

För barns bästa

Vänbok till Anna Singer


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A ROLE FOR CRITICAL LEGAL THEORY IN SWEDISH FAMILY LAW?

1 INTRODUCTION

Swedish family law has often been described as a normative model for family law in other jurisdictions.¹ A closer examination, however, raises questions as to whether Swedish law may also exemplify the complications that arise in attempting to develop legal rules without normative conflict.² Under current interpretations of Swedish law, for example, a transgender woman who is legally recognized in the gender of her identity will be registered as the mother of her child if she contributes sperm to the child's conception, regardless of whether she

¹ See e.g., Jens M Scherpe, 'The Nordic Countries in the Vanguard of European Family Law' (2007) 50 *Scandinavian Studies in Law* pp. 265–288.

² By the term 'legal rules', I intend to describe what most theorists recognize as those prescriptions, maxims or precepts that exist in laws, regulations, and judicial decisions, described as 'the rules of law – the formal contents of the legal system', which most theorists, particularly positivists, distinguish from the broader norms on which the rules are based and the norms that interpretation might generate. See Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press 1997), pp. 57–62. Critical legal theorists problematize this distinction by analyzing the normative tensions within legal rules and the manner in which normative choices are made in formulation and reformulation of 'positive' law, not just rule application. Id., pp. 31 ff. On the question of whether norms regarding the protection of the rights of children in particular are fully realized in Swedish law and practice, see Anna Singer, 'Voices heard and unheard – A Scandinavian perspective', (2014) 36 *Journal of Social Welfare and Family Law* pp. 381–391.

would prefer to be registered in a more gender-neutral way.³ In sharp contrast, a cisgender woman in Sweden cannot be registered as the legal mother of her child if she is married to the birth mother and the couple conceived the child by utilizing assisted reproduction services in the Swedish health care system during their relationship.⁴ That same woman will also not automatically be recognized as the legal parent of her child if she is married to the birth mother – even though a man married to the birth mother would be.⁵ Under other rules, unmarried biological fathers have no legal mechanism to initiate recognition of their paternity in Sweden, even though their children do, as do the mothers of those children and Swedish legal authorities on their behalf – including the power to initiate proceedings to establish paternity against the biological fathers' wishes.⁶ Parents in Sweden are also currently presumed to have the legal authority to consent to gender 'normalizing' surgeries on their children – including the removal of their children's genitals and gonads – even though Swedish law broadly criminalizes the surgical removal of female genital tissue, the sterilization of children, and other manipulations of children's genitals.⁷ In all of these matters, different normative approaches might follow from the European Convention of Human Rights (ECHR), not only because Sweden is a Contracting State to the ECHR, but because conformity with the ECHR is presumptively required pursuant to Sweden's Instrument of Government.⁸ As interpreted by the European Court

³ Though no Swedish statute expressly states such a rule, this is the current practice and interpretation of Swedish law by the Swedish Tax Authority. Skatteverket, *Folkbokföring och ändrad könstillhörighet* (2016), pp. 13–21.

⁴ Föräldrabalken (1949:381) (hereafter 'FB'), 1 kap, 9 § (permitting the female partner of a woman who gives birth to be registered only as a 'parent').

⁵ Compare FB 1:1 and 1:9.

⁶ See generally FB, chapters 2–3, especially FB 3:5.

⁷ See Section 3.2.

⁸ The 'incorporation' of the ECHR into Swedish law is significant from a jurisprudential perspective, as the Instrument of Government makes conformity of legislation to the ECHR a part of Sweden's 'positive' law. See Kungörelse (1974:152) om beslutad ny regeringsform, 2 kap., 19 §. This incorporation is not intended to fully incorporate the body of case law of the European Court of Human Rights but requires Swedish law to be in accord with the ECHR, albeit with the Instrument of Government taking precedence over the ECHR if the two instruments conflict as a matter of domestic Swedish law. The ECHR may, though, take precedence over the Instrument of Government under Sweden's treaty obligations. See Iain Cameron, *An Introduction to the European Convention of Human Rights* (Iustus 2014), pp. 193–202.

of Human Rights, the ECHR appears to stand in considerable tension with the aforementioned statements of Swedish law.⁹

Under traditional legal theories, normative tension in interpretations of law, such as those described above, might not be considered problematic. According to these theories, legal rules can only be fully understood in relation to the legal system to which they belong, such that peculiar outcomes may actually follow a principled logic of an established legal order, even though they might appear incoherent to non-legal experts or outsiders to the legal system in question. Critical legal theorists, however, would likely counter that each of the rule interpretations set forth in the introduction to this essay reflect mere choices among multiple norms that are embedded in legal rules, rather than interpretations compelled by legal logic.¹⁰ According to critical legal theory, modern rules of law are generally structured to require a balancing of multiple norms, not only when applied case-by-case but in the interpretation of legal doctrine. Despite expectations that legal actors will interpret and apply rules deductively and objectively, adherence to a legal order also effectively encourages legal actors to rely on social norms, which serve as deep structures to legal systems and influence rule interpretation. This explains why, in family law, perceived shifts in social norms regarding matters such as gender and the status of children can change the meanings of rules, even without any changes to positive law. Indeed, juridical concepts that are often presumed to be simple and clear – such as ‘motherhood’ or what constitutes a ‘male’ or ‘female’ child from a legal point of view – can have indeterminate meanings, which can also be used to impose severe disadvantages on vulnerable persons and others disfavored by socio-legal hierarchies.

⁹ On whether familial status can be extended to select couples in a discriminatory way, see *X and Others v. Austria* [GC], no. 19010/07 (2013). On the right of unmarried biological fathers to a legal mechanism to establish paternity, see *L.D. and P.K. v. Bulgaria* (application nos. 7949/11 and 45522/13) (2016). On Sweden’s positive obligation to protect children from harm to their identity and intimacy, see *Söderman v. Sweden* [GC], no. 5786/08 (2013).

¹⁰ By the term ‘critical legal theories’, I refer not to one particular strand of critical legal theory but ideas that I perceive as common to critical legal theory as developed in the US and UK, regarding the normative tension in law and the manner in which legal systems, internal rule structures, and external legal consciousness determine which norms prevail in shaping the meanings of rules. See Alan Hunt, ‘The Theory of Critical Legal Studies’, (1986) 6 *Oxford Journal of Legal Studies* pp. 1–45; Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books 2006), ix–xxiv. Roberto Unger, *The Critical Legal Studies Movement: Another Time, a Greater Task* (Verso Books 2015).

This essay is a sketch of an argument that critical legal theory may be useful to an understanding of how Swedish law reflects complex normative choices in tension with what is often thought to be positive law. The essay was specifically written for this collection because of the significant contributions that Anna Singer has made to our understanding of Swedish family law, particularly on matters of the rights of children and how ideas about gender have complicated the way in which broadly stated norms in family law are often given effect. For nearly two decades, Professor Singer has provided carefully detailed analysis of how ‘positive’ Swedish family law is actually a polycentric, pluralistic collection of rules, which often encompasses competing norms.¹¹ As Professor Singer has also cautioned, the recognition and realization of children’s rights, in particular, can encounter serious challenges if those rights are merely incorporated into Swedish law as norms, which may be disfavored against competing norms.¹² Thus, in the spirit of Professor Singer’s work, this essay offers a summary of critical legal theory to illustrate why that theory may independently validate these concerns and provide insights into how Swedish law might function in the future.

