Is There One System of Family Law in the Nordic Countries?

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A. Introduction

The existence of a Scandinavian or Nordic legal system is fairly often assumed. The area of family law can serve as a good example for a discussion of the basis for this assumption.

Historically, since the late Middle Ages, Norway and Iceland were under the Danish King, members of a union with Denmark. Finland was a part of Sweden. The wars in connection with the dramatic European period when Napoleon was the emperor of France changed this situation. Finland became a part of Russia in 1809. The country preserved a specific independence within the Russian Empire, and Swedish law continued to be in force. Another change resulted when Sweden sought compensation for the loss of Finland, with Norway forming a union with Sweden in 1814. Norway also kept its own parliament and its own legislature. The Swedish-Norwegian union was dissolved in 1905. Finland became independent in 1917. Finally, Iceland had belonged to Norway before both countries became parts of the Danish-Norwegian realm. In 1874, the Icelandic parliament received legislative power and in 1944 Iceland became totally independent.

This historical background makes it possible to speak of both a west Nordic and an east Nordic legal tradition. However, around 1870 an ideological basis for Scandinavian co-operation was created, inspired by the older Nordic history dating back to the Viking Age. The animosity and periods of wars between Denmark-Norway and Sweden were forgotten. Co-operation was made possible by the similar cultural and societal conditions, as well as by the important, perhaps decisive fact that the Danish, Norwegian and Swedish languages can be used without translation. In the beginning of the 20th century law committees consisting of legal experts from each country undertook the task of jointly preparing a number of legislative propositions to present to national politicians and parliaments for decision making. After its independence in 1917, Finland quickly accepted the legislative results to

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date and began participating in future co-operations. Consequently, it seems more appropriate to speak of a Nordic, and not a Scandinavian, co-operation within legislative issues.

In some areas, the early co-operation resulted in almost identical pieces of legislation. The new marriage laws from the 1920s offer the best and only illustration within family law. This legislation truly did represent a Scandinavian legal system (which shortly afterwards became Nordic when Finland joined the group). Other similar examples can be found within the law of obligations, the best known being the Acts on Sales and on Contracts (introduced in Sweden in 1905 and 1914 respectively).

In the 1950s, a new round of Nordic co-operation took place with the aim of revising some of the older rules concerning marriage. This time, Nordic co-operation was also inspired by the existence, as of 1952, of the Nordic Council, an assembly of members from the national parliaments meeting once a year. However, the starting points were different. Politicians played a more active role as members of the national law committees, the joint Nordic meetings were shorter and the outcomes were meagre, at least as far as Nordic unity is concerned. A similar co-operation with respect to legislation concerning parents and children (adoption, paternity, non-marital children) gave these joint ideas an influence in some or all of the Nordic countries, but the similarity of the legal solutions can by no means be characterized as a Nordic legal system. However, the very friendly attitudes to Nordic co-operation prevailed not only in the dinner speeches.

Around 1970 the situation changed. One important factor, at least in Sweden, was the political desire to influence legislation at an earlier stage and more decisively than previously. Such desires were exercised through committee directives, as well as by the creation of law committees of which the majority of members were politicians, although still supported by legal experts.

In Sweden, a decline of the marriage rate and an increase in unmarried cohabitation were noted at the end of the 1960s. Since then, an increase in the divorce rate has implied a lower family stability than had previously been the case in the 20th century. This trend is compounded by the fact that the separation rate for cohabitees is much higher than the divorce rate among married couples. This lower stability in core families has in its turn led to an increase in one-parent families consisting of a parent (mostly the mother) and a child, and also of reconstituted families in which the new partner of the parent joins the one-parent family.

These changes in family patterns began in Sweden and Denmark, but very soon the same tendencies were visible in all of the Nordic countries, not to mention the rest of Europe, although there are some well–known differences, particularly between northern European and southern European countries.

Brand new legal issues also arose due to new methods introduced by medical science, such as DNA tests for the establishment of paternity, as well as artificial insemination and egg donation as means for procreation. Independent changes in societal attitudes have also led to new legal considerations, particularly with respect to homosexual relationships.

The above mentioned older Nordic efforts to find joint solutions within family law did not survive the societal changes and the new interest by national politicians to participate earlier in the legislative procedure. Sweden chose its own path in 1969 through the famous committee-directives, introducing a new ideology concerning divorce and unmarried cohabitation. This Swedish attitude caused an irritation in the other countries. Co-operation continued, but it has mostly been directed towards an exchange of information and views prior to the introduction of new legislation in a country. National legislative activities, however, have been intense in order to address in one manner or another the changes occurring within family patterns and values.

The remainder of this article will be devoted to some comparative observations concerning, first, unmarried cohabitation and homosexual relationships; secondly, several legal issues concerning parents and children; and thirdly, marriage. The main focus will be to gauge the extent to which Nordic solutions have been either achieved, concerning new legal issues, or preserved regarding the laws on marriage, laws which truly did represent a unified legal system when they were introduced 80 years ago.

