jurisdictions as well.

A successful co-operation concerning *substantial* succession law has not as yet developed in institutions like EU and EFTA: The member states have - like probably all or at least most countries worldwide, including Norway, its own national law of succession. Hence, problems which arise when a particular case involves persons or property connected to more than one jurisdiction must be solved by *procedural* rules (on private international law) concerning what jurisdiction the case should be solved in, and the choice of law to be applied. Nevertheless, as the field 'private international law' is an entity of every nation's own national law, these rules will not always lead to a legal solution that is accepted in both or all the involved jurisdictions. The Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, concluded on August 1st, 1989 was elaborated to deal with questions like these.[5] However, it has yet to come into force. On the other hand, the European Commission has made a proposal for a regulation of the European Parliament and the European Council on, *inter alia*, jurisdiction and applicable law in matters of international successions (concerning EU citizens).[6] It is not yet clear what effect such regulation will have for Norwegian law and legal system. At least for the next few years, decisions will be based on partly unclear rules of Norwegian private international law, which are to a large extent non-statute law.

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[4] For a review of the rules of inheritance and non-probate in favour of cohabitants see Thomas Eeg, *Samboeres arve- og uskifterettslige stilling,* (Oslo, Tidsskrift for familierett, arverett og barnevernrettslige spørsmål, 2010), pp. 25-59.

[5] See, for instance, Louis Garb (ed.), *International Succession,* (The Hague – London – New York, Kluwer Law International, 2004) p. 1.

[6] Commission of the European communities, Com(2009)154.

The prevailing viewpoint seems to be that legislative unification or harmonisation is hard to achieve in the field of substantial succession law.[7] It is probably also a widespread viewpoint that uniform rules are not desirable in this field. On the other hand, in some aspects the Norwegian law is influenced by the aforementioned features of the development, as well as other features, also when it comes to substantial succession law. For instance, the acknowledgement of cohabitation and gay marriages is connected with the recognition of freedom of personal values and the acceptance of differences, and can be supported by principles of human rights such as the right to family life and privacy and non-discrimination principles. Such principles can be used in an argumentation for expanding inheritance rights to other than the deceased's spouse (in heterosexual marriages) or relatives. However, it can also be argued that human rights-principles should lead to a larger degree of freedom regarding the right to make a will: The right to ownership over property is seen as a basic human right, forming the basis for the protection from encroachment from others. It can be argued that it more or less is a natural effect to dispose as one sees fit over own property, testamentary dispositions included. At least, this seems to be a legit viewpoint in an era of individualisation.

This project will describe more extensively the features of development and how they influence, or should influence, the law of succession. Hence, it will also survey the current legislation, conventions, non-statutory rules and ongoing legislative or other forms of initiatives likely to be adopted or influence Norwegian law in this field. The main object is to give an interpretation and evaluation of these rules and proposals, in particular in light of the question to what extent Norwegian succession law (including international succession law) is equipped to handle the pressure of the ongoing societal development. It also aims to offer research results, possibly in terms of model rules, which can be considered by legislators and perhaps also applied by decision-makers (i.e. the courts) in cases where the law today does not offer clear solutions.

Project II (doctoral fellowship): *Dispositio inter vivos* or *mortis causa* and the Significance of the Principle of Legitimate Portion

A topic which has been subject for several articles as well as chapters in textbooks and handbooks for practitioners is the so-called borderline between *dispositio inter vivos* and *mortis causa*.[8] Basically, the first mentioned type has – or is at least supposed to have – its effects in the lifetime of the person who made the disposition in question, while the latter has its effect upon (or rather after) his death. However, there are grey areas where it is very difficult to decide what kind of category the disposition fits in. At the same time this may be a crucial question to answer: The rules of the law of succession apply for *dispositio mortis causa*. Amongst these, the rules of legitimate portion for heir of the body are of particular interest. As the main rule in Norwegian succession law, 2/3 of the estate is the portion reserved for the heirs of the body.[9] In many cases, this leaves the owner too little room to distribute his property as he wishes by will. Hence, valuable assets are often transferred in the owner's lifetime – or at least, so it seems. The typical case where the question arises is when an aging spouse or cohabitant with children from a former marriage or relationship transfers

[7] The so-called 'cultural constraints argument' is first and foremost a feature of the debates in family law, see, *inter alia*, Masha Antokolskaia, *Family law and national culture. Arguing against the cultural constraints argument,* (Utrecht Law Review, vol. 4, 2008), pp. 25-34, but is viewed to have the same validity in the closely connected field of inheritance law, see for instance Helge J. Thue, *Internasjonal privatrett. Personrett, familierett og arverett. Alminnelige prinsipper og de enkelte reguleringer*, (Oslo: Gyldendal Akademisk, 2002), p. 505.

