GENERAL LESSONS FOR EUROPE BASED ON A COMPARISON OF THE LEGAL STATUS OF NON-MARITAL COHABITANTS IN THE NETHERLANDS AND GERMANY

WENDY M. SCHRAMA

1. INTRODUCTION

Non-marital cohabitation is a social phenomenon which increasingly confronts European legal systems with rather urgent and complex questions. This relatively new social development not only affects family law, but also has far-reaching consequences in many other legal areas, like inheritance law, tax law, social security and pension law. In order to deal with the questions raised by non-marital cohabitation, different legal models have been developed in the various European countries, of which a majority also include regulations for same-sex couples. The registered partnership legislation in the Scandinavian countries and The Netherlands, the introduction of *Eingetragene Lebenspartnerschaft* in German law, the French PaCS, the Belgian Act on Statutory Cohabitation, the Property (Relationships) Act (1984) (New South Wales) and the Property (Relationships) Act 1976 (New Zealand) are just a number of different models illustrating the growing need for legislation in this area of the law.

From this perspective, it is not surprising to see that the Commission on European Family Law is planning to dedicate their third working field to informal lifestyles. In view of the harmonisation of family law in Europe, it is interesting to compare the Dutch and the German legal systems, since this generates a number of general ideas. These ideas relate in the first place to understanding what non-marital cohabitation actually is. In this respect it is necessary to take a closer look at sociological and demographical research regarding informal lifestyles. Section 2 will in particular focus on the legal implications of the sociological dimension of non-marital cohabitation. Secondly, the different approaches of the Dutch and German jurisdictions with respect to changes in society relating to lifestyles will be analysed in the context of constitutional differences between both systems (section 3). The third general lesson is related to the value of lifestyles as a means to regulate not only the internal relations between

partners, but also the relation to the State. From this point of view, it also deals with the ways in which the Dutch and German legal systems have responded to social changes with respect to non-marital cohabitation (section 4). After deliberating on these general lessons, this paper will end with some concluding remarks (section 5).

2. LEGAL IMPLICATIONS OF SOCIOLOGICAL RESEARCH ON INFORMAL LIFESTYLES

2.1. WHAT IS NON-MARITAL COHABITATION?

Currently, there are an estimated 1.4 million non-marital cohabitants in The Netherlands[1] and 4.2 million in Germany.[2] An important problem which has to be tackled in any examination of the legal position of non-marital cohabitants is the question of what non-marital cohabitation is. Since there is, unlike marriage, no system to register the beginning or the end of non-marital cohabitation, a clear definition thereof is lacking in both countries. A formal approach does not therefore offer any help. It would be possible to adopt one of the definitions used in the Dutch or German legislation.[3] However, looking at a legal definition only provides a halfway solution, since social facts and human behaviour partially determine what is important for the law; not only the law itself.

Just one example to illustrate this. Imagine that empirical research shows that 95 per cent of non-marital couples live together for just one year before getting married. This would confront a legal system with rather different questions and priorities compared to a situation in which non-marital cohabitation would turn out to be a long-lasting lifestyle with a high birth rate. What are the implications of sociological research[4] for the legal systems in The Netherlands and Germany?[5]

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1 STATISTICS NETHERLANDS, http://www.cbs.nl/en/figures/statline/index.htm. Data from 2003.

2 H. ENGSTLER & S. MENNING, *Families in Germany – Facts and Figures*, 2004, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, Berlin, p. 10. Data from 2000.

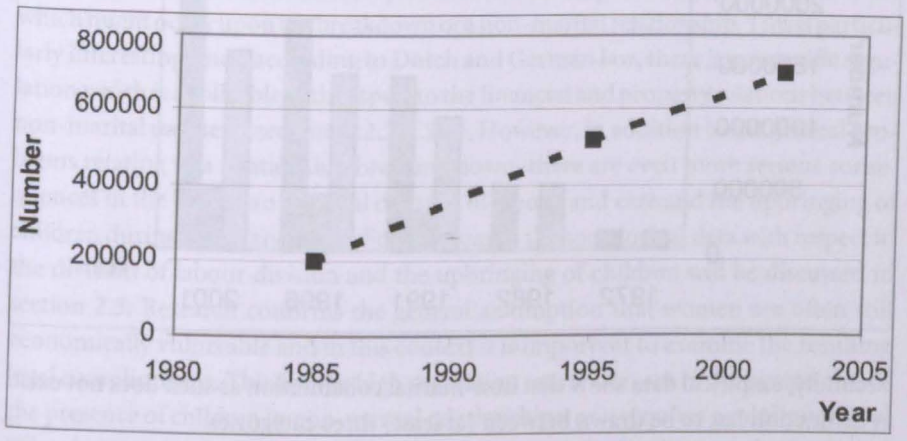
3 In The Netherlands there are at least fifteen different legal terms referring to the situation in which couples lives together without being married, for example in tax law ('tax partnership'), social security ('joint household'), rent law ('durable joint household') and private law ('life-companion' and 'living together as husband and wife'). In Germany the term *eheähnliche Gemeinschaft* (social security law) and 'durable joint household' (tenancy law) are the most important terms. See W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 128-212.

4 See W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 9-97 for a much more elaborated presentation of sociological and demographical data.

5 However, lawyers should be careful with the use of empirical data, since, as a non-specialist, one encounters several difficulties. First, what are the relevant sources of sociological research? Secondly, the interpretation of those sources is rather complex, in particular when there is no consensus among

First of all, figures 1 and 2 show a rapid increase in the number of non-marital cohabitants over the last few decades in both The Netherlands and Germany. Cohabitation has obtained a secure position. One in six cohabiting couples consists of non-marital cohabitants in The Netherlands versus one in ten in Germany.

Figure 1. The number of non-marital relationships in The Netherlands

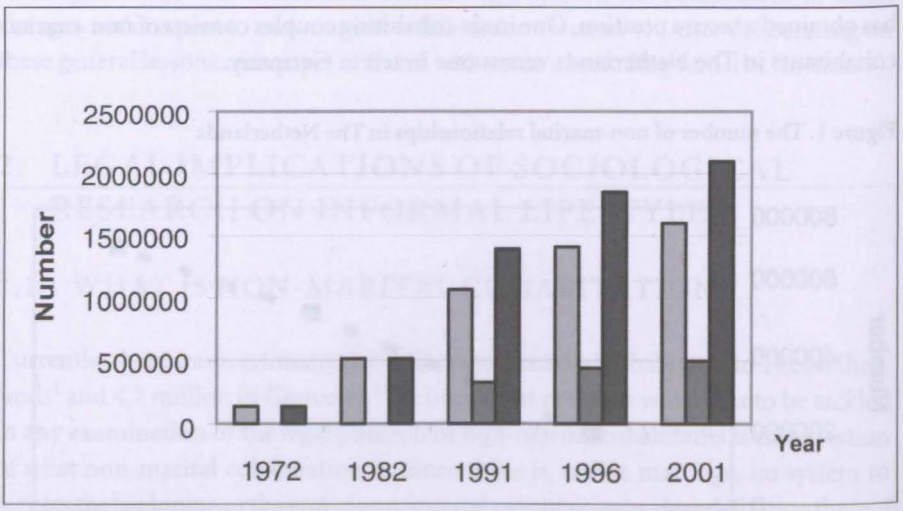


Source: Statistics Netherlands

sociologists themselves. Thirdly, the results of research carried out in different countries (like in this case The Netherlands and Germany) are often not comparable, since research differs, for example, on cohorts, ages, periods, calculating methods and definitions. Finally, there are hardly any comparative analyses between different countries by sociologists on this subject. See, however, K. KIERNAN, The State of European Unions: An Analysis of Partnership Formation and Dissolution, in: M. MACURA & G. BEETS (eds.), *Dynamics of fertility and partnership in Europe, Insights and lessons from comparative research*, Volume I, United Nations, New York and Geneva, 2002, p. 57-76 and K. KIERNAN, The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe, *IJLPF* 2001, p. 1-21.

