FROM CONTROL OF THE FAMILY TO ITS AUTONOMY

BY

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I. BACKGROUND

In the evolution of Finnish family law legislation during the last 300 years, four different periods of change can be distinguished. This is shown in the following table containing the most important family law statutes.

Under Swedish Rule (until 1809)	The Period of Autonomy (1809–1917)	Independent Finland (1917–)
– Church Act (1686)	– Single Woman's Legal Competence Decree (1864)	– Civil Marriage Decree (1917)
– Matrimonial Code (1734)	– Equal Right to Marital Property Decree (1878)	– Illegitimate Children Act (1922)
	– Spouses' Property and Debt Relations Act (1889)	– Adopted Children Act (1925)
		– Marriage Act (1929)
		– Paternity Act (1975)
		– Maintenance Act (1975)
		– Adoption Act (1979)
		– Children's Custody Act (1983)
		– Partial Reform of the Marriage Act (1987)

The first period of change dates back to the years 1680–1730. At that time several events caused changes which influenced especially marriage law. The Reformation was the most significant of these processes. It had weakened the position of the Church from both an economic and a social point of view. However, the Church regained its important role during the 17th century, though it had to consent to support the system of estates in general and the nobility and the power of the Crown in particular.

These purposes were served by a religious doctrine of orthodoxy. Its princi-

ples not only required observance of the true protestant faith but also laid down that the Crown and the graded system of estates were authorities established by God. At the end of the 17th century the influence of the Church on matrimonial matters increased again,[1] especially as far as *contracting* and *dissolving* marriage were concerned.[2]

The second period of change that family law went through occurred in the second half of the 19th century, when a gradual process of industrialization had started. Under Russian rule (1809–1917) the Finnish Diet was given more power than under Swedish rule to determine the content of family law statutes. The Diet represented a relatively small part of the population, primarily propertied people. Its proceedings focused on the abolition of mercantilism and the elaboration of legislation based on liberalistic views.

As the table shows, particularly new legislation on *the position of women* (at first single and later, married) was enacted. The purpose of these statutes was to eliminate family law arrangements hindering free economy.[3] On the other hand, the provisions relating to contracting and dissolving marriage were not considered to be in need of reform and, consequently, they remained unchanged.

The third period of change followed in the beginning of the period of independence. At that time more and more people had moved from the countryside to the cities and the working class had steadily grown in size. An important development also took place in the structure of the family, in which the emphasis shifted from its productive role to its consumption function. Migration from the rural districts to the towns led indirectly to an increase in the divorce rate.

The function of marriage also changed, because pairing came about not only through marriage but also without it. In particular people belonging to the

[1] Of the Finnish researchers who have studied the history of family law of this period should be mentioned in particular Heikki Ylikangas, *Suomalaisen Sven Lejonmarckin osuus vuoden 1734 lain naimiskaaren laadinnassa* (The Role of the Finn Sven Lejonmarck in the Elaboration of the Matrimonial Code 1734), Helsinki 1967, especially pp. 245 ff. See also Ylikangas, "Perheoikeuden historia Suomessa" (The History of Family Law in Finland), in Hannu Tapani Klami (ed.), *Oikeushistoriallisia tutkielmia I* (Legal History Studies I), Turku 1977, pp. 94 ff., especially pp. 103 f.

[2] As the table indicates, the provisions of the Church Act of 1686 were applied to these matters before the Matrimonial Code (M.C.) 1734 came into force (in 1736). Both *contracting* marriage and *dissolving* it were regulated by this Act. During the elaboration of the M.C., it was emphasized that the norms of the Church Act of 1686 should also in future be applied to the extent appropriate. This appears from the *travaux préparatoires* to the M.C. published by Sjögren, *Förarbetena till Sveriges rikes lag 1686–1736*, Uppsala 1900–1909, I, p. 224.

Therefore one can say that in a way the Church dictated the content of the family law provisions which were directly or indirectly connected with sexual morals. The decision-making on *matrimonial* property norms and other provisions of this type was left to the politicians. The conditions which influenced the enactment of the latter norms are dealt with by Ylikangas, *op.cit.* (1967), pp. 235 ff. (see footnote 1 above).

[3] Jukka Kekkonen, *Merkantilismista liberalismiin* (From Mercantilism to Liberalism), Vammala 1987, pp. 146 ff., in particular p. 152.

lower social classes preferred an illegitimate relationship to matrimony. Legislative reforms focused on the legal position of the child, on contracting marriage and above all on its dissolution.[4]

The fourth period of change occurred in the 1970s and 1980s and differed in many respects from the previous ones. The most significant evolution is easy to detect by examining the breakdown of population according to social class and by comparing this with the situation in for example the 1950s. In the fifties the proportion of the gainfully employed population engaged in agriculture was nearly 40 per cent, while it is now less than 10 per cent. However, the most fundamental development has been the very fast increase in the proportion of wage-earning people. In Finland, employees at present constitute almost 85 per cent of the gainfully employed.

