

# Family Forms and Legal Policies

## A Comparative View from a Swedish Observer

Anders Agell

### 1 Introduction

This paper is an introductory contribution to the theme “Living Arrangements and Family Structures” as including unmarried cohabitation, homosexual relationships, single-parent families and step-parenthood.<sup>1</sup> The presentation has the aim of giving a general survey of legal policies as a basis for further considerations. As social changes in gender roles and family living have occurred earlier in most other European countries, Swedish development should especially be observed within the comparative perspective.

However, each of these four mentioned subtopics offers enough problems alone to merit special study. A joint overview necessarily has to be either superficial or confined to specific aspects. I have chosen the latter approach over the former, although I touch upon each of the subtopics to some degree. The following overview is primarily directed to a discussion of alternative legal policies presented in a conference concerning the combined issues of societal and legal changes.

As already indicated, there is not only one, but several concepts of what constitutes a family. It is true, however, that constitutional principles often protect *the family* in a very general sense. Such rules have repercussions in other legal areas. Take, for instance, the situation where a constitutional court, or the European Court of Human Rights, has declared that a grandparent or a former foster parent has the right of visitation with a child. The effect of such a ruling is not a definition of what constitutes a family, but a recognition of the fact that

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<sup>1</sup> The paper originates from a conference, arranged in Vienna in June 1997 by the State Institute for Family Research at the University of Bamberg, Germany, and the Austrian Institute for Family Studies in Vienna. It will also be published in L.A. Vascovics (Hrsg.), *Lebens- und Familienformen – Tatsachen und Normen*, Leske & Budrich Verlag, Germany. The text was revised in December 1997. Later developments have not been taken into account

there is special link between a child and another person, a link that must be respected in family law. Private law has to adjust itself to this type of decision. Most rules in family law govern relationships between individuals, e.g., between spouses, or between a child and its parents.

A Dane with a sense of humour said to me about twenty years ago: “Swedes are curious. Men and women, who can marry, don’t want to. But homosexuals, who can’t marry, want to do so.” This presentation deals primarily with unmarried cohabitation and with homosexual relationships. My reason for doing so is that I believe that the attitude of the legislator and the courts to unmarried cohabitation between men and women might be crucial to the future of marriage in our societies. However, the decisive factor is how social habits develop and to what degree law can influence such habits.

Homosexual cohabitation is of less practical importance, but does raise questions relating to principles and beliefs. Finally, I will take up issues concerning single-parent, and step-parent families. The position of children in different family forms is perhaps the most important issue of all. Due to lack of space, I will draw attention only to a few general aspects in these areas.

## **2 Unmarried Cohabitation**

### **2.1 Introductory Remarks**

As a matter of principle, it is worth mentioning common law marriage, an institution that has survived in a dozen states in the United States. This informal marriage is based on the cohabitation of the parties, holding themselves out to the world to be husband and wife, and their assumed willingness to be treated as a married couple, although they have not participated in a wedding ceremony. Common law marriage has the same effect as formal marriage in all legal areas, including the need for a divorce if either party wants to remarry.<sup>2</sup>

For countries unfamiliar with common law marriage, it is more natural to look at the issue the other way around. Since the wedding ceremony is the entrance ticket to marriage, the full legal effects of marriage can not be accorded to any relationship that lacks that ticket.

At least theoretically, there is an even more radical alternative to the problem of which legal effects should be given to cohabitation as compared to marriage. That would be to abolish marriage as a legal concept, while still allowing for its

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<sup>2</sup> Common law marriage still forms the basis for new case law. An introduction to the subject can be found in any leading textbook on American family law. The earlier tendency to abolish common law marriage has possibly disappeared. Utah did introduce the concept only a few years ago. The question might be raised as to whether this change is connected with the growing rate of cohabitation out of wedlock. The states in which common law marriage is not recognized face the same problems as other countries as to how to treat unmarried cohabitation. From the point of view of legal systematics, the American situation is not simple.

religious and social roles.<sup>3</sup> Such a solution would imply that the pertinent legal rules would be based upon cohabitation, and other forms of dependency, not on the existence of marriage. Another consequence would be the superfluity then of rules concerning the conclusion of marriage and of divorce. However, there does not appear to be any realistic basis in our societies for giving up the traditional role of marriage as a legal concept. A decisive point of view of a more practical character is the value in building legal effects upon an agreement between the parties, although marriage can be characterized not only as a contract, but also as a status, as it does not come into existence without a wedding ceremony.<sup>4</sup>

## 2.2 Private Law

In most European countries, the legislators' attitude towards unmarried cohabitation is very restrictive as far as the legal effects of private law are concerned. As the cohabitees have chosen *not* to marry, the conclusion in many countries appears to be that no *special* legislation should be introduced to regulate their mutual relationship. This attitude does not imply, however, that the relationship between the cohabitees is not covered at all by legal regulation. Instead, general rules as found in the law of obligations should be applied. One illustration of this is the application of rules on co-ownership of household goods and of a dwelling, where the property has been acquired for joint use in the course of the cohabitation. The parties' *presumed* agreement on co-ownership then can be given a more or less fictitious role in this field. Another possibility is the application of what is called *BGB-Gesellschaft* in German law and *société de fait* (*de facto partnership*) in French law. In England, the concept of *trust* has also been used for cohabitees. In addition, rules on *unjust enrichment* can be used in order to avoid unfair consequences, especially where a woman, as a housewife, has indirectly supported her partner in his professional career.<sup>5</sup>

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<sup>3</sup> This idea was presented and discussed in an interesting manner by Eric Clive, *Marriage: An Unnecessary Legal Concept*, in *Marriage and Cohabitation in Contemporary Societies*, John M. Eekelaar & Sanford N. Katz, (eds.) Toronto, 1980.

<sup>4</sup> In other words, the contract in itself is not sufficient for the legal effects of marriage (when common law marriage is not accepted). Cf the decision by the Swedish Supreme Court found in *Nytt Juridiskt Arkiv* (1985) p. 172. Two cohabitees had entered into a written agreement in which they contracted that all financial effects given a marriage would apply to their relationship. According to the Court, the contract could not be given full legal effect.

