

ORDER OR FREEDOM

THE ESTABLISHED VIEW AND AN EXISTENTIALISTIC FAMILY LAW THEORY

BY

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1.1. During the last few decades work has been in progress in the Nordic countries on the renewal of family law. This has affected the family law debate. What this debate primarily has shown, however, is how difficult it is to define the fundamental problems inherent in established family law. There may be several causes of this, but there is *one* almost self-evident reason why the essential issues seem to remain untouched: the fear of getting too close to one's own married life.

1.2. Nevertheless, in such a period of legislative activity it seems important to bring to light some fundamental issues of family law.

First, the established view on the legal regulation of cohabitation between man and woman will be outlined and some consequences of this view will be indicated. Next, an alternative view will be presented which in the opinion of the present author ought to be added as a supplement to the prevailing ideology. By way of conclusion, the main features of the proposed legal regulation of unmarried cohabitation presented by the Norwegian Commission on Marriage Law will be mentioned.

In order to make the outline of the established view as concrete as possible Professor Anders Agell is chosen as a spokesman. In his book "Marriage or Cohabitation"¹ Anders Agell presents a view of the legal regulation of married and unmarried cohabitation which is representative of the traditional debate on family law politics. At the same time, however, Anders Agell is interesting because he does what is rarely done by others—he operates with clear-cut issues. In addition to that his views are interesting as legal philosophy.

2.1. Anders Agell defines the concept of marriage according to the Swedish Marriage Act of 1973 as "a revocable contract" (p. 12), as "a secular contract, the marriage type of contract" (p. 72).

Evidently, Agell makes this definition on the basis of the provisions on the contracting and dissolution of marriage. His description of marriage as a "revocable contract" is based on the fact that "one party can unilaterally

¹ Agell, Forsman, Ingebrand, *Äktenskap eller samboende* (hereinafter referred to as "Marriage or Cohabitation"), Stockholm 1980. A shorter version of the book has been published by Agell, see "The Swedish Legislation on Marriage and Cohabitation. A Journey without a Destination", in 24 *Sc.St.L.*, pp. 9 ff. (1980).

secure a divorce” (p. 12). That the pivot of his understanding of marriage is based on the rules on the contracting and dissolution of marriage appears also from his statement that the more liberal the marriage law, “the less occasion for cohabitants not to marry for principal reasons” (p. 11, cf. p. 98). This statement also indicates that what he considers the principal features of marriage are the rules on contracting and dissolution.

Simultaneously with, or maybe as a consequence of, Agell’s definition of marriage on the basis of provisions on contracting and divorce, he also tries to minimize the legal effects of marriage. “Swedish marital law contains limited legal effects of marriage only, and they are all designed to meet practical needs.”²

2.2. The minimizing of the legal effects of marriage made by Agell seems to contrast with what he sees as the positive aspects of the marriage form of cohabitation, namely that it is subject to a certain legal regulation.

However, what Agell is actually doing is moving from the individual to the general without making it clear. The individual man and woman may agree that their cohabitation shall be of the marriage type, and that each one may withdraw from the agreement. Viewed from that angle, their individual marriage is based on “a revocable contract”. But their rights and duties as a married couple in relation to each other and to others have not been determined by their marriage contract. They are subject to the special legal regulation applying to *all* marriages.—This jump from the individual to the general is also incorporated in Agell’s term “marriage type contract”. The legal phenomenon described by Agell as “of the marriage type” is the set of rules to which all married couples become subject through the contracting of their individual marriage, as opposed to cohabitants who do not enter into an agreement typifying their cohabitation as marriage.

As a legal arrangement, marriage is a general arrangement; an institution which is there, determined in advance by legislation. The individual couple do not contract a marriage, they enter into it. Marriage as a general arrangement is expressed or realized through the marriage of the individual. And yet, marriage as a general *arrangement* is different from, and, as will be demonstrated later on, something more than the individual marriage.

