THE NEW NORWEGIAN LEGISLATION RELATING TO PARENTS AND CHILDREN

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1. Two statutes recently (December 21, 1956) adopted in Norway concerning the legal relations between parent and child seem to possess sufficient general interest to warrant discussion in this yearbook. One of these measures concerns the status of legitimate children, the other that of illegitimate children.

While large portions of the family law in force in the Scandinavian countries have been formulated in statutes which have been drafted jointly and in their main features are the same in all the countries concerned, this is not the case with regard to the legislation concerning parents and children. In 1950, however, this part of family law also was selected for joint drafting by co-operating legal committees in Denmark, Finland, Norway and Sweden; Iceland was not represented. Up to the present, however, the resulting draft on the general legal relation between parent and child has not led to any legislation except the two Norwegian statutes mentioned above.

2. With regard to the Act relating to legitimate children, I will mention only one feature, namely, the rules about the right, in the case of a divorce, of one spouse to meet his or her children when the Court has ordered that the other spouse shall have the enstody of the children. For many reasons a right of access may be of great importance to the spouse who does not have the custody, but at the same time this right may place a great strain on the other spouse and often on the children also. Particularly is this the case when the spouse with whom the children live remarries and her (or his) new spouse endeavours to be more than a stepfather (or stepmother, but that is a much less common situation) to the children. The children may thus be torn between two families in a way which may involve serious consequences for their psychological development.

The rule of the right of access for the spouse who has not the custody of the children was in principle established by a judgment of the Norwegian Supreme Court as early as 1940. But the new Act gives particular rules of a more detailed character. The right of access cannot, of course, be absolute, and under the Act it is

expressly withheld if its enjoyment may be expected to have "adverse effects" on the children; it is therefore neither necessary nor sufficient that blameworthy conduct shall be established with regard to the parent from whom the right of access is withheld.

Under the rules prevailing before the legislation of 1956 it was not clear whether any means were available to enforce the right of access if the other spouse opposed its enjoyment or resorted to evasive action in order to circumvent it. The new Act solves this problem by providing that the Court may order a fine, progressive with time, to be imposed in the case of a breach of a ruling as to right of access.

When the Act was framed there was general agreement as to the content of the right of access. Regarding its enforcement, on the other hand, there was much disagreement, and probably the rules on this subject would not have been inserted had it not been that—owing to legislative technicalities which cannot here be discussed—failure to do so would have jeopardized the adoption of the Act as a whole. For this reason, many of those who found the draft rules on enforcement open to objection did not oppose them, believing, as they did, that their practical importance was not great. About this they were probably right: the provision prescribing a right of access is one most parents would obey. Furthermore, indirect sanctions are possible, amounting if necessary to the deprivation of the recalcitrant parent of the custody of the children. On the other hand, the possibility of incurring a penalty may give pause to those who will not accept a rule as being legal unless it is backed by force.

3. Before reviewing the rules relating to illegitimate children, it is appropriate to say a few words about their sociological background. Naturally the legal rules themselves play a part in shaping the social position of the illegitimate child. Other elements, however, have also contributed to make the problems of the illegitimate child less severe than they were at one time.

One important point is that the number of children born out of wedlock is fairly small in Norway and appears to be diminishing. Whereas in the 1930's it was estimated that 6–7 per cent of all children were born out of wedlock, the corresponding figures in the present decade are 4 per cent or perhaps a little less. Furthermore, these figures relate to the status at the time of birth. Not a few of these children are legitimated by the subsequent marriage of the parents, and a very considerable number— perhaps 40 per

cent—are adopted and thereby acquire a legal position vis-à-vis the adoptive parents which in every important respect is equivalent to the position of a legitimate child vis-à-vis its parents. Today's situation is that the demand for adopted children is greater than the supply and an unmarried mother therefore need not raise her child as her own if she does not wish to, unless the child is in some way defective or is likely to be of an hereditary disposition such as to deter prospective adopters. On the whole, therefore, one may say that the children who remain illegitimate are those in the group having the best future prospects, namely those whose mothers want to keep them and believe themselves able to offer the children reasonably good living conditions. Besides those, however, there are some children (though comparatively few) whose future prospects are very bad: perhaps the child is mentally or physically defective or has a hereditary disposition which prevents adoption (in such cases, however, the prospects would not be bright even had it been born in wedlock), or its mother opposes adoption but is incapable of fulfilling her task of raising and supporting the child, although she may honestly wish to do her best for it. An important feature is the fact that in the course of time social disapproval of the unmarried mother and child has become less outspoken than it was and has sometimes completely disappeared or even been replaced by approval; in this respect, however, great variations probably exist, connected with the social background of mother and child.

