FAMILY LAW AS A REFLECTION OF FAMILY IDEOLOGY

BY

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1. INTRODUCTION TO THE CONCEPT OF FAMILY IDEOLOGY

Family ideology is not a single, clear-cut concept. An ideology can be defined as a system of ideas which are characteristic of a certain social class or of a political, religious or philosophical movement. The concept of family ideology, then, embraces a whole complex of ideas concerning the family held by a certain group of people. However, it may not be at all clear precisely who constitutes this group, and the "complex of ideas" may cover both facts and opinions, and may have a greater or lesser degree of coherence. Family ideology is here defined as the prevailing opinion within a society at any given time as to what constitutes a "proper" family as opposed to family groupings which are not perceived as according to the ideal. Such a definition does not require that there should always be a prevailing family ideology; indeed, the point is that at certain times there may be no family ideology for law to reflect, or that family law may be deliberately designed not to reflect a prevailing family ideology. In the latter case, it is possible that the structure of family law may still allow the outlines of a prevailing family ideology to be perceived.

2. FROM A "CLOSED" NUCLEAR FAMILY TO AN "OPEN" FAMILY STRUCTURE

The title of this paper was originally based on the assumption that the concept of the "closed nuclear family" was the prevailing expression of family ideology in Denmark as well as other Western countries at the beginning of this century, and further, that a case could be made to show the acceptance of a more "open" family structure, or at least a more varied family structure, prevailing today.[1] The Danish Adoption

[1] The assumption was not pure imagination. The attenuation of family ties in this century is a common theme in family law history, see for instance Mary Ann Glendon, *The New Family and the New Property*, Toronto 1981 (referred to henceforth as Glendon (1981)). The closed modern family succeeds a more open lineage family with "relatively weak" and "permeable" boundaries, Glendon (1981), p. 14. See also Edward Shorter's description of the nuclear family as a state of mind which unites father, mother and child in a specially intense and boundary-protective way, Edward Shorter, *The Making of the Modern Family*, London 1977, pp. 204 ff.

Act of 1956, which severs any legal connection between an adopted child and its natural parents and family, can be seen as an example of a late legal reflection of the closed nuclear family ideology.

The shift in family ideology can perhaps be seen most clearly in the change in the value placed on visiting rights. Originally, the Danish Family Law Commission (1909–18) did not want visiting rights to have any legal status; it pointed out

> ... the dangers to the healthy and harmonic development of children which have often appeared inherent in a settlement by which the parent who is not awarded custody of the child is given a positive right to receive visits from the child or to attend the child.[2]

The Commission changed its proposal due to pressure from Norway and Sweden,[3] with the somewhat curious result that visiting rights were given legal status in Denmark far earlier than in Norway.[4] The point is, however, that the Commission's original opinion was in harmony with the idea that a child has the right to grow up in *one family* (to make a parallel with the idea frequently expressed today that a child has the right to *two parents*).

Visiting rights for the divorced parent not having custody were written into statute law in Denmark in 1922. In 1969 it was made possible for unmarried fathers to have visiting rights, and in 1985 the rules regarding visiting rights were standardized for all parents not having custody, regardless of marital status. In discussing the Amendment of 1985, the Danish *Folketing* gave support to the very strict code of practice exercised by the Ministry of Justice, which meant that visiting rights could hardly ever be taken away, and, further, expressed the view that all visiting rights should in general be strengthened.

It has thus been established in Denmark that whatever happens, a re-formed family cannot immediately close itself within its new borders.

However, there is much to indicate that a simple view of a shift from "closed" to "open" family structure gives too narrow a perspective.

Family law reflects much more than just family ideology, and the picture will be a confusing one if we attempt to look only at present family ideology and its manifestation in current law. However, the

[2] A draft Bill regarding the Contracting and Dissolution of Marriage, Copenhagen 1913, p. 260.

[3] See further *Rigsdagstidende 1918–19* (The official report of parliamentary proceedings), appendix A, cols. 5358–60.

[4] In Norway visiting rights were made statute law in 1956; see further Lucy Smith, *Foreldremyndighet og barnerett* (Custody and Child Rights), Oslo 1980, pp. 464 ff.

relationship between family ideology and family law may become much clearer with the advantage of hindsight. Seeking, for example, a more detailed picture of family ideology at the turn of the century, we find, happily, that others have already done much of the work for us.

3. FAMILY LAW AND FAMILY IDEOLOGY AT THE TURN OF THE CENTURY

At the beginning of the twentieth century there was a fairly stable and established view of the family which was held throughout the Western world. Mary Ann Glendon presents the prevailing picture of the family as follows:

> Marriage was an important support institution and a decisive determinant of the status of spouses and children. Marriage was in principle to last until the death of a spouse, and should be terminable during the lives of the spouses, if at all, only for serious cause. The community aspect of marriage and the family was emphasized over the individual personalities of each member. Within the family, the standard pattern of authority and role allocation was that the husband-father was predominant in decision-making and was to provide for the material needs of the family, while the wife-mother fulfilled her role primarily by caring for the household and children. Procreation and child-rearing were assumed to be the major purposes of marriage, and sexual relations within marriage were supposed to be exclusive, at least for the wife. Marriage and divorce were supposed to take place within legal categories.[5]

In short, "the" family was perceived as "a basic social institution", the "foundation of society".