3.1. Viewing marriage as a contract, as Professor Agell does, is nothing new. It has been the view ever since Hugo Grotius and the natural law theory of the 18th century, albeit not always to the same degree. At the same time, however,

² P. 77: “... the legislator has precisely endeavoured—successfully—to frame the legislation as a secular contract type ... which has been devised with various practical objectives in view”.

a different notion has existed, namely that marriage is also an institution. This aspect has been particularly emphasized by the church.

The concept of marriage as an institution has, however, also been the legal picture of marriage, even though it has not explicitly come to light in legal writing. Jurists have taken the existence of and the need for a legal system regulating cohabitation between man and woman so much for granted that they have not attached much weight to the system as such in their concept of marriage. They have characterized marriage as a contract, where the institutionalized legal consequences are an obvious part of the agreement.

This is what Agell does too: Marriage is a contract. The contents of marriage as an institution are being reduced to something solely designed to “meet practical needs” (p. 77). However, it is evidence of Agell’s theoretical openness that he nevertheless mentions the fundamental question—in that he finds it necessary explicitly to reject the idea as “hardly realistic”—that the entire legal system for regulation of the relationship between spouses should be abolished. In his opinion “one cannot trust people in general to solve their problems in that way [by contract]” (p. 87).

From the book “Marriage or Cohabitation” it appears very clearly that the legal *regulation* of cohabitation between man and woman is exactly what Agell considers to be the essential point. This is shown especially in his discussion of unmarried cohabitation—“agreed cohabitation”, as the present author has chosen to call it³—and the “alternative methods” which he believes one is facing when trying to find some kind of regulatory system for these relationships as well. It is evident that a legal institutionalization of unmarried cohabitation, and not only the regulation of some aspects of it, is a fundamental issue for Agell.

3.2. The question of how to regulate unmarried cohabitation is an interesting topic for legal as well as political discussion. That question will, however, not be discussed here, but rather the issue of the “ideal demands” which Agell makes on the legal regulation of the cohabitation of man and woman. It seems that his model for these ideal demands is the established marriage model, a model which he believes ought to be the basis for the regulation of agreed cohabitation as well.

The aim of the legal regulation of cohabitation between man and woman should in Agell’s opinion be to arrive at *one* set of rules so that “as many cases as possible should be covered by a system of rules which is as complete as

³ Helge J. Thue, *Avtalt samliv: en orientering om de rettslige sidene ved papirløse ekteskap* (hereinafter referred to as “Agreed Cohabitation”), Oslo 1977.

possible” (p. 85). And the “system should be easy to apply from the point of view of legal technique” (p. 75).

This presents the “ideal demand” on a legal system. The aim is to maximize the legal system’s conflict-solving potential; a demand on law as a *system*. It is exactly this systematic legal regulation which Agell considers to be “the ultimate goal” of family law (pp. 90 and 94). Agell seems to take for granted what should be the material substance of this coherent, closed and, probably, also detailed family law system, i.e. “a collection of practical rules on maintenance liability, community of marital property ... and a right of succession” (p. 71).

By supporting the system demand on family legislation which he presents in his book “Marriage or Cohabitation”, Agell proposes a mixture of analytic-positivist legal philosophy and modern system theory.⁴ However, what is more important in our context is that he expresses a purely institutional view of marriage and cohabitation.

4.1. As was said by way of introduction, Agell was chosen as a suitable representative of established family law theorists and his presentation as an example of the traditional views of the legal regulation of family life.

Historically speaking, the institutional view of marriage expressed by Agell is deeply rooted in legal theory and the theory of the state as well as in religion. In order to fully comprehend the implications of such a view and the consequences inherent in it, it must therefore be viewed in a historical context.

Unfortunately, all there is room for here are a few clues.

4.2. The most frequently quoted dictum from ancient times is Aristotle’s “Man is a social animal”. To him the state and social systems naturally emanated from man’s social disposition and needs. They were the prerequisites for man’s complete development. The individual who was able to live outside society was abnormal, “either a beast or a god”, said Aristotle.⁵

Seneca exercised decisive influence on the view that man is incomplete except within a social order. To him society’s institutions were necessary correctives to man’s corrupt nature. They were necessary in order to outweigh the factual defects of human nature and not in order to attain some higher ideal goal.

