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THE NON MARRIED COUPLE AND SOCIETY:
SOCIO-JURIDICAL ASPECTS OF COHABITION

by

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Introduction

In recent years the laws governing the family as well as the underlying values related to marriage and divorce have undergone radical changes. In particular the needs and desires of individuals have received increased attention. While this focus may tend to undermine the family as a unit, this same form has led to the equality of the marital partners. Equally relevant, governments have increasingly shouldered economic and social support which formerly was performed by the family. Finally there has been a substantial increase in the number of couples living together without getting married. The laws in a number of countries have tended to respond to this phenomenon by treating married and unmarried couples similarly. Thus the concept of "cohabitation" became both on the national, as well as international level, relevant. The concern to harmonise within a larger framework legislation which has so far been carried out on a piecemeal basis can be easily understood.

In order to assess the relevance of cohabitation within the European community a few concrete examples might be revealing. Among the numerous questions contained in a survey undertaken by the EEC in 1975 (1), one response merits special attention. Asked about the degree of happiness they believe to have reached, those respondents whose marital status was defined as "unmarried couples" indicated with 23% to be "really happy", thus ranking first. Another 41% belonging to the same category declared to be "quite happy".

Another survey realised quite recently by the French newspaper "Le Monde" reinforces these findings. Asking to qualify the fact that a great number of young people are living together without being married, those who consider this situation as not shocking at all were 55% (Le Monde, Liberté 81) as compared with the survey of IFOP of November 1975, where the response of parents was only 25%. Thus indeed one may state at first sight, that the most visible aspect of this trend is its strong linkage with the cohort group under 25. Next to this emerging new juvenile behaviour, a second category of unmarried couples has also to be identified: those who so far have not completely severed their previous marital attachments and yet have entered a new relationship or, due to social security reasons such as old-age pension, prefer to retain the legal status of widow/widower.

Before attempting to analyse these new styles of life, some questions of a general order have to be raised. Is it possible to consider cohabitation as a universal phenomenon or is this way of life closely related to changing economic structures? Furthermore, is cohabitation a protest movement, a criteria indicating membership of a certain social group or counter culture or is it rather a mutation of present day marriage and divorce patterns in highly industrialised societies? Finally, is the legal recognition of cohabitation a move to shape marriage and non-marriage according to one common model or should it be rather considered as an attempt to solve practical problems on a piecemeal basis?

Thus it seems imperative to evaluate briefly the major social factors which have produced a totally different outlook on the functioning of basic societal institutions such as the family. These are growing importance of human rights, changes in the status of women, women's economic involvement, encouragement of family planning, free access to contraceptives, changes in sex roles. These and some other related factors seem all to have contributed to the "individualisation" within the life style of the couple.

Furthermore, the readiness to confer legal protection to unmarried couples, implies also a long tradition of secularism and non-intervention in the realm of religious beliefs.

It is due to these reflections that before analysing the progress and achievements or neglect of legal provisions concerning cohabitation, we would briefly like to enumerate those social conditions and factors which we consider as a "sine qua non" for the emergence of cohabitation. The absence of these characteristics in a given society would mean that without such structural changes, legal provisions in favour of cohabitation would eventually only meet the needs of a small minority.

1. Structural changes and change in the family

1.1 Industrialisation

Whatever definition of industrialisation one chooses, there are three main processes that arise with industrialisation and eventually gives way to the nuclear family. Industrialisation reduces the authority of those who have traditional status, such as parent or husband. Second, it offers the less powerful, such as the young and women, alternative sources of rewards that they used to be able to get only in families, for example sexual pleasures, social security, personal services. Third, industrialisation is partially undermining the authority of older institutional supports for the family, such as religious institutions, schools and the State.

According to one of the leading scholars in this field, William J Goode, the crucial points of pressure from industrialisation on the traditional family structure are the following:

1. increase of physical mobility and decreasing frequency and intimacy of contact among members of a kin network;
2. creation of class-differentiated mobility, resulting in discrepancy of life style and taste;
3. expansion of governmental services. Elimination of large corporate kin groupings providing political protection;
4. creation of a value system recognising achievement more than birth;
5. loss of control over family members, resulting in growth of personal choice as the foundation for partner choice and marriage (2).

1.2 Women's economic participation and changing status

Industrialisation breaks down the dichotomy between home and work, it offers greater options for both women and men. Thus there is a noticeable increase in the number of women holding jobs independent of their husbands, fathers or male kin. In all societies women have worked, in many societies they have also held jobs where wages are paid. But until very recently in world history, very few women obtained those jobs, or were promoted in them, without the permission or the active help of their male kinsmen. It also has to be emphasised that women's attainment of equal status depends not only on their economic participation, but also on the degree of control they possess over the activities in which they take part. The increase of women's control over their earnings is mainly related to the political system, as well as to the degree to which public authorities and public opinion have been mobilised in favour of an enlargement of women's rights.

