THE SWEDISH LEGISLATION ON MARRIAGE AND COHABITATION
A JOURNEY WITHOUT A DESTINATION

BY

ANDERS AGELL

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1. INTRODUCTION

This paper deals with the development in Sweden concerning cohabitation without marriage between a man and a woman.[1] The central issue is one of legal policy, the question of what general attitude the legislator—but also courts and other authorities—should adopt to such cohabitation. That question cannot be discussed in isolation from the formulation of the system of rules for formal marriage and the legal position of children. It will therefore also be necessary to say something about changes that have taken place in recent years in the Swedish legislation both on marriage and on parents and children. It will further be of interest to discuss the actual development of the way in which families are formed.

The increase in recent years of cohabitation without marriage is not a phenomenon confined to Sweden. Similar tendencies are to be found in other countries, too. But the formal pattern of family formation has changed more rapidly in Sweden than in most other parts of the world. Moreover, during the last ten years or so the Swedish legislation has been based on a conscious attitude to cohabitation outside marriage, and this means that it may be particularly interesting to study the sociological and legal development in Sweden in this area.

As is well known, there is a strong Scandinavian tradition of legislative cooperation. At the same time the social conditions in the Scandinavian countries are similar. The question of cohabitation outside marriage has come to be the subject of debate in all Nordic countries. Non-marital cohabitation was one of the subjects discussed at the 1975 meeting at Reykjavik of the Nordic Jurists' Conference, a body which meets every

[1] The author has previously treated the same subject in Swedish in a paper in *FJFT* 1978, pp. 1 ff., and in a book (with Gösta Forsman and Göran Ingebrand as co-authors) *Äktenskap eller samboende. En rättspolitisk och en demografisk undersökning*, Stockholm 1980. The following paper was before its publication in *Scandinavian Studies in Law* used at a conference arranged by the International Association of Legal Science in Berkeley, USA, in August this year. The author has also written a shorter paper in English on the subject, which was presented at the Third World Conference on Family Law arranged in Uppsala, Sweden, June 5–9, 1979, by the International Society on Family Law in cooperation with the Faculty of Law, Uppsala University. The last-mentioned paper and a number of papers from other countries will be published by the International Society on Family Law (through Butterworth's, Canada) *Marriage and Cohabitation in Contemporary Societies* (edited by J. Eekelaar and S. N. Katz).

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three years.[2] Cohabitation outside marriage is commoner in Sweden and Denmark than in Norway and Finland; Iceland perhaps occupies an intermediate position in this respect.[3] In what follows, however, the focus will be on Swedish conditions, partly because the author is most familiar with these and partly because, as already mentioned, the Swedish legislation has gone furthest in applying a definite legal-political approach to non-marital cohabitation. It may further be observed that the change in the divorce laws which was undertaken in Sweden in 1973 and of which more will be said in the next section has not been copied in the other Nordic countries.

But although Swedish conditions will remain the focus of interest in the rest of this paper, some information on legal solutions in the other Nordic countries will be given here and there in the footnotes.[4]

2. THE MARRIAGE LEGISLATION

The Swedish legislation on marriage is at present being reformed step by step. In 1973 important changes were made in the Marriage Code both as regards the prerequisites for divorce and in other areas.[5] These amendments seem above all to express two principal evaluations, relating respectively to the prerequisites for divorce and to moral questions in a wide sense.

The *rules on divorce* were, even before the changes, liberal when viewed from an international perspective. Under the legislation of 1915 on the contracting and dissolution of marriage, "spouses who owing to a deep and lasting disruption find that they are unable to continue to live together" could obtain a separation without the court's having to examine the cor-

[2] See *Forhandlingarne på Det syvogtyvende nordiske juristmøde i Reykjavik den 20–22 august 1975*, Reykjavik 1977, pp. 355–96, and appendix 2 with the introductory paper by the Danish judge Inger Margrete Pedersen.

[3] Cf. Kirsti Bull, "Avtaler mellom ugifte samboende", *TfR* 1979, p. 282.

[4] The following papers have previously been written in English on the changes within Swedish family law: Folke Schmidt, "The Prospective Law of Marriage". 15 *Sc.St.L.*, pp. 193 ff. (1971); Jacob Sundberg, "Experiment Repeated", *Am. Journal of Comparative Law* 1975, pp. 34 ff.; *idem*, "Marriage or No Marriage: The Directives for the Revision on Swedish Family Law", *ICLQ* 1971, pp. 223 ff. See also J. F. G. Baxter, "Recent Developments in Scandinavian Family Law", *ICLQ* 1977, pp. 150 ff.

Concerning cohabitation without marriage, see, especially for Danish law, Inger Margrete Pedersen, *Papirløse samlivsforhold,* Copenhagen 1976, and, for Norwegian law, Helge J. Thue, *Avtalt samliv,* Oslo 1977.

[5] See, on this, *SOU* 1972:41 (Familj och äktenskap. 1. Betänkande av familjelagssakkunniga) and *Prop.* 1972:32 (Förslag till ändringar i Giftermålsbalken m. m.). A general introduction to the new legislation is Anders Agell, "Den svenska familjerätten – En presentation", *TfR* 1975, pp. 536 ff.

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rectness of the spouses' statements concerning the breakdown of the marriage. After a compulsory year of judicial separation, each spouse had the right to request the dissolution of the marriage. In 1968 there was undertaken a minor adjustment of the text of the statute which meant that henceforth the spouses would not even have to state that a deep and lasting disruption existed, provided they both agreed that they did not wish to continue living together. If, on the other hand, only one of the spouses wanted the cohabitation to cease, a judicial separation or possibly an immediate divorce could be obtained in a number of specified eventualities of permanent breakdown of the marriage (in some cases on the ground of the responsibility of one of the parties for the existing state of affairs).

Under the legislation of 1973, spouses can obtain an immediate dissolution of their marriage if both wish to part and neither of them has the custody of children under the age of 16. If either of these two prerequisities should be absent, the spouses have to submit to a reconsideration period of six months after proceedings have been instituted. The aim of the reconsideration period is to prevent over-hasty divorces where there are children or one of the spouses wants to continue the marriage. After the expiry of the reconsideration period, either spouse can demand a decree for immediate divorce.[6] Thus if only one of the spouses wants a divorce, he or she can secure it after the expiry of the mandatory period. The spouses need not live apart during the reconsideration period; they may continue as before.

Since one party can unilaterally secure a divorce, the legislation may in fact be said to give expression to the interpretation that marriage is a revocable contract. Such a view can hardly be objected to on the ground of the special circumstance that the normal version of the civil marriage formula still contains a pronouncement by the officiator in which he reminds the newly married couple of "the promise of fidelity for life" which they have made. For if the parties so request, the officiator may be called upon to use a simplified procedure whereby he only has to ask the parties whether they wish to enter into marriage with each other and, after their affirmative response, he pronounces them to be married. It may be added that in Sweden couples are free to choose either a religious or a civil marriage ceremony.

As far as moral questions are concerned, nowadays the only rule in the Marriage Code which expresses any evaluation in a very broad sense is the introductory provision in ch. 5, sec. 1: "Man and wife are under a duty to be faithful and to assist each other; they must in consultation together act

[6] See the Marriage Code, ch. 11, secs. 1–3.

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in the best interests of the family." In the 1973 legislation the responsible minister emphasized that the provision is a reminder of the desirability of loyalty and mutual consideration between the spouses and that it does not refer only to the desirability of sexual fidelity. At the same time there were repealed in 1973 certain old rules which not only meant that a spouse's guilt was a ground for immediate divorce on special grounds but also that it involved other legal effects, such as the right to punitive damages in certain cases, a reduced right to maintenance and a diminished possibility of securing the custody of the children under the Parents and Children Code, if both parents should in other respects be considered equally suitable as custodians having regard to the best interests of the children.

It should be added that the legislative committee which prepared the new rules on divorce has also been charged to review the economic legal effects of marriage. This work can be expected to lead to the submission of proposals for legislation during 1980 or 1981. It is of particular interest that the committee's terms of reference also include a possibility of proposing rules on the economic relations between unmarried couples.

With regard to the legal rules on *parents and children*, it can be stated that the Parents and Children Code has undergone a series of changes since its adoption in 1949. The differences between children born within or outside wedlock have, broadly speaking, disappeared. The most important event in this connection was the introduction in 1969 (through an amendment of the Inheritance Code) of full right of inheritance, on the father's side also, for children born out of wedlock. Even the terms child born within and child born outside wedlock were actually removed from the statute text in connection with the amendments of 1976, which applied to a series of different questions, including the introduction of a possibility of joint custody of children for divorced and unmarried parents. The reason for the terminological change was that the earlier mode of expression might reflect a persisting moral evaluation acting to the disadvantage of children born outside wedlock.[7] Certain minor differences in legal effects still remain, however, depending on whether the child's parents have been married or not. These rules will be dealt with later on, in connection with the review of the rules on non-marital cohabitation between men and women and of the rules concerning any children they may have.

[7] See *Prop.* 1975/76: 170 (Om ändring i Föräldrabalken m. m.), pp. 157 f.

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3. PATTERNS OF FAMILY FORMATION

As will be seen from the table below,[8] during a period of rather more than 10 years there was a marked decline in the *marriage rate* in Sweden. Thus between 1966 and 1978 the number of *first-time marriages* of women per 1 000 unmarried women fell from 198 to 68, i.e. by two thirds in only 12 years. (The fact that the decrease in the total number of marriages is smaller is due to an increase in the number of remarriages.)