Seneca’s significance as regards the idea of institutions in legal and state

⁴ Agell states in “Marriage or Cohabitation”, p. 93, note 1, that the term “ultimate goal” comes from Jan Hellner’s paper in the collection of essays in honour of Per Olof Ekelöf (*Festskrift till Ekelöf*), Stockholm 1972, p. 304. Hellner’s presentation is mainly based on Börje Langfors, *A System for Business Management*, Lund 1968, cf. *op.cit.*, p. 304, note 15. See also footnote 12 below.

⁵ *Politics* I, 1-2.

theory derives from the fact that the church fathers to a considerable extent based their view of society on his teachings. They felt free to do so because the view of this pre-Christian philosopher on religion and human nature coincided with the view of Christianity.⁶

Later the institutional view—especially of the family—became predominant in theology and in the theory of the state. One writer who integrated these theories into a coherent institutional theory was the French sociologist and lawyer Maurice Hauriou (1856-1929). Hauriou, too, underlined that man was a social animal,⁷ but it was against the background of *The Fall* that he considered legal systems and institutions as a necessary regulatory interference with man's fallen nature (*l'homme fallible*).⁸ In fact, the institutionalization of human behaviour had to take place by means of “[le] sacrifice de liberté”.⁹

More recently a theory on the institutionalization of human behaviour has been presented by Arnold Gehlen, the anthropologist. He uses the philosophy of Herder as a basis and states that man is a “Mängelwesen”, a being who needs a society, particularly social systems such as law and religion. These systems are needed to reduce the infinitely numerous, incalculable possibilities and alternatives for action confronting man. They are to prevent surprises and stereotype behaviour into habit, repetition and learning.¹⁰ To achieve this, the institution, the system, must possess a certain stability and duration.¹¹ It is on such an institutional basis that the now so famous German sociologist Niklas Luhmann considers it to be the task of the law to enhance the complexity of the structure of the social system.¹²

The fundamental underlying thought is to institute a uniform system for everybody, a system that may act as a support and which they can follow, or,

⁶ This led to a very widespread myth that Seneca was a friend of Paul, and that they exchanged letters, see Wilhelm Munthe, *Litterære falsknerier* (Literary Forgeries), Oslo 1940, p. 8.

⁷ “L’homme est animal politique”. *Précis de droit constitutionnel*, 2nd ed. Paris 1929, p. 59.

⁸ “... le lien social étant naturel et nécessaire ...”. See Maurice Hauriou, “La théorie de l’institution et de la fondation. Essai de vitalisme social”, *Cahiers de la Nouvelle Journée*, Paris 1925, p. 2.

⁹ *Précis de droit constitutionnel*, 2nd ed. Paris 1929, p. 652. On the basis of the teachings of Hauriou, the national-socialist legal theorist Carl Schmitt developed a very consistent institutional theory, cf. his book *Über die drei Arten des rechtswissenschaftlichen Denkens*, Hamburg 1934, especially pp. 20 ff., 42-46, 51, 54 ff., 55 ff. and 63.

¹⁰ A. Gehlen, *Antropologische Forschung*, Hamburg 1961, pp. 38, 44.

¹¹ “Les institutions représentent dans le droit, comme dans l’histoire, la catégorie de la durée, de la continuité et du réel ...” See Maurice Hauriou, *op.cit.*, p. 1.—The influence of Henri Bergson is evident.

¹² Niklas Luhmann, *Rechtssystem und Rechtsdogmatik*, Stuttgart 1974.

The system theory may be regarded as a technocratic solution carrying inside itself a de-politicization of social life, which regards democracy as a learning process and which leads to self-legitimization of power. See Andrés Ollero, “La fonction technocratique du droit dans la Systemtheorie de Niklas Luhmann”, *ARSP* 1975, pp. 557 ff.

to quote Herder, "... der Mensch sei ein Tier, das einen Herrn nötig habe ...".¹³ This master is, in Gehlen's opinion, the necessary social institutions.

