DEFINING THE INFORMAL MARRIAGE

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This article, based on a paper delivered at the Third International Conference of the International Society on Family Law at Uppsala Sweden June 1979, examines a legislative and judicial trend according legal incidents to aspects of informal or de facto relationships. The generic term "informal marriage" is adopted to embrace these relationships. The author argues that the increased flexibility of social attitudes towards the informal marriage indicates that there should no longer be any distinction in law from the more traditional legal marriage. Legislative recognition to date of the informal marriage for some purposes is criticised for the absence of any common principles or discernible overall policy. Judicial recognition of the informal marriage, whilst having laudable motives, is said to lack the certainty of statutory intervention. The author advocates a full measure of legal recognition to the informal marriage, and advances some tentative suggestions as to how this should be accomplished.

I INTRODUCTION

The concern of this article is to discuss an increasing coalescence of legal marriage and extramarital cohabitation. This means that these two domestic institutions are gradually beginning to coincide in quality; the one from a position of rigidity and flexibility in which it had become locked by Lord Hardwicke's Act against clandestine marriages in 1753 (and from which it was to achieve a gradual process of liberation after the Divorce and Matrimonial Causes Act of 1857) the other from an apparent inchoation, bare of forms and formalities. Both have now arrived upon the same platform and, like players on a stage or duellists facing each other across an arena in which their differences must shortly be resolved, are engaged in advancing upon one another: a little uncertainly as yet, as though not quite sure what will be the outcome of their encounter. However, as little by little, each sheds its more dominant characteristics and takes on some of the other's features, they will begin, as they come to tangle, to merge imperceptibly in one another. For by that time there will no longer be anything left to tell them apart.

In examining this subject an initial terminological difficulty is encountered. The concept of "legal marriage" has a well-defined and widely understood meaning. Cohabitation without marriage, on the other hand, because it comes in many different shapes and guises, is more ambiguous. Unlike legal marriage, extra-marital cohabitation may

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range from arrangements that to outward appearances are indistinguishable from legal marriage at one end of the spectrum, to casual and intermittent relationships whose resemblance to marriage is remote and insubstantial. This protean quality in turn has led to problems of nomenclature: what should such a marriage-like relationship be called, and what should be the terms by which it is to be governed? The expression "stable, illicit union" for some years enjoyed a certain vogue,[1] but seems quite outmoded today, certainly in Australia. "De facto" relationship is more common and has the merit of a certain accuracy, if not of elegance, although it has been castigated judicially as an "inaccurate, euphemistic neologism".[2] The parties have been referred to as "illegitimate wife" and "illegitimate husband",[3] as "non-spouses",[4] as "common law husband and wife"[5] and as "cohabitees".[6] Other terms that have been used are "mistress", "paramour"[7] and "concubine".[8] All these circumlocutions suffer in various degrees from the vices of inaccuracy, inelegance and evasion of issues. None of them can be said to be an apt and contemporary term for a contemporary institution. They reflect rather a certain embarrassment and failure on the part of society to come to grips with a social situation. The terminological confusion surrounding non-marital but marriage-like relationships parallels that which affects the description of children born of such unions, ranging from "bastard" to "illegitimate" to "ex-nuptial" to "born out of wedlock"—all of them clumsy and having a degree of the pejorative about them.

It is not the aim of this article to attempt to resolve these semantic confusions. For present purposes, the expression "informal marriage" will be used to denote the relationship under discussion. This term is intended to avoid some of the emotive overtones with which the majority of other terms have become tinged. "Informal marriage" stresses the resemblances with legal marriage, with which this article is concerned. Where the word "marriage" is used *simpliciter*, legal marriage is meant.

One other point needs to be made. The development of marriage as a social institution and of attitudes to marriage and divorce have been parallel in England and Australia. At the least they have a common origin, at the most they are identical. The ensuing discussion is therefore

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[1] *E.g.* Report of the Law Commission: *Reform of the Grounds of Divorce: the Field of Choice* Cmd 3123 (1966) 18; *Report of the Royal Commission on Marriage and Divorce* (the Morton Commission) Cmd 9678 (1956).

[2] *Maddock* v. *Beckett* [1961] Tas. S.R. 46, 52 *per* Burbury C.J.

[3] *Davis* v. *Johnson* [1978] 2 W.L.R. 182, 201 *per* Sir George Baker P.

[4] *Id.*, 214 *per* Goff L.J.

