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Published in:
Kvinder, Køn & Forskning

DOI:
[10.7146/kkf.v32i1.128685](https://doi.org/10.7146/kkf.v32i1.128685)

Publication date:
2022

Document Version
Publisher's PDF, also known as Version of record

Citation for published version (APA):
Bak-McKenna, M. (2022). Constructions of Families in the Legal Regulation of Care. *Kvinder, Køn & Forskning*, 2022(1), 33-49. <https://doi.org/10.7146/kkf.v32i1.128685>

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Constructions of Families in the Legal Regulation of Care

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Abstract

This article considers the extent to which constructions of care within law and policy continue to privilege the heterosexual family model of care giving i.e., two parents cohabiting in a monogamous, long-standing relationship acting as one economic unit with joint children with one primary wage earner and one primary carer. Taking its focal point in the legal frameworks that surround parental leave, it explores the manner in which 'non-traditional' family forms are conceived in legal frameworks surrounding care, using recent changes to Danish parental leave policies as a case study..

KEYWORDS: Care, parental leave, work and care, social reproduction,

Introduction

The “crisis of care”, drawn into stark focus by the Covid pandemic, continues to pose a deepening challenge across the globe (Mahajan et al. 2020; Bolis et al. 2020). Resource-starved health and social care systems have often been a major contributing factor to high infection and death rates (Hick et al, 2021) while the strain felt by those with care-giving responsibilities – caring for children or dependents – while working full time, has been deeply apparent (Pozzan et al, 2020; Wenham et al 2020) As many scholars have pointed out, the realities of the social reproduction crisis revealed by the pandemic can hardly be seen as a shock but should be understood as the culmination of an ongoing erosion of social reproduction by neoliberal forces, characterized by a retrenchment of the welfare state and marketisation of care (Camilletti & Nesbitt-Ahmed 2022; Dowling, 2021). While data is only beginning to trickle in, it is clear that within private care settings existing patterns of inequality, particularly women’s disproportionate share of reproductive activities, have only become exacerbated (Charmes 2019; Sevilla & Smith 2020). This is particularly evident among working mothers with school age or younger children, who bore the brunt of additional unpaid care work – along with labour market penalties (OECD, 2020 Lynch, Kalaitzake, & Crean, 2021; Andersen et al, 2022). Despite the issue of unpaid care and domestic work having gained relevance in policymaking in the past decade, leading to a slew of policies aimed at providing better recognition and redistribution of unpaid labour, it is still predominantly women who step in to provide care in times of crisis and austerity.

The role of the family in maintaining these imbalances in unpaid care work has been underlined in the literature (Dalla Costa & James, 1972; Silbaugh, 1996; Ferguson, 2016). Other research indicates that gender norms also affect household care organisation and time allocation to child-rearing (Breen & Cooke, 2005; Zbyszewska, 2016; Lassen, 2021). Although, as Vera Lomazzi, Sabine Israel and Isabella Crespi note, “these arrangements (...) are not simply the result of

individual preferences, but of the interplay of individuals’ values, partners’ negotiations, structural factors, and institutional opportunities” (Lomazzi, Israel & Crespi 2018). Accordingly, one of the approaches taken in tackling the care deficit at state level has been challenging the gendered nature of the regimes of care, by challenging and transforming legal regimes governing family, employment and welfare. Many of these efforts centre upon the redistribution of caregiving responsibilities in the private sphere through the promotion of gender equality and by shifting gendered divisions of labour, which remain deeply embedded in governance regimes. The much-debated endeavor to increase fathers’ share of parental leave through the creation of non-transferable quota for fathers, represents one of the most visible examples of legal policies aimed at promoting rights and responsibilities in areas of care. Over the past decade in Europe, moves towards a more equal distribution of parental leave through law reform and social policy has been headed by the European Commission and its initiative to promote female employment and better reconciliation of work and family, culminating in a 2019 EU Directive which included demands for non-transferable leave for fathers to be ratified at the domestic level. However, while these policies have led to incremental gains in the distribution of parental caregiving, research indicate that for the most part family policies have not fundamentally altered existing gender gaps in social reproduction at the private level (Stratigaki, 2004; Leon and Millns, 2007; Shamir, 2010; Duvander *et al*, 2019) Indeed, in countries that have introduced non-transferable parental quotas for fathers, such as Sweden, there is still a considerable gap between men and women in time spent on unpaid care work within the home (Staland-Nyman et al 2021; Björk Eydal et al. 2015)

