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Family Formation in Scandinavia
A comparative study in family law

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1. Introduction

This comparative study of the three Scandinavian countries of Denmark, Norway and Sweden, examines the law relating to two aspects of family formation: access to marriage and fertility treatment. The aim of the study is to indicate how historical developments in these countries have influenced their family laws and, in so doing, to establish the importance of a historical perspective on this area of law. For this purpose the historical focus is on the changes in sovereignty and territory understood as basic historical factors. This suffices for the aim of this contribution since it only introduces an analytical tool in family law that connects family law to history without offering any historical analysis of family law. Instead, differences in ideology relating to the state which underpin Scandinavian family laws are illustrated and finally connected to the differences in national history.[1]

For a non-Scandinavian audience, it is important at the outset to appreciate the changes to sovereignty and territory; Norway gained independence from Denmark in 1814 and later from Sweden in 1905. In addition, Denmark shares a common border with Germany in the part of Denmark named Jutland but lost territory in the war against Prussia and Austria in 1864. Germany was then not yet unified.[2]

In this study the tool for analyzing ideological aspects of family law takes its starting point in an established classification of marriage which distinguishes between whether the law is constructed in terms of the spouses' or parents' *contract*, or alternatively in respect of the family as a *civil status* relationship.[3] The perception of family law being that this legal field is situated between these two poles; contract and civil status. This duality is the framework for addressing whether and to what extent the different national legal constructions of 'the good family' excludes individual autonomy through substantive law.

From the contractual standpoint, adult family members are considered to be autonomous individuals with freedom to form their own relationship. In this perspective, the private comes before the public involving a relatively clearly marked private-public divide in the law. Alternatively, if the family is viewed as a matter of societal status, the state defines relations between family members in terms of the substantive idea of 'the good family' as an entity. Consequently the state – not the spouses themselves – provides an answer to what constitutes 'the good family' involving a higher degree of complexity to the private-public divide.

The contractual standpoint is taken as an expression of a liberal ideology referring to a sceptical attitude to state interference in the formation of families in this study. Danish law is seen as representing the most liberal understanding of the family.[4] Norway and Sweden are more in favour of a perception of 'the good

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1 The terms 'Scandinavian' and 'Nordic' are used interchangeably throughout the study.

2 For a broader presentation of the Scandinavian countries, see M. Hilson, *The Nordic model, Scandinavia since 1945* (2008).

3 See C. Sörgjerd, *Reconstructing Marriage* (2012), p. 4 with further references in note 2.

4 This is consistent with other comparisons of the state construction in the two oldest Scandinavian countries, Denmark and Sweden, e.g.: 'The strong liberal advocates prominent in Danish political history have never really had a Swedish counterpart. It seemed much more natural in Sweden to embark on a "statist" path.', see T. Knudsen et al., 'State Building in Scandinavia', (1994) 26 *Comparative Politics*, no. 2, pp. 203-220, p. 213.

family' legally defined by the state, albeit with clear differences between the two countries. The Swedish approach to the substantive idea of 'the good family' is more individualized than in Norway as will be deliberated below.

The family law issues in focus are narrow but have been selected in order to begin with a simple account of the law itself, prior to contextualizing the law. The two chosen aspects of family formation: access to marriage and fertility treatment, represent typical issues of status (without excluding contractual elements); marriage as a traditional one and fertility treatment as a new one. It focuses on the legislative work – broadly defined – including administrative guidelines, reports from ethical and legislative committees and legal literature to explain the law and the legal policy thereof. Historical reasoning is not articulated in the legislative work, but history is understood in the sense referred to in comparative law as an invisible power: '"Invisible" does not mean that these powers cannot be identified, but that they are usually taken for granted: for example, whether and how law forms and reflects history, geography, philosophy and ideology.'[5]

The study then adopts a broader perspective in two steps to establish a connection to the historical development of the state and its family ideology. The first step outlines the broad context of the relevant family law legislation and links this with the characteristics found in the study of the two factors of family formation. It focuses on the traditional legal sources and fragmentally includes academic sources that compare the different Nordic policies and laws. It is not suggested that the identified characteristics cannot be perceived differently, since there are many determining factors for the legislative outcome. The objective is simply to demonstrate that different features of the national laws may be understood in terms of differences in state history and family ideology. The second step relates these findings to public policy. To establish that family law in its character of private law does in fact have a connection to public policy, the study examines the models for parental leave introduced in Denmark, Norway and Sweden. This demonstrates that variations between the Scandinavian countries on this particular issue are consistent with differences in their family laws. The essential point is that the same relationship between the state, the family and the child underpins parental leave as an aspect of public policy and also legal policy applied to the family. It focuses on legislation and literature comparing Nordic public policy.

The conclusion of the study adds the final link that connects the two initial aspects of family formation to history. It provides a brief outline of aspects of state formation in Scandinavia focusing on the changes in sovereignty and territory that are suggested to have influenced the laws and variations in legal policy relating to the constitution of the family described earlier. It focuses on selected literature on comparative policy and law and studies in national history. One final introductory point is important. An account of Scandinavian co-operation is a necessary preliminary aspect to a comparative analysis of the law and legal policy in these jurisdictions.

2. Nordic co-operation

The idea of a Nordic community can be traced back to the 19th century. In line with the development of modern nation states, a supranational Scandinavianism developed in the 1830s among students and poets, but this was not supported militarily. Thus, Denmark was not assisted by its Scandinavian neighbours in the war against Prussia and Austria in 1864. Instead, Scandinavianism developed as cultural and legislative cooperation. An official inter-parliamentary body was formed in 1952 in the Nordic Region called the Nordic Council. The fruitful legal cooperation started in the 1870s and its purpose was to find a joint Nordic way of approaching legislative questions. It developed with an informal and voluntary nature with meetings between Nordic lawyers every third year. The idea was and still is to discuss common new legal solutions, but at the same time to leave it to the lawmakers of each country to decide whether such new legislation should actually be drafted and adopted. The Nordic countries have resisted large-scale law projects such as the French *Code civil* and the German *Bürgerliches Gesetzbuch* (BGB). Within the civil law, issues such as marriage, succession or contracts have been regulated by independent acts, of which many are the results

5 See M. Siems, *Comparative Law* (2014), p. 102 with reference to B. Grossfeld et al.

of common Nordic drafting and an exchange of ideas. Indeed, the non-existence of wide and complicated civil codes has made Nordic legislative cooperation possible. Still today, Nordic lawyers prefer single acts, which are easier to make and to amend, and which do not govern the law too much but allow pragmatism and judicial and scholarly interpretation to meet practical ends.[6]

The Nordic countries are not so intertwined that a comparison is impossible. Rather, the fact that they are independent sovereignties is reflected in differences in their family laws. These countries introduced new laws at the beginning of the 20th century with legislation enacted from 1909-1929. These were important reforms – not only because of the substance, as they involved the introduction through a democratic process of more extensive and systematic legal codifications of parts of private law. Different committees drafted their respective national laws but strove for similar legislation and, to a certain degree, they were successful. Internationally, the family law reforms were ahead of their time in emphasizing freedom and equality. Women were equal to men, for example, in relation to spouses' obligation of mutual support, but also different in fulfilling these obligations as housewives rather than breadwinners. In addition, the new grounds for divorce were liberal. Nordic co-operation has been seen as competitive with each country attempting to express its values of freedom and equality in its legislation in the best way. In fact, this competitive attitude may have contributed to the relatively progressive legislative outcome in Scandinavia compared to other countries.[7] Another explanation relates to the Church.