[8] For an overview see Thomas Eeg, *Når gjelder arvelovens regler om testamentsform og begrenset rådighet?*, (Oslo, Jussens Venner vol. 44, 2009), pp. 61-154 (p. 65, note 3).

[9] However, the legitimate portion is further limited within these 2/3; according to The Inheritance Act section 29 each of the deceased's children cannot claim more than property worth NOK 1 000 000 if that would be in contrast to the dispositions of a will, see for instance Thomas Eeg, *Beløpsbegrenset pliktdelsarv*, (Oslo, Tidsskrift for Rettsvitenskap, 1994), pp. 364-423.

his (part of) ownership of the house where they live to the other – "transfer" in the sense that at least the formalities seems to be in order. Unless the transfer can be subsumed as a *dispositio mortis causa* and thus the house rightfully should be returned to the deceased's estate, the transfer will reduce the value of the heirs of the body's shares of the inheritance significantly. Therefore, the categorization and the subsumption of the dispositions in singular cases can have vast consequences of economic and other sorts, and are of utmost importance. This is true not only for the parties involved, but also in terms of the predictability and fairness of the rules governing the matter.

The problem – or rather, the complex of problems – is of a general nature in the sense that it does not arise only in regard to ownership of dwellings, but also in regard to other types of ownership to immovables, movables, (family) businesses etc. In short; the ownership of practically all kinds of property with a significant economic value may give rise to problems, at least in theory. Furthermore, the problem complex can also arise *between* the deceased's heir of the body, or between the heirs and a third party (i.e. other than the deceased's spouse or cohabitant). Finally, it should also be mentioned that the complex also comprises the question what constitutes a *dispositio inter vivos* when it is clear that the disposition of the deceased shall not be fulfilled (or completed) until after his death: Is the disposition to be construed as a contractual compensation for goods (or more often services) he received in his lifetime, or does it supersede what can be regarded as a reasonable balanced compensation, which means that it might be construed as a gift meant to be completed after his death?

It is reasonable to assume that the aforementioned difficulties in practice partly stems from a lack of solid theoretic base, partly from a lack of clear objective criteria to be applied to the cases. The Inheritance Act can hardly be said to give more than a few vague starting points for legal reasoning when it comes to drawing up criteria or guidelines for determining what constitutes a disposition for which its rules apply. Hence, this area of law is to a wide extent based on case law, notwithstanding that several of the newer relevant reasons of the Supreme Court judgments state one or more of the aforementioned statutory provisions as their starting point for the legal reasoning. And although the problem complex certainly is not a new one – the oldest of the approximately eighty or so Supreme Court rulings which are considered relevant are from the 19th century – there are also fairly new decisions[10] that on the one hand cannot be said to bring more clearness onto this complex matter, and on the other shows that it is very much alive in the present.

It has been suggested that the uncertainty that prevails in this area of the law, has to do with "… a combination of a very flexible source-of-law system with a style of writing decisions that focuses more on a description of the specific fact than on a description of the legal reasoning" – or at least that this combination "… has a negative effect on the predictability of the law".[11] This seems to be an adequate description. The question that remains is what – if anything – should be done about this situation: Is it for instance a recommendable solution to demand that more objective criteria are fulfilled, like judicial registration of the transfer of ownership to immovables, combined with a general time limitation between the registration of the transfer and the time of death for invalidating the transfer? If so, should this apply to all transfers of immovables, or should there be a distinction between on the one hand gifts between spouses and cohabitants, and other transfers?