B. Cohabitation and Homosexual Relationships

When Sweden chose its own path with the committee directives in 1969, the choice was based on the assumption that social changes would first come to one country and that it therefore was necessary to adjust the laws of that country as quickly as possible. It was also assumed that the first reaction to these social changes could serve as an example to the other Nordic countries. In reality, this perceived need of an independent Swedish action had no strong basis, as the other countries soon faced social changes similar to those that had begun in Sweden and also in Denmark.

A question that can be raised is whether the Swedish 'theory of the first example' was successful? The Swedish legislation concerning cohabitation was not copied or followed in the other Nordic countries. However, the Danish law regarding registered partnerships for homosexual couples later on served as a model for the other countries.

First, in 1973 a Swedish Act was introduced concerning the right of a cohabitee to take over the joint dwelling from the other party at the termination of the relationship, presupposing that a needs-test, particularly with respect to the parental responsibility for the children, made such an outcome reasonable. The Act was very modest in the sense that it did not introduce any right to divide economic values. The ideology of a 'neutrality' to marriage and cohabitation was at the same time accepted by *Riksdagen* (the Swedish parliament) as a general basis for the legislation. 'Neutrality' as a general idea meant that cohabitation should be treated as an acceptable form of living together for man and a woman. Within private law,

however, special rules should be introduced only with respect to social needs, and particularly with respect to the need to give the financially weaker party economic protection. The aim within private law should not be to place cohabitation on an equal footing with marriage.

A 'pure' right to take over the joint residence can also be invoked in the other countries according to rules with respect to the tenancy of housing. Norway also took a small step further in 1991 by introducing a special Act on the right to dwelling and household goods for persons 'living together in one household'. The household here as a concept can include not only the cohabitees, but also siblings, friends, homosexual partners, etc. A condition for the application of the act is that the parties have lived together for at least two years or have a mutual child. Upon the termination of the cohabitation, the non-owning party can be given the right to take over the dwelling and household goods in the event 'special reasons' motivate such a taking over. However, the entitled party has to pay for the economic value of the property, thus it is not a matter of giving one party economic compensation from the other.

The more far-reaching ideological starting points of Swedish neutrality to unmarried cohabitation led to a more decisive legislative step in form of the Cohabitees Joint Homes Act of 1987, applicable when an unmarried man and an unmarried woman cohabit under 'marriage-like conditions'. According to the basic principle of this act, the economic value of the residence and/or of household goods, acquired by one cohabitee for the joint use of both, can be divided equally between the parties upon their separation at the request of the non-owner. After the death of one cohabitee, only the surviving partner, and not the heirs of the deceased, can request an application of the Act.

The Swedish Cohabitees Joint Homes Act did not raise any enthusiasm in the other Nordic countries and has no direct counterparts there. The reason was mainly the desire to avoid special legislation with respect to the economic consequences of cohabitation. Instead, solutions for achieving fair outcomes upon the separation of two cohabitees have been offered in the case law of the other countries, perhaps as efficiently as with the Swedish Act. In Norway, case law has implied a co-ownership of the family home of spouses and cohabitees, with a view to protecting housewives without incomes of their own. The Danish Supreme Court has awarded financial compensation in the form of a lump sum to the financially weaker party, normally the woman, whose work in the home has indirectly contributed to improving the financial status of the man. The Court has applied the principle of unjust enrichment with respect to cases of unmarried cohabitation. Such a solution has also been used in Norwegian case law.

Differing from the situation with respect to the legislation concerning cohabitation, the acts regarding a registered partnership can be seen as a 'successful' example of one country going first, followed by the others. That is what happened when Norway (1993), Sweden (1994), Iceland (1996) and Finland (2001) more or less copied the Danish model found in the Act from 1989. A homosexual couple, by registration through a civil ceremony of partnership, can be governed by all of the

rules concerning marriage. The terms 'marriage' or 'spouses' are not used in the legislation, but the same rules as for spouses are made applicable in all legal areas. This includes the economic consequences of marriage as well as the rules with respect to impediments to marriage and to divorce, and also inheritance law, tax law, social welfare law, etc.

However, registered partners were not allowed to adopt a child or to have joint custody of a child. In this last mentioned respect, Danish and Icelandic legislation has been amended. A partner's adoption of the other partner's child has been made possible where it corresponds to the general conditions for adoption. A proposal to the same effect has been presented by a governmental committee in Sweden in 2001.[1]

How can it be explained that the Swedish Cohabitees Joint Homes Act was not introduced in any other Nordic country, but the Danish act regarding registered partnerships successfully served as a model for the other countries? The success of the latter is certainly dependent upon the fact that the legislation primarily has a symbolic function. Political majorities in the national parliaments were eager to meet the demands that homosexual couples should have the opportunity to obtain the same legal status as spouses, although the concepts or terms of marriage and spouses were not used.