1.3 Increase of policies affecting fertility

(Free access to contraception, liberalisation of abortion, governmental support of family planning)

One of the most important factors which resulted in a substantial change towards sexual behaviour in general and marriage in particular is the new freedom women have gained through the marketing of the pill, free access to other types of contraceptives, the liberalisation of abortion and governmental support for family planning programmes. Since couples are able to determine the size and timing of their procreation, anatomy stopped being fate for women and has become a major element of independence in their sexual behaviour. The large-scale commercialisation of the pill has led to a new type of permissive education in regard to girls, especially in countries where the dating and the free mixing of sexes has been part of a legitimate code of behaviour. One may say that parallel to economic independence women in highly developed western countries have largely been able to gain their reproductive freedom. This evolution has substantially contributed to reducing the importance of marriage, at least (3).

1.4 New concepts of equality between sexes reflected in national and international legislation and conventions

The current transformation of the old patriarchal family structure into the modern type of partnership marriage has played a decisive role over the years. This evolution can be traced down in a number of highly developed European countries. Full equality in law between husband and wife was first introduced in the Nordic countries (Sweden: 1920, Iceland: 1923, Denmark: 1925, Finland: 1929). In Central Europe, parallel to the economic development after 1950, countries such as Italy, Britain and Switzerland started to realise legal reforms. Thus the new Swiss Federal Bill of 1979 has abolished the differential notion of the two spouses in favour of a co-operative relationship. In Belgium and France legal reforms have already been carried out (Belgium: 1958, France: 1965, with the husband's dominating status as "chef de la famille" abolished in 1970 and adultery eliminated from the Penal Code in 1975). Similarly, Austria in 1976 and the Federal Republic of Germany in 1977, have relinquished the centuries old idea of a "natural division of labour" between husband

and wife and of the concomitant notion in Roman law, endorsed by the General Civil Code, of the husband's privileged position in regard to decision-making and directive powers in all family matters. At the same time the husband's obligation to provide maintenance for the wife was discarded. Also, it formally abolished the unilateral obligations of the wife to assume her husband's name, to follow him to his place of residence, to do the housekeeping, to assist the husband in his gainful activities and, finally, to obey and make others obey his decisions. As a contrast in less economically developed countries, such as Turkey, Ireland, Spain, to some extent Portugal, the wife is expressis verbis required to "obey" and there is no full equality between husband and wife. Finally, Greece is still in the process of adopting a Civil Code.

New concepts of equality between sexes as supported by international organisations such as the UN, Council of Europe, the CCE and OECD have been trying in recent years increasingly to secure women an equal basis with men both inside and outside marriage (4). In order to realise this aim strong insistence was displayed in favour of the application of the non-discrimination clause. As far as women are concerned, this clause has been particularly important in the field of family life. In the Marckx case, for instance, the European Court of Human Rights held that certain provisions of the Belgian Civil Code infringed the convention. The provisions in question related to the manner of establishing the maternal affiliation of a child born out of wedlock and to the effects of establishing such affiliation as regards the extent of the child's family relationships and the patrimonial rights of the child and the mother. Similarly, the Council of Europe adopted in 1972 a resolution (Resolution 72/1) providing that the domicile and residence of a married woman should be determined by factual criteria and should not depend upon that of her husband. In 1977 (Resolution 77/12) the Council of Europe recommended that there should be legal equality for the acquisition of the nationality of the other spouse.

The chief subject of concern in the last decade, however, has been the position of women at work. In 1977 three major recommendations were laid down as guidelines for action by European governments and concentrated on three main subjects:

- preparation for working life;
- position of women in the working world;
- reconciliation of family responsibilities with occupational activities.

Furthermore, in the introduction of the "Convention on the Elimination of All Forms of Discrimination Against Women", adopted by the UN on 18 December 1979, it is stated that this convention reflects "the depth of the exclusion and restriction practised against women solely on the basis of their sex, by calling for equal rights for women, regardless of their marital status in all fields - political, economic, social, cultural and civil" (5).

Finally the position adopted in regard to unmarried mothers and the special protection of their children which has been extended through the recommendations of the Council of Europe, indicates once more that during the last decade the law making efforts of international bodies have been moving more and more in the direction of assuring the individual full autonomy in regard to his private life and to decrease the role of the State in terms of imposing certain norms and values on all citizens.

In summing up it may be said that due to the concerted efforts, the concept of marriage and family life being "a social obligation" has gradually given way to an eudemonistic concept, which is solely based on the subjective notion of "happiness" (6).

1.5 The impact of women's movements

Parallel to the numerous progressive resolutions and conventions which have been adopted over the last twenty years within manifold international organisations the impact of women's movements, especially of radical feminism, seem to be of paramount importance for a different outlook on marriage. Without the mobilisation of public opinion in many western countries, the right to divorce without referring to the fault of one side and the right to be able to have legal access to abortion would not have been granted.

Contemporary feminism sees the patriarchal family (meaning male dominance and female dependence, based on men's ownership of property, ability to earn money and their legal rights over women) and the sex roles that are shaped within it as the major issue for women. Most early feminists did not, they considered the fight for equal rights especially in politics and the law their major task. In the twentieth century the legal and economic bases have come into question by virtue of women's entry into the labour force. Similar to early feminism which developed first in a fast industrialising country, Great Britain, the new feminism emerged in an industrialised society with a very large number of college educated women, the United States. One of their speakers, Kate Millett, describes both family and society as patriarchal and distinguishes between "traditional patriarchy" in which women have no legal standing or economic existence and "modern patriarchy" in which women are formally accorded equal or nearly equal rights with men, but in which women do unpaid labour in the home rather than working for wages outside it.