A frequently appearing example which demonstrates the risk of the use of demographic data in other disciplines is the reference in legal publications to the decline in marriage rates, which is interpreted as a sign of the diminished status of marriage. However, such an interpretation may oversimplify reality, since a decline in marriage rates can also be the result of a changing population structure. If, for instance, the average age of the population increases, this could be a relevant factor in explaining a decrease in marriage rates.

Figure 2. The number of non-marital relationships in Germany[6]



Secondly, empirical data show that non-marital cohabitation as such does not exist. A distinction has to be drawn between (at least) three categories:[7]

1. Pre-marital cohabitation: young people who live together only for a limited period of time (mostly between 0-5 years). A large minority of these cohabitants eventually separate, the remainder will eventually marry. This is the largest group of cohabitants in both countries.
2. Post-marital cohabitation: One or both partners were previously married or lived in a long-term non-marital relationship. There are no specific data on the proportion of post-marital cohabitants who convert their relationship into a marriage. In Germany 33 per cent of all non-marital cohabitants are post-marital; there are no reliable data for The Netherlands.[8]
3. Long-term non-marital cohabitation, which the partners consider to be an enduring alternative to marriage or registered partnership. Only very few cohabitants live together for a long period.

Each category has its own characteristics, but the existing sociological research does not yet provide a sufficient insight into the exact differences between the groups. However, lawyers and the legislature should be well aware of this diversity, since each of the categories has its own legal problems. The relevance of this classification is related

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6 Figure from W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 14.

7 See also W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 95-97.

8 Of the unmarried couples with children 28 per cent consist of post-marital relationships.

to general policy concerns and to the legislative question of whether the position of non-marital cohabitants has to be reformed in certain aspects.[9]

In the next sections the sociological characteristics will be analysed in the perspective of the legal position of non-marital cohabitants. First, section 2.2.1 focuses on the relatively high separation rate of non-marital relationships. The legal implications thereof are numerous. In the first place, it is interesting to investigate the problems which might occur upon the breakdown of a non-marital relationship. This is particularly interesting since, according to Dutch and German law, there is no specific regulation which is applicable with respect to the financial and property relations between non-marital partners (sections 2.2.2-2.2.4). However, in addition to the general problems relating to a relationship breaking down, there are even more serious consequences in the case of an unequal division of labour and care and the upbringing of children during the relationship. For that reason the sociological data with respect to the division of labour division and the upbringing of children will be discussed in section 2.3. Research confirms the general assumption that women are often still economically vulnerable and in this context it is important to examine the resulting legal complications. Thirdly, the high separation rate is relevant in the perspective of the presence of children in non-marital relationships, as it requires a minimum level of legal protection for this group. In this context the current legal status of non-marital cohabitation will be evaluated in section 2.4. Finally, some general conclusions will be formulated (section 2.5).

2.2. PREVENTION AND CONTROL OF CONFLICTS WHEN A RELATIONSHIP BREAKS DOWN

2.2.1. High Separation Rate

The separation rate between non-marital couples is higher than between married couples, especially in the case of pre-marital cohabitants.[10] Most breakdowns take place within 8 years after the start of the cohabitation; in this period the differences with respect to the divorce rate are remarkable in both countries.[11] In The Netherlands there were an estimated 70,000 separations (from a total number of 700,000 relationships)

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9 This classification could also be useful in determining which cohabitation period could be used in a specific provision in order to legally qualify as a cohabiting couple.

10 Since there is – unlike for divorce – no system to register separation between non-married couples, these figures represent estimations based on cohort-based studies.

11 W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 26-31, p. 68-72 and p. 89-90.

versus 35,000 divorces (from a total number of more than 1.7 million marriages) in 2000.

The implications of these sociological findings for the law are far-reaching, since the fact that a large number of separations take places invariably leads to the question whether the legal position of partners upon the breakdown of the relationship gives rise to certain problems. This issue is relevant to all three types of non-marital cohabitation, although pre-marital relationships are most likely to end in separation. Sociological research does not reveal the specific separation percentages in post-marital and long-term cohabitation and therefore it is difficult to quantify the number of these couples experiencing a breakdown. Nevertheless, one would expect that the stability of these relationships is no higher than that of marriage, which means that the risk of separation is still substantial. Furthermore, the nature and effects of the problems caused by a separation might vary for the different categories. The separation of a long-term non-marital cohabitation might be expected to lead to more, and to more intense problems compared to short-term cohabitation, since the effect on the financial and property relations between the partners in a long-term relationship can be expected to be more profound, especially when there are children involved.

In order to create a better understanding of the legal implications of the high separation rate, it is necessary to go into some detail concerning the current legal situation. As stated before, separation raises the question whether the legal position of non-marital couples results in specific problems. In The Netherlands and in Germany, no legal regulations exist specifically aimed at the financial and property aspects of the relationship between non-marital cohabitants. General contract and property law apply, which results in a number of problems, due to the fact that the relations between cohabiting partners deviate from other types of relations in certain respects.[12]

The special nature of love-based relationships and the resulting problems for the application of general property and contract law will be examined in 2.2.2. Subsequently, attention will be paid to alternative solutions to overcome these problems. In this context the significance of marriage law, company law and cohabitation contracts will be analysed in section 2.2.3. The way in which the courts deal with claims arising out of conflicts between former cohabitants will be dealt with in 2.2.4.

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[12] The same special nature gives rise to problems when one of the parties dies. The problems of the surviving cohabitant are even more urgent, since non-marital partners have hardly been recognised in Dutch and German inheritance law. See: W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 474-490.

2.2.2. *The Special Nature of Love-Based Relations*

The relationship between non-marital partners is characterised by a special nature, due to a number of factors. First, the relations between partners are characterised by the fact that the personal love-relationship between the partners determines the financial behaviour of the partners.[13] Contract law and property law are based on the general presumption that each party acts in his/her own interest. Consequently, there is hardly any room to take the special nature of love-based relations into account. The *quid pro quo* principle underlying general contract and property law functions well between two persons who do not know each other and who act primarily on a commercial or financial basis, but this rule is hardly relevant to non-marital love-relationships. This also implies that coincidence plays a substantial role. During the relationship it is usually irrelevant to the partners who pays what, who owns what and who contributes what to the other partner.