<sup>5</sup> A more comprehensive comparative survey is given by Rainer Frank, *The Status of Cohabitation in the legal systems of West Germany and other West European countries*, in *The American Journal of Comparative Law*, p. 185 (1985). A comparative overview for France, England, Germany, Sweden and the United States can also be found in the sixth chapter of Mary Ann Glendon's book, *The transformation of family law. State, Law and Family in the United States and Western Europe* University of Chicago Press, 1989. See also *Des concubinages dans le monde* in Centre national de la recherche scientifique Jacqueline Rubellin-Devichi, (ed) Paris 1990. The rules on unmarried cohabitation can of course have changed since the publication of these overviews. Additional information is available through the more or less comparative essays published in the *International Journal of Law and Family* (Oxford University Press), not to mention literature published in the individual countries.

A special question is whether cohabitation should form the basis for a claim for *alimony*, a claim that can play a practical role, not in the ongoing cohabitation, but in its termination, in the situation where one partner (normally the woman), has difficulties in economically supporting herself after the separation. There are countries that have introduced legislation containing provisions concerning support (e.g., provinces in Canada, Australia and the former Yugoslavia), but most countries have no such rules for cohabitants. In Sweden, the argument professed has been that it would not correspond to public opinion if persons living in a free union would have support obligations to one another. This argument, however, is not quite so convincing when the underlying reason for a possible support claim is the dependency created by the cohabitation itself. However, even if a special rule on alimony is not applied to former cohabitants, the unfair consequences now in question could, as has already been indicated, be avoided by application of rules on unjust enrichment.<sup>6</sup>

Even those countries wishing to avoid special legislation on cohabitants' internal affairs can, however, adopt special legislation giving one partner the right to continue living in, or disposing of, the joint dwelling, despite the fact that the other partner is owner or tenant in possession. Such a possibility is of social importance, especially where children are involved.

Sweden seems to be the only country in Western Europe that has introduced a special act making it possible to redistribute the value of property between cohabitants. According to the basic principle of the Cohabitants (Joint Homes) Act of 1987, the value of a dwelling, and/or of household goods, that have been acquired by one partner for joint use by both partners, can be splitted up equally between them upon separation, if the non-owner requests it. The Act is applicable only when an unmarried man and an unmarried woman cohabit under what are called "marriage-like conditions".

After the death of one partner, only the surviving partner, and not the heirs of the deceased, can request application of the Act. The surviving cohabitant has no right to intestate succession according to the Code on Inheritance. However, for protection of the surviving cohabitant, the special Act gives him or her, up to the amount of approximately \$ 10,000, the right to keep more than half the value of the dwelling and household goods, before the estate of the deceased is distributed among the heirs.

The Swedish Act has some weaknesses. It gives the non-owner the right to share the value of the property acquired for joint use, even if the cohabitant who owns the property bought it with money owned before the parties began cohabiting. However, the underlying policy is that property bought by one partner for the joint home should normally be seen as having been acquired by their joint efforts. In addition, there is a special rule allowing for a decrease in

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<sup>6</sup> Even if cohabitants are not obliged to support one another, the fact that they nevertheless do so can be taken into account outside the private law area, e.g., in the law of execution and regarding the right to general social aid. Cf Anders Agell, *Die Begründung und die Grenzen der Unterhaltspflicht unter erwachsenen Verwandten in Schweden*, in *Familiäre Solidarität, Beiträge zum Europäischen Familienrecht Band 5*, Dieter Schwab & Dieter Henrich, (eds), Verlag Ern und Werner Giesecking, Bielefeld, 1997.

the degree of sharing to an equitable amount in individual cases. A remaining weakness, however, is that the Act does not offer any financial remedy for the benefit of the weaker party if no dwelling or household goods have been acquired for joint use. Take the example where the parties owned all the necessary equipment before they began to cohabit. Nevertheless, one partner, usually the man, may have *increased* his wealth as a result of the couple's cohabitation, while the other partner, normally the woman, may have *reduced* her financial possibilities for the future.<sup>7</sup>

The named criticism of the Swedish Act sometimes meets with the objection that there is a need to protect the weaker party, and that the Act, as such, is better than nothing. This attitude reveals the basic legal policy that has guided the Swedish parliament in recent decades: the legislator should respect the choice of couples who cohabit without marrying, but at the same time not hesitate to introduce legislation in order to meet practical needs. As we will see below, this policy is more far-reaching in social welfare and tax law, where, as a matter of principle, cohabitation is put on par with marriage.

In addition, it should be mentioned that the question of whether a cohabitee should be entitled to economic compensation in cases, where the Act on joint homes does not give any remedy, could be assessed possibly as a case of unjust enrichment. Astonishingly enough, published case law in Sweden contains no instance of any claims based on that ground.

The Supreme Courts of Denmark and Norway have developed principles that protect the weaker cohabitee, perhaps as efficiently as the Swedish Act. In Norway, case law has implied co-ownership of the family home of spouses and cohabitees, with a view to protecting the housewife without an income of her own. The Danish Supreme Court has awarded financial compensation in the form of a lump sum to the weaker party, normally the woman, whose work in the home has indirectly contributed to improving the financial position of the man. The theoretical basis for the Danish solution was somewhat unclear in the beginning, but apparently the Court has applied the principle of unjust enrichment.

It is also worth adding that the *Scottish Law Commission* has recently published a Report on Family Law which contains proposals for cohabitees concerning the equal sharing of property and financial provision in other respects.<sup>8</sup> The legal technique has been to use, as a starting point, several of the rules applicable to spouses according to the Scottish Family Law Act of 1985. The presumption of equal shares in household goods should, with modifications (the length of the cohabitation can play a role), be applied to cohabitees.<sup>9</sup> Furthermore, where a cohabitation has been terminated otherwise than by death, the former cohabitee should be able to apply to a court for a financial provision

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<sup>7</sup> I have described the Swedish Act in more detail in *Die Schwedische Gesetzgebung über nichteheliche Lebensgemeinschaften* in *Zeitschrift für das gesamte Familienrecht* 37, 1990, p. 817.