It is not difficult to point to legal manifestations of this view of the family. According to the Danish Code enacted in 1683 which, as far as the family law elements were concerned, remained in force until 1922, marriage was in principle dissoluble only by a court and only on the grounds of adultery, desertion or impotence. An administrative practice had developed, however, whereby there was a possibility of legal separation being granted by the King on the basis of incompatibility, and —from 1790—divorce was made possible if the spouses had been legally separated for some years. At the beginning of the twentieth century, a wife was still constrained by remnants of the tradition of patriarchal authority, which meant that the husband could make decisions about where the family should live and about how the children should be

[5] See further Glendon (1981), p. 17.

The existing concern for the institution of marriage could not justify the lack of rights of illegitimate children:

> The source of their claim to rights towards their parents is—as it is for legitimate children—the natural kinship to the parents established through their conception and birth, and there appears to be no community interest which can justify the removal of the rights so acquired.[14]

The Ministry considered the need to protect marriage as a social institution to be highly over-estimated:

> The Ministry can . . . not recognize that a change in the existing state of the law will involve any danger to the institution of marriage. There can be no doubt that this institution holds such a consolidated position in our society that it has no need of the protection which is presently thought to be afforded by the more favourable treatment of legitimate children, and it can hardly be reasonably assumed that equality for children born out of wedlock with legitimate children would cause an increase in the number of unconjugal births.[15]

The conclusion is obvious:

> It is therefore the opinion of the Ministry that children born out of wedlock should in principle have the same legal rights toward both their parents and should stand equal with legitimate children in their relationship to the parents, with the only differences being those which must naturally result from the cohabitation of parents of legitimate children.[16]

From this point on, marriage was no longer to be considered decisive in determining the status of children. However, it should be noted that the idea of marriage as "the" legal way of living together was to continue to be upheld, and furthermore that it was not everyone who agreed with the Ministry in being unconcerned about the status of marriage.[17]

[14] *Rigsdagstidende 1934–35*, appendix A, col. 2588.

[15] *Rigsdagstidende 1934–35*, appendix A, col. 2587. The quotation continues: "It would be more correct to think that the so-created close connection between the mother and father's economic and moral obligation towards the child would give rise to stronger motives than previously for parents to legalize their relations by marriage. It could also be thought that the changed legal effects of paternity in certain cases would imply that greater care should be shown on the part of the male party in engaging in sexual relationships outside marriage".

[16] *Rigsdagstidende 1934–35*, appendix A, col. 2588.

[17] The Liberals and Conservatives voted against the proposal regarding the illegitimate child's inheritance after the father and its right to bear his name, their reason being partly that it included a "danger to and deterioration of the importance of the institution of marriage", see *Rigsdagstidende 1936–37*, appendix B, col. 2206. However, the phraseology is more moderate than in Mathilde Hauschultz's statement during the reading of the

5. THE "HAPPY PERIOD" OF DANISH FAMILY LAW, 1938–1968

With the matrimonial legislation of the 1920s and the child laws of 1937 the most insidious problems of injustice in family law had been resolved.[18] A course had been set which maintained the institution of marriage as the legal framework of family life, but which did away with the patriarch of the turn of the century, and which removed from illegitimate children the burden of supporting the institution of marriage through their exclusion from the rights enjoyed by legitimate children. The continuation of this now-established trend regarding equality of children can be seen in the Child Act of 1960,[19] which combined in one Act covering all children the provisions of the Act regarding children born out of wedlock with those of the Act regarding legitimate children, and which completely separated from the matrimonial law the rules regarding maintenance of children. The obligation of parents to provide for their children was to apply irrespective of whether the parents were married or not. The rules regarding maintenance could therefore no longer form a part of matrimonial legislation.[20] It will be seen later that this trend in Danish legislation can be traced through to the Names Act of 1981 and the Guardianship Act of 1985.

This period of Danish family law was "happy" not only because legislation established and maintained a fixed course. More important is the fact that the optimism of the Ministry of Justice regarding marriage proved to be justified. There was no increase in the number of children born out of wedlock and there were no other signs of a weakening of the respect held for marriage in the public mind or expressed in the habits

Adoption Act of 1923, in *Rigsdagstidende 1922–23*, cols. 2934 f.: "On the other hand I must state that the Conservatives in years ahead will still maintain the gulf between legitimate and illegitimate children, as surely as our society is based on marriage. The day we omit the gulf between legitimate and illegitimate children we might as well omit marriage as that upon which society is based".

[18] The concept of a happy period is a loan from Jørgen Dalberg-Larsen, who in *Retsstaten, velfærdsstaten og hvad så?* (The Constitutional State, the Welfare State and then What?), Copenhagen 1984, p. 147, maintains that one can regard the 1960s as the happy period of the welfare state. He in turn was making a parallel with Francis Sejersted's description of the mid-19th century as the happy period of the liberal society in "Rettsstaten og den selvdestruerende makt ..." (The Constitutional State and the Self-destroying Power ...") in *Om Staten*, ed. Rune Slagstad, Oslo 1978, p. 52.

[19] Act no. 200 of May 18, 1960.

[20] See Act no. 256 of June 4, 1969, regarding the contracting and dissolution of marriage.

of family formation.[21] Marriage and divorce took place within the framework of the law as they had always done.[22] For most people, cohabitation without marriage remained virtually inconceivable. This fact had great advantages for legislators, since laws concerning marriage could therefore be thought of as covering all cohabiting couples.