5.1. Inherent in a view aimed at attaining institutionalized order there are four characteristics of significance to the problem we are dealing with here: the legal regulation of the cohabitation of man and woman. First, regulation is considered necessary. Secondly, the regulation must be clearly set out and complete. Thirdly, the system is not established by those included in it, but is made for them by outsiders. Finally, the regulation as a system—as an institution—is something more than the individual relationship between the parties in the institution. It is, as expressed by Georges Renard, "a human community in an idea".¹⁴

5.2. The idea that a legal system is necessary stems—consciously or unconsciously—from the view that, to use Gehlen's term, man is a "Mängelwesen"; he needs support from outer social systems. "One cannot get past the demand for rules" on the relationship between spouses and their relations with others, says Agell (p. 75).

However, in family law theories it is not usual to present a definite view of man as grounds for legislation. On the other hand, practical reasons or a need for rules are often invoked, as Agell also does, "to protect the weaker party" (p. 86). Yet, behind these apparently neutral statements there is a concept of man: a creature who needs to have his life arranged in an orderly manner by authorities or institutions, instead of doing it himself. This applies especially to the "weak" ones, who are in greater need of support than others.

The legal regulation of cohabitation between man and woman shall be a necessary support and guidance for them. The system should to the greatest possible extent govern their lives and give them the necessary security, by reducing surprises and eliminating difficult choices. They should be able to predict their lives and each other. The legal regulation must therefore be as clearly set out and complete as possible. And that is precisely what Agell emphasizes as the "ultimate goal" of family law (p. 90, cf. p. 94).

5.3. If this goal is to be attained, actions and behaviour must be typified through roles. This is the nucleus of all institutionalization, even of the

¹³ G.J. Herder, *Ideen zur Philosophie der Geschichte der Menschheit*, Stuttgart 1827, vol. IX, pp. 5 and 219.

The objection to the man/beast theorem, which holds a central place in anthropology, is obvious: "Man setzt den Menschen fiktiv als Tier, um dann zu finden, dass er als solches höchst unvollkommen und sogar unmöglich ist". H. Freyer, *Weltgeschichte Europas I*, Darmstadt 1949, p. 169.

¹⁴ "... communion des hommes dans une idée". See G. Renard, *Théorie de l'Institution*, Paris 1930, p. 95.

institutionalization of cohabitation in marriage. In the marriage *type* of cohabitation it is not the individuals with all their peculiarities who have a relationship with each other, but the spouse roles of which the marriage type order is composed. These spouse roles have been shaped by our culture in the widest sense of the word and have deep historical roots.

Therefore, marriage as a social institution is a relationship of roles. And in marriage as a legal institution this relationship of roles becomes a legally regulated relationship between standardized parties.

The central point of a relationship of roles is, as will appear from the term, the relationship *between* the roles or the parties. This is what is being governed or standardized in order to achieve harmony between the roles or parties. Regulation and standardization are attained by assigning mutual rights and duties to the parties.

This relationship *between* the parties is exactly the issue in the established family law, and this issue has certain consequences.

First, it implies that, like all institutionalization, the most important issue is harmonization of the interaction of the parties. The question of how this harmonization is attained disappears. In the relationship between master and slave there may be harmony even if we do not like the way in which their relationship has been harmonized.

Secondly, a problem making the relationship *between* the parties the central issue implies that this relationship becomes isolated, so that the individual's other relations fall outside the field of vision. Such isolationism is typical of the traditional family law.

Thirdly, the problem entails that the individual becomes significant only as party to a relationship with another individual. Together they make a unit, a married couple or a family.

This unit, the marriage or the family, is dealt with by lawyers, theologians, social scientists and politicians as an independent entity, something different from and more than the personal relationship between the individual parties to the unit. Thus, it is usual to describe the needs which man and woman and their children try to satisfy through cohabitation, as the functions of *the family*. This is, for instance, how it has been done by the Swedish commission in their report from 1972.¹⁵ Here the following functions are pointed out as pertaining to the family: the "reproductive", the "sexual", the "fostering", the "financial", the "emotional", and the "religious function" as well as the "protective and leisure time function".