2 FROM LAW TO THEORY AND BACK AGAIN

2.1 The relationship of legal systems to critical legal theory

Most legal scholars generally agree that legal systems in Europe and North America were transformed in the late nineteenth and early twentieth centuries, with the ambition of modernizing them by ‘scientifically’ reordering them and sustaining them through logical, deductive reasoning.¹³ The substantive aim of these efforts was to create ‘an indivisible system, with inherent legal substance, not just a loose

¹¹ These themes permeate her work, ranging from her doctoral thesis, see Anna Singer, *Föräldraskap i rättslig belysning* (Iustus 2000), to her most recent works, see e.g., Anna Singer, ‘Family Forms and Parenthood: Sweden’ in Andrea Büchler and Helen Keller (eds.), *Family Forms and Parenthood: Theory and Practice of Article 8 ECHR in Europe* (Intersentia 2016), pp. 426–456.

¹² Anna Singer, ‘Alla talar om barns rätt’ in Lotti Ryberg-Welander (ed.), *Rätt, social utsatthet och samhälleligt ansvar: Festskrift till Anna Hollander* (Norstedts juridik 2012) pp. 69–82.

¹³ Duncan Kennedy, ‘Savigny’s Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought’ (2010) 58 *American Journal of Comparative Law*, p. 830.

and contingent amalgamation of compromises, impositions, and accidents' – particularly the collision of reactive rulemaking, metaphysical ideas, and political power.¹⁴ Scholarly defenders of such reforms theorized that the transformed systems could be held together by an internal logic, such that individual rules of law could not only serve instrumental purposes, but would primarily derive their meaning from concepts established for specific legal systems, which could then be maintained according to carefully designed, interlocking legal principles. Critical legal scholars have termed this conceptual form of jurisprudence as *classical legal thought*, one that helped to establish the framework upon which modern legal systems are built, fostering expectations of the general validity of legal systems and theories of the coherence of positive law. Indeed, the persistence of this form of thought is reflected in the current concern about importing norms into legal systems from external sources, such as the United Nations, the Council of Europe, and the European Union (EU) – in essence, a type of normative tension that some scholars perceive as a 'crisis in jurisprudence' in determining how conceptual coherence in national legal systems can be maintained.¹⁵

Critical legal scholars have sought to demonstrate that this current state of 'crisis', if it can be called that, is not new, at least not in terms of the greater historic struggle of modern legal systems to establish a theory and a method that can resolve normative conflicts of their own making. Rather, according to critical legal theory, an indeterminate balancing of norms is an inherent character of classical legal thought, due to the manner in which modern legal rules are structured. Critical legal theories have flourished in jurisdictions such as the United States (US) and the United Kingdom because the judiciaries in those jurisdictions have created highly transparent records of how legal authorities have struggled to avoid normative tension while interpreting positive law. In jurisdictions such as Sweden, however, identification of this tension requires a sharper focus on how legal actors – such as courts, administrative agencies, and even expert committees preparing legislation – actually respond to tensions in positive law. As shown below, Swedish law actually bears striking similarities to US law because of the manner in which legal realist movements and instrumental aims

¹⁴ Unger, *supra* n. 10, p. 14.

¹⁵ Kjell Åke Modéer, 'Harmonization or Separation? Deep Structures in Nordic Legal Cultures' (2007) 50 *Scandinavian Studies in Law* 179, 182; accord Jacob W.F. Sundberg, 'A Chair in Jurisprudence' (2005) 48 *Scandinavian Studies in Law*, pp. 455–57.

affected the way in which both systems consist of rules that are conceptualized and structured to embody multiple norms. A summary of how these two legal systems evolved relative to these foundations should underscore the relevance of critical legal theory to scholarly analysis of the functioning of these systems.

2.2 Systemic transformations and legal thought in the United States

The transformation of the US legal system to one based on classical legal thought began in earnest in the early 1800s, after a period of transition in which much British law continued to function as the law of the land.¹⁶ Populist favor for legislation to displace the common law, in particular, flowed from distrust of the judicial system – a legacy of the British monarchy.¹⁷ Many jurists themselves, however, also professed skepticism about the rigidities of inherited concepts of law, particularly those based on natural law and rights associated with spheres of power. These skeptics, though, maintained that the judiciary was better positioned than the legislature to maintain the law in a scientific way, both because of the judiciary's oversight of the US legal system and its legal expertise. Indeed, in the 1800s, the judiciary was already vested with considerable authority in the US – including the power to mediate conflicts among the branches and levels of government, to interpret and apply state and federal constitutions, and to develop interstitial law, as well as common law in the absence of statutory law. Thus, during this era, the judiciary began a systematic attempt to reshape the legal system into a singular, complex whole, supported by members of the legal profession and scholars who similarly advocated a scientific reordering of law nationwide. Individual rules of law were also restructured over time, often for instrumental purposes, but also in conceptually establishing the relationship between public interest in private law and private interests in public law, as well as each rule's place in the system. The theory behind this transformation was that the logic of the law could be maintained as it was applied

¹⁶ On the role of British law in the US, see Ford Hall, "The Common Law: An Account of Its Reception in the United States (1950) 4 *Vanderbilt Law Review*, p. 791.

¹⁷ The historical summary in this section is drawn especially from Morton Horwitz, *The Transformation of American Law: 1780–1860* (Harvard Univ. Press 1979), in addition to the sources in note 10, *supra*.

so that each new development of law did not substantially disrupt the legal order.¹⁸

Jurisprudential faith in this form of thought dissipated by the early 1900s once many scholars and judges increasingly observed that highly conceptual reasoning often produced legal outcomes that seemed divorced from socio-economic reality. Within a general frame of thought described as *legal realism*, some of these scholars 'progressively' proposed that the US legal system might be sustainable if it were grounded in other sciences, including social sciences and economics, to ensure that legal reasoning was framed by real-world experience and reason.¹⁹ Though legal realists leveled criticisms across the spectrum of public and private law for decades, several notorious US Supreme Court decisions in the field of constitutional law eventually marked the sharpest fall of classical legal thought, as many high-profile and controversial decisions were neutralized or reversed by reinterpreting constitutional norms through the lens of socio-economic analysis.²⁰

¹⁸ This was indeed the entire point of classical legal thought, by both creating subfields of law and relating them to other subfields and the system as a whole. In this manner, new norms generated as a result might not only be contained (in subfields of law) but also constrained (in relation to the system as a whole). To paraphrase Maria Grahn-Farley, modern legal systems have been conceptualized and structured to save themselves from 'the disruption of the localized' and even to 'prevent localized disruptions from taking place'. Maria Grahn-Farley, 'The Law Room: Hyperrealist Jurisprudential & Postmodern Politics' (2001), 36 *New England Law Review* p. 42 and p. 56. For arguments that classical legal thinkers aimed to secure legal orders from unstable social movements and other juridical disruptions, see Horwitz, n. 17, *supra*, and William M. Wiecek. *The Lost World of Classical Legal Thought: Law and Ideology in America 1886–1937*, (Oxford University Press, 1998). Ironically, as Duncan Kennedy points out, the abstraction, nesting, and systemic tethering of concepts in 'classical legal thought' actually led to constant risk of disruptions of positive law by placing legal rules in considerable normative tension. Kennedy, *supra* n. 10, pp. 245–56. It should be noted, however, that anxiety about normative developments and tensions disrupting legal orders is not limited to classical legal thought, but has been shared by modern legal scholars who are particularly hostile to critical theory and post-modern legal thought. See Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (N.Y.U. Press 1995), pp. 36–61, 106–127, and 244–45.