Lutheranism is a dominant feature of the Scandinavian countries. Church historians acknowledge this as a feature of the Scandinavian countries for their long tradition of the Evangelical Lutheran State Churches. Strong ties between the Church and the state date back to the Middle Ages and, in particular, to the Reformation, which reached Scandinavia in the 1520s and 1530s. The churches were gradually integrated into the governing of the state. For many centuries, the Lutheran churches had a hegemonic status and the clergy represented both the state and the Church in local communities. Until the beginning of the 20th century, more or less the whole populations of the Nordic countries were Lutheran. Still today, Lutheranism is the denomination of the majority.[8] The individualism of the family law reforms cannot be seen as independent from Nordic Protestant ethics, claiming the principle of personal freedom and the value of the individual, human dignity. Furthermore, in the 19th and early 20th centuries, Lutheranism created a benevolent climate for the education of girls and for the women's rights movement. Women in the northern European countries gained the vote one generation before women in Catholic Europe. Even though religious movements had been relatively strong in the 19th century, the Church did not present very influential opposition to the early 20th-century marriage reforms, especially not in the three Scandinavian countries.[9]

Social Democratic parties gained power in all three Scandinavian countries in the years after the reforms and maintained social attitudes and institutions from the 19th century. Francis Sejersted has argued that this was the case for companies, class consciousness, the media system, the state Church and standard schools but, most important for this study, it also applied to the nation and the family.[10] The Nordic reforms retained and continued, in the period of Social Democracy, the breadwinner-housewife model of the bourgeois family, legally framed by marriage. Social Democrats took the great modernization project from the non-Socialist parties and put their own stamp on it. The result has been called the Social Democratic order – also called the Scandinavian model, or simply the Swedish or Nordic model.[11]

In Sweden and Norway the 1970s marked the end of Social Democratic hegemony. In Denmark the Social Democratic Party never had a parliamentary majority. In some respects the changes of this period were more important than the period of reform in the early 20th century. The decline of Social Democracy in Sweden and Norway was consistent with a new perception of the family which was no longer framed

6 See P. Letto-Vanamo et al., 'Cooperation in the field of law', in J. Strang (ed.), *Nordic Cooperation, A European region in transition* (2016), pp. 93-107, pp. 93 et seq., p. 98 and p. 102.

7 See K. Melby et al., *Inte ett ord om Kärlek* (2006). This source is part of an ambitious Nordic comparative study among historians with several publications on the reforms from the period 1909-1929.

8 See P. Markkola et al., 'Lutheranism and the Nordic Welfare States in Comparison', (2014) 56 *Journal of Church and State*, no. 1, pp. 1-12, p. 1.

9 See K. Melby et al., 'The Nordic Model of Marriage', (2006) 15 *Women's History Review*, no. 4, pp. 651-661, p. 658.

10 See F. Sejersted, *The Age of Social Democracy* (2011), p. 487.

11 Ibid., p. 1.

exclusively by marriage. In addition, a new legal understanding of equality, based on identical roles, replaced the complementarity of the breadwinner-housewife family. Political considerations in Sweden and Norway ensured that this transition was followed by comprehensive reforms of their respective Marriage Act in 1987 and 1991 but there was no counterpart to this in Denmark.[12] Illustratively, Denmark has kept adultery as a reason for divorce dating back to the Reformation. Today this reflects marriage as a contract which is morally based on faithfulness, since adultery is no longer a public concern in Scandinavia.[13] No broader societal welfare approach in respect of children has been introduced in Danish divorce law. By contrast, a waiting period is prescribed in Swedish law for divorcing spouses with children younger than 16 years.[14]

An adjustment to international capitalism was part of the same development as the reduced strength of the Social Democratic parties in Scandinavia.[15] The supranational regulation that developed in this period was not Nordic but originated from the European Union and also from a concept of human rights.[16] The new focus on individual rights which are superior to the national legislator involved a shift in the perception of democracy in the direction of constitutional democracy.[17] This tended to downplay national differences in family laws. Nordic co-operation on the legislative level in this field of law has not subsequently reached the level of the early 20th century reforms. Nevertheless, Scandinavian comparisons are often found in legislative work; in addition the legal situation in other countries in the region is often – although not systematically – referred to in reform proposals as an inspiration for introducing new laws.

3. Who may start a family?

This section gives a simple account of the law itself in the Scandinavian countries concerning the two chosen aspects of family formation: access to marriage and fertility treatment. The law in the Scandinavian countries is compared focusing on differences in the duality of contract and social status. It is demonstrated that Denmark is the most liberal and Norway the least liberal country as defined above in reserving fertility treatment to couples.

3.1. Marriage

This section focuses on the personal connection required to marry in Scandinavia and therefore requires an examination of private international law. The first issue examined involves the least favoured foreigners – asylum seekers. The second issue: tourists.

The conditions in the Scandinavian countries under which marriage authorities can perform a wedding ceremony are determined by rules of jurisdiction. Traditionally, there has been no statutory regulation in this area, but this has changed in recent years. In Denmark, a rule of jurisdiction was introduced in the Marriage Act (*Lov om ægteskabs indgåelse og opløsning*) in 2002 as part of a reform of immigration law which had the objective of making family reunification in Denmark more difficult.[18] The provision requires that both spouses have Danish citizenship or a legal right to remain.[19] The result is that a person who is in the country while his or her immigration application is being processed is no longer allowed to marry in Denmark. Asylum seekers are suspected of abusing rights to family reunification by way of sham marriages in order to remain in the country.[20] The situation before 2002 was that an administrative guideline from 1983

12 Swedish Marriage Act: SFS (1987:230), *Äktenskapsbalk* and Norwegian Marriage Act: LOV-1991-07-04-47, *Lov om ekteskap*. See the historical development in Sweden, Sörgjerd, supra note 3.
13 Danish legislation: LBK nr 1818 af 23/12/2015, *Lov om ægteskabs indgåelse og opløsning* § 33.
14 Swedish legislation: *Äktenskapsbalk* 5:1.
15 See Sejersted, supra note 10, p. 488.
16 Most important is probably the case law based on the 1950 European Convention on Human Rights Art. 8, 'The right to family life'.
17 The new ideological focus on constitutional democracy is described by Mogens Herman Hansen, see M.H. Hansen, *Demokrati som styreform og som ideologi* (2010), pp. 59 et seq.
18 Danish legislation: LOV nr 365 af 06/06/2002, *Lov om ændring af udlændingeloven og ægteskabsloven med flere love*.
19 Danish legislation: *Lov om ægteskabs indgåelse og opløsning* § 11a.
20 Exceptions to the requirement of citizenship or a lawful stay are made and are closely built on respect for human rights. Examples in the guidelines are: The length of the stay in Denmark and if the partners knew each other before they arrived in Denmark, the partners are expecting a child, they are seriously ill or have serious disabilities, see Danish administrative guidelines: VEJ nr 11361 af 30/12/2015, *Vejledning om behandling af ægteskabssager.*

required proof of a lawful stay; however, this was interpreted as allowing asylum seekers to marry pending the determination of their asylum application.[21] In 1994, Norway introduced a provision in the Marriage Act (*Lov om ekteskap*) similar to this early Danish administrative criterion. Consequently, Norwegian policy is less restrictive than the current Danish law allowing asylum seekers to marry pending their application.[22] In Sweden, there is no rule requiring a right to stay as a precondition to marry and no statutory rule of jurisdiction for marriage.

In comparing the Scandinavian countries, it is clear that Denmark adopts the strictest approach to asylum seekers' right to marry and Sweden the most liberal with Norway in the middle. If the focus shifts to tourists with a lawful stay, a less disadvantaged group, the emerging picture is quite different. Asylum seekers and tourists fall under the same ruling but only the asylum seekers may have problems with fulfilling the conditions of jurisdiction. The tourists may face different barriers following from another part of the legal framework being the choice-of-law rules in respect of marriage impediments. In this respect Denmark is the Scandinavian country with a liberal approach. Thus, Russian same-sex couples married during the Eurovision Song contest in 2014 held in Copenhagen.