The problem complex offers a vast number of questions to be asked, and preferably answered. The main aim of this project is to offer models or model rules that can be applied in dealing with these cases. These models should be partly based on in-depth studies of how

[10] See Norsk Retstidende 2007 pp. 776 and 2008 pp 1589.
[11] Giudetta Cordero Moss, *A comparision of Italian, English and Norwegian Inheritance Rules as an Illustration of Different Legal Methods*, (Oslo, Tidsskrift for Rettsvitenskap, 1999) pp. 884-903, (p. 884-885).

these questions are dealt with in other jurisdictions, because although the core problem is not limited to Norwegian law, the need for a court decision on the highest possible level seems to be a distinctive feature here. Hence, an important methodological tool will be a study of the comparable areas of law in other jurisdictions, which presupposes a study of the legal system and in particular other parts of the private law and civil procedural law in these jurisdictions. To increase the chances of a successful outcome of such an exercise, this project will also seek to gain insight on a more general level in legal reasoning, methodology and legal culture of these jurisdictions.

At least as far as the situation in Norwegian law is concerned, it is adequate to say that the principle of legitimate portion is the main reason for the existence of the problem. Aside from rules that secure heirs a part of the deceased's estate (even if the deceased has made a will that reduces their part), there are in general no legal obstacles that cannot be easily and legally overcome, if a person wants to keep her property until death and to make testamentary provisions. Hence, there is also a need to scrutinize the principle of legitimate portion. This could be a Ph.D.- or post-doc-research topic in itself, but it should also be possible to implement at least some aspects in a project on disposition mortis causa vs. inter vivos:

In early Nordic history, the kin groups (*ættene*) were the fundaments of society. Amongst a vast number of functions, the kin provided for its members. The principle of inheritance rights based on consanguinity is supposed to stem from this period. As the right to dispose by will or donate *mortis causa* developed in the laws of the Nordic countries, the principle of a legitimate portion for relatives of the deceased emerged. Today, different jurisdictions have different ways of dealing with the issue, but the common core is that a part of either the intestate's estate or of the heir's inheritance cannot be disposed of by the will of the testator. If the testator nevertheless has disposed of this part, the will is void, totally or partial. This is true for most civil law jurisdictions and the Nordic countries. In England and Wales, and probably in a number of other common law jurisdictions which originally recognised total testamentary freedom, the same effect more or less can be reached through statutory rules that grant certain family members the right to apply the court for a discretionary provision.[12]

One of the reasons for principles of intestate inheritance for relatives as well as legitimate portion and family provision, is that the relatives' inheritances should substitute or be an extension of provisions from the now deceased when he (or she) passed away. However, there is no longer a legal obligation under Norwegian law to provide for other family members than one's spouse and children under the age of eighteen. The obligation to provide for persons without sufficient income or own private means, has been overtaken by society in the shape of multiple welfare-state contributions and benefits. This is so even if one is married; a spouse is not supposed to cover all expenses for the other, and parents are not supposed to cover all expenses for their children. This is at least true in the sense that social security, reduced tax duties and so on, takes care of some of the burden. Furthermore, statistically one seldom leaves behind minor children at death, and the spouse and children of the deceased often benefit not only from inheritance, but also from life insurance, pension payments and social security. Hence, one can say that the solidarity-based welfare state, which to some extent is financially supported by Norway's oil wealth, has taken over at least one of the functions of inheritance rules that favour relatives and spouses.

The principle of legitimate portion has been criticised, partly on the basis that the deceased's children normally are grownups when their parent(s) die(s).[13] This is an argument that points to an assumption that the principle no longer can be justified as a substitute or

[12] See, for instance, D.H. Parry, R Kerridge and A.H.R. Brierley, *Parry and Kerridge: The Law of Succession*, (London, Sweet & Maxwell/Thompson Reuters, 2009), pp. 163-166, pp. 212-218.
[13] For the Norwegian debate see, in particular, Peter Lødrup, *Arverett*, (Oslo, Gyldendal Akademisk, 2008) pp. 103-109.

extension of the obligation to support family members. But can we take for granted that the welfare state, together with sources like private pensions funds, will provide sufficient provision for everybody also in the future? To oversimplify a complex question: What happens when the oil-wells are emptied, or if oil production is banned or drastically reduced due to its devastating effects on the environment? And are these questions that should be of concern already today, with implications for how a modern succession law should be designed? At least, it should be considered whether worst-case scenarios for the future of the oil production and the welfare state indirectly should serve as an argument for inheritance law as an instrument for providing support or not.