This article adds to the literature by considering the question of inclusivity by reference to the capacity of parental leave policies to challenge or disrupt prevailing understandings of caregiving and the gendered division of labour. As research has underlined, the design and framing of parental leave in law and policy reflect wider narratives about concepts and practices of care and work,

which may act as barriers to redressing inequities of caregiving by re-embedding gendered regimes of care (Suwada 2017; Busby, 2011). Of these, the most prominent is the enduring binary opposition of paid work—as an economic and productive activity—and unpaid care work—as a non-economic, non-productive activity outside of the formal economy (Doucet, 2021). This is reflected by the fact that most parental leave schemes are articulated in law and policy as employment policy related to the right to reimbursement of labour market earnings while they take on that care work; reflecting the position that parental benefits *should* be attached to employment—rather than based on citizenship (Dobrotić and Blum 2020, 604). Another is the gendered nature of care work and the reinforcement of the role of women as caregivers, prevalent in many maternity leave policies (e.g., O’Brien, 2009; Ray, Gornick, & Schmitt, 2010; Rostgaard and Ejrnæs, 2021). One aspect that has received less attention in the literature, however, are categories and structures of caregiving as they relate to (hetero)sexual constructions of the family. While the “sexual family” (Fineman, 1991) has been central to discourses of care and caregiving in law and policy, the past three decades have given rise to a rapid increase in non-traditional family and living arrangements, intimate partnerships and kinship systems. This includes a dramatic increase in single-parent and multi-parent households (involving more than 2 parents), as well as multi-generational households, but also in queer and family relations of choice, such as communal living situations, which challenge the binary oppositions and divisions of care distribution through varied and diverse care giving arrangements.

The object of the article, therefore, is to broaden the frame of analysis to consider the extent to which constructions of care within law and policy continue to privilege the heterosexual family model of care giving i.e., two parents cohabiting in a monogamous, long-standing relationship acting as one economic unit with joint children with one primary wage earner and one primary carer. Taking its focal point in the legal frameworks that surround parental leave, it explores the manner in which ‘non-traditional’ family forms are conceived

in legal frameworks surrounding care, using recent changes to Danish parental leave policies as a case study. The introduction of a new policy of non-transferable leave for fathers in October 2021 was accompanied by an emphasis on the flexibility of the policy to encompass single and LGBT+ families; it therefore provides a useful object of analysis regarding the question of inclusivity and whether parental leave policies do, in fact, move beyond a heteronormative ideal, to encompass non-traditional family forms.

The structure of the article is as follows. I begin by providing an overview of the changing configurations of market, family and state within the Danish context, which provide a backdrop to recent reforms to the Danish parental leave scheme. I then introduce feminist theorising on care and its related network of concepts, along with queer perspectives, to analyse the framing of care distribution in attendant legal regimes and policies, particularly those relating to non-traditional family forms. I then consider the case of work and family policies in Denmark, to analyse how developments around sexuality and the rise of non-traditional families are shaped and constrained by existing normative divisions surrounding the appropriate organisation of care within the home.

Sharing the Care: Danish Parental Leave Schemes

Nordic states, like Denmark, are considered among the most family-friendly in the world, partly due to their generous family leave policies in terms of length as well as reimbursement levels. With the rise of women’s labour participation, state support for working families was channelled through affordable day care, childcare allowances and parental leave, and the hope that men would begin to take on a higher portion of household duties given women’s employment responsibilities. A generous ‘childcare leave’ scheme was introduced in 1994, to meet the rise in birth rate at the beginning of the 1980s. This emerged following the introduction of a Directive by the Council of the European Communities in co-operation with

the European Parliament in 1992 concerning the protection of pregnant workers and workers who have recently given birth or are breastfeeding. By the mid 1990s, more than 80 % of Danish mothers were in employment. Over the past three decades, the duration of parental leave with economic compensation have been expanded. Up until 2001 parents were offered 14 weeks of maternity leave followed by 10 weeks of parental leave that could be shared between parents. Since 2002, this has been extended to 18 weeks of maternity leave and 32 weeks of parental leave. The system currently combines transferable but relatively low public benefits (average replacement rate is around 50%) with temporary and earmarked wage compensation partly provided by employers. This, together with investments in public day care and other public-funded care services and the general rise in the educational level of women, have ensured that Denmark has one of the highest female employment and fertility rates in Europe (Dahl and Rasmussen, 2012; Kleven, Landais, & Sjøgaard, 2019).

Despite efforts to improve the balance between family and work life, however, there remains a prominent gendered division of labour both within and outside the labour market in Danish society. While generally seen as a “women-friendly” welfare state women still perform more care than men in relation to formalised care work and care in families. Current estimates put the number of additional care work performed by women at around 9 extra weeks each year (Bonke, 2002). Moreover, inequality and segregation in the labour market is significant both in terms of wage and employment type. Women dominate professionalised caring sectors, which are characterised by lower wages, particularly in the public sector. The gender pay gap in Denmark is still currently between 15–20 percent (Kleven, Landais, & Sjøgaard, 2019). In particular, the effect of children on the careers of women relative to men are large and have not fallen over time, remaining one of the key drivers of labour market gender inequality (Angelov *et al.*, 2016). Recent research has shown that the “child penalty” in Denmark, by which women fall behind men due to children, equals about 20 percent and increases with each child (Kleven *et al* 2019).