Shulamite Firestone sees male domination in the family as the historical origin of class system and argues that a biological family in which women are dependent upon men, creates a psychology that makes possible hierarchical relations throughout society.

All these provocative ideas have been most influential in highly industrialised societies with a large exposure to mass media, possibility to mobilise women through trade unions and associations. The close link between women's educational achievement, rate of employment, political involvement and strong demand for more equality and autonomy, definitely confines the continuous repercussions of women's movements to relatively rich countries - capitalist or socialist - with no unemployment. Where the great majority of the population ignores hunger, illiteracy, lack of hygiene and medical care, these are the sites which are in quest of a new style of life and which are experimenting with new forms of marriage too.

II. Emerging alternative life styles

The above briefly outlined factors largely contributed to a significant change in regard to marriage. For centuries and even today in meridional Europe, the individual was expected to live for the family, whereas nowadays at least in western Europe and North America the individual assumes that in the first place he has a right to be happy, whether in or outside the family. This new concept of marriage and family which the well known French sociologist André Michel defines as "eudemonistic conception" is a recent one. When Saint Just wrote "Happiness is a new idea in Europe", only the well-to-do bourgeois, product of the French revolution, were able to benefit from a secular life philosophy, discarding freedom-limiting religious beliefs. In the twentieth century however this elitist style of life together with the democratisation of the large masses became a goal for almost all social states. This evolution confronts us with the following characteristics:

- a. Except for large land-owning farmers or upper bourgeoisie families, the free choice of partners has replaced the pre-arranged marriage.
- b. In all western Europe there is a strong decline in marrying. This decline seems to be linked with the educational level of women. As Nadia Youssef and Shirley Hartley have proved (7) in an eighty-country survey, there is definitely a positive correlation between illiteracy and the rate of marriage.
- c. With the decrease of marriage, there is also a noticeable increase in divorces. Furthermore, it is predominantly women who are asking for divorce. Out of 100 divorces, the percentage of women who are seeking the dissolution of marriage are as follows: 71% Federal Republic of Germany, 66% Switzerland, 61% Finland and Great Britain, 59% France, 55% Netherlands, 50% Belgium.
- d. Another alternative is the relationship of the couple without cohabitation (boyfriend relationship). In France within the 20-24 year-old women, 10% were living in free union, while another 11.5% were having a steady relationship without cohabitation. This second group might be considered as constituting a "trial marriage".
- e. Parallel to the changing attitude toward marriage and divorce, new alternative forms of family life are emerging. In the first place "free unions" have to be cited. In France in 1976, 44% of those who contracted marriage were previously living in a form of "free union" (concubinage).
- f. A third alternative to the traditional marriage is the "one parent" or "incomplete" family. Within this group the percentage of separated or widowed women are diminishing, while the number of divorced or bachelor mothers are increasing.

In contrast to these new alternative life styles, which are the outcome of manifold structural changes, one has also to mention the "traditional de facto marriage", such as in the case of Turkey. Aiming to change in a radical way the status of Turkish women, the Swiss Civil Code was adopted in its totality as far back as 1926. During this legal reception only the age limit for marriage was changed and lowered from 20 to 17 for men, 18 to 15 for women. However social reality reveals a different aspect. This implies the sufficiency of the partners with an informal, non-registered, community-like acknowledged religious ceremony, which leads to no legal

consequences. While in recent years the tendency moves toward the model of "double ceremony marriage" which means a religious ceremony followed by a civil, formally registered marriage - this pattern is observed all over Turkey both in metropolitan cities and rural settlements above 3,000 up to 75% - still in a number of less developed regions of Turkey as well as among the Turkish migrant workers community abroad, de facto marriage, called "imam marriage" can be frequently encountered. However the Turkish legislator and courts in order to encourage the adoption and spreading of the Turkish Civil Code, categorically refuse to take de iure notice of this factual situation. A law project to modify divorce procedures has so far not been enacted. Adultery and bigamy are offences covered by the Turkish Criminal Code. In case of complaint the offenders may be sentenced to imprisonment.

The fact that over the years a considerably large number of de facto marriages have not been registered induced the Ministry of Justice to take action in order to legitimise all children born out of wedlock. Thus the Turkish parliament passed a series of laws (No. 2330 (1933); 4727 (1945); 5524 (1950); 6650 (1956)). The total figure of registration under these laws is 7,724,419 children. Each time the Registrar of Civil Affairs has been authorised to issue each new born child a regular birth certificate without requesting the normally obligatory marriage licence. Social policy benefits such as free medical treatment, maternity allowance, purchase on discount in government agencies are only available in case of formal marriage. Since the alternative of recognising a traditional de facto marriage would indirectly imply a departure from secularism and a return to the Sharia and theocratic state, the likeliness to recognise such unions seems near to nil. The official attitude in line with constitutional protection of the family (Article 35) is to encourage couples to perform the act of marriage according to the requirements of the law, thus acquiring a legal status.