Of course, what has just been said does not prevent the occurrence of particular cases in which the illegitimate birth gives rise to great external difficulties and serious internal tension with respect to mother and child. Still less does it mean that the problems of the illegitimate child can be regarded with equanimity by the legislature. It does mean, however, that as far as mere numbers are concerned the problem is far smaller than it was two generations ago.

4. For a long time Norwegian legislation took up the position that the illegitimate child was in a regular family relation to its mother and its mother's family only, while the father had to support it. Throughout the 19th century, legislation aimed at extending the father's duty of support and making its enforcement more effective. The latter consideration was not the less important of the two. Generally the mothers were people of small means. Many of them did not even know the rights which they (or their

children) possessed and even if they did, they were afraid of alienating the father by seeking to have these rights enforced.

As long as "fatherhood" gave rise only to economic consequences, the law did not require biological evidence of paternity. It was sufficient to prove the occurrence of sexual intercourse between the mother and the man indicated at a time such that the child might be his. If such intercourse had taken place with several men, the obligations of paternity were imposed on all of them; there was no *exceptio plurium concumbentium*.

In 1915 new statutory rules were enacted. In part their purpose was to extend the duty of support, such an extension being important from the practical point of view. But the rules also implied a change of principle for the future. The illegitimate child was to be in a regular family relation to the father and the latter's family, involving as main legal consequences the right to inherit from the father and his family and the right to use the father's family name. It may be mentioned here that, under Norwegian law, children are entitled to inherit a "legal share" of their parents' estate—this share being two-thirds of the share in case of intestacy —and are protected against testamentary disposition. The arrangement prevails in favour of all children, including illegitimate ones. For the latter it is particularly important, since otherwise the father might render the child's right to inherit from him illusory merely by making a will.

When the law took up such a position, it was evident that the conditions for establishing paternity must be changed and tightened. It became necessary to furnish positive proof that the man indicated really was the biological father of the child; it was no longer sufficient to show that he might be so. The establishment of paternity therefore required two proofs, one positive and one negative. As to the positive requirement, satisfactory evidence had to be furnished to show that the man had had sexual intercourse with the mother such that (and not only at a time such that) by the laws of nature he might be the father of the child. As to the negative requirement, there must be neither any reason to assume that during the critical period the mother had had sexual intercourse with another man—which meant the introduction of *exceptio plurium concumbentium*—nor any other circumstances which made it doubtful whether the defendant was the real father.

In the event of the evidence failing to establish paternity in the sense of the new law, the defendant might be ordered to support the child but in other respects he was relieved from the appli-

cation of provisions relating to family status. The issuance of such an order required no more than was required to establish paternity under the old law. Under the new statute it was sufficient that the defendant had had sexual intercourse with the mother at a time such that he could be the father of the child, even if the probability of biological paternity was negligible. The new law further adopted the rule that judgment could be given against several men for the support of the same child.

Thus at this time there were three categories of illegitimate children: those who entered into a regular family relation with one father, those who enjoyed support without paternity and those children as to whom it was not even possible to establish a duty of support. And within the group enjoying support only, there was a division between cases where one person only was liable to support and cases where several men were so liable.

The Norwegian Act of 1915 introducing the new family status of illegitimate children was a very radical step. Since then the same arrangement has been adopted by several other countries—in Scandinavia, by Denmark and Iceland.

Students of the growth of law will find several interesting features in the Norwegian Act of 1915. I believe that it can be said with a fairly high degree of probability that the law was not the result of a general concurrence of opinion in the legal consciousness (although it is evident that such a conclusion cannot be established by any exact measurement of opinions). The law is in a great degree the work of one man, namely the Norwegian statesman and social reformer Johan Castberg. I believe that it may be positively stated that the framers of the law were not moved by dispassionate calculation as to the best method of benefiting society. It may be of interest to note in passing that the legal rule which most sharply contradicts the Norwegian rule, the rule in the *Code Napoléon* forbidding attempts to establish the paternity of illegitimate children ("*la recherche de la paternité est interdite*"), was motivated by a sociological consideration, viz. that society had no interest in establishing the descent of the child ("*L'État n'a aucun intérêt à ce que la filiation des enfants naturels soit constatée*"). One may doubt the sincerity of the reasons adduced, as is often the case when the good of society is invoked. One may also feel quite sure that those politicians who voted for the Norwegian bill did not do so to benefit themselves or to win support for their parties from grateful unmarried mothers and illegitimate children. They were moved by a sense of justice and

decency, although they would probably be unable to expound the rational content of those concepts as used by them.