Before performing a wedding the wedding authorities have to ensure that no marriage impediments hinder the wedding. In the Scandinavian countries, impediments relate principally to age, kinship and monogamy. If the prospective spouses have a connection to a foreign country, the question of choice of law in respect of marriage impediments arises. Choice-of-law rules have traditionally not been subject to legislation in Denmark, but have been regulated by administrative practice and case law. This also applies for the choice-of-law rule relating to marriage impediments. Thus, according to administrative guidelines, impediments are decided by Danish law.[23] Historically, this may be understood from the fact that the choice of law reflects the *lex loci celebrationis* (the place of entering into a marriage), derived from the *lex loci actum* (the place of entering into a contract).[24] From this point of view there is no reason for a choice-of-law rule based on civil status that distinguishes substantive law (the impediments) from the formalities. Prior to the revision of these guidelines in 2006, an exception was made if the marriage would not be recognized in a country to which the partners had a close connection.[25] Today, only the Danish impediments are relevant. This facilitates marriage tourism as it is relatively easy and quick for Danish municipalities to investigate whether there are impediments for prospective spouses. There is no public record explaining why these administrative guidelines were modified. The change was made administratively with reference to the Minister responsible for family law and consequently involved a political decision by the government. Even before the amendment of the guidelines, the Danish town of Tønder, close to the German border, was known as the European Las Vegas. German law, which refers to nationality and requires foreign nationals in Germany to prove that marriage is in accordance with their national law,[26] may be burdensome in practice. In contrast, the Danish choice-of-law rule and substantive law involving few impediments can easily be examined and fulfilled. Bureaucratic requirements are less onerous and access to marriage is liberal.[27]

Norway also does not have international private law legislation in this area. The traditional connecting factor is domicile. The Norwegian approach is that marital impediments are qualified as an element of civil status which is decided by the law of the domicile.[28] As a main rule, parties who are not domiciled in Norway

21 Explanatory notes to Danish legislative proposal: 2001/2 LSF 152 § 2 and as explained in a Norwegian legislative proposal: Ot.prp.nr.44 (1993-1994) Chapter III, Section 1.1.

22 The relevant provision was implemented by Norwegian legislation: LOV-1994-06-24-24*, Lov om endringer i lov av 4. juli 1991 nr. 47 om ekteskap* § 5a. See Norwegian legislative proposal: Ot.prp.nr.44 (1993-94) Chapter III, Section 1.1.

23 Danish administrative guidelines, supra note 20.

24 See H. Thue, *Internasjonal privatrett – Personrett, familierett og arverett* (2002), pp. 307 et seq.

25 Danish administrative guidelines: BEK nr 1285 af 08/12/2006, *Bekendtgørelse om indgåelse af ægteskab*. Earlier versions BEK nr 662 af 01/08/1995 § 18 and BEK nr 510 af 20/06/2005 § 14.

26 German legislation: *Einführungsgesetz zum Bürgerlichen Gesetzbuche* Art. 13.

27 Substantive law in Denmark and Germany is almost the same, see a report on foreigners' marriage in Denmark: *Familiestyrelsen* dated 05.05.2006. A Danish choice of law different from the *lex fori* would not create unity with German law anyhow because Denmark traditionally applies domicile as a connecting factor and does not apply *renvoi*.

28 See P. Lødrup et al., *Familieretten* (2011), p. 56 and Thue, supra note 24, p. 315.

have to prove that there are no impediments in their home country, which will prevent the Norwegian authority from marrying tourists such as Russian same-sex couples.[29]

Historically, Sweden has chosen nationality as the connecting factor in private international law. Sweden not only has a Marriage Act but also private international law legislation.[30] As in Norway, impediments are considered as part of the civil status. Until May 2004, the impediments were regulated by the law of nationality supplemented by an alternative two-year residence condition. In 2004, the private international law ideal of international unity, which meant that choice-of- law rules should respect citizens' connections to other countries, was challenged. The objective was to protect young persons with foreign nationality from being forced to enter into marriages that were contrary to the Swedish impediments.[31] This new legislation made the Swedish impediments mandatory for all prospective spouses.[32] It was argued that nationality as a generally applicable rule in private international law was being challenged by societal developments. It was considered that it would be too complicated to introduce a general rule based upon domicile supplemented by mandatory impediments based on age, kinship and monogamy. Therefore the *lex fori* was made the main choice-of-law rule. To avoid limping marriages and also forum shopping, an exception was made for foreign couples who were not domiciled in Sweden. Nonetheless, a dispensation is possible and based on grounds such as those relating to difficulties in obtaining the necessary information from another country or a weaker connection to Sweden than to the country of nationality or domicile. However, this would not extend to same-sex couples who are Russian tourists.[33]

Comparison between the countries in this area demonstrates that Denmark – with the exclusive application of Danish law – developed an early understanding of marriage as a contract. This has been strengthened subsequently and facilitates contemporary marriage tourism. In contrast, Norwegian and Swedish law treat marriage as an element of civil status. In the case of Sweden, this also involves social protection, and may explain the freedom to marry to the less advantaged asylum seekers perceived as a social right.

The different national policies on same-sex marriage are illustrative of the Danish approach. Since the introduction of same-sex marriage in Denmark in 2012,[34] there have no longer been any legal obstacles to homosexuals marrying in Denmark, regardless of an obvious lack of recognition in their home country. Consequently, Russian same-sex couples were married during the Eurovision Song Contest in 2014. This occurred at the same time as international criticism of President Putin's negative policy on homosexuality. The Municipality of Copenhagen (*Københavns Kommune*) advertised wedding ceremonies in 2014 as an event where one could marry at different locations in 'Wonderful Copenhagen' to the sound of a Eurovision song. When the wedding authorities were interviewed in the press, they explained that they were proud of facilitating the wedding ceremonies – as a means of demonstrating their values in treating homosexuals in the same way as other couples. This could hardly have happened in Oslo or Stockholm. Same-sex marriage was introduced in Norway in 2008,[35] but the choice-of-law rule concerning marital impediments means that Russian tourists must satisfy Russian impediments to avoid limping marriages.[36] The Swedish consideration is similar in preventing same-sex Russian couples from marrying. Concern over limping marriages was even more pronounced in Sweden as in Norway when same-sex marriage was introduced in 2009.[37] One may add that there seems to be a political interest in Denmark in the pecuniary aspect of marriage tourism, although this is not explicitly expressed in written preparatory legislative work on family law.[38]

29 Norwegian legislation: *Lov om ekteskap* § 7 h.
30 Swedish legislation: SFS (1904:26 s. 1), *Lag om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap*.
31 Swedish legislative proposal: Prop. 2003/04: 48, p. 1.
32 Swedish legislation: SFS (2004:144), *Lag om ändring I lagen* (1904:26 s. 1) *om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap*.
33 Swedish legislative proposal: Prop. 2003/04:48, Section 4, *Åtgärder mot barnäktenskap och tvångsäktenskap*.
34 Danish legislation: LOV nr 532 af 12/06/2012, *Lov om ændring af lov om ægteskabs indgåelse og opløsning, lov om ægteskabets retsvirkninger og retsplejeloven og om ophævelse af lov om registreret partnerskab*.
35 Norwegian legislation: LOV-2008-06-27-53, *Lov om endringer i ekteskapsloven, barnelova, adopsjonsloven, bioteknologiloven mv.*
36 Norwegian legislative proposal: Ot.prp,nr.33 (2007-2008) Chapter 6.2., *Om lov om endringer i ekteskapsloven, barnelova, adopsjonsloven, bioteknologiloven mv.*
37 Swedish legislation: SFS (2009:253), *Lag om ändring i äktenskapsbalken* and Swedish parliamentary document: Betänkande 2008/09:CU19 *Könsneutrala äktenskap och vigselfrågor,* p. 20.
38 In 2015 the Danish television channel DR 1 transmitted a documentary in three episodes called 'Business on the wedding Island' (*Business på bryllupsøen*) describing how the population on the periphery of Denmark – the island Ærø – has survived financially by marriage tourism.