III. Cohabitation: terminology and definition

3.1 Terminology

Before attempting to define legally this new concept, a brief enumeration of terms in usage seems important. Indeed the variety of legal terms used as "terminus technicus" in various legislations and jurisdictions is astonishingly broad and confusing. With the exception of Sweden, where during the drafting of the new family law the Minister of Justice explicitly requested that any new legislation ought to be neutral, the terms used in a number of western European and socialist countries varies considerably according to the approach courts and law-makers are adopting (8). In order to give an idea about the bewildering richness of this terminology, here are some of the most common terms used in European countries:

France: union libre, concubinage, personne à charge, ceux qui vivent maritalement, mariage de fait, ménage de fait. (Neither the term "free union" nor "concubinage" can be encountered in legislative texts, except for Article 340 of the Civil Code. The law makers prefer the neutral term "depending person", the social legislation extends protection to those "who live maritally".)

Federal Republic of Germany: nicht eheliche Lebensgemeinschaft, Konkubinat, Eheähnliches Zusammenleben wilde Ehe, Rentenkonkubinat, Onkelehe, Bratkartoffelverhaeltniss. (Non-marital life companionship, marriage like common living, wild marriage, living in sin together, pension concubinage, uncle marriage, roasted potato relationship.)

The word "concubinage" is still in the Federal Republic of Germany the terminus technicus. Judges and lawyers, depending on their moral views, either use it or replace it by such terms as "a relationship similar to marriage". Even the term "roasted potato relationship" was not found "defamatory" by the Higher Land Court in Schleswig Holstein (9).

Holland: concubinage, cohabiting out of marriage, conducting a lasting common household.

Switzerland: de facto marriage.

USA: common law marriage, living together, ambiguous marriage.

Other Anglosaxon countries: informal marriage, unmarried cohabitation, domestic partnership, de facto relationship, de facto marriage, putative marriage.

Hungary: life community, cohabitation, long term cohabitation, non-marital union, concubinatus.

Yugoslavia: long term cohabitation, non-marital union.

3.2 Definition

In spite of the broad range of legal terms, there seems to be more or less a consensus on the definition of this kind of social conduct which a social scientist would call marriage behaviour, but which the applicable law does not recognise as such. Broadly speaking, this includes those heterosexual unions, which are entered into with some idea of duration and in which the couple hold themselves out to the relevant community as in some way belonging together (10). In Sweden and Great Britain some laws are looking for the presence of a child.

The laws in Canada provide quite explicit definitions. Thus the Family Maintenance Act 1978 of Manitoba equates unmarried couples and married ones, "where a man and a woman who are not married to each other have cohabited for a period of one year or more and there is a child of the union ... while they are still cohabiting or within one year after they cease cohabiting".

Similarly the new Family Reform Act of Ontario accepts cohabitation in two cases: "a man and a woman not being married to each other who have cohabited (a) continuously for a period of not less than five years or (b) who have been in a relationship of some permanence where there is a child born of whom they are the natural parents and have cohabited within the proceeding year".

In the same line the Family Relationship Act of Australia regards a person as a "putative spouse" of another if he is, on that date, cohabiting with that person as the de facto husband or wife of that person and (a) he has cohabited with that person continuously for the period of five years immediately preceding that date or has during the period of six years immediately preceding that date so cohabited with that other person for periods aggregating not less than five years or (b) he has had sexual relations with that other person resulting in the birth of a child.

In socialist countries the law-makers, by not requiring the presence of a child in a non-marital relationship, pay special attention not to equalise this type of a relationship with a marital union. The basic reason seems to be a pro-natalist consideration. All incentives for credit extension and allocation of housing are solely allocated to married couples. According to the new Hungarian Civil Code cohabiting persons are defined as "a woman and a man living together in economic and affective community without concluding marriage". In Yugoslavia similarly cohabitation is defined as the union of a man and woman established solely by the consensus of both parties (11). The duration of this relationship is not determined. The law on marriage and family relations of the SR of Croatia stipulates "a long period of time" (Article 25-4).

Thus the options for the determination of cohabitation are manifold. The main elements are: public reputation, cohabitation (and/or support) for a period of time, or the birth of a child.

In Great Britain these criteria have been widened. Indeed the Supplementary Benefits Commission uses six criteria in deciding whether cohabitation exists or not. These criteria are as follows:

1. public acknowledgement;
2. stability of the relationship;
3. the sharing of accommodation;
4. whether there are children of the relationship;
5. financial support; and
6. the existence of a sexual relationship (12).

IV. Patterns of legal response

In the major western countries, where marriage-like unions have become increasingly visible, there is a noticeable trend on one side to dejuridify formal marriage, on the other side to juridify informal marriage. This convergence of legal and de facto marriage is more marked in public than in private law. However one important point has to be stressed: whereas in California and Washington (USA) and in the Scandinavian countries informal marriage has emerged as a widespread, substantial social institution, in France this institution received particular legal attention until 10 July 1975 because of the difficulties in obtaining a divorce. In France legal and de facto marriage are converging. The union has come to resemble the legal marriage of the Civil Code by drawing to itself some of the legal effects of marriage (through the filiation reforms) and imitating others (through the *société de fait*). As Scapel states it, in France the matrimonial model has been imposed on those who have declined to marry (13). The English approach seems to be singularly free of ideologising, either in favour of traditional marriage or in favour of removing discrimination against informal marriage. The law there has simply responded to a series of practical problems in a pragmatic way. In the common law countries however the following important distinction has to be made: to the extent that political parties support ministry programmes that have an impact on the family under the parliamentary model of the Commonwealth countries, it is possible that theoretical

considerations and doctrinal consistency may support broader reform efforts than the American model in which legislation is often introduced at the behest of private sponsors (14). Whereas in each of the Commonwealth countries (Great Britain, Australia, Canada, New Zealand) there is a single court at the apex of the national court system empowered to set binding precedents on common law questions, in the United States the Supreme Court has no such power (14).