On the other hand, one could also argue that there is no room for principles securing intestate inheritance rights at all from the viewpoint of political or philosophical individualism: Testator should not meet any legal obstacles for disposing as he wishes over his estate. This argument can be seen in the light of person's right to dispose without consideration for the limitations regarding legitimate portions as long as the disposition takes effect in the person's lifetime. At the same time, in many cases there are ways for the enlightened person to avoid severe consequences of his disposition while also achieving the distribution he wants. If for example an aging person transfers the ownership of his house to his cohabitant, he will normally continue to live in the house until his death, but if he instead chooses to leave it to her by will, the rules of legitimate portion may be an obstacle. Therefore, it is plausible to assume that the enlightened person will transfer the ownership before he dies. Although it can be argued that the nature of this problem is what constitutes an evasion of the law, it can also serve as an argument for abolishing the rules of legitimate portion.

The part of the project that scrutinizes the principle of legitimate portion, should *inter alia* elaborate on what lines of arguments that have been used to justify rules of legitimate portion from a historical viewpoint. This part of the task will gain from insight in the methodology of legal history. This historical part will presumably give a sound fundament for an evaluation of arguments *pro et contra* legitimate portions today and in the future. It is also desirable and to some extent also necessary to apply a comparative perspective and method, as well as other perspectives, to fully comprehend the ongoing debates in other jurisdictions on the desirability of legitimate portions or family provision rules.[14] For an evaluation of arguments, it is also desirable to give a survey of the relevant instruments of support that the heirs receive or can receive from other sources than the deceased's estate, and to what extent they are efficient as means of provision. This survey should also account for the nature, stability and future prospects of such non-inheritance sources.

Project III (researcher position): Encounters between Norwegian and Muslim Succession Law in a changing Society

Given the fact that the immigrant population with a Muslim background in Norway gradually has increased over the years and the first generation of labour immigrants from Muslim countries, such as Pakistan, Morocco and Turkey are about to reach the age of retirement, it is urgent to investigate how these changing social factors will effect Norwegian society and Norwegian law and legal practice in particular.

In general terms, succession law is a cultural expression of certain fundamental values in a society. The Islamic law of succession is primarily based on the Shari'a, God's divine law and an expression of His Will. This implies that Islamic succession law, in principle, is not bound by national borders, but should be practiced as a part of the religious expression of

[14] See, for instance, C. Castelein, R. Foqué and A. Verbeke (eds), *Imperative Inheritance Law in a Late-Modern Society. Five perspectives*, (Antwerp – Oxford – Portland: Intersentia Publishing, 2009), offering perspectives of legal anthropology, legal history, sociology of law and law and economics as well as comparative law.

adherents of Islam, including Norwegian converts. In Muslim countries, national succession law (Muslim succession law) is still to a large extent based on classical Islamic succession law, with only minor adaptations.[15]

The main purpose of the Islamic system is material provision for surviving dependants and relatives, for the family group bound to the deceased by the mutual ties and responsibilities, which stem from blood relation. The manner in which this provision is to be made, is prescribed by law, in rigid and uncompromising terms. Relatives are marshalled into a strict and comprehensive order of priorities and their shares are meticulously defined.[16]

It is a well-known fact that women according to Islamic succession law inherit half of what a male heir would inherit and that non Muslims cannot inherit Muslims.[17] As property that is situated abroad normally is governed by the law of the foreign country, due to the international recognised principle of *lex rei situae*,[18] non-Muslim and female spouses may risk being left with hardly any or no succession rights.

In addition, succession rights can become scattered because of the different types of marriage that Islam practices, such as polygamous marriages, time-limited *mut'a* marriages[19] or *urfi* marriages (customary, unregistered marriages) and the entitlement of children born from these different kinds of marriages to inheritance.

Another complicating factor is that the wife is entitled to her *mahr*, the Islamic dower, upon the death of her husband and that this right prevails over all other rights, also those of third parties or creditors.[20]

These provisions may stand in strong contrast to Norwegian succession rules and may easily come into conflict with fundamental human rights considerations. Simultaneously, Norwegian private international law governs that the choice of law in cross-border cases should be determined by the last domicile of the deceased. This implies that Muslim succession law, in principle, can become applicable in cases where the deceased, for instance, has retired in his country of origin and his or her heirs are living in Norway, or where the deceased did not yet obtain domicile in Norway in terms of private international law.