[5] *Dyson Holdings Ltd* v. *Fox* [1976] 1 Q.B. 503, 513 *per Bridge* L.J.

[6] *Report of the Select Committee of the House of Commons on Violence in Marriage* (1975) H.C. 553—i, par. 52.

[7] *Davis* v. *Johnson* [1978] 2 W.L.R. 182, 564-565 *per* Lord Diplock.

[8] *Maddock* v. *Beckett* note 2 *supra*, 52.

applicable in broad terms to both countries. Where specific distinctions are to be made these will be indicated.

II THE PURPOSES OF MARRIAGE

The traditional purposes of legal marriage can be categorised under six headings. These in turn can be grouped under two principal headings: public and private. The word "public" is intended to denote considerations which have a wider significance than are nowadays considered to be of a purely personal nature affecting only the parties themselves and their immediate families. Private considerations include such matters as dynastic alliances and financial motivation. The public considerations alluded to relate merely to considerations drawn from a wider framework of reference and primarily not to the parties themselves.

Therefore we may consider the following scheme in relation to the purposes of legal marriage:

I. *Public purposes.*
   1. Religious, metaphysical.
   2. Public policy.

II. *Private purposes.*
   1. Physical, sexual.
   2. Emotional.
   3. Social.
   4. Economic.

From a functional point of view, these purposes were always exclusive to marriage. That is, they represented aims which normally could never be realised except through legal marriage.

Recent developments have seen considerable changes in attitudes, and a consequent rearrangement of social and ethical values. The religious aspect has certainly receded to vanishing point, at least in our secular society. It survives, if at all, as a vestigial adjunct to the private purposes of marriage, but has little public impact. In the above categorisation, the separate religious and public policy purposes of marriage have a common origin, dating back to the time when religion and the state formed an inseparable socio-political entity. However, for our present discussion we must consider them in recent times to have represented two separate and distinct points of view.

The public policy aspect of marriage is more complex than the religious aspect. Objectively it remains embodied, as always, in the attitude that marriage and the family are the cornerstone upon which the state is founded. Basic to this consideration was the fact that no development was possible, without an unceasing supply of population, either for purposes of external expansion or for internal economic and industrial growth. At a time of high infant and adult mortality, of epidemic diseases and of famines of epidemic proportion, it was necessary to keep up the numbers of the population. During the centuries

of imperial expansion it was even more necessary. Hence the attitude of government was in general pro-natalist and pro-family. As these needs have become less important, the state has not found it necessary to keep up demands in these respects. As a basis of public policy, lip service continues to be paid to the principle of the family. However, as a motive force in the formation and execution of policy it has greatly diminished. The private purposes of marriage have also receded in importance because marriage has lost its *exclusive* role as a regulator of the relations between the sexes. This development began as a social phenomenon that has been helped along by significant legal changes, for example the matter of removing, so far as laws can do, the consequences of illegitimacy.[9]

With the decline in the public purposes of marriage, its private aspects have become proportionately more important. At the same time, there has been a considerable growth in the practice of cohabitation outside marriage. Socially, there is now little to distinguish between legal and informal marriage. Both relationships serve similar functions in personal relationships; either can be temporary, fleeting or long-term, indefinite, even permanent. In the light of these social changes it is becoming increasingly arbitrary to continue to maintain the legal distinctions between these two forms of social relationship, when in functional terms there is little to divide them. This article assumes that there is little justification for retaining the remaining legal discrimination against the informal marriage. If it fulfills the same functional role as legal marriage and both are often indistinguishable from one another in fact if not in law, then the retention of discriminatory rules can only be justified, if at all, on historical grounds. This is always an inadequate basis for the regulation of human relationships and human happiness.

III THE LEGAL AND INFORMAL MARRIAGE

"Marriage" said Lord Penzance in 1866 is "the voluntary union for life of one man and one woman to the exclusion of all others".[10] Paraphrasing that "definition", the Marriage Act 1961 (Cth) prescribes in the case of a *civil* marriage[11] that the celebrant shall say to the parties in the presence of the witnesses:

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[9] See the Status of Children legislation of the various States, *viz.*: Status of Children Act 1974 (Vic.) s. 3(1), Status of Children Act 1974 (Tas.) s. 3(1), Family Relationships Act 1975 (S.A.) s. 6(1), Children (Equality of Status) Act 1976 (N.S.W.) s. 6, Status of Children Act 1978 (Qld) s. 3(1), Status of Children Act 1978 (N.T.) s. 4(1). In Western Australia, no one comprehensive piece of legislation has been enacted, but the same result has been achieved by distributive amendments to other legislation, *viz.*: Administration Act 1903-1979, Adoption of Children Act 1896-1976, Inheritance (Family and Dependants Provision) Act 1972, Wills Act 1970-1971.