The second special element of the relationship between cohabiting partners is the fact that the partners are home-sharers. This brings about certain complicating factors as well. It is for example more difficult to establish property claims with respect to moveable goods. Besides, after separation there is only one home, but – due to housing shortages in both countries – two persons (and possibly children) who might want to continue living there.

Thirdly, due to the emotional nature of the relationship, it is more difficult to resolve conflicts upon the breakdown of the relationship. This typical nature of a love-based relationship is not limited to non-marital cohabitation, but also manifests itself in other relationships like marriage or a registered partnership. In this sense, marriage and non-marital cohabitation are both species of the genus love-relationships. To a certain extent even relations between cohabiting relatives (brothers, sisters, etc.) share some of these typical characteristics.

With respect to marriage[14] Book 1 of the Dutch Civil Code and Book 4 of the German Civil Code provide a clear system of coherent provisions regarding the financial and property consequences of the relationship between the spouses and between spouses and third parties. In these rules the special nature of love-based relationships is taken into account. For non-marital cohabitation there is no such regulation.

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13 This applies to all types of cohabitation, but the extent to which these factors manifest themselves might differ. W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 368-371.

14 Also with respect to the registered partnership and *eingetragene Lebenspartnerschaft* there are clear provisions.

2.2.3. *Alternative Solutions?*

In both Dutch[15] and German[16] legal literature, attempts have been made to overcome the problems resulting from the difficult position of non-marital cohabitation in private law. From this point of view, both marriage law and company law could be relevant. Next to this, the question arises whether cohabitation contracts may contribute to a solution for the difficult application of general civil law.

In both The Netherlands and Germany, the prevailing view is that it is not possible to apply marriage law in the context of non-marital cohabitation. Application on the basis of an assumed analogy between marriage and non-marital cohabitation is generally observed to be impossible, regardless of whether a couple have minor children.[17] Although the level of similarity required for an analogy might be met, the most important bottleneck is that marriage law mostly consists of provisions which are so closely connected with marital status that it is not possible to apply them outside marriage.[18] In a case brought before a Dutch court at the end of the 1970s the question rose whether matrimonial property law could actually be applied by reason of analogy to property relations between non-married couples. Although the district court judge did apply the marriage provisions,[19] this line of reasoning has generally been disapproved.[20]

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15 In The Netherlands little attention has been paid to the significance of informal lifestyles in the last decade. See, however, for example, C. FORDER, *Het informele huwelijk: de verbondenheid tussen mens, goed en schuld*, Deventer: Kluwer and A. VERBEKE, Naar een billijk relatie-vermogensrecht, *TPR* 2001, p. 373-401. Both primarily concern private law aspects of the relations between partners.

16 Apart from the numerous publications in journals and the *Kommentare*, there are a number of general books on non-marital cohabitation, like, for example: D. BURHOFF, *Handbuch der nichtehelichen Lebensgemeinschaft*, Herne/Berlin: Verlag für die Rechts- und Anwaltspraxis 1998; H. GRZIWOTZ, *Nichteheliche Lebensgemeinschaft*, München: Verlag C.H. Beck 1999; R. HAUSMANN & G. HOHLOCH (eds.), *Das Recht der nichtehelichen Lebensgemeinschaft*, Handbuch, Berlin: Erich Schmidt Verlag 2004. In contrast to The Netherlands the legal position of non-marital cohabitants has also been examined in public law.

17 W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 272-282 and p. 346-357.

18 In The Netherlands it has been argued that Art. 1:131 (1) DCC concerning the onus of proof with respect to the property claims of spouses concerning moveable goods could be applied to conflicts between unmarried partners. See: W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 278-280.

19 Rb. Groningen (District Court) 5 November 1976, *NJ* 1977, 407.

20 HR 8 October 1982, *NJ* 1984, 2 annotated by CJHB. Also in the legal doctrine of that time the decision was heavily criticised.

Various other solutions have been suggested, like the application of the provisions of company law concerning partnerships (*'maatschap'* and *'(Innen-)gesellschaft'*)[21] and the qualification of cohabitation as a comprehensive *contract sui generis*.[22] Both solutions have proved not to be successful.

Another means to deal with the financial and property law aspects of non-marital cohabitation is a cohabitation contract. In The Netherlands, approximately 50 per cent of unmarried couples have concluded a cohabitation contract (*samenlevingscontract*).[23] In my opinion, this relatively high rate has to be explained in the light of conditions in other areas of law which require a cohabitation contract to be signed by a notary, in order to obtain certain financial advantages. In order to qualify as a cohabiting partner for some provisions of inheritance law, a cohabitation contract signed by a notary is required.[24] A partner's pension will usually also be paid on the basis of a contract between the partners and signed by a notary.[25]

In Germany, the number of non-marital cohabitants who have concluded a cohabitation contract (*Partnerschaftsvertrag*) seems to be considerably lower than in The Netherlands.[26] According to a study carried out at the end of the 1990s, only a small number of non-marital cohabitants had concluded a contract which was signed by a notary. Mostly, if there is any contract at all, this concerns an oral agreement between the partners, with a rather limited range of issues dealt with.[27]

Sociological research seems to suggest that in both countries partners are usually not aware of the important legal differences between marriage and cohabitation, in particular with respect to the private law effects of relations between the partners.[28]

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21 W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 416-424. The application of the provisions has been rejected by the Dutch Supreme Court: HR 8 July 1985, *NJ* 1986, 358. The German BGH has also rejected the general application of company law provisions in the GCC: BGH *FamRZ* 1980, 664.

22 W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 382-384.

23 STATISTICS NETHERLANDS: A. DE GRAAF, Helft samenwoners heeft samenlevingscontract, *Webmagazine* 22 maart 2004.

24 Art. 4:82 DCC.

25 In practice a number of models for this type of contract have been developed with a varying degree of economic commitment: M.J.A. VAN MOURIK, *Modellen voor de Rechtspraktijk*, Leids model I-V, Kluwer Losbladige.

26 Bundesministerium für Jugend, Familie und Gesundheit, *Nichteheliche Lebensgemeinschaften in der BRD*, p. 87 seems to indicate that in 1985 approximately 20 per cent of non-marital couples had concluded a cohabitation contract.

27 L.A. VASKOVICS & M. RUPP & B. HOFMANN, *Lebensverläufe in der Moderne: Nichteheliche Lebensgemeinschaften, Eine soziologische Längsschnittstudie*, Opladen: Leske + Budrich 1997, p. 139.

28 W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 375 and p. 378.

This implies that cohabiting partners often do not realise that there is no specific legal regulation to determine their relationship.[29]

A cohabitation contract can be helpful to prevent and solve conflicts between the partners upon the breakdown of the relationship, since it provides some insight into the intentions of the parties. However, the use of cohabitation contracts may introduce new problems.[30] Due to the nature of everyday life, the relationship between the partners is dynamic. This is in particular relevant when children are born during the relationship, since this might have a large impact on the earning capacity of, mostly, women (see section 2.3). The partners will probably not have foreseen these changes and the contract may contain provisions which are not supposed to regulate the changed situation. Imagine, for example, a couple where both partners have full-time employment, who then agree that no compensation is payable upon the breakdown of the relationship. After five years a child is born and the woman reduces the time spent on paid work. The question then arises whether the parties intended to include this new situation in their contract. Although the partners are free to adapt the contract to the new conditions, in practice very few couples appear to do so.