¹⁹ Gary Minda, *supra* n. 18, pp. 20–43.

²⁰ See Kennedy, *Rise and Fall*, *supra* n. 10, pp. 7–33 and 249–270. On the question of economic regulation, for example, the US Supreme Court conceptualized the liberty to contract as a constitutional limitation on regulatory powers but subsequently reversed course by using economic analysis to reassess the reasonability of such regulation and to deny a broad liberty to contract. Compare *Lochner v. New York*, 198 U.S. 45 (1905) and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) with *Nebbia v. New York*, 291 U.S. 502 (1934) and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). On the question of whether 'equal protection' permitted racial segregation in 'separate but equal' facilities,

This shift in legal thought, however, could also not avoid troubling legal outcomes through legal interpretation based on 'realist' ideas. On the question of discriminatory interference with the right to form a family, for example, the US Supreme Court during this period issued one of its most infamous legal realist decisions, upholding the compulsory sterilization of a woman who had been 'diagnosed' as a 'moral' imbecile.²¹ Deferring to medical and social science, the Court concluded that the same constitutional 'principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes' in order to 'prevent those who are manifestly unfit from continuing their kind', rather than to eventually 'execute their offspring' or 'let them starve for their imbecility'.²² Decisions such as these appeared to validate the concern of more 'radical' legal realist scholars, who challenged legal logic as a mechanism to reinforce the social order, often at the expense of progress toward greater justice.²³

Critical legal theory emerged from the fallout of jurisprudential disagreement as to how the US legal system could maintain its conceptual legitimacy in light of its diverse aims.²⁴ By the mid-1900s, some scholars continued to urge strict positivistic conceptions of law in certain fields of law, but most scholars conceded that the law was more complex than a mere system of rules – with disagreement over whether interpretation could be grounded in a process-oriented balancing of policies, as well as interests in fundamental fairness, or whether the law could evolve progressively through normative interpretation, particularly in constitutional and civil rights law.²⁵ Critical legal scholars argued that this very openness to balancing or normative interpretation ensured that positive law was placed in tension with multiple legal norms, which could be invoked selectively and could not be judged to be purely apolitical or scientific. These scholars maintained that the

for example, the Court originally held that it did, see *Plessy v. Ferguson*, 163 US 537 (1896) but step-by-step used socio-economic analysis to break down the notion that such segregation was *unequal* in fact but to find that it perpetuated racial animus in society at large. see e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

²¹ For background on the case, see Daniel Kleves, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (Harvard University Press 1985), pp. 110 ff.

²² *Buck v. Bell*, 274 U.S. 200, 207 (1927).

²³ Minda, *supra* n. 18, pp. 29–30.

²⁴ Minda, *supra* n. 18, p. 31 (describing critical legal theory as the successor to 'radical' or critical legal realism); see also Kennedy, *Rise and Fall*, pp. xxvi–xxx.

²⁵ Minda, *supra* n. 18, pp. 32–43; Kennedy, *Rise and Fall*, *supra* n. 10, pp. xxix.

nesting of public law norms in private law and vice versa was a legacy of classical legal thought's attempts to maintain legal rules in normative relation to different interests in the legal system.²⁶ The very nature of developing these rules through a balancing of interests or through more instrumental aims meant that a 'favored' outcome was not necessarily a 'correct' one but, rather, reflected choices of norms to legitimize outcomes. Critical legal theorists further argued that a *legal consciousness*, grounded in acceptance of legal logic and the law's relation to social norms, produced a sub-system of legal thought that rationalized normative choices in interpretation as a measure of sound functioning of the legal system.²⁷ More often than not, the resulting legal process favored 'particular interest groups, social classes and entrenched economic institutions' with legal reasoning that worked to 'mystify outsiders' and to 'legitimate results', rather than determine them.²⁸ This theoretical approach, despite the controversy it generated, is largely credited with the acceptance of its general premises in US legal education, as well as the emergence of post-modern legal thought in US jurisprudence.²⁹

2.3 Systemic transformations and legal thought in Sweden

The transformation of the national legal system in Sweden began gradually in the early 1800s, as it did in the US. Though Sweden had a strong tradition of local government, the development of its modern national legal system is often marked as beginning with the establishment of the Instrument of Government in 1809.³⁰ Styled as a constitutional monarchy, the new form of government did not immediately constitute a formal break in sharing of power among the people, the nobility, and the clergy, as well as the crown.³¹ This arrangement did not, however, preclude the establishment of a more

²⁶ Kennedy, *Savigny*, *supra* n. 13, pp. 821–35; Kennedy, *Rise and Fall*, *supra* n. 10, p. xx–xi.

²⁷ For contrasting views, see Kennedy, *supra* n. 10, pp. xiv – xvii and Hunt, *supra* n. 10, pp. 17–20 and 31.

²⁸ Martha Minow, 'Law Turning Outward' (1987) *Telos* pp. 79, 83.

²⁹ See Minda, *supra* n. 18, p. 126.

³⁰ See e.g., Thomas Bull and Frederik Sterzel, *Regeringsformen: En kommentar* (Studentlitteratur AB 2010), pp. 12. See also Magnus Isberg, 'The development of constitutional law in Sweden', in *The Constitution of Sweden; The Fundamental Laws and the Riksdag Act* (Sveriges Riksdag 2012), pp. 12–15.

³¹ Bull and Sterzel, *supra* n. 30, p. 12–13; Isberg, *supra* n. 30, pp. 13–17.

democratic legal system, which formed slowly and subtly over time – marked prominently, according to some scholars, by such events as the establishment of a bicameral legislature in 1866 and universal male suffrage in 1909.³² These milestones, however, do not adequately capture the more complex social developments that led to the transformation of the substance and form of Swedish law. The push for law reform also emanated from sociopolitical and economic movements, for example, in calls for equitable housing and legal support for workers, as well as the establishment of universal suffrage for women in 1921.³³ Reform was also spurred on by effective withdrawals from the Swedish political system through mass emigration of approximately one-sixth of the Swedish population, particularly emigration to the US.³⁴ In response to this latter problem, a Parliamentary Emigration Commission conducted a thorough investigation of socioeconomic conditions in Sweden and possible law reforms. While assertions of any causal connections between that investigation and many reforms are problematic, the concluding report and its twenty-one volumes of supporting data constitute powerful documentation of a growing consensus at the time that Swedish law was rapidly undergoing transformation to serve the broader public interest.³⁵ Indeed, the establishment of a new progressive coalition government shortly thereafter in 1917 is often considered a critical turning point in this reshaping of Swedish law with such instrumental aims.³⁶ Family law was included in this reform, with several laws passed in succession regarding support for children and equality between spouses between 1917 and 1920.³⁷ More notoriously, sterilization laws and the succes-

³² Bull and Sterzel, *supra* n. 30, p. 13; Isberg, *supra* n. 30, pp. 15–17.