[10] *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 1307.

[11] This does not apply to a religious marriage, presumably because it is assumed that the celebrant and the form of ceremony used will sufficiently convey the same message to the parties.

> Before you are joined in marriage in my presence, and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter. Marriage, according to the law of Australia, is the union of a man and a woman to the exclusion of all others voluntarily entered into for life. . . .[12]

As a description of the legal incidents of marriage both statements are patently false. At the time of Lord Penzance's dictum divorce had been available for nine years. The lifelong character of marriage therefore, even one hundred and twenty years ago, was a romantic ideal rather than a description of a legal incident or characteristic. It mirrored no doubt the expectation of the parties and of society as a whole: a model to which marriage was desired and believed to conform. Dissolution was still so exceptional in nature that it hardly detracted from the applicability of the dictum. However, the universality of the expectation has since been subjected to a process of progressive erosion. Similarly, the notion of the exclusiveness of the union has not prevented the formation of competing or concurrent unions by either or both parties. Since the abolition in Australia of adultery as a ground of divorce,[13] there is no longer any sanction attaching to a breach of the principle of exclusiveness, except upon the separation of the parties.

The introduction of divorce in 1857 laid the foundation for the eventual perception of marriage as a transient relationship. Dissolubility was introduced in response to social pressures. Whereas it had been thought that marriage could be protected only by rigorous enforcement, it came to be realised that a too rigid approach would lead to it being by-passed. The evolutionary process was characterised by the abandonment of legal sanctions against de facto dissolution or marital immorality. The high water mark of this trend came in 1943 when the House of Lords acknowledged that it might be in the public interest to dissolve a marriage that had broken down. *Blunt* v. *Blunt*[14] set the seal of highest judicial approval on the emergence of irretrievable breakdown as the basis for divorce in the English and Australian law of marriage. It endorsed a development that had been germinating for some time.[15]

It is no exaggeration to say that these tendencies towards a greater flexibility saved marriage as an institution for the time being. However,

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[12] Marriage Act 1961 (Cth) s. 46.

[13] With the introduction of the Family Law Act 1975 (Cth), operative from 5 January 1976. For an account of the principal provisions of the Act, see H. Finlay, "A New Deal for Family Law—The Australian Family Law Act 1975" (1977) 41 *Rabelszeitschrift* 71, and H. Finlay, *Family Law in Australia* (2nd ed. 1979) chapters 1-8.

[14] [1943] A.C. 517.

[15] *E.g. Pullen* v. *Pullen* (1920) 36 T.L.R. 506, and the introduction of insanity as a ground for divorce, not until 1937 in England: Matrimonial Causes Act 1937 s. 2(d), but 1908 in New Zealand: Divorce and Matrimonial Causes Act 1928 s. 10; 1911 in Western Australia: Divorce Amendment Act 1911 s. 2(d); 1919 in Tasmania and Victoria: Matrimonial Causes Act Amendment Act 1919 s. 1f(a)

if that flexibility had come about in response to pressures seeking less rigid and less permanent forms of association between the sexes, those same pressures were also resulting in other less formal forms of cohabitation. The first point is that these forms of cohabitation on the one hand and legal marriage on the other are not different in essence. They are merely at opposite ends of a spectrum with more in common than dividing them. What distinguishes them above all is a degree of formality or informality. If this assumption is correct, many similarities in treatment which the law gives to legal marriage and to informal marriage may be expected.

It is not intended here to pass moral judgment as to whether or not the law should treat the informal marriage as it treats legal marriage. The fact is that the law is already doing so in many respects by statute and judge made law. This reflects the social pressures demanding that the law should do so and it is likely that this tendency will continue. However, if the assumption is correct, one is entitled to conclude that the present phase in the evolution of domestic institutions in Western society is characterised by increasing coalescence in formal and informal marriage.