Marriages, divorces and children born to unmarried parents

	Marriages			Divorces		Percentage of children born outside wedlock (as from 1977, to unmarried mothers)
Year	Total number	Total number of first-time marriages per 1 000 unmarried women aged 20–44	Per 1 000 of the average population	Total number	Per 100 000 of the average population of married women	
1956	51 200	168	7.07	8 600	500	10.2
1961	52 400	187	6.97	8 700	485	11.7
1966	61 100	198	7.83	10 300	547	14.6
1971	39 900	105	4.93	13 700	712	21.7
1972	38 600	96	4.76	15 200	795	25.1
1973	38 400	90	4.70	16 300	860	28.4
1974	44 900	100	5.50	27 200	1 449	31.4
1975	44 100	92	5.38	25 800	1 383	32.4
1976	44 800	90	5.45	22 400	1 213	33.2
1977	40 350	76	4.89	20 400	1 110	34.5
1978	37 850	68	4.57	20 300	1 123	35.9
1979	37 300	63	4.50	20 300	1 127	37.5

A decline in the marriage rate may be due to various reasons. If the marrige age begins to rise, the result will be a decline in the marriage rate during a transitional period, but this does not necessarily imply any general change in the disposition to marry. To some extent the fall in the marriage rate in Sweden can be explained by a rise in the age of marriage. In 1966, when the marriage rate reached a peak, the median age for people marrying for the first time was exceptionally low. At the same time as the marriage rate fell after 1966, the median age for marrying rose by about two years for both sexes, so that in 1978 it amounted to 27½ years for men and 25 years for women.

[8] The statistical data have been taken from *Sveriges officiella statistik*.

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However, the decline in the marriage rate is so marked that it is impossible to explain it solely by reference to the rise in the marriage age. Without presenting tables or diagrams here to demonstrate the point, it can be said that the proportion of marriages has fallen in all age groups among both men and women. The overall impression is therefore that the total decline in the marriage rate reflects changes in the marriage pattern which go considerably further than a moderate rise in the marriage age.

The table also shows that the *number of divorces* took a leap upwards in 1974, when the new rules on divorce entered into force. After that the number of divorces fell back again. Here, however, the decline in the marriage rate and the increase in the number of instances of non-marital cohabitation have probably played a part. For because of the fact that a large number of people live together without getting married the group of relatively recent marriages (up to 10 years) in which divorces usually occur diminishes. That this is so is confirmed by the statistics on the average duration of marriages, which rose during the 1970s from 9½ to rather more than 11 years. It could also be added that the number of formal divorces *must* fall when the number of formal marriages declines.

An especially striking feature of the table is perhaps the marked upswing in *the proportion of children born to unmarried parents*. This proportion was for a long time about 10 % of all births. In 1966 it had, however, risen to 15 %. Subsequently the rise continued at a steady pace, so that no less than 37 % of all children born in 1979 had unmarried mothers. In the great majority of these cases, however, the unmarried mother was living together with the child's father at the time of the child's birth. The proportion of single mothers can be defined as the proportion of all mothers who bore children in a certain year and were neither married to nor living with the child's father. According to a nation-wide study for 1971, based on a representative random sample, this proportion was 5–6 %.[9] There is no reason to believe that the proportion has risen since 1971, although the proportion of children born to unmarried mothers has risen considerably.

As will already have appeared, both the decline in the marriage rate and the increase in the proportion of children born to unmarried mothers are connected with the marked growth during the last 15 years of the tendency for men and women to live together without marrying. In by far the majority of cases a formal marriage is nowadays entered into only after a non-marital cohabitation of varying duration. Reliable data on the proportion of unmarried couples among all cohabiting couples exist only from

[9] The investigation, which has been carried out at the Faculty of Law, Uppsala University, is presented in Agell, Forsman & Ingebrand, *op. cit.*

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the end of the 1960s, when the decline in the marriage rate after 1966 had directed attention to the change in family-formation habits. For 1969 the share of unmarried couples in the total number of cohabiting couples had been estimated at 6–7 %. According to the population and housing census of 1975 the share had risen to more than 11 %, a figure which may, however, be thought rather too low in view of the fact that the existence of cohabitation is probably not always revealed. It has been estimated that by 1978 the proportion had risen to 15 %. A certain further rise is likely to have occurred since 1978. On the other hand, the total proportion of unmarried couples among all cohabiting couples increases only slowly, since the calculations are dominated by the large proportion of previously married couples. The proportion of unmarried couples living together is, of course, considerably greater among younger cohabitors, especially men and women below the age of 30. Thus, according to the above-mentioned population and housing census of 1975, the proportion of unmarried persons among women who were living together with a man was 57 % in the age group 20–24 years, 23 % in the age group 25–29 years, 10 % in the age group 30–34 years, and 6 % in the age group 35–39 years. The current development must, however, mean that the proportion of unmarried cohabitors is growing in all age groups and especially so in those above 30 years.

It is not possible to appraise with any certainty the reasons for the decline in the marriage rate. At any rate it is not due to any decline in the disposition to cohabit. It can be supposed that a number of different factors have been at work. One important factor is probably the greatly increased intensity of gainful employment among women and the enhanced economic independence resulting from that tendency. New methods of contraception may have led to general changes in people's views on sexual relations. On the other hand, the rapid urbanization of the Swedish society has probably not played a major role. Traditionally, in fact, the habit of living together without marriage has been commonest in the most sparsely populated areas of Sweden, those in the north.

The most intensive sociological investigation of cohabitation and marriage patterns which has been undertaken in Sweden in recent years is one commissioned by the legislative committee on family law.[10] This study comprised two groups of cohabiting couples in a medium-sized Swedish

[10] *SOU* 1978: 55 (Att sambo och gifta sig. Fakta och föreställningar). (Report published by the Family Law Committee and written by Jan Trost and Bo Lewin.) The material has also been analysed in a doctoral dissertation in sociology (Bo Lewin, *Om ogift samboende i Sverige*, Uppsala 1979, Acta Universitatis Upsaliensis. Studia Sociologica Upsaliensia, 15., with a summary in English) and in a book describing the current sociological situation also more generally (Jan Trost, *Unmarried Cohabitation*, Västerås 1979).

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city (Gävle, with just under 100 000 inhabitants). One group consisted of 100 couples newly married in 1974, the other of just over 100 couples who were living together without being married. Since the material is limited and the selection of cases was made according to several different methods, the results are not statistically reliable. The aim of the study was, however, to find out what attitudes and preconceptions occur; in view of this the statistical uncertainty is less serious. Here, in condensed form, are some of the results of the investigation:

Nearly all couples who married had lived together for varying periods without being married. The establishment of a durable relationship may have taken place either gradually (the couple cohabiting temporarily at first but later more permanently) or at a definite point of time, e.g. because one of the parties had obtained a suitable dwelling. For most cohabiting couples cohabitation itself was, moreover, accepted to such an extent that in the committee's opinion it is today hardly natural to ask couples why they do not get married. Rather, it would seem reasonable to ask those who have married why they changed their civil status during their cohabitation. The committee's answer to the question why people get married is that they do so because it is traditional to marry and if people live together for a long period it is traditional for them to get married. Cohabitation without marriage is obviously accepted as a social institution. It can also be noted that 90 % of both the men and the women considered that, generally speaking, their relationship was fully comparable to marriage.

It appears at present impossible to predict the future development of marriage habits in Sweden. As has already been seen, the proportion of cohabiting couples who are unmarried is currently rising even in ages above 30 years. From the above-mentioned special study of unmarried parents who had children in 1971 it emerged that the majority of these parents were living together not only in 1971 but also in 1975 and 1979.[11] Among those parents who were living together both in 1971, 1975 and 1979, the proportion of married couples was 45 % in 1975 and 62 % in 1979. This clearly means, on the one hand, that gradually the majority of those parents who were at first unmarried got married to each other. On the other hand, it can also be concluded that many cohabiting couples who had children out of wedlock did not get married. The proportion of unmarried but cohabiting parents who did *not* get married, despite the fact that the cohabitation continued, was 55 % in 1975, when the child reached the age of 4 years, and 38 % in 1979, when the child was 8 years old.

The data just mentioned confirm an observation which can be made

[11] See Agell, Forsman & Ingebrand, *op. cit.*

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already on the basis of the official statistics of the development of marriage, namely that there is an increasing group of cohabiting couples who put off marrying for a very long time. The question is to what extent the development also implies a tendency for these couples never to marry, so that in the long run it will be a usual thing for cohabitation outside marriage to be dissolved only by death. It seems at present impossible to have any definite opinion on this question, which, however, is particularly interesting from the viewpoints of legal policy and of legal science. Long-term—especially lifelong—cohabitation is from the perspective of legal policy a bigger problem than cohabitation during a short period as a preliminary stage to formal marriage. From the point of view of legal science it is of particular interest to what extent the drafting of the legislation may be of importance as a factor contributing—side by side with general changes in human habits and attitudes—to the development of the marriage rate.

4. COHABITATION RESEMBLING MARRIAGE. THE LEGAL SITUATION

4.1 *Legal-historical aspects*

As a background to the modern problem of non-marital cohabitation we may note briefly the relationship in Swedish law of this phenomenon to the rules on so-called *uncompleted marriages* which were contained in the great work of codification known in Swedish as "1734 års lag" (the Code of 1734). One important difference is that these uncompleted marriages did not particularly relate to cohabiting men and women. Their practical importance was primarily connected with cases where the parties did *not* cohabit. According to an ancient tradition which found expression in the medieval provincial laws, marriage came about through what was known as "fästningen" (the marriage contract) together with an ensuing marriage ceremony with a so-called "bedding". As a result of the Code of 1734, however, the wedding ceremony—owing to the ecclesiastical influence—came finally to be accepted as the fundamental requirement under temporal law as well. The Code nevertheless still provided that certain legal effects arose in consequence of relationships which had not led to a formal marriage—i.e. uncompleted marriages.[12]

[12] On "uncompleted" marriages, see especially *Lagberedningens förslag till revision av Giftermålsbalken och vissa delar av Ärvdabalken I. Förslag till lag om äktenskaps ingående och upplösning m. m.* 1913, pp. 96–105.