³³ See Patricia Mindus, *A Real Mind: The Life and Work of Axel Hägerström* (Springer 2009), p. 173 (regarding the economic and political climate and its relationship to law reform and realist thought); see also Bull and Sterzel, *supra* n. 30, p. 13 (noting the extension of full suffrage to women in 1921) and Isberg, *supra* n. 30, p. 16.

³⁴ Gunnar Broberg and Magnus Tydén, 'Eugenics in Sweden: Efficient Care' in Gunnar Broberg and Nils Roll-Hansen, eds. *Eugenics and the Welfare State: Sterilization Policy in Denmark, Sweden, Norway, and Finland* (Michigan St. Univ. Press 2005), p. 78.

³⁵ Franklin D. Scott, 'Sweden's Constructive Opposition to Emigration', (1965) 37 *Journal of Modern History* pp. 332–334; see also H. Arnold Barton, *A Folk Divided: Homeland Swedes and Swedish Americans, 1840–1940* (Southern Illinois University Press 1994).

³⁶ Bull and Sterzel, *supra* n. 30, p. 13.

³⁷ For an example of such legislation regarding children, subsequently replaced by the current Children and Parents Code, see Lag (1949:382) om införande av föräldrabalken,

sive interest in population control grew out of family law reform discussions during this same time period.³⁸

There is considerable scholarly consensus in Sweden that this systemic transformation was supported by developments in jurisprudential thought steeped in Sweden's own form of legal realism. The Swedish legal realist movement, like its US counterpart, focused on pragmatism and social and economic effects of the law, all of which led to separating law from metaphysics and traditions maintained for their own sake.³⁹ But Swedish legal realists also had more explicit goals in conceptualist rulemaking that bore greater resemblance to classical legal thought than the work of US legal realists. In multiple fields of law, Swedish legal realist scholars advocated highly positivist ideas about how law should be developed and applied in a controlled manner.⁴⁰ Like classical legal thinkers, Swedish legal realists reconstituted rights as largely conceptual legal constructs,⁴¹ with the word 'right' often used to refer to state-controlled benefits and normative expectations rather than constraints on state power.⁴² As in the US, however, neither classical nor legal realist thought in Sweden appears to have been able to dominate the manner in which the law actually developed. In public law, for example, the pragmatic challenges of controlled governmental steering led to conceptualization of rules that were 'often vague', with a growing understanding that legal concepts would not be expected to have 'specific meanings in themselves', but rather would be 'vessels' to be 'filled by the legal process [...] as a tool for realizing the ideals of the welfare state'.⁴³ In this scheme, administrative agencies were seen as 'lending a helping hand' through the 'legal

2 §. For a summary of developments in Swedish marriage law during this period, see Caroline Sörgjerd, *Reconstructing Marriage* (Intersentia 2011), pp. 55 ff.

³⁸ Gunnar Broberg and Magnus Tydén, *supra* n. 34, pp. 110–124.

³⁹ Heikki Pihlajamäki, 'Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared' (2004) 52 *The American Journal of Comparative Law*, p. 469.

⁴⁰ See e.g., Torben Spaak, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy* (Springer 2014), pp. 181–205 and 241–259; Marie Sandström, 'Law – Fact, Fiction or In Between? Axel Hägerström's Quest for Legal Realism' (2005) 48 *Scandinavian Studies in Law*, pp. 329–40.

⁴¹ Spaak, *supra* n. 40, pp. 141–155; Jane Reichel, 'European Legal Method from a Swedish Perspective – Rights, Compensation and the Role of Courts' in Ulla Neergaard, Ruth Nielsen and Lynn Rosenberry (eds.), *European Legal Method – Paradoxes and Revitalization* (DJOF Publishing 2011), pp. 249–50.

⁴² Elisabeth Rynning, *Samtycke till medicinsk vård och behandling* (Iustus, 1994), pp. 69 ff.

⁴³ Reichel, *supra* n. 41, pp. 248–9.

jungle', albeit without 'strict observance of procedural safeguards'.⁴⁴ The use of goal-steering legislation, in particular, vested administrative agencies with considerable power to determine the normative content of abstract rules, which narrowed the 'spectrum of theoretical solutions' but left them open to interpretation.⁴⁵ Not surprisingly, legal scholars in Sweden by the late twentieth century differed in opinion over whether such rules of law could be dogmatically applied through legal rules alone or whether interpretation should reflect the 'underlying culture and shared values of the society' out of respect for a broader 'normsystem or value system'.⁴⁶

Over the last several decades, even without direct reliance on critical legal theory, Swedish scholars studying different areas of law have noted that the legal system that emerged from this legacy has operated with great potential for indeterminacy and considerable normative dissonance, propelled in particular by a 'legislative tradition ... of relatively abstract formulation of legal norms'.⁴⁷ In private law, for example, balancing of norms in legal interpretation has become more commonplace, making it difficult to decipher patterns of legal decisions as strictly following any positivist theory of law.⁴⁸ In many legal fields, the law by design, together with central administrative agencies' constitutionally protected interpretive authority, has permitted interpretations that reflect normative choices rather than a singular interpretation that might have originally been intended.⁴⁹ In family

⁴⁴ Id., p. 253; see also Stig Strömholm, 'Public' Rule-making and 'Private': The Swedish Experience' (1971), 15 *Scandinavian Studies in Law*, pp. 219–84.

⁴⁵ Reichel, *supra* n. 41, p. 248; Stig Strömholm, 'Goal-Steering and Judicial Review' (2000) 40 *Scandinavian Studies in Law* 189–197; Bull and Sterzel, pp. 17–18 and 275–85.

⁴⁶ Minna Gräns, 'Some Aspects of Legal Decision Making in the Light of Cognitive Consistency Theories' (2005) 48 *Scandinavian Studies in Law* 99, p. 100.

⁴⁷ Thomas Bull and Iain Cameron, 'Legislative review for human rights compatibility: A view from Sweden' in M. Hunt and others (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit* (2014) Oxford: Hart Publishing Ltd, p. 280.

⁴⁸ See, e.g., Håkan Andersson, 'Constructive deconstruction: a test of postmodern legal reasoning: the example of third party losses on the borderline between tort law and contract law', in Mads Andenas & Nils Jareborg (eds.), *Uppsala-King's College London Colloquium* (Iustus 1999), pp. 356–388; Håkan Andersson 'Likhetsargumentation – analogi och metamorfos', in Anders Fogelklou & Torben Spaak (eds.), *Festskrift till Åke Frändberg* (Iustus 2003), p. 13–37; Joel Samuelsson, *Tolking och Utfyllning: undersökningar kring ett förmögenhets-rättsteoretiskt tema* (Iustus 2008).