IV THE FLEXIBILITY OF MODERN MARRIAGE

Hyde v. *Hyde* was put into proper perspective in *Nachimson* v. *Nachimson*.[16] There it was sought to attack the validity of a marriage in a foreign country (Soviet Russia) whose laws at the time permitted dissolution on much easier terms than was then the case in the English courts, namely by a simple unilateral decision, notified to a judge or, later, to a registrar. While the marriage was undoubtedly valid by Soviet law, as well as being monogamous and therefore satisfying the traditional test of the validity of a foreign marriage in English law,[17] its validity was attacked on the basis that it did not satisfy the lifelong quality of marriage as laid down in *Hyde* v. *Hyde*. As Lord Brougham had pointed out in *Warrender* v. *Warrender*,[18] this argument confused incidents with essence. Specifically, it sought to incorporate rights flowing from and arising out of the contract in the terms of the very contract itself.

However, the rationalisation of the formula in *Hyde* v. *Hyde* as a common expectation of the parties and of the community in relation to

(2)(v); Divorce (Insanity) Act 1919 s. 3; 1923 in Queensland: Matrimonial Causes Act Amendment Act 1923 s. 2(1)(a); and 1929 in South Australia: Matrimonial Causes Act 1929 s. 6(i). Insanity was not a ground in New South Wales under that State's matrimonial causes legislation.

[16] [1930] P. 217.

[17] "If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceedings or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicil of one or other of the spouses": *Berthiaume* v. *Dastous* [1930] A.C. 79, 83 *per* Lord Dunedin.

[18] (1835) Cl. & F. 488, 6 E.R. 1239.

marriage has continued to be eroded and gradually to be reduced to a legal fiction. A recent case in the New South Wales Court of Appeal, *R.* v. *Cahill*,[19] dealt with a number of male Chinese who had sought to remain permanently in Australia but lacked legal immigrant status and had been refused permission to remain. They were therefore illegal immigrants and subject to deportation. In an attempt to reverse this situation and to obtain permission to remain, they had married, or attempted to marry Australian women. Although such a marriage confers no legal right to remain in Australia (which is obtainable solely through the exercise of the discretion of the Minister for Immigration) no doubt it could be a factor that might influence him in a would-be immigrant's favour. The marriage in question in *R.* v. *Cahill* was in every way a legal marriage, although it was common ground that it was entered into for no other purpose than to secure permanent entry into Australia. There was evidence that the parties had no common intention to consummate the marriage; that there would be some attendant financial advantages to the female party involved; and that the marriage would be dissolved once the male party was assured of his prospects of remaining in Australia. The authorities prosecuted the parties for "conspiracy to prevent the enforcement of a law of the Commonwealth, namely the Migration Act 1958". However, as has already been pointed out, the act of marrying *per se* could have no legal effect whatever upon the questions of immigration and of deportation. It would not therefore prevent the enforcement of any law. The question was referred to the New South Wales Court of Appeal as to whether "the agreement between the accused contemplated conduct so offensive to public morality that it could be said to be unlawful".

The Court was unanimous in holding that the marriage in question was not only lawful, but that it was not morally repugnant. In effect it was pointed out that the motives for entering into marriage are irrelevant to the legal status of the marriage and that the only criterion applicable to that status in law is whether the marriage satisfies the laws relating to its validity. It was pointed out that

> [q]uite apart from matters of religious teaching, it is known that marriages are at times contracted for reasons falling short of the more generally recognized purposes of entering into that relationship. In England in bygone days there were instances of celibate marriages being contracted for the purpose of affecting rights of inheritance of titles. The same situation exists both here and elsewhere in relation to marriages affecting rights of property succession. At times marriages were or are entered into in connection with legitimation of existing or imminent issue of a since-terminated intimate relationship. The purposes and motives, equally as the hopes and anticipations, affecting two people when they enter into

[19] (1978) 22 A.L.R. 361.

> a marriage, are susceptible of too wide a variation to render it possible for the criminal law to classify some as offending and the others as according with what is meaninglessly described as "community expectation" in so far as this may travel beyond the specifically described concomitants of a marriage.[20]

It seems, therefore, that the lifelong quality of "Christian" marriage is now little more than a pious hope—or perhaps a desideratum of policy, but of no legal significance and certainly lacking any legal sanctions. The monogamous character of such a marriage is still present and is enforced by the sanctions of nullity and the criminal offence of bigamy. It is not suggested that this aspect of marriage in our society is necessarily weakening or likely to become superseded. However, the quality of monogamy is one-dimensional: successive marriages are possible and in the eyes of a conscientious objector to divorce, may be regarded as a form of serial bigamy. It is interesting to note, incidentally, that under the "special procedure" that has evolved in England under the Matrimonial Causes Act 1973, an uncontested divorce on a ground involving separation can now be granted without the appearance of either party or their legal representatives. Until now, a decree has been made by a judge after reading the papers. It is now proposed to simplify the procedure still further by entrusting the function of dissolving a marriage to a registrar.[21] This seems approximate to the Russian position revealed in *Nachimson* v. *Nachimson*.[22]