A second limitation of cohabitation contracts is that it is not possible to solve a number of problems. It is difficult to agree to a just and practical compensation mechanism for contributions to the partner's property or the partner's career, since most systems would require good bookkeeping, which is difficult in practice. Although not related to the specific problems of separation, it is important to note that the legal position of unmarried cohabitants in inheritance law cannot be easily improved by a contract (or will), since many provisions in inheritance law are of a mandatory nature. Furthermore, the partners cannot attribute jurisdiction to the family law section of the courts,[31] they cannot opt for a petition procedure instead of a summons procedure and they cannot attribute competence to the court to make provisional court orders with respect to the use of the home and furniture, maintenance, child-related issues, etc. (see also section 2.4).[32]

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29 This supports the idea that in The Netherlands the desire to regulate mutual financial and property relations is not a decisive determinant to conclude a contract, but that the economic advantage of qualifying as cohabitants in other fields of law is such a determinant.

30 It is difficult to asses the practical importance of this problem. In both countries there is little case law in which cohabitation contracts play a role. See however Rb. Middelburg, sector kanton, 15 May 2002, LJNAE 3258.

31 In The Netherlands divorce cases are subject to a petition procedure whereas problems arising from the breakdown of a non-marital cohabitation are subject to a summons procedure. The first type of procedure is characterised by an informal, more oral nature than the latter, which obviously has advantages.

32 See, for example, Arts. 822 and 827 Dutch Code of Civil Procedure.

In conclusion, using the freedom of contract by agreeing to a cohabitation contract can certainly contribute to conflict prevention and conflict settlement upon the breakdown of a relationship. However, it is not the ultimate remedy to mitigate the problems resulting from the general application of contract and property law to the relations between cohabitants. The most important limitation is that a substantial number of couples have no cohabitation contract at all. Secondly, contracts are usually not adjusted to changed factual circumstances and, finally, a number of issues cannot be solved by means of a contract.

2.2.4. *Case Law*

So far the conclusion is that, although attempts have been made to deal more adequately with financial and property conflicts between former partners, there are no real solutions in contract and property law or in marriage law. In both countries there is a substantial body of case law in which financial and property aspects between former unmarried partners are the central issues.[33] Empirical findings contain no data on the number of disputes between partners upon the breakdown of the relationship and the way in which these disputes are settled. Presuming that only a very limited proportion of the couples experiencing a conflict apply to the court for a solution, the number of discordant separations is potentially considerable.

A number of issues frequently appear in the case law. In The Netherlands property relations are a regular source of disputes.[34] In The Netherlands there are also numerous decisions concerning the question of who is allowed to continue to live in the rented house after separation.[35] The courts in both countries often have to deal with compensation claims for contributions by one partner towards the other partner's house or company.[36]

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33 Outside this scope there is a body of case law as well, for example with respect to the principle of equality (see section 3) and to the interpretation of legal definitions of non-marital cohabitation in all fields of law.

34 HR 8 October 1982, *NJ* 1984, 2 (regarding property rights over a dog); HR 16 January 1987, *NJ* 1987, 912 annotated by E.A.A. Luijten (with respect to a bank deposit); HR 26 May 1989, NJ 1990, 23 annotated by E.A.A. Luijten (with respect to a capital gain partially realised by a successful joint company on the basis of a implicit contract of co-ownership) HR 17 December 2004, LJN: AR3636, http://www.rechtspraak.nl (with respect to conflicts arising out of property distribution with respect to a house owned by both partners). See further W.M. SCHRAMA, *Vermogensrecht voor ongehuwden samenlevers*, Deventer: Kluwer 2000, p. 63-65. In Germany there appears to be more emphasis on the compensation issue.

35 W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 270-271.

36 W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 445-455 with respect to Dutch case law and p. 459-464 regarding German law.

Not all potential problems result in case law. There are hardly any decisions in The Netherlands[37] and Germany with respect to maintenance between (former) partners, probably because it is obvious that maintenance claims will not be successful. This also appears to be true with respect to monetary claims for compensation for contributions made to the household or towards the care and upbringing of children.

The outcome of procedures is unpredictable. Similar claims lead to different results, depending on the court and the lawyers involved and on the way in which the claim is substantiated. The lack of any clear, specific legal provisions for non-marital cohabitation is a contributing factor, since the rather difficult application of property and contract law is likely to be interpreted in different ways by the courts. Sometimes the decisions are clearly unjust, in particular in cases where the courts do not recognise the social function of non-marital cohabitation.[38] A problem is that judges or lawyers sometimes deal with a conflict between former partners without taking into account the special cohabitation context in which it has arisen. Secondly, also in civil procedural law the special nature of non-marital cohabitation is overlooked. For married couples procedural law offers a special regime, in which there is room to do justice to the special nature of the relationship between the parties. In The Netherlands and in Germany, divorces are dealt with by special family law divisions, instead of the general civil law divisions.

In my opinion it should be considered how introducing family law legislation for non-marital cohabitants could contribute to a solution. Furthermore, changes should be made in civil procedural law. It is important that the family law divisions of the courts have the necessary authority to deal with these conflicts, not only because these courts have the necessary expertise and skills in handling family conflicts, but also because

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37 HR 9 January 1987, *NJ* 1987 annotated by E.A.A. Luijten held that non-marital cohabitation as such does not infer a maintenance duty. In the case before Rb. Leeuwarden 31 January 1985, *NJ* 1985, 728 it was argued that maintenance had to be paid on the basis of an implied contract. The court decided, however, that the fact that both partners had their own financial household did not support the existence of such a contract. The BGH has not yet provided an explicit ruling on whether a post-cohabitation maintenance duty exists, but it is generally presumed that the court would deny this. There is one limited exception in § 1615 l BGB with respect to the mother who has a right to be maintained by the father during a period of at least six weeks after the birth of their child.

38 In The Netherlands the courts sometimes refuse to award compensation for contributions with respect to the purchase or reconstruction of a house owned by the other partner (see section 2.3). However, the courts solve certain other problems in a flexible way which does justice to the nature of non-marital cohabitation, for example with respect to the application of the provisions regarding co-tenancies. In Germany the distinction between contributions which justify compensation and those which do not regularly results, in my opinion, in artificial categories. Even large investments may, depending on the court's interpretation of the partners' intention, not be compensated (see section 2.3).

it would be better if the rules of procedure would leave sufficient room to take the special love-based nature of the relationship between the litigants into consideration.

2.3. PROTECTION OF THE FINANCIALLY VULNERABLE PARTNER

A further implication of sociological research is that the law should provide a sufficient level of protection for financially vulnerable partners. Despite substantial changes over the last few decades, women in The Netherlands and Germany are still an economically vulnerable group, especially when they have children (see also section 2.4). This is most relevant for post-marital and long-term cohabitation, since in most cases the female partner's economic position in a pre-marital relationship has not yet been influenced by the relationship.