5. The law just described has been in force for more than forty years. During this time it has certainly become part of the public consciousness. To no small extent this may be said of the rule that the child may inherit from its father and his family. Although this rule was ardently disputed when the Act was passed, probably nobody today would advocate its removal, even though dispassionate consideration may show that in certain instances it could result in hardship being caused to persons who in its absence would have inherited. I am thinking particularly of cases where a man has had a child out of wedlock and omits to tell his wife about it when marrying her. Of course, he ought not to be silent about such a thing, and I believe that generally husbands do make confession. But difficulties arise—in this case as so often in others—because of people who do not act as they ought to. And it cannot be denied that it causes hardship to the widow if at her husband's death she has to give up part of the common property to a child whose existence she did not even suspect. For people of small means the result may be that the widow will have to break up the home in order to raise money to pay the child its inheritance. However, one should not exaggerate the hardships involved. As a rule the father in such a case will not feel greatly obligated in his relation to the child and he has the opportunity in his lifetime to transfer his assets to his wife so as to render illusory the child's right to inherit.

In passing it may be mentioned that the Norwegian Act of 1915 not only confers upon the child the right to inherit from its father but also confers upon the father the right to inherit from the child, apart from cases where the child was born as the result of an indecent assault upon the mother. This rule, however, is not considered to be essential to the system, and it may be that it will be changed as a result of the work now in progress for the revision of the Norwegian law of succession.

The part of the Act which caused most criticism as time went by was that containing the rules providing for the establishment of a duty of support unconnected with paternity. This may seem surprising, as the law here merely maintains the status quo. But by taking up the fundamental position that illegitimate children were entitled to a regular family status with regard to the father, the 1915 Act—much against the intention of the legislature—came to depress the social position of those children whose right of

support was granted without the establishment of paternity. Such a decision involved an assumption of the sexual promiscuity of the mother during the period of conception, and the scheme of support served to remind the child of this very fact during the whole of its adolescence. This means placing a severe psychological strain on the child. Experienced social workers affirm that children settle down more easily where no duty of support is imposed at all. The child can then find refuge in the thought that the mother has only had sexual relations with one man, who has deserted her and who cannot be found.

Against the scheme of imposing on several men the duty of supporting the same child particularly sharp criticism was forthcoming. From an economic point of view, of course, it might be advantageous to hold several persons jointly liable. But the advantage was dearly bought. It involved a particularly brutal reminder of the mother's lapse.

6. The criticism of principle which could be raised against the system of duty of support without paternity was but one of the factors resulting in the demand for a revision of the 1915 Act. Another important factor was the change in the situation regarding evidence which was brought about by the advances in biological science and in particular by the research work on human blood-groups and their genetics.

Indeed, this factor became so important that one main rule of the 1915 Act was actually abandoned. As mentioned above, the Act prescribed that a duty of support could be imposed on every man who had had sexual intercourse with the mother at a time such that, by the laws of nature, he might be the father of the child, without regard to the relative probability of his paternity. The rationale was that this purely economic legal consequence should be tied to a fairly simple theme of proof, and that doubts as to the evidence should be excluded in so far as they related to the probability of the sexual intercourse having resulted in conception. But even before the advent of blood-group evidence it sometimes happened that a court refused to impose a duty of support if it was convinced that the child was not the fruit of the sexual intercourse which was proved, e.g., in the event of proof of sterility in the man. Such cases, however, were so infrequent that, from a practical point of view, they did not result in any considerable modification of the system of the law. But later, when blood-group evidence entered the picture, the courts in course of

time went so far as generally to refuse to impose a duty of support when paternity was excluded according to such evidence.

The first step thus being taken, the next one was called for. If a duty to support the child could not be imposed on A because his paternity was excluded on account of the blood-group evidence, it was not a long step also to disregard his sexual intercourse with the mother during the critical period in a suit against B concerning the paternity of the same child, so that B—provided that the case against him was a good one—would be held the father and not merely liable to support. No judgment of this content, however, was rendered under the 1915 Act. The step was to be taken by the Act of 1956.

7. By the 1956 Act the intermediate solution of imposing a duty of support without conferring family status was abolished. The choice is now between full paternity with family status and nothing at all.