V. Major legal issues as related to cohabitation

As presented from the sociological angle, it is obvious that in most highly industrialised and developed countries de facto marriage has become more visible and acceptable. Courts and legislatures are increasingly acting and being called upon to act, to resolve the practical economic and child related problems that arise in these unions. As M A Glendon rightly points out (15), in western countries the recent legal development of informal marriage is being accompanied by a diminution of the legal effects of formal marriage. The attribution of legal effects to informal marriage and the diminution of the legal effects of formal marriage seem to interact upon and reinforce each other.

Until the recent past, the law dealt with de facto marriage, when faced with some urgent question due to the death or departure of one of the spouses. Now, legal developments have gradually begun to affect the legal position of the unmarried partners during the course of their union. This has taken place more in public law than in private law, but there too significant innovative measures have been codified.

Within the framework of this report, we shall first try to point out the most important changes in private law and later touch upon the major modifications in public law. The issue of children born out of wedlock, given the fact that this subject has become the focus of a special convention, will not be treated specifically.

5.1 Ante-nuptial agreements - contract cohabitation

One of the hotly debated issues in regard to non-marital relationships is centred around the question whether extra-marital cohabitation can be provided for by legal contract. It was assumed that agreements on starting, continuing or rewarding extra-marital relationships were null and void in the eyes of the law as being contrary to accepted moral standards. Many countries have now discarded this view. In general it is considered that parties are to a large extent free to regulate their cohabitation by contract. The major cause is related to the recognition that the wife is no longer seen as a subordinate in a master-servant relationship, but as a person who enters a voluntary association with the implication of equal rights, duties and contributions.

As stated by W O Weyrauch, pre-marital contracts herald changed attitudes towards marriage and illustrate an increasing tendency to allow the parties to determine the nature and terms of the relationship prior to marriage rather than have those terms imposed by the State (16). Today marriage is not always viewed as a status necessarily entered into for life. Since the parties to a possible future marriage deal with each other on an assumed level of equality and equal bargaining power, their agreement, if it leads to marriage at all, tends to reflect their financial and personal expectations, for instance choice of career and domicile, how many children to have if any, sexual and recreational preferences (17).

In the United States next to common law marriages which require cohabitation and repute of being married, the courts also recognise under certain circumstances "contract cohabitation". Thus the emerging American law of marriage seems to be valued neutral toward different forms of cohabitation. The traditional rules that have governed marriage are relaxed and merge with standards of a contractual or equitable nature for both marital and non-marital cohabitation.

In Canada, the Family Law Reform Act of 1978, section 52 permits unmarried, heterosexual couples, who are living together to enter into binding and enforceable contracts in much the same way as married persons are permitted to do so. They may agree upon their respective rights and obligations during cohabitation or upon ceasing to cohabit or upon death and may deal with the same issues as in a marriage contract (18).

In a number of European countries too marriage contracts have become increasingly popular. In the Netherlands and Sweden cohabitation contracts are no longer illegal. However no claims can be made by them which are contrary to the provisions contained in laws relating to marriage. For instance no contract can ensure that any children ensuing from the relationship bear the father's name.

In the Federal Republic of Germany ready-made contracts which define inter alia the cohabitants' respective responsibilities can be purchased. The value of such contracts - yet to be tested in the court - is doubtful, because German lawyers see in them a possible infringement of Article 6 of the Constitution, which guarantees the special protection of marriage and the family. Contracts of this kind might be regarded as "contra bonos mores" (sittenwidrig), if the consideration for one partner's financial security is seen to reside primarily in sexual services. Furthermore such contracts could also be held to be contrary to public morality if they are construed by the courts as "Knebelungsvertraege" ie contracts restricting the economic independence and economic mobility of one of the partners (19).

In Belgium too the law limits the freedom of contract of people living in cohabitation. Any agreement transferring specific matrimonial effects to concubinage is void as being contrary to public policy. But now the number of agreements declared void is decreasing.

It can be argued in general that the legal device of contract is particularly useful for women from the middle classes and of high educational attainment, who are self-assertive and competitive in their relations with men. It is less adequate for parties of the lower classes and those who, because of the continued differential treatment of the sexes, lack equal bargaining power (20).

5.2 Common home

The question whether a cohabitee has the right to take over the rights of the lease of the common home held by the other partner has been solved expressly in some countries. In Sweden this is regulated by the Act on the Common Dwellings of Unmarried Couples (1973), where the party of an unmarried couple, who has the greater need of the home, has the right to take it over after termination of cohabitation (21).