With respect to social and economic needs, it probably would have been sufficient to treat a homosexual couple in the same manner as a cohabiting man and woman. As a matter of fact, that had already happened in Sweden with the enactment of the Homosexual Cohabitees Act of 1987, making many of the rules governing cohabiting men and women in marriage-like conditions applicable as well to homosexual cohabitees. Thus, the right to share in the economic value of the dwelling and household goods, acquired by one party for their joint use, is the same. The Act of 1987 is still applicable to cohabiting homosexual partners who have not registered their partnership. The fact that the Act with respect to registered partnership was introduced only seven years later indicates how rapidly the political pressure built for a growing equalization of heterosexual and homosexual relationships.

C. The Relationship Between Parents and Children

Nowadays, approximately an equal number of children in the Nordic countries are born to married and unmarried mothers respectively. The unmarried mother is

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[1] The Swedish Committee Report ('Statens offentliga utredningar, SOU, 2001:10') also contained two other proposals: first, the right for partners to jointly adopt a child, and secondly, the right for a lesbian woman to be inseminated with a procedure for declaring the registered partner consenting to the insemination, also the mother! (The outcome of these controversial proposals seems uncertain. The committee's experts on children or on adoption have made reservations.)

normally cohabiting with the father at time of the birth of the child. A leading principle in all of the countries is that the *paternity* of the child, where possible, must be established. In most cases, particularly those of unmarried cohabitation, this is easily done with a written confirmation by the man that he is the father. The declaration has to be confirmed also by the mother and its veracity accepted by the social welfare board. The rules differ slightly between the Nordic countries but the principles are similar.

Icelandic law, however, contains a unique solution where the mother, according to the National register of the population or other unequivocal evidence, is cohabiting with a man at the time of the birth. If the mother alleges that the man is the father, the paternity is established in accordance with a presumption for his fatherhood. The same presumption has also been made applicable where the cohabitation began after the birth of the child but prior to the establishment of the paternity of another man.

If paternity is not established through confirmation, it can be decided upon in a court ruling. Worded in different ways in the different Nordic laws, paternity can be established if there is a clear probability of the child's conception during sexual intercourse between the mother and the man. During the 1990s, DNA tests were used so commonly that the paternity issue could be resolved without having the evidentiary difficulty of proving intercourse, and taking into account the complication that the mother might also have had intercourse with more than one man at the time of the conception of the child. On the whole, the state of the law with respect to establishing paternity, or vacating an older decision, appears to express very similar ideas of legal policy, with some differences in the technicalities and no firm co-ordination.

Neither did the new possibilities for artificial procreation create any organized co-operation prior to the adoption of legislation in the different Nordic countries. The legal considerations have been both similar and different. A joint solution according to the statutory rules in Denmark, Norway and Sweden, is that insemination is obtainable only for women who are married or cohabiting with a man under marriage-like conditions, presupposing also that the man has given his consent to the insemination. When these conditions are fulfilled, the rules with respect to paternity are construed to make the husband or cohabitee the legal father of the child instead of the sperm donor. A difference in attitude arises concerning the ability of the child to receive information as to the biological father. In Denmark and Norway, the anonymity of the donor is guaranteed. In Sweden, on the other hand, the name of the donor is kept for future access by the social welfare board and the child is entitled, upon reaching a certain age, to receive information as to the identity of the father. Egg donation, the implant in a woman's womb of the egg from another women, is today completely forbidden in Sweden and Norway, but accepted in Denmark.

The most important feature with respect to the development of the rules concerning *parental responsibility* in the last 15 years is no doubt the growing acceptance of joint parental responsibility for divorced parents as well as for

unmarried parents regardless of whether they live together. At the same time, it is clear that the sole parental responsibility of one parent alone can be necessary or desirable depending upon the circumstances.

With respect to divorce, the promotion of joint parental responsibility has been the strongest in Finland, Norway and Sweden. As a main rule, joint parental responsibility for spouses is automatically preserved after a divorce (or separation) if neither of the parents contests the issue. In Denmark and Iceland, on the other hand, it must always be determined upon divorce (or separation) whether joint parental responsibility shall be awarded or whether parental responsibility shall be given to one parent alone. Where the child is born to an unmarried mother, she becomes the sole legal custodian in all of the Nordic countries. However, in Iceland, cohabiting, unmarried parents receive joint parental responsibility automatically as soon as the paternity is legally established. (Compare above the presumption for paternity.) In the other countries, unmarried parents desiring to have parental responsibility jointly can easily obtain it.

