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Are we still modern? Inheritance law and the broken promise of the enlightenment

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MPIfG Working Paper 10/7

Jens Beckert

Are We Still Modern?

Inheritance Law and the Broken Promise of the Enlightenment

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for the Study of Societies

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Max-Planck-Institut für Gesellschaftsforschung, Köln

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Abstract

The regulation of the transfer of property mortis causa has been a major concern of social reformers since the Enlightenment. Today, by contrast, the issue of the bequest of wealth from generation to generation stirs hardly any political controversy. Since the mid-twentieth century the topic has lost much of its earlier significance in public debates. In this working paper I show that over the last forty years we can observe a backlash in key areas of inheritance law which breaks the Enlightenment's promise to distribute wealth in society based on individual achievement rather than ascriptive criteria. Hence the question: "Are we still modern?"

Zusammenfassung

Die Regulierung der Vermögensvererbung war wichtiger Gegenstand von Sozialreformen seit der Aufklärung. Heute hingegen erregt der Umgang mit Erbschaften kaum noch politische Aufmerksamkeit. Seit der zweiten Hälfte des zwanzigsten Jahrhunderts hat das Thema seine Bedeutung im öffentlichen Diskurs verloren. Das Working Paper zeigt einen Backlash in zentralen Bereichen des Erbrechts während der letzten vierzig Jahre auf, durch den mit dem Versprechen der Aufklärung gebrochen wird, Reichtum nicht nach Kriterien der Herkunft, sondern nach Maßstäben von Leistung zu verteilen. Daher die Frage: „Sind wir noch modern?“

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The regulation of the transfer of property *mortis causa* has been a major concern of social reformers for more than 200 years. Reform of the laws on inheritance became a pressing topic in the eighteenth and nineteenth centuries for thinkers and politicians such as Montesquieu, Rousseau, Mirabeau, Thomas Jefferson, Alexis de Tocqueville, Blackstone, Hegel, Fichte, and John Stuart Mill. All of these thinkers agreed on the importance of inheritance law for the transformation of the social and family order, based on principles of individuality, social justice, democracy, and equality before the law. In fact, reform of inheritance law was seen as a key instrument of social reform, undoing the feudal order of the past and realizing the bourgeois order. The centrality of inheritance law reform is very aptly described by two quotes from Alexis de Tocqueville and John Stuart Mill. Tocqueville wrote that the question of inheritance was so important to a society's development that when "the legislator has once regulated the law of inheritance, he may rest from his labor" ([1835]1980, Vol. 1: 48). And John Stuart Mill ([1848]1976: 202–203) saw inheritance law as the most critical area of law, equaled in significance only by contract law and the status of workers.

For social reformers, the bequest of property was often deeply problematic. It was associated with a system of inherited privileges characteristic of aristocratic societies and stood in conflict with fundamental bourgeois values of equality and meritocracy. These values are intimately linked to modernity. In his pattern variables, the American sociologist Talcott Parsons (1951) distinguished modern societies from traditional societies in terms of five pairs of categories that pattern social relationships and institutions. While social relationships in traditional societies are characterized by affectivity, collectivity orientation, particularism, diffuseness, and ascription, relationships in modern societies are, by contrast, characterized by affective-neutrality, self-orientation, universalism, specificity, and achievement.

It is just one of these categorical juxtapositions that I will discuss: The distinction between ascription and achievement. Ascription means that social status is institutionally allocated based on characteristics ascribed to people by birth. Certain rights, obligations, roles, or privileges are conferred upon a person, based on the social position of his or her parents or based on gender, age, ethnicity, or nationality. Achievement, by contrast, means that the distribution of wealth and social status is based on the actual contribution or performance of the individual.