<sup>8</sup> Scottish Law Commission, Report No. 135, 1997.

<sup>9</sup> Clause 34.

based upon the principles in the Family Law Act, namely that fair account should be taken of the economic advantages derived by either party from the contributions received from the other, and of any economic disadvantages suffered by either party in the interest of the other partner or the children in the family.<sup>10</sup>

Compared to the Swedish Act, the Scottish proposal is more limited in that the right to share property does not include the value of the dwelling, a value which is covered by the Swedish Act where the dwelling has a market value (i.e. consists of either real property or a condominium apartment). On the other hand, the proposal for a financial provision in general has no equivalence in the Swedish Act.

### **2.3 Tax Law and Social Welfare Law**

Rules in different legal areas are not infrequently based on the existence of a marriage. This may, for instance, be the case in tax law or in social welfare law. If a spouse is treated differently from an unmarried person, the legislator has to address the question of whether cohabitation under marriage-like conditions should have the same legal effects as a marriage. One possibility is to place cohabitation on par with marriage, and this is the principle that has been chosen by the Swedish legislator in social welfare and in tax law. In practice, however, this equal treatment is sometimes based on the existence of a mutual child, in which case the similarity with marriage is especially clear and easily proven. Equal treatment of spouses and cohabitants also seems to exist in a number of other countries.<sup>11</sup>

The basic attitude in Sweden has been justified by the argument that, within tax and social welfare law, social needs, and not marital status, should be decisive for legal consequences. This can sometimes entail an advantage, or sometimes a disadvantage, for the persons involved.

A less favourable attitude to cohabitation as compared with formal marriage could result in a different strategy. The legislator would then have to insure that cohabitation did not result in better benefits or in lower taxes than with marriage. If the law treated a spouse better than an unmarried person, e.g., with regard to a widow's pension, the negative attitude towards cohabitation would mean that a cohabitee under marriage-like conditions did not automatically enjoy the same pension entitlement. My point here is not to recommend any particular attitude, but to draw attention to alternative legal policies in social welfare and tax law.

I would like to add a comment of a more technical nature. The application of rules governing spouses to cohabitants should, and this is probably the prevailing view in Europe, be decided upon by the legislator and not by the courts. The

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<sup>10</sup> Clause 36. There is also, in the Report, a proposal contained in Clause 35 for a presumption of an equal sharing of the value of money and property derived through savings from a housekeeping, or similar, allowance.

<sup>11</sup> Cf Neville Harris, *Unmarried Cohabiting Couples and Social Security in Great Britain*, in *The Journal of Social Welfare & Family Law*, 1996, p. 123 (with references).

legal approach to cohabitation raises matters of principle and legal policy. The questions involved concern different legal areas. I do not believe that the courts or administrative authorities should be seen as having either the legitimacy or the necessary overview to draw analogies between marriage and cohabitation.

#### ***2.4 Dependency, Close Relationship or Household as Alternative Concepts for Legal Effects***

As has already been indicated above, it can occasionally be natural to give legal effects to cohabitation, not by applying rules for spouses, but by using a broader concept which includes marriage, cohabitation and also other relationships.

Persons living together can be treated in accordance with the protections afforded to families in the law of execution. In the law of torts, *compensation for loss of a breadwinner* can be awarded not only to individuals who are legally entitled to maintenance from the deceased, but also to others who have in fact been *financially dependent* upon the deceased, including cohabitees and others. The right to *financial support directly from the estate* of the deceased, at least for a transitional period, can similarly be based on dependency and can be extended to a cohabitee as well as to relatives of the deceased. Yet another example can be provided by the procedural rules on *privileged witnesses*, that is, the rules exempting persons in a close relationship to a party from testifying in court.

If the close relationship as such, and not the marriage, is considered to be decisive, then such a relationship can, depending on the circumstances, include not only spouses, but also cohabitees and other persons, e.g., an aunt and a niece who have lived together for many years.

In some countries, a sceptical attitude to cohabitation as compared to marriage has led to the conclusion that any legislation should treat cohabitation as one of several forms of living together in *one household*. The household as a concept could also cover siblings, friends, homosexual partners, etc.

Modest legislation of this type was introduced in Norway in 1991. When two parties cease living together, the party who is not the owner of the dwelling or household goods can be given the right to take over the said property from the party who is the owner. However, several conditions have to be met. The entitled party has to pay for the value of the property that is taken over. This means that the Act does not give the party any financial compensation upon the termination of the cohabitation. The partners in the joint household must have lived together at least two years or have a mutual child. There also have to be *special reasons* in favour of one party taking over the property, the most important of which are the needs of the children.

Legislation based on the existence of a joint household, covering different living arrangements including the relationship between spouses, is currently being considered by the English Law Commission as a problem of "home sharing". The issues under consideration include the possibility of claims for financial compensation, but the outcome is yet unknown. It seems likely to me, however, that cohabitation under marriage-like conditions, to say nothing of formal marriage, normally creates more far-reaching financial cooperation than

that which exists in other joint households, for instance when two siblings or two good friends live together. Marriage-like cohabitation, often leads to an intermingling of incomes and expenditures and to joint work in the home, not in the least when there are children. For my part, I am sceptical to the idea of equal treatment of the very dissimilar situations covered by the concept of a joint household. Such legislation should not be given more than a limited scope, as is the case with the Norwegian Act. Consequently, its social importance will be very limited. The Norwegian Act is scarcely applied in practice.

The idea of taking the concept of a joint household into account has, however, also been discussed in Sweden. Opposition to the introduction in 1995 of legislation regarding registered partnership (cf. below under Section 3), was combined with the proposal that a better alternative was to treat homosexual relationships within a broader category of persons living in the same household, including, for example, two siblings or two good friends living together without any marriage-like or sexual relationship. However, that argument was not accepted by parliament. In 1997, a government committee nevertheless received the task of scrutinizing several different issues, including the need for rules regarding persons living in the same household. Although the committee has been given the freedom to propose supplementary rules to family law, the central task remains conducting a survey of the treatment of persons living in the same household within the area of social security.