In Great Britain, according to the Rent Act a person living with a tenant at the time of his death, even if not married to him, has the right to carry on the tenancy provided the relationship was a stable one. The Domestic Violence and Matrimonial Proceedings Act 1976 in Great Britain refers expressly to a man and a woman who are living together in the same household and enables either party to apply to the court for an injunction to exclude the other party from the matrimonial home or a part of it, if the other party is molesting the applicant or a child living with the first party.

In France where the free union while not prohibited is still considered as a de facto situation, outside the realm of the law, legal protection in regard to the common home carries an exceptional character; only in the case of a tenant who lived in a building constructed prior to 1 September 1948 and with whom a person lived for over a year totally on his charge, may the surviving partner request the continuation of the lease (22).

In Hungary in case of death a person who has lived with the deceased for at least six months has also a right to continue the lease of the apartment (23).

5.3 Property

Many difficulties and unjust situations concerning property arise after the dissolution of cohabitation, because the general rules of contract law are not adapted to meet the needs of such situations.

In France in the case of the breaking up of the free union, property is divided as if a de facto partnership (*société de fait*) had existed, but this must be proved. While in earlier years the French courts were exhibiting a more generous inclination to admit the presence of such a partnership, the jurisdiction of 25 July 1949 pronounced by the Cour de Cassation introduced a strong restriction on this subject. A simple contribution of one partner to meet the expenses of the couple is not sufficient. The conditions of a de facto partnership are only admitted if in order to acquire property all resources were pooled in order to acquire immovable property, order furniture or pay invoices or if the collaboration among the two partners exceeded what is called plain conjugal assistance (24).

Furthermore in the case of one partner having worked for the other, he may have his right for remuneration recognised if he acted in good faith and his subsistence has not been assured (25).

In the Netherlands, especially after the adoption of the new Dutch Divorce Law, the legislator following the leading opinions in his country adopted a more neutral position. As a consequence of this new approach in 1976 one court accepted joint ownership of goods acquired during cohabitation. The judge's reasoning was as follows: "That a man and woman who live together in an extra-marital relationship knowingly forfeit the legal protection afforded by legislation to the institution of marriage that the legal regulations to which such cohabitation is subjected must, as far as possible, be brought into line with those relating to the state of marriage". The inference from this was that joint ownership of property must be assumed unless the contrary can be proved (26).

In Anglo-Australian law due to the absence of a system of community property in relation to marriage, the courts rely upon the principles arising out of trusts and equity. These principles are equally applicable to the case of a partnership within and outside the marriage. "This trust ... applies to husband and wife, to engaged couples and to man and mistress, and maybe to other relationships too" (27). As matters now stand the doctrines of trust and/or of a contractual licence go some way towards creating a kind of community property, a kind of "Zugewinnngemeinschaft" as between spouses or the parties to de facto unions (28).

In the United States, where there is no single court at the apex of the national court system to set binding precedents, the courts of a number of States encouraged by expanding recognition of the value of homemakers' services in the context of divorce law, there has been a dramatic parallel recognition of the legal sufficiency of domestic services as a measure for unjust enrichment (29).

On the issue of attributing some property related rights the most debated verdict in recent years in Anglo-Saxon countries is the decision given by the California Supreme Court in regard to the Marvin v Marvin case. Actor Lee Marvin and Michelle Truola had lived together for a period of six years without the benefit of marriage. Michelle devoted herself to homemaking duties, allegedly foregoing a singing career. All property acquired during the relationship was put into Lee's name and at the time of the separation was valued at about one million dollars. Upon their separation Michelle received 1,000 dollars per month pursuant to a voluntary agreement reached between them. However payments stopped after 19 months. Michelle thereupon asserted two causes of action: (a) the first to ask the court to determine her contract and property rights, (b) the second requesting that a constructive trust be imposed upon one half of the property acquired during the relationship. The court decided that although no property was wrongfully held by Lee, Michelle was granted 104,000 dollars "for rehabilitation purposes to re-educate herself and to learn new, employable skills or to refurbish those utilised" (30). The jurisdiction without elevating the status of a non-married relationship to one of marriage, nevertheless represents a flexible application of the law to the contemporary standards of society.

In Switzerland a number of cantons had criminal provisions against cohabitation without marriage until quite recently. In one of them, the canton of Zurich, the criminal law provisions were abrogated as recently as in 1972 by 211,912 to 94,493 votes. Although at present the opinions are still divided, Swiss courts are generally acknowledging a claim of compensation for work done by pseudo-spouses provided a contract exists between the parties (31).

In Yugoslavia non-marital relations have been subject to codification. Thus the Croation Law on Marriage and Family Relations regulates the property rights of non-married cohabiting partners. According to Article 293 the property acquired through the work of the partners to a non-marital union that has lasted for a long period of time is considered their joint property. This property is to be distributed in accordance with the provisions on the distribution of joint property of married couples. However in order to enjoy an equal treatment with marriage, these non-marital unions have to have lasted for a long period of time.