As far as decision making with respect to parental responsibility is concerned, there is a growing trend to allow the parents to negotiate agreements with only weak control – or no control at all – exercised by a court or a municipal board of social welfare. This direction appears to be similar in all of the Nordic countries, with the technicalities differing.

In Norway and Sweden, joint parental responsibility can be combined with a decision as to whether the child shall live with one or the other of the parents (in English law this is called 'a permanent residence order'). In Sweden (but not in Norway), the decision also can prescribe that the child shall live with each parent, for example, two weeks at a time. In Denmark, such a division of the contents of the custody decision is not currently possible.

The rules as to the *maintenance* of children differ even more. Maintenance allowances are normally paid by the parent not living together with the child. Although parents in all of the Nordic countries are jointly responsible for taking care of the economic needs of their children, the methods for the calculation of maintenance allowances differ greatly. A practical reason for the differences, as well as the considerable technical complication, is the existence of 'maintenance advances', or 'maintenance support' that can exceed the amount of the maintenance allowance paid by the state. Where maintenance advance or support has been paid out to the child, the state takes over the right to the maintenance allowance as a recourse claim against the parent obliged to pay. Maintenance advance as a social benefit in the Scandinavian countries has a tradition dating back to the 1930s.

Denmark appears to be most strongly influenced by the existence of maintenance advance with respect to the calculation of maintenance allowances. There, the maintenance allowance to a child is normally fixed to the same amount as the possible advance, neither less nor more. The income of the parent, with whom the child is living, is not taken into consideration at all. In Norway, the starting point is that the duty to pay maintenance allowances shall be calculated as a percentage of the income of the payer, the percentage depending upon the number of children.

However, if the parent having physical custody has a very high income, his or her resources are also taken into account, potentially decreasing the amount otherwise calculated. More recently, the tendency has been to take into account the income of the custodial parent in more and more cases.

The calculation of maintenance allowance for children in Sweden and Finland is more clearly bound to the starting point that both parents are obliged to contribute to the needs of an individual child with respect to income and other economic ability. On this basis, a semi-official, almost mathematical model was developed in Sweden in 1978. The calculations are sometimes complicated and/or burdensome to apply. They presuppose comprehensive information with respect to the incomes, taxes, basic living costs and existing family situations for both of the parents as well as for the child itself. These rules are still in force according to the Code on Parents and Children, but for most parents living separately, they lost practical importance in 1996 by a new Act on 'maintenance support', that was introduced instead of the older 'maintenance advance'. According to this Act, the recourse claim from the state against the parent responsible for paying a maintenance allowance is calculated only as a percentage of the income of the payer. This solution has undoubtedly led to a simplified system but also to an unacceptable tension between the rules on repayments of maintenance support and the general principles in the Code on Parents and Children, and even to an unfairness against payers of maintenance in specific situations.

To cut a long story short: there is no Nordic legal system with respect to the relationship between children and parents. The leading ideas on parental responsibility are similar, but this is true for other European countries as well.

D. Marriage Law

I. Introduction

As emphasized above, the Nordic marriage laws from the 1920s truly represented a Nordic legal system. Is it possible today to speak of the same unity 80 years later?

The two most important subjects in marriage law concern the conditions for divorce and the economic consequences of a marriage and its dissolution. In the joint Nordic system, spouses could from the beginning obtain a *divorce* according to principles that were very liberal for their time. The *economic relations* of the spouses were regulated in a way that combined the individual freedom of both spouses during the marriage with an equal sharing of property at the dissolution of the marriage. The main purpose was to strengthen the position of the wife, normally a 'housewife'.

New acts with respect to marriage were introduced in Sweden in 1987, in Norway in 1991 and in Iceland in 1993. These statutes did not enact radical changes as compared to the older laws, but some important alterations have taken place,

particularly in Sweden and Norway. Although the older framework has been kept in Denmark and Finland, some changes have also been made in these countries, to a greater degree in Finland than in Denmark. The Danish legislation on marriage has kept its original character more than the laws of the other countries. Let us now consider what has happened with respect to the conditions for divorce and the economic consequences of a marriage.

II. Conditions for Divorce

A system comprising of a court order for the separation of the spouses, followed by a period of living apart as a condition for divorce, was introduced as a joint Nordic model in the 1910s. As a matter of fact, the model was based on the Norwegian legislation of 1909. It is still valid in the west Nordic countries, but not in Sweden and Finland.

In all of the Nordic countries, the older reference to a permanent breakdown of the marriage as a condition for divorce has been abolished. The wish of one spouse to terminate the marriage is treated as a sufficient ground.

The necessary time during which spouses in Denmark, Iceland and Norway have to live apart, between the order of separation and the application for divorce, differs somewhat. The period in Norway is always one year. The one-year period is also applicable in Denmark and Iceland, where only one of the spouses desires the divorce. Where both spouses have such a desire, the period has been shortened to six months.

