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Understanding Family Law

Eva Ryrstedt

1. Introduction

The contemporary notion of how a researcher works, at least to some extent, is that of an individual participating in a research team. However, the research team may be construed in many different ways, depending on the uniting factor for the group. In the Norma Research Programme, the unifying factor is the theory of law as normative patterns in a normative field, in interaction with a functional approach to the law. Thus, a social science approach to the law is shared by the researchers. Many of us have also worked with e.g. a comparative approach to the law, which is a quite natural development when using normative patterns to understand the complexity of the legislation and how it originates from society. The multi-disciplinary legal science framework that is a part of the research done within the Norma Research Programme constituted a basis for the program, even when the group was originally formed back in 1996.

During both my time as a doctoral candidate and as a senior researcher, I have been part of this research group. Already in my doctoral thesis on division and joint dwelling,[1] I worked with the theory of normative patterns – as I will describe in the next section. Always having willing colleagues to engage in discussion has also played an important role in my development as a researcher. The fact that the members of the research program work with

[1] Ryrstedt, E., *Bodelning och Bostad; Ekonomisk självständighet eller gemenskap*, Juristförlaget, Lund 1998.

different areas in the law, but are united by their approach to the law, has broadened my legal vision.

In addition, I have also established extensive and long-term international contacts during the last ten years, which have led to co-authoring of papers, ongoing discussions with colleagues abroad, participation in international conferences, and different types of research collaboration – such as in the project 'The nexus of law and biology for emerging technologies', which was funded by the Australian Research Council (Linkage-International). I have also published papers in several international journals. As part of this research collaboration, I have also visited or held research seminars in many universities. An obvious interest in this context is the EU perspective; in terms of national family law, this primarily means a focus on harmonisation. The Commission on European Family Law (CEFL) has worked for several years with issues regarding harmonisation and has drafted principles in two different books.[2] However, it can be argued that far-reaching attempts to harmonise may be detrimental, owing to different religious views and an obvious difference in the conception of family and responsibility in families, but also because of economic differences among European countries.[3]

For my part, the social science approach has led to an interest in finding ways other than more traditional legal ones, to solve different research issues. I have often started out with the legal-dogmatic method, but also, sometimes implicitly, worked with e.g. the theory of normative patterns. Many of the issues I have worked with have also required empirical studies and a multi-disciplinary legal science approach. Some issues in family law are strongly influenced by economic considerations, often in the form of access to different benefits. Thus there is a strong connection between family law and social law. My international involvement has also led to an interest

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[2] Boele-Woelki, K., Ferrand F., Gonzáles Beilfuss, C., Jänterä-Jareborg, M., Lowe, N., Martiny D., Pintens W., *Principles of European Family Law, Regarding Divorce and Maintenance Between Former Spouses*, Antwerpen-Oxford, 2004 and *Principles of European Family Law, Regarding Parental Responsibilities*, Antwerpen-Oxford 2007.

[3] See Ryrstedt, E., Anmälan av: Boele-Woelki, Katharina, Ferrand Frédérique, Gonzáles Beilfuss, Cristina, Jänterä-Jareborg, Maarit, Lowe, Nigel, Martiny Dieter, Pintens Walter, Principles of European Family Law, Regarding Divorce and Maintenance Between Former Spouses, Antwerpen-Oxford, 2004, 170 s., and Principles of European Family Law, regarding Parental Responsibility, 331 s., to be published in *Juridisk Tidskrift*.

in how other countries have solved corresponding legal problems. The comparative perspective has made a thorough analysis possible, especially regarding how legislation on family law functions, but also as regards alternative solutions.

2. From matrimonial law and back again

Any topic involving legislation on spouses and cohabitants provides a wealth of opportunities for study for someone working with the law from a broad normative perspective. This legislation is full of individual rules that have society's evolution to thank for their formation. This is especially true for a subject such as the one I chose for my doctoral thesis. The thesis describes some of the important aspects of matrimonial law, and law regarding registered partnership and cohabitants, with an emphasis on joint dwelling. One aim with the thesis was to shed light on the normative structure of these relationships. I found the two basic normative patterns, 'community' and 'financial independence'/'individual ownership', in conflict with each other. The pattern 'community is an old concept in matrimonial law, and is mainly evident in rules applied during a relationship and division of property upon dissolution of this relationship – even if the pattern 'financial independence'/'individual ownership' is also the starting point there, through the spouses' ownership. However, the latter pattern is most evident in the legislation that governs the relationship after the cessation of the relationship. The tension between the patterns also affects the equality between spouses. At the same time, the economic community during the marriage is what constitutes a factual economic equality regarding the standard of living![4] It can thus be said that the community between spouses leads to material equality.[5] Moreover, equality ambitions are also maintained through the division of property upon the dissolution of marriage – only thereafter are the patterns of individuality allowed to dominate. Furthermore, in my thesis the content of the legal regulation is set in relation to the question of whether marriage and cohabitation are best