The year 1968 marks the end of the "happy period" of Danish family law. The selection of this date is to some extent arbitrary, but there is something very suggestive about the dramatic change of feeling in the Danish *Folketing* in the months between May 1968 and October of the same year. On May 14, 1968, the Ministry of Justice put forward a proposal for a new Marriage Act which in essence made only few and uncomplicated changes to the previous legislation. The Bill was favourably received in the *Folketing*. When the same Bill was brought in unaltered on October 3, 1968, it was met with massive resistance.[23] According to the report of the *Folketing's* Legal Committee of May 1969 there was

> agreement that a thorough investigation should be made into the whole matter of matrimonial legislation in order to determine to what extent there is a need to adapt the current legislation to the changed social conditions, the change in the position of women in society, and the resulting changes in the institution of marriage.[24]

With the debate in the *Folketing* in the Autumn of 1968 the political peace which had surrounded family law was broken. The most obvious

[21] Therefore, Erik Manniche could in the paper "Forandringer i familien" (Changes in the Family) in *Social Forandring* (Social Changes), ed. Erik Manniche, Fremad 1970, state that still more people marry, that they marry at an earlier age, and that their marriages —despite more divorces—on an average last longer and longer. "As a whole one can say that the family system which we have at the present time is characterized by stability—the changes which occur take place very slowly and gradually, not suddenly and dramatically" (p. 154).

[22] The wedding was recognized by Danish courts as a necessary basis for marriage from about the year 1600. All the same, there is much that indicates that the ordinary rural population looked upon betrothal as ceremonious enough for the establishment of a family in the 18th century; see further Strange Beck in *Familieret*, 2nd ed., Copenhagen 1986, p. 190.

[23] The most evident resistance was manifested by Socialistisk Folkeparti (the Socialist People's Party) who on the same day submitted a fully drawn up Bill for an Act regarding cohabiting couples which made the Marriage Act superfluous, and whose main provision was to effect that 3 years' cohabitation—after registration—in all the areas of legislation should entail the same legal effects as the contracting of marriage. The Bill can be found in *Folketingstidende 1968–69* (Official Report of Parliamentary Proceedings), appendix A, cols. 961 ff.

[24] *Folketingstidende 1968–69*, appendix B, cols. 1886–87. Concerning the Marriage Act and the appointment of the Marriage Committee of 1969, see further Graversen, *op.cit.*, p. 212.

consequence of this was that family law, for some time at least, was torn away from the exclusive embrace of the "experts", the jurists. Family law had become a political issue; its "happy period" was over.

6. THE EROSION OF THE IMPORTANCE OF TRADITIONAL FAMILY LAW

If there has been change in the area of family law in Denmark since 1968, it is not due to legislation, or at least not to legislation within the area of traditional family law. Since the passing of the Marriage Act of 1969 very little has taken place apart from the amendment of the Guardianship Act in 1985. The Marriage Committee, which was set up in 1969 almost simultaneously with the passing of the Marriage Act, submitted a total of nine reports between 1974 and 1983 without proposing any major innovations in legal principle to the area of family law, and the work of the Committee has made no real mark on legislation.[25] When the Committee resigned after submitting its ninth report, it seemed no more than the extinguishing of a night-light.

Yet something has happened in the area of family law. The very first point in the description of the picture of the family at the turn of the century was that marriage was an important support institution. Marriage can hardly be described as that any longer. The proportion of married women in Denmark between the ages of 25 and 44 in gainful employment has increased from 27% in 1960 to 51% in 1970, 66% in 1976, 83% in 1981 and 87% in 1983.[26] In practice, marriage has declined drastically as an institution for supporting housewives, both during the existence of a marriage and after separation and divorce. Add to this the fact that in current practice the application of the rules

[25] The Marriage Committee had the following mandate: "The Committee shall consider to what extent, in view of the changed social conditions, the change in woman's position in society, and the consequent changes in the attitude to the marriage institution, there is a need for a revision of the rules on contracting and dissolution of marriage, including the rules regarding the procedure for separation and divorce, and also the rules regarding the legal effects of marriage and the children's legal status during the marriage and after separation or divorce.

At the same time the Committee must consider whether in connection with this there is a need for a change in the rules in the remaining legislation which is connected with the marriage legislation and whether some of the provisions in the legislation which attaches legal effects to marriage ought to be used in certain non-marital relationships".

[26] *Levevilkår i Danmark* (General Conditions of Living in Denmark), *Statistisk oversigt 1984*, Danmarks Statistik and Socialforskningsinstituttet, p. 134, table 6.1. The corresponding figures for men in the same age group were 98, 96, 94, 95, and 95 respectively.

regarding separation and divorce presents very little real obstacle to the dissolution of marriage, and it is clear that there has been a very considerable narrowing of the actual legal difference in the ties between spouses and those between unmarried cohabitees.[27] It is not claimed that these legal considerations have affected the decisions of many couples concerning marriage, but in objective terms it can be said that the choice between marriage and cohabitation has become far less important in some very central legal areas.

7. LEGISLATIVE STRATEGIES

It was in fact the great increase in the number of unmarried cohabitees which more than anything else drew the attention of Danish legislators to this area. Sometimes legislators commented on fundamental principles, as for example in the proposed Act regarding cohabiting couples put forward by the Socialist People's Party in 1968; more often, however, it was simply a matter of expressing surprise or shock. Typical of the latter is the following statement taken from the report of May 25, 1973, regarding amendments to the Child Allowance Act made by the *Folketing's* Social Welfare Committee:

> The Committee considers ... that the information it has received while examining the proposed legislation makes it seem probable that there is a strong trend towards new family patterns, and that as a result there should be a further consideration of the principles of family policy ... which underlie the legislation concerning direct and indirect support to families with children (including single-parent families), and that this consideration should include investigation and clarification of the effects of various forms of civil status.[28]

In short, the concern of the Social Welfare Committee was that the social welfare programmes giving financial assistance to those who were defined as sole supporters of children were in fact channelling financial support to cohabiting couples.