From this perspective, the bequest of wealth from generation to generation is deeply problematic in the context of modernity (Beckert 1999). Inherited property comes to the heir "effortlessly," through the death of another person. The institution of inheritance thus runs counter to the justification of unequal distribution of wealth based on individual merit and achievement and perpetuates social privileges. It also violates the

This text is based on a keynote lecture given at the opening of the workshop "Inherited Wealth, Justice and Equality" on March 4, 2010, at Antwerp University.

principle of equality of opportunity, which asserts that the starting conditions should be as equal as possible for all, so that differences in wealth can reflect the actual accomplishments of individuals. How can the “unearned” acquisition of wealth be justified within the context of a social order that legitimizes social inequalities as the product of the different contributions its members make through personal achievement?

But are our societies today really still concerned with the issue of the bequest of wealth from generation to generation? I will argue that the topic of inheritance concerned social reformers from the Age of Enlightenment onwards, up until the mid-twentieth century, when it all but disappeared from public debate. Today, it is a marginalized issue that pops up here and there without creating the social controversies it once did. This is not an interesting observation as such. It could be, one might suspect, that after 150 years of reform the law has finally become “modern,” and social discourse can shift its attention to other subjects. However, as I will argue, this is not the whole story. Instead, what we can observe over the last forty years is a backlash in crucial areas of inheritance law which breaks the Enlightenment’s promise of moving from ascription to achievement. Hence the question: “Are we still modern?”

I will first describe three fields of reform of inheritance law which have been of crucial importance to liberal reformers since the late eighteenth century: changes in statutory law, the abolition of entail, and the introduction of progressive estate taxation. I will show how changes in these legal fields can be understood as the recognition of values of equality, meritocracy, and social justice. Following this, I will argue that at least in two of these areas the last forty years have seen a backlash which breaks in important ways with previous achievements.

But is this really problematic? Do we still have to bother about debates passionately conducted two hundred years ago? Are the normative principles of the eighteenth and nineteenth centuries still relevant today? In the last part I will discuss the question of what the diagnosed backlash means for society and what it means for the concept of modernity.

1 Inheritance law and the family

Let me start with reforms of statutory inheritance law and their implications for family relations.

Historical analysis reveals how crucial reforms of inheritance law were believed to be for political and social modernization (Beckert 2008). One of the aims of reforms in inheritance law in the late eighteenth and early nineteenth centuries was changing the structure of family relations. These changes to the family were seen, at the same time, as

part of reforms of the political order. This finds clear expression in reforms of inheritance law in France during the Revolution. The reforms were aimed at altering family structures by establishing equality among the children, abolishing the father's arbitrary license in making decisions relating to inheritance, and breaking the dynastic continuity of noble families. The change in family structures brought about by changes in inheritance law was also a *means* of creating the social conditions for new political structures. In France, family relationships based on greater equality were seen to be the foundations upon which the social structures of the new political community were to be erected. In a constantly recurring metaphor, the family was described as the "cell" of the nation, whose structure would have a decisive influence on the nature of the political order. Family affairs were thus an "*affaire d'État*."

These normative and political convictions were reflected in several reform projects. The first was the abolition of primogeniture, a measure introduced in most European countries at about this time, with the remarkable exception of England, where it was not abolished until 1925. Primogeniture was an important part of intergenerational preservation of economic and political power in feudal societies. Its abolition was a means of breaking with this order.

Other reform projects in statutory inheritance law referred to the equality of brothers and sisters and the rights of the surviving spouse to parts of the property of the deceased. While children achieved equality before the law independent of their gender with the abolition of primogeniture, the strengthening of inheritance rights of the surviving spouse was a long-lasting process that was completed only in the second part of the twentieth century.

The issue here is largely one of gender equality. Property law favored men over women. This was most pronounced in common law. Common law stipulated that, upon marriage, disposition over the wife's property passed to the husband. The wife's moveable property was transferred to the husband, which meant that he also passed it on by will. In the case of real property, while it remained formally in the wife's possession, its economic benefit belonged to the husband. In short, the wife became a *femme couverte*. The legal background to this was the principle of marital unity in common law. The "executor" of this unity was the husband. "The husband and wife are one person in law," according to William Blackstone's famous dictum ([1771]2002, 1: 339).