In The Netherlands, the participation of women in the workforce has increased considerably over the last twenty years, but this rise is mostly the result of the growing importance of part-time work.[39] Women will generally continue to work after the birth of a child,[40] but the one and a half income family still prevails. In 1992 some 26 per cent of working couples with minor children consisted of this kind of family, whereas in 2003 this had increased to 47 per cent.[41] The proportion of families with minor children in which only one partner is responsible for the income was 34 per cent in 2003; this was 57 per cent in 1992.[42]

The labour force participation of women with children in West and East Germany differs considerably. Before reunification in 1989, 90 per cent of mothers went out to work in East Germany, most of them full-time. After reunification, the employment rate of women – with or without children – stabilised at 75 per cent in the 1990s. Only working women with children under the age of six years participated less (61 per cent) in the labour force in 2000.[43] Since 1991 the proportion of full-time working mothers

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39 STATISTICS NETHERLANDS and A.C. LIEFBROER & P.A. DYKSTRA, *Levenslopen in verandering, Een studie naar ontwikkelingen in de levenslopen van Nederlanders geboren tussen 1900 en 1970*, Sdu Uitgevers, Den Haag 2000 p. 149-151.

40 W. PORTEGIJS & A. BOELENS & L. OLSTHOORN, *Emancipatiemonitor 2004*, Centraal Bureau voor de Statistiek en Sociaal en Cultureel Planbureau, Den Haag 2004, p. 100 indicates that 10 per cent of working women who had a child in 2003 left the labour market.

41 STATISTICS NETHERLANDS.

42 W. PORTEGIJS & A. BOELENS & L. OLSTHOORN, *Emancipatiemonitor 2004*, Centraal Bureau voor de Statistiek en Sociaal en Cultureel Planbureau, Den Haag 2004, p. 70.

43 H. ENGSTLER & S. MENNING, *Families in Germany – Facts and Figures*, 2004, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, Berlin 2004, p. 32.

has declined, mostly because of an increase in the proportion of mothers not working at all.

In West Germany the employment rate for women is to a great extent dependent on the presence of children. Some 85 per cent of women without children in the household are employed in comparison with 63 per cent of women with children in the household. The increasing labour force participation of mothers during the last thirty years is largely the result of an increase in part-time work.

Both in The Netherlands and in Germany women spend more time taking care of the children and the household than their male partners.[44] In both countries the income of women is considerably lower than that of men.[45]

The economic vulnerability of women is not only caused by the differences in the income position of both partners during the relationship, but also by long-term negative effects on the earning capacity of these women. Besides, the division of care and paid work also results in differences in future pension rights and social welfare benefits. These effects last for the rest of their lives.

At the moment, there is hardly any legal protection at all for this vulnerable group in Dutch and German law. Private law encompasses three ways in which a 'household partner' can be compensated for losses suffered as a result of the relationship: 1. Participation in property which is present at the end of the relationship; 2. A right to be maintained after the breakdown of the relationship; 3. Monetary compensation for contributions during the relationship. For married couples all three mechanisms apply on the basis of marriage law, but for unmarried couples there is no legal right to any form of compensation whatsoever. An unmarried partner has, according to Dutch and German law, no right to be maintained, not even if his/her need is directly connected to the division of tasks during the relationship.[46] Next to this, the vulnerable partner will generally not participate in the assets which the other partner has acquired during the relationship, regardless of whether he/she has (in)directly contributed to the purchase of these goods.

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44 W. PORTEGIJS & A. BOELENS & L. OLSTHOORN, *Emancipatiemonitor 2004*, Centraal Bureau voor de Statistiek en Sociaal en Cultureel Planbureau, Den Haag 2004, p. 93-95.

45 W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 34-38 and p. 74-78. In The Netherlands only 41 per cent of women (regardless of whether they have children) were economically independent in 2001: W. PORTEGIJS & A. BOELENS & L. OLSTHOORN, *Emancipatiemonitor 2004*, Centraal Bureau voor de Statistiek en Sociaal en Cultureel Planbureau, Den Haag 2004, p. 70.

46 In The Netherlands one could argue that a maintenance duty can be derived from an implicit contract between the partners, but in practice this solution generates many problems and is not used. See: W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 434-438.

Finally, no monetary compensation has to be paid for contributions like child care and housekeeping, even though the other partner has considerably profited therefrom.

In The Netherlands no general compensation rule has been developed by the courts. The case law of the lower courts is inconsistent and results in different outcomes. There are no claims put forward on the basis of child care; most claims are based on financial investments in real estate owned by the other partner,[47] or on non-financial investment in the other partner's business.[48]

In Germany the general principle on this point of law is the *Nichtausgleichung*, which means that the relations between the partners will not give rise to compensation claims after separation, not even when one of the partners has made substantial contributions, financially or otherwise, to the joint household or the upbringing of the children. The financial and property relations are determined at the end of the relationship and will not be subsequently changed.

There is just one, rather limited exception to this principle with respect to contributions intended to create a joint property interest, which in the perception of the partners belongs to them together, even after separation. For this category, monetary compensation might be appropriate. A problem is how to determine whether the partners intended to create a joint property interest. Substantial contributions by one partner to the property of the other partner might, depending on the circumstances,

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47 HR 26 May 1989, *NJ* 1990, 23 annotated by E.A.A. Luijten (a woman claimed 45,000 euro in compensation on the basis of an implicit contract to share the value of the property. The HR determined that the Court of Appeal had applied an incorrect test); Hof Den Haag 5 January 1977, *NJ* 1977, 569 (financial contributions by a male partner towards the house of the female partner, compensation claim rejected); Rb. Breda 28 June 1977 (unpublished) (concerning a contribution of 4,100 euro by the woman to the man in order to purchase a houseboat. The claim on the basis of unjust enrichment was rejected); Rb. Assen 8 March 1983 and 7 February 1984, *NJ* 1987, 427 (the male partner had invested financially with respect to the purchase of a house; the court granted compensation, but only the exact amount invested and not the increase in the value of the house); Rb. Alkmaar 11 July 1974, *NJ* 1975, 54 and Hof Amsterdam, 7 May 1975, *NJ* 1976, 110 (a claim for 3,200 euro on the basis of contributions by the male partner by reconstructing the house of the female partner was granted on the basis of unjust enrichment). See also HR 17 December 2004, LJNAR 3636 (concerning compensation with respect to financial contributions related to the purchase of a house) and VZNGR Rb. Rotterdam 14 December 2004, NJ Feitenrechtspraak 2005, 130 (with respect to a house).

48 Rb. Assen 8 March 1983 and 7 February 1984, *NJ* 1987, 427 (the court granted one fifth of the profit of the company to the male partner for his contributions); Rb. Arnhem 7 March 1991, *RN* 1991, no. 5, no. 195 (the female partner claimed the liquidation of the partnership. If the male partner does not succeed in proving that no partnership exists, the court will divide the assets of the partnership according to each partner's contributions); Rb. Zwolle 2 June 1993, *PRG* 1993, 3954 (the female partner claimed 220,000 euro because of contributions to the companies which were owned by the male partner on the basis of unjust enrichment. The court tried to reconcile the parties, there was no judgement with respect to the merits of the case).

imply the will to create a joint property interest.[49] The BGH in this respect sticks to a standard of a minimum contribution of about 20,000 euro.[50] Depending on the factual circumstances, compensation can be awarded with respect to the purchase of land and the subsequent construction of a house thereon, for which the partner invested with the title has provided the money while the other partner has contributed considerably by means of working[51] and with respect to the reconstruction of the house.[52] For all other investments, whether financially or by working in the household, taking care of the children or the long-term nursing of a sick partner, no compensation has to be paid after a breakdown.[53] These are presumed to be performed in the interest of the relationship.[54] Drawing a line between both categories is rather difficult, since it is to some extent arbitrary whether an intention to create a joint property interest is to be inferred from the facts. Therefore, the legal position of non-marital cohabitants is not clear in this respect. In addition, sometimes the results are, in my opinion, unfair, since this approach does not correctly take into account the special love-based nature of the relationship. It leaves the partner who has made substantial contributions empty-handed.