[27] The development tendencies suggested here are not an isolated Danish or Scandinavian phenomenon, see Glendon (1981), but unlike Denmark and the other Scandinavian countries most of the foreign legal systems have not had a similar "happy" period. This means that the process of making spouses equal, and also that of making children born out of wedlock equal with those born in wedlock, together with the "erosion" of the importance of private family law, have occurred as one connected sequence, and not as different sequences separated in time.

[28] Quotation from Jørgen Graversen, "Enlige forsørgere. Et aspekt af diskussionen om civilstand som tildelingskriterium" (Sole Supporters. An Aspect of the Discussion on Civil Status as a Criterion for Allocation of Public Support) in *Juristen* 1975, pp. 440 ff.

No investigation and clarification of "the effects of various forms of civil status" has ever been made. Instead, intense discussion has taken place on what legislative strategy might be adopted in view of the large number of unmarried cohabitees.

Three possibilities in particular have been put forward. The first aims at making rules which cover married and unmarried cohabitees jointly. The 1968 Socialist People's Party proposal adopts this line. The second idea is the Swedish "neutrality principle", which in its original presentation was worded as follows:

> New legislation should ... be neutral as far as possible with regard to various forms of cohabitation and divergent moral concepts. Marriage has had and should have a central place within family law, but we ought to endeavour to ensure that family law legislation does not include any regulations which create unnecessary difficulty or inconvenience for those who have children and establish a family without getting married.[29]

In Sweden, the neutrality principle has resulted in a double strategy for legislation, so that non-discrimination has been the aim in social welfare law and taxation law, while in the traditional family law the target has been freedom of choice, but not freedom of choice between marital rules and no rules at all. There is readiness to legislate on the legal relationships between unmarried couples in matters which are considered to be especially important.[30]

The third possible strategy is that advocated by the Danish Marriage Committee. This strategy aims at promoting marriage wherever possible. The point of principle from which the Marriage Committee begins is that there is no documentary evidence or other reason to believe that unmarried cohabitees want to be governed by legal rules which differ in essence from those embodied in the legislation regarding marriage. Separate legislation for unmarried cohabitees would therefore simply establish "a second-class form of marriage" without achieving that

[29] From the directives (1969) to the Swedish Marriage Committee, *Familjelagssakkunniga*, quotation taken here from their first report, *SOU* 1972:41, *Familj och äktenskap 1* (Family and Marriage 1), p. 58.

[30] See Anders Agell, *Samboende utan äktenskap* (Cohabitees without Marriage), 2nd ed. Stockholm 1985, pp. 93 f. Professor Anders Agell, who is one of the most ardent and consistent critics of the neutrality ideology, also states that the neutrality ideology has less meaning when the non-theological and practical character of the marriage legislation is taken into consideration: "The idea that society should not actively recommend marriage as a form of cohabitation seems to be fully comprehensible only if marriage is regarded as an ideological concept which means something more than a private-law contract type." See also Anders Agell, "The Swedish Legislation on Marriage and Cohabitation. A Journey Without a Destination", 24 *Sc.St.L.*, pp. 9 ff. (1980), especially p. 36.

balancing of the interests of the parties which is found in the marriage legislation.

> Marriage is by far the most widespread way of living together. Neither the general opinion of the Committee nor the information gathered by the Committee ... suggest any reason to suppose that there is specially widespread dissatisfaction with the legal results of the rules embodied in the marriage legislation. These rules have evolved through the centuries, and have been carefully adjusted to regulate the relationships between the partners ... within the prevailing social conditions.[31]

Or, in other words,

> ... the rules embodied in the marriage legislation ... form all in all the best possible "standard contract" as a framework for cohabitation.[32]

The conclusion is that

> Legislation should ... wherever possible be designed to prompt couples to enter marriage and not to discourage marriage. Consequently, the Committee are in agreement that the basic principle underlying the reforms should be that there should be no special advantages attached to living together outside marriage. The cohabiting couple should not be better off than the married couple as a result of the proposed reforms, but should at most be placed on an equal footing with married people. The application of this principle would result in particular in reforms of taxation and social welfare legislation.[33]

8. THE SEPARATION OF PARENTHOOD AND MARRIAGE IN DANISH LAW

The Marriage Committee's proposed strategy for legislation was not that adopted as the basis for the 1985 Amendment to the Majority Act.[34] It was decided to solve through legislation what was perhaps the most pressing problem for unmarried parents, that of custody of children. However, this was not done by making separate regulations for cohabiting parents. It could almost be said that the contrary principle was adopted, since the pattern of the legislation was based more upon the 1960 Child Act. The rules concerning custody were totally removed

[31] The Marriage Committee's Report no. 8, *Samliv uden ægteskab I* (Cohabitation Without Marriage I), Report no. 915 of 1980, p. 47.

[32] *Ibid.*

[33] *Ibid.*, pp. 49 f., cf. Anders Agell, *Samboende utan äktenskap*, pp. 100 ff.