⁴⁹ On the authority of the administrative agencies, see Bull & Cameron, *supra* n. 47, p. 281. For examples of normative tension, see e.g., M. Jäntere-Jareborg, 'The Recognition and Legal Effects of Foreign Adoptions in Sweden' (1992) 36 *Scandinavian Studies in Law* 106 (explaining disagreement over two possible normative interpretations of Swedish

law, lack of clear distinctions between abstract norms and Swedish 'positive' law was so prominent as the 1900s drew to a close that, in a landmark case, the European Court of Human Rights took the unusual step of advising the Swedish government on the difference between a 'norm' and 'law'.⁵⁰ While the Court endorsed normative and flexible rulemaking, it emphasized that a law, unlike a norm, requires 'sufficient precision to enable the citizen' [...] to foresee [...] the consequences which a given action may entail' and to narrow 'the scope of the discretion' vested in authorities and protect against arbitrary interference with individual rights.⁵¹

Today, the difficulty in distinguishing positive law in Sweden from a collection of norms has become even more complex with the formal 'incorporation' of the ECHR into Swedish law, such that conflicts with domestic Swedish law are resolved by judicial *normprövning*.⁵² Though Swedish courts have increasingly attempted to resolve normative conflicts in this way, the European Court of Human Rights has also done so and has in some cases found the Swedish legal framework itself inadequate to support the ECHR's norms.⁵³ Accession to the EU has also meant that EU law and its norms are not only developed and imposed from outside of Sweden but often must be 'transposed' into law by the Swedish government.⁵⁴ These developments have had a structural effect, even on the Swedish legislative process, which has aptly been described as moving away from a 'linear' process with 'a beginning and an end, where organs organized in a hierarchical structure have demarcated tasks', to one that is 'circular', recursively and collaboratively developed by multiple levels of governance and legal authorities.⁵⁵ As several scholars have noted, these changes have constituted a cross-fertilization of national and international legal

law on foreign adoptions); Anders Agell, 'The Swedish Legislation on Marriage and Cohabitation: A Journey without Destination' (1980) 24 *Scandinavian Studies in Law* 21–23 (explaining competing interpretations of neutrality theory used in different contexts in different fields of Swedish law).

⁵⁰ *Olsson v. Sweden no. 1*, Case no. 10465/83 (1988) § 61.

⁵¹ *Id.*

⁵² See Cameron, *supra* n. 8, pp. 190–206; Karin Åhman, *Normprövning: Domstolskontroll av svensk lags förenlighet med Regeringsformen och Europarätten 2000-1010* (Norstedts 2011).

⁵³ *Söderman v. Sweden* [GC] no. 5786/08, § 117; *Arlewin v. Sweden*, no. 22302/10, § 59.

⁵⁴ Reichel, *supra* n. 41, pp. 265–66.

⁵⁵ *Id.*

orders with plural norms,⁵⁶ the expansion of the number and types of deep structures in national law,⁵⁷ and an intensification of the ‘complexity of legal process’, with ‘a high level of sophistication and abstraction in coherency theories’ that are difficult for legal authorities to follow.⁵⁸ In all of these ways, critical legal theory, it would seem, offers considerable aid in explaining how Swedish law develops, with Swedish ‘positive law’ often existing in considerable tension with an array of norms. As explained in the remainder of the essay, the array of norms relevant to Swedish family law has particularly increased in relation to international law, especially the Convention on the Rights of the Child, and may increase even further in the future.

3 CRITICAL LEGAL THEORY IN SWEDISH FAMILY LAW

3.1 Critical themes in family law

Critical legal theorists have long scrutinized family law, particularly the manner in which family law is conceptualized and positioned in legal systems, as well as how its rules are structured. Critical legal scholars have also challenged the popular narrative that family law has historically been a part of private law shielded from public law.⁵⁹ Rather, as they have shown, family law in Europe and North America was, historically speaking, only recently conceptualized as a discrete field of law, one in which familial decision-making was presumed ‘private’ as part of broader thinking about public interest in families as the foundation of society, which, in turn, might necessitate clear rules for determining boundaries for public intervention.⁶⁰ As Anna Singer and other family law scholars have documented, the evolution of family

⁵⁶ Xavier Groussot, ‘European Rights’ and Dialogues in the Context of Constitutional Pluralism’ (2010) 55 *Scandinavian Studies in Law*, pp. 45, 55 and 74.

⁵⁷ Kjell Åke Modéer, *supra* n. 15, p. 182.

⁵⁸ Minna Gräns, *supra* n. 46, pp. 101–2.

⁵⁹ Michael D.A. Freeman, ‘Towards a Critical Theory of Family Law’ (1985) 38 *Current Legal Problems*, p. 153; Janet Halley, ‘What Is Family Law?: A Genealogy Part I’ (2011) 23 *Yale Journal of Law & Humanities* 1; Janet Halley, ‘What Is Family Law?: A Genealogy’ Part II, (2011) 23 *Yale Journal of Law & Humanities* p. 189; Frances E. Olsen, ‘The Myth of State Intervention in the Family’ (1985) 18 *University of Michigan Journal of Law Reform*, p. 835.

⁶⁰ Frances E. Olsen, ‘The Family and the Market: A Study of Ideology and Legal Reform’ (1983), 96 *Harvard Law Review*, pp. 1497–1578; Janet Halley and Kerry Rittich, ‘Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism’, (2010) 58 *American Journal of Comparative Law*, p. 753.

law in Sweden is indeed one in which public law incursions into families increased in the nineteenth century – particularly for the protection of children – while still attempting to maintain normative presumptions that family units were centers of caring that required intervention only in exceptional cases.⁶¹ Critical family law scholars have mapped the way in which this normative framework has actually permitted public law norms to be selectively invoked in interpreting family law rules, often at the expense of women and children, especially when privacy norms could be used to excuse various forms of marital or parental violence. This has been described as *family law exceptionalism*, a legal presumption permitting conduct within families that would not be acceptable outside of family units.⁶²

In this light, critical legal theory can be particularly useful in rethinking the concept of ‘family law’ – a field that is neither purely private nor public law, but, rather, part of an overall system of rules, nested with public law and private law norms that are directly and indirectly aimed at family members. As Anna Singer points out, the concept of ‘family’ is not defined in Swedish law nor is Swedish family law confined to a private law framework.⁶³ This is transparent from the central Swedish statute regulating certain relationships and interactions among parents and children – the Children and Parent’s Code (*Föräldrabalken*) – which, through multiple formal references in the statutory text and in various preparatory works to legislation, clearly intersects with public law, criminal law, medical law, and international human rights law, among other fields of law. A striking example of this is Sweden’s pioneering rule abolishing ‘corporal punishment’ and ‘degrading treatment’ as a means of disciplining children.⁶⁴ Despite the prohibition appearing as a standalone rule in the Children and Parents Code, the Swedish Supreme Court has so far primarily interpreted the rule as a negation of a traditional, presumptive exemption of parents from prosecution when they strike their children, at least in cases where such violence would be a crime against someone outside

⁶¹ Singer, *Föräldraskap i rättslig belysning*, *supra* n. 11, pp. 60–86.

⁶² Singer, *Föräldraskap i rättslig belysning*, *supra* n. 11, pp. 35–38; Jan Hellner, ‘Metodproblem i rättsvetenskapen – Studier i förmögenhetsrätt’ (Jure 2001), p. 7.