These changing attitudes to marriage can be traced back directly to the change in the nature of marriage as an institution, which the divorce legislation of 1857 had introduced for the first time. However, profound as the change was, one may see this as but a further link in a chain of constant evolution throughout the history of Christian civilisation.[23] If the earlier part of the Christian era saw a gradual formalisation of the marriage relationship, it is evident that we have now entered a phase in which we are resiling from that position. Thus marriage has become and is becoming increasingly less rigid as an institution. The change reflects a modification which has taken place in the attitudes of our society to sexual relationships. Arguably marriage had to become less rigid and to compete with extramarital cohabitation if it was to survive at all. Had it remained inflexible it would have been by-passed, as it may yet be by-passed unless further modifications are made. That this appears inevitable is the ultimate consequence of the effective withdrawal of the sanctions that formerly attached to any transgression directed at it: legal, social, financial, moral and for practical purposes, religious.

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[20] *Id.*, 366 *per* Street C.J.

[21] Evidence of Sir John Nimmo, 29 November 1979, Proceedings of the Joint Select Committee on the Family Law Act, 6744-6778, 6751.

[22] Note 16 *supra.*

[23] E. Westermarck, *History of Human Marriage* (5th ed. 1921); G. Howard, *A History of Matrimonial Institutions* (1904).

V THE EMERGENCE OF THE INFORMAL MARRIAGE

At the same time that we see the change in the character of "Christian" marriage, we are witnessing also the emergence of the informal marriage as an acceptable and widely practised alternative. Cohabitation arrangements usually possess many of the attributes of marriage. They may be as stable or as permanent; they may result in the formation of families and the raising of children and are often outwardly indistinguishable from the "real thing"; the woman may adopt the man's surname, perhaps by deed poll, so that all parties legally bear his name. In the result, the union's informal character may not be generally known, but even if it is, there are no longer any significant social sanctions in operation against it. This has removed one of the deterrents that once operated so strongly in favour of legal and against the informal marriage.

The reasons why people enter into informal marriage are many. Sometimes, it is simply a case of legal incapacity: one or both parties are already or still married to someone else. They may intend to marry each other when both are free to do so, but in the meantime they are unwilling to delay living together. In many cases, the parties simply refrain from entering into legal marriage because they do not wish to do so. They may not desire the reduced degree of permanence of marriage, given the easier attainability of divorce. They may not like the legal consequences that flow from marriage. Marriage is said to be or to confer a status, but that is only to say that it constitutes a contract of adhesion with all its terms clearly set out, or implied and understood and which cannot be dissolved simply by the parties except on the terms and in the manner sanctioned by the state. There is no possibility of individual variation in the terms of the contract at the option of the parties themselves.[24]

Whatever benefits may result from the freedom from regulation are also counterbalanced by certain disadvantages. Not so long ago, a party to an informal marriage was virtually deprived of any legal protection. To extend such protection in the circumstances was regarded as contrary to public policy, because it would have promoted immorality as it was then understood. It was sought by this restrictive attitude to protect legal marriage as the cornerstone of society. To countenance as lawful any rival alternative was thought to weaken the institution of marriage. There was also the social purpose evident in the Poor Laws, of attaching liability for the support of indigent persons to those who were liable to sanctions or amenable to coercion. This alone was a powerful argument for discouraging the procreation of illegitimate children, whose support was far more difficult to enforce against a putative father, even if his identity was known and he could be found, than in a case where "*pater*

[24] See paper by J. Cunningham and J. Antill, "Cohabitation: Marriage of the Future?" presented at the ANZAAS Congress, Auckland, N.Z., January 1979.

est quem nuptiae demonstrant".[25] The situation was even worse in the case of "abandoned women" for whose support no former or "de facto" husband could be made liable.

If we now move forward to the present day and look at the closing years of the twentieth century we see a totally different picture. The informal marriage has become commonplace and is accepted, or at least tolerated, by society. Where even two or three decades ago strong social sanctions militated against its formation, or tended to drive it under the counterpane, so to speak, it is now practised widely and openly. Disapproval, if felt, is seldom voiced, for to do so is considered old-fashioned. It cannot in any case affect the practice.