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The strongest attachment to the ancient form of entering into wedlock was to be found in the Book on Marriage, ch. 3, sec. 9, of the 1734 Code. The provision in question meant a possibility for a woman who had first entered into betrothal with a man and later had had intercourse with him, to secure a court ruling that she had thereby become his wife. In most respects there then ensued full marital-law effects: the woman secured the right to bear the man's name; she also secured the right by marriage to the community of property; and the relationship constituted an obstacle to marriage with another person. Since it was not made a prerequisite that the parties should live together, certain other legal effects did not ensue. The husband did not, as otherwise occurred in marriage, have guardianship over his wife nor did he have the right of administration over the property she would have brought into the marriage. In the event of death, too, the legal effects differed.

The rules on uncompleted marriages were abolished as a result of an Act of 1915 on the entering into and the dissolution of marriage. Several different reasons were put forward for the abolition. It was held, for example, that marriage should be based on an overt declaration of will which would be a guarantee of good faith and would ensure publicity. It was felt to be wrong that a court should have the power to establish a marriage against the will of one of the parties. An uncompleted marriage did not correspond to actual marital cohabitation but was conceived of only as a juridical bond. It was held that in fact the existence of such a marriage was proof that there was no hope of a continued relationship.

At the same time as the institution of uncompleted marriages disappeared from the legislation, there were, however, introduced certain rules on damages in the event of breach of promise to marry (*bruten trolovning*). According to the 1915 rules the man in such a case became liable to pay the woman reasonable damages if he had had sexual intercourse with her during the betrothal period and the betrothal had later been broken through the man's fault.

The rules on betrothal remained in existence until the legislation of 1973 on the contracting and dissolution of marriages (cf. above, section 1), when all rules on betrothal were deleted from the Marriage Code. There were several reasons for this deletion: that during the betrothal period the parties ought to be entirely free from legal bonds, that nowadays young people do not accept the idea that betrothal entails legal effects, and that it is difficult to determine whether betrothal exists in cases of cohabitation without marriage.[13]

[13] See *SOU* 1972:41, pp. 119 ff., and *Prop.* 1973:32, pp. 92 ff.

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This brings us from the point of view of legislation to the modern phenomenon, cohabitation between men and women without formal marriage, which will now be discussed in somewhat greater detail.

4.2 *The neutrality ideology*

It was in 1969 that the legislative committee on family law received the directives which attracted so much notice.[14] Of particular interest for questions concerning non-marital cohabitation are in the first place certain guidelines for the legislative work. Thus the Minister of Justice stressed *inter alia* that family community within the framework of marriage was still the natural form of living together for the great majority of people but said that new legal rules were needed if marriage was to be able to fulfil its function in the future also. In this, as in other areas, it was in the Minister's opinion true to say that legislation is one of the most important instruments at the disposal of society when it is a question of meeting people's wishes or directing the development into new paths.

With a view particularly to non-marital cohabitation, it was further pronounced that any new legislation ought to be *neutral* in relation to different forms of cohabitation and different moral attitudes. Marriage occupied and should occupy a central position within family law, but an endeavour should be made to ensure that family-law legislation did not contain any provisions which would create unnecessary difficulties or inconveniences for people who had children and formed families without marrying.

In the Government Bill of 1973 on the contracting and dissolution of marriage, similar viewpoints were expressed by the responsible minister.[15] It was held to be important that people's freedom to frame their personal lives themselves, including the freedom to choose the form of cohabitation and to determine ethical norms for the cohabitation, should be respected. It should be the ambition for the marriage legislation to provide solutions of practical problems and to frame the rules in such a way that they could be accepted by practically everyone. With this as the aim, it should be possible to preserve marriage as the normal mode of family formation for the overwhelming majority of people. This, according to the Bill, would be desirable from several points of view. (What these were was not, however, stated.)

The neutrality ideology was analysed in greater detail in the 1972 report

[14] See *Riksdagsberättelsen* 1970 Ju 52.
[15] *Prop.* 1973:32, pp. 83 ff.

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of the legislative committee on family law, and it was on this report that the legislation of 1973 was based.[16] The committee found that two entirely different interpretations of the neutrality principle were possible. *On the one hand,* it could mean that the individuals should be allowed to choose what norms were to apply in their cohabitation; the legislator ought not to impose uniform rules on cohabitors. *On the other hand,* the neutrality idea could be interpreted quite differently as implying that the same rules ought to apply to the cohabitation of men and women whether they had married each other or not. The two interpretations—freedom of choice or uniform rules irrespective of choice—are obviously mutually incompatible. In the committee's opinion it was necessary to arrive at a balance between them.

Swedish law now applies both concepts of neutrality, one of them in the field of marriage law, the other within social and tax law as well as in other legal areas which do not concern the mutual relations of the cohabitors. This attitude was used as a lodestar in the legislation of 1973. In the 1973 Bill it was stated that it was obvious that marriage-law rules could be made applicable only in cases where the contracting parties had entered into marriage in the form indicated by the law. At the same time, however, it was pointed out that the situation should not be allowed to occur that the children's interests were less well safeguarded because the parents had not married each other; having regard to the custody of the children and the right to a common family dwelling, efforts should therefore be made to provide uniform rules for all cohabiting couples.

It is true that with respect to social and tax law the legislative committee on family law had expressed the opinion that investigational difficulties might arise in any attempt to link the legislation to factual cohabitation instead of to marital status. The committee had also pointed out that it might be difficult to arrive at an overall picture of rights and duties if some systems of rules were linked to factual cohabitation and others to marital status. In the 1973 Bill it was, however, stated as a guideline that in formulating rules on taxes and social benefits the endeavour should be made to avoid giving the rules such contents that people would be disadvantaged by marrying and would gain by getting divorced. Clearly the neutrality ideology finds expression here in the importance of the desideratum of uniform treatment, from the point of view of principle, of cohabitation of men and women irrespective of marital status. It is true that the legislative matter in question did not concern social and tax law, but the pronouncement can nevertheless be regarded as representative

[16] *SOU* 1972:41, pp. 91 ff.

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having regard both to the assent forthcoming during the processing of the Bill in the Riksdag and to the fact that an effort to secure factual uniform treatment irrespective of marital status has for the last two decades been a guideline in the legislation in different areas within social and tax law.

4.3 *The mutual relationship of cohabiting parties*

The actual legal situation regarding cohabitation outside marriage is difficult to describe. The difficulty is connected partly with the contradictory interpretations of the idea of neutrality of legislation and partly with the fact that practical needs in individual cases must ultimately determine whether recourse is had to legislation. In addition, there is the fact that such cohabitation as carries legal effects is defined differently in different legislative enactments. Furthermore, many problems concerning free cohabitation can arise in practice without there being any directly applicable legal rules. The question may then be asked whether the courts ought to make use of statutory rules for married persons for purposes of analogy or to apply some other legal principles instead. Considering how widespread cohabitation without marriage is nowadays, Swedish case law is surprisingly poor in decisions at least within private law.

With regard to the mutual legal relationships of cohabiting parties, it should be mentioned by way of introduction that agreements on the parties' economic interrelations must certainly in principle be considered valid, in so far as the courts cannot generally refuse to recognize contracts between freely cohabiting men and women on the ground that their relationship is immoral. Such an attitude would clearly be quite incompatible with the neutrality ideology which has been accepted by the legislative bodies and with the series of legal effects which have been attached to non-marital cohabitation in different places in the legislation. Moreover, according to the Marriage Code married spouses have as a matter of principle freedom of contract in respect of their mutual relations, although there are special rules on gifts between spouses and for the protection of creditors of the spouses.

Although in principle the cohabiting parties may be considered to possess freedom of contract, this does not automatically mean that the courts would accept as binding any contracts whatever, irrespective of their contents. In cases of non-marital cohabitation important questions are, for example, who is to be the owner of property which one of the parties acquires during the cohabitation, or whether one of the parties can assume a duty to contribute to the maintenance of the other party during the cohabitation or after a possible separation. Agreements in these respects

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can involve a personal commitment of uncertain scope which the courts would perhaps not be prepared to approve.[17] Agreements on the distribution of property after the death of both parties can, moreover, conflict with the special rule that a person can only dispose of his estate by testamentary means.[18] However, Swedish case law throws no light at all on the question to what extent there exist limits, as regards the contents of the agreement, to the possibilities which, as a matter of principle, two cohabiting partners have of entering into agreements. Nor will these questions be discussed further here. What, on the other hand, will be dealt with is such legal questions as have been regulated by legislation or case law without there having been any agreement between the parties. The contents of 4.3–4.7 aim at providing a general overview of the legal situation. A large number of rules which are of no importance for the situation as a whole are, however, disregarded.

With regard to the right to property upon the dissolution of non-marital cohabitation through separation or death, there is no legislation. On the other hand, there was adopted in 1973 *a special Act on the common dwelling of an unmarried couple.*[19] The Act was based on an existing statute (of 1959) on the right to the dwelling after the dissolution of a marriage. According to the 1973 Act, the cohabiting party who has the greater need of the dwelling has also the right to take it over after the cessation of the cohabitation, even if the lease or the tenancy right is held by the other party. The Act, however, only refers to rented dwellings and to condominions. It does not confer any right to take over a residential property which is *owned* by the other party. The area of application has also been delimited in another way, the governing consideration being whether the parties have children together or not. If there are no children, the Act is applicable only where "urgent" reasons exist, e.g. the woman is pregnant or the cohabitation has been of very long duration. The new Act is the first example of legislation on the legal relationship between parties cohabiting outside marriage which has reference to a special social requirement.

In general, however, legislation on the direct mutual relationships of cohabiting parties is lacking. It is at present somewhat uncertain whether one of the parties can have a *claim on part of any property* that the other party has purchased with his or her own money during the cohabitation.