Simultaneously, the past decades have shown that the welfare model of universalism promoted in the Nordic states, where care is seen as a state responsibility, publicly outsourced and state-financed allowing individuals to combine paid and unpaid caring responsibilities, has not made them immune to a rising global care deficit (Hansen, Dahl and Horn, 2020). As recent research has shown, the Nordic welfare state model has been placed under increasing pressure by neo-liberalisation, along with the reverberations of the financial crisis (Dahl, 2012; Poutanen and Kovalainen, 2014; Hansen, 2007). While historically and socially variegated from other national patterns, the dynamics of the Nordic care crisis exhibit many of the same characteristics as in many parts of the globe, where rising needs of care and a decreasing supply creates a deficit of care in the private and public spheres (Hochschild, 1995: 332).¹ In the Danish context, these pressures have impacted commodified regimes of care in the public sector which have been effected by inadequate economic resources and the absence of that, which Fiona Williams terms, “good enough” care (Hansen *et al* 2020). The reduction of state investment in social services and welfare programs has also resulted in an offloading of caring responsibility onto communities, families and individual citizens (UNDP, 1999). Research on the work/life balance of Danish families reveal the inadequacies of institutional care, as well as the costs on families and individual family members in bridging care needs and compensating for deficiencies in the system (Dahl, 2012; Dahl, 2017). Research also underlines the gendered division in the impacts felt, with women assuming a larger responsibility and receiving less support in private care arrangements (Hansen 2007, 2019).² Women were also found to have carried out a much larger share of childcare and household work during the COVID-19 lockdown (Andersen *et al* 2022)

This has spurred an increasing interest in welfare reforms that aim to redistribute caring responsibilities, such as non-transferable parental leave. Efforts, that have been spearheaded at the EU level. Unlike its Nordic neighbours, which have all introduced non-transferable leave for fathers of

between 9-15 weeks over the past two decades, there has been considerable political reluctance in Denmark to introduce a similar policy.³ Research indicates that Danish women take on average 9 times as much parental leave as Danish men.⁴ In 2012 the Government appointed a committee to examine the effects of the proposal for an earmarked period of up to 12 weeks of the leave reserved for fathers, however, despite broad support from trade unions the proposal was later withdrawn. The decision was expressed by the then Minister of Employment on the basis that it would not be right for the government to decide how the parents choose to share the leave. With the adoption of the EU Work-Life Balance Directive in 2019, which aimed at improving families' access to family leave and flexible work arrangements and encouraging a more equal sharing of parental leave between men and women, EU states, including Denmark were required to implement a minimum of 9 non-transferable weeks for fathers before August 2022. Public and political debates surrounding the creation of the new scheme followed a similar pattern to earlier arguments concerning the relationship between wage work and care; namely, concern for the rights of individual families to delegate their caregiving responsibilities within the private sphere. A particular area of concern was the economic impact on families where fathers are the higher earner (Høgholm Jørgensen and Egholt Søgaard, 2021). In opposition to this, the issue of extended leave period was framed within an 'equal rights' frame as part of a 'right of fathers'.

The new law was adopted in March 2022⁵ According to statements made by the Social Democratic government, its aims were to strike a balance between EU demands and the flexibility of families, both in relation to the organization of domestic care and labour market access. The ruling Social Democratic government expressed support for a greater uptake of parental leave by fathers, which it argued was particularly beneficial for children and would remove barriers to women's labour market participation.⁶ Of note was the emphasis upon the scheme's progressive inclusion of alternative families, specifically single

and LGBT+ family constellations. The framing of the quota policy, primarily with regards to family and labour flexibility, reflects similar trends in EU parental leave policies which have introduced researched time for fathers (Eydal and Gíslason 2008; Lappegard 2008; Geisler and Kreyenfeld 2011). However, the impact of such policies has been mixed. Research around paternity leave quotas, including in the Nordic context, has shown that while non-transferable quotas have incentivized fathers to increase their leave uptake, they are not effective in prompting fathers to use more than their personal entitlements (Duvander et al 2019). Data shows that only a small minority of fathers take more than their quota of leave (see for example Arnalds et al, 2013). Moreover, although the average number of days is increasing, only some fathers may be reacting to the reform. This is particularly linked to education and income level (Duvander and Viklund 2014). As I will argue, this is also related to the framing of parental leave policies, which often manifest existing attitudes regarding care and work that can act as a barrier to shifting broader social norms and expectations, particularly the gendered nature of care.

Narratives of Work and Care: Situating Feminist Legal Theorizing on Social Reproduction

As has been concluded by decades of interventions by feminist scholars, the status and treatment of care within social and political contexts has been both problematic and precarious (Fraser 2016, Ferguson, 2016; Mies, 1986). Feminist theorists of care have shown that despite being a central aspect of most social and economic systems, care has largely been invisibilised and excluded from economic systems of value (Waring, 1988). This status is sustained through narratives suggesting women's natural predisposition to care work or biological destiny as mothers, as well the division between the spheres of 'production' and 'reproduction'/ 'work' and 'home', as a means to support a gendered division of labour (Cox and

Federici, 1975). The division between paid work and unpaid care work is visible in many aspects, not least the exclusion of unpaid care work from the ambit of GDP, but also in the persistence of analytical categories such as *stay-at-home mother*, *stay-at-home father*, *working mother*, and *working father*, which build on a division between work and care (Doucet, 2021). As Nancy Fraser argues, the care crisis emanates from a boundary struggle between production and reproduction, with capitalism 'freeriding' on activities of provisioning, caregiving and interaction that produce and maintain social bonds, although it accords them no monetarized value and treats them as they were free' (Fraser, 2016, 101).