In Sweden and Finland, a court order as to separation as the first step towards a divorce was abandoned through legislation in 1974 and 1988, respectively. Instead, a period of reconsideration was introduced: six months must elapse between an application for divorce and the issuance of a divorce decree by the court. In Finland, the reconsideration period is always applicable. In Sweden, it is applied only under certain conditions: first, where one of the spouses lives together with and has the parental responsibility for a child of his or her own under the age of 16, and secondly, where only one of the spouses desires the divorce. Consequently, where there are no children and both spouses want the divorce, a period of reconsideration is not compulsory. However, the spouses can then also jointly petition the court for an order making such a period applicable

The six-month period commences upon the day the application for divorce is filed with the court. The spouses can choose whether they want to live together or not. After the expiration of the six-month period, each spouse is entitled to request a court decree on divorce. This final application must been done within one year from the initial application for divorce. Otherwise, the first application is no longer valid, and the spouse wishing to raise the divorce issue once again has to start from scratch.

In Denmark, Iceland and Norway, an administrative procedure for separation and divorce, a procedure that has a long historical tradition, is a legally valid alternative to a court ruling. In Denmark and Iceland, this administrative alternative presupposes that the spouses have reached agreement as to the 'ancillary matters'

(parental responsibility, alimony, etc.). The rules in Norway are somewhat more liberal as far as an 'administrative' divorce or separation is concerned. In court cases, however, a divorce (or separation) can in all the countries be obtained even where the ancillary matters have not been resolved in advance.

Divorce as such is consequently rather easy to obtain. In Sweden, there normally is only a written procedure at court with no oral hearings. If an agreement between the spouses concerning ancillary matters has not been reached at the time of the divorce decree, they must be resolved afterwards through an agreement or a court ruling. On the other hand, there is fairly often a need for interim orders during the divorce procedure.

On the surface, similarities appear between the divorce procedures in Finland and Sweden and the principles in the English Family Law Act of 1996. A period of reconsideration also plays a role according to the English statute. However, the entire English procedure is combined with many additional efforts to save existing marriages. Therefore, the English system seems to differ greatly from the east Nordic model. Also notable is the fact that the English act has not yet been put into force, and perhaps never will be.

The above discussion illustrates the fact that the conditions for divorce have drifted apart into one west Nordic and one east Nordic model. However, the two models are based on similar legal policies. On the one hand, a spouse is given the unilateral right to terminate the marriage. On the other hand, the rules aim at avoiding, if possible, hasty divorces in the interest of either the children or the spouse not desiring the divorce, or even for the sake of family stability in general. (Compare, however, the national variations.)

A controversial issue has been whether the period of separation, based on the court decree, ought to be retained. When separation based on a court order was abolished in Sweden and Finland, it was assumed that the older claim might in fact be counterproductive if one wanted to promote family stability. The period of reconsideration was seen as a less decisive step towards divorce than a court decree on separation. It was also noted that a separation must be combined with solutions concerning the ancillary matters with respect to the children and the economic relations of the spouses in a way that indicates the end of the marriage, with only one condition: the spouses are not yet free to remarry.

However, the legislators in Denmark, Iceland and Norway were not willing to give up the old argument that a period of separation offers the best ground for evaluations by the spouses as to whether they preferred to terminate the marriage or continue to remain together. It has also been maintained that a period of consideration has in fact already taken place prior to the application for a decree on separation. According to these views, the resolutions of ancillary matters in connection with the separation decree could not be given any weight as an argument against the system, as the period of reconsideration was often combined with interim orders on the same issues. There has also been the suspicion that the expiration of the reconsideration period of six months could cause one spouse to 'buy out the divorce in time' prior to the application for divorce becoming invalid after a further period of six months.

It is worth mentioning also that the marriage laws in all of the Nordic countries contain at least one more ground for divorce in addition to what has been already been mentioned in this article. If the spouses, due to the breakdown of their marriage, have lived apart for at least two years, each spouse is entitled to a divorce. This ground for divorce is seldom applied but it is reminiscent of the condition for divorce based on factual separation, which plays an important role in many European countries.

III. The Economic Consequences of Marriage and Divorce

Here the Nordic system of spouses' property as it was created 80 years ago will be examined, and an assessment made of the changes that have occurred within the concepts of divisible property and with respect to the possibilities to adjust the equal sharing of divisible property.

1. The Nordic System

The central pillars of the Nordic system with respect to spousal property still stand where they were erected more than 80 years ago. As a matter of principle, each spouse owns his or her own property, and each has his or her own debts. At the dissolution of the marriage, each spouse has the right to share equally in the net economic value of both spouses' property.

These matrimonial principles do not prevent spouses from becoming co-owners of property by joint acquisition.