The new economic and production circumstances have also influenced the structure of the family: both divorce and cohabitation have become much more frequent.[5] Together with the radical alteration of the tasks of the family compared with the situation in the agrarian society, the role of legislation has changed. Statutes no longer aim at orienting citizens' behaviour: legislation is adapted to the evolution of the economy and of conditions of production. Also, attitudes have changed: modern legislation recognizes the unrestrained right to divorce and the right to cohabit without being married.[6]

II. OUTLINE OF THE PROBLEM

When studying the legislator's approach to contracting marriage and its dissolution this paper will concentrate on three statutes, the Matrimonial Code

[4] Sami Mahkonen, *Lapsilainsäädäntö ja tasa-arvo* (Legislation Relating to Children and Equality), Lakimies 1977, pp. 242 ff., in particular pp. 265–272, and Mahkonen, *Avioero. Tutkimus avioliittolain erosäänösten taustasta ja tarkoituksesta* (Divorce. A Study on the Background and Purpose of the Divorce Provisions of the Marriage Act), Vammala 1980, pp. 150 ff.

[5] Of the couples starting to live together, nearly three-quarters are cohabiting. This means that *as a rule* people go and live together without marrying; they contract marriage only after having lived together for an average of one or two years. The development of this trend in Finland has been investigated in a study of 78 pages in English by Kauko Aromaa, Ilkka Cantell and Risto Jaakkola, *Cohabitation in Finland in the 1970s*, Research Institute of Legal Policy 63/1983, Helsinki 1983.

[6] In Finland a new divorce system came into force on January 1, 1988. According to the Act passed the year before (see the table) the right to decide on divorce is given to the spouses themselves. They do not have to demonstrate why the foundation of their union has ceased to exist. Usually the spouses petition together for a divorce. After six months the petition has to be renewed, upon which the divorce is granted.

In private law legislation (practically) no legal consequences have been attached to cohabitation. In certain public law statutes, on the other hand, cohabitation has been taken into account, in particular as far as taxes and social security are concerned. However, until now statutory arrangements have been *unsystematic*. See Sami Mahkonen and Pauliine Koskelo, *Avioliitto vai avoliitto?* (Marriage or Cohabitation?), Vaasa 1984, in which the latter analyses public law statutes applying to cohabitation, pp. 47–98.

of 1734, the Civil Marriage Decree of 1917 and the Marriage Act of 1929. In the legislative drafts of each of these texts, the legislator has taken a stand on the question to what degree legal provisions should *control* the contraction and dissolution of marriage.

Precisely this aspect of the problem is the subject of the present study. The purpose is not only to describe the evolution of given parts of Finnish family law and some of its characteristics but also to elucidate why the attitude of the legislator changed in Finland in the first half of the 20th century.

A chronological order will be followed. First the conditions under Swedish rule will be dealt with, as this will allow a more specific formulation of the problem. After that, the focus will be on the situation immediately before and after Finland became independent. Next, the background and purpose of the provisions concerning divorce included in the Marriage Act, and certain reform projects discussed in the 1930s, will be treated. Finally, the causes of the changes will be examined.

III. THE SITUATION UNDER SWEDISH RULE

One could say that the main feature of the legislation under Swedish rule was matrimonial absolutism. The legislator's objective was to encourage people to marry and to prevent marriages from being dissolved during the spouses' lifetime.

According to the Matrimonial Code a religious ceremony should be used to celebrate a wedding. However, not all citizens accepted this and many couples refrained from legalizing their relationship. Therefore statutory measures were taken in July 1755.

> The 1755 Decree laid down that if a couple living together did not want to legalize their relationship the minister of the congregation concerned had to try to persuade them to marry of their own consent. If he did not succeed he had to report the matter to the cathedral chapter, which was obliged to admonish the couple. If the partners persisted in their refusal after the admonishment, the case had to be brought before the court of first instance. In the case of unremitting opposition the court was to pass a bread-and-water prison sentence of eight days. When after having served their sentence the couple still refused to comply, the Decree provided that they should be punished for recidivism with a bread-and-water sentence of twelve days.[7]

The 1755 Decree shows that individual freedom of choice was limited and societal *control* correspondingly predominant. This means that the social norms

[7] Flintberg, *Lagfarenhets-Bibliothek*, part 2, Stockholm 1797, p. 49.

adopted by individuals had to yield to legal provisions. The legislator dictated from above what was morally reprehensible or acceptable and how people should actually live.