The increasing concern over matters of care, leading to a rise in regulation and public policies addressing issues of care, is bound up not only with a rising 'care deficit' but also changing gender roles, particularly with regard to the nature and extent of women's participation in paid work. Despite demographic shifts away from the 'male breadwinner' model towards the increased labour participation of women, this has not led to significant changes in the distribution of care work and social reproduction within the home (Bhattacharya 2017). Women have largely continued to assume primary responsibility for caregiving, seeking to 'balance' their work and family responsibilities by assuming a 'dual burden' of work and care, which has arguably exacerbated rather than alleviated gender inequalities. This dependence has only grown under conditions of neo-liberalisation. As Fraser argues:

Globalizing and neoliberal, this regime promotes state and corporate disinvestment from social welfare, while recruiting women into the paid workforce—externalizing carework onto families and communities while diminishing their capacity to perform it. The result is a new, dualized organization of social reproduction, commodified for those who can pay for it and privatized for those who cannot, as some in the second category provide carework in return for (low) wages for those in the first. The two-earner household

has become a paradigmatic node in this regime (Fraser 2016, 112)

The move towards policies aimed at reconciling work and family life, including parental leave, which have sought to accommodate the needs of carers, are posited as the solution to ongoing imbalances in care arrangements by aiming at a *redistribution* of care. However, the ability of this approach to deliver greater gender-equality in areas of care has been mixed (Stratigaki 2004; Müller et al 2018). Research has pointed to the social, structural and discursive formulation and construction of these policies as critical to their ability to deliver on gender equality (Rocha 2021). This includes not only the variations in length, compensation (and level of compensation) and transferability, among other factors, but also the manner in which policies frame and approach the issues of parental leave and care, and particularly whether they challenge the stereotypical gendered divisions of care. And yet, despite significant regulatory adaptation, feminist scholars have shown, that these efforts have been too often instrumental and limited, rather than transformative, in so far as reconceiving prevailing attitudes towards care work and gendered parenting roles (Suwada 2017; Busby, 2011). Despite the stated aim of 'family-friendly' policies of parental leave and other work/life balance instruments to place unpaid care work at the heart of policy reform and encourage an equal distribution of caring, many remain wedded to the underlying dynamics of the 'production boundary' and its gendered division of labour (Busby, 2011; Conaghan, 2013).

In their comparative study of European laws on parental leave work, Leon and Millns underline that despite the gender neutrality of the provisions on parental leave, generally legal frameworks of maternity rights are much stronger than their parental rights counterpart (Leon and Millns 2007, 343). This, they argue, works to maintain a gendered conceptualisation of childcare, in which greater legal and financial protection is conferred upon working mothers, underscoring the primary role/responsibility of women in caring for children. Even with the introduction of 'daddy days' or 'use

it or lose it' quotas, research indicates that the quota seems to create a norm of how much leave fathers should use, rather than promoting more equal distribution of shared leave between men and women; the sharable part of family leave being often seen as primarily for the mother to take (Duvander et al 2019).

This imbalance is exacerbated by existing social norms and expectations but also frequently by economic factors. The framing of these policies in terms of labour market flexibility for women inevitably centres concerns of economic performance and productivity (the expectation being that if men and women were to share domestic care work in the family more equally, then women would be better able to participate in the labour market), making them susceptible to the realities of economic imperatives, particularly in the private sphere. The criteria of employment to qualify for the earnings-related benefit, moreover, ensures that the scheme remains wedded to the labour market and ideas of productivity by rewarding work before having children. The level of compensation is a decisive factor for the take up of parental leave by fathers (Suwada 2017). As Nancy Folbre underlines, a common characteristic of family leave allowances is that they "defray only a small percentage of the cost of children" (Folbre 1994, 122–123), which often undermines the economic incentives for fathers to take up caregiving responsibilities. The low level of legally guaranteed parental benefit, in an already gendered labour market in which women generally earn less than their male partners, also means that for economic reasons a supposedly gender-neutral policy of parental leave ensures that the burden falls upon women (highlighting the fact that the gender pay gap remains a crucial matter when addressing reconciliation) (Dickens, 2006, 306; Shamir, 2010). If they are already mothers, the chances that the gender pay gap among the couple is even higher increases.⁷ The low level of remuneration maintains a division between the productive worker and the marginalized caregiver, whose reproductive activities are largely depicted as an impediment to labour participation. This works to maintain a traditional family policy where gender roles

are clearly differentiated between care and paid employment.