The main purpose of this project is therefore to investigate under which circumstances both Muslim parties and non-Muslims (Norwegian and foreign citizens), fully or partly, are subject to Muslim succession law and what legal implications this may have for the parties involved.

In recent years principles such as party autonomy and the choice of law, meaning to which extent individuals themselves can choose which law should be applied to the division of their inheritance, have also gained influence in the international debate.[21] This project will therefore also investigate to what extent formal Norwegian law provides scope to grant parties the possibility to make a choice for the law of their country of (family) origin, for instance by means of party autonomy or by means of testamentary disposition.

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[15] Abduallahi A An-Na'im, *Islamic Family Law in a Changing World. A Global Resource Book,* (London, New Yorks, Zed Books Ltd, 2002), p. 17.

[16] See N.J. Coulson, *Succession in the Muslim Family*, (Cambridge: Cambridge University Press, 1971), p. 1.

[17] Knut Vikør, *Between God and the Sultan. A History of Islamic Law*, (London: Hurst & Company, 2005), p. 319.

[18] See, for instance, Helge J. Thue, *Op. cit.*, pp. 506, 512 about the different legal questions that this rule may give rise to in cross-border disputes.

[19] *Mut'a* marriages are practiced in Shi'a Islam (as practiced in, for instance, Iran, parts of Iraq and Pakistan) and range from one hour to 99 years,. These marriages are, on the other hand, highly controversial in *Sunni* Islam, as practiced by the majority of Muslim communities in Norway.

[20] See, for instance, Katja Jansen Fredriksen, "Mahr (dower) as a Bargaining Tool in a European Context: a Comparison of Dutch and Norwegian Judicial Decisions", pp. 147-190, in: Rubya Mehdi and Jørgen S. Nielsen, *Embedding Mahr in the European Legal System*, (Copenhagen: DJØF Publishing, 2011).

[21] See Mosa Sayed, *Islam och arvsrätt i det mångkulturella Sverige. En internationellt privaträttslig och jämförande studie*, (Uppsala: Iustus Förlag, 2009), p. 25.

It should, however, be underlined that succession rights in *practice*, both in Muslim states and in an immigration context in Norway, are often practiced on the basis of a combination of formal rules, customary law and local traditions, called normative pluralism.[22]

In Norway, heirs have the possibility to administrate and divide the estate in private, i.e. unassisted by the courts. Little research has been performed in this field,[23] but research from other European countries seems to indicate that Muslim families often arrange their succession disputes in private, according to rules and customary or with assistance from local diplomatic representations.[24]

This may explain why there in Norwegian litigation so far only has been decided one formal case by the courts that concerned a succession dispute between the Norwegian heirs of a deceased man of Kenyan nationality and his alleged first and second wife and child from Kenya (RG 2009 p. 613). This project will therefore also contain of an empirical part, which by means of questionnaires and qualitative interviews at the various probate and municipal courts, as well as the consular representatives of Muslim countries in Norway, aims to get an overview over the extent to which Muslim succession rules are practiced among Muslim communities in Norway.

2.3.2 Project management, organisation and cooperation

The leader of the project here applied for will be associate professor Thomas Eeg, who will also be conducting his own research under the project.

Eeg will in addition most likely be the supervisor of the Ph.D.-project. Guidance will also be given in the context of integration in the adequate research groups. The Research Group on Family and Children Law, Succession Law and Law of Persons, is led by Eeg. The other researcher with a particular interest for succession law in this group, professor Torstein Frantzen, is also the leader of the Inheritance Act committee. (See http://www.uib.no/fg/familie and http://www.uib.no/personer/Torstein.Frantzen for further information.) Furthermore, the research group on Legal Culture, led by professor Jørn Øyrehagen Sunde, can *inter alia* offer insight and guidance in the field of legal history and comparative legal research. (See http://www.uib.no/fg/rettskultur and http://www.uib.no/personer/Jorn.Sunde for further information.)

The Ph.D.-student will be enrolled in the Ph.D.-programme of law, which is the organized doctoral training offered by The Faculty of Law, University of Bergen. He or she will also be situated with office facilitations etc. at The Faculty of Law, but it is the intention that he or she will conduct research abroad for a shorter period at one of the cooperating or other institutions.