This statement does not mean that all children who would have found somebody liable to support them under the 1915 Act will be in the latter group. The requirements under the previous law for the establishment of paternity have now been reduced. Some of those children who would have been in the intermediate category under the 1915 Act will qualify for the establishment of regular paternity under the new law. Some children, again, will not qualify for any type of legal relation to the man who *may* be their father. But having thus lost the civil right of action which they enjoyed under the old law, they are at the same time aided by means of a new rule of a public-law character. For an Act of 1957 confers on every child under 18 years of age the right to monetary grants from the State if the child has lost its father (or the mother if it was mainly dependent on her for its support) or if the child is born out of wedlock and the establishment of paternity (or a right of support under the old law) has failed. The awards thus given are, it is true, somewhat smaller than the payments resulting from the equivalent civil action. In return, the claim is directed against a debtor with greater resources.

Under the 1956 Act the requirements for establishing paternity are partly of a positive character—proof that the man indicated has had sexual intercourse with the mother at a time when the child may have been begotten; and partly of a negative character —that no circumstances are established making it "unlikely" that he is the true father. Perhaps this term is not very precise, but the

intention is to require a high degree of probability in favour of paternity. During the preparatory work on the Act it was emphasized that imposing paternity status on the basis of a weak foundation will cause hardship to the person held to be the father and that such a state of things serves the interests neither of the child nor of society.

A variety of circumstances may make it "unlikely" that the defendant is the father. Deficient procreative power on the part of the man may be relevant and so may other circumstances making it unlikely that the sexual intercourse has led to conception. The mother's conduct may raise doubts. Should the period of gestation be unusually short or unusually long with regard to the sexual intercourse proved, this fact may also make it unlikely that the defendant is the child's father, especially if the mother's conduct has been such as to raise doubts. But particular attention is paid to those cases in which the paternity is unlikely owing to genetic evidence.

The fundamental novelty of the 1956 Act—and it is a feature which will probably appear extreme—is the fact that it does not categorically exclude a judgment imposing paternity (including regular family status) even in the event of the mother having had sexual relations with several men during the critical period. The Act merely provides for a case where the paternity of the person declared to be the father must be "substantially more likely" than that of anyone else.

This rule calls for further explanation. Of course, it is not intended merely that the man whose paternity is the most probable (or least unlikely) among the known connections is to be held to be the father. Firstly, the law requires a *substantial* preponderance of probability. Secondly—and this is important—paternity cannot be imposed in these cases unless the general requirements therefor are satisfied. Even if the probability of the paternity of one of, say, three possible fathers is substantially greater than that of the other two, the man concerned must still not be held to be the father if the court, having weighed the evidence, finds it "unlikely" that he is the father. Finally, the comparison to be made does not relate only to those men who are known to have had sexual relations with the mother. It is not sufficient that A's paternity is substantially more likely than that of B and C (even should their paternity be excluded in view of the blood-group evidence) if it is possible to assume that the father is X or Y, of whom nothing is known. The probability in favour

of A's paternity must be substantially greater than that in favour of *anybody else*—greater even than the paternity of a possible father who is unknown.

The practical importance of the fact that the Act no longer unconditionally permits *exceptio plurium concumbentium* cannot be measured with any certainty until the Act has been in force for some years. But some extreme cases are already clear. If it is established in court that both A and B have had sexual relations with the mother in circumstances permitting the inference that either of them could be the father, and if the court does not believe that there is anybody else involved, paternity is to be imposed on A if the blood-groups exclude B but not A. And the law does not require even so high a degree of certainty as this. One may assume, for instance, that the mother has had intercourse on various occasions with her fiancé A, but she has also had intercourse on a single occasion with B somewhere near the limits of the possible conceptive period. In this case, unless there are established special circumstances which exclude A, the law requires that he be held to be the father.

Finally, as a matter of interest, it may be mentioned that the new Act relating to illegitimate children also guarantees the father's right of access to his child. In such cases the parents generally do not live together in a home, though there are, of course, cases where the marriage rites are the only element of marriage lacking. But, as a general rule, the child has to be with the mother. If the father so demands, however, he is entitled to see the child and also to enforce his right by invoking the aid of the State authorities, in the main under a system equivalent to that prevailing when after a divorce one spouse wants to meet a child living with the other spouse. The rule thus introduced in the relation between the father and his illegitimate child may have been intended rather to stress a principle than to fill a need, the principle being that legitimate and illegitimate children are not to be treated differently. Probably there are not a great many fathers wandering about with unfulfilled yearnings for access to their illegitimate children. As a rule, to be sure, the mother will be glad if the man wants to be a true father to the child. But it is perhaps consoling to know that the law, too, has solved the problems which may arise if the father demands access to his illegitimate child and the mother opposes this.