## ***2.5 Some Considerations of Legal Policy in General***

The decisive question concerning cohabitation remains: What are the reasons for choosing one legal policy over another, presupposing that marriage should be kept as a concept of basic importance within family law, and that cohabitation, in contrast to common law marriage, should not be given all the consequences of a formal marriage?

It is true that special legislation on cohabitation under marriage-like conditions can solve certain practical problems and promote fair solutions in individual cases. On the other hand, there are also possible disadvantages in the willingness of the legislator to build a system of special rules for cohabitantes, partly similar, partly dissimilar, to the law designed for spouses. In this connection, the following points may be made:

(1) The rules regarding divorce normally imply that the legislator tries to preserve family stability, not in the least with respect to the interests of the children.<sup>12</sup> For cohabiting partners, there is no corresponding mechanism. This

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<sup>12</sup> According to statistics from the Commission of the European Union, the probability for divorce for marriages entered into in 1995 varied with 8 % in Italy, 12 % in Spain, 17 % in Greece, to 55 % in Belgium (new divorce laws skewed the statistics), 52 % in Sweden, 49 % in Finland, 45 % in Great Britain and 41 % in Denmark. Germany and Austria were somewhat in between with a rate of 33 % and 38 % respectively. For several of the listed countries, including Sweden, the high frequency of separation for unmarried couples also has to be taken into account. In Sweden, 55 % of all children born have unmarried mothers who are normally cohabiting with the father at the time of the child's birth. As the risk for separation for unmarried couples in Sweden is two to three times higher than the risk for

reveals a conflict of values if the legislator is supposed to be uninterested in marital status.

This point is based on the assumption that family stability is of value, first of all to the children within a family, but also to the man and woman married to one another, or living together under marriage-like conditions. The same is true of two partners in a homosexual relationship. Such a traditional attitude can be reconciled with the knowledge that most divorces, and separations, are probably necessary in order to dissolve unions that do not work, and that such separations can be beneficial both to the parties and to their children. However, one aspect of the issues of whether law can promote family stability is the legal policy concerning cohabitation as compared to marriage.

It is worth emphasizing in this connection that rules regarding marriage, and especially divorce, should be framed in such a way that modern couples are not deterred from marrying because they do not like those rules.

The formation of a marriage might have some beneficial influence on family stability since the partners, by going through with a wedding ceremony making mutual promises to stay together, should have thereby decided upon the character of their relationship.

(2) The development of a special system of rules for cohabitees under marriage-like conditions makes it difficult for citizens to assess the differences between marriage and cohabitation.

(3) The assessment of whether a couple is cohabiting in marriage-like conditions is, in most cases, rather easy, especially when the man and woman have clearly shared a home for a considerable time. However, the concept of "cohabitation under marriage-like conditions" is theoretically rather complicated and its application is sometimes difficult. In addition, the question of whether the marriage-like cohabitation has terminated can also be problematic, for example when one party has received a job in another city, or has moved to a home for the elderly.

(4) When two unmarried person (e.g. parents) enjoy better social benefits than cohabitees (and spouses), there is a risk of abuse of the system and attempts to conceal cohabitation.

One conclusion that can be drawn from these critical remarks is that, *as a matter of principle*, the best state of affairs would be for men and women who desire to form a union normally to marry, and then one set of rules would be sufficient, namely those governing formal marriage based on the agreement to marry. The establishment of special rules for cohabitees encourages the habit of living together without marrying.

It might be said, therefore, that the introduction of rules on cohabitation solves practical problems in a way that might represent a *primary* goal of legislation. This advantage, however, in the short run can be seen as counteracting a high marriage rate, and the application of only one system (instead of two, marriage and cohabitation) as possible *ultimate goals*.

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married couples, these divorce statistics do not give an accurate assessment of overall family stability, or instability.

On the other hand, however, is the crucial question as to what degree the legislator can influence the rate of marriage, which basically depends on general social habits. With some differences in timeframes, most European countries have seen a decline in the marriage rate. If, however, the legislator really wants to stimulate the rate of marriage, then tax and social welfare laws are probably the most suitable legal areas in which to achieve such an effect by placing married couples in a better position than cohabitantes.

Sweden seems to be the country in Western Europe that has chosen the clearest and most positive attitude towards cohabitation. The attitude of “neutrality” was formulated within a rather short period when the marriage rate had begun to decrease in the late 1960’s. The message from the legislators was that the state should remain neutral to whether a couple chose to marry; marriage should continue to have an important place in society but that the law should not create difficulties for couples who preferred not to marry. Legislation based on this ideology has followed the line already described above. Legislation on cohabitation has been enacted in order to meet practical needs of individuals in the area of private law, and in order to treat, as a matter of principle, marriage and cohabitation equally within tax law, social welfare law and other legal areas, for example the law of execution.

Although the social changes came first, and the ideology later on, it is very likely that the attitude of the legislator has strengthened the habit of unmarried cohabitation in Sweden, and the attitude of many individuals that marriage is, and should be, unnecessary.<sup>13</sup> In many countries, it is assumed that cohabiting couples who do not marry desire to avoid legal effects in their living together. Such an assumption, however, is not correct in the case of Sweden. Although cohabiting couples often consider marrying unnecessary, they nevertheless desire to have as many of the legal effects of marriage as possible. They have nothing against marriage as such. This is of course a contradictory opinion, perhaps well summarized in the words: “Marriage is a wonderful institution, but who wants to live in an institution?”<sup>14</sup>

Even for countries that do not wish to introduce special rules concerning unmarried cohabitation, especially not in the area of private law, it seems difficult to avoid such a step in certain respects. One illustration is provided by the question of whether the obligation to pay alimony to an ex-spouse should cease when the entitled party remarries or begins to cohabit with a new partner. From the perspective of the ex-spouse paying the alimony, it seems fair to treat the entitled party’s new cohabitation in the same manner as a remarriage, even if there is no legal duty for cohabitantes to support one another.