We know that many spouses and parents do not manage to realize these

¹⁵ *SOU* 1972:41, pp. 63 ff.

ideals. However, since the ideals become part of marriage as an institution, the marriage institution becomes something more than an individual marriage.

There are several examples of the “added value” of marriage as an institution. For instance, time limits or terminability are no part of marriage as an institution. The presupposition is its durability, its insolubility. And this is so even if some couples may dissolve their marriage.¹⁶

Part of the marriage institution is also the system of maintenance. This is part of the marriage institution even if in many marriages there can be no question of such duty because the man’s earnings are too small to maintain his wife and children.

5.4. The added value of marriage as an institution compared to individual marriages is a consequence of the marriage type of cohabitation being an institutionalization of the mutual relations between the spouses, and of the fact that the institutionalization is established by the spouses being expected to behave in accordance with standardized roles. In many marriages these roles do not fit, or the individual married man or woman is unable to live up to the demands made on them by the spouse role; marriage as an institution becomes something more than their own marriage.

6.1. The legal effects of marriage are based on these standardized roles. One cannot therefore maintain as a matter of course, as Agell does, that the legal effects meet practical needs only. If these effects are to be assessed one has to unveil the pattern of roles inherent in the marriage system, a pattern which is the presupposition for current systems. And the pattern of roles of the established marriage system is revealed by investigating the preconditions underlying the legal effects. If, for instance, an investigation is made of the duty of maintenance and the “rules governing matrimonial property”, which are among the practical regulations mentioned by Agell, one will find that they are not quite as unproblematic as he seems to believe.

6.2. The duty of maintenance presupposes that one of the spouses earns nothing or too little to maintain himself or herself. This is the situation in marriages where one spouse is a housewife and has to be wholly or partly maintained. In what follows, only these marriages will be dealt with because they are the kind on which the marriage law is modelled and because in a discussion of fundamental issues unambiguous examples are the best.

¹⁶ This idea of the insolubility of marriage is the only thing that can explain why some women still choose a career as a housewife, despite the fact that every third or fourth marriage is breaking up.

The precondition for the man's duty to pay maintenance is that the wife takes his share of the housework and of caring for their children. He pays her—maintains her—for doing his housework.

Even though the Norwegian Act—and the Swedish one, too, until quite recently—characterizes housework as maintenance, the housewife is nevertheless in the service of the man. Financially, their relationship is like the one between employer and employee. This does not change just because one says that there is a division of work between them, where both perform the services necessary to a family. In industry there is also a division of work between employer and employee. Both categories do work which is necessary, but the employee is in the service of the employer. In this lies the basis for class barriers.

In every marriage where the man partly or wholly maintains his wife, there is social and financial inequality between them. Seeing that everybody is dependent on money for his living, and that the housewife directly or indirectly gets her money from the man, the inequality makes her dependent on him. This dependence is different from that between an employee and an employer, as the housewife does not get paid according to her work and her efforts, but in accordance with what the husband is able to pay for her work. *Her* effort is being valued according to *his* income.

6.3. Housework produces no surplus in the form of durable values which the housewife can own and dispose over. The assets owned by the couple have been acquired by the man, and under the law the right to dispose over them is his.¹⁷

The formal legal equality between spouses established by our legislation is therefore based on a reality that does not exist for very many married women. Either they have no income because they are housewives, or their incomes are lower than those of their husbands. This also appears from the main rule on community of marital property: the assets are shared equally on the dissolution of the marriage. Its presupposition is that there has not been financial equality between the spouses.