The law has moved in conformity with these changed mores. The attitude underlying *Fender* v. *St. John Mildmay*[26] in which Lord Wright said in the House of Lords: "The law will not enforce an immoral promise . . . between a man and woman to live together without being married, or to pay a sum of money or give some other consideration in return for immoral association" is now outmoded.[27] The courts are increasingly prepared to give the sanction of law to "immoral contracts". At the least they are no longer precluded from giving legal protection or recognition to aspects of such relationships by considerations of policy against "immorality". Why? There are two connected reasons for this. First, the legislatures have led the way and have, albeit in piecemeal fashion, extended legal protection to extramarital relationships or to certain aspects of them. The second reason is a choice of values by the courts. Obviously the restrictive attitude of the courts to "immoral contracts" has not prevented a large-scale and growing proliferation of such arrangements. Thus, the declared policy rationale of the old attitude has failed to achieve its objective. That is the negative aspect of this reason. Looking at the matter positively, to deny enforcement to an "immoral" cohabitation agreement may be to expose one of the parties to exploitation. The former policy of the law of discouraging extra-marital cohabitation and thereby bolstering legal marriage has failed. It has produced unforeseen and undesirable consequences. Having failed the law was ripe for change. What was to be put in its place?

The evidence from the reported decisions proves the greater willingness of the courts in recent times to countenance and protect informal marriages. However, in the absence of legislation, that willingness on the part of the courts has operated piecemeal. It seems the situation will

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[25] "He is the father whom the marriage indicates". The maxim (Glanvill, Book vii, C. 12; *cf.* P. Bromley, *Family Law* (5th ed. 1976) 292) summarises the presumption of legitimacy, according to which, if a child is born to a married woman, her husband is deemed to be the father until the contrary is proved.

[26] [1938] A.C. 1.

[27] *Id.*, 42. See H. Finlay, "The Battered Mistress and the Violent Paramour" (1978) 52 *A.L.J.* 613; H. Finlay, *Family Law in Australia* (2nd ed. 1979) ch. 9; R. Bailey, "Legal Recognition of De Facto Relationships" (1978) 52 *A.L.J.* 174.

remain so unless legislators adopt a more coherent approach to the question.

It is the element of unpredictability and uncertainty that has remained the most serious weakness of the informal marriage. In this respect, it compares unfavourably with legal marriage which has the advantage of certainty of status and legal consequences prescribed by law. Is it possible then or desirable for legislation to spell out the criteria which shall be deemed to give rise to a relationship sufficient to serve as a foundation upon which a legal edifice can be erected, with the certainty of legal consequences, extending the kind of protection to the parties which they would have enjoyed if they had entered into legal marriage?

It may be interposed here that to regulate cohabitation, albeit for the purpose of giving greater protection to the parties, is to invest this form of relationship with a rigidity approximating that of marriage. This may lead to a rejection of such regulation and a desire for "contracting out", if possible, by those who have rejected marriage, and for much the same reasons. As has been noted, objections to marriage do exist in the community.[28] Some objectors consider marriage to be too restrictive, or to impose a non-egalitarian framework upon the parties. This attitude is a relevant but not an adequate reason against allowing parties to an informal marriage who wish to regulate the terms of their relationship to do so, or against extending a measure of legal protection to parties who have entered into a relationship that leaves them open to exploitation.

One overwhelming difficulty in dealing with cohabitation or informal marriages that has already been adverted to is the problem of definition. Such unions in fact extend over a considerable range of circumstances. At one end of the spectrum there will be little difference between a de facto union and a legal marriage except this attribute of legality. At the other end there are transient and temporary liaisons, "one night stands", intermittent relationships, concurrent arrangements[29] and so on. These exhibit few or none of the characteristics of a legal marriage. If legislation is to be devised to extend to extramarital cohabitation some recognition similar to that which applies to legal marriage, then the closer the arrangement approximates to the firstnamed model, the easier will be the task of giving it that recognition. It will also be easier to justify.