[34] To be fair it must be mentioned, however, that the Marriage Committee in its Report no. 8 looked into a number of especially pressing areas, including custody, where legislation contrary to the strategy might be a possibility.

from the marriage legislation and were included instead in the Majority Act, which applies to all children irrespective of their parents' marital status and irrespective of whether their parents were cohabiting or not. This does not mean that the rules regarding custody of the children of unmarried parents and those concerning children of married parents are the same; but it does mean that the achievement of custody rules which correspond to those for the children of married parents does not necessarily depend on the parents being married but can also come through agreement on joint custody. This legislation affects the operation of the 1981 Names Act, which provides that a child obtains its parents' surname if their surnames are the same, or alternatively the name of the parent decided upon by the holder or holders of custody. Where both parents have custody it makes no difference whether they are married or have joint custody by agreement.

In general this means that the legal relationship between parents and children has been removed from Danish marriage legislation, and that the parents' marital status is irrelevant if they agree to joint custody. To put it another way: if little Peter's unmarried parents have agreed on joint custody, his status *vis-à-vis* his parents does not change if his parents subsequently marry.

It is hard to imagine a much more effective way of legally separating parenthood and marriage.

9. WHAT HAS BECOME OF FAMILY IDEOLOGY?

As Mary Ann Glendon has pointed out,[35] it appears contradictory that modern family law reflects loose family ties and interchangeability in couple relationships, while observation suggests that the ties in couple relationships are very tight as long as the relationship remains unbroken. However, close and intense couple relationships are in fact fragile and vulnerable.

The importance of a prolonged couple relationship is clearly reflected in law. Throughout the Western world there has been a strengthening of the legal rights of inheritance of the surviving spouse, both where there is competition with heirs other than the issue of the deceased spouse (e.g. heirs descended from the deceased's parents or grandparents) and where there is competition with children of the deceased. In

[35] Glendon (1981), pp. 28 ff.

Denmark these rights were improved in the Inheritance Act of 1963. By this Act the surviving spouse became the sole heir in competition with heirs other than issue, and was also given the right to receive a minimum sum even if this meant that there would be nothing of the estate left for the children.

The amendment of the Inheritance Act took place during the "happy period" of Danish family law, and it might therefore have seemed obvious to mention it in the section on that subject. However, even in countries where reforms of family law have been made in a different sequence, there has been a strengthening of the legal status of the surviving spouse. In other words, there is no reason to believe that the decline of marriage has made any difference to the law in this respect.[36]

This point would have been difficult to fit in to the scheme of things if we had kept to a simple view of a contrast between a "closed" and an "open" family structure.

As mentioned in section 8, the debate in Denmark over family law has been more over legislative strategy than over family ideology. As for Swedish law, one could say that the neutrality principle has been used in an attempt to dispel a prevailing family ideology.[37] It is undoubtedly the case that the purpose of modern family law all over the world is to provide solutions to practical problems, and in the words of the Swedish professor Anders Agell it will therefore be throughout of a non-theological character. This would also apply to legislation made according to the guidelines suggested by the Danish Marriage Committee. As far as the wishes of the Committee are concerned, the desire to have only one set of regulations, with all the practical legal advantages that this would provide, far outweighed the desire that these standard regulations should have a given character. Therefore, it is hardly correct to claim that the Committee was defending a particular family ideology, although it must be said that, in its choice of phraseology, it certainly did not dissociate itself from a former family ideology centred on marriage. It is obvious that the Committee wished to encourage marriage, and

[36] An examination by Professor Finn Taksøe-Jensen of wills from 1984, mentioned in his book *Arveretten* (Inheritance Law), Copenhagen 1986, p. 25 and pp. 134–37, confirms this impression.

[37] This observation holds more than a superficial meaning when one considers that an often quoted passage in the Swedish directives from 1969 reads: "... There is no need to relinquish the use of legislation on marriage and the family as one of several instruments of reformative efforts towards a society where every adult individual is responsible for himself without being economically dependent on his relatives and where equality between men and women is a reality".

probably agreed with Agell's principal concern for the stability of the family and his hope that giving priority to marriage would contribute more towards this than legislation based on the neutrality principle.[38]

The last area to be considered as a possible reflection of a modern family ideology is the concentration in law on biological parenthood. It is a thought-provoking point that the discussion in Denmark on joint custody began with reference to unmarried cohabitees[39] and ended in legislation which except in very few particulars is totally linked to biological parenthood. The tendency is even more marked in the rules concerning visiting rights, which are granted only to biological parents. Viewed together with the rather extravagant use of slogans such as "Parents are forever" and "A child has the right to two parents", this trend might seem to indicate the acceptance of an ideology attaching too much importance to the fact of biological parenthood.[40] This would not in fact seem to be the case.

First of all, the biological parents are normally those concerned in the early stages of the child's existence, and therefore important in more than one respect to continuity in the child's life. Just as significant as this point, however, is the fact that the concentration on biological parenthood can be seen as symptomatic of caution in the use of law. There can be a great many important people in a child's life, including most obviously grandparents and step-parents; but if the rights of all these people towards the child were to be protected in law this would inevitably lead to many more custody cases being brought before the courts. This would mean that family affairs would become "legalized" to a far greater extent, a situation which can hardly be considered desirable.

Without doubt the separation of parenthood and marriage/cohabitation has contributed to the ease with which homosexual relationships have been included under the Swedish law concerning cohabiting couples. In Denmark, it has now been possible to introduce a registration system for homosexual couples whereby they are able to enjoy

[38] See Anders Agell, *Samboende utan äktenskap*, pp. 104 ff.