⁶³ Singer, *Family Forms*, *supra* n. 11, pp. 431 & 444. For the array of laws affecting children and their relationships to their families in Sweden, see Anna Singer, *Barnets bästa. Om barns rättsliga ställning i familj och samhälle* (Norstedts Juridik 2012).

⁶⁴ FB 6:1.

of the family.⁶⁵ What remains unclear, however, is whether the Code itself creates a legal mechanism to redress all ‘corporal punishment’ and ‘degrading treatment’, concepts that are broadly stated as abstract norms to be fleshed out in future cases – and most likely exceptional ones.⁶⁶

Throughout Swedish law, rules that address the parent-child relationship are broadly formulated for balancing various normative interests, particularly the ‘rights’ and ‘responsibilities’ of parents relative to the ‘rights’ and wishes of their children.⁶⁷ The incorporation of the ECHR into Swedish law has complicated this balance of norms, not only in the manner in which Swedish law affects private and family life but also with the ECHR imposing positive obligations on the Swedish government to protect children from their parents.⁶⁸ It further complicates Swedish family law in the sense that ‘rights’ in domestic Swedish law are often synonymous with a norm or interest, whereas the European Court of Human Rights has made clear that it reserves the power to determine whether those rights are civil rights within the meaning of the ECHR and actionable in Swedish courts, particularly in cases where Sweden’s highest courts are silent on the status of the rights in question.⁶⁹ This normative complexity is heightened by the manner in which Swedish law is presumed to reflect the Convention on the Rights of the Child, particularly the right of the child to be heard, given that the European Court of Human Rights has often interpreted the ECHR in ways that have been criticized as inconsistent with the Convention on the Rights of the Child.⁷⁰

In these and other ways, Swedish family law provides ample reason to be cognizant of how Swedish authorities may draw upon external social norms to resolve much of this normative conflict. Critical family

⁶⁵ See e.g., NJA 2003 s. 537.

⁶⁶ Singer, *Barnets bästa*, *supra* n. 63, pp. 249–50.

⁶⁷ Examples are too numerous to list here, but are reflected particularly in the Children and Parents Code, such as in the central rules in Chapter 6, see e.g., FB 6:1 and 6:11. For additional examples in Swedish law, see Singer, *Voices heard and unheard*, n. 2, *supra* and Singer, *Barnets bästa*, *supra* n. 63, throughout.

⁶⁸ For extensive discussion, see Jameson Garland, *On Science, Law, and Medicine, The case of gender-‘normalizing’ interventions on children diagnosed as ‘different in sex development’* (Uppsala Univ. Press, 2016), pp. 540–58.

⁶⁹ *Id.* pp. 549–557.

⁷⁰ Ursula Kilkelly, ‘Litigating the Rights of the Child’ in Ton Liefaard and Jaap E. Doek (eds.), *The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015), pp. 193–209.

law scholars have, in particular, documented how legal actors use social norms, particularly regarding gender and parent-child relationships, to justify both norm creation and interpretation.⁷¹ For example, Sweden's current laws on elective sterilization and abortion have deep roots in what the Swedish government considers 'family planning' for adults, enacted out of respect for procreative choice and bodily autonomy.⁷² During the same general time frame in which these laws were enacted, however, Sweden also enacted its Gender Classification Act, compelling sterilization of transgender persons as a condition of gender recognition in order to prevent 'confusion' in families.⁷³ Since the formal repeal of that sterilization requirement in 2013, the gendered consequences of the repeal have ricocheted back into interpretations of traditional family law, as set forth at the outset of this essay. Indeed, critical feminist and family law theories thoroughly explain why Swedish law does not permit a child born to two cisgender women utilizing assisted reproduction services in Sweden to have two legal mothers but why a child may have two legal mothers if one of the women is transgender with the reproductive capacity of a biological male. Incongruities such as these are not unusual in Swedish family law. As the detailed example that follows illustrates, the normative structuring of family law often produces outcomes that cannot be explained by rules alone, but rather must be considered to be guided by social assumptions about parents, children, and gender that require more critical scrutiny.

⁷¹ Frances Olsen, 'Constitutional Law: Feminist Critiques of the Public/Private Distinction' (1993) 10 *Constitutional Commentary* 319; Frances Olsen, 'The Sex of Law' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Basic Books 1998), pp. 691–707; Margaret Davies, 'Feminism and the Flat Law Theory' (2008) 16 *Feminist Legal Studies*, p. 285; These arguments are now taken up by scholars classified as post-modern scholars, See Martha Chamallas, 'Past as Prologue: Old and New Feminisms' (2010) 17 *Michigan Journal of Gender & Law*, pp. 169–70.

⁷² See *Kungl. Maj:ts proposition till abortlag, m.m.*, Prop. 1974:70, p. 28; *Regeringens proposition med förslag till steriliseringslag*, Prop. 1975:18, p. 23.

⁷³ Prop 1972:6, p. 50.

3.2 The role of family law in gender reconstructive surgeries on infants and young children with differences in sex development

In discussions of children's rights, an intensifying global controversy currently surrounds the clinical practice of surgically 'normalizing' the appearance of infants and young children born with differences of sex development, purportedly to steer their gender development and spare the children various harms.⁷⁴ In 1972, Sweden became the first nation in the world to formally ratify these procedures as a means to secure changes of juridical gender status of such children.⁷⁵ Today, however, eight human rights authorities – including authorities from the Council of Europe and the United Nations – have declared these procedures violations of the affected children's human rights.⁷⁶ This current human rights discourse, however, has tended to avoid addressing a central question in family law: *Can parents consent to the removal of the genitals and gonads of their children without any evidence that the removed organs are diseased or that the medical procedures are necessary, or even safe and effective for their intended purposes?* Currently, no statutory rule in Sweden expressly and without limitation authorizes parents to consent to any medical procedures on their children. Rather, that consent is presumed to fall under the broadly stated norm that parents have the 'right' and the 'responsibility' to make decisions on matters concerning their children's affairs.⁷⁷ Nor is such a parental right recognized as unlimited under the ECHR. Indeed, the European Court of Human Rights has held that Contracting States, such as Sweden, have a positive obligation to protect children from physical invasions affecting their identity and intimacy.⁷⁸ Currently, the only rule of Swedish law expressly affirming parental authority to consent to the procedures in question is in connection with change of registered gender, subject to approval by the National Board of Health and Welfare.

⁷⁴ For a detailed analysis of past and present justifications, see Garland, *supra* n. 68, pp. 75–125.

⁷⁵ See Lag (1972:119) om fastställande om könstillhörighet i vissa fall (hereinafter 'KtL'), 2 § and 4–4 a §§.

⁷⁶ For a recent summary, see Kavot Zillén, Jameson Garland & Santa Slokenberga, *The Rights of Children in Biomedicine: Challenges posed by scientific advances and uncertainties* (2017), p. 44.

⁷⁷ FB 6:11. See also Prop. 2013/14:106, *Patientlag*, pp. 65–68 (confirming the rule for infants and young children in relation to Patientlag (2014:821) 4 ch., 3 §).

⁷⁸ *Söderman v. Sweden* [GC], no. 5786/08 (2013) §§ 79–86.