Reforms to strengthen the legal position of the surviving spouse started in the first half of the nineteenth century. Over a period of 150 years one can observe a steady process of increasing equality between men and women in property law and in inheritance law. These trends demonstrate a growing assertion of the principle of equality. They also demonstrate the declining role of the dynastic bequest of wealth within the family blood line.

Gender equality was not the only way in which reforms of inheritance law interfered in traditional family relations aiming at equality in the family. Especially in France, but also in Germany, the normative principle of equality was also supposed to be asserted through the limitation of testamentary freedom. At one point during the Revolution testamentary freedom was completely abolished and even today the stipulations of the *Code Civil* contain strong restrictions on testamentary freedom. The normative motivation behind this can be seen in a quote taken from a speech by Mirabeau in the Assemblée Nationale in 1791:

I do not know, gentlemen, how it should be possible to reconcile the new French constitution, in which everything is traced back to the great and admirable principle of political equality, with a law that allows a father, a mother to forget these sacred principles of natural equality when it comes to their children, with a law that favors differences that are universally condemned, and thus further increases the disparities brought forth in society by differences in talent and industry, instead of correcting them through the equal division of the domestic goods. (Mirabeau, April 2, 1791, in Mirabeau [1791] 2003: 24)

2 Entails

A second field in which the reform of inheritance law was meant to transform the social order on the basis of Enlightenment ideas was the abolition of entails. Entails were an important and highly controversial instrument for preserving the concentrated distribution of landownership of feudal societies by placing restrictions on heirs' rights of disposition. If property is entailed, it cannot be sold; instead, it is passed on from generation to generation according to the succession determined by the founder. As a rule, the landed property was bequeathed to the eldest son and had to be passed on in all subsequent successions to the eldest son in the next generation. Entails are a legal institution of dynastic bequest through which the testator can control the use of his property across generations, thereby exerting influence on the property relationships of the succeeding generations. The wealth is directed by the "dead hand" of the person who established the entail.

Fierce criticism developed against entails as early as the eighteenth century. It was aimed at the special privileges granted to one class of property owners, as well as at the political structures propped up by these privileges. Preferential treatment of one social class in property law runs counter to the principle of civic equality, which serves as the normative foundation of the liberal concept of social order. Liberal social theory rejected entail as an instrument for the dynastic perpetuation of the nobility's privileged social status. In the liberal worldview, entail goes against civic equality, individual rights of freedom, the concept of meritocracy, and political democratization. This criticism was combined with economic arguments concerning the negative economic effects of restrictions on the mobility of property. John Stuart Mill ([1848]1976), for instance,

denounced entails as an aristocratic institution which promoted an economic culture that ran counter to people's acquisitive tendencies: the "heir of entail, being assured of succeeding to the family property, however undeserving of it, and being aware of this from his earliest years, has much more than the ordinary chance of growing up idle, dissipated, and profligate" (Mill[1848]1976: 895).

Two quotes by contemporaries show how vital they considered the abolition of entails to be for the modernization of society. A report to the *Assemblée Nationale* from 1792 reads: "(E)ntails are odious. ... their preservation is incompatible with the sacred principles of liberty and equality ..." (Arch. Parl., First Series, Vol. 49, p. 55, quoted in Eckert 1992: 183). In the United States, Thomas Jefferson formulated his rejection of entails succinctly: "The earth belongs in usufruct to the living" (Jefferson 1789). Even conservative legal scholars – at least in the United States – were outspoken critics of this institution. James Kent, for instance, wrote in the early nineteenth century that entails have "no application to republican establishments, where wealth does not form a permanent distinction, and under which every individual of every family has his equal rights, and is equally invited, by the genius of the institutions, to depend upon his own merit and exertions" (Kent[1827]1971: 20).

Hence, one of the crucial reforms in inheritance law in the nineteenth century was the abolition of entails, which occurred in the United States during the Revolution. The same holds true for France, with the exception, however, that entails were reintroduced in the period of restoration and finally abolished only during the Second Republic in 1848. In Germany, abolition had to wait until the Revolution of 1919.