[39] The discussion regarding agreed joint custody has in some countries started with unmarried cohabitees and in others with the separated and divorced, see Jan Trost, "Behov, ønsker og adfærd på det familieretlige område i de nordiske lande" (Needs, Wishes and Behaviour in the Family Law Area in the Scandinavian Countries) in *Nu* 1982:5, *Familieret i Norden* (Family Law in Scandinavia), pp. 23 f.

[40] There are other indications of a preferential position of biological parenthood. A research report of 1978 from the American Bar Association shows that testators by and large want their estate shared equally between their children, irrespective of whether this means children born out of wedlock or legitimate children, and irrespective of whether the latter are children in an existing or a dissolved marriage. See Glendon (1981), p. 27.

virtually all the legal benefits of marriage; there is at the time of writing great interest in seeing to what extent this registration system will actually be used. For those whose concept of marriage is based on a traditional family ideology, the introduction of the registration system for homosexuals has been a hard blow. However, if it is indeed the case that the marital legislation provides the "best possible standard contract" as a framework for permanent cohabitation, then the move is a logical one. Another important consequence of the dissociation of parenthood and marriage as legal concepts is that children born out of wedlock are no longer, from a legal point of view, of any special interest whatever.[41]

10. HOW CHILDREN ARE BECOMING "VISIBLE" IN DANISH LAW

Section 4 above discussed how both spouses became "visible" in the marriage legislation of the 1920s. A similar development is now occurring as far as children are concerned. The separation of the legal relationship between parents and children from the area of marital law can be viewed as a contribution to this process of making children "visible". More important, however, is the fact that in all Scandinavian countries rules have been implemented which give children above a certain age greater control over their own lives. Regulations which give children the right to make their own decisions or the right to make decisions together with their parents concerning their name, religious affiliation, membership of associations and other personal matters are becoming more and more common. Such rules reflect a full or partial legal disengagement of children from the decisions of their parents. Other new rules are giving older children the right to be heard when decisions regarding them have to be made by their parents, by administrative authorities or by the courts. Such rules do not limit the decision-making powers of the authorities—including the parents—but do compel the authorities to take the children's views into consideration. Concerning the parents' decision making, such rules are in fact only guidelines without full legal force; for this reason, the inclusion of such rules in Danish law was avoided in the 1985 amendment to the Majority Act.

[41] See Anders Agell, "Individ, familj, stat. Om värderinger i familjerättslagstiftningen under 1900-talet" (Individual, Family, State. Regarding values in family law legislation in the 20th century) in *SvJT* 1984, pp. 715 ff., especially p. 737.

On the other hand, however, regulations have been made in Denmark —as they have in Norway and Sweden—which give children above the age of 12 the right to be heard before a decision regarding custody or visiting rights is made in cases where the parents do not agree.[42]

This process of making children "visible" in law does not just tend to give older children a greater degree of influence in personal matters affecting themselves. It also leads to a strengthening of the legal protection of children. Both trends are often discussed together under the heading of the strengthening of children's rights. However, the concept of children's rights is then being used in two different, and potentially conflicting, ways. A strengthening of the child's "right" to protection can very well be at variance with the child's "right" to self-determination.[43] In other words, what is best for the child need not be identical with what the child wants. But who is to decide what is truly in the child's best interests, and by what right are they to do so?

The increased interest in safeguarding children is a development which is currently taking place at many different levels. The introduction of the concept of a child policy is an illustration of this at the legislative level; in their report number 918 of 1981, the Danish Child Commission expressed the view that ideally there should be a child policy stating that all legislation of a certain degree of importance should be considered in terms of its consequences for children and adolescents. The Norwegian Child Ombudsman is charged with working at many levels for necessary consideration to be given to children's needs, rights and interests. And at the level of individual cases, there is a growing tendency for experts in child care to be involved in the safeguarding of children's interests. The problems specifically connected with measures protecting threatened children are considered in section 11.

At all levels, however, there are great differences of opinion regarding what the true interests of children are. Neither at the legislative level nor at the individual level can this fundamental issue be avoided. Robert H. Mnookin has called this uncertainty "the enigma of the children's long-term interests", an enigma which contains both a problem of

[42] See the Majority Act, sec. 26. The rule in the Swedish *Föräldrabalken*, ch. 6, sec. 11, does not include any specific age limit.

[43] See the legal sociologist Jørgen Dalberg-Larsen in the paper "The Child's Rights in Relation to the Family and Society" in J. Graversen (ed.), *Familieretspolitik* (Family Law Policy), Copenhagen 1988, p. 147.

prediction and a problem of values in the choice between various alternative measures.[44]

The complexity of these questions is illustrated by the continuing debate in Scandinavia about whether children should be given party status in cases regarding custody and visiting rights and in cases of the possible removal of children from their parents' care. Party status could be given both to afford the older child a better chance of having his or her views considered and to provide the younger child with a legal representative, whose principal task would be to safeguard the child's interests but not necessarily the child's wishes. There is good reason to be sceptical about the doubling or trebling of the safeguard implicit in providing legal representation for younger children; for this doubling or trebling does not mean that the uncertainty regarding their interests is lessened, but merely that more people express an opinion.[45] As for older children, it does not seem certain that it would be in their interests to be involved in their parents' disputes regarding custody.[46] However, there may be good sense in giving older children party status in cases where they may be placed in care away from their homes.