5.4 Support obligation

On this subject two opposed trends are noticeable. The first trend is related to alimony. The absence of a claim for post-dissolution spousal maintenance is, in any event, fast becoming characteristic of legal marriage termination. Thus in Europe, except for England, a number of countries are moving away from the idea that in principle legal spouses have a continuing economic responsibility for each other after divorce. France, Sweden and some American States have adopted as a starting point that there should be no alimony in principle. The other significant trend lies in the direction that whether there is a formal marriage or not, support for the needy part of a dissolved couple should be allowed only in specified cases of need and should, if possible, be temporary (32).

Thus the legislatures and courts are giving the concept of "family" a broad interpretation so that the burden shifts from the community to the cohabiting couple. The major reason for imposing such a liability appears to be the desire to fix liability on the persons living in a family-like situation, to avoid invidious comparisons, with persons living in a lawfully established family and to protect the community from the burden of supporting those who would otherwise be entitled to social assistance (33).

In Yugoslavia provisions related to support obligations are contained in the Croatian Law on Marriage and Family Relations (Article 254-258). These provisions enable partners of non-marital unions which have broken down to receive support from the other partner if they have no means of supporting themselves and are not capable of working or if they are unemployed. Action for support can be brought within one year after the non-married partners have ceased to cohabit. This obligation can be limited to a specific time period, especially if it is possible for the recipient to secure the financial means required for his livelihood within a foreseeable interval of time. The right to receive support is also to be waived (a) if the recipient marries, (b) if the court ascertains that the recipient has entered a new non-marital union, (c) if the right has been abused (34).

5.5 Succession

In most countries a cohabitee does not have the same rights of succession in the case of an intestacy as a spouse. Interestingly enough it is precisely in this area that the development of English "cohabitation law" has been most pronounced. According to the new Inheritance Act of 1975 a de facto spouse may claim reasonable maintenance out of the deceased partner's estate. The claim can only be made if the claimant was being wholly or partly maintained by the deceased before death. No distinction is taken between a de facto and a legal widow. The judge is given full discretionary power.

In the United States, succession legislation has not yet taken account of the claims of de facto surviving spouses. There is however a considerable body of case law involving such claims. The legal position of the de facto widow or widower has been considerably improved in the two American community property jurisdictions, where recent developments have brought about community property-like division of assets upon de facto divorce. A Californian appellate court has given a surviving cohabitant a half share of the property acquired during the period of cohabitation, even though the deceased had also left a living undivorced wife (35).

In Germany on the death of a cohabitee the survivor has no right of inheritance. It is possible for a bequest by will or a gift on death to be made. Should no bequest or gift be made by testamentary disposition a cohabitee is entitled to nothing.

In France where mechanisms to achieve property division between cohabitants have long existed, the question arose whether a de facto spouse could also recover damages for the wrongful death of her provider (36). On this subject there have been different approaches on behalf of the Court of Cassation. The civil division adopted first a liberal, later a conservative approach. The criminal division however reacted differently and continued to award damages, provided that the union had been stable and that it was "non-adulterous", by which was meant that neither partner had a living undivorced legal spouse. In 1972 and 1973 however, the criminal division awarded damages even to women who were in alleged adulterous unions. Then in June 1975 the laws making adultery a crime in France were repealed.

Similarly, in Japan a court decision as early as 1932 allocated the wife and children of a de facto marriage damages as compensation for loss of support arising from the wrongful death of the husband and father, because their relationships were considered to be the same as those of formal marriage (37).

Thus it becomes apparent that particularly in regard to succession, the question of cohabitation is treated extremely differently, ranging from an almost parallel status between wife and mistress (England) to total negation of such a person (Germany, Austria, meridional Europe).

VI. Social law and cohabitation

In the field of social law unmarried couples are recognised in many countries. Very often this is justified by the fact that cohabiting couples form an economic unity, although there is no legal unity. As Carol S Bruch rightly points out (38), when the government's purse is at stake, the degree to which unmarital households are given protection often reflects a blend of considerations: the degree to which individual or family economic need is the basis for benefits, the degree to which social policies control and the degree to which an extension of benefits to a new class of beneficiaries is seen as imposing a strain on public resources. Where economic models play an important role, benefits extended to married couples and their families will be most readily extended to those in identical financial circumstances. For instance, the US Supreme Court ruled that it was not permissible to extend the Food Stamp Programme only to households in which all the members were related. Similarly, programmes in New Zealand that provide support for higher education and housing recognise some informal family units (39).

In Japan, the Labour Standard Act of 1947 provides that a surviving family or a person who has been supported by the income of a deceased workman immediately before his death, is eligible for the survivor's compensation. A de facto spouse thus acquired the position of first ranking claimant to the survivor's compensation (40)

In France, the Law No. 78-2 concerning social security, recognises in Article 13 that "the person who lives in marital terms with a social security beneficiary and is totally supported by him, is entitled after proving this relationship, to illness and maternity insurance". The criteria here applied is marital life under one roof. The right to benefit from such social security rights precludes a yearly renewable declaration (41).

Furthermore, national public enterprises such as the French railway administration and Air France are granting a "couple" reduction to married or non-married cohabitants. Cohabitation also permits the young man performing his military service to be appointed as close as possible to his "home" and the rules concerning the right to overnight leave are applied both to formally married as well as de facto married soldiers (42). Finally, the Ministry of Education has elaborated a procedure concerning the transfer and appointment of teachers married or cohabiting, so that these transfers are not upsetting the family life of these couples. This procedure however is only applicable if the cohabitants have recognised a child. In fiscal matters there is by and large a three-fold category for tax-payers: unmarried, married and widowers. Persons living in the form of a free union are looked upon as unmarried, thus they are paying heavier taxes than the married couple.