Couples were forced to marry even if they did not want to. Rigid control prevailed also otherwise, which appears for example from the divorce system of the Matrimonial Code. Under the Code divorce could be obtained only when one of the spouses had committed adultery or deserted the other. There were no other grounds for divorce in statute law. This implies that the system was strictly based on the principle of guilt.[8]

In Finland, Swedish law was applied also after the country had been annexed to Russia. Thus the Matrimonial Code remained in force during the whole period of autonomy (1809–1917) as far as the norms relating to contracting and dissolving marriage were concerned.

> In the autumn of 1885 the well-known Finnish professor and member of the Diet, baron R.A. Wrede delivered a series of lectures on the content and main principles of the Matrimonial Code of 1734 at the University of Helsinki. He strongly emphasized the importance of marriage and its lifelong nature and opposed the possibility of obtaining divorce.[9] Briefly, Wrede was in favour of matrimonial absolutism.

More generally, at that time the intellectuals' view of the world, which was homogeneous, advocated the ideal of *absolute* sexual morals. Unlike for example the Swedish clergyman and author Carl Jonas Love Almqvist (in his book *Det går an*, 1839), the Finns did not approve of so-called "free love". The individualistic moral conceptions supported by Almqvist were severely condemned in Finland both at the beginning of the 19th century and later.[10] Among the officials responsible for drafting and enacting new legislation, there were in Finland in the 19th century as yet practically no supporters of *relative* sexual

[8] To be sure a divorce could be obtained by means of an *exemption* procedure based on free discretion. This was possible in all Scandinavian countries. See e.g. Ivar Nylander, *Studier rörande den svenska äktenskapsrättens historia*, Stockholm 1961 *passim*; H. Gabrielsen, "Meddelelser om en Forandring i den norske Bevillingspraxis i Skilsmissesager", *TfR* 1894, pp. 70 ff., and Sami Mahkonen, *Avioero* (Divorce) (see footnote 4 above), pp. 105–149. In the last-mentioned work it is demonstrated that this procedure was used in a very liberal way especially in the 1920s, at the end of which period more than 80 per cent of all divorces granted were based on exemptions. People had recourse to the exemption procedure precisely because it made it easier to obtain a divorce. In Finland this procedure was repealed from January 1, 1930.

[9] *Anteckningar enligt professor R.A. Wredes föreläsningar öfver Giftermåls-Balken* (1888). The Finnish translation was published in 1916. See the latter work, pp. 3 and 11.

[10] In particular the Finnish (Hegelian) philosopher and statesman J.V. Snellman (1806–1881) criticized Almqvist and vigorously defended marriage. See Snellman, *Läran om staten*, Stockholm 1842 (II), pp. 707 f. See also Armas Nieminen, *Taistelu sukupuolimoraalista. Avioliitto- ja seksuaalikysymyksiä suomalaisen hengenelämän ja yhteiskunnan murroksessa sääty-yhteiskunnan ajoilta 1910-luvulle* (The Battle for Sexual Morals. Matrimonial and Sexual Issues in the Period of Change of Finnish Society and Spiritual Life in Finland from the Era of the Estate System to the 1910s), Helsinki 1951, pp. 108–117.

morals who would have shown a liberal attitude towards premarital or extra-marital relationships or towards divorce restrictions.

The advocates of absolute sexual morals had adopted the doctrine of the Church. However, at the end of the 19th century the homogeneous Christian culture started gradually to decay and correspondingly religious liberalism began to spread. Especially the upper social classes criticized the Church—and demanded the *legalization of civil marriage*, among other things. This happened in Sweden in the 1880s and in Finland a little later.[11]

IV. THE SITUATION AT THE BEGINNING OF INDEPENDENCE

The Civil Marriage Decree of 1917 became effective at the beginning of the following year. After that there were two alternative ways to celebrate a wedding. Therefore one may claim that citizens' freedom of choice increased and that, correspondingly, statutory control diminished. The same seems to apply to the reform of the divorce legislation: the grounds for divorce of the Matrimonial Code remained in force until the end of 1929, when the new Marriage Act with its additional grounds for divorce came into force. Accordingly, this would mean that, in divorce matters, freedom of choice also increased and control decreased. It may be assumed that attitudes towards unlegalized cohabitation would, equally, have become more permissive than before.

With regard to absolute sexual morals and the control to which the couple was subjected, three questions arise: 1) did the Civil Marriage Decree aim at *reducing* societal control? 2) was the creation of a new divorce system meant to *enhance* the citizens' freedom of choice? and 3) did attitudes towards unlegalized cohabitation become more *liberal* than before?