[4] Compare Ryrstedt, 1998, p. 389
[5] Ryrstedt 1998, p. 401.

characterised as status or contractual relationships.[6] Pursuing my interest in the matters I describe above, I subsequently published some different papers (as book chapters) on cohabitees from a comparative and critical perspective. Though I did not discuss the normative patterns in these papers, the understanding of these concepts was important for the conclusions I made, and for the criticism of the legislation in Sweden.

With the beginning of a new project, consisting of writing a Commentary to the Marriage Code, the circle is closed. After having focused for several years on issues regarding children, I have returned to the area of the family law where I started – marriages and their legal effects. Even if such a book does not give room for expansive methodological considerations, the theory and method of normative patterns are essential for drawing different conclusions as to how the law should be interpreted in this area. Of course, this is of particular interest when it comes to issues where no answer can be found by using the legal-dogmatic method. The ability to go forward in such a case is dependent on the use of other methods, such as the method of normative patterns, but also the comparative method.

3. A special interest in issues regarding children

Prior to this, however, my interest has mainly been issues regarding children. I have focused on the legislation on legal custody, residency and access, in relation to how to solve conflicts about children in a way that accommodates the best interest of the child.

The broadening of my research into the field of children and their relations to their parents meant dealing with legislation that was characterised by both older and newer ideas. Historically, society saw children as possessions, which of course was reflected in the legislation. Nowadays, we seem to be

[6] See further Ryrstedt, 1998. The mapping of normative patterns is conducted in relation to the theory of normative patterns, developed by Anna Christensen, who also found a kinship between the theory of normative patterns and the model of status to contract, developed mainly by Max Weber. See e.g. Christensen, A., *Normative development within The Social Dimension*, Norma 1996:1, Lund, p. 7 and Weber, M., *Ekonomi och samhälle; förståelsesociologins grunder, del 2*, Lund, 1985, pp. 196–200.

moving towards recognition of children as individuals, whose views we are to take into regard. Naturally, when these two types of rules are to be used at the same time, there may be a clash.

Furthermore, there is a strong connection which needed to be explored, between these issues and issues related to economic considerations for social security benefit schemes. Thus, my research in this area, in the research project 'Barnbidrag/underhållsstöd/vårdbidrag – är reglerna om mottagare förenliga med regleringen om gemensam vårdnad, boende och umgänge?' (Child Benefits/Public Child Support/ Care Allowance – are the Rules on Recipients Consistent with the Legislation on Joint Legal Custody, Residence and Access?), was aimed at investigating how these different sets of rules interact. I also tried to establish the coherence – or lack of coherence – in the intersection of the two types of rules: rules on family law and rules on social law.

When trying to determine the effects of social security-related economic considerations for family law outcomes, neither the legal-dogmatic method nor the comparative one was enough. Thus, I started working with empirical data, collected through questionnaires directed towards different professional groups working with families with children. My main focus was to try to establish whether parents' considerations regarding e.g. children's residence were influenced by the constructing of the benefits – that is, by who would be the recipient of the benefits. The result of this part of the study was that economic considerations had quite an astonishing impact on the parents' considerations and thus on their decisions.

This study also encompassed issues connected to the demand for consensus between joint legal custodians, in a comparative perspective. In this part, I explored in depth some other countries' legislation on this particular point. This project led to several publications, both in Sweden and in international journals, as may be seen in my publication list. One paper – on joint legal custody[7] – must be mentioned here, since it was referred to in 'Every picture tells a story'. Report on the inquiry into child custody arrangements in the

[7] Ryrstedt, E., Joint decisions – A Prerequisite or a Drawback in Joint Parental Responsibility? In *Australian Journal of Family Law*, 2003 Vol. 17, No 2. pp. 155–207.

event of family separation, House of Representatives Standing Committee on Family and Community Affairs, December 2003, Canberra.