It is also true that the case law in Sweden and Finland has shown a willingness to accept the co-ownership of spouses (and cohabitees) where one has purchased a dwelling or household goods in his/her name alone but with the help of an economic contribution by the other. Such a form of co-ownership, however, is not given full effect to the advantage of the 'hidden' owner against the interest of the creditors of the spouse openly purchasing the property. The case law in Sweden, Finland (and Denmark as well) is thereby construed to fit within the general principles of the statutory law.

The Norwegian Marriage Act of 1991 has gone a step further. It contains a special rule with respect to the co-ownership of the spouses despite the property being acquired by one spouse alone. According to that rule, the ownership of property that has served for the personal use of both spouses, such as a joint dwelling and/or household goods, must be assessed with respect to the work done by the spouse in the home. This new rule goes back to the development in the case law for protecting the interests of the housewife when the dwelling and household goods clearly had been purchased only by the husband. Work in the home as such is seen as a ground for co-ownership, deviating from the original principles in the Nordic laws according to which work in the home was protected, not through a co-ownership of the property acquired by one spouse, but through the right to share divisible property upon divorce. The difference is that a co-ownership of property is, in Norwegian law,

as a matter of principle protected against the creditors of the other spouse. The right to share divisible property in the future does not give such a protection.

The joint ownership of the spouses, however, only has decisive importance when the dwelling and household goods are non-divisible according to the marital rules. If, on the other hand, the same property is divisible and each spouse has property of a value exceeding his or her debts, the issue of ownership is of no interest. There will in any case be an equal sharing of the value. An important fact, true for most other European countries as well, must be added here. The right to take over the dwelling at divorce is independent of the ownership. Such a right depends primarily on social needs, including as a major factor the interests of the children.

Although the new Norwegian rule is a deviation from the original principles of the Nordic system, the main rule is the same as before: the right to share the value of divisible property at the dissolution of the marriage does not as such imply any ownership by one spouse in the property belonging to the other. The Nordic system differs in this respect from the marital property systems in many European countries, where marital property means co-ownership already during the marriage. Another unusual principle in the Nordic model is that all property, including property owned prior to the marriage or acquired as a gift or inheritance, is included in the equal sharing of values at the termination of the marriage. (Also in this respect, however, another solution has been introduced in Norwegian law, see *post*.) The spouses are free, however, to decrease the divisible property through a marital property contract that can be executed before or during the marriage.

Whether property is divisible property within the spouses' internal relationship lacks importance with respect to creditors. It is a common misunderstanding among lay people that the property of the wife can be protected against the husband's creditors if its character is changed by a marital property contract from divisible property to non-divisible property. Irrespective of its character, the creditor of one spouse, as a general rule, cannot reach property owned by the other spouse. However, upon execution, rules as to the burden of proof with respect to ownership play a supplementary role in diminishing the ability of one spouse to successfully claim that he/she is the owner of property that in fact belongs to the debtor.

It is not easy to find the perfect terminology for describing the Nordic model for spouses' property in a foreign language. As a matter of fact, even the internal Nordic terminology is somewhat misleading, at least in Denmark and Norway where such property that shall be divided in the future is called '*fælleseje*' (Danish spelling), not too different from the English translation 'community property'. But its counterpart, '*særeje*', if interpreted as 'non-community property', can cause the misleading understanding of 'separately owned' as opposed to 'non- divisible', which is the true meaning. The alternative terms of 'marital' and 'separate property' can also be misleading as they are often used to describe systems in which marital property implies co-ownership.

In order to avoid misunderstanding in this respect, the Nordic system is sometimes described as built upon a 'deferred community of property'. The addition of the word 'deferred' might be a small improvement, but the terminology is still

unsatisfactory. With respect to the existing rules, it is somewhat misleading to speak of a community even with respect to the termination of the marriage. What then happens is that the value of separately owned property is divided between the spouses. Although property can be transferred from one spouse to another, the wealthier spouse, obliged to compensate for the economic difference to the other spouse, can do so through the payment of monies. Therefore, even the idea of a 'deferred community' has a rather weak basis.

This article will now consider 'divisible' or 'non-divisible' property. The basic principles regulating the property of spouses have been supplemented by a significant number of special rules to create a working machinery. These issues will not be discussed here. However, many rules in 'the machinery' have drifted apart and created a varying Nordic pattern. Only a few principles, which are connected with the structure of the Nordic system, will be dealt with below.