Seen in this light, the ability of 'family-friendly' policies to deliver greater equality with regard to the allocation of caring responsibilities is impeded by embedded gendered structures, particularly within the family that shape choices on how to share leave (Duvander *et al* 2019); a situation exacerbated by states' continued practical reliance on informal care arrangements to absorb the care deficit in place of formal, publicly subsidised care solutions. That is, care remains undervalued, under supported and under remunerated within policies on care, and more broadly within society and the market, which will lead to a limited impact on shifting the inequalities of distribution within the home.

Non-Traditional Families and Social Transformations of Care

A further dimension of the legal regulation of care has emerged against the backdrop of broader demographic changes, which have seen the rise of a host of new configurations of intimacy and kin-like relationships other than the heterosexual family model. This includes new ways of creating intimate relationships, which include friends, lovers and former partners, and new kinds of family models such as rainbow families, create new possibilities of *redistribution* of care beyond the traditional family model and its gendered "social contradictions" (Fraser 2016 22). As Schacher, Auerbach and Bordeaux Silverstein note, same-sex relationships may challenge gendered roles by, "degendering parenting, reconceptualising family, and reworking masculine [and feminine] gender roles" (Schacher, Auerbach and Bordeaux Silverstein, 2005, 31). These broader relationships of caregiving include creating care arrangements in multiple domestic spaces, creating multiple and separated forms of income, and involving a wider range of individuals in carrying out care activities (Weeks, Heaphy and Donovan 2001). This is particularly visible with regards to new forms of parenting arrangements, involving non-biological, adoptive and donor parents.

The embedded “familialism” – to draw on Esping-Andersen categorization of welfare regimes with regard to the extent to which families are held responsible for their members’ welfare (Esping-Andersen 1990; 1999) – of family leave policies, against the backdrop of the collapse of the male-bread winner model as the primary solution to in-home family care provision, means that family-based care remains desirable as a means of absorbing and discharging the care burden, requiring stable family forms. This move, away from specific family models towards an emphasis on family functioning, opens a space for the reconsideration of issues of sexuality and non-standard intimacies. However, the extent to which family friendly policies actually reflect and support alternative constellations of the family outside of the traditional nuclear family model varies greatly across different welfare states.

Scholarship has explored the challenges and contradictions of claims for inclusion and recognition of LGBTQI+ families within dominant regimes of social citizenship, not least their disciplining and restrictive potential, as well as their potential to reinforce the “norm of heterosexuality” (Fineman, 1991 Richardson, 2005, Seidman, 2001). Criticism of the emancipatory limitations of the demand for same-sex marriage in particular, has given rise to calls for recognition of more expansive family forms to reflect the diversity of peoples’ intimate relations. For example, Judith Butler posits the concept of kinship as a counterbalance to the restrictive conceptual and juridical focus on traditional marriage:

If we understand kinship as a set of practices that institutes relationships of various kinds which negotiate the reproduction of life and the demands of death, then kinship practices will be those that emerge to address fundamental forms of human dependency, which may include birth, child rearing, relations of emotional dependency and support, generational ties, illness, dying, and death (to name a few). (Butler 2002, 102–3)

However, as Butler also points out, even as these new modes of kinship emerge, their conditions of possibility are dependent on external parameters, including the normative regulation of the state. The demands of legibility within a dominant heterosexual framework indicates that for these relationships to become recognised, they need to be decipherable to the existing normative framework and its accompanying law. That is, these alternative family forms must enter into legitimate subjectivity and, “to be a subject at all requires first complying with certain norms that govern recognition – that make a person recognizable” (Butler 2009, iv). This often precludes the possibility of true subversion to the traditional family form, leading Butler to question whether “kinship is always already heterosexual” (Butler 2002, 123).

The same demands of legibility also extend to legal regimes that structure caregiving. Despite the recasting of family structures to include some LGBTQI+ families, dominant regimes of care enforce a traditional model of intimacy and relationships, which exclude the vast majority of alternative kinship arrangements. The dominant juridical understanding of the family within the societal division of labour continues to privilege “the traditional and increasingly exclusive notion of the legally married, nuclear and economically functional model” (Salford 2002, 411; Diduck 2003). This limited family form not only governs the politics of recognition but also the disciplining responsibilities and expectations, which are associated with the state sanctioned family form. The conferring of rights onto LGBTQI+ families, particularly as carers, is contingent upon their fulfilment of the model of care, which mimics the heterosexual family structure with its gendered divisions of labour (Stychin, 2004; Barker, 2006). That is, while the state has decentered heterosexuality from the family structure, enabling LGBTQI+ individuals to be admitted into its ambit, it maintains a particular form of family functioning.

Ann Barlow’s analysis of configurations of caregiving in British family law, for example, demonstrates how the law’s recognition of care work normalises heterosexual families to the exclusion of other organizational forms for the

provision of care (Barlow, 2007). In the case of marriage dissolution, for example, she explores how value is placed on non-financial contributions during a marriage, which is not available to those who cohabit (Wong, 2007). Even less value is accorded to non-couple care-giving relationships or state-dependent single parenthood, where paid work is considered to be the carer's primary goal and reproductive labour becomes non-existent at best. Family leave policies, such as those enabling parents to take job-protected leaves from work to carry out caregiving activities, are also largely dependent on the extent to which they fit the legally recognized version of a parent. The biological and heteronormative model of family expressed in welfare and family law regimes also privileges biological parents over other potentially relevant adults (for example, sperm donors or surrogate mothers).