An attempt will be made to answer each of these questions by examining the history of three different legislative projects. The first concerns the elaboration of the Civil Marriage Decree.

[11] The launching of the legislative drafting in Finland and the reasons for it will be treated later on. For Sweden, see e.g. J. Jansson, *Debatten om civiläktenskapets införande i Sverige*, Stockholm 1964, pp. 128 ff. As is well known, many people maintained during the French Revolution and later that marriage should be regarded as a civil law contract. They claimed that civil marriage and divorce on a contractual basis should be allowed and founded their demands on natural law doctrines. There is an enormous amount of legal writing on this matter: see e.g. Jacob W.F. Sundberg, *Familjerätt i omvandling*, Stockholm 1969, pp. 72 ff., and Marianne Weber, *Ehefrau und Mutter in der Rechtsentwicklung*, Tübingen 1907, pp. 295 ff., and especially p. 314. In Finland the idea of freedom of contract received no support during the period of so-called absolute sexual morals (in the 18th and 19th century).

1. *The Civil Marriage Decree (1917)*

The Matrimonial Code made religious marriage compulsory and at the same time turned it into the only valid way of contracting marriage; this had *not* been the case under the Church Act of 1686. The Matrimonial Code was in force in the whole country and applied to all citizens whatever their religion. Those who did not belong to the Evangelical-Lutheran Church—especially Baptists—held that they could not submit to the religious celebration of marriage. Therefore these couples cohabited illegally; in other words their union was a so-called *marriage of conscience*.

To regulate these cases a law proposal was made in the 1882 session of the Diet to authorize civil marriage.[12] This proposal was the first of its kind, but did not lead to actual legislative drafts. Six years later a proposal to legalize civil marriage did not proceed any further.[13]

Before the Matrimonial Code came into force, the principles of ecclesiastical law were applied, including the provisions of the Church Act of 1686 on so-called *imperfect marriage*. This institution was also dealt with in the Matrimonial Code.[14]

Probably the primary purpose of the legislation on imperfect marriage was originally to secure the position of the woman and of the child born out of wedlock. It is also possible that the legislator intended partly to enhance societal control especially as far as the lowest social classes were concerned, the sexual morals of which had loosened around the 1800s.[15]

In this context the issue is not of great importance. However, it should be noted that imperfect marriage had its revival at the end of the 19th and the beginning of the 20th century. At that time upper class people with radical cultural and moral views used this institution *on a contractual basis* in order to give their relationship a legal appearance and to avoid religious celebration of their union.[16] This arrangement was no longer a question of sanctioning a

[12] Minutes of the Peasantry 1882 I, p. 215 (petition proposal No. 58).

[13] Minutes of the Estate of Burgesses 1888 I, p. 140, and II, p. 1427 (petition proposal No. 16).

[14] Imperfect marriage was connected with sexual intercourse (*copula carnalis*): if the partners had had a sexual relationship, one of them (according to ecclesiastical law only the woman, under the 1734 Code also the man) could under certain conditions demand that the relationship be legalized. In this case the woman obtained the position of a spouse and offspring became legitimate. In other words, in the situation concerned the other partner was *opposed* to the legalization of the relationship. See more in detail e.g. Sundberg, *op.cit.* (footnote 11 above), p. 35.

According to research in Finland imperfect marriages ended relatively often in a divorce. See Sami Mahkonen, *Johdatus perheoikeuden historiaan* (Introduction to the History of Family Law), Vammala 1978, pp. 30–35. Since usually the relationship had led to childbirth, the only correct conclusion seems to be that imperfect marriage was sanctioned primarily to improve the *legal* position of the child. Apparently there was no actual cohabitation involved.

[15] Ylikangas, *op.cit.* (footnote 1 above) 1977, p. 104.

[16] Sundberg, *op.cit.*, pp. 49–54, and Nieminen, *op.cit.*, pp. 181 f.

relationship despite the opposition of one of the partners, but constituted a kind of *de facto* civil marriage.

With this background in mind it is easy to understand why the law proposal which led to a reform of the legislation was made by members of the group (the Estate of the Nobility) representing the highest social classes.[17]

The proposal for the Civil Marriage Decree was introduced in the Diet in the first decade of our century immediately after the parliamentary reform of 1906. In the discussions and votes, the members belonging to the highest social classes and at the same time supporting the political Right were in favour of alternative ways of contracting marriage—i.e. both civil and religious celebration would be legally valid—while the representatives of the Left demanded that only the civil ceremony be compulsory and have legal force.[18] In the final vote the "alternative" model won by 102 votes to 79[19]—the Social Democrats lost the issue.

2. *The Reform of the Divorce Legislation (1929)*

As stated above, under the Matrimonial Code a divorce could be obtained when one of the spouses had committed adultery or voluntarily deserted the other; there were no other grounds for divorce in *written* law.