3.2. Fertility treatment

Presently, Denmark has no restriction on fertility treatment in respect of civil status or a cohabitation requirement. When access to fertility treatment was first introduced in Danish law only couples were granted such access. Based upon an equality perspective, women were granted access to publicly financed fertility treatment irrespective of their civil status as single, a cohabitant, a registered partner or a spouse in 2006.[39] It is characteristic of this regulation that it is framed as health law rather than family law. Therefore, it is intrinsically linked to health aspects and to the perception of fertility treatment as a general health service to be provided by the Danish welfare state. As such, the regulation is more dominantly influenced by an equality principle than family law.

Traditionally, the sperm donor has been guaranteed anonymity in Danish family law. Historically, this may be understood as a consequence of the perceived unity of traditional marriage and its nature of exclusivity. The sperm donor was understood as someone who was not to disturb this unit. The reform of fertility treatment from 2012 meant an alteration to the anonymity principle, making it the choice of the woman or couple receiving fertility treatment as to whether the donor is to be anonymous or known.[40] In the preparatory work, the pros and cons are mentioned, concluding that the decision of the parties involved shall be respected.[41]

The position in Norway is similar to the earlier position in Denmark, as only couples are given access to fertility treatment. There has not been any reform allowing treatment for singles. Female couples have been allowed treatment since 2009.[42] However, unlike Denmark, Norway abandoned the anonymity of the sperm donor in 2005, changing the character of sperm donation from anonymous donation to an arrangement where the adult child has access to information about the donor.[43] The Norwegian Biotechnology Advisory Board (*Bioteknologirådet*) has recently suggested a further alteration to the act, making it an explicit – but unsanctioned – duty of the parents to inform the child how he or she was conceived. The logic of this suggestion being that a child must have information relating to the (donor) conception for the right of access to information to be viable.[44]

As in Norway anonymous sperm donation is not an option in Sweden. This is not a new development but dates back to the introduction of the Act on Insemination (*Lag om insemination*) from 1984.[45] Like Denmark, since April 2016 Sweden does offer fertility treatment to single women corresponding with the possibilities for married and cohabiting couples.[46] The purpose of the legislation is 'to increase the possibilities for involuntarily childless persons to become parents' as explained in the draft.[47]

A comparison between the countries in respect of access to fertility treatment demonstrates that Denmark is the most liberal country. Denmark is also a popular place for fertility tourism, a profitable industry. Globally, Denmark is one of the leading exporters of sperm with the world's greatest sperm bank *Cryos* situated in Denmark. This interest – just as the interest in marriage tourism – is never explicitly expressed in written preparatory legislative work on family law but may nevertheless play a role. In a Scandinavian perspective Norway seems to emphasize the perception of a family as consisting of two parents like the traditional marriage disallowing reproductive treatment to single women.

39 Danish legislation: LOV nr 535 af 08/06/2006, *Lov om ændring af lov om kunstig befrugtning i forbindelse med lægelig behandling, diagnostik og forskning m.v.*

40 Danish legislation: LOV nr 602 af 18/06/2012, *Lov om ændring af lov om kunstig befrugtning i forbindelse med lægelig behandling, diagnostik og forskning m.v., børneloven og lov om adoption*.

41 Danish legislative proposal: 2011/1 LSF 138, *Forslag til Lov om ændring af lov om kunstig befrugtning i forbindelse med lægelig behandling, diagnostik og forskning m.v., børneloven og lov om adoption*.

42 Norwegian legislation: supra note 35.

43 Norwegian legislation: LOV-2003-12-05-100, *Lov om humanmedisinsk bruk av bioteknologi m.m.*

44 The Norwegian Biotechnology Advisory Board (*Bioteknologirådet*) dated 09.02.2015.

45 Swedish legislation: SFS (1984:1140), *Lag om insemination*.

46 Swedish legislation: SFS (2016:18), *Lag om genetisk integritet m.m.* Chapter 6.

47 Swedish legislative Commission: SOU 2014:29 and the Swedish legislative proposal: Prop. 2014/15:127 *Assisterad befruktning för ensamstående kvinnor*.

3.3. Characteristics

The comparison of the law in the previous two sections relating to two aspects of family formation – entering into a marriage and having children through fertility treatment – demonstrates that Denmark is the most liberal Scandinavian country emphasizing a contractual understanding of the family. Marriage and fertility tourism is facilitated, however, with strict exceptions related to immigrants in respect of marriage. Norway and Sweden have more focus on marriage as a status providing a more substantive legal understanding of the family that to a further extent includes the disadvantaged asylum seekers and prescribes non-anonymous donors. With fertility treatment being reserved for couples, Norwegian law is less liberal and is closest to the traditional ideal of the family. These identified characteristics will be placed in a *broader* family law perspective in Section 4.

4. Family law

4.1. Introduction

The aim of this section is to develop an understanding of the identified characteristics by looking more broadly into family law to search for national differences within the duality of contract and status. In the outset this section will describe how immigration law has influenced marriage law. Immigration law is a field of public law covering persons with restricted access. Marriage law, in contrast to immigration law, may be understood to reflect the family as the cornerstone of society. From marriage, the study moves on to parentage law. It is characteristic of the Scandinavian regulation of parentage that the establishment of paternity and co-maternity is an obligation for the relevant family authorities. The initiative is not left with the parents. Finally, the study looks into the obligation of parents to care for and support the child which is inherent in the concept of parental responsibility and the obligation stemming from parentage to support the child financially.

4.2. The Marriage Act – the Immigration Act divide

All the Scandinavian countries have a policy on forced marriage. In relation to this political issue, it has been relevant to frame forced marriages legally. From a more abstract point of legal categorization, one may argue, on the one hand, that forced marriage is a question which is relevant to the national understanding of marriage as a common societal institution, implying that this regulation should be implemented in the Marriage Act without regard to the specific legal effects upon an aspect of immigration such as concerning the right to family unification. On the other hand, one may argue that the issue concerns a specific problem related more or less only to immigrants and asylum seekers and that this regulation should be implemented in the Immigration Act. The last mentioned option downplays marriage as a common societal institution regulated in family law – targeting, instead, the relevant group of people in immigration law. Systematically, this creates a fragmented marriage institution (them – us) rather that a common marriage institution because the formation of some families is regulated by family law and others by immigration law. The path that has been taken in the Scandinavian countries is the object of this section.

Danish legislation on forced, sham and arranged marriages is systematized primarily as a part of immigration law. This approach may be perceived of as a consequence of the strict Danish approach in immigration law with limited attention to family considerations. There has been only one reform of the Marriage Act relating to the problem concerning jurisdiction as described in Section 3.1, and a provision of a duty for the marriage authorities to inform prospective spouses of the fact that marriage does not necessarily create a legal right to remain in Denmark. Other provisions related to forced, sham or arranged marriage are legally connected to family reunification and are implemented in the Immigration Act (*Udlændingeloven*).

In Norway, the first of the alternatives mentioned above – marriage as a common societal institution – has been chosen resulting in several reforms of the Marriage Act. The Marriage Act has undergone five

reforms during recent years, primarily to prevent forced marriage.[48] Some of these reforms tend to lean towards a more value-expressive legislative style than effective regulation.[49] The second reform implemented a provision in the Marriage Act that made the marriage conditional upon the spouses' declaration that the marriage is being entered into with their free and full consent, and that they recognize each other's equal right to divorce.[50] The fourth reform was part of the implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women. It was explicitly incorporated into the Marriage Act that men and women have the same right to freely choose their spouse and to enter into marriage only with their free and full consent.[51] In addition to the reforms on entering marriage the reasons for divorce were reformed adding forced marriage as a reason.[52]

Sweden has only had two reforms of its Marriage Act (*Äktenskapsbalken*).[53] The second reform was a consequence of the ratification of the EC Convention on preventing and combating violence against women and domestic violence.[54] The supervision of marriage impediments was strengthened, leaving out the possibility to allow minors to marry.[55] In addition, minority and forced marriage as legal reasons for an immediate divorce were introduced.[56] As a supplement to the Marriage Act, Sweden has also reformed its private international law legislation as described in Section 3.1. Not only has the choice-of-law rule concerning marriage impediments been altered, but also the rules on the recognition of a marriage entered into outside Sweden.[57]