Joanne Conaghan and Emily Grabham employ the concept of sexual citizenship to explore the manner in which rights linked to care and family protection, particularly those stemming from the legal recognition of partnerships, are prefaced upon their ability to fit within attendant heteronormative family forms (Conaghan and Grabham, 2007, 325). Citing the UK Civil Partnership Act 2004, they demonstrate how relationship recognition for lesbians and gay men mirrors marriage in virtually every way and is designed to encourage a particular set of relationship practices. These are primarily centred around maintaining a stable, long-term relationship with similar expectations surrounding financial dependency, particularly as it relates to spousal support (Barker, 2006, 249). The hallmarks of the 'ideal' citizen carer that emerge from these regimes include:

She (or he) will be in a monogamous, two-person relationship. She will be cohabiting with her partner. There will be an assumption that one partner earns more than the other, and/or that one partner is more domestically oriented than the other, thereby mirroring the heteronormative gendered division of labour within the home. The partners will act as one economic unit, sharing finances and

expecting to take responsibility for or depend on the other partner in the case of illness, unemployment or if the partnership breaks down. (Conaghan and Grabham, 2007, 337).

They also cite the UK benefits system, where same-sex couples have been treated as spouses, resulting in a large number of same-sex couples becoming financially dependent on each other in a similar manner to the asymmetries caused by the model of traditional marriage. This approach to non-traditional family arrangements is built on a set of normative assumptions about the appropriate form of family intimacy, centred around material concerns such as shared finances and a shared domestic space. The 'citizen carer' also maintains a defined conjugal relationship with the expectation that children will be raised as if part of a two-parent nuclear family model. As Conaghan and Grabham note, "the trade-off for relationship recognition therefore includes adopting sanitised and privatised relationship patterns that are intelligible to the heteronormative mainstream, but which have considerable economic and affective consequences for sexual minorities." (Conaghan and Grabham 2007, 335)

In this sense, the enclosure of non-traditional relationships into the married nuclear family model not only maintains prevailing social norms and institutions of family, gender, work, it also forecloses the possibility of an alternative to traditional model of organising "the reproduction of life". These emancipatory social and legal gains for some LGBTQI+ families, simultaneously strengthen the exclusionary nature of the family form and maintain the contradictions and divisions of caregiving responsibility within the heterosexual family model.

Recognition of Care within Non-Traditional Families in the Danish Legal Context

Mapping these insights onto the accessibility of legally recognized, family-based rights for

non-traditional families in Denmark, the section considers the implications of parental leave policies for non-traditional family forms. By doing so, it aims to draw a link between government policy in the area of care imperatives and reconfigurations of sexuality around concepts of work, family and care.

Denmark has undertaken a number of gender-neutral legal initiatives in the area of work and family life, which might be said to broaden the scope of family-friendly policy to encompass non-traditional family forms and encourage greater redistribution of caring responsibilities within families. Denmark became the first country in the world to legally recognize same-sex relationships in 1989, giving homosexual couples a number of rights which were to be equated with (heterosexual) married couples.⁸ In 2012 Denmark recognized same-sex marriage, following the introduction of a law to make marriage legally gender neutral.⁹ Despite this, there is still a significant gulf in rights that accrue to alternative family forms. For example, single and lesbian women were deprived of the right to physician-assisted artificial insemination in both public and private settings by law in 1996, with the requirement to 'live with a man in a marriage-like relationship' (§ 3). The ban was not abolished until ten years later in 2006.¹⁰ While joint within-country adoption was made available to same-sex couples in Denmark in 2010,¹¹ the right has been more of a formal than a practical right, as very few same-sex couples have been able to adopt a child. Instead, second-parent adoption has been an increasingly important avenue to parenthood for male couples through surrogacy arrangements. However, commercial surrogacy (i.e., paying more than medical costs to a surrogate mother) is illegal in Denmark and if the court finds that a couple has used a commercial surrogate, it may result in the adoption not being granted to the non-biological parent.¹² With these restrictions in place, which place heavy emphasis on traditional family models, gay and lesbian couples and singles have increasingly turned to alternative routes to parenthood. Shared parenthood has become increasingly common, where same-sex couples jointly have children with a single

mother/father or another couple – a so-called 'Rainbow family'.¹³ However, a child can only have two legal parents in Denmark, severely restricting the possibility of non-biological parents to gain the attendant rights and status of a parent. Female same-sex couples who seek medically assisted procreation face similar difficulties. There is no marriage presumption for same-sex couples and the social mother has to go through a process similar to the one cohabiting different-sex couples go through in order to legally verify their parenthood. Trans families face similarly restrictive legislation. Transmen are automatically registered as mothers on their child's birth certificate, while transgender women are registered as the child's father instead of second mother.