3 Estate taxation

Finally, the third field in which the new regulations on inheritance were meant to be an important element of social reform was estate taxation. The early nineteenth century saw the emergence of a debate among liberal and early socialist social reformers in which inheritance taxation was advocated as an important instrument for making good on the promise of equality and for solving the "social question." Within the framework of liberal social theory, inheritance taxation appeared to be an especially suitable tool for achieving equality of opportunity *within* a system based on private property (Beckert 1999). Since inheritance taxation falls upon property that passes to heirs without any effort of their own, taxing this wealth is in line with the meritocratic principle. In normative terms, inheritance taxation seems far less problematic than an income or consumption tax.

Four arguments served to justify the introduction of an inheritance tax:

(1) Proponents of an inheritance tax referred directly to the principle of achievement. Many liberal thinkers argued that the “accidents of birth” have no normative place in a liberal social order. Social inequality could be justified only by the different individual contributions of members of society, not by the luck of being born into a wealthy family. As a consequence, property needs to be redistributed by each new generation. In the 1840s, the American social reformer Orestes Brownson, for instance, advocated confiscatory inheritance taxes. They alone were compatible with the principle of equality of opportunity and individual entrepreneurship:

A man shall have all he honestly acquires, as long as he himself belongs to the world in which he acquires it. But his power over his property must cease with his life, and his property must then become the property of the state, to be disposed of by some equitable law for the use of the generation which takes his place. (Brownson[1840]1978: 24)

Brownson’s intention was to endow individuals with equal resources at the start of life. To that end, ascriptive material privileges were to be abolished (ibid.: 60ff.). Property rights terminated upon death and property thus reverted to society (ibid.: 71). If property became “free,” “one man can rightfully appropriate to himself no more than, in an equal division of the whole among all the members of the new generation, would be his share” (ibid.: 75). Brownson’s goal was to implement equal opportunity and with it an achievement-based distribution of social wealth.

(2) The second argument in favor of estate taxation referred to changing family structures in the process of modernization. John Stuart Mill ([1848]1976), for instance, pointed to the change in the structure of property in bourgeois societies. In earlier societies, the family owned property. When a family member died there was no succession, because one share of the family wealth simply passed to the other members of the family. Death and birth merely changed the identity of those who participated in property jointly owned by the clan. Modern society, however, was characterized by a fundamental change in family structures, according to Mill. That change made it meaningful to speak of individual property in the first place, but at the same time it delegitimized inheritance: “The unit of society is not now the family or clan, composed of all the reputed descendants of a common ancestor, but the individual; or at most a pair of individuals with their unemancipated children” (Mill[1848]1976: 222).

(3) A third argument justifying inheritance taxes referred to the changing role of the state, which takes on more and more obligations and needs to secure the financial means to fulfill them. This was an argument that was advocated in particular by representatives of the historical school in Germany. In his *Rede über die soziale Frage* (Speech on the Social Question, 1872), Adolf Wagner advocated a progressive inheritance tax because, in the process of modernization, tasks of the family would increasingly shift to the state:

The more individualism takes hold in the life of the people in place of the strict family and gender order, the more justified in principle, and the more necessary and just in practice, does the participation of the public body, especially the state, in inheritance become, and therefore the more justified is a system of expansive inheritance taxes. (Wagner 1880: 477f.)

(4) Finally, the fourth argument referred to the consequences of wealth concentration through inheritances for the democratic political order. This argument was especially prominent in the American debate in the early twentieth century. It reflects mistrust of “big business” and its role in the Gilded Age. The populist and progressive movements in particular pointed to the threat to the democratic political process stemming from wealth concentration. President Franklin D. Roosevelt applied this argument, for instance, in a speech to Congress in 1935: “Such inherited economic power is as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our Government” (Roosevelt, Congressional Record, No. 79, Vol. 9, p. 9712, June 19, 1935).