In comparing the framing of forced marriage as an element of family or immigration law Denmark holds a unique position among the Scandinavian countries. The Danish Marriage Act has been less often revised due to immigration policy. This may be perceived as an emphasis on the contractual aspect of marriage, where the private comes before the public. This implies that the Danish notion is that immigrants should not influence the Danish perception of the family as construed in family law and further that the Marriage Act should not serve as an instrument of social engineering aiming at the integration of immigrants. In line with this notion and in contrast to Norway and Sweden, Denmark did not abolish the provisions in the Marriage Act on the annulment of forced marriage as part of the modernization of family law. This may serve as an explanation for the reform of divorce in Norway and Sweden only. Generally family law in Denmark did not go through a modernization process after the 1970s to the same degree as in Norway and Sweden, leaving the annulment institution in force. Consequently, there was not the same need to reform the Marriage Act in Denmark as in the other countries, where during the last couple of decades immigration became an important subject on the Nordic political agenda. The clearer Danish distinction between family and immigration law may also reflect upon Denmark as having the strictest immigration policy, which would be in accordance with the ranking in general studies of Scandinavian immigration.[58]

To further qualify the differences between the Scandinavian countries one may have to add another factor to the distinction between contract and status and immigration policy, namely human rights. National differences in the approach to human rights may also serve as an explanation for these differences. Denmark is the only country that has not reformed the Marriage Act as a consequence of the ratification of a human rights convention. This may be in line with the general Danish reluctance towards implementing human

48 Norwegian legislation: (Reform 1) LOV-1994-06-24-24; *Lov om endringer i lov av 4. juli 1991 nr. 47 om ekteskap*. (Reform 2) LOV-2003-07-04-72*, Lov om endring i lov 4. juli 1991 nr. 47 om ekteskap*. (Reform 3) LOV-2003-12-19-119, *Lov om endringar i lov 4. juli 1991 nr. 47 om ekteskap (ekteskapslova) m.m.* (Reform 4) LOV-2005-06-10-38*, Lov om endringer i likestillingsloven mv.* (Reform 5) LOV-2007-01-18-1, *Lov om endringer i ekteskapsloven og straffeprosessloven mv.*

49 For a description of some of the reforms, see A.A. Strandbakken, 'Tiltak mot tvangsekteskap – er en god tanke drevet for langt eller fort?', (2004) 2 *Tidsskrift for Familierett, arverett og barnevernsrettslige spørgsmål,* no. 2, pp. 68-70, p. 70 and J. Asland, 'Innvandrerelaterte udtfordringer i nordisk familierett', (2006) 4 *Tidsskrift for Familierett, arverett og barnevernsrettlige spørgsmål,* no. 1, pp. 16-34, Section 5.

50 Norwegian legislation: *Lov om ekteskap* § 7(l).

51 Ibid., § 1a.

52 Ibid., § 23.

53 Swedish legislation: (Reform 1) SFS (2004: 142), *Lag om ändring i äktenskapsbalken*. (Reform 2) SFS (2014:376), *Lag om ändring i äktenskapsbalken*.

54 Norway has signed the convention but not ratified it yet. Denmark has ratified it but it did not involve a reform of the Marriage Act.

55 Swedish legislation: *Äktenskapsbalk* 2:1.

56 Ibid., 5:5.

57 Swedish legislation: SFS (1904:26 s. 1), *Lag om vissa internationelle rättsförhållanden rörande äktenskap och förmynderskap* 1:8a. Norway has copied the rule of recognition and placed it in the Norwegian Marriage Act: *Lov om ekteskap* § 18 a.

58 See K.F. Olwig et al., *Migration, family and the welfare state: integrating migrants and refugees in Scandinavia* (2012).

rights in a legislative text in contrast to Norway and Sweden. The Norwegian idealistic legislative style is in accordance with the general national policy on the implementation of and the weight given to human rights conventions. Norway has to a further extent incorporated conventions into national law and given them superiority over national law.[59] Swedish law appears to have the most modern legislative style being more technical, with its rational legal systematization of private international law and the manner in which human rights are implemented, in contrast to Norway's value-expressive legislative style. A difference that may be perceived as a difference in modernity as such in the sense that in Norway rationality as part of modernity is mixed with nationalism. This will be further developed in the conclusion. To demonstrate that Sweden is the country with the clearest ideology of modernity as more generally expressed within family law, one may add the Nordic differences with respect to the regulation of cohabitation. Only Sweden has introduced an act on cohabitation protecting cohabitation as a family form. This may be perceived to be part of a stronger Swedish ideology of modernity. The modernization project was to create a society with rational individuals making rational decisions and marriage was perceived to be a free choice in a value-neutral family policy.[60]

4.3. Parenthood

The obligatory establishment of legal paternity in the Scandinavian countries may be described as a result of a political balancing where the law either substantively mirrors the biological fatherhood, or the decision of the mother and the social father which in turn may overrule the biological father. The first alternative mirrors parenthood as a status and the second alternative mirrors paternity as a contract. With respect to donor anonymity as discussed previously, the different Scandinavian perceptions of the donor reflect a different balancing of biology and social fatherhood. This is also reflected in the more recent establishment of co-motherhood.

In Danish law the acknowledgement of paternity is not limited to the biological father's acknowledgement. In a situation where there are two possible fathers (social and biological), the mother may, in agreement with the fathers, agree that the non-biological father should acknowledge paternity and become the legal father. As such, this approach protects social fatherhood and mirrors a contractual understanding between the three parties.[61] A similar contractual construction is not part of the Norwegian or Swedish Children's Acts.

According to the Danish Children's Act (*Børneloven*), the biological father has a right to pursue his paternity even if there is another legal father; however, this is limited to the situation where he was married to or had been living together with the mother. The social father is thus legally protected and the extent of the biological principle is limited.[62] Social fatherhood is not legally protected to the same extent in Norwegian and Swedish law. In the Norwegian Children's Act (*Lov om Foreldre og Barn*) there is no limitation on the biological father's right to pursue the biological truth, until the child is three years old.[63] In Sweden the biological father may not even initiate a paternity case but the family administrative authorities have discretion to institute a paternity case on behalf of the child and the father may communicate the biological truth to the family authorities and convince them to pursue his paternity.[64] Thus, the public authorities have the competence to balance social and biological considerations clearly mirroring paternity as a matter of status.

A contractual understanding of parentage in Danish law can also be found in respect of co-motherhood. A mother, a co-mother and a known sperm donor may legally enter into an agreement on the establishment of the parentage of the second parent. The choice between the co-mother and the known donor must be made prior to the commencement of fertility treatment.[65] This contractual construction is not the legislative answer in Norway and Sweden. In Norway it is not an available treatment to receive sperm from

59 Danish legislative Commission: *Betænkning* 2014:1546 *om inkorporering mv. inden for menneskeretsområdet*, pp. 84 et seq. and pp. 88 et seq.
60 See Sörgjerd, supra note 3, Chapter 5.
61 Danish legislation: LBK nr 1817 af 23/12/2015 *Børneloven* § 14, Section 3.
62 Ibid., § 6.
63 Norwegian legislation: LOV-1981-04-08-7, *Lov om barn og foreldre* § 6. From 2002 until the introduction of Act No. 64 dated 21.06.2013 the Norwegian position was even more radical also in a European context. The biological father's possibility to pursue his paternity was unlimited during the child's childhood. The intermezzo from 2002-2013 was criticized for being without nuances in favour of biology.
64 Swedish legislation: SFS (1995:974), *Föräldrabalk* 3:5.
65 Danish legislation: LBK nr 1817 af 23/12/2015 *Børneloven* § 27 a.

a known donor unless the known donor becomes the legal father and in Sweden the legislation points at the consenting female partner of the mother to be the legal co-parent.[66]

The Danish tolerance towards parental understandings of the importance of biological truth reflects an understanding of the parents as autonomous, providing a less state intervention approach. Both Norway and Sweden have – with the biological principle and the Swedish authorities' discretion to initiate paternity cases – a stronger substantive understanding of a father than under Danish law. The fact that biological fathers have the strongest rights in Norwegian legislation points at Norway as the country with the clearest substantive perception of 'the good family' expressed as the best interests of the child as a part of the welfare discourse of the welfare state.