These restrictive policies regarding the legal definition of a parent or family also spill over into constructions of family, work and care within legal entitlements surrounding family leave. *Barselsloven* – the legislation governing maternity, paternity, and adoptive leave in Denmark – currently affords birth mothers four weeks of leave before the expected birth of the child. Birth mothers are required by law to take the first two weeks following the birth of their child off from work and are entitled to 12 additional weeks which must be held consecutively. 'Fathers' (a term which includes the same-sex partners of birth mothers and adoptive parents, but not same-sex partners of birth fathers) are entitled to two weeks paternity leave, which must be used before the child reaches 14 weeks. Beyond these earmarked weeks, both parents are entitled to up to 32 weeks of leave from their jobs but each is only entitled to financial compensation up to a total of 32 weeks.

The new law change, which is expected to be implemented in August 2022, will allocate 11 weeks of non-transferable leave to fathers and reduce the number of weeks available for each parent to 24. The proposed legislation also contains a provision, which will first be implemented at the beginning of 2024, that extends the possibility of accessing some parental leave to a) the legal parent's married partner; b) the legal parent's de facto partner if they live together and have been in a 'marriage-like' relationship for 2 years; c) a donor

with a 'parental like relationship to a child'; and d) the donor's married or defacto partner with a 'parental like relationship to a child', which is expressly directed towards LGBT+ families. The proposal also includes a right for single parents to transfer parental leave to a family member. However, this only concerns the 26 transferable weeks, and not the 11 earmarked weeks which must be taken by the legal parents.

While the law is expressly directed towards gender equality and the redistribution of care within the home, it is apparent that the approach to work and families still largely reflects a heterosexual family model of care, based on a two-parent model of 'primary' and 'secondary' caregivers. For example, while single parents are able to share a proportion of their parental leave, this is limited to one single family member, rather than multiple. This approach largely overlooks the rising amount of care that is being provided by grandparents and other extended family members (Hank, K., Buber, I. 2009), particularly within single parent households, which are on the rise in Northern Europe (Esteve & Liu, 2020). Moreover, while the scheme enables parents to hold leave simultaneously, it is largely built on the assumption that one parent will continue to work, normally full time, whilst the other remains at home to look after the child. Given that the compensation rate during the first 24 weeks varies according to sector, with it being up to private employers to decide how much of an individual's salary will be covered during the period, with some being granted a full salary for all or some of the period, while others are only covered by the state (*barselsdagpenge* – being slightly higher than unemployment benefits), the relatively unregulated financial implications of parental leave means that the economic consequences will likely influence the organization of caring arrangements by families. This position is implicitly acknowledged in explanations and examples of how the scheme can be organized by families in the most recently updated pamphlet issued by the Danish Ministry of Employment.¹⁴ The disparities in accessing leave, coupled with the fact that pension payments are suspended during parental leave, leaves the primary caretaker much worse

off financially. In practice, economic considerations as well as social constructions of gendered parental roles play a major role in influencing the division of parental leave in families. A Danish study conducted in 2020 found that the economic reasons and a strong preference that the mother should take leave were the primary motivating factors in the distribution of leave amongst parents.¹⁵ Likewise, early research on the new quota scheme predicts that the introduction of mandatory leave with a low replacement rate will only marginally increase the leave of fathers (Høgholm Jørgensen and Egholt Søgaard, 2021). Given the persistence of a substantial pay gap between men and women, many families are often economically unable to forgo the pay of the higher earner for any substantial period.

While same sex parents were also made eligible to share parental leave (after the Maternity Act was revised in 2009), currently only individuals who are legally recognized as the parents of the child can make use of family leave. As a child can only have two legal parents, non-traditional families involving more than two parents are ineligible to access these rights, further reinforcing the idea of two primary care givers. Furthermore, the registration of same sex parental rights from birth is presently restricted to same sex partners of mothers. Same sex fathers are currently unable to be registered as co-parents from birth. This restricts not only the right of same sex father to access parental leave benefits, but also restricts the possibility of other relevant figures such as surrogate mothers or other members of rainbow families from accruing rights in relation to a child. To be granted parental rights (*medmoderskab*), moreover, the same sex partners of birth mothers must have a civil partnership with the birth mother and be expected to commit to the care and upbringing of the child (*omsorgs og ansvarserklæring*).¹⁶

In this sense, same sex partners of new mothers are granted parental rights, based on the understanding that they assume responsibility for children in a manner that fits with the state's normative model of family identity; one in which the burden of care, both financially and practically,

is shared privately with a co-parent within a defined two-person relationship. Similar demands are placed on adoptive stepparents, particularly the requirement that the two parents must have shared a registered address for at least 2.5 years to achieve the required 'stability' to make them eligible for parental rights. Defined as falling within the same category as fathers within family law legislation, moreover, same sex partners of biological mothers are also eligible to fewer weeks of leave than biological mothers, thereby reinstating the biologically determinant model of care divisions. From this it becomes clear that when caring rights are extended to LGBTQ+ and other non-traditional families, it is on the basis that they can be slotted into existing gendered structures rather than pursuing alternative configurations of intimacy and child-rearing.