2. What Property and Values are Divisible?

As has already been indicated above, according to the main rules, all of the belongings of both of the spouses are considered divisible property, including property owned before the marriage or acquired by gift or inheritance from a third party. Divisible property can be transformed into non-divisible property through a marital property contract by the spouses or through a third party condition with respect to a gift or inheritance. However, there are also some types of property or rights that, due to their special character, might be excluded from the division. The value of an author's manuscript, not yet the object of a publishing contract, is named as an example with reference to the exclusive personal right of the author to decide whether to publish the manuscript. Other rights or property can also be of a personal type that should not be included in a division upon a divorce. Compensation to one spouse for pain and suffering resulting from an accident is another example (although the Nordic solutions differ a bit here). The value of a spouse's pension rights can be discussed from similar starting points, today offering an important subject for legal policy considerations. The state of the law concerning the treatment of pension rights and related insurance benefits differs to some degree between the Nordic countries. The legislator has not yet in any of the countries succeeded – or tried – in treating all possible benefits in a coherent manner, neither in direct connection with the division of property in general or through an independent set of rules.

Within the Nordic laws there is only one system with respect to matrimonial property. This system, the 'legal regime', can be changed by the spouses through a marital property contract. Such an agreement must fulfil certain criteria concerning form and registration, not further discussed here (but which to some degree differ). A marital property contract can be executed before or during the marriage. The spouses are free to change an older agreement without restrictions. Such a freedom is made possible as the distinction between divisible and non-divisible property has nothing to do with ownership or responsibility for debts. The position of the creditors, in other words, is not affected.

Nevertheless, there are limits for the conditions prescribed by marital property agreements. In all of the Nordic countries, the spouses can transform special belongings or all of the property of one spouse from divisible to non-divisible property upon divorce or the death of a spouse. The transformation can also refer to property acquired before a certain point of time, normally the wedding. At the same time, the conditions must meet the general requirement, which in Danish law has been called the 'specification'. It implies that a condition that makes property non-divisible will be deemed invalid if the owner spouse is given the freedom later to influence that which has been determined to be non-divisible property. Consequently, one spouse's continuous ownership of shares or of monies in a bank account cannot be made non-divisible. This same request seems to be upheld in all of the countries with the exception of Norway.[2]

Swedish law scarcely allows for any extensions of that which is stated above. Thus, it is probably not possible for two spouses to decide that property will be non-divisible property in the event of a divorce but divisible property if the marriage is dissolved by the death of one spouse. Such a condition is valid in all of the other countries: in Denmark and Norway as a result of statutory changes to the original system; in Finland through a decision last year by its Supreme Court. Danish and Norwegian legislators have given spouses considerably greater freedom to construe the contents of marital property agreements. Different combinations have been made possible. It can be prescribed that all property shall be non-divisible upon divorce but that only the property of the surviving spouse shall be non-divisible if the marriage is terminated by death of one spouse. Such a condition allows the surviving spouse to keep the entire value of his or her own property and at the same time receive one-half of the value of the property of the deceased. Other conditions are also possible in Denmark and Norway, perhaps also in Finland, but will not be further discussed here.

The argument for the traditionally restrictive Swedish attitude has mainly been the reference to the presumed advantage of simple and clear rules that can be understood by everyone. The arguments were again repeated in the preparatory work for the Marriage Code of 1987. The difference between Sweden, on the one side, and Denmark, Norway and Finland, on the other, is worth observing with respect to how marital property systems can be influenced by the spouses' own wishes.

3. Adjustment at Divorce in the Equal Division of all Property

A majority of spouses do not enter into any marital property contract. Thus, the division of property is exclusively dependent upon the rules governing the division of

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[2] When the principle of specification is not upheld in Norwegian law, it is in any case possible to avoid a final outcome that is not acceptable. If the owner of a bank account, that has been made non-divisible without restrictions, increases its value by using divisible property, the other spouse can claim compensation in connection with the division of property upon the dissolution of the marriage.

property upon divorce or after the death of one spouse. The starting point is that the rules with respect to the equal division of all the net property of both spouses are applicable in both of these situations. Where a marriage is dissolved by the death of a spouse, the final outcome depends upon the combined application of the matrimonial property system and the inheritance rights after the death. The following remarks will be directed only with respect to divorce.

A further piece of information, of interest as far as the principles are concerned, is that spouses in all of the Nordic countries are free to effect a division of property as they wish, presupposing that the agreement is not to the detriment of the interests of their creditors in a way that corresponds to a gift. As a matter of principle, it is also worth noting the difference between a marital property contract, drawing up the boundary between divisible and non-divisible property, and the later agreement as to the division of the property with respect to general principles and the contents of a marital property contract.

In the absence of a marital property agreement, the economic value of all of the property, upon divorce, shall be equally divided between the spouses. However, the debts of each spouse first must be deducted from the value of the property belonging to the same spouse (but never from the property of the other spouse). An equal division of the economic net value can in certain situations be unreasonable with respect to a wealthy spouse after a short marriage. The situation was different 80 years ago when the aim of the system was to give housewives a portion of the property of the husband upon the dissolution of the marriage, which normally took place with the death of a spouse after a long marriage.