In conclusion, mechanisms to adjust the economic asymmetry between cohabiting partners are currently lacking. Other approaches to give more protection to unmarried partners who have invested in the relationship seem to a large extent be unsuccessful in both countries (see section 2.2).

2.4. PROTECTION OF CHILDREN

Closely connected to the previous problem is the presence of children in non-marital relationships. An increasing number of children live with non-marital, cohabiting

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49 BGH *FamRZ* 1992, 408-409; BGH *FamRZ* 1993, 939-941.

50 BGH *NJW* 1985, 1841.

51 Granted: BGH *FamRZ* 1985, 1232. Monetary compensation for the work of the male partner in constructing two houses on the basis of § 733 (2) BGB. Denied: BGH *FamRZ* 1993, 939-941: No intention to create a joint property interest, since the wife who owned the land and the house had paid all the financial costs while the construction work by the man was not substantial.

52 Granted: KG *FamRZ* 1983, 271-273 (With respect to a same-sex couple). See also BGH *FamRZ* 1982, 1065-1066 (With respect to 190,000 DM). Denied: BGH *FamRZ* 1983, 1213-1214 (The male partner claimed to have invested 73,000 DM in the reconstruction of the house owned by the female partner. The claim was rejected, because the contribution was made in the interest of the non-marital cohabitation); OLG München *FamRZ* 1988, 58.

53 BGH *FamRZ* 1983, 349 (Financial contributions in a short-term cohabitation); BGH *NJW* 1997, 3371-3372 (Cohabitation of 15 years, the man had contributed 94,000 DM to the wife so that she could pay her debts, which she had incurred in the construction of a house); BGH *FamRZ* 1996, 1141-1142 (The contributions of one partner towards old-age benefits did not have to be compensated).

54 BGH *NJW* 1980, 1520-1521; OLG Frankfurt *FamRZ* 1981, 253; OLG München *FamRZ* 1980, 239-240.

parents in The Netherlands and Germany. An estimated 30 per cent of non-marital cohabitants in both countries have children in their households, which is a substantial number.[55] This includes children from previous relationships. In The Netherlands 28 per cent of non-marital relationships with children are post-marital and in Germany 54 per cent. It would be interesting to analyse the specific characteristics of those relationships; currently it is not clear what the influence of a new relationship is on the division of tasks, to which extent partners have children together and how they deal with their financial relations. Another aspect is that a growing number of people have children before they marry. Undoubtedly, this also results in a growing number of couples with children separating before marrying. Although the cohabitation may not have lasted for very long, the effects of having children together are lifelong. From a legal point of view, this requires special attention.

It is important, also from the perspective of the high separation rate, to prevent conflicts between the parents on financial and property issues. If separation is inevitable, there should be a regime in which the stability of the family will be promoted as much as possible. Legislation which would allow a court to order an occupational right with respect to the house and furniture for a limited period, as well as the introduction of a conflict settlement procedure in which children may be heard, could make the transition into a single-parent family somewhat easier. Of course, clear regulations on property and financial aspects are also very important from this perspective, as is the protection of the financially weaker partner.

From a procedural point of view, all problems resulting from the breakdown of the relationship should be dealt with together in one case by one and the same judge, who is preferably experienced in family law matters and issues relating to children. At the moment, both in The Netherlands and in Germany, financial and property claims between the partners will be brought before the civil law division of the court, whereas matters with respect to children (maintenance, parental responsibilities, contact) will be dealt with by the family law division.

2.5. CONCLUSIONS

The most important general lesson in the context of the harmonisation of European family law is that knowledge of the sociological dimension of lifestyles is a prerequisite for understanding the meaning of non-marital cohabitation for the law. In order to asses whether or not legal reforms in and outside family law are desirable, it is abso-

[55] H. ENGSTLER & S. MENNING, *Families in Germany – Facts and Figures*, 2004, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, Berlin 2004, p. 11. Data from 2000.

lutely necessary to take this dimension into account. Unfortunately, this occurs far too rarely at the moment.

With respect to informal lifestyles, it is, even from a sociological point of view, not easy to answer the question of what non-marital cohabitation exactly is. Nevertheless, it is clear that there are different types of non-marital cohabitation, each type having its own characteristics. One could imagine that pre-marital cohabitation gives rise to relatively few and less serious problems, whereas long-term cohabitation – a relatively small group out of the total number of non-marital cohabitants – could justify further-reaching state intervention.

In the context of the high separation rate for non-married couples a clear set of provisions regarding financial and property relations is worth considering, in particular since conflicts of this nature may occur in all three types of cohabitation. A suitable procedure to settle conflicts between cohabitants is a step forward for all types of cohabitation.

The unequal division of paid employment and care for children between men and women, combined with the increasing number of children growing up with non-marital couples, is a substantial source of problems with a profound impact on the lives and future of the partners and children involved.

It is not only the protection of economically weaker partners which is important, but also the best interests of children living with non-married partners. The law should offer them a sufficient level of protection, which could be a good reason to limit the personal autonomy of the partners. Furthermore, clear rules regarding property and financial conflicts are also important from this point of view, as are proceedings before a family court in which children may be heard and in which all relevant matters may be decided upon in one and the same procedure.

3. CONSTITUTIONAL DIMENSION

The social developments regarding non-marital cohabitation turn out to be generally comparable in The Netherlands and in Germany.[56] Both legal systems face the same social reality, but the differences in judicial reactions in both countries are profound. Dutch law may be characterised as being open to these social changes and is pragmatically interacting with social reality, whereas the German approach is one of denial, or

[56] W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 91.

sometimes even trying to turn back the clock by using the law as a means to reverse certain social changes (see also section 4).

It is difficult to provide a correct explanation of this difference in attitudes, but it is clear that the constitutional dimension of family law plays an important role. Article 6 (1) of the German Basic Law gives special State protection to marriage and the family. The Dutch constitution does not have such a provision.[57] The impact of Article 6 (1) Basic Law is extensive. Not only does it control the political and academic debate on lifestyles, but it also determines whether the legislature has the power to legislate for non-marital couples. The political and legal debates have been and, to a certain extent, still are polarised. Terms like '*Krise der Ehe*' and 'decay of the family' are frequently used. From this point of view, one should not be surprised that the social changes, including non-marital cohabitation, were seen as undesirable developments, which could negatively affect the status of marriage.