One last alternative for legal policy, which has occasionally been mentioned, is to base legal effects, including financial claims between cohabitantes, on special *registration*. In my opinion, this is a poor alternative as far as cohabitation

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<sup>13</sup> The attitude of the Swedish legislator has been discussed in my paper *Should and can Family Law Influence Social Behaviour*, in *The Changing Family. Family Forms & Family Law* (John Eekelaar and Thandabantu Nhlapo (eds), Hart Publishing, Oxford 1998).

<sup>14</sup> This is a citation from a Swedish expert on common law marriage, Mr. Göran Lind.

between men and women is concerned. It is not appropriate to introduce an official solution that will compete with marriage as an institution. Furthermore, social needs that arise in cases of cohabitation will in any case undoubtedly also arise if no registration has taken place.

However, registration of cohabitation as a possibility has been enacted in the Netherlands as of January 1, 1998 through an act passed in 1997 on the registration of partnerships. As a matter of principle, registration gives the same legal effects as a marriage, with the difference, however, that registration does not, as does marriage under Dutch law, carry any ramifications regarding the children of either partner. The possibility of registration for heterosexual couples, who have the option of marriage available, might seem very peculiar. There is, however, a special explanation that can be found in the consideration given to homosexual couples, who are not allowed to marry and for whom the act has been constructed. Thus, the act has been strongly influenced by the desire not to discriminate against anyone, neither homosexuals who cannot marry, nor heterosexuals who *do not wish to marry* and therefore(!), according to the legislators, should be given the same possibility of registration that has been introduced for homosexual couples!

The new Dutch possibility for registration of relationships between men and women is especially surprising as it gives, as a matter of principle, the same effects as marriage. It is possible, however, that this state of affairs will be shortlived. According to a committee report given in 1997, Dutch legislation should go a step further and open up the possibility of a complete marriage for homosexual couples. In such a case, it is unclear whether the act on registration will then be repealed, so that heterosexual couples would once again have to rely upon marriage as the only alternative for formal recognition of their relationships.<sup>15</sup> Let us now study, as an independent topic, several legislative tendencies concerning homosexual couples.

### 3 Homosexual Relationships

I take it as given that all rules implying discrimination on the grounds of sexual orientation should be abolished. However, marriage as a concept means, in cultural terms, the relationship between a man and a woman. Traditionally, an ultimate goal of marriage has been to promote procreation and the upbringing of a new generation, although not all spouses do have children. I find it, without need to go into detail, quite impossible to view the traditional definition of marriage as discrimination under any *constitutional* rules.<sup>16</sup> It is another issue

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<sup>15</sup> My knowledge of the new legislation in the Netherlands is based on Caroline Forder's essay, *Re-thinking marriage, parenthood and adoption*, in *The International Survey of Family Law for 1995*, Andrew Bainham, (ed), International Society of Family Law, Marinus Nijhoff Publishers, London, 1997 ,p 359, as well as information provided by Professor Paul Vlaardingerbroek.

<sup>16</sup> An exhaustive comparative study on legal relationships of homosexual couples can be found in Bea Verschraegen's book, *Gleichgeschlechtliche 'Ehen'*, Schriftenreihe des ÖVP-Parlamentsklubs, Band 9, Meiden und Recht Verlags GmbH, Wien, 1994. One perspective in

that the opening up of the institution of marriage to homosexuals could be discussed as a problem of legal policy, *de lege ferenda*.

It is well known that Denmark (1989),<sup>17</sup> Norway (1993),<sup>18</sup> Sweden (1995), and Iceland (1996)<sup>19</sup> have introduced "registered partnership" for couples of the same sex. The underlying philosophy as well as terminology implies that partnership is not the same thing as marriage. Marriage as a concept is still reserved for the relationship between men and women, but the legal effects of registered partnership are basically the same. The special acts make reference to the countries' Marriage Codes.<sup>20</sup> As a matter of principle, all the legal effects of marriage have been made applicable to registered partners, including the conditions for divorce and the matrimonial property system. The terminology differs, however. For example, the partnership is not called a marriage. There are impediments to partnership as there are to marriage: a married person cannot register a partnership and a registered partner cannot marry. The registration is not called a wedding ceremony, although the registration procedure is the same as the civil ceremony for concluding a marriage. The rules corresponding to divorce speak of "dissolution" of the registered partnership. There are, in other words, strong factual similarities between marriage and registered partnership, but the terminology differs. Despite the terminology, the popular press talks about "weddings" and "marriages" between homosexuals.<sup>21</sup>

But there are also limitations on the extension of the rules for married couples to homosexual couples. The main exceptions concern children. According to the Swedish Act, registered partners cannot jointly adopt a child, as can spouses. Nor can one partner *alone* adopt a child. There is also a rule preventing registered partners from obtaining joint legal custody of a child. Another rule

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the book concerns "Menschenrechte". American constitutional issues are discussed in a comprehensive manner by Lynn D. Wardle, in *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, in Brigham Young University Law Review, 1996, p. 1. See also Martin D. Dupius, *The Impact of Culture, Society, and History of the Legal Process. An Analysis of the Legal Status of Same-sex Relationships in the United States and Denmark*, in 9 International Journal of Law and Family, 1995, p. 86. A decision by the Supreme Court of Hawaii (*Baehr v. Levin*) has created special attention as it has declared that the impossibility for homosexuals to marry constitutes sex-discrimination according to constitutional principles.

<sup>17</sup> See Linda Nielsen, *Family Rights and the "Registered Partnership" in Denmark*, in International Journal of Law and the Family, 1990 p. 297.

<sup>18</sup> See Peter Lødrup, *Registered Partnership in Norway*, in The International Survey of Family Law for 1994, Andrew Bainham, (ed) International Society of Family Law, Martinus Nijhoff Publishers, London, 1996, p. 387.

<sup>19</sup> See David Thór Björvignsson, *General Principles and Recent Development in Icelandic Family Law*, in The International Survey of Family Law for 1995 at p. 225 (registered cohabitation).

<sup>20</sup> The information contained here is based upon the Swedish act, which may differ in one respect or another from the respective laws in the other Nordic countries.