VI THE PROBLEM OF IDENTIFICATION

When one talks of extending to informal marriage some of the legal protection of legal marriage the argument is often encountered, in the

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[28] See *e.g.*, J. Cunningham and J. Antill, note 24 *supra.*

[29] *Cf. Dyson Holdings Ltd* v. *Fox* note 5 *supra*, 511 *per James* L.J.: "Relationships of a casual and intermittent character and those bearing indications of impermanence would not come within the popular concept of a family unit".

words of the Australian Royal Commission of Human Relationships, that

> the recognition of de facto relationships as conferring interests in property should be approached with caution. If parties refrain from marrying because they do not want to incur the legal and financial obligations of marriage then the law should be slow to impose those obligations on them.[30]

It is submitted, that the matter cannot be shrugged off so simply. The Royal Commission itself recognised this fact, for the Report goes on:

> On the other hand, where parties have lived together, ostensibly as man and wife for some time, injustice could be caused if the dependent party were unable to claim any interest or right of occupation in the home.[31]

The Commission went on to draw attention to the difficulties of *identifying* the kind of relationship which should give rise to rights and obligations. They continued by spelling out a desideratum that in defining those rights and obligations any disincentive or undermining of marriage was to be avoided.

But before we go any further in our examination of the current and evolving forms of legal and informal marriage, something more ought to be said as to whether, and to what extent the law can and should recognise a relationship which the parties have entered into upon their own terms, or upon no terms at all. It is usually assumed that in doing so the parties have deliberately eschewed the legal consequences which marriage carries with it, and that this was done by an act of considered deliberation in order to evade the incidents of a relationship that has been frozen into an unalterable rigidity by the decisions of others, conceived in a distant past and now felt to be unpalatable and irrelevant. This view may well be an accurate reflection of the views of many. However, the presumed desire of both parties to an informal marriage to evade the consequences of legal marriage rests on an untested assumption. It is not at all certain that the parties are necessarily as desirous as they are assumed to be of avoiding those legal consequences, or that both of them are equally of the same mind on this point, nor that such a desire is the motivation for their adoption of this formless mode of relationship in every case.

Whatever may be the motivation for the conditions under which entry into the relationship is initially made, a time may come when it breaks down and a party who originally preferred, or at any rate was content or prepared to be left without any prospect of legal redress, may then come to desire access to some such redress. Is such a party to be met with the facile retort: "You have made your bed, now lie in it" and

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[30] *Report of the Royal Commission on Human Relationships* (1977) vol. 4, 73, para. 129.

[31] *Ibid.*

to be simply denied any remedy? One would have thought that those days of laissez faire are irretrievably lost to the past. Instead, the community which is externalised as the state, works out its conscience through the philosophy of the welfare state. Increasingly it has assumed to itself a duty to interfere in private relationships in order to save individuals from themselves and from each other. Intervention is perceived to become necessary wherever in the absence of protection a party becomes exposed to exploitation by another party in the course of their dealings with one another. Any supposed waiver of a remedy by agreement or voluntary surrender can be no more acceptable than a supposed defence of consent to an unlawful assault. The legendary vision of the sturdy, independent workman selling his labour on his own terms to the highest bidder in a free and open market has long stood exposed as a romantic or capitalist fiction devoid of economic reality. Similarly it would be ironic if the growing emancipation or liberation of women increasingly were to allow them to enter into informal relationships devoid even of the kind of protection which the strait-jacket of marriage conferred on them. In an age of continuing and increasing economic and social interdependence, the range of situations where the state may find itself forced to intervene is likely to grow further rather than to diminish. It is important therefore to identify the informal marriage because either party to the relationship is to be the subject of some kind of community initiative or intervention or, at the very least, as a matter of creating a record against the future eventuality of such initiative or intervention.

When we now turn to the question of how informal marriages can be identified, several possibilities at once come to mind. One way in which the difficulties may be overcome is for the parties themselves to "write their own ticket" and so to specify the legal relationships which are to govern their union. There has been a good deal of consideration given to cohabitation contracts, particularly in the United States.[32] So far however, it does not appear as though the courts have been involved in interpreting such contracts and ruling on their validity. As a result, there has remained a certain element of doubt as to their effectiveness and enforceability. On the one hand, *Fender* v. *St. John Mildmay* still looms in the background. On the other hand there is the increasing preparedness of the courts to recognise extra-legal unions, at least for certain purposes. There is also increasing evidence of legislative recognition. That recognition, it is true, has so far been fragmentary rather than comprehensive. There are laws allowing a taxpayer to claim as a dependant a "de facto" spouse with whom he is cohabiting.[33] Status of children