As a background to the problems involved, the reader should be made

[17] For Norwegian law the question of the validity of agreements between the parties concerning the ownership of property has been discussed in *TfR* 1979 by Kirsti Bull (pp. 282 ff.) and Helge Thue (pp. 595 ff.).

[18] Cf. the Decedents' Estate Code 1958, ch. 17, sec. 3.

[19] *SFS* 1973:651.

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aware of the fact that the marriage legislation in the Nordic countries is based on the principle that each of the spouses is the sole owner both of property which he possessed at the time of marrying and of property which he has acquired during the marriage. At the same time, each spouse is in principle responsible only for his own debts with the value of his own property and not, on the other hand, for the debts of the other spouse. This independence of the spouses with regard to ownership and debts has, however, been combined with a system which means that the property of each spouse is communal marital property in the sense that the value of the property (after deduction of the spouse's debts) must be divided equally between the spouses in the event of divorce or death. (In the case of death a spouse has, moreover, right of succession unless there are children.)

In the case of cohabitation, there exists no right to communal property between the parties in the way which applies under the Marriage Code. If one of the parties has increased his or her assets during the cohabitation, the absence of such a right may naturally seem unsatisfactory from the other party's point of view. A question closely associated with this is whether one of the parties can lay claim to the property of the other on other grounds. This question appears to have arisen not infrequently in Swedish practice. Questions of this type have been adjudicated in a couple of appeal-court decisions in recent years,[20] but the problem has never been considered by the Supreme Court. It is true that the appeal-court cases concerned disputes on ownership between *spouses* who had continued to be married after having earlier obtained a court order for separation. According to the legislation then in force, however, there was no communal right to property acquired after an earlier separation order. The situation was therefore similar to that which exists in cohabitation outside marriage. In the two cases in question, the court of appeal enunciated a legal principle to the effect that property which has been acquired by one of the parties with his or her own money can be covered by a claim for joint ownership for the other party if the following three prerequisites exist. (1) The property must have been purchased for the common use of the parties. (2) The party who has not made the purchase with his own money must have made the acquisition possible through his contributions to the common household economy; these contributions can consist either of his own income from work or of work in the common home. (3) There must not exist between the parties any agreement that the party who has made the purchase shall be the sole owner; in such a case the agreement applies.

The cases just mentioned constitute a clear legal innovation since, as

[20] See *SvJT* 1974 rf., p. 71, and *SvJT* 1977 rf., p. 2 (Court of Appeal Malmö).

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mentioned, the Marriage Code is based on the principle that each spouse in a marriage becomes the sole owner of what he has bought with his own money. The right of the other spouse to a future share in the value of the property is not the same as an immediate right of ownership. When the court in the cases in question found that a right of common ownership may exist, despite the fact that the property was bought by only one of the parties, the final outcome was, however, similar to the situation which would have existed if a right of joint marital property had existed.[21]

On the other hand, in a decision of 1975 the Supreme Court took up a position on a somewhat differently formulated claim from a woman who had lived with a man during the ten years immediately preceding his death.[22] During the last few years of this period the man had been ill and the woman had then taken care of him in their common home. After his death she claimed *payment for her work* from the man's estate. The claim was rejected. The Supreme Court stated in its reasons for the decision that it was true that as a main rule payment ought to be made when a person had performed work on behalf of another, even if the parties had not concluded any agreement on payment. The main principle must, however, be subject to certain exceptions, e.g. where a child had helped its parents at home or where friends had helped one another on occasions where need arose. The work performed by a woman for a man with whom she had lived in circumstances resembling marriage should be regarded as one of the exceptions in which economic compensation could not be demanded for the work. As in a marriage, the work should be considered to have been carried out in the interest of both parties and as part of the cohabitation.

It may be added that an economic claim following the dissolution of a non-marital cohabitation could also raise the question of an application of the general legal principle concerning *compensation for unjust enrichment.* However, neither in the Supreme Court case of 1975 nor in the appeal-court cases referred to earlier did the plaintiffs frame their pleading in such a way that there was ever any question of applying such a principle.

Cohabitating parties are furthermore under *no legal obligation to pay maintenance* for each other's subsistence either during or after the cohabitation. Nevertheless, importance has been attached to the factual economic community between them. As will be seen below, this occurs in a number of cases within social and tax law. In private law, too, however, the factual

[21] Joint ownership for a cohabiting couple has also been applied in Danish and Norwegian case law. See, for Danish law, Inger Margrete Pedersen, *Papirløse samlivsforhold*, 1976, pp. 81–107, and, for Norwegian law, the cases 1975 NRt 220 and 1978 NRt 1351 and Carl Jacob Arnholm & Peter Lødrup, *Familjeretten,* 1976, pp. 126 f., 142 and 179 f.

[22] See 1975 NJA 298.

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circumstance that the parties contribute to their common support has acquired importance under legal rules which concern the right or duty of each of the parties to pay maintenance to children (in accordance with the Parents and Children Code) or to a previous spouse (under the Marriage Code). These rules were the result of an enactment in 1978.

Earlier there was a provision in the Swedish Marriage Code providing that the right of a divorced spouse to alimony should cease if the spouse so entitled should remarry. This rule was repealed in 1978. Instead, the remarrying of a divorcee entitled to alimony has now to be evaluated in accordance with a general rule (which already existed earlier) to the effect that alimony which has been awarded can be reviewed if "altered circumstances" have appeared.[23] Paradoxically enough, one of the reasons for the amendment was a concern for marriage as an institution; the earlier rule concerning the automatic cessation of alimony upon remarriage might cause the recipient not to remarry but instead to cohabit with a new partner. Under the new legislation the question of the cessation of the duty to pay alimony is to be judged in accordance with the rule on altered circumstances whether the recipient has remarried or is cohabiting with a new partner.[24]

Cohabitation without marriage can also be of importance if one of the parties is under a duty to pay maintenance to a third party. In 1978 there were introduced into the Parents and Children Code certain rules for calculating the maintenance allowances payable to children. According to these rules, the parent liable to pay maintenance is always entitled to reserve from his income an amount for his own necessary living expenses.[25] He is, however, entitled to include in this reserved amount not only his personal needs but also, if there are "special reasons", the needs of a spouse with whom he is living. "Special reasons" may be that the spouse is unable, owing to illness or the need to take care of a child or children, to undertake gainful employment and therefore cannot provide for herself. In so far as the whole of the income of the person liable to pay maintenance is needed for his own and his spouse's necessary living expenses, he cannot in other words be called upon to pay maintenance allowance to his own child. (The child, however, has a right to a so-called advance allowance from the state.) Here it is worth noting that the statutory rule on a reserved amount for the spouse prescribes that "with a spouse [there shall be] equated another person with whom the party liable to pay maintenance is cohabiting permanently, if they have a child together". Consequently

[23] The Marriage Code, ch. 11, sec. 15: cf. ch. 5, sec. 9.
[24] See *Prop.* 1978/79: 12 (Underhåll till barn och frånskilda m. m.), pp. 141 f.
[25] Ch. 7, sec. 3, of the Code in the text of 1978 (*SFS* 1978: 853).

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here the new party in a cohabitation relationship is given priority to minimum subsistence during the cohabitation in relation to children of the other party despite the fact that no private-law duty of maintenance exists between the cohabiting parties. As has been shown, however, the legal effect of cohabitation in this case appears only if the cohabiting parties have a child together.[26]

The circumstance that the parties have a child together has also been given further consequences as a result of the legislation of 1978 on maintenance. The Parents and Children Code already contained a rule on the liability of a spouse to pay maintenance to a *stepchild,* i.e. a child of the other spouse. (Under Swedish law this duty is, however, subsidiary in the sense that it does not reduce the liability of the biological parents to pay maintenance but only, in case of need, complements it.) In 1978 the rule on the duty to pay maintenance to stepchildren was extended to apply to the children of the other party in a cohabitation relationship, too, though only on the already mentioned condition that the parties also have a child of their own together. The justification for the extension of the rule was that all children in the new family should have a claim to the same economic standard whether they are the children of both parties or are the children of only one of the parties.[27]

4.4 *The situation upon the death of one of the parties*

If a non-marital cohabitation relationship is dissolved through the death of one of the parties, this can bring into operation a number of legal rules which confer a benefit on the survivor with respect to his or her actual economic dependence on the deceased. From a practical point of view the most important consideration is the right to different pension benefits. Here the situation exhibits marked differences according to the type of pension involved. According to the Act on National Insurance, these are the basic pension and the supplementary pension. The basic pension guarantees basic economic security, while the amount of supplementary pension depends on the individual's previous income from gainful employment. (There are, too, various private pension systems which provide additional benefits.)

[26] It may be added that rules which secure to a debtor a reserved amount of his income are also to be found in the Act on Attachment of Income, 1968. The Act is applicable to claims for unpaid maintenance allowances, taxes and fines. The debtor is entitled to a reserved amount for his own needs and those of "his family". According to the *travaux préparatoires* of the Act, the cohabitee of the debtor (and also the children of the cohabitee) are to be considered as "his family", and such an interpretation is established in practice.

[27] See ch. 7, sec. 5, and *Prop.* 1978/79: 12, p. 88.

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If a *married man* has died, his *widow* has a right to a widow's pension under the National Insurance Scheme on basic pensions and supplementary pensions, subject to certain conditions. With regard to the right to a widow's pension in the form of a *basic pension,* an express rule states that with a widow there shall be equated an unmarried woman who at the time of the deceased's death was cohabiting on a permanent basis with the deceased and has or has had children by him (or was earlier married to him and was still living with him at the time of his death).[28] On the other hand, there is no corresponding rule with regard to a right to a widow's pension in the form of a *supplementary pension* for a surviving woman who was not married to the deceased. Thus the widow's pension in the form of a basic pension has been placed in a special position due to the pension's purpose of providing social security.