4.4. Parental responsibility

Two aspects of parental responsibility are studied: The notion of shared residence and the legal framework for parents' agreements.

In the Scandinavian countries a shared living arrangement for children after a divorce is common. This is legally reflected in the term *shared residence*. In contrast to Norwegian and Swedish family law this has not been implemented in the Danish Act on Parental Responsibility (*Lov om Forældreansvar*).[67] As such Norwegian and Swedish law come to mirror the equal status of parents in modern parenthood and children's status of having shared residence to a further extent than Danish law. In Danish law, the earlier legal distinction singling out a resident parent and a contact parent despite the fact that the child may share his or her time equally between the parents has been retained. Legally, only one of the parents is the resident parent of the child. The fact that public child support in Denmark is paid to the resident parent illustrates the public-private divide because it is not a public law matter that the child may reside equally with both parents. In Norwegian and Swedish law the perception of status has been extended to cover shared residence and has an impact on the regulation of public child support making the public-private law divide more complex.

The Scandinavian countries generally favour parental co-operation endorsing agreed solutions in respect of parental responsibility but there are differences within the national laws. The use of mediation in the parents' conflict is implemented in different ways. It follows from the Danish Act on Parental Responsibility that the parents, as a main rule, may be offered mediation.[68] This is in contrast to the Norwegian legislative solution where mediation is mandatory for the parents – as a strong main rule.[69] In Sweden the judge may refer parents to mediation as part of his or her discretion.[70] It is only in Sweden that parents' agreements on parental authority have to be approved by the public authorities.[71] The Swedish substantive approach to children's welfare may then involve a stronger legal relationship between private law issues (custody, residence and contact) and public law (children in need) than in Denmark and Norway. An example of this is the Swedish administrative authorities' discretionary power to initiate a private law procedure, such as asking for the transfer of parental responsibility between parents.[72] In Denmark parental agreement on contact is legally enforceable without any public scrutiny. In the legislative work it is mentioned that the objective is to make enforcement less bureaucratic for the parents.[73] The parents merely have to state that the agreement is enforceable.[74] In Norwegian law the enforceability of an agreement is still conditional upon the decision of a family law administrative authority.[75]

66 Swedish legislation: SFS (1995:974), *Föräldrabalk* 1:9.
67 Norwegian legislation: *Lov om barn og foreldre* § 36. Swedish legislation: *Föräldrabalk* Chapter 6, § 14 a. In the Swedish Act this is not explicitly mentioned.
68 Danish legislation: LBK nr 1820 af 23/12/2015, *Forældreansvarsloven* § 32.
69 Norwegian legislation: *Lov om barn og foreldre* § 51.
70 Swedish legislation: *Föräldrabalk* 6:18 and 18 a.
71 Ibid., 6:17 a.
72 Swedish legislation: SFS (2001:937) *Socialtjänstförordningen* 5:2.
73 Danish legislative proposal: 2003/1 LSF 179, *Forslag til Lov om ændring af lov om ægteskabs indgåelse og opløsning og forskellige andre love*, Section 4.2.
74 Danish legislation: LBK nr 1255 af 16/11/2015, *Lov om rettens pleje* § 478, stk. 1, nr. 3.
75 Norwegian legislation: *Lov om barn og foreldre* § 55. This provision is reminiscence from before parental responsibility matters were moved to the court system.

This comparison establishes that Danish law emphasizes the contractual understanding of parenthood and Norwegian and Swedish laws emphasize status. In relation to parental responsibility, Denmark has not implemented shared residence mirroring a liberal family law ideology with a distinct division between private and public law. The contractual element is mirrored as follows: mediation is voluntary, agreements on parental authority are not scrutinized by a public authority and agreements on contact are enforceable without the involvement of a public family law authority. A comparison between Norway and Sweden shows Sweden as the country with the strongest legislative focus on the best interests of the child based on a discretionary authority in respect of mediation, the scrutiny of agreements and the public authorities' access to initiate a case while Norwegian law mirrors the obligatory mediated family.

4.5. Child support

A legal parent who does not fulfil his or her obligation to support a child is obliged to pay child support to the other parent. If the parents do not agree on the amount thereof, the primary caregiver may apply for child support from the other parent through the family law authorities. These child support cases are typically standardized cases with standards for the calculation of the specific amount which should be paid. Nevertheless, the manner of calculation differs between the Scandinavian countries.

In Denmark, the amount is easy to calculate. The amount is standardized in the Act on Child Support (*Lov om børns forsørgelse*) depending upon stated income categories.[76] The amount depends only on the number of children whom the debtor parent has an obligation to support and his or her gross income. Each year, a revised table is published by the administration.[77] Politically, the legislative work is not directly based on a calculation on the costs of raising a child but takes a more generalized approach. The latest legislative report on the topic poses the question of what do children cost? The answer in the report is that this cannot be answered clearly. The reason is simply that the diversity of life dictates that an inventory of factual costs would be subject to considerable uncertainty.[78]

This is different in Norway and Sweden. Here a common feature is that the calculation of the amount is based on a more formalized understanding of the costs of raising a child.[79] The factors which are relevant for the amount are more nuanced than in Denmark and are more ambitious in reaching a fair solution also between the parents; the income of both parents is taken into consideration.[80]

In Denmark and Norway, a certain basic amount may be covered, upon request, by the public authorities if the debtor parent does not meet his or her obligation. The amount is then collected by the public authorities from the debtor parent.[81] The duty of the Swedish administration is more profound in the sense that there is no immediate connection between the amount covered by the public authority which is given to the primary caregiver, and the amount that the debtor parent has to pay.[82] It is not necessarily the same amount. One may say that in Sweden the private law obligation in family law has less of an influence on the calculations in the public welfare regime.

4.6. Characteristics

In the description of the selected family law issues in this section, the characteristics found in the narrow approach in Section 3 are recalled but the duality between contract and status needs some elaboration to qualify the differences between Norway and Sweden.

76 Danish legislation: LBK nr 1815 af 23/12/2015, *Lov om børns forsørgelse* § 14.
77 Danish administrative guidelines: CIS nr 9444 af 27/06/2014, *Cirkulæreskrivelse om indkomstoversigt for fastsættelse af børne- og ægtefællebidrag fra 1. juli 2014*.
78 Author's translation, see a report from a Danish legislative committee: *Betænkning* 2001:1389 *om børns forsørgelse* (2001), p. 147.
79 Norwegian administrative guidelines: <www.nav.no/Beregning+av+underholdskostnaden.415321.cms> (last visited 9 June 2016). Swedish administrative guidelines: <www.konsumentverket.se/Global/Konsumentverket.se/Best%C3%A4lla%20och%20ladda%20ner/Broschyrer/Dokument/2015/Kollpapengarna-2015-Engelska-KOV.pdf> (last visited 9 June 2016).
80 Norwegian legislation: *Lov om barn og foreldre* § 71. Swedish legislation: *Föräldrabalk* 7:1, 2a, 3.
81 Danish legislation: LBK nr 1095 af 07/10/2014, *Lov om børnetilskud og forskudsvis udbetaling af børnebidrag* § 14 and § 18. Norwegian legislation: LOV-1989-02-17-2, *Lov om bidragsforskott* § 3 and § 10.
82 Swedish legislation: SFS (2010:110), *Socialförsäkringsbalken* Chapter 19.

The study demonstrates the Danish emphasis on marriage or the family as a contractual relation and a Danish reluctance towards developing the legal understanding of status. Danish marriage law is almost kept out of immigration policy favouring instead public law legislation on the matter. We also recall the private character of a family in relation to the parent's own choice between sperm donors and a relatively narrow scope for the biological truth in respect of the establishment of paternity. Explicitly in the legislation there is also a contractual option between a co-mother and a sperm donor. Furthermore, agreements on contact are enforceable without validation from a public authority.