Financial equality for the woman does, however, materialize on the last day of the marriage: She is entitled to one half of the net assets. In this way a divorce or—according to the main model of the Act—the death of the husband becomes a way for the woman of acquiring property. It is not at all difficult to broach an ethical question in this connection: What is the reasoning underly-

¹⁷ In Norwegian law this has been partly changed through court decisions. The housewife has been given rights as co-owner of property acquired by the man. See H.J. Thue, *Samliv og sameie* (Cohabitation and Joint Property), Oslo 1983.

ing the fact that love, which is the foundation of marriage, can yield financial profit? Secondly, how is it possible to have a system by which the size of such profit shall depend on whom you have been in love with and married, either a bishop or a poet?¹⁸

7.1. As already mentioned, the established issue of family law which is limited to viewing the spouses as parties to a legal relationship, has its consequences. The spouses are considered to be a unity, and this unity, the marriage, is dealt with separately so that other connections in which the spouses have a role, are cut off: Their social position which is established by the outer society falls outside the family law sphere of interest. The financial situation of the individual is mainly determined by the person's connection with working life. By keeping this fact out of family law, it becomes possible to maintain that the legislation equalizes the positions of the spouses where finances are concerned, despite the fact that it is based on a social model that makes it possible for a woman to become an unpropertied housewife with no rights except those derived from her husband.

7.2. The traditional perspective of family law research—and of the legislation as well—coincides with the way of stating the problem in the social sciences and theology. Marriage is regarded as an institution, as a uniform legal, social and religious arrangement of the cohabitation between man and woman. This is an external understanding of marriage. It is the view of the outside observer, and thus the approach is “scientific” in a traditional sense. However, the present author believes that the result of this way of stating the problem is that something essential is lost in the process, namely the individuals in the marriage. They are necessarily reduced to standardized players of roles, to spouses.

Such a view of the individual does, however, show up one aspect of human existence only, namely that man as a social being adjusts to social systems. However, the individual is not only an adjusted actor in a role, he is also unique and special with his own world of needs, dreams, ideals and expectations, who acts conscientiously and actively and who has the freedom to choose for himself whether he wants to adjust or not.

These two aspects of man—as socially adjusted and as freely choosing and acting—are not independent of each other, however. There is balance between

¹⁸ In connection with the Storting debate in the 1880s on a new Norwegian statute on matrimonial property (Act of June 29, 1888), the “Four Great” Norwegian writers Bjørnstjerne Bjørnson, Henrik Ibsen, Alexander Kielland and Jonas Lie sent a joint application to the Storting where they said, *inter alia*: “Love is a many-splendoured thing, (but) not very suitable as a basis for a permanent financial arrangement” (Doc. No. 92, 1884).

them. Any adjustment takes place at the expense of the individual's possibilities of, and experience of, maintaining his identity and integrity as a person. A too radical adjustment will disturb the balance and may end in sickness or in revolt.¹⁹

7.3. As long as the adjustment takes place in response to claims and expectations, a central issue for all research concerning the family should be to make the claims and expectations constituting the substance of the spouse roles the subject of research. Especially at a time when marriage law is being revised, a self-evident question should be whether the substance of these roles is realistically compatible with the society we live in and whether it is suitable for leading us in the direction where we want to go. These questions are so obviously pertinent in a debate on legal policy that, whether they are posed or not, any new legislation will necessarily be an answer to them. If they are not posed, the legislation will indirectly confirm that things are just as they should be.

8.1. In order to make the foundation of the marriage system—the institutionalized role pattern—a subject for investigation, research on the family must change its starting point, from institution, structures and rules, to going properly into the social and legal reality of men, women and children and their situation in marriage. One must abandon the idea of marriage as a common reality to man and woman and instead start with the different reality of men and women and in that way try to form a picture of the marriage of men and of women.

The married man and woman do not primarily experience marriage as a relationship between two roles or as a legal relationship between two people, but they see it as a set of social, legal, financial, moral, religious, and mythical demands and expectations that confront them, and to which they have to respond or relate. To them marriage is a reality. Family research which fails to include in its understanding marriage as an *experienced* reality, may easily end up with a naive picture of the actual problems.