If, however, we turn our attention to other areas as well, we find that the system is not applied very consistently. Thus, according to a special Act on *occupational injuries insurance,* a surviving woman may have a right to a special widow's pension not only if she has had a child by the deceased but also if she has otherwise "lived together with the insured for a considerable period under circumstances resembling marriage".[29]

The right to *damages for the loss of a breadwinner* is not of very great social importance in Sweden, since the survivor's needs are in general met through various insurance arrangements and it is only in a small proportion of all cases of death that claims for damages arise. A change was, however, made in 1975 in the general Tort Liability Act (1972) respecting the basic prerequisite for a right to damages when a person has been killed. Previously, damages for the loss of a breadwinner could only come into question if the deceased had had a legal duty of maintenance in respect of the survivor. Now, damages can conceivably be payable even if no such duty existed, namely if *the survivor was dependent on the deceased for his or her support.*[30] This innovation was made with particular regard to cases of cohabitation without formal marriage. It may, however, be observed that here we have an example of a statutory rule which sets up a concept wider than just cohabitation resembling marriage. For as "survivors" with a right to damages there may now come into question other persons, too, towards whom the deceased had not been under a duty to pay maintenance (e.g. his grandchildren or siblings).

With regard to the various forms of private insurance, it will only be mentioned here that the system of *group life insurances* (especially those

[28] Act on National Insurance 1962, ch. 8, sec. 2.
[29] See the Occupational Injuries Insurance Act 1976, ch. 5, sec. 6.
[30] Tort Liability Act 1972, ch. 5, sec. 2 (text of 1975).

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organized according to employment) is now very widespread in Sweden and that it is also usual for the beneficiaries clause to state that in the case of the assured's death the amount insured is to go to a spouse or, if the deceased was unmarried, to some person with whom he has cohabited under circumstances resembling marriage.[31]

4.5 *Social welfare and tax law*

It has already been mentioned that under certain conditions cohabitation can give a right to a widow's pension in the form of a basic pension if the man has died and the parties have or have had a child together (or have previously been married to each other). It is, however, important to note that the attention paid by legislation to non-marital relationships does not always lead to an advantage for the parties. On the contrary, it sometimes gives rise to a disadvantage. Thus under the rules on basic pensions two married spouses who live together and are both entitled to the basic pension get less in pension than do two single persons. (The explanation of this is that it is considered cheaper for two people to live together than to live separately.) In this respect, too, unmarried couples who live together on a permanent basis are treated in the same way as married couples if they fulfil the already mentioned requirement that they have a child together or that they were previously married to each other.[32]

In certain other legislation also it is a prerequisite for equality of treatment with married couples that a cohabiting couple must have a child together (or have previously been married to each other). The same delimitation has existed since 1962 in *the Swedish tax legislation.*[33] At that time the income of married couples was subject to joint assessment, and this, having regard to the progressivity of tax with rising income, could form an incentive for cohabiting couples to remain unmarried in order to reduce their income tax. The new rule on equality of treatment with married couples for unmarried cohabiting partners who had a child together (or had previously been married to each other) had thus as its aim to prevent cohabiting couples from circumventing the rules which applied to married couples by not getting married. Nowadays, however, spouses (and cohabiting couples with children) are separately assessed in respect of income from work.

As already mentioned, however, there are also a number of other enactments which expressly place unmarried couples on a par with mar-

[31] See, generally, Carl Martin Roos, *Grupplivskyddet,* Stockholm 1974.
[32] Act on National Insurance, ch. 10, sec. 1.
[33] See the basic Municipal Tax Act (from 1928), sec. 65, subsec. 5 (text of 1962).

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ried couples without requiring that the parties shall have children together or have previously been married to each other. The definition of such cohabitation as in that case is equated with marriage may vary to some extent. Usually, however, it is required that the cohabitation shall be "lasting", or "resembling marriage". Here only one example will be given.

A social benefit which is enjoyed by many people in Sweden, especially families with children, is the *housing allowance*. This allowance is subject to a means test related to the combined income of married applicants. A married couple can, however, be entitled to a larger allowance than a single person. The classification of a couple as married can therefore be both a disadvantage and an advantage. The statutory definition of cohabitation which is to be treated equally with marriage involves the requirement that the man and the woman shall be living together under *circumstances resembling marriage* and that they shall have a *common household*.[34]

4.6 *The situation in relation to the parties' creditors as well as in other special areas of law*

Where spouses have as a matter of principle freedom of agreement concerning their mutual economic transactions (e.g. concerning gifts, purchases and loans between them) there is a risk that they will abuse this freedom in order to put assets beyond the reach of creditors of one or the other of the spouses. Certain rules intended to counter this are to be found in the Marriage Code, in the Execution Act and in the Bankruptcy Act (and indeed also in other pieces of legislation). Under the Marriage Code a special form requirement must be met if major gifts between spouses are to be legally valid at all. These rules cannot readily be made applicable to cohabitation outside marriage, not even by means of an analogy. On the other hand, the Supreme Court, through two decisions rendered in April 1979, has applied a rule on spouses in the *Execution Act* analogously to cohabiting couples. In order to understand these decisions, it must be remembered that each spouse in a marriage is sole owner of his property and is responsible for his own debts but not for those of the other spouse. The rule in the Execution Act which is at issue provides that in the case of distraining on one of the spouses the burden of proof is reversed in relation to what would otherwise apply.[35] If, for example, execution is to take place for payment of the husband's debts, the wife, according to this

[34] See the Ordinance on State Housing Allowances to Families with Children (1976), sec. 18. The same rule on equal treatment of unmarried and married couples applies under the Ordinance on State and Municipal Housing Allowances (1976), sec. 5, subsec. 1.

[35] Execution Act (from 1877 with later amendments), sec. 69, para. 4.

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rule, has the burden of proof when claiming that certain property in the spouses' common dwelling belongs to her and therefore cannot be seized. If she cannot furnish such evidence, the property in the estate is presumed to belong to the husband (the debtor) and can be distrained upon in respect of his debt.

In both of the above-mentioned cases from 1979 it was a question of distraining on a man who was living together with a woman in circumstances resembling marriage. In one case the parties had no children, but the cohabitation had been going on ever since 1965. In the other case the man and the woman had children together and had cohabited for at least some years. In both cases the Supreme Court found that the special rule of evidence for spouses should be applied by analogy at any rate to such cohabitation as existed in the cases at bar.[36]

In the *Bankruptcy Act* there are a number of different provisions concerning reversion to a bankrupt's estate of transactions to the disadvantage of the creditors that were undertaken by the debtor before the bankruptcy. The possibilities of intervention persist for a particularly long time if the debtor undertook the transaction in question in relation to a person with whom he is "closely connected". A special rule defines what persons are to be reckoned as closely connected with the debtor. Among these are not only his spouse and a series of specified relatives but also "a person who is otherwise particularly close personally to the debtor".[37] This expression is used mainly to cover a person with whom the debtor cohabits under circumstances resembling marriage (though it can also relate, e.g., to foster children). The rule constitutes an example of cohabitation being given the same importance as marriage but within the framework of a rule which also embraces other cases of close connection between two persons.

The requirement as to "close connection" also occurs, for that matter, in certain rules in the *Code of Judicial Procedure*. Such a rule concerns disqualification of a judge from dealing with a case on the ground of his relationship to a party in the case. Another rule grants release from the general duty to bear witness in lawsuits on the ground that the person concerned is in a certain relationship to a party in the case. In the Code the rules in question mention first marriage and various cases of family relationship as grounds for disqualification of a judge and release from duty to bear witness, respectively. Thereafter it is added that the same rule shall apply if a person "is in a similar way closely connected with a party".[38]

[36] See 1979 NJA 302 (I and II).
[37] Bankruptcy Act (1921), sec. 29a (from 1975).
[38] See Procedural Code (text of 1973), ch. 4, sec. 13, concerning judicial disqualification, and ch. 36, sec. 3, para. 1, concerning witnesses.

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4.7 *The situation of children with cohabiting but unmarried parents*

The Parents and Children Code contains no rules which expressly apply to children of unmarried but cohabiting parents. The general rules on children born to unmarried mothers are therefore applicable. Nowadays, however, these rules differ so little from the rules concerning children of married parents that the situation can be summed up by saying that it is of little importance for a child's formal legal position whether its parents are married or not. In the application of the rules on children of unmarried parents it can, however, sometimes be of practical importance whether the parents are living together or not.

As has been mentioned above, the terms "child born in wedlock" and "child born out of wedlock" were deleted from the Parents and Children Code in 1976. As a reason for this it was stated that it was assumed that these old expressions could express a lingering moral evaluation to the disadvantage of children born to unmarried mothers. (Terms corresponding to "legitimate" and "illegitimate" children were removed as early as the 1910s.)

There remain, however, a couple of differences in the legal consequences, depending on whether the parents were married or not at the time of the child's birth. The prerequisites of the establishment of paternity are different, since it is presumed that the husband in a marriage is the father of a child born to his wife.[39] The paternity of a child of an unmarried mother must, on the other hand, be established through admission by the father or a court judgment. Child welfare committees have a duty to ensure that paternity is established for all children. If an unmarried mother cohabits with the father the investigation can be simplified, even though formally the same rules apply as when the unmarried mother is living alone.[40]

If a child is born to married parents, both parents together become the custodians (and guardians) at the birth of the child. If the mother is unmarried, she alone has the legal custody whether she is cohabiting with

[39] See, on this, the Parents and Children Code 1949, ch. 1 (text of 1976).