Outside the political and legislative arena, this fundamental principle also leaves its trademark in the case law, since married couples regularly complain about a violation of Article 6 (1). Thus they try to obtain the same rights with respect to specific regulations as unmarried partners. As a result, the influence of Article 6 (1) covers all fields of law, from tax law to inheritance law and employee benefits.[58]

Although both the Dutch and the German courts[59] are under a duty to determine whether the equality principle has been violated, the existence of Art. 6 I Basic Law implies that the German courts use a different test. Whether distinctions between married and unmarried persons amount to discrimination is a question which depends on the interpretation of Art. 6 (1) Basic Law. The special status of marriage may be a justification for certain distinctions between married and unmarried couples. Differentiations with respect to social benefits,[60] tax law[61] and civil law[62] have been scrutinised by the courts in the light of the special status of marriage. Therefore, Article 6 (1) controls both the tendency of unmarried couples to try to assimilate certain

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57 The Dutch constitutional system does not allow the courts to test the constitutionality of legal provisions, but provisions of the European Convention on Human Rights and the International Covenant on Civil and Political Rights are applicable.

58 W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 287-298 and p. 597-619.

59 Art. 3 (1) Basic Law.

60 BSG 24 March 1988, *FamRZ* 1988, 1261-1267 (*Arbeitslosenhilfe*); BVerwG 5 July 1985, *NJW* 1986, 738-740 (with respect to a *Wohnberechtigungsbescheinigung*); BVerfG 17 November 1992, *FamRZ* 1993, 164-169 (*Arbeitslosenhilfe*).

61 BVerfG 3 November 1982, *NJW* 1983, 271-274 (income tax); BVerfG 1 June 1983, *NJW* 1984, 114 (inheritance tax); BFH 27 October 1989, *NJW* 1990, 734-736 (income tax); BVerfG 15 November 1989, *FamRZ* 1990, 727-729 (inheritance tax).

62 BVerfG 6 April 1990, *FamRZ* 1990, 729-730 (concerning a gift).

aspects of their status with the position of married couples and the tendency of married couples to try to obtain the same legal position as unmarried couples.

In The Netherlands, the debate on family forms has not been polarised. There is no fear that the status of marriage will be affected by non-marital cohabitation. The legislature is simply trying to solve practical problems in a pragmatic way. As in many respects it is difficult to differentiate between both lifestyles, a gradual assimilation of both statuses has taken place. The recognition of non-marital couples is generally well balanced, since legal recognition brings about both advantages *and* disadvantages for unmarried couples and recognises the different social functions of non-marital cohabitation.

Next to this neutrality, an important incentive for the process of reform is the desire of the legislature to meet the requirements of the principle of equality. Generally speaking, the legislature has, in dealing with reforms in a specific field of law, stressed the similarities between non-marital cohabitation and marriage rather than looking at the differences (see also section 4).

The principle of equality is also a mechanism used by unmarried couples in the case law to obtain rights which are equal to those of married couples. The Dutch courts have held on several occasions that the principle of equality has been violated in various fields of law by the different treatment of married and unmarried couples. There is no justification for different treatment to be found in constitutional provisions attaching special protection for some family forms. As a result, the legal position of unmarried couples has been improved considerably.[63] Married couples sometimes invoke the equality principle as well, for instance with respect to differences in tax law.[64] Usually these claims are not successful.

The general lesson to be learnt from the comparison between the Dutch and German approach to non-marital cohabitation is that family law does not operate in isolation. Although this is not very surprising, it is nevertheless important to bear in mind the constitutional aspects when trying to harmonise family law with respect to informal lifestyles. This dimension might have far-reaching consequences for the way in which changes in society are dealt with.

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63 HR 21 March 1986, *NJ* 1986, 585 (discrimination with respect to parental responsibilities), CRvB 13 November 1986, *AB* 1987, 456 (certain unjustified differences with respect to the compensation of costs for military employees), HR 23 September 1988, *NJ* 1989, 740 (provisions on the choice of a child's surname were in breach of the equality principle, since they were limited to married parents without good reason).

64 HR 27 September 1989, *NJ* 1990, 449 annotated by E.A. ALKEMA and HR 15 December 1999, *BNB* 2000, 57. In both cases the claim was rejected.

4. LIFESTYLES AS A MEANS TO ORDER RELATIONS IN SOCIETY

Marriage finds its basis in family law. Family law prescribes how a marriage has to be concluded, what the rights and duties of spouses are, how a marriage may end and whether maintenance has to be paid. It is also in the field of family law that the connection between marriage and children is established. However, marriage is also valuable for other areas of the law. In inheritance law, marriage was for a long time the one and only recognised lifestyle; important rights and duties are attached to marital status. Outside private law, lifestyles play an important role as well. Entitlement to social benefits may depend on whether the applicant is married to a partner who has sufficient means to maintain both of them. In tax law and criminal law, being married makes a difference. In other words, marriage is an instrument not only to regulate the relationship between the spouses and between the spouses and the children, but also the relation between spouses and the State.

The system in which marriage is the one and only means to regulate relations has for a long time been in conformity with social reality, but now social developments show a shift towards informal lifestyles. This brings about fundamental issues, which do not only relate to family law, but to the law in general.

There are different methods for reforming the law. In the first method, a bottom-up approach, the legislature prefers to solve problems in isolated areas of the law. For instance, if financial motives compel the state to recognise unmarried couples, tax law itself will be changed, without affecting other areas of the law in which lifestyles are relevant. This method is likely to result in problems, since the legislation will be changed, but probably without a fundamental discussion on the meaning of lifestyles for the law as a coherent, interacting system of rules. This might result not only in a different appreciation of the social functions of non-marital cohabitation in distinct fields of law, but also in the use of divergent legal terminology and various criteria in order to be considered a cohabitant.

The second method means working from the top down and starts within family law itself. Once non-marital cohabitation is regulated within family law, it is legally defined and institutionalised. Then it can be useful as a legal tool in private and public law. Changing family law therefore has far-reaching implications and should not be introduced without a fundamental debate on the meaning of lifestyles for the law.

In both The Netherlands and in Germany the first method has been used, but with rather different outcomes.[65] In The Netherlands, the law has in many respects acknowledged the shift in society from formal to informal relationships. This development started as early as the 1970s. The recognition of non-marital cohabitation has taken place in many respects: cohabitation as a ground to terminate post-marital maintenance after a divorce (1971), the position of a co-tenant has been regulated in tenancy law (1979), the position in inheritance tax law (1981), with respect to judicial protection on behalf of adults (1982), in income tax (1984), in social security law (1987)[66] and with respect to compensation for losses suffered as result of the death of a breadwinner (1992). Even though this does not imply complete equality in all fields of law, the legislature picked up social signals quite quickly. The recognition is not dependent on whether this is financially advantageous for the state; the effects are given regardless of the positive or negative consequences. The process of gradually equating both statuses started decades ago and is still continuing. Over the last fifteen years, the legal position of non-marital cohabitants has in many of these regulations been fully equated with the position of married couples. This implies that non-marital cohabitation is recognised as an economic and financial unit between partners, as a love-relationship and as a relation between home-sharers. However, there are two main problems.