In order to understand marriage as part of human reality, it is not sufficient for the researcher to act as an *observer*. The married man and woman do not observe marriage. They do not understand it by means of their common sense and rationality alone. They experience it and live it with their totality as persons. They employ their knowledge and their prejudices, their emotions

¹⁹ René Marcic has formulated this as the contrast between man as a social being and man as a being with *dignity*. See, for instance, his paper "The Persistence of Right-Law", in *ARSP* 1973, pp. 86 ff., especially from p. 92 including references made to his other works.

and their beliefs, their experiences, dreams, expectations, frustrations and neuroses. They see it not only as it is, but also as how it might be, ought to be, is supposed to be with all its possibilities for better or for worse. Altogether this makes up their understanding of the marriage institution.

The aim of the researcher should not primarily be to acquire knowledge about the marriage institution, but to gain an understanding of the reality for those who are married. One must start by keeping in mind that marriage as a system exists only in and through man's and woman's experience of it. That and that alone is also how it exists to the researcher. Hence, he or she who studies the family must accept all human ways of perception as relevant in order to comprehend the situation of married couples. Therefore, in order to arrive at such an understanding, the basis for the theoretical analysis must be the researcher himself. The only consciousness and experience *directly* accessible to a person are his own. In order to understand other people, one must therefore try to avoid as far as possible making them objects of the study, and instead consider them as intelligent *subjects* like oneself. One must attempt to create a relationship of reciprocity where, to use existentialist terminology, one looks upon oneself as an object in the world of the others and upon the others as objects in one's own world. By studying marriage as experienced reality, this is far more simple than is the case with most other research projects. The researcher has, either in his own marriage or through that of his parents, an experienced reality in common with those he is studying. To the extent to which the scientific description of marriage does not coincide with the researcher's experience and view of his own marriage, then it will not do so as far as other marriages are concerned.

A study designed to *understand* spouses as acting subjects in their situation will be a study that concentrates on their *freedom*, because seeing the individual as an understandable acting subject presupposes his freedom. However, it will also be a study which reveals the limits to this freedom; the limits set by the marriage institution for the freedom of the individual.²⁰

8.2. By studying the individual in marriage and by aspiring towards a real understanding of men's and women's marriages, it will also be possible to compare their respective marriage situations.²¹

²⁰ The difference between a perspective trying to maintain the individual as far as possible within its subjectivity and the traditional object-making method emerges clearly in the view of the future—towards which freedom reaches: To me—the subject—the future is the *possibilities* that are open to me. In the *eyes of the others*, who see me as an object, my possibilities become probabilities. They become a question of statistics.

²¹ See Thue, *Hans ekteskap—og hennes: en kritisk analyse av ekteskap og ekteskapslovgivning* (His Marriage—and Hers), Oslo 1978, especially chs. 4, 9 and 10.

Moreover, such a comparison is necessary in order to find out what kind of relationship actually is being institutionalized for cohabitation between man and woman by the established marriage system: Whether it is a relationship of dependence, a relationship of power, or a relationship of personal equality.

Marriage is regarded as a personal relationship. This will also be the view of the legislator today. However, if the wish is to investigate whether the marriage system realizes, or is fit to realize, the ideal of a personal and equal relationship between spouses, the substance of such relationship must be clarified.

By a personal relationship and one of equality one means a relationship built on love, friendship and respect. It is a relationship between independent persons who enter into it freely and maintain it freely, who stake their entire beings on it, emotionally, intellectually, ethically—and in marriage also practically. They have no motives beyond having a total relationship with each other and having something happen between them. The value is the relationship *per se*. It does not serve definite and limited purposes. If it does, then it is not personal, but functional, because in that case one tries to obtain, by means of the relationship, some advantage, for instance maintenance or being “protected”.

Because a person enters into the relationship with his entire self, the basis and the aim of the personal relationship must be a relationship between independent and equal individuals. And, with the openness, closeness and intimacy—for better or for worse—presupposed by married cohabitation, one can hardly accept another view without at the same time accepting an invasion of integrity.

If we start by supposing that cohabitation between man and woman in or outside of marriage is a personal relationship—and ought to be so—a politico-legal view of it cannot be limited to what kind of legal effects the relationship should have, but must also include the legal consequences and interference that can be tolerated. Therefore, the question of the legal effects of marriage will not only be a question of appropriateness—or of practical arrangements—but also a question of taking the consequences of a fundamental starting point and endeavouring to avoid provisions that may change the personal character of the relationship. “Wenn es nicht nötig ist, ein Gesetz zu machen, dann ist es nötig kein Gesetz zu machen.”²²

8.3. The objections to the established way of stating the problem of family law presented here are not only of a scientific-theoretical kind, but also of an existentialist character. They are objections to its view of man.