[40] In 1977 a legislative committee in Norway proposed the abolition of the legal presumption of the paternity of the husband where a child has been born in a marriage. (The desirability of equal treatment of all children was given as the reason for this proposal.) Thus under the proposal the paternity for all children would need to be established specially through admission or a court judgment, whether the mother was married or not. See *Norges offentlige utredninger* 1977:35, pp. 18 ff. The proposal has been criticized and so far, at any rate, it has not led to legislation. See also Peter Lødrup, "The Position of Children of Unmarried but Cohabiting Parents". (Paper to the Third World Conference on Family Law, Uppsala 1979. Cf. note 1 above.)

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the father or not. If she marries the father, however, he will become custodian together with the mother. Even if the parents remain unmarried, they can nevertheless make a request to the court to be granted joint legal custody irrespective of whether they are cohabiting or not. The court must in such a case direct in accordance with the agreement between the parents, provided this does not obviously conflict with the best interests of the child.

In case two parents are disputing over the legal custody of children, the court has to direct according to what is reasonable having regard to the best interests of the child. The same rule applies irrespective of whether the parents are married, divorced or unmarried. Where the parents are unmarried it may, however, be of decisive importance, in the application of this rule, for the father's possibilities of being given the custody whether he has lived together with the mother and the child or not. Only in the case of cohabitation will the father have had such a social contact with the child that it can be in the child's interest that he should be given the custody instead of the mother.[41]

With regard to the *maintenance liability of the parents* in relation to their children, the rules in the Parents and Children Code are so formulated that it is of no significance whether the parents are married to each other or not. From the point of view of principle the duty of maintenance is of the same extent in both cases. On the other hand, there is a main rule to the effect that a court ruling on the parents' duty to pay maintenance allowance to a child can be obtained only if *the child is not living permanently with the parent* whose liability for maintenance is in question. In this connection it is of no importance whether the parents are married or are cohabiting outside marriage. According to another rule, however, also a parent who is living together with the child can be ordered to pay a certain monthly maintenance allowance if he has *neglected* his general duty to maintain the child.[42]

Finally, it may be mentioned that a child of an unmarried mother is given the mother's *family name,* whereas a child of married parents at birth is given the father's name. The custodian of a child of an unmarried mother has, however, freedom to notify the civil registration authority that the child is to have the father's surname instead.[43] This right of choice

[41] See, on the rules concerning custody, the Parents and Children Code, ch. 6 (text of 1976).

[42] See, on the rules concerning maintenance to children, the Parents and Children Code, ch. 7 (text of 1978).

[43] See the Names Act 1963, sec. 2.

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exists independently of whether the unmarried parents are living together or not. In practice, however, this right is mainly used by cohabiting parents.[44]

5. COHABITATION RESEMBLING MARRIAGE. DISCUSSION OF LEGAL-POLITICAL ISSUES

5.1 *The neutrality ideology*

Undoubtedly the general notion of neutrality with regard to the form of cohabitation has played a part in bringing about what seems to be an ever-increasing disposition in recent years to introduce special rules on non-marital cohabitation. It is true that at the time of the 1973 legislation on new divorce rules, etc., the pronouncement was made that it was desirable that marriage should be preserved as the normal mode of family formation, but this has not prevented neutrality being chosen as a guideline for the practical treatment of the matter. Statements made in the legislative process have also shown that it is considered that the state should not, within the framework of a general neutrality, give the citizens recommendations about marriage.

In taking up an attitude on the idea of the neutrality of legislation towards the form of cohabitation—marriage or free cohabitation—it is necessary to consider how the system of rules for formal marriage is formulated. Today the Swedish legislation on marriage is of a highly secular character. It has been stated above (section 2) that the rules on the entering into and the dissolution of marriage have been framed in such a way that from a legal point of view marriage can be regarded as a revocable contract, and that the legal effects of a marriage have been dissociated altogether from any taking into account of a spouse's "guilt" or moral judgments as a whole. The legislation constitutes a set of practical rules on *duty of maintenance as between spouses, community of marital property in the special*

[44] In 1979 an investigator working in conjunction with consultative experts submitted proposals for new rules on names. See *SOU* 1979: 25. The investigator proposed considerable changes in the Names Act of 1963. Under that Act a wife acquires the husband's family name upon marriage, but she has the right to keep her previous name if she so wishes. According to the proposals the spouses should have the right to choose either the husband's or the wife's name as the common family name. If they do not choose a common name, each spouse should, however, keep his previous name. (The reason behind the proposal is the concern for equality between men and women.)

With regard to children, the investigator proposed that a child should at birth take the parents' common family name if the parents have the same name, but otherwise should always take the mother's name. (It is, however, proposed that there should always be a right for the child, through his custodian, to choose the other parent's name.) In other words, the new rule would apply equally to children of married and of unmarried parents.

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Scandinavian sense, gifts and other agreements between spouses, and protection of creditors, as well as on *succession.* Since the legislator has found these rules applicable for the contract type represented by marriage, it must for that reason be in the general interest that the rules shall be used in as many cases as possible. As special arguments reference can be made to the rules on community of marital property and on maintenance which can serve as *protective rules* after divorce or death in support of the party who has become economically dependent on the other as a result of a cohabitation extending over a long period. With regard to the question of creditor protection, it must, in the interest of third parties, be considered best that the same rules shall be applied irrespective of the marital status of the cohabiting man and woman. Where creditor protection is concerned, there is no rational basis at all for the idea that the parties should choose the system of rules. Right of succession, too, should be regarded as a desirable effect in the case of long-term cohabitation.

It is not only in relation to economic questions that the neutrality ideology appears questionable as a general point of departure. The Marriage Code contains rules both on obstacles to marriage (though only a few) and on a reconsideration period for divorce, particularly so where there are children. It is scarcely reasonable that, *on the one hand*, the legislator should try to influence both *family formation* and *family dissolution* through rules in the Marriage Code while at the same time, *on the other hand*, the attitude is announced that society ought to be neutral towards the question of what form men and women choose for cohabitation.

The idea that society should not actively recommend marriage as a form of cohabitation seems to be fully comprehensible only if marriage is regarded as an ideological concept which means something more than a private-law contract type. It is evidently thought that the legislator ought not to take up an attitude on ideological questions concerning people's private lives. Such a standpoint is in itself indeed eminently reasonable for any sort of liberal approach. However, the legislator has precisely endeavoured—successfully—to frame the legislation as a secular contract type, the marriage type of contract, which has been devised with various practical objectives in view. There is no reason why the economic legal effects of marriage should have to be linked back to questions of ideology. The rules on obstacles to marriage and on a reconsideration period can, it is true, be said to be ideological in the sense that they concern questions other than purely economic ones. The rules providing for a reconsideration period may be said to be the expression of a cautious attempt to safeguard family stability and prevent a too hasty dissolution of families out of consideration for children and for the spouse who wishes to continue the marriage. But

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although an ideology is involved here, it is not a question of an ideology which must be rooted in any religious superstructure to marriage. In the legislation the rules have been justified by reference to general considerations which have won the support of a large majority in the Riksdag.

Having regard to the de-ideologized, practically-orientated nature of the Swedish marriage legislation, it thus appears that the state as legislator ought to find it in its interest that long-term cohabitating couples should marry, so that they would be covered by the complete system of rules for the contract type marriage.

It may, furthermore, be questioned whether it is even logically reasonable to confer on the idea of neutrality towards the form of cohabitation different contents in different legal areas, in accordance with the dual forms of manifestation of the neutrality ideology. The tension between the two approaches emerges most clearly where the economic community which exists in a long-term cohabitation outside marriage is taken into account despite the fact that the parties have no mutual legal obligations. This occurs both within social law in a wide sense and also in other legal areas, e.g. the law of execution. Despite the fact that the cohabitors have no legal obligations to each other, externally importance is attached to their actual economic community or dependence. In the majority of cases, of course, it is nevertheless logically possible to distinguish in this way between, on the one hand, mutual obligations and rights and, on the other, factual economic community. The results of a mixture of legal obligations and factual economic community may, however, become inconsistent when they are expressed in different rules within one and the same legal area. Such is the case with regard to family-law liability for maintenance when a person who is liable for maintenance in respect of a child can in certain cases invoke a right to reserve a certain amount for a cohabiting partner with whom he or she has a child, despite the fact that he is not legally liable for maintenance towards a cohabiting partner to whom he is not married. In the opinion of the present author such inconsistencies are evidence of a defective legislative technique which leads to a system of rules that is difficult to survey as a whole and to understand in detail.

5.2 *Purposes of legislation and practical options open to the legislator*

Even if one rejects the neutrality ideology as such, it is nevertheless conceivable that the development of the Swedish legislation on non-marital cohabitation can be justified on practical grounds. The legislative bodies cannot disregard the facts that cohabitation without marriage occurs and that it has become very much more common in recent years. The question

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then is to determine what basic attitudes can be justified on practical grounds.

Two possible lines of action have already been touched upon in the discussion of the neutrality ideology as such. The ideology clearly means in practice that the legislator, because of social needs in particular areas which are taken up in the legislation, introduces special rules on non-marital cohabitation to such an extent as is deemed practically appropriate. Another possibility is for the legislator, on the basis of the desideratum that the majority of cohabiting couples should marry, to adopt a restrictive attitude to the legislation on non-marital cohabitation. A third possibility is to strike out in the other direction and aim at a completely equal treatment of non-marital cohabitation and formal marriage. A fourth possibility would be gradually to reduce the effects of even formal marriage or simply to abolish all rules on formal marriage. In such a case the questions concerning non-marital cohabitation, too, would be placed in a different situation; but since this possibility would seem to be not only politically inopportune but also quite unpractical as a general solution it will not be considered further here. The other three possibilities, however, will be discussed below.