Norway and Sweden have developed family law to a further extent based on the understanding of the family as relations of civil status. Besides the introduction of the concept of shared residence, both countries calculate the amount of child support in a relatively multi-factored way, based on an understanding of the general costs of raising a child.

In a comparison between Norway and Sweden, the latter country seems to have the most penetrating substantive legal regulation of the family and with an individualized approach to family members while Norwegian family law is less individualized with the clearest notion of a family and being more idealistic in its legislative style. In Section 3 in was concluded that Sweden is more liberal than Norway allowing singles to have fertility treatment but it is more precise to characterize Sweden as having at least the same emphasis on civil status as Norway in family law defining 'the good family' in substantive law. So, looking more broadly into family law as in this section, Sweden may be characterized as less liberal than Norway but the Swedish idea of 'the good family' includes fertility treatment for single women and mirrors a more individualized approach to the family which has been called Swedish 'statist individualism'.[83] Thus, in Norway singles are not allowed to have fertility treatment, and Norway gives priority to biological paternity in different respects. Norway, with the less individualized family law, has a more explicit mediation approach to the parents' relationship facilitating the two parents' cooperation. In Sweden, a father's right to initiate a paternity case is subordinated to a public authority's discretion to initiate a procedure. A discretionary authority that is also present in Swedish custody cases. Moreover, parents' agreements on parental responsibility need validation from the public authorities. Finally, the public child support regime is legally more developed compared to private child support in Norway.

5. Public policy

As shall be seen in this section, the same perception of the family in the parental leave legislation as in family law can be found. Despite the complex connection empirically between families and public policy, it seems to be straightforward to identify the same ideology in public policy and family law. The public policy on parental leave is the selected area, because it is closely connected to the perception of the relationship between the members of a family which is the object of family law.

One way of approaching the relation between the state and the family is how the international and national changing circumstances influence – as being interrelated – the state and the family. One may say that from the 19th century to the middle of the 20th century (the end of Social Democracy's hegemony in the 1970s), a focus was on building the national democratic states and liberalizing the national market economy. One may perceive the building of the modern family as part of the building of the modern state, i.e., the family can be seen as legally modernized as part of the same broader political process – but in a different manner. The new *freedom* in modern society and the individual rights in the family were supplemented with a counter-narrative of marriage as a *safe* haven based on tradition. Politically, society was understood within the legal discourse and the family within an ethical discourse. However, the discourses are interrelated. The natural complementarity between the breadwinner and housewife with individual duties and rights may be understood as being one step ahead of the welfare state and a further individualization of the family to

83 See H. Berggren et al., *Är svensken människa? Gemenskap och oberoende i det moderna Sverige* (2006). The authors explain that, on the one hand, the individual is liberated from the ties of dependency that characterize the traditional family, churches, and charities while, on the other, it has left the individual relatively powerless in relation to the state.

come.[84] As mentioned in Section 2, the hegemony of Social Democracy was after the 1970s replaced by a stronger emphasis on state adjustment to the global market, replacing the breadwinner-housewife model with equality between the spouses. The marriage institution was in a crisis and a more fluent understanding of the family appeared. Women fully entering the labour market and the new caring tasks of fathers made the spouses more alike. The increase in the number of women on the labour market was considered financially profitable to the nation. Legally, parenthood became almost separated from marriage and was based on the upcoming focus on rights. The new democratic model of parenthood – legally translated into mediation – was introduced in the national children's acts in the late 20th century. The legal discourse of society was spread to cover the family as well. Today this is still the broader societal framework of family law. A new public policy was needed in the Nordic countries to support some balance between the dual-earner families and the labour market.

So, based upon this interrelation, the comparison continues with the three regimes on parental leave currently in force; but narrowed down to the duration of public-paid parental leave without regard to differently built-in flexibility and empirical data on the parents' perspective. All three regimes have a mother and a father quota and a quota they may share as they like. The father's quota is based on the 'use it, or lose it' principle. It should be noted that the Danish possibilities for leave are substantially regulated via collective labour agreements whereby individual employees may be offered a supplementary leave entitlement. Thus, as a consequence of the Danish labour market model, different groups of employees in the labour market enjoy very different leave entitlements which are particularly relevant for some Danish fathers who may have entitlements similar to those in the other Nordic countries. Nevertheless, the general ideology of the public entitlements is different between the countries as will be shown.

Table *Parental leave counted as the approximated number of weeks according to the legislation (no distinction is made between paternity, maternity and parental leave)*

Number of weeks	***Total***	***Mother***	***Father***	***As they choose***
Denmark	52	18	2	32
Norway	49	3+10	10	26
Sweden	68½	13	13	42½

Description of the table:

The numbers in red express the idea of equality between the two parents. The current Danish legislation on parental leave normally provides for 52 weeks of leave in total with social security benefit: four weeks before the birth for the mother[85] and 14 weeks following the birth, two weeks of paternity leave for the father,[86] and 32 weeks for the mother or the father.[87] The current Norwegian legislation on parental leave normally provides for 49 weeks of leave with social security benefit. Three weeks before the birth for the mother and ten weeks following the birth, ten weeks of paternity leave for the father. Furthermore, the parents may split 26 weeks as they like.[88] The current Swedish legislation on parental leave normally provides for 480 days' (68½ weeks') leave with social security benefit.[89] The mother may take the leave from 60 days before the expected date of confinement (8½ weeks).[90] 90 days (13 weeks) are reserved for the mother and father each and they may share the remaining 360 days (42½ weeks) between them.[91]

84 See Melby et al., supra note 7, pp. 159-160 and pp. 332-334.
85 Danish legislation: LBK nr 571 af 29/04/2015, *Bekendtgørelse af lov om ret til orlov og dagpenge ved barsel* § 6.
86 Ibid., § 7.
87 Ibid., § 9 and § 21.
88 Norwegian legislation: LOV-1997-02-28-19, *lov om folketrygd* § 14-9.
89 Swedish legislation: SFS (2010:110), *Socialförsäkringsbalken* 12:12.
90 Ibid., 12:5.
91 Ibid., 12:17.

This comparison of the Scandinavian countries establishes – as the most significant result – that the Danish father's quota of two weeks is small. The Danish small quota means that the parents can, to a wide extent, make their own arrangement. Consequently, it is built on an understanding of the question as private between the parents, rather than a matter of state coercion limiting the parents' freedom of choice. This was the argument for the abolition in 2002 of the previous two-week father's quota. In addition, the view was brought forward that the matter could be dealt with through the collective agreements on the labour market.[92] The Swedish legislation has the highest father's quota of 13 weeks compared to the ten weeks in Norway, but both countries operate with identical father and mother quotas in the name of equality. The Swedish legislation seems to be formally more equal than the Norwegian, because the Swedish legislation does not point at whether the mother should take her weeks before or after the birth of the child. The Swedish quota of parental leave in total is relatively high with 68½ weeks compared to 52 weeks in Denmark and 49 weeks in Norway, and it may as such be seen to provide legislation based on the strongest individualization of the family, since it allows relatively long periods of parental leave for both parents. In Norway a relatively large part of the weeks are also split between the parents. Nevertheless, one should keep in mind that this assessment is only based on the very narrow issues of the numbers of weeks to address this ideology. Other factors may complicate the assessment.