<sup>21</sup> Registration of partnership in Sweden presupposes that at least one of the partners is a Swedish citizen with domicile in the country. A similar rule seems to be in place in the other Nordic countries.

prevents the use of artificial means of reproduction by such partners in Sweden, a procedure available to spouses and cohabitants under marriage-like conditions. All of these exceptions from the rules regarding spouses are based on the philosophy that, as far as we know today, it is in the best interests of a child to have a father and a mother, and not two parents of the same sex.

On the other hand, one of the registered partners may already have a child of his or her own who lives together with both partners. Such a situation cannot be forbidden. On the contrary, when this situation has arisen, it is to some degree protected and supported by the law. As I have said already, the rules on dissolution of a partnership refer to the divorce rules for spouses. Thus, the special reconsideration period that applies when one spouse has custody of his or her biological child living in the family is also applicable to partnerships. This implies that what we might call 'step-parenthood' in a partnership is taken into account in the same way as step-parenthood is in a marriage. The same is true under certain rules governing the *parent's benefit* scheme in social security law. The Swedish legislation, therefore, incorporates value judgements that might be considered contradictory. Surprisingly enough, the issue was not discussed during the drafting of the legislation.

There is also another exception from the equal treatment of spouses and registered partners. Legislation, which treats spouses differently on the basis of sex, is not applicable to registered partners. Thus, to the degree that there are statutory rules regarding a widow's pension, neither partner in a same sex relationship can ever be entitled to such a pension.

The Nordic Acts on registered partnership seem to be primarily based on an ideological effort to offer homosexual partners a possibility of *official recognition* of their relationship as being of equal value as a marriage. It is true that the *travaux préparatoires*, at least in Sweden where I am most familiar with the situation, also speak of the practical needs of cohabitants, in a similar way to the needs of spouses. No empirical knowledge about the practical needs of homosexual partners is, available, however.

When the Swedish bill on registered partnership was being drafted, one critical comment concerned the risk that placing partnership and marriage on an equal footing might damage the reputation of marriage as an institution. As a consequence, the registration of partnerships might have an adverse influence on the marriage rate. The rejoinder to this critical argument in the final bill was simply that it was not possible to understand how the possibility of registering a partnership could damage the reputation of marriage. This may be true of people who are totally free from prejudice. For those who still find it difficult to view homosexual relations as natural, or at least unavoidable, the impact of the legislation might be different.

Registrations of partnerships have not been very common. During the first year, 1995, the total number in Sweden was 335; for 1996, the figure was down to 155. The trend seems to be similar in Denmark and Norway.

In Sweden there is another law, some years older than the act on registered partnership, called the Homosexual Cohabitants Act (1987). That law enumerates selected statutory rules in different legal areas, concerning men and women cohabiting under marriage-like conditions, and declares these rules applicable

also to homosexual cohabitantes. The reference includes the Cohabitantes (Joint Homes) Act (*see* Section 2.2 above on heterosexual cohabitantes). A government committee report behind the Homosexual Cohabitantes Act (1987) had expressed arguments not only against the idea of marriage between homosexuals, but also against a procedure for registration. Political opinions, however, shifted rapidly after 1987, to some extent under the influence of the legislation adopted in Denmark and Norway, until the Swedish Bill on registered partnership was enacted in 1995, following considerable political controversy in parliament.

The enactment of the Act of registered partnership has made the future of the older act on homosexual cohabitantes somewhat doubtful. A government committee, set up in 1997 as mentioned above in Section 2.4, might consider repealing the older piece of legislation. To do so would have previously been natural, as the laws on registration of partnership or homosexual cohabitation have been looked upon as alternatives. However, the directives of the government to the new committee expressly mention only one other possibility. That would be to amend the act on homosexual cohabitantes and to make, as a matter of principle, all (not just selected) statutory rules concerning heterosexual cohabitantes applicable to homosexual cohabitantes as well. If the act were amended in this manner, the legal alternatives for heterosexual and homosexual couples would, as a matter of principle, be completely parallel. A registered partnership would correspond to a marriage, and informal cohabitation between homosexual persons would be treated in the same manner as cohabitation between a man and a woman under marriage-like conditions.

The Netherlands, in 1997, also enacted a law on the registration of partnerships.<sup>22</sup> The new act came into force January 1998, and shows strong similarities to its counterparts in the Scandinavian countries, as registration of homosexual partnerships makes the rules on marriage applicable as a matter of principle. There are, however, exceptions concerning children, a well-known phenomenon in the Scandinavian laws as shown above. Upon closer examination, however, the rules concerning children in a registered partnership are totally different in the Netherlands as compared to Scandinavia.<sup>23</sup>

In the Netherlands, marriage automatically gives a step-parent certain rights with respect to legal custody of a child and obligates him (or her) to support the child. Such an effect does not automatically occur as a consequence of a registered partnership. On the other hand, a second act that has come into force in 1998, gives a registered-partner the possibility to apply for joint custody of a child of his or her partner. A decision on joint custody presupposes consent by the biological parent not living with the child. This displays an ideological difference as compared to the Scandinavian solutions, which do not give registered partners the possibility of joint legal custody of a child.

The legal development in the Netherlands appears to have been more radical than that which has occurred in Scandinavia from another point of view. In a

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<sup>22</sup> See the reference in note 14.

<sup>23</sup> It has already been mentioned above, in Section 2.5 that the Dutch act has been made applicable also to heterosexual couples, who are free to marry!

report given in 1997, a legislative committee stated that there were no legal objections to homosexual marriages, and that adoptions by homosexual couples should be permitted.<sup>24</sup> Such a step would, of course, mean a fundamental change in the traditional concept of a marriage as a relationship between husband and wife.

Although the existing law and pending proposals differ between Scandinavia and the Netherlands, it also can be observed that there are several political voices, at least in Sweden, calling for a change in the law to make it possible for registered partners to jointly adopt a child, and also for a lesbian partner to legally undergo artificial insemination. These voices reflect an aim going beyond the desire for recognition, which I have already stressed, to the elimination of *any* difference whatsoever between heterosexual and homosexual couples. In that respect, the relationship to the child is not only a practical issue, but also a symbolic issue. The same is also true, of course, of the desire to open the door of formal marriage also to homosexual couples.