The formal legal authorization of gender reconstructive surgeries on infants and young children in Sweden arose in a state of considerable legal uncertainty surrounding those procedures. In 1972, as now, Swedish law required medical personnel to report the 'sex' of a child at birth for registration (either as 'male' or 'female'), except that parents were expected to do so if the child was not born under medical supervision.⁷⁹ No legal definition of what constitutes a 'male' or a 'female' person existed in Swedish law then, nor does such a definition exist today. Thus, clinicians and parents have long served as agents of the state in establishing each individual's juridical gender status without any legal criteria to contain their judgments. Under other rules, surgical removal of organs and parts of the body in some instances may be presumed legal if performed by licensed medical personnel to treat illness or congenital anomalies.⁸⁰ And yet, the criteria for determining whether atypical genitals or gonads are considered deformed has never been clearly established by medical science or law. Indeed, at the time of the enactment of the Gender Classification Act, the invasive character of these procedures also raised the specter of criminality under the Penal Code and laws on castration and sterilization.⁸¹ To avoid conflict with the Penal Code, such procedures to this day must fall within the scope of medical licensure. Since 1963, Swedish medical law has limited licensed medical personnel to the use of medical practices that have been validated as safe and effective in accordance with 'science and carefully tested experience', even though no governmental authority has given that legal standard a precise definition.⁸² And yet, no careful testing confirming the safety and efficacy of gender reconstructive procedures on infants had been performed by 1972, in Sweden or elsewhere, nor has it been performed since. In fact, at the time that Sweden ratified these procedures through the Gender Classification Act, the safety and efficacy of these procedures was so uncertain that Sweden's experts warned these procedures might surgically impose the wrong gender on a child.⁸³

⁷⁹ Folkbokföringslag (1991:481) 18 and 24 §§.

⁸⁰ See Garland, *supra*, n. 68, pp. 173–79.

⁸¹ *Id.*, pp. 134–37.

⁸² See Garland, *supra*, n. 68, pp. 215–40; Nils-Eric, Sahlin and Lena Wahlberg, 'Om icke vedertagna behandlingsmetoder och kravet på vetenskap och beprövad erfarenhet' (2017) *Förvaltningsrättslig tidskrift*, pp. 45–66.

⁸³ SOU 1968:28, pp. 53–4.

The Gender Classification Act resolved some of the legal uncertainty surrounding these procedures by authorizing them in association with juridical gender change. The statute, still in effect, provides that parents may apply for a change of their children's gender, with surgical alteration of their children's genitals and gonads, subject to approval by the National Board of Health and Welfare to ensure that the change is 'most compatible' with the requested gender assignment.⁸⁴ On the question of juridical gender status, however, the government and its investigating committee determined that it was not possible to define what constitutes a 'male' or a 'female' person;⁸⁵ therefore, the government agreed that these terms should be kept 'vague', with classification left, ideally, to medical judgment.⁸⁶ For gender reconstruction surgeries performed before registration or to make the child appear more typical for the registered gender, the Act did not apply. In the preparatory works to the Act, both the government's bill and the investigative committee report acknowledged that the procedures simply had to be in accord with Swedish medical law,⁸⁷ even though neither the experts nor the government documented any findings that the reconstructive surgeries on the children in question actually met the standard of 'science and carefully tested experience'. Indeed, the Act to this day provides a mechanism for a second change of gender for children on the grounds that gender reassignment procedures might impose the wrong gender on a child.⁸⁸ Nevertheless, the government and expert investigative committee presumed that parents not only would and

⁸⁴ The 'most compatible' requirement is found in KtL 2 § and has never been clearly defined. In 2012, KtL 2 § was modified to delete language suggesting that a change of registered gender for children would be granted if the physical 'deformities' could be surgically 'corrected', though the reform bill provided only that the bodily appearance of such young children would still likely 'tip' the balance in favor of a requested gender, in order to prevent a child from being reregistered with a gender but having a bodily appearance that was not typical for that gender. See Prop. 2011/12:142, *Ändrad könstillhörighet*, pp. 37–38. The bill offered no further detail on which bodily appearances of children with mixed sex characteristics would 'tip' a result toward an assignment that is 'most compatible' for a 'male' or 'female' gender, a determination that is, therefore, left by law to the National Board of Health and Welfare, most likely based on medical opinion. For a discussion, see Garland, *supra* n. 68, pp. 130–152.

⁸⁵ SOU 1968:28, *Intersexuellas könstillhörighet*, p. 39.

⁸⁶ SOU 1968:28, p. 39 and Prop. 1972:6: *Kungl. Maj:ts proposition med förslag till lag om fastställande av könstillhörighet i vissa fall, m.m.*, p. 18.

⁸⁷ SOU 1968:28, p. 63 and Prop. 1972:6, pp. 27–28.

⁸⁸ SOU 1968:28, p. 53 and 57 and Prop. 1972:6 p. 51 & 58. The provision remains in place as this book goes to press, see KtL 1 §, final sentence.

could consent to these procedures, but that they should do so. As the expert investigating committee advised, parental refusal to consent, in theory, could be overridden by public authorities under the Children and Parents Code.⁸⁹

Today, the legality of these procedures in Sweden apart from the Gender Classification Act remains less than clear. As of 2017, the world's leading medical experts have conceded that no evidence exists indicating that these procedures are safe and effective for their intended purposes, nor is there evidence that any children need the procedures at young ages for their physical or psychological health.⁹⁰ Rather, the best available evidence shows that children subjected to these procedures often experience pain and dysfunction, as well as psychological and sexual trauma; some children also have been surgically assigned the wrong gender and all have lost the right to make fundamental decisions regarding their bodily integrity and gender identity.⁹¹ In January 2017, the National Board of Health and Welfare acknowledged that the medical-scientific community lacks the evidence to provide guidance on the safety and efficacy of the procedures, even though the Board also stopped short of declaring them illegal as lacking support in 'science and carefully tested experience'.⁹² Consequently, the question remains: On what terms can parents authorize these procedures to be performed on their children when no change of juridical gender is involved? On the one hand, the Gender Classification Act deems it permissible for parents to request such procedures and consent to them, not only as medical care, but also with the severe legal consequences of change of gender status. On the other hand, the questionable therapeutic value of these procedures raises new questions as to whether the procedures are difficult to describe as anything more than excisions of the parts of the bodies of children to satisfy gender norms – something now considered rights violations by human rights authorities. Swedish family law could, thus, be interpreted *either* way, to permit clinicians and parents to determine that the procedures are in the 'best interests of the child', as reflected in Sweden's gender registration scheme and social gender norms, or beyond the scope of parental authority, out of

⁸⁹ SOU 1968:28, p. 53.

⁹⁰ Peter A. Lee and others, 'Global Disorders of Sex Development Update since 2006: Perceptions, approach and care' (2016) *Hormone Research in Paediatrics*, pp. 158, 159.

⁹¹ See Zillén et al., *supra* n. 76, pp. 41–43.

⁹² Socialstyrelsen, *Vård och behandling av personer med intersexuella tillstånd: Kartläggning av det tidiga omhändertagandet* (2017), pp. 11–20.