In Holland, Section 5 of the General Act on Supplementary Benefits states that in situations which do not differ fundamentally from that of a family, such as brothers and sisters living under one roof or concubinage, supplementary family benefits are to be paid. Every couple living together is in principle looked upon as a family, regardless of sex or marital status. However, if the party receiving assistance goes to live with another person who has an income of his own, his assistance grant is reduced or withdrawn. The principle here is that the community should not pay out more money than is required to cover basic necessities. Concubinage also has an indirect effect in the Old-Age Pension Act. The law permits both parties in case of remarriage or concubinage to retain their pensions (43).

In Great Britain, a number of laws related to social security on one side reflect the norms of a society that encourages stable familial relationships within the status of marriage, on the other side remain neutral toward cohabitation. Thus the Supplementary Benefits Act of 1975 refers to "two persons cohabiting as man and wife", the Social Security Act of 1975 refers to "cohabitation with a man as his wife", the Housing Finance Act of 1972 states that a married couple includes a "man and a woman who lives with him as his wife". English law at present adopts a negative attitude to cohabitation in supplementary benefit and social security areas. Recipients of social security benefits if living in cohabitation lose out. Courts and parliament in England acknowledge stable relationships outside marriage only in the context of domestic violence, family provision on death, contractual licences and the rights to shared property based upon the constructive trust.

In Belgium social security law recognises non-marital cohabitation as a family situation. In France since 1978 unmarried couples can obtain a "certificat de concubinage" with which they can obtain the same benefits under social security law as married couples.

Conclusion

Having briefly examined the underlying factors encouraging the spreading of cohabitation and the various legal responses which have emerged in recent years, it is time to answer some of the questions raised at the beginning of this report.

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1. It seems quite clear that the social pressures leading to cohabitation outside marriage are not uniform. Widespread cohabitation in countries where divorce is or has been until recently either impossible or very difficult to obtain or where the procedure for entering formal marriage is beyond the means of ordinary people raises issues quite different from those facing countries where people choose to cohabit despite easy marriage and divorce laws. Thus one may say that cohabitation so far is not a universal phenomenon.
2. Cohabitation appears to be definitely closely related to fast structural changes. The most effective and lasting factors in this regard are linked to industrialisation, urbanisation, advanced technology, comprehensive social security legislation, full employment, changing status of women, change in sex roles, growth of the sphere of privacy. From the political point of view one must add the degree of secularisation, participatory democracy, adherence to human rights, legislation of progressive, egalitarian legal reforms. All these additional factors are a corollary to this development. Thus in such countries which have reached a high level of technological development, the alternative life style adopted by the young generations particularly seems to have transformed a protest movement and/or the values of a counter culture at the beginning, into a social norm meeting general approval by public opinion. Thus widespread juvenile cohabitation rates of today, will most probably force the responsible law-making bodies of tomorrow to enact detailed legislation in the near future.
3. Whether the response in less developed European countries with socio-political values closely associated to religions with rigid, norm-setting character such as Catholicism and Islam, will be equally fast and comprehensive, is doubtful. In all these countries the family is looked upon both from the constitutional as well as sociological point of view as one of society's basic units, performing an important part of its social activities. Religious belief systems in these countries are reinforcing the passivity of women and are orienting them toward rather "feminine" occupations. Under such circumstances cohabitation in general functions by and large only in favour of men by freeing them from a cluster of legal obligations, while contributing to the exploitation of the women, who are mostly performing various services of domestic character. Furthermore, in these meridional countries more lax rules of conduct - if based on an egalitarian basis - remain rather the monopoly of the upper income groups or other marginal groups such as students, migrants.

This explains the weight of tradition in southern European countries, still strongly dominated by feudal structures and agricultural production. Domestic migration towards industrial centres has not come to an end and disparities between village and city life in terms of education, health care, working conditions and leisure time activities are still quite sharp. Pre-arranged marriages based on inter-family alliances have two important consequences: compensation for loss of the unpaid worker and a high rate of marriage among relatives.

4. However, even those countries where cohabitation appears to affect only minority groups or is unilaterally determined by the male side, the problem deserves intensive attention. Whether cohabitation appears as a visible new way of life or a transitory solution for exceptional situations such as an interval between two marriages, benefitting of pension rights etc, its problems have grown too large to be ignored. Given the fact that cohabitation reflects not only the personal preferences of two individuals, but leads to the emergence of children and eventually to adopt or reject the community-financed egalitarian ideals, it is the duty of social scientists and lawyers to take a closer look at this phenomenon.

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5. The major problems lawyers today are confronted with revolve around the question: Should the institution of marriage in its modern form, be overtly encouraged or not? Should the State remain neutral as between cohabitation and marriage or explicitly express its preference? Can the State totally ignore de facto marriages? How should we interpret the constitutional protection of the family, adopted by some European countries, in a narrow or broad sense?

Footnotes

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