The above mentioned research project raised issues connected to the Swedish National Registration. This is a technical institute designed to confirm where citizens reside and to register facts such as identity and family. However, this system has come to play an important role for regulation of benefits. The study tries to answer questions on how the rules on National Registration work, and how they directly affect the situation when persons receive different subsidies, especially those regarding children. The focus in the project 'Folkbokföringens betydelse för det sociala trygghetssystemet' (The Relevance of The National Registration for the Social Security System) was to analyse how the different types of legislation interact.

The overall aim in this project has been to investigate how the rules on National Registration affect the rules within the social security system, and thus family law. In this project, I worked with a comparative method and perspective, which enabled me to conduct an in-depth analysis of the way family law works together with the technical registration, in relation to how families live in reality.

It also became evident that National Registration had come to play a part in the definition of the family a child belonged to – though in a formal way, this is something that is a problem in itself. Today, the definition of a family is no longer a rather simple and straightforward task, especially if the best interest of the child is brought into the equation. My list of publications includes those written for this project.

In the two projects I just described, I found that the child appears to be an object, to which certain benefits are connected and for which parents fight for e.g. legal custody. The question becomes thus to what extent the child's opinion matters, and to what extent the child gets an opportunity to speak his or her mind. In Sweden, the child's right to speak is only one part of what is in the best interest of the child; this means that questions develop as to whether the best interest of the child is decisive in these matters, as the Swedish law has determined it to be. One of the papers in this project was written together with another member of the Norma Research Programme, Titti Mattsson, and dealt with the issue of accepting children as counterparts

in regard to their parents. The paper was thus multi-disciplinary, focusing on public and civil child proceedings, but was also comparative.[8]

Joint legal custody, even if the parents do not live together, was previously the norm under Swedish law. It is still common, even if a presumption longer exists. The Swedish system builds on the parents' consensus, which I dealt with in the first of my projects. Since there is no real dispute-resolving mechanism in Sweden, apart from issues regarding the legal custody itself, residency and access, and since we focus on the parents' reaching an agreement on issues regarding children, an emphasis is put on mediation (cooperation talks). In many cases, a failed mediation may lead to court proceedings. There, the question is to what extent the children are able to speak up in the investigations conducted by the social services authorities, but also how these wishes are expressed in the judgements. I explore these issues in the project 'Barnets bästa eller föräldrarnas – en studie av utfallet av alternativa beslutsmodeller rörande vårdnad/boende/umgänge' (The Best Interest of the Child – or that of the Parents? Decision-making Concerning Parental Responsibility/Residence or Access).

Here, in addition to using a legal-dogmatic method and a comparative method, I needed more advanced methods to help me answer the questions I posed. In the part dealing with mediation, I conducted an empirical study based on interviews of mediation participants. The interviews were analysed with a computerised text analysis tool called PERTEX.[9] In the part concerning the study of social services' reports and court decisions, I used an intuitive text analysis method.

The aim in Swedish mediation is for the parents to agree. However, an agreement might not always be in the best interest of the child, or correspond to each parent's wishes. The analysis leads to interesting conclusions; for example, that the mediation in fact seems to be a negotiation. It seems obvious that this might pose a hindrance to solutions

[8] Ryrstedt, E. and Mattsson, T., Children's Right to Representation: a Comparison between Sweden and England, *International Journal of Law, Policy & the Family*, No 1/2008, pp. 135–147.

[9] See further for PERTEX e.g. Helersson, H. and Mattsson, J., Demonstrating Pertex: A New Method for Improving Text Interpretation, *Field Methods,* May 2001 Vol. 13 No 2, pp. 115–136.

in the best interest of the child. Regarding social services' reports and court proceedings, the results are important both in relation to mediation as such, and for the judgements themselves. Even if the children were always discussed in the reports, it did not seem that enough room was given to their views, or that they had been given the right to an 'informed' point of view. Neither the best interest of the child nor the child's wishes were always highlighted in an individual or detailed way by the courts.

Also, for this project, I refer to my list of publications for further details of the published papers.

As said in the beginning of this paper, I am now returning to matrimonial law and to a legal-dogmatic method. Nevertheless, I will no doubt continue to pursue my interest in the relations between parents and their children, not least in the context of my international network.