First of all, there are three fields of law in which the significance of non-marital cohabitation has not been acknowledged: in family law with respect to the financial and property law aspects of the relationship, in inheritance law and in criminal (procedural) law. The application of general property and contract law results in unpredictable and sometimes unjust outcomes (see section 2.2.4). Furthermore, there is no appropriate procedure for settling property and financial conflicts between the partners and there is a low level of protection for vulnerable partners and children (see section 2.3 and 2.4). Another important area in which the legislature has not yet demonstrated an intention to undertake substantial improvements to the legal status of unmarried cohabitants is inheritance law. Recently Book 4 of the Dutch Civil Code regarding inheritance law was reformulated, but although the position of a cohabiting partner has been improved somewhat, the legal position of a spouse has been improved even more. The differences between both lifestyles are still remarkable. Finally, in the field of criminal law and criminal procedural law non-marital cohabitation has not yet appeared in the Dutch Criminal Code and Criminal Procedure Code. Although

[65] Although there is a very clear notion concerning the significance of non-marital cohabitation in Germany, there has been no institutionalisation of non-marital cohabitation, which makes it necessary to use separate definitions and terminology in isolated fields of the law.

[66] This, to a certain extent, was actually a codification of rules developed in case law.

this field of law is one in which one traditionally attaches a great deal of weight to legal certainty and predictability, the time has come to adapt to the new social reality.[67]

The second shortcoming of the current Dutch approach is that the reform of the legal system has taken place in a rather haphazard way, without a clear idea on the meaning of cohabitation and its position in relation to other lifestyles. There are, for instance, more than fifteen statutory definitions of cohabitation. Whether a couple qualify as cohabitants, thus depends on the relevant provision. The result is ad hoc piecemeal law, which results in legal uncertainty and sometimes even unjustified outcomes.[68]

In Germany, there is a large gap between social and legal reality, between social and legal norms, since the law has hardly been adapted to the increasing diversity of living arrangements. Non-marital cohabitation has not been given the recognition and position it deserves; the result is the unjustified ignoring of social facts. The prevailing reason for regulating non-marital cohabitation is to safeguard marriage by attaching financial disadvantages to non-marital cohabitation.[69] Recently the first small positive signal has been given by the codification of case law with respect to the right of an unmarried cohabitant to take over a tenancy contract in the case of the death of his/her partner.[70] It is striking to see that the legal status of relatives is in many areas better than that of unmarried cohabitants.[71] Unmarried cohabitants regularly claim to fall within the scope of provisions regulating the position of relatives, but this is not very

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67 W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 151-152.

68 W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 224-225 and p. 513-516. One example of an unjust result concerns non-marital cohabitation as a ground for the termination of a post-marital maintenance right (Art. 1:160 DCC). If a non-marital relationship subsequently breaks down, a maintenance right does not revive, even though the former non-marital partner has – unlike a married partner – no duty to support a partner who is not self-sufficient. See W.M. SCHRAMA, *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer 2004, p. 546-547.

69 For example, with respect to social security law the legislature had already recognised non-marital cohabitation before 1960 in order to prevent a violation of Article 6 (1) Basic Law. See also § 122 *Bundessozialhilfegesetz* and §§ 193 (2), 194 Sozialgesetzbuch III concerning *Arbeitslosenhilfe*.

70 § 563 (4) BGB which uses a broader definition extending to all persons who have lived in a joint household with the tenant.

71 A relative has a right to the so-called *Dreißigste* (§ 1969 BGB, concerning the right of a relative to be supported under certain conditions by the estate during 30 days after the death of the other relative), cohabiting relatives are not subject to the negative aspects of sharing a household in social security law as non-marital couples are, in inheritance tax special favourable provisions apply, *Familienzuschlag* is only granted to relatives, social benefits with respect to housing (*Wohnungsbaugesetz* and *Wohnungsgeldgesetz*) are limited to relatives. *Familienprivileg* (tort law) and *Familienhilfe* are also limited to relatives.

often successful.[72] The consequence of the German approach is a low level of protection for cohabitants, not only in family law, but also in, for instance, social security law, tax law and inheritance law.

In conclusion, from the perspective of the harmonisation of family law, one should be aware of the close connection between family law and other areas of the law. Reform of legislation, in particular in the field of family law, should be carefully considered on the basis of a fundamental debate concerning the meaning of lifestyles for the law, since a decision (not) to institutionalise non-marital cohabitation has important effects for the law in many fields. In The Netherlands reform is necessary, in Germany reform is inevitable in order to deal with non-marital cohabitation in a consistent and fair way which does justice to social reality.

5. CONCLUDING REMARKS

Non-marital cohabitation is a social phenomenon which confronts legislatures and courts all over Europe with interesting legal questions. In many jurisdictions legislation specifically aimed at informal lifestyles has already been enacted, but these vary considerably. From this perspective it is interesting to see whether European principles for informal lifestyles will contribute to a more uniform approach. If we wish to change our legal system from one primarily based on formal relationships to one in which informal relationships are also relevant, it is important to keep three general lessons in mind.

First of all, it is important to investigate the sociological and demographical dimensions of non-marital cohabitation in Europe. Without this knowledge it is virtually impossible to deal properly with reforms in the law. On the basis of this research it becomes clear what legal questions have to be raised and which problems are most urgent. I expect that the distinction between pre-marital, post-marital and long-term cohabitation is not only relevant to The Netherlands and Germany, but that this classification also exists in other European countries. All three groups have their own

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[72] Just to give some examples: § 205 RVO concerning *Familienhilfe* for '*Angehörige* who live in a '*häusliche Gemeinschaft*' with the insured person and who is/are partially or completely maintained by him/her cannot be extended to non-marital cohabitants: see BSG *FamRZ* 1991, 58-60. With respect to the application of the *Familienprivileg* for *Familienangehörige* to non-marital partners there exists no consensus in the case law and legal literature. Granted by: AG München *FamRZ* 1982, 65; OLG Köln *FamRZ* 1991, 1293-1294; LG Saarbrücken *VersR* 1995, 158-159; LG Potsdam, *FamRZ* 1997, 878-879. Rejected by: OLG Schleswig *VersR* 1979, 669; BGH *FamRZ* 1988, 392 annotated by Bosch; OLG Hamm *VersR* 1993, 1513; OLG Frankfurt a.M. *VersR* 1997, 561-562. § 1969 I BGB concerning the so-called *Dreißigste* has been applied to an unmarried partner by OLG Düsseldorf *FamRZ* 1983, 274-277 annotated by BOSCH.

characteristics and this may have implications for the way in which the law should be reformed. Special attention should be given to the position of economically vulnerable partners and children when a relationship breaks down.

The second general lesson – like the first – emphasizes that family law should be seen from a broad perspective. The importance of constitutional aspects for family law should not be underestimated. Art. 6 (1) of the German Basic Law demonstrates the far-reaching influence of constitutional aspects on the political and legal debate on lifestyles, which is a partial explanation for the different approaches to non-marital lifestyles in The Netherlands and Germany.

Thirdly, we should be aware of the important function of the institutionalisation of lifestyles in family law. Once a specific lifestyle has been institutionalised in family law, it will almost automatically become a distinctive criterion in other fields of law.

However urgent the desire to solve the problems experienced by non-marital cohabitants may be, their interests are best served not by overhasty measures, but by an extensive academic debate and an in-depth analysis of all the relevant dimensions.