Comparing the three regimes of parental leave, the characteristics of the three countries, established in Sections 3 and 4, are again recognized. There is a Danish emphasis on the privacy of the parents' arrangement. By emphasizing the contractual aspect of the relationship, it is more excluded from the social engineering approach of public law. The Norwegian and Swedish social engineering approach is based on the understanding of the family as a societal institution. There is more emphasis on today's family model of equality. The Swedish long periods of parental leave, a more generous model, creates more individual freedom within the family than in Norway. Again, the ideology of the family as a societal institution is clearest in the Norwegian regime. Norway not only has the strongest biological principle, it also favours a notion of a family consisting of two parents. Norway thereby has a substantive understanding of the family which is closest to the breadwinner-housewife model that also depends on two parents. One may add that Norway during the 20th century in public law as in family law had a double strategy developing the modern equality approach, but has at the same time protected the breadwinner-housewife model through cash grants for childcare and the late development of daycare institutions.[93] In family law, the breadwinner-housewife model was continuously present in Norwegian marriage law throughout the 20th century. In line with this development, Norway has also developed the so-called housewife co-ownership which has not been the case for Denmark and Sweden which have retained separate ownership. The Norwegian house co-ownership entails that 'due consideration shall be given to the work of a spouse within the home' to determine the ownership of property, such as concerning the family home or ordinary household items used by the spouses.[94]

6. Family law, ideology and history

In this section, it is suggested how the differences within the duality of contract and civil status in Scandinavian family laws as explained in Sections 3-5 may be perceived in a historical perspective with a focus on the changes in sovereignty and territory understood as basic historical factors.

In contrast to Norway and Sweden the contractual element of family relations is strong in Denmark. It comes to represent the liberal understanding of the family in Scandinavia. An explanation for the Danish liberal ideology may be found in the lost war in 1864. State nationalism in Denmark has been described as

92 See T. Rostgaard et al., 'The reason for abolishing the earlier Danish father quota', in G.B. Eydal et al. (eds.), *Fatherhood in the Nordic Welfare states, Comparing care policies and practice* (2014), pp. 277-302, p. 285. A. Borchorst, 'The public-private split rearticulated: abolishment of the Danish daddy leave', in A.L. Ellingsæter et al. (eds.), *Politicising Parenthood in Scandinavia* (2006), pp. 101-120.

93 See Sejersted, supra note 10, pp. 417 et seq. A.L. Ellingsæter, 'The Norwegian childcare regime and its paradoxes', in A.L. Ellingsæter et al. (eds.), *Politicising Parenthood in Scandinavia* (2006), pp. 121-144.

94 Norwegian legislation: *Lov om ekteskap* § 31. See D. Bradley, *Family law and political culture* (1996), p. 189. One may also trace nuances in favour of the housewife in the Norwegian marriage comparing the traditional Nordic Marriage Acts from the beginning of the 20th century, see Melby et al., supra note 7, p. 184.

seriously weakened by its defeat in 1864, whereas the nationalism of the population was strengthened.[95] The national liberals and the elite had lost the war, and the peasant farmers were sceptical towards the state, but able to establish cultural, economic and, finally, political hegemony. Co-operative enterprises were established by farmers themselves being independent from the state.[96] In correlation to this, the Social Democrats as a political party were not as strong as in Norway and Sweden.[97] Thus, Danish history may serve as an explanation for the scepticism of the state developing substantive family law based on a perception of the family as a relation of civil status. Instead, from a contractual standpoint the autonomy of parents and spouses is favoured compared to Norway and Sweden.

Turning to Norway, one historical argument that may explain that a substantive vision of 'the good family' has been easy to track in Norwegian law is that the breadwinner-housewife model was the dominant ideology in the Scandinavian countries at the beginning of the 20th century, when Norway was the most progressive country in respect of child welfare policy.[98] Some 20 years before Denmark and Sweden in 1909 Norway granted mothers economic compensation during parental leave. In this period, gender roles were primarily thought of within the framework of complementarity, and the pioneering status of Norway may have had the effect that family policy also later emphasized the mother-child dyad at home.[99] This was the period of the dissolution of the Union between Norway and Sweden in 1905. It was not a point for Norway at that time to imitate the Swedish reforms, as, in the eyes of Norway, Sweden was associated with rigid traditionalism and arrogance. The Norwegians regarded themselves as better innovators of social policies than the Swedes.[100] The era of Social Democracy in Norway was initiated by a national history, where the progressive forces mobilized history from before the dependency of Denmark and Sweden. Norwegian modernity was thereby mixed with nationalism as a story of national liberation. Norway adopted its 'democratic' constitution when the country was liberated from Denmark in 1814 which may explain why Norway has the strongest Scandinavian constitutional tradition. Mandatory mediation as part of the democratic lifestyle and idealistic legislative style may be perceived as a reflection of the values embedded in the Norwegian Constitution, although the latter aspect has not been focused upon in this study.

Still, according to Anette Borchorst, political discourse over many subsequent decades strongly emphasized the role of women in the family, framing Norway as 'the country of housewives'.[101] Two explanations for the duration and continued presence of the Norwegian commitment to the nuclear family are given by Francis Sejersted in a comparison with Sweden. First, the Marxist criticism of the bourgeois family was introduced into Swedish Social Democratic discourse by Alva Myrdal, albeit in a watered-down version. The message was that children had to get out of the family. Second, women were actively mobilized as labour power outside the home during periods when there were general shortages of labour during World War II, and through the period of economic prosperity that followed; in other words, women also had to get out of the family. None of this happened in Norway.[102]

Finally, the characterization of Swedish family law is linked to history. The Swedish state-supported individual may be explained historically. In the post-1945 era, Sweden established itself as the uncontested leading country in social policy, and served as a point of reference for the other countries.[103] Sweden is the strongest industrial society and the progressive nation-building project was linked to modernity itself,

95 See O. Korsgaard, *The struggle for the people – five hundred years of Danish history in short* (2008) p. 57.
96 See U. Østergaard,'The Nation as Event: The dissolution of the Oldenburg Monarchy and Grundtvig's Nationalism', in J.A. Hall et al. (eds.), *Building the Nation: N.F.S. Grundtvig and Danish National Identity* (2015), pp. 110-133, pp. 126 et seq.
97 See Bradley, supra note 94, pp. 45 et seq.
98 The most significant legal requirements concerning illegitimate children were 'The Castberg Children's Act' from 1915.
99 See I.E. Haavet, 'Milk, Mothers and Marriage', in N.F. Christiansen & K. Petersen (eds.), *The Nordic Model of Welfare – A Historical Reappraisal* (2006), pp. 189-214, p. 212.
100 Ibid., p. 204.
101 See A. Borchorst, 'Women-friendly policy paradoxes? Childcare policies and gender equality visions in Scandinavia', in K. Melby et al. (eds.), *Gender Equality and Welfare Politics in Scandinavia: The Limits of Political Ambitions?* (2008), pp. 27-42, p. 34.
102 See Sejersted, supra note 10, p. 418.
103 K. Petersen, 'Constructing Nordic Welfare? Nordic Social Political Cooperation 1919-1955', in N.F. Christiansen & K. Petersen (eds.), *The Nordic Model of Welfare – A Historical Reappraisal* (2006), pp. 67-98, p. 71. Denmark is suggested as the leading Nordic country in the 1920s and 1930s in respect of social policy. The main reasons for this were Denmark's early economic modernization and the Danish Social Democrat and Minister K.K. Steincke's social reforms in the 1930s.

and to being modern and belonging to the avant-garde.[104] Technocracy as part of modernity, or 'the art of social engineering', became generalized in Swedish society as part of the Swedish modernity to a further extent than in Norway.[105] As pointed out by Thomas Etzemüller in his book on Alva and Gunnar Myrdal, in Sweden people speak quite unselfconsciously about 'the art of social engineering' by which they mean the idea that we can create the greatest degree of happiness in the 'the good society' through rational social planning.[106] Thus, the absence of the Danish scepticism towards the state explained by the war in 1864 and the Norwegian story of national liberation explained by Norway's liberation from Denmark in 1814 and Sweden in 1905, may serve as part of an explanation for the Swedish emphasis on civil status and the Swedish framing of the individual in substantive family law.

104 See Sejersted, supra note 10, p. 10 with further references.
105 See Sejersted, supra note 10, pp. 46 et seq.
106 See T. Etzemüller, *Alva and Gunnar Myrdal – Social Engineering in the Modern World* (2014), p. 16. See more specifically about the concept of social engineering in Chapter 1.