In order to avoid unreasonable outcomes from the general principles, Nordic legislators have introduced rules making it possible to adjust the equal division. Danish law contains the most restrictive rule for such an adjustment. It is based on the natural idea that a spouse should be entitled to exclude, from the equal division, property owned already prior to the marriage or acquired as a gift or inheritance from a third party. However, the possibility for such an adjustment presupposes that the property of the mentioned type constitutes the 'most substantial part' of the total property of the spouses, and that an equal division would be 'obviously unreasonable'. Without discussing the details, it can be maintained that the rule in the Icelandic Marriage Law of 1993 has similarities with the Danish solution but that an adjustment can be somewhat more easily obtained.

The Swedish Marriage Code of 1987 contains the possibility for an adjustment of the equal division not based on the difference between property owned before and acquired during the marriage. Instead, above all else, it is a short marriage as such that can form the basis for the conclusion that the outcome would be 'unreasonable'. The idea underlying the adjustment is that the right to a division of *all* the property of both spouses should occur incrementally during the marriage. When a marriage has lasted for five years, not a very long period of time, it shall no longer be considered a short marriage according to the preparatory work for the Swedish Marriage Code.

In the Finnish Marriage Act, a similar rule was introduced in 1987 for the

avoidance of an 'unreasonable result'. As with the Danish law, the Finnish rule also stresses the difference between property owned before or acquired during the marriage. A striking difference with the Swedish rule is that an adjustment in Sweden can take place only to the benefit of the spouse owning the property of the highest value. That spouse can, with the help of an adjustment, avoid handing over property/paying monies to the other spouse. In Finland, the spouse who has the more limited belongings can also in appropriate cases be given the advantage of an adjustment.

The Norwegian Marriage Act of 1991 contains a more decisive step. Upon the division of property at divorce, each spouse is always given the right to keep such property outside of the division that 'clearly can be traced back' to property owned before the marriage, or to property acquired through gift or inheritance. Although the Norwegian rule is said to be a rule as to the adjustment of the equal division of all of the property of the spouses, the outcome is very much the same as the results of property divisions in systems found in France, Belgium, Italy and Spain. There, property owned prior to the marriage or acquired through gift or by inheritance falls outside of the 'community of property' already according to the main rules.[3] The perspective in Norway has been reversed, but the basic structure of the rules is the same.

It might be difficult for the reader of this sweeping survey to appreciate the different issues concerning spouses' property in the Nordic countries. The point the author wishes to illustrate is that the rather numerous rules, similar when the Nordic system was introduced eighty years ago, have drifted apart in different respects. Particularly, the last mentioned step taken in the Norwegian law excluding from the equal sharing property owned before the marriage or received through gift or inheritance, is important as a matter of principle. Without being able to more fully develop the ideas in this paper, it is my opinion that the Swedish rule for adjustment does not function very well, and that there is a need for a reassessment of the legal construction of the rules. This is also certainly true for Danish law.

E. Final Remarks

That which clearly could be seen as a legal system governing the law of marriage when introduced in the Nordic countries in the 1920s, might today be better characterized as a model. There are too many differences for it to be natural to speak of a joint *system* of rules. However, a model exists on the basis of similar ideas and the preservation of some of the central 'pillars' in the construction.

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[3] Compare A. Agell, 'The Division of Property upon Divorce from a European Perspective' in (Pousson-Petit (ed.)) *Liber Amirocum Marie-Thérèse Meulders-Klein*, 1998, at pp. 1–20.

With respect to divorce, there is the right of a spouse to terminate the marriage without referring to a specific ground and with limited restrictions in order to prevent hasty divorces.

The freedom to regulate the ancillary matters to a divorce through agreements and without formal control, could perhaps also be added here as a characteristic feature of the Nordic model.

With respect to the economic relations of the spouses, the central 'pillars' still characterize the model: the independent ownership (with some exceptions in Norway) and the independent responsibility of each spouse during the marriage, but the equal sharing of divisible property upon the dissolution of the marriage.

This paper has also shown that there has been, within the entire area of family law, a permanent exchange of ideas and an influence across the borders of the Nordic countries. However, that which could be called a Nordic legal system does not either exist in this broader area. The Acts concerning registered partnerships happen to be an exception, where Denmark successfully created a 'system' which has been transformed to the other Nordic countries and has been able to fulfil purposes of a strong symbolic nature.

A couple of years ago, the ministers of justice within the co-operation of the Nordic Council initiated an investigation, currently being conducted, with respect to the similarities and dissimilarities of family law within the Nordic countries. The aim is to create the basis for an assessment as to what degree a better harmonization of family law would be possible. In marriage law, one could more appropriately discuss a re-harmonization. An increased unity within the Scandinavian area might have value, both for individuals and for families moving from country to country, for the quality of the legislation in itself, and for the possibility of the Nordic countries jointly speaking to the wider international community. Whether such ideas are realistic depends exclusively upon the political willingness in the different countries to consider Nordic unity a value in itself.

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