Before embarking on a legal-political discussion of the options open to the legislator it is, of course, desirable to be clear about the objectives one wishes to establish for a regulation of the relations between men and women who live together on a long-term basis. There can be different opinions on these questions. One can discuss as a particularly central aim the desirability that the system should safeguard the *children's* interests; and this also brings up the question of *family stability*. There should, moreover, be agreement about certain general objectives, primarily in the domain of legal systematics, which may be relevant in all legislation. *First*, it is desirable that as many cases as possible should be covered by a system of rules which is as complete as possible. *Secondly*, the system should be easy to apply from the point of view of legal technique. This latter consideration has two aspects: it comprises the ease of application for courts and other authorities and the possibility for private citizens to graps both what applies in an individual concrete legal question and how the system works as a whole. The considerations mentioned should be taken into account in any discussion of the different courses of action open to the legislator.

(1) Let us first consider the alternative whereby the legislator does not issue separate rules on individual questions concerning free cohabitation but instead alters the rules on marriage in such a way that *all persons who live together on a long-term basis in circumstances resembling marriage are con-*

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sidered to be married even though they have not entered into a formal marriage. As readers will know, such a solution is not unknown in some parts of the world. It occurred in the Soviet Union between 1926 and 1944, when "*de facto* marriages" were recognized as valid and could be formally registered at a later date upon the request of one of the parties. Furthermore, according to the rules on common-law marriage in Scottish and American law, non-marital cohabitation may in certain circumstances automatically imply the same legal effects as formal marriage. (It should, however, be mentioned that in the USA the rules on common-law marriage have been abolished in most states.)

The main advantage of establishing complete parity between free cohabitation and marriage would, of course, be that it would serve the aim of bringing about a complete regulation of as many cases of cohabitation as possible. At any rate in the case of cohabitation of a long-term character, it may seem to be justifiable to accord to such a relationship equality of treatment with a formal marriage. The actual family relation and the need of solutions may be the same in both cases. The idea of equal treatment of free cohabitation and formal marriage as regards the mutual relations of the parties has also had its advocates here and there in Nordic legal writing. It has, however, expressly been rejected in the Swedish legislative work on the ground that marriage-law rules can only be made applicable if the parties have chosen to marry.

To bring about complete parity between free cohabitation and formal marriage would, however, be difficult. At any rate in the Swedish society, it would not seem feasible to apply the notion to its full logical extent in such a way that "marriages" based on informal cohabitation could be dissolved only through divorce or could constitute an obstacle to another marriage. Even with a more limited scope than this, the solution involving equality of treatment on grounds of principle appears dubious having regard to parties who have deliberately chosen not to marry. Another possible disadvantage of placing free cohabitation on a par with formal marriage is that the frequency of non-marital cohabitation would increase still further, since formal marriage would not bring with it any legal effects which would not follow in any case. The legal fact would then, within all legal areas and to an increased degree, be the existence of cohabitation resembling marriage, a state which may be difficult to evaluate, and not the existence of a formal marriage, which can easily be established.

(2) Let us then, bearing in mind what is practically appropriate, deal with the middle way for legislation which is applied in Sweden. There the policy is *to legislate on free cohabitation in those respects where there is considered to be a need for practical solutions* without, however, aiming at full equality with

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married couples. This way of treating the problem has the advantage that by it at least certain questions are solved. It has, however, some clear disadvantages. The unmarried cohabiting couples will not be covered by the rules on maintenance liability, community of marital property in general, and on right of succession which appear desirable at any rate in long-term cohabitation. The gain in the form of practical solutions for the special questions arising in free cohabitation which are made the object of special regulation, may therefore, where the marriage rate is low, be outweighed by the fact that rules will be lacking in other respects.

Moreover, since the equal treatment of unmarried cohabiting couples with married couples is sometimes, but not always, based on the existence of children (or earlier marriage between the partners), the legislation would not fully achieve the desired parity with married couples even in those legal areas where it is sought. From the point of view of individual people this at the same time means that it would be impossible or difficult to arrive at an overall view of the differences in legal effects between marriage and free cohabitation. The advantages and disadvantages can vary, depending on what legal question is at issue. If the cohabiting couple have children, most of the legal effects within social law in a wide sense will be the same as if the couple had been married. An unmarried surviving woman, however, has no right to a widow's pension according to the rules on "supplementary pension". On the other hand, if she has children together with the man she can have a widow's pension in the form of a "basic pension" after the man.[45] If the parties are childless, however, it may pay them to be unmarried, since they can then each draw the full basic pension at the age of 65.[46] But if the man should die, the above-mentioned disadvantage arises that a younger, childless woman will not receive the widow's pension, even in the form of a basic pension.

In actual fact, in Sweden today there exist from the legal point of view three categories of cohabitating couples, which in some respects are treated differently, namely married couples, unmarried couples with children, and unmarried couples without children.[47] The growing difficulty for the uninitiated to understand the system of rules is a clear disadvantage of the present Swedish development, with its tendency to have recourse to extensive selective legislation on free cohabitation.

[45] Cf. section 4.4 above.
[46] Cf. section 4.5 above.
[47] This problem has been observed and discussed by a state committee with the task of coordinating as much as possible the comprehensive system of social insurance and social benefits in Sweden. (This system transfers so much money back to the taxpayers that the total amount represents one third of all private consumption in Sweden.) In its report, published in January 1980 (*SOU* 1979: 94. En allmän socialförsäkring. Modell och riktlinjer), the

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Legislation on the meaning of free cohabitation in specific legal areas also of course has the consequence, in the same way as does a complete equation of free cohabitation with marriage, that courts and other authorities are faced with *problems of application* where it is a matter of determining whether an instance of free cohabitation is of such a character that it should be equated with a marriage. The application can, it is true, be simple if the statutory rules are based on the prerequisite that the parties have or have had children together. In other cases it may be necessary to make an evaluation concerning the existence of cohabitation (perhaps even as a sexual relationship) and its durability, as well as of the parties' mutual economic relations.

Another aspect of the problems of application is that the use of cohabitation as a criterion in the legislation may invite *abuse*, inasmuch as people may conceal the fact of cohabitation because in some cases single persons have better social benefits.

(3) It remains to discuss the third possible line of action for the legislation, viz. that as a matter of principle there should be no need to set up through legislation more than one contract type—formal marriage. Such a line of action should be combined with educating the public on the suitability of marriage in the event of long-term cohabitation. If the legislation could be restricted to *one* system of rules, of the contract type represented by marriage, and the marriage rate could be kept up, this would undoubtedly be the best solution for achieving the general aims for the legislation which have been touched on above. These are that the regulation shall be uniform and complete, that the system shall be easy to apply, and that individuals shall be able to understand their situation without undue difficulty.

If one accepts the idea that as a matter of principle there should be no need for statutory rules on more than on contract type—formal marriage—the logical consequence must be a more restrictive conception of rules on free cohabitation than is implied by the line that is at present followed in Swedish legislation. Undoubtedly, however, the great frequency of non-marital cohabitation creates a practical need for solutions through legislation on certain questions. The differences in the results as

committee has proposed the introduction of a uniform definition of such cohabitation as should be placed on a par with marriage in all the different parts of social-welfare law. (See *op. cit.*, ch. 11, esp. pp. 150 ff.) The equation of cohabitation with marriage should apply, *first*, if the unmarried partners have been previously married to each other or have or have had a child together, *secondly*, if they are expecting a child together and, *thirdly*, if they live together permanently under marriage-like conditions.

The committee admits that the proposed solution will create a risk of difficulties in the application of the rules, but considers that the advantages of a uniform definition within all parts of social-welfare law are paramount.

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between the neutrality ideology and a more restrictive attitude towards rules on free cohabitation cannot be summed up in any simple formula. Within social and tax law and also in a number of other contexts (e.g. property law) it is at present difficult in Sweden to dispense with at least such rules as prevent unmarried couples from enjoying better benefits than married couples by remaining unmarried. It may also be proper on grounds of fairness to give unmarried couples who have cohabited for a long time the same benefits as are enjoyed by married couples, especially when it is a question of pensions or other benefits following upon the death of one of the partners, when it will be too late for the parties to enter into marriage. Where, on the other hand, it is a matter of benefits during the lifetime of both parties (e.g. tax benefits or family allowances), the issue is much more doubtful, since then the parties have the possibility of acquiring the right to the benefits by marrying.

In private law, too, there may in cases of long-term cohabitation be a need for rules which protect the weaker party, *inter alia* with regard to the distribution of the property of the parties after the dissolution of the relationship. It should, however, be possible to meet this need through rules, having the character of exceptions, which would not play a part in the construction through legislation of dual and partly different systems of rules for married and unmarried cohabiting couples. The exceptional character would most clearly be marked if solutions based on fairness arrived at by analogy with the rules for marriage were applied in judicial practice without any special statutory support. In, for example, the appeal-court decisions mentioned above (section 4.3) on the ownership of a dwelling which had been bought mainly with money belonging to the man, it would have been possible in view of the dissolution of the relationship to have given the woman a share of the property which the man had acquired with the help of her efforts by invoking the fundamental idea behind the Scandinavian system of community of marital property, i.e. the desideratum of giving the partner working in the home a share in the growth of the couple's wealth.

It is true that "reasonability solutions" applied through case law can lead to a more uncertain legal situation than can legislation. One would, however, avoid the peculiar situation which is characteristic of the Swedish development during recent years, namely that the legislator himself is at an ever-increasing pace producing statutory rules also for unmarried couples, a practice which can be supposed to be particularly likely to lower the marriage rate.

Actually, the Swedish neutrality ideology seems increasingly to be leading to a more or less routine equating of free cohabitation with mar-

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riage in many areas, without there being any real discussion of the practical need for this in each particular question. It appears very possible that in the long run an even greater, unintended effect is involved in the present development. For if the growing selective legislation on free cohabitation contributes to the marriage rate remaining low or even falling still further, it may be impossible to hold the position that free cohabitation should not in all respects produce the same consequences as formal marriage. It can, in other words, be questioned whether the middle way represented by the Swedish legislation will not in the long run become untenable both socially and from the viewpoint of legal systematics. The legislators would then be compelled either to change over to a full equation of free cohabitation with marriage or to adopt the restrictive basic attitude that as a matter of principle it should suffice to have legislation on formal marriage.