Progressive inheritance taxes were introduced in France in 1901, in Germany in 1906 and in the United States in 1916. The conflict over the taxation of inheritance was the most important theme in inheritance law in the twentieth century. Inheritance taxation was a highly contested political issue. This came about also because the taxation of inheritances introduced a new regulatory quality compared to the questions of inheritance law examined previously. Through inheritance taxes *the state* does not interfere with the distribution of property *within the family*, but *appropriates for itself* a part of the property left behind by the deceased. Questions of individual property rights, equality, justice, and the economic and familial consequences of the rules of inheritance law are related to the distribution of wealth *within society*.

4 Inheritance law as social reform

The discussion of the three legal fields in which inheritance law has been most controversial shows the extent to which this legal realm had been considered crucial for social reform. While most of the arguments were brought into the debate by the first half of the nineteenth century, the political controversy continued until about the 1930s. In the first part of the twentieth century, many of the reforms discussed in the nineteenth century were finally institutionalized. Entails were also abolished in Germany (1919), Great Britain ended primogeniture (1925), legal reforms in statutory law led to more gender equality, and almost all Western European countries and the United States introduced progressive inheritance taxes. Hence we can observe how inheritance law, in accordance with the principles of achievement and equality of opportunity, represents an important pillar of modernity.

This is not to say that the reforms that were implemented did not meet fierce opposition. It took until 1919 for entails to be abolished in Germany. The introduction of progressive inheritance taxes was met with furious opposition by conservatives, and in the United States the federal estate tax was almost abolished again in the 1920s. But despite this opposition there was an understanding that the regulation of the transfer of prop-

erty from one generation to the next is an important topic with profound implications for the type of society we live in. The topic of inheritance law reform entered the political discourse from various social fields: from social movements that emanated from the lower social classes and the middle class; from property owners themselves; and from scholarly discourse. While the reforms did not meet with universal approval, there was a climate of public opinion in which reform was perceived as necessary to enhance equality of opportunity, to counterbalance the existing concentration of wealth, and to promote tax equity. In the United States, a new understanding of the role of the state in social reform took hold in the late nineteenth century, one that would shape large parts of the history of Western countries in the twentieth century.

5 The backlash on inheritance law in the late twentieth century

Popular support for inheritance taxation can be observed in the United States, for instance, in populist movements such as Senator Huey Long's *Share Our Wealth* movement in the 1930s. Long's demand was to impose a confiscatory tax on fortunes over one million dollars (Fried 1999: 65ff.). By 1935, the *Share Our Wealth* movement had grown to 7 million members, all over the United States. However, this popular support for estate taxation was not sustained throughout the twentieth century.

It is this change to which I now turn. To understand the change in the dominant perception of bequeathed wealth in the last quarter of the twentieth century, we must examine two other populist movements in the United States. One is George McGovern's unsuccessful bid for the presidency in 1972. He called for a progressive inheritance tax, which would reach 100 percent for inheritances above half a million dollars (Weil 1973: 74). McGovern assumed that the vast majority of voters had strong reservations about the existing concentration of wealth in American society and would therefore support his plan. But the political mood in the United States had changed by that time and the broad American middle class was now unwilling to support such demands. By the 1990s, opposition to estate taxation had become even more influential. In the context of debates in the United States on abolishing the federal estate tax, the advocacy group "nodeathtax.com" lobbied for the abolition of the estate tax, exerting a strong political influence on public attitudes towards the tax. The vast majority of American voters supported the tax reforms of the Bush administration in 2001, which included the phasing out of the estate tax in 2010.

The lack of support for McGovern's plan in 1972 can be seen as a symbolic turning point in applying inheritance law and inheritance taxes as instruments of social reform. Since the early 1970s, a process of restoration in inheritance law can be observed against the backdrop of vanishing public support for using inheritance law as a reform instrument and an increasing public ignorance about this issue.