11. MEASURES TO PROTECT THREATENED CHILDREN

In all the Scandinavian countries, legislation is currently in preparation on measures to protect threatened children. In Norway, a Bill for a new Social Services Act was brought in on March 31, 1989; among other things, the new Act is to replace the current Child Protection Act of 1953. The proposal includes—just as the Child Protection Act did—rules regarding voluntary as well as compulsory measures for children. Sweden got a new Social Services Act on January 1, 1982; this Act only authorizes voluntary measures for children and young people, but another Act came into force simultaneously—the "Act with Special Provisions regarding the Care of Young People" (*Lag med särskilda*

[44] See further Robert H. Mnookin (ed.), *In the Interests of Children*, New York 1985, p. 16.

[45] See the Norwegian draft Bill (*odelstingsproposisjon*) 1988–89 no. 60 regarding the Act on Social Services etc., p. 109, with reference to *NOU* 1985:18, p. 301. Robert H. Mnookin characterizes it as paradoxical when, in spite of the enigma regarding the child's true interests and without being able to comply with its wishes, one provides it with a legal representative.

[46] Proposals regarding this have been put forward in the Swedish report *SOU* 1987:7, The Child's Rights 3, pp. 83 ff., but the proposal has not been included in the department's *aide-memoire* on care and visiting rights of July 10, 1989, which is to form the basis of a Bill in the area in the autumn of 1989.

bestämmelser om vård av unga). Under this second Act compulsory measures can be taken concerning children and young people. In Denmark, a committee was appointed in the summer of 1988 to put forward proposals for amendments to the rules regarding children and young people in the Social Assistance Act (the Danish Social Services Act). The Social Assistance Act came into force on April 1, 1976; it includes rules on both voluntary and compulsory measures for minors. Thus, in all the Scandinavian countries, the safeguarding of threatened children's interests has been transferred to the social authorities. Child protection has become a social matter. The final resort of compulsory measures, however, has been transferred to the courts.

Among the points which recur with varying degrees of force in the Scandinavian debate on this topic are the following:

(1) the importance of attempting to prevent problems by means of measures taken in the home of the child;
(2) the strengthening of the requirements for local authorities to take constructive action both before and during the process of placing a threatened child away from home;
(3) the limiting of the numbers of children placed in care away from their homes; and
(4) the increased consideration to be given to the wishes of older children through rules regarding self-determination, party status and children's right to be heard.

Only one topic will be discussed here. It concerns the possibility of the public authorities contributing to the creation of continuity in the life of the child placed in care away from home. The starting point for the discussion on this point has often been the "yo-yo children", those placed in care again and again as a result of ill-prepared returns home. There would appear to be complete agreement that this pattern of placement and return is detrimental to any child. But in what ways could the problem be limited or avoided?

One possibility would be to adopt the method followed in Sweden in the 1970s, which was to make a distinction between "support" and "substitute" placings of children. When a child was placed in care for the first time, an assessment was made of the capacity of the parents to fulfil their role as parents, and of the possibility that their capacity might be increased with the right support. If the prognosis was that the parents did not have, and never would have, a reasonably adequate capacity to fulfil their role, then efforts were at once made to find new "parents" for the child, a *substitute* family which would, it was hoped, be

able to provide a stable environment in which the child could grow up. If, however, the prognosis was good, then the placement in care was to be regarded as one of several supportive measures which had the aim of reuniting the family after a short period of time.

The method described above has been the subject of intense discussion and criticism, as for example in the Swedish report *SOU* 1986:20, *Barns behov och föräldrars rätt* (The Child's Needs and the Parents' Rights). The report proposes that substitute placings should be discontinued; one reason given for this is that the continuity in the child's life which these placings aim to provide is in fact based on an identity-threatening discontinuity in the child's life as a whole. According to the report, parents cannot in fact be replaced by substitute "parents". The new family could become important people in the child's life, but could never exactly be new parents. We have returned to the "enigma" of children's real interests, for we see that even the concept of continuity in the child's life can be the subject of diametrically opposing views. The debate has not yet ended, and it may never be settled. It is still uncertain whether an expected proposal for a new Swedish Act on compulsory measures will give a clear decision regarding the possibility of using substitute placings.

However, one thing is clear. In Denmark, Sweden and Norway it is impossible to avoid taking up a position on what one would do to ensure that the child's upbringing is characterized as far as possible by continuity and attachment rather than by rupture and separation.

One possible contribution to a solution to this problem can be seen in a trend in Norway towards making a distinction between measures for fairly small children and those for older children. In Norway, the possibility of compulsory adoption for small children exists to an extent which is unknown in Denmark or Sweden.

One could take the view that the use of substitute placements and compulsory adoption as solutions to the continuity problem rests upon a family ideology which belongs to a bygone era, while a concept of "inclusive" fostering, which seeks at all times to include in the child's life both the natural parents and other people who have become important to the child, may represent a more contemporary family ideology.

As we have seen, a legal system reflects much more than just ideology and good intentions. If the development of preventive measures and support placings is to receive priority, then the most effective argument will presumably be the expectation that a solution on these lines will be far more cost effective in the long term than a large number of expensive placements in care.

12. PERSPECTIVES ON LEGAL POLICY

What are the legal policy perspectives that arise as a result of this discussion? What opportunities and what pitfalls are there in the current trend in Danish legislation?

First, there is the possibility that some parents might indeed be encouraged to make use of the new voluntary advisory arrangement available under sec. 27(a) of the Majority Act and/or the new opportunity to establish agreed joint custody in the event of separation or divorce, thus providing reasonable continuity in their children's lives despite the circumstances.