During the validity of the Matrimonial Code it was also possible to get a divorce by means of an exemption procedure. This required that the petition for divorce be brought before the authority wielding the highest judicial power, not before the court of first instance. The authority concerned had free discretion to grant a divorce on grounds other than statutory. This means that there existed two systems at the time, and that people wishing to divorce could choose between alternative procedures.

In Finland a new Marriage Act was passed in 1929 and came into effect on January 1, 1930. Since then a divorce can only be granted by a court and exclusively on grounds provided by statute. The exemption procedure based on free discretion was abolished.

A comparison between the grounds for divorce of the Matrimonial Code and those of the 1929 Marriage Act shows that the number of grounds considerably increased.[20] In this sense it became *easier* to obtain a divorce than before.

[17] Minutes of the Nobility 1904–1905, appendix I A (petition proposal No. 25).

[18] Parliamentary Minutes 1910 I, pp. 147–150.

[19] Parliamentary Documents 1911 I, p. 240. When the issue was dealt with in 1910–1911 the Left, i.e. the Social Democrats, had 86 representatives and the other groups 114.

[20] In the Marriage Act the grounds for divorce remained unchanged until 1948, when the provisions on judicial separation were added. Before this reform, the following grounds for divorce were provided for by the Act: adultery (sec. 70), venereal disease (sec. 71), assault (sec. 72), criminality (sec. 73), drug addiction (sec. 74), mental illness (sec. 75), breakdown of the relations between the spouses and living separately (sec. 76, subsec. 1), desertion (sec. 76, subsec. 2) and disappearance of a spouse (sec. 77).

However, we ought to examine the grounds for divorce actually used before the Marriage Act came into force, both those it laid down and those accepted in exemption proceedings. When we then compare the results with the situation after 1930, only one conclusion can be sustained: that in fact and in practice it *became more difficult* to obtain a divorce. Moreover, research has established that the *attempt to make it more difficult was deliberate*.[21]

These facts imply that control increased. It is clear which interest groups advocated restrictions on divorce and which were opposed to this policy: the supporters of the new Act belonged to the political Right and its opponents to the (extreme) Left.[22] Thus a contradiction of the same type occurred as in connection with the legalization of civil marriage.

Before returning to this matter, a description will be given of the attitudes adopted towards unlegalized cohabitation after the Marriage Act had come into force in Finland in the 1930s, and especially in the second half of that decade.

3. *The Attempts to Criminalize Unlegalized Cohabition in 1935–1939*

During the elaboration of the Civil Marriage Decree and the parliamentary proceedings concerning it, one point was reiterated: illegal cohabitation and immorality had spread, especially in the 20th century. The issue was taken up in several church assemblies and ministerial conventions,[23] where it was stated that so-called "free love" and "marriages of conscience" had become more general in the highest and the lowest social classes alike. The former seemed to have been influenced by Central European literature (cf. August Bebel) and the latter again "... by the pernicious agitation of the Social Democratic Party".[24]

Also, the archbishop of Finland was aware of the continuous increase in the number of unlegalized relationships, and did not want to remain passive. In 1931 he appealed to the Ministry of Education to elicit appropriate measures. The Cabinet complied, and on the submission of the Ministry of Justice appointed a committee to investigate the number of couples living in unlegalized relationships and to elaborate the necessary law proposals.[25]

The Law Drafting Commission of the Ministry of Justice published three

[21] The most important research result of the present author's doctoral dissertation (Sami Mahkonen, *Avioero* (Divorce), see footnote 4 above) has been presented above. *Op.cit.*, pp. 202 ff.
[22] *Op.cit.*, pp. 206–211.
[23] This appears for example from the minutes of the ministerial conventions at Savonlinna of 1907 (pp. 135 f.), 1912 (pp. 201 f.) and 1917 (pp. 271 f.). See also e.g. the minutes of the ministerial conventions of 1907 at Turku (p. 299) and at Porvoo (p. 48).
[24] See for example the minutes of the 1917 ministerial convention at Savonlinna, p. 271.
[25] See more in detail Risto Jaakkola, "Om samboende i Finland på 1930-talet", *Historisk Tidskrift för Finland* 3/1984, pp. 301 ff.

reports on the problem in 1935–1939.[26] The report of 1938 throws light on the views prevailing in Finland at that time. To illustrate the matter (and to corroborate statements made in the present paper), *vide* the following rather long passage from this report:

> In Finland the number of cases of unlegalized cohabitation is at present as high as eight or nine thousand, which is shown by the statistical data collected by the committee appointed on May 11, 1934 to investigate the causes of this deplorable phenomenon. Although contracting marriage before the civilian authorities has been organized by statute from the beginning of 1918 (Decree Relating to Contracting Marriage Before the Civilian Authorities of November 2, 1917) and hence one would have expected these cases to decrease in number, the information given to the committee seems to prove that this has not happened and that, on the contrary, the number of couples living in unlegalized relationships has constantly grown after the turn of the century.[27]

The committee also had a relatively clear idea of why the number of illegitimate couples had continuously increased especially in the 1910s and 1920s. This development was considered to be due to people's attitudes, which had turned against the doctrines of the Church:

> The reasons for this regrettable fact appear from the statements made to the committee by the police, the poor relief authorities, the cathedral chapters and ministers of the Church. In the first place are pointed out the loosening of moral conceptions and the hostile attitudes towards the social order and the Church, which during the last few decades have become increasingly general in certain parts of the population, and which together with excessive individualism have weakened the intensity of the reactions of the public against those who have placed themselves outside the social order in the way referred to above.[28]

Nowadays we tend to emphasize a kind of private autonomy of the family. The relationship of a couple is considered to concern only the woman and the man in question and therefore they have the right to choose the form of living together which is most suitable to their situation. In the 1930s a different approach prevailed:

> It is certainly not in accordance with the spirit of the legislation to regard the free relationship between man and woman as their private matter in which society should not be allowed to intervene. However, such an individualistic conception seems to be widespread in some circles and has probably been encouraged by the fact that when ch. 20 of the Penal Code was revised in 1926, the section on the punishable nature of illicit intercourse was repealed. This attitude has manifestly also substantially contributed to the spreading of illegitimate relationships. Under these conditions it is deemed beyond dispute that the task of the legislator is to

[26] LvK 1935/4, LvK 1938/7 and LvK 1939/6.
[27] LvK 1938/7, p. 1.
[28] LvK 1938/7, p. 1.

> defend the opposite opinion and to try by means of legal provisions to induce those who in this respect have placed themselves outside the social order to comply with these views.[29]

In the Civil Marriage Decree of 1917 the needs of the *highest* social classes were given priority. The situation differed depending on who should be punished for having an illegitimate relationship. Here the aim was to subject particularly the members of the *lowest* social classes to societal control. This is clearly shown by the following quotation:

> As has been pointed out above, society should not yield to those who out of defiance or indifference do not fulfil the requirements set by society in this respect. However, since the issue is a delicate one and the facts are difficult to prove, it is desirable that punishment of the offenders be avoided. Indeed, the people concerned are mostly more or less indigent and if they were fined they would not be able to pay and would be obliged to serve a prison sentence instead; and as a result their children would have to be supported by poor relief. In sec. 7 of the draft act these factors have been taken into account in such a way that a trial concerning illegitimate cohabitation can be postponed to give the defendants the opportunity to separate or to have their wedding celebrated. If it is established after such postponement or when the case is otherwise being decided that cohabitation has ceased or has been legalized, no sanction would be imposed (sec. 7, subsec. 2); however, terminating cohabitation would exempt the parties from punishment only if with regard to the circumstances it would be apparent that the partners concerned really intend to comply with the social order.[30]

Obviously the Civil Marriage Decree which came into force at the beginning of 1918 did not entirely come up to expectations. The purpose of the statute was certainly to induce those who were unfavourably disposed towards religious marriage and who belonged to the highest or the lowest social classes to resort to the new procedure for celebrating marriage. Therefore illegitimate couples were first discreetly offered the opportunity to make their relationship official or, in the opinion of the committee, to stop living outside the social order and to place themselves within it.

This policy succeeded in the *upper* classes. Indeed, when in addition to religious marriage it became possible to choose civil marriage, people from the upper classes with radical cultural views, on one hand, and leading personalities of the labour movement, on the other, did marry before the civil authorities.[31]

[29] LvK 1938/7, p. 2.

[30] LvK 1938/7, p. 3. According to sec 7, subsec. 2, of the law proposal, the most severe sanction would have been imprisonment for three months. If after having served their sentence the partners again started to cohabit, the sentence for recidivism would have been imprisonment for at most six months (sec. 8); LvK 1938/7, pp. 4 f.

[31] For example the union of the future Prime Minister of Finland (in 1926–1927), Väinö Tanner, who was one of the leaders of the Social Democrat Party, and his companion Linda Anttila was a so-called marriage of conscience until 1918, when their wedding was celebrated

People of the *lowest* social classes, on the contrary, did not want to make their relationship official, though the 1917 Decree had come into effect on January 1, 1918. Research data shows that unlegalized cohabitation even became more general in these circles.