Ten years ago I personally took a fairly unfavourable view towards any special legislation regarding homosexual couples. Step by step, however, I have come to understand the desire of homosexuals for official recognition of their relationships. However, it is perhaps doubtful whether it is appropriate to attach the full effects of marriage to a registered partnership, at least as a matter of principle. I do believe, however, that those who speak on behalf of homosexuals, who undoubtedly have a difficult social situation, will not be satisfied until there is official recognition in a form more or less like a marriage. From this point of view, it might be difficult to achieve any final solution merely by treating homosexual couples within a larger category of persons living in the same household. However, the situation depends of course on the religious, societal and political climate within a country.

The question of whether registered partners should be allowed to create joint legal parenthood, through joint custody, adoption or artificial insemination, should be decided upon with respect primarily to the best interest of the child over the interest of the homosexual couple. The problems are complicated, and more depending on an assessment by experts in child psychology than by legal experts.

#### **4 Children in Single-Parent Families and Stepfamilies**

Different family forms create somewhat different problems. However, a question of general concern is how to view joint legal custody when parents do *not* live together in a marriage. Conceptually, by “Joint legal custody” I mean that both parents have the right to participate in decision-making related to the child and also, a point which is of practical importance, a right to obtain information about the child from schools and other authorities, for instance. However, joint legal custody is a separate issue from physical custody, and does not imply that the child must alternately live with both parents.

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<sup>24</sup> Based on information given to the author by Professor Paul Vlaardingerbroek.

One complication of joint custody is the difficulty arising when the two custodians have different opinions concerning the welfare of the child, e.g. regarding religious upbringing or choice of school. Some countries make it possible for a parent to turn to a court to have the issue resolved. Other countries, among them Sweden, base joint custody on the assumption that parents are able to cooperate. If they are not, there is no option but to bring joint custody to an end. There is, however, another alternative and that is to construct the concept of joint legal custody as a more “diversified” way. A court could, for instance, decide where the child is to live. However, the parent with whom the child lives could be given the power to solely make all necessary decisions, at least those relating to the daily welfare of the child.<sup>25</sup>

The English Children Act of 1989 contains an interesting technical solution to these issues. The term “custody” has been abolished. Instead, a parent is given *parental responsibility* for the child.<sup>26</sup> Parental responsibility continues for life and can never be taken away from a parent. The custodial parent, if necessary with help of a so-called *residence order* made by a court, is given full authority to make decisions on behalf of the child. The court can also issue various other orders, taking into account the opinions of the other parent.<sup>27</sup>

A custody issue is normally resolved in the light of what is assumed to be in the best interest of the child. There is a very strong tendency today to promote joint legal custody by changing the law gradually. The discussions taking place in Germany and in Austria illustrate how old principles are being reconsidered. Let me say just a few words on what has happened in Sweden, where joint custody for divorced or unmarried parents was first introduced in 1976. Today, joint custody continues automatically after divorce, provided that neither of the parents requests sole custody and that there is no reason to believe that joint custody would be contrary to the best interests of the child. Unmarried parents can obtain joint custody by means of registration with an authority responsible for population registration.

These changes are of course the result of a high proportion of parents living alone, changing gender roles and a greater interest among many fathers in retaining their legal custody. It is often said that parents can divorce or separate, but parenthood is for life. On the whole, I believe that the Swedish experience of

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<sup>25</sup> A wealth of information on the development of rules on custody can be found in *Kindschaftsrecht im Wandel Zwölf Länderberichte mit einer vergleichenden Summe*, in *Studien zum ausländischen und internationalen Privatrecht* 40 Peter Dopffel, (ed) Max-Planck-Institut, J.C.B. Mohr, Paul Siebeck, Verlag, Tübingen, 1994.

<sup>26</sup> “Parental Responsibility” might sound like a more attractive term than custody. A change in terminology has been discussed in Sweden, but was not carried through. When legal custody can rest solely with one parent, it was not considered suitable to call it “parental responsibility” as the term might then give the impression that the other parent was relieved from all duties towards the child. The construction of the rules in the English Children Act has other starting points, as parental responsibility is a much more diversified concept, the contents of which depend on where the child lives, and the different orders the courts can issue.

<sup>27</sup> Concerning the English Children Act, see, e.g., S.M. Cretney & J.M. Masson, *Principles of Family Law*, 6th ed, Sweet & Maxwell, London, 1997.

joint custody is good, although joint custody in itself offers no guarantee that an absent parent, normally the father, will take an active interest in the child. In any event, the possibility of joint custody seems to meet the psychological needs of many fathers. As long as joint custody is not forced upon parents when either is strongly opposed to it, the risks of the arrangement not functioning are probably small. It also seems important to have clear rules on what the parent with whom the child normally lives can decide without consulting the other custodian.

If joint custody does not work, however, there is a strong tendency to promote the exercise of the *right of visitation* with the child for the non-custodial parent. The visitation issue is primarily seen as a right for the child, not for the parent. Another tendency in Sweden is that considerable efforts are made to promote what are called *cooperation talks* when parents have differences of opinion on custody issues. The aim is not to achieve one specific solution, but to facilitate a better understanding of the parents' own problems and the child's situation.

Once a country has expanded recognition of joint custody to parents who are not married to one another, it seems probable to me that most will face developments similar to those that have taken place in Sweden. In other words, my guess is that joint custody will sooner or later become available to cohabiting, unmarried parents and to parents who do not live together, irrespective of whether they have been married, not married or even cohabited with one another. The conditions for joint custody could, however, differ between these subgroups.

The points of view on custody are, at least from a Swedish perspective, mainly the same whether the child lives in a single-parent family, or in a reconstituted family in which the primary caretaker has a new partner. It is true, however, that the latter family type raises special issues.