²² Hermann Lange in “Tradition und Fortschritt im Recht”, *Festschrift gewidmet der Tübinger Juristenfakultät zu ihrem 500-jährigen Bestehen 1977*, Tübingen 1977, p. 376.

Particularly unfortunate are the strong ideas of—and emphasis on—security and a well-ordered life connected with marriage. They bring the parties into what Sartre calls “*la mauvaise foi*”, bad faith about being a human being.

All of us want safety, both in the sense of outer stability and in the sense of peace in one’s soul. We are looking for “the way homeward”, as Thomas Wolfe put it. To many people family and marriage has become the haven of safety. But sooner or later it is discovered that marriage does not offer the safety one was looking for. This is one of the causes of marital problems and divorces. People’s expectations of marriage are simply not attainable; existentially, there is no “way homeward”.

To itself every individual human being is unique and different from the others and from every other. One’s spouse will always be one of the group “the others”. Therefore, existentially, one always stands alone, and a person must constantly choose his life and his future, and be responsible for his choices and his actions.

This is not only irritating for one’s mental laziness, but also frightening because we have absolute authority over our own life. The anxiety we feel is “the dizziness of freedom”, as expressed by the Danish philosopher Søren Kierkegaard.

No marriage system can do away with this existential situation of man. Therefore, instead of glossing over it by comprehensive legislation giving the impression of order and safety, one should by as little legal interference as possible underline the individual’s existential freedom and responsibility, thus making the individual aware of his human situation so that he will be better equipped to have authority over his own life.

9. The Norwegian Commission on Marital Law has submitted an interim report on unmarried cohabitation.²³ The report comprises only the private law aspects of this form of cohabitation, as public law issues are not covered by the Commission’s terms of reference.

In the report the Norwegian Commission takes the stand that the relationship between the parties and the private law consequences thereof should not be subject to general and comprehensive legislation. In practice, the Commission sticks to the standpoint focusing on personal freedom advocated in the present author’s book “Agreed Cohabitation”,²⁴ and which has been indicated in this paper, namely that: The rights and duties of the parties shall, as stated by the Commission, be linked to the individual irrespective of civilian status and shall be regulated by the general rules of law (p. 33).

²³ *NOU* 1980:50, Unmarried cohabitation.

²⁴ See footnote 3 above.

The Commission does not enter into a discussion of marriage versus unmarried cohabitation, but nevertheless presents some fundamental *principles* in support of the proposal submitted. It says, for example, that “comprehensive legislation may easily conflict with the wishes of the cohabiting parties” (p. 41) and that “the wish to protect cannot alone be a reason to claim comprehensive legislation, not even for the more durable cohabitations” (p. 42).

There is a praiseworthy consistency in the report between the fundamental starting point and the concrete proposals presented. The Commission takes the full consequence of the fact that rights and duties shall be tied to the persons involved and not to the relationship between them. They suggest regulation only of questions that cannot be satisfactorily resolved under the general legislation. These are, for instance, the cohabitants’ right to the family dwelling after a break-up of the cohabitation or death, an extended right to own a share in a housing cooperative, and that certain rights stemming from previous marriages cease at the establishment of unmarried cohabitation.

Even though the Norwegian proposal does not comprise public law aspects such as tax law and social security law, it is nevertheless likely, to the extent to which its proposals become statutory, to assume significance also as far as legislation in these fields is concerned. Keeping in mind that the Commission states that rights and duties shall be tied to individuals regardless of civil status, this must also become a guiding principle for the public law regulation of unmarried cohabitation.

It will be interesting to see whether the Commission is going to base its proposal as regards a new marriage law—whenever that may come—on this view and also whether there will be a general clean-up concerning the legal effects of marriage.