Conclusion

While inroads have been made into tackling the gendered division of labour through legislation and regulation that promote fathers' uptake of parental leave, there is still a considerable way to go in ensuring equality in care distribution. Eliminating such inequality entails the social transformation of individual ideals, social norms and financial constraints which structure the nexus between market, family and state in dynamics of care. In particular, the trend away from heteronormative notions of family that emphasize the role of social and economic obligation in relations of social reproduction prompt a reconsideration of

gendered dynamics of care. Non-traditional intimacies, particularly those arising from same-sex relations, are advancing the pluralization of relationship forms within the private sphere – pushing politically and culturally contested ideas about “the correct or moral ways in which people should conduct their lives, and the people with whom they should conduct them” (Pine, 2002, 339; Razavi, 2013).

Despite the potential of these non-traditional intimacies to lead the way in expanding approaches to care and creating the economic and social conditions that facilitate better modes of care distribution, however, these approaches are largely conditioned by heteronormative approaches to care contained and enforced by legal structures. As the case of Danish parental leave reform demonstrates, this can be seen more starkly in the manner in which many of the associated care rights and protections for families formed by lesbians, gays, and other non-traditional families are premised on the demand that they approximate traditional heteronormative family constructions, in place of alternative configurations of intimacy and child-rearing.

Given the critical limitations of this model to care, it is clear that if the growing care deficit is to be tackled in a sustainable manner, legal and policy frameworks must adapt to the broader changes in society and gender relations, including tackling the gendered narratives and binaries of work and care, production and reproduction that remain embedded in legal structures regulating care and ensuring that legislative reform allows for a true reconceptualization of care distribution.

Notes

- ¹ As Arlie Hochschild describes in her seminal text from 1995: *In private life, the care deficit is most palpable in families where working mothers, married and single, lack sufficient help from partners or kin. ... In public life, the care deficit can be seen in government cuts in funds for services for poor mothers, the disabled, the mentally ill, and the elderly. In reducing the financial deficit, legislators add to the 'care deficit'.*
- ² For example, Danmarks Statistik has registered little change in the number of men taking care of their

- sick children, with women continuing to use more allocated care provision days than men. <https://www.dst.dk/da/Statistik/nyheder-analyser-publ/nyt/NytHtml?cid=32036>.
- ³ Norway was the first country to enact such a father's quota into law in 1993, followed by Sweden in 1995, Denmark in 1998 (abolished in 2002) and Iceland in 2000.
 - ⁴ See <http://bm.dk/da/Aktuelt/Publikationer/Arkiv/2014/Kvinder%20og%20maend%20paa%20arbejdsmarkedet%202013.aspx>
 - ⁵ L 104 Forslag til lov om ændring af barselsloven. 3 March 2022.
 - ⁶ Betænkning Til lovforslag nr. L 104 afgivet af Beskæftigelsesudvalget. 23. February 2022.
 - ⁷ According to the European Institute for Gender Equality's 2017 Equality Index the total gender gap in net monthly earnings in the EU stands at 31%, to the detriment of women, but jumps to 48% for couples with children under the age of seven.
 - ⁸ Lov om registreret partnerskab (1989).
 - ⁹ Lov om ændring af lov om ægteskabs indgåelse og opløsning, lov om ægteskabets retsvirkninger og retsplejeloven og om ophævelse af lov om registreret partnerskab (2012).
 - ¹⁰ Lov om kunstig befrugtning i forbindelse med lægelig behandling, diagnostik og forskning m.v. (1997).
 - ¹¹ The Adoption Act was changed in 2009; however, in 2008, courts started granting adoptions to lesbian couples who had undergone inseminations at Danish clinics soon after birth in anticipation of the law change.
 - ¹² In Denmark, a woman who gives birth is considered to be the child's legal parent and, if she is married to a man, her husband is considered to be the legal father. Hence, achieving joint parenthood through adoption by a social parent requires the surrogate mother's consent. If she is in a heterosexual marriage, her husband also needs to consent. If none of the parents-to-be are the biological parents, then the couple needs to jointly adopt the child.
 - ¹³ In 2018 Danmarks Statistik registered the births of 3.316 'rainbow' children – defined as children who have either two or more same sex parents. This accounts for 5% of all births. Danmarks Statistik (2018): Børn og familier, side 39 f. Tilgængelig via: <https://www.dst.dk/Site/Dst/Udgivelser/GetPubFile.aspx?id=31407&sid=bornfam2018>
 - ¹⁴ Ministry of Employment, 'Flexible Parental Leave' (2003) available at: https://bm.dk/media/6789/fleksibelbarselsorlov_foraelde_dec_2003.pdf
 - ¹⁵ Danish Institute for Human Rights, 'Mere ligestilling i de danske barselsregler' 2020. <https://menneskeret.dk/udgivelser/barsel>
 - ¹⁶ Bekendtgørelse om registrering af faderskab og medmoderskab i forbindelse med anmeldelse af barnets fødsel (2019).

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