For the *single-parent family*, the assessment of child support to be paid by the other biological parent is the most important issue in private law. In addition, there are strong links between the assessment of child support and the right to social benefits. These connections can turn up in different ways. The child might be entitled to a *child support advance* from the State if the parent, who is obligated to pay support, does not fulfil his obligation. Indeed, the support advance might exceed the support allowance, in which case it has the character of a general, supplementary social benefit. The calculation of the support allowance to be paid for a child can also be connected with the standard of living offered by social security. England offers perhaps the best example of this. Another side of a related problem is how means tested social benefits, e.g., housing allowances, are assessed for single-parent families.

Solutions to the above mentioned problems differ greatly between countries, and are beyond the scope of this general survey. The same issues exist within *reconstituted families*, which create, however, additional complications as the child is now involved in what could be called a "three-parent relationship", comprising of its two biological parents and the new partner of the parent with whom the child lives. This overview may be concluded with some very general

remarks on the position of children in reconstituted families, which constitute a growing family type.<sup>28</sup>

The special problems concerning reconstituted families can be divided into two spheres: personal and economic. The problems turn up above all when the primary caretaker has married a new partner, who is then the *step-parent* in the traditional sense. According to the willingness in different countries to take cohabitation without marriage into account, informal “step-relationships” can also be given legal effects. I cannot clarify here to what extent this might be the case from a comparative perspective. Therefore, the concept “step-parenthood” is used here in the traditional sense of a person married to a biological parent of the child, leaving other cases aside.

In the personal sphere, questions can arise as to what extent it should be possible for a step-parent to obtain custody of the child, to adopt the child or to give the child his (or her) family name. Each of these questions is rather complicated. A general policy should be based on awareness of the fact that it is in the child’s interest to keep, if possible, good relations with both of its biological parents and with its step-parent. Legislation should, as far as possible, try to support such an objective, and therefore promote co-operation, not conflict, between the adults involved. According to my views, the law should be cautious in allowing a step-parent adopt a child, to receive legal custody or to change the child’s name where such measures create a risk for cutting off or damaging a good social relationship between the child and the non-custodial parent. Another reason for such an attitude is that the step-parent, living with the child, should normally be able to establish a good relationship with the child irrespective of his or her legal status. A good influence by a step-parent can often be exercised without any legal rights.

In the economic sphere, the basic question is to what extent a step-parent should be obligated to support the child. A related economic problem concerns the possible effect of step-parenthood in the laws on social security. The attitude towards a step-parent’s duty to support a stepchild varies greatly between different countries. In some countries, no duty is assumed to exist (Denmark, Norway and Finland, for example). In other countries, lacking statutory rules regarding the issue, a step-parent can nonetheless be obligated to pay support, as the existence of the child in the family is interpreted as proof of the step-parent’s willingness to accept economic responsibility (a normal consideration in the United States). The obligation ceases in most countries if the step-parent leaves the family. In England, however, there are statutory rules making it possible to order payments of support for a stepchild when the marriage has been dissolved.

An alternative to a duty of a step-parent to pay support directly for the child is to obligate him or her, as is the case in Switzerland, to assist the other spouse

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<sup>28</sup> Cf my essay, *Step-parenthood and Biological Parenthood, Competition or Cooperation*, in *Parenthood in Modern Society. Legal and Social Issues for the Twenty-first Century*, John Eekelaar, (ed) The International Society of Family Law, Marinus Nijhoff Publishers, London, 1993.

(the biological parent) in supporting the child.<sup>29</sup> I will only add a few words regarding the Swedish solution, which was introduced by legislation in 1920, and which could be considered worthy of a destiny better than remaining virtually unknown in other countries. The step-parent has a duty to support the child. However, the starting point is that the duty of the step-parent should not at all decrease the obligation of the non-custodial parent to pay maintenance to the child. The step-parent has, however, a subsidiary obligation to support the child if the non-custodial parent does not fulfil his or her obligation. Furthermore, if the stepparent has the financial capacity to offer his new family, including the stepchild, a better standard of living than that which can be offered by the child's two biological parents, he or she has the primary duty to give support up to that higher level. One argument for this solution has been that the stepchild must not be discriminated against in comparison to other children within the step-family who have the spouses as their biological parents. The duty of the step-parent exists only as long as he or she lives with the stepchild and the other spouse. In other words, it ceases if the spouses separate.

The Swedish rules are rarely, if ever, applied for direct legal claims on behalf of the stepchild.<sup>30</sup> The duty has been looked upon as giving a legal expression to an underlying, moral obligation. However, the rules also play a practical role, as they provide a clear basis for taking step-parenthood, as compared to biological parenthood, into account in the construction of social benefits.

Finally, it can be debated whether the different rules regarding step-parenthood should be brought together in one special act. I do not believe, however, that such a change would mean an improvement from a legal-technical point of view. The issues raised by step-parenthood each have a strong connection with general rules regarding custody, support, family names and adoption. It does not seem very appropriate to remove the different solutions for step-parenthood from their connection with the general rules on the subject under consideration.

## 5 Final Remarks

To briefly summarize such disparate topics as unmarried cohabitation, homosexual relationships, single-parent families and step-parenthood, is no easy task. Each of these areas, as I mentioned in the beginning, raises special questions. On the other hand, the sub-topics are linked together by social changing habits and attitudes in modern societies.

The decreased stability of the core family constitutes the basis for the growing number of single-parent and reconstituted families. Thus, the vulnerability of the core family also deserves special attention as having profound importance to children as well as to the wellbeing of parents. Changing

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<sup>29</sup> Regarding the Swiss rule, see Cyril Hegnauer, *Unterhalt des Stiefkindes nach schweizerischem Recht*, in Festschrift für Wolfram Müller-Freienfels, Nomos Verlagsgesellschaft, Baden-Baden 1986, p. 271.

<sup>30</sup> The same is true also for other support obligations between family members living together.

gender roles are also of special interest in this connection, not only as a means of promoting equality of men and women but also with respect to the desire to combine a change of gender roles with the protection of family stability.

The increased independence of women, combined with more liberal attitudes in our societies, forms the background to the increase of unmarried cohabitation. The change of ideological climate has in its turn opened the door for legal considerations concerning homosexual couples.

The development of living arrangements (including the core family as well) offers thrilling themes for research covering both legal and social science.