‘respect’ for the personhood of the children and protection against bodily harm and ‘degrading treatment’.⁹³

To critical legal scholars, the manner in which Swedish law has made so much uncertainty possible in a case such as this cannot be seen as peculiar, at least in relation to how modern legal systems function. As these scholars have cautioned, family law is often a field of law in which conduct that may be normatively considered unthinkable outside of families may be legal if occurring ‘within’ them. In fact, many of the procedures involved in gender reconstruction on children with differences of sex development are even more broadly considered illegal in today in Sweden than they were in 1972 –including the sterilization of children,⁹⁴ the excision of clitoral tissue,⁹⁵ and nonconsensual digital penetration and dilation of their children’s genitals to maintain them once surgically constructed.⁹⁶ As critical feminist scholars have also advised, the very maintenance of juridical gender itself may serve as a norm that is used to legitimize binary gender as a social norm, despite the harsh consequences that gender norms entail.⁹⁷ Indeed, the preparatory works to the Gender Classification Act made clear that while gender was decreasing in relevance as a matter of law before 1972, gender registration and the rights associated with juridical gender status persisted in Swedish law, such that Swedish values had to be given primary weight in the design of any law facilitating gender change on children as well as adults.⁹⁸

Of equal importance, perhaps, critical legal scholars warn that new legal rules designed to address problems such as gender reconstructive surgeries on children are unlikely to be able to avoid considerable juridical uncertainties. Sweden could, for example, follow human rights

⁹³ See FB 6:1, 6:11 and 6:13. See also Garland, *supra* n. 68, pp. 148–153, 347–55 and 584 ff.

⁹⁴ See Steriliseringslag (1975:580), especially 1–3 §§ and 5 § (restricting the procedure to adults except in case of illness). See also HSLF-FS 2016:6, *Socialstyrelsens föreskrifter om sterilisering* 3 § and 5 § (requiring documentation that adults have received information required for sterilization).

⁹⁵ Lag (1982:316) med förbud mot könsstympning av kvinnor, 1 §.

⁹⁶ As a general matter, such nonconsensual activity violates the Criminal Code. See NJA 2013 s. 548 (interpreting Brottsbalken (1962:700) 6 kap. 1 §). On the invasive nature of dilation, see Anna Nordenström, *Commentary to Secondary Vaginoplasty for Disorders of Sex Development: Is There a Right Time? Challenges with Compliance and Follow-up at a Multidisciplinary Centre* (2013) 9 *Journal of Pediatric Urology*, p. 632.

⁹⁷ See the works of Olsen, in particular, at n. 71, *supra*.

⁹⁸ Compare SOU 1968:28 pp. 20–31 and 38–39 with Prop. 1972:6, p. 17.

authorities' recommendations, which currently propose that governments must ensure that reconstructive gender surgeries on children will occur only with each child's informed consent, to reduce the risks of unwanted procedures while protecting the interests of young persons who do want or need them.⁹⁹ The Swedish rules for consent in medical care, however, are highly indeterminate, especially where minors are concerned. Under the current Patient Act, a minor may be deemed capable to consent to medical interventions without parental assent – thus, not strictly following the text of the Children and Parents Code – if the treating clinician determines that the minor alone has the maturity to consent.¹⁰⁰ This interpretation of Swedish law is not enshrined in any statute, but reflected in the preparatory works to the Patient Act, which also give no indication that clinicians have any legal training or criteria upon which to make such decisions.¹⁰¹ Nor do any Swedish rules provide clear guidance or mechanisms to protect minors from pressure or coercion from parents or clinicians, or to ensure that minors are adequately informed before 'consenting' to such interventions. Indeed, the preparatory works to the Patient Act provide that failure to adhere to the Act does not give rise to any judicial remedy – without any exceptions for breaches of informed consent,¹⁰² and without mentioning that the Swedish Supreme Court has confirmed that such breaches should be actionable in Swedish courts pursuant to the ECHR.¹⁰³ In all of these ways, if Sweden were to uncritically incorporate human rights norms in limiting the legality of gender reconstructive procedures on minors, it would not be certain that such norms would remain unaffected by other indeterminacies embedded in Swedish law.

As these final concerns indicate, critical legal theory should not be reductively dismissed as simply a critique of policy, but rather should be essential to understand how normative interpretations of law are highly complex. To be sure, critical legal theory permits forceful questions regarding how chosen norms may harm vulnerable groups – such as in questioning why Swedish law prohibits much spanking of a child, as well as invasive medical procedures on the genitals for

⁹⁹ See Zillén et al., *supra* n. 76, pp. 43–44.

¹⁰⁰ Prop. 2013/14:106, pp. 65–66.

¹⁰¹ See Garland, *supra* n. 68, pp. 307–08 and 319.

¹⁰² Prop. 2013/14:106, pp. 41.

¹⁰³ NJA 2007 s. 504. For further analysis, see Håkan Andersson, *Ansvarsproblem i Skadeståndsrätten* (lustus 2013), pp. 661–85.

'normal' children, but has also been presumed to permit parents to authorize the excision of genitals and gonads of their children solely on the grounds that the children are considered atypical for their gender. But critical legal theory also challenges scholars to think beyond traditional assumptions that legal outcomes are compelled by a respected method for balancing and importing norms. Rather, critical legal theory requires vigilance in understanding that norms may guide outcomes, but legal actors often determine which norms prevail, not always with strict deductive reasoning from legal sources, but rather with potentially subjective views of which legal and social norms should have legal effect.

4 CONCLUSIONS

Swedish family law may in many respects be more progressive than family law in other jurisdictions, but the Swedish legal system has not been spared from the vagaries of jurisprudence that affect its counterparts elsewhere. Rather, the Swedish legal system appears to be beset with similar normative tensions that are present in other modern legal systems, tensions that may be continually increasing. At this writing, in fact, the Swedish government has proposed simple incorporation of a new set of norms from the Convention on the Rights of the Child into Swedish law, on the assumption that no new law is needed to provide guidance on how the Convention's norms will work in accordance with other Swedish laws.¹⁰⁴ Rather, the government has proposed that courts and other administrative agencies will resolve normative conflicts as they confront them, which may be reconsidered in future governmental investigations over time.

For Swedish scholars who embrace the notion that Swedish law is not well described by positivist legal theories, critical legal theory should aid in monitoring how Swedish law resolves normative conflict.¹⁰⁵ Especially where preferences among competing norms determine how Swedish law progresses, it is essential for scholars to determine why certain norms prevail and others do not. So, too, where decision-makers who interpret Swedish law resolve conflict among legal norms through

¹⁰⁴ Lagrådsremiss: Inkorporering av FN:s konvention om barnets rättigheter (6 July 2017) pp. 79–81.

¹⁰⁵ This does not mean that it is necessary to eschew legal positivism to find critical legal theory useful. For a highly developed vision of critical legal positivism, see Kaarlo Tuori, *Ratio and Voluntas: The Tension Between Reason and Will in Law* (Ashgate 2013).

reference to social norms (or their perception of those norms), the impact of those decisions needs to be carefully scrutinized. This will, in the coming years, remain especially important in family law, where children and other vulnerable persons are often at risk of highly varied legal decisions without being able to participate in them, despite the legal system's ambitions toward objective consideration under the law, in the best interests of all family members as individuals.