The corresponding danger is that law-makers, encouraged by any successes in this respect, might be tempted to make the advisory arrangement compulsory, and to make joint custody into a legal instrument in order to enforce "proper" divorce behaviour in conformity with what one might call a "divorce family ideology".[47] Making the advisory arrangement compulsory would mean that more people would become dependent "clients" of the authorities. Making joint custody into a legal instrument would result in the "legalization" of the machinery in the current rules which is intended to facilitate solution of problems through communication between the parents. This legilization would result in parents' behaviour being controlled through their wish to "please" the authorities, and in more custody decisions having to be made. The present advisory arrangement is voluntary and without any authoritative function; that is its strength and the source of its potential. As for the rules regarding joint custody, these imply the mutual acceptance by the parties of each other's parental role, without any interference from authority. If this fundamental concept is abandoned, then we are on our way to the publicly administered divorce. A child-protection function would then be transferred to the County Governors and to the courts, a function that these authorities would have difficulty in carrying out. The present role of these authorities is to provide a means of resolving conflicts; this task could not be combined easily with an extensive child-protection function.

The present author is on the whole rather sceptical about non-specific demands for better legal protection of children. There is good reason to

[47] This has taken place in Finland and partly in Norway, see further Jørgen Graversen and Inger Koch Nielsen, *Fælles forældremyndighed ved separation og skilsmisse* (Joint Custody in Cases of Separation and Divorce), Socialforskningsinstituttets meddelelse no. 43, pp. 25–27 and 31–35.

stress the importance of children's interests in the provision of services and in administrative procedures which aim to help people to be better parents. It is interesting to note in this context that the most extensive measures currently in operation aim at strengthening the parents in their parental role, making them "masters in their own house". It is correct to give new and greater priority to such preventive efforts and to make the aid available attractive to parents who have problems with their children. In this connection, non-specific demands for better legal protection for children could have a devastating effect. In addition, such demands could contribute to a weakening in the requirements for administrative authorities to intervene constructively when there is a need for legal protection.

Regarding the issue of granting greater "rights" of independence to children, one surely has to establish a balance between the justifiable demands for older children to have greater rights to self-determination on the one hand and, on the other, a "liberation" of children that would deprive them of close and obligating social relationships at an age when they would be quite unable to cope with such "freedom".

In the area of marital/cohabitation law the present author would highlight the diminished relative importance of the private law regulations and the attenuation of the marital laws. This development in Denmark has recently been taken a stage further by the 1989 amendment to the Marriage Act, whereby the rather limited regulations relating to separation and divorce were further reduced and the rules concerning the payment of maintenance to the spouse—in practice, to the wife—after separation and divorce were weakened. The effect of this latter change will be to strengthen the tendency towards fewer cases of maintenance awards and shorter periods of maintenance payment. However, as already pointed out, this development does not affect the growing tendency towards the strengthening of the legal status of the surviving spouse when the marriage ends as a result of death. Further development in that direction is desirable.

The new amendment ought in the present author's opinion to be the starting point for an updating of the regulations as far as the wider legal effects of marriage are concerned. It is on the whole very satisfactory that the Marriage Committee did not suggest that there should be constant legislative activity in the area of Marital Law; nevertheless, the time seems to have come to move towards legislation which will clarify some of the many practical problems attached to the questions of ownership of property in marriage and cohabitation. Such a clarification has been achieved in Sweden with the Marriage Act and the Act on

Cohabitees' Joint Homes, both of 1987; in Norway, the Marriage Committee ended its work in 1987 with a recommendation for a new Marriage Act which would include similar clarification. The fact that the Danish Marriage Committee was dissolved in 1983 should no longer be regarded as a bar to the start of a similar process in Denmark.

The present author has considerable doubts concerning the value of the negative legislative strategy adopted by the Danish Marriage Committee in its intended defence of the institution of marriage.[48] Following this strategy would necessitate legislation governing unmarried cohabitees, at least in the area of social welfare law, with the expressed aim of ensuring that their position is no better than that of spouses.[49] Insofar as the aim of legislators is to create equality between spouses and unmarried cohabitees, the primary strategy for legislation should instead be to make spouses independent under social welfare law. It is therefore very encouraging that on May 14, 1987, the *Folketing* unanimously passed the following resolution:

> The *Folketing* urges the Government:
>
> (1) to plan a gradual but purposeful redrafting of social welfare legislation to ensure the independence and equality of spouses and cohabitees (the individual principle) . . . this plan to be based on the recently-submitted Report of the Committee of the Ministry of Social Law, Report Number 1087, which concerns equality between cohabitation with and without marriage
>
> (2) to ensure a continuous process of revision of laws by incorporating the individual principle in all future legislation concerning the conditions of the family, and, in cases where this is impossible, to state the reason for this.

There is not much evidence to suggest that either the frequency of marriage or the stability of families is noticeably influenced by legislation. However, freeing marriage from the burdens of taxation and social welfare law through implementation of the individual principle will presumably be rather more effective than any change in private family law could possibly be.

[48] Kirsti Bull has pointed out in *TfR* 1983, p. 598, that a negative legislative strategy like this would hit marginal groups very hard. They get neither the advantages which married people have nor the advantages of single people.

[49] The Marriage Committee was fully aware of this perspective, see Report no. 8 (915/1980), pp. 45–46, and Report no. 9 (989/1983), pp. 130–32.