The research project will also utilize national research expertise and promote national network-building in so far as The Institute of Private Law, University of Oslo, is a cooperating partner. Amongst researchers from this institution are associate professors Peter Hambro and John Asland, respectively a member and secretary of the committee on a new inheritance law, and professor Tone Sverdrup, who *inter alia* is a member of the Expert Group of the Commission on European Family Law (CEFL). (See attached letter of intent.) Furthermore, associate professor Inge Unneberg, lecturer of succession law at the University

[22] See, for instance, Rukhsana Ashraf, *Normativ Pluralisme og Arv. Norskpakistanske kvinners rett til å sitte i uskiftet bo,* (Oslo: Kvinnerettslig skriftserie 79, 2009); Jens Jørgen Viuff, "Islamisk arveret i Danmark – 2006", pp. 191-205, (p. 193), in: Rubya Mehdi (ed.), *Integration & Retsudvikling,* (København: Jurist- og Økonomforbundets Forlag, 2007).

[23] The only research performed in Norway is a master thesis of Rukhsana Ashraf, as mentioned above. This thesis contains a small selection of interviews, performed among Norwegian-Pakistani widows with regard to the surviving spouse's undivided entitlement to retain possession of the estate ("uskifte", non-probate).

[24] See Sebastian Poulter, "The Claim to a Separate Islamic System of Personal Law for British Muslims, p. 157, in: C. Mallat & J. Connors (eds.), *Islamic Family Law,* (London: Graham & Trotman, 1990); Susan Rutten, *Erven naar Marokkaans recht: Aspecten van Nederlands international privaatrecht bij de toepasselijkheid van Marokkaans erfrecht.* (Antwerpen-Groningen: Intersentia, 1997).

of Tromsø, at the present employed at BI Norwegian Business School (also called BI Norwegian School of Management), and a member of the committee on a new inheritance law, will also contribute with his expertise.

As it is, in a sense, a part of the nature of the (contemporary) law of succession to be viewed in a historic perspective in order to be fully understood, the project will also utilize the connections with the already established Nordic Succession Law Network, where Eeg and Sunde are members. This network consists of members from several universities and other educational institutions in the Nordic countries, in the fields of law *and* history. This project will in return hopefully strengthen the network. (See attached letters of intent, and for further information http://jura.ku.dk/nsln.)

Project III will be performed in close cooperation with the Centre for Middle Eastern and Islamic Studies at the University of Bergen and will support on an already established network of Shari'a scholars in Norway and abroad, organised by professor Knut S. Vikør (see http://www.smi.uib.no/ksv/cv.html for further information).

The researchers on the project will present their work-in-progress in workshops on a yearly basis. Participants of the workshops will also include supervisors and specially invited experts. In addition, there will be seminars, also on a yearly basis, where members of support groups such as the Nordic Succession Law Network will be invited to speak on subjects of relevance for the project. It is the intention to combine workshops or seminars with a guest research period in Bergen for one or several of the invited speakers or participants.

3. Key perspectives

3.1 Relevance and benefit to society

The law of succession affects practically everybody. This project will meet important demands in civil society, as it is in part designed to evaluate important areas of Norwegian succession law in the light of practical challenges relating to societal changes, and to propose reforms. For further elaboration see 2.1 and 2.3.1.

3.2 Environmental impact

The research project will have no significant environmental impacts in itself.

3.3. Ethical perspectives

The project in itself does not raise any particular ethical questions, notwithstanding that it will address topics related to value-orientation, human rights, and gender discrimination based on cultural traditions. For further elaboration see 2.3.1 and 3.4. It can also be mentioned that the project leader was responsible for the module on research ethics at The Faculty of Law's ph.d.-programme from 2006 to 2010.

3.4 Gender issues (Recruitment of women, gender balance and gender perspectives)

With regards to substantial succession law, the research environment at The Faculty of Law, and basically the entire Norwegian research environment, consists of men only. Women will therefore be encouraged to apply for the doctoral fellowships and the researcher position. With special regards to project III, it should be mentioned that a likely applicant is a woman, as Katja Jansen Fredriksen submitted her Ph.D.-dissertation, "The Islamic dower (the *mahr)* and its relation to 'limping marriages and divorces' among Muslim communities in Norway. Private International law, possible solutions and the threshold for tolerance.", 31 December 2011. Gender perspectives are also relevant in particular to project III, as Muslim succession law discriminates on a gender basis. See 2.3.1 for further information on how this will be taken into account.