5.3 *Family stability and the interests of the children*

The analysis so far carried out has not taken account of one special consideration which has been mentioned above as an objective of legal policy, namely that the legislation must safeguard the interests of the child. Here the question of the value of family stability also comes into the picture. In a pluralistic society such as exists in present-day Sweden there can be differences of opinion with regard to the question whether family stability should be adopted as an objective for the legislation. Here we confine ourselves to pointing out that even the liberal rules on divorce adopted in 1973 were in fact designed to prevent over-hasty dissolution of families where there are children below the age of 16. The rules requiring a reconsideration period before the granting of the divorce were constructed with precisely this aim in view.[48] It must then be inconsistent when the Swedish legislator, by adopting the neutrality ideology, shows a lack of active interest in the question whether cohabiting couples with children marry or not. Precisely in view of the reconsideration-period rules for divorce, it ought to be considered desirable that parents should be married to each other.

A draft Bill of 1979 shows that the legislative organs have in fact come to feel a marked interest in the question of the parents' joint responsibility for the children's situation, but this is manifested in another way than by trying to stimulate the contracting of marriages. As has been touched upon earlier (section 4.7), there has for several years past existed a possibility for both divorced and unmarried parents to have joint custody of their chil-

[48] Cf. section 2 above.

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dren whether the parents are living together or not. In a draft Bill on children's rights, the entire system of rules on custody is treated from different points of view. In various ways the legislative committee has tried to encourage joint custody as being beneficial for the children. As a complement to the rules in the Marriage Code concerning a reconsideration period for divorce, it is now proposed that a special rule shall be introduced in the Parents and Children Code providing for a reconsideration period of six months before parents can obtain a dissolution of the joint custody of their children and the assignment of custody to one of the parents singly. Where the parents are married and have filed a petition of divorce before applying for a dissolution of the joint custody of their children, the reconsideration period for the divorce is, however, also to be counted as sufficient with regard to the proposed rule concerning a reconsideration period for dissolution of joint custody.[49]

Where married parents are concerned, it may seem to be from the point of view of legal systematics a peculiar arrangement to provide in the children's interest for double reconsideration periods as a matter of principle—one period for the dissolution of the marriage itself and another for the dissolution of the joint custody. Rules in the latter respect would, however, be of independent importance if the parents had retained the joint custody after divorce but later wished it to be dissolved. There is also a difference with regard to the function of the reconsideration period in the two cases. The reconsideration period for the dissolution of the marriage is orientated towards the question whether the parents are to dissolve their own relationship. The proposed reconsideration period for dissolution of joint custody relates to the question whether the parents are to abstain from a joint legal responsibility for the children, quite regardless of whether they are married or cohabiting with each other. The reason behind the proposed legislation is precisely a desire to bring unmarried parents with joint custody within the scope of rules on a reconsideration period, since the joint responsibility of the parents for their children is considered to be of especial value. At the same time the proposal illustrates the fact that the legislative organs in Sweden are not interested in the question whether or not cohabiting couples, even those who have children together, marry each other. The tendency in different parts of the legislation to equate cohabiting couples with married couples provided they have or have had children together means, moreover, that cohabiting couples with children may have less reason to marry than have childless couples.

[49] See *SOU* 1979: 63 (Barnens rätt. 2. Om föräldraansvar m. m.).

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Before we go further, it may be appropriate to ask whether the legislator's lack of interest in the question whether parents are married to each other can be justified by reference to the possibility that single mothers with children might be subjected to disadvantages if the community should by different methods try to promote the contracting of marriage. The conceivable conflict of aims lies on a rather abstract level. It would consist in the possibility that the promotion of marriage for cohabiting couples might as a reflex effect preserve those negative evaluations acting to the disfavour of children of unmarried single parents that it was desired to get rid of once for all by removing from the legislation all disadvantages for children of unmarried parents, including even the terms "child born in wedlock" and "child born out of wedlock".[50]

For several reasons, however, it appears scarcely realistic to suppose that in the Swedish society of today the supporting of formal marriage as the normal and desirable type of contract for couples cohabiting on a long-term basis would involve disadvantages for children of single parents. Since divorces are common, there will always be many children who live with only one of their parents. Moreover, there is no reason—even were it possible to do so—to oppose "trial marriages" in the form of free cohabitation. This means that in the future, too, it will be common for children to be born to unmarried parents, who in many cases will separate. Under such societal conditions, it seems improbable that any efforts on the part of the state to encourage formal marriage as the proper contract type could produce negative effects for children of single parents.

All the arguments concerning the child's interests and family stability do not, however, lead back further than what has already been said to the effect that the legislator ought, if he takes seriously his own rules on a reconsideration period for divorce, to consider it desirable that cohabiting parents should marry.

5.4 *Legislation and the marriage rate*

Using an expression taken from systems theory, one can speak in a discussion of legal policy, too, of *primary goals* and *ultimate goals*. Ultimate goals are directed to the state of affairs which is set up as the final target for the legislation. The primary goal may represent a stage on the way towards the ultimate goal, but it is the latter which is the more important.

The Swedish neutrality ideology means that the legislator sets up a number of primary targets, i.e. legislation on those special questions where

[50] Sections 2 and 4.7 above.

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the immediate, practical need of a solution appears particularly great. The question which ought seriously to be considered in this connection is whether this may not at the same time be expected to contribute to producing a situation where the marriage rate remains at so low a level that in the long run the achievement of such objectives as can be regarded as ultimate goals is jeopardized. In this latter category may be classed the desiderata stated earlier for all legislation, viz. that the statutory rules shall comprise a complete regulation of as many cases as possible, that the system shall be easy for courts and authorities to apply, and that it shall not be too difficult for the citizens to grasp. Among the ultimate goals there should also be included a cautious propping up of family stability out of consideration for the interests of the child, an aim which has been accepted by the Swedish legislator through rules on a reconsideration period before divorce where there are children (and also when only one of the spouses wants a divorce).

We have, moreover, found that, to the extent the Swedish neutrality ideology in combination with legislation directed only to immediate, practical problems helps to keep the marriage rate at a low level, the development leads to a poor achievement of the ultimate goals set. With this approach it will obviously be a key question for an overall legal-political evaluation how the marriage rate is likely to develop and to what extent it is affected by legislation. As has been pointed out earlier, it is at present impossible to predict with any certainty the future development of the marriage rate in Sweden.

Nor is it possible to state to what extent the legislation during recent years has actually contributed to the marked decline in the marriage rate which we have observed earlier (section 3). In so far as legislation influences the marriage rate, this effect can be either *direct* or *indirect*. By direct effect we mean the situation where a particular legislative measure is noted by the public and immediately either encourages couples to get married or has the opposite effect. Since the citizens' knowledge of the system of legal rules is rather limited, it is, however, doubtful whether legislation on a particular matter can have any great effect on the patterns of behaviour. But especially if the legislation concerns questions which are important from the point of view of principle or for practical reasons and attracts attention when it is introduced, it seems probable that it will have at least some impact. Although a causal connection cannot be proved (at any rate not without special studies) it is suggestive that the marriage rate rose suddenly in 1974, when marriage may have received a certain boost through the introduction of new rules on divorce and the removal of all rules regarding "guilt" in the Marriage Code and the Parents and Children

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Code. It is also worth noting that a new decline in the marriage rate appeared in 1977, when the new rules on joint custody for divorced and unmarried parents may have removed a special reason for cohabiting parents to marry.

Side by side with the direct effect of legislation on individual questions, we may furthermore expect an indirect effect through the impact on the general formation of attitudes in society of the form and tendency of the legislation as a whole. Common sense would suggest that such an indirect influence on attitudes must exist. A special argument in favour of this hypothesis is, it may reasonably be supposed, that any direct influence of an individual legislative measure will be likely to have a residual effect on the formation of attitudes in the society. The sum of these residual effects is precisely what constitutes the indirect influence of the accumulated legislation.

The assumption that in the long run legislation influences—and in Sweden has already influenced—the marriage rate is not gainsaid by the fact that the changed patterns for family formation may have been triggered off by various social factors, such as an increased tendency for women to go out to work and a freer approach to sexual life. The legislation may nevertheless have contributed to the development, which has been exceptionally rapid and powerful in Sweden.

6. CONCLUDING REMARKS

If legislation continues to be guided by the neutrality ideology, this will mean the construction for cohabitation between men and women of a system of rules which is an alternative to marriage. In Sweden, with its secular marriage legislation, it should, the author submits, be sufficient to have only one legal institute, whether it be called marriage or something else. If the marriage rate remains low, resulting in a large number of instances of long-term cohabitation outside marriage, we believe, as has been shown earlier, that in the long run it will not be possible to maintain the prevailing attitude and that instead the development will, little by little, bring about a change-over to the approach that long-term cohabitation between a man and a woman is completely equivalent to marriage. As we have already seen, however, it would be better if (1) the legislation was so far as possible restricted to a contract type which already exists, embodied as it is in the current legislation on marriage, which now is purely secular, (2) the state encouraged the contracting of marriages, and (3) legislation

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on free cohabitation was carried through as restrictively as possible instead of being based on the notion of neutrality on the part of society. The question, however, is whether in Sweden today there exist either the political prerequisites or the practical possibilities for changing the course of the present development.

Applying the terminology used earlier concerning different goals for the legislation, it may be said that the ideological approach of the legislator, involving as it does neutrality towards the form of cohabitation and an orientation towards the solving of immediate practical problems, has meant a concentration on primary goals and a total lack of interest in discussing ultimate goals for marriage law. If this interpretation is accepted, one may indeed rightly speak of Swedish family-law legislation on marriage or cohabitation as a journey without a destination.

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