Since the strategy adopted in the Civil Marriage Decree had failed, the authorities decided to change it. The planned new line of action was at the same time an *attempt to turn to much more stringent measures*. While the sanctions prescribed in the 1755 Decree mentioned above were eight and—in the case of recidivism—twelve days' imprisonment, the reform scheme provided for imprisonment for three or six months.

However, no legislative action was taken. In November 1940 the Cabinet decided to abandon the criminalization project.[32]

4. *Summary*

In the foregoing, three questions were asked: 1) did the Civil Marriage Decree aim at reducing societal control? 2) was the creation of the 1929 divorce system meant to enhance citizens' freedom of choice? and 3) did attitudes towards unlegalized cohabitation become more liberal in the early years of independence?

Though positive answers to these questions seem plausible, examination of the matter gives entirely different results. Consequently, the answer to all three questions should be No.

What are the reasons for this? Why did the Finnish law drafting officials and the legislator deliberately try to augment—and not at all to reduce—statutory control from the 1910s to the 1930s?

This development must have some specific causes, because the reform projects in question certainly did not come about incidentally. To conclude, these reasons will be analysed. In the light of knowledge gained earlier, a more general examination will be made of the conditions which influenced the evolution of family law.

V. THE CONDITIONS WHICH INFLUENCED THE EVOLUTION OF THE CONCEPTION OF THE FAMILY

The adherents of hermeneutics in particular utilize the concept of the view of the world and its changes. The outline of this reasoning is as follows. A given

before the civil authorities. Several other leftist members of Parliament, at least ten as was mentioned during the discussions on civil marriage (Parliamentary Minutes 1910 I, p. 150), had the same kind of relationship and legalized it in the same way.

[32] See Jaakkola, *op.cit.*, p. 303.

view of the world corresponds to the economic and cultural state of affairs of society at a given moment, and legislation in turn corresponds to this view of the world. In this sense, valid legislation is a kind of manifestation of the world view.

When we project the view of the world in family law and its development, we can use the term conception of the family, which is part of the world view. In this context we shall pay only limited attention to changes in the world view, i.e. we shall confine ourselves to alterations significant for family law.

The conception of the family, then, is in many ways connected with the economic and cultural basis of society and with the changes occurring in this foundation. Society itself determines the conceptions of what is legally considered right or wrong, good or bad. These conceptions again are translated into legal provisions, which in their turn exert an influence upon society. In different sectors of life, this circular movement takes various forms and different factors receive various contents.[33]

Undoubtedly this reasoning is correct. However, the problem is why the conception of the family has changed and why for example the control to which contracting a marriage and dissolving it was subjected changed in Finland in the early years of independence. This matter could be represented by means of the following scheme:

a) concrete acts	⟶	1) family law
b) individual consciousness	⟶	2) conception of the family
c) social consciousness	⟶	3) view of the world
d) evolution of production relations	⟶	4) legislative power
e) evolution of the factors of production	⟶	5) foundation of power[34]

There seem to be basically three alternative explanations for the tightening of statutory control. First, one may attribute the legislator's stricter approach to *ideological* or similar reasons (alternative I); this explanation focuses on levels

[33] See e.g. John M. Eekelaar and Sanford N. Katz (eds.), *Marriage and Cohabitation in Contemporary Societies*, Toronto 1980, in which the Finnish legal theorist Aulis Aarnio has put forward the ideas in question in his article "Changing Concepts of the Family and the Reform of Family Law in Finland", pp. 23 ff.

[34] This reduction scheme was elaborated by Guy Ahonen, *Det samhälleliga medvetandet som materiell rörelseform* (unpublished manuscript, Swedish School of Economics, Helsinki, February 1987). The basic idea of the scheme is the following. On the left is indicated on an *abstract level* how different research traditions proceed in their search for *ultimate* explanations. On the right there is a *concrete* outline of how these explanations could be applied to family law and its evolution.

The elements on the left and those on the right are in a way counterparts of each other. They are all extremely simplified and open to criticism. It is for example perfectly possible to maintain that conceptions of the family represent views of the world, which means that point 2) on the right would be transferred to point 3). The disposition used has been adopted for the sake of *technical clarity of the presentation.*

1 to 3.[35] As alternative II, the changes may be referred *partly* to structural societal factors and *partly* to developments in the view of the world or the conception of the family; in this case attention is paid to levels 1 to 4.[36] The third alternative (III) should also be taken into account, according to which the crucial question is ultimately the evolution of the *factors of production*, as marxist researchers have stated; levels 1 to 5.[37] Alternatives I and III are here rejected, for the following reasons.