1. Estate taxes have been abolished or severely reduced in many OECD countries, starting in 1972 with New Zealand. Opinion polls regularly show that the tax finds very little support among the electorate, even among the majority of voters who would never be personally affected by this tax because they lack taxable assets. It is puzzling that this is the case. Is it because voters lack accurate information, as the American political scientist Larry Bartels (2005) argues in his analysis of the Bush tax reforms? Is it because the taxation of bequests is seen as an undue interference in family relations? Is it because many people dream of being an heir to a large fortune themselves one day? Is it because (small) countries seek advantages in international tax competition?
2. The discussion of entails showed that Enlightenment reformers were especially suspicious of forms of dynastic wealth transfer that tie up wealth according to the will of the testator over many generations or indefinitely. In common law, the rule against perpetuities prevents wealth from being locked for more than about 100 years. In recent years, this rule has been abolished or significantly modified by almost half the American states. It has also been abolished in Ireland (Röthel 2010: 75; Moshman 2006). In other jurisdictions as well, wealthy testators seek increasingly to control the living through their “dead hand,” whether through trusts or by donating their wealth to foundations. What does this imply for the possibility of social mobility in a society? What does it mean for the living to have their lives partly controlled by decisions taken by a preceding generation? What does it mean with regard to Thomas Jefferson’s dictum: “The Earth belongs in usufruct to the living”?
3. It is only in the field of statutory inheritance law that we can observe a continuation of modernization processes that started in the early nineteenth century. Husbands and wives are treated equally by inheritance law today; the horizontal relationship between a husband and wife has been strengthened at the expense of the inheritance rights of the blood line; increasingly, homosexual couples enjoy the right to inherit from their partners; and children born out of wedlock have been granted the same inheritance rights as legitimate offspring. Many of these developments are very recent. Some of them have not been completed. But, unlike the realms of estate taxation and control by the “dead hand,” these developments show no signs of reversal.

6 Conclusion

“Are we still modern?” It is, I believe, a helpful exercise to go back in history and try to understand the normative concerns of the time in which the foundations of our political and social orders were formed. This provides a yardstick against which current discourses and institutional changes can be measured. Inheritance has been seen as an important instrument of social and democratic reform. Indeed, it has been an instru-

ment of social modernization. Concerns about equal opportunities, individual freedom, social justice, and the viability of the democratic order stood front and center in these debates. Today, interest in the topic has largely vanished and when the taxation of inheritances is debated, issues of efficient taxation dominate. This is but a small part of the issues involved in the regulation of transfers *mortis causa*.

It is certainly not easy to explain this change. I believe it is part of the great transformation (Blyth 2002) that has taken place since the 1970s in all Western countries. Support for a strong state as an instrument of social reform has declined dramatically since the years of the postwar consensus. Taxation is seen as inhibiting economic growth within the context of the dominant supply-side economics. Globalization allows mobile capital to choose among legal jurisdictions on a global scale, providing incentives, especially to small states, to offer low taxation regimes to wealthy individuals.

The change, however, is not just economic, but social and cultural as well. The increasing social pressures on the middle class, combined with processes of individualization observed by sociologists since the 1960s, contribute to desolidarization. Attempting to protect one's offspring from the vagaries of the market through inheritance is an individualized reaction to social conditions which expose actors to more and more insecurity. The taxation of inheritances is not perceived as a means of securing the provision of opportunities socially, but as a further threat.

Culturally, there seems to be a tendency for the distribution of wealth to find legitimation even if it is not based on achievement resulting from individual performance. Instead, "success" – as the German sociologist Sighard Neckel (2008) argues – is the category according to which wealth and social status are allocated, whether it concerns the incomes of top managers that have increased to levels which bear no relationship to their work performance, the incomes celebrities derive from their popularity, the promise of riches from lotteries, or inheritances. Societies seem once again willing to allow prosperity to be disconnected from individual performance. If one is to believe sociological studies on attitudes towards inequality, it seems that structures that reproduce social inequality are much less a normative problem for the average person than they are for the social scientist (Sachweh 2010).

"Are we still modern?" What it means to be modern must be constantly redefined. Judged by the normative standards defined in the era of the Enlightenment and informing political controversies through much of the nineteenth and twentieth century, social organization is undergoing profound change. Current developments in inheritance law and the public discourse about them are indicative of this shift in how societies set priorities.

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