When studying the evolution of family law it is rather easy to establish regularities which are due to the *structure of society*, as has been indicated above. For example, the Civil Marriage Decree and the attempts to criminalize illegitimate cohabitation were not unrelated to the political balance of power and its modifications. On the contrary: these legislative projects were carried out (or attempted) with the support of the political Right, and were aimed mainly at the lower social classes (and at the same time at leftist people). The purpose was precisely to subject adherents of the political Left to control.

Alternative III cannot be substantiated satisfactorily. Indeed, an adequate explanation of this evolution, and of the more general family law reforms, is perfectly possible without recourse to changes in manpower, the development of machines or the availability of raw materials (i.e. to the factors of production).

The present author thus considers alternative II as the right explanation. The heart of the matter is that in Finland immediately before and after the Civil War of 1918, legislative power was held predominantly by the political Right. The Right attempted to secure its interests by trying—first gently (cf. the Civil Marriage Decree of 1917 and the divorce reform of 1929)—to encourage conformity among those who had placed themselves outside the legal order of society. When this failed, the Right planned harsher measures

[35] In Finland one can find this kind of explanation especially in *legal* research with a historical tinge. For example: the table at the beginning of this paper indicates that in Finland legislation conferring an equal right to marital property on the spouses was passed in 1878. This has been attributed to the rise of ideologies advocating equality between the sexes. See Ahti Saarenpää, "Tasa-arvosta tasajakoon" (From Equality to Equal Division), *Oikeustiede* XIII, Vammala 1980, p. 191. The argumentation is tautological, because equal shares of marital property *means* equality; a phenomenon cannot in itself be *its own* explanation.

In particular Heikki Ylikangas, *Oikeus historiallisena ilmiönä* (Law as a Historical Phenomenon), Vammala 1978 (pp. 182 f.) rejects ideological explanations because they leave unanswered the question of why certain ideas are approved and transformed into legal patterns and others are not. Ylikangas points out that legal changes do not propagate like epidemic diseases. Changes should serve the purposes of the social groups supporting them in order to be considered for legalization, he emphasizes (*ibid.*).

[36] See e.g. the reference in footnote 33 above.

[37] See e.g. Viktor Afanasjev, *Filosofian alkeet—Dialektinen materialismi, historiallinen materialismi* (Elements of Philosophy—Dialectical Materialism, Historical Materialism), Moscow 1976, pp. 190–193.

(the criminalization schemes of 1935–1939). In this sense both the implemented and the unrealized reforms were based on class conceptions.

The situation changed drastically in November 1939, when the so-called Winter War with the Soviet Union broke out. This war lasted little more than a hundred days. While the Civil War of 1918 had split the people,[38] the Winter War united them. This makes it easy to understand why the Government decided in November 1940 to abandon the criminalization project. Because of the changed conditions and the coming about of a national consensus, the bills which had already been drafted were never introduced in Parliament.

Especially after the Second World War, attitudes towards contracting marriage, unlegalized cohabitation and divorce changed radically. This cannot be explained *exclusively* by referring to structural developments in society; other factors must also be taken into account, and these are connected with the altered conception of the family. Because many people had been killed, families had disintegrated and the whole approach to life had been thoroughly modified, attitudes towards the relationship between man and woman and towards individual freedom of choice were also revolutionized.[39]

[38] The population, which numbered approximately 3,330,000 people, was divided into so-called Reds (supporters of the Left) and Whites (supporting the Right). In the war about 6,000 people were killed and in the summer of 1918 about 80,000 Reds, of whom more than 12,000 died, were in concentration camps. See Jaakko Paavolainen, *Vankileirit Suomessa 1918* (Concentration Camps in Finland in 1918), Helsinki 1971, p. 332.

It should also be mentioned that in Finland on May 29, 1918 an act with *retroactive effect* was passed (cf. the principle *nulla poena sine lege*), on the strength of which more than 500 Reds were sentenced to death for having participated in the Civil War. This shows that Finland was politically split, and this situation continued until the end of the 1930s. The political Right which was in power exercised control over the party which had lost the Civil War and this control even extended to neutral fields such as family law.

[39] One could describe the situation after the war and especially at present by saying that all kinds of moralization have been excluded from the legislation. If cohabiting partners do not want to marry this is considered to be their private matter. And if a married couple wants to divorce this is also their personal affair. The task of the legislator is not to interfere but to stay in the background and only to solve the legal problems involved.

See for example *SOU* 1981:85 (Äktenskapsbalk), which states (p. 116): "Det är inte lagen som skapar äktenskapet eller samboendet; det är tvärtom förekomsten av äktenskap eller samboendet som kräver lagregler för att lösa konflikter om praktiska ting" (Law does not create marriage or cohabitation; on the contrary, marriage and cohabitation require legal rules for the solution of conflicts over practical matters). This statement is also characteristic of the attitudes prevailing in Finland in the 1980s.