[32] L. Weitzman, "Legal Regulations of Marriage: Tradition and Change" (1974) 62 *Calif. L. Rev.* 1169; Note, "Marriage Contracts for Support and Services: Constitutionality Begins At Home" (1974) 49 *N.Y.U.L. Rev.* 1161. *Cf.* J. Dwyer, "Immoral Contracts" (1977) 93 *L.Q.R.* 386. N. Dardick, "Marital Contracts" (1973) 13 *J. Family L.* 1.

legislation has ended the status of illegitimacy.[34] Increasingly there has been legislation, for instance in South Australia, giving recognition to de facto relationships in a variety of situations such as inheritance, fatal injuries and superannuation.[35] In one Australian state it is even possible for a de facto "wife" to claim maintenance.[36] Therefore, it is evident that so far from public policy still requiring such contracts being regarded as void, there are ample indications of a complete reversal of attitudes. The supposed protection of the institution of marriage has given way to the desire of extending the protection of the law to the family unit, however constituted, and to its members, and generally to persons who are potentially at risk from exploitation, or at any rate neglect.

VII CRITERIA FOR RECOGNITION

The Royal Commission on Human Relationships has commented on cohabitation contracts to the effect that there was no certainty that they would be recognised or enforceable. In this, the Report may be erring on the side of excessive caution. But as regards policy in relation to enforcement, the Report points to a valid reservation:

> Nor is it necessarily desirable that any such contract should be enforceable. If an agreement is made between husband and wife about property, maintenance or custody, the Court may have regard to its terms but would not enforce the agreement as such. It may not be just and equitable in the circumstances or it may not be consistent with the welfare of the child. We do not consider that an agreement between persons who are not married should have any greater effect. It is a relevant factor evidencing an intention of the parties concerning the nature of their relationship.[37]

Nevertheless, it seems inevitable that cohabitation contracts will eventually come into their own and will have a significant part to play in the regulation of extramarital unions. It will be necessary therefore, to give attention to the question of their enforceability. As a first step, policy guidelines must be spelt out as to the limits and conditions of enforcement. Secondly, it will be necessary to devise legislation to give effect to the policy. The observations of the Royal Commission Report will be relevant to both policy and legislation, but subject to those considerations it is submitted that cohabitation contracts can be one method of identifying and enforcing de facto unions. They must ultimately remain under the supervision of the law and they will there-

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[33] Income Tax Assessment Act 1936 (Cth) (as amended) s. 159L.

[34] Note 9 *supra.*

[35] Inheritance (Family Provision) Act 1972-1975 (S.A.) s. 3, Wrongs Act 1936-1975 (S.A.) s. 20, Superannuation Act 1974-1979 (S.A.) s. 121.

[36] Tasmania: Maintenance Act 1967, s. 16; see generally R. Bailey, note 27 *supra.*

[37] *Royal Commission on Human Relationships*, note 30 *supra*, para. 125.

fore remain as a subordinate, somewhat specialised compartment in our next legal category which concerns the recognition generally to be given to cohabitation by law.

It has already been pointed out that legislation has concerned itself increasingly with the recognition of cohabitation arrangements.[38] What stands out above all is the fact that there is no discernible overall policy, no common principle according to which recognition is to be given. The connecting factor varies widely. In the Tasmanian Maintenance Act 1967 it is based on one year's cohabitation.[39] The Family Relationships Act 1975 of South Australia requires a five year cohabitation period, although the requirement of a period of cohabitation is waived if the parties have had sexual relations resulting in the birth of a child.[40] The legal consequence flowing from either circumstance is the recognition of the status of a "putative spouse" which in turn gives rise to certain legal rights under the inheritance laws. Similar rights arise in relation to compensation in the event of the death of a spouse as a result of the negligence of a third party.[41] The same is true of the right to a solatium in respect of such death, for which South Australia alone among the Australian States provides. An interesting provision in relation to this is the principle of apportionment of the solatium where there is both a surviving spouse and a surviving putative spouse.[42]

A somewhat similar provision as to inheritance exists in Western Australia for a de facto widow, but it is not tied to any specific period of cohabitation.[43] Under the Superannuation Act of the Commonwealth a period of three years cohabitation is specified as the qualifying period for entitlement to benefits. An exception is made where cohabitation only commenced after the deceased had attained the age of 60 years, in which case the qualifying period is five years.[44]

Further, under the Family Law Reform Act 1978 of Ontario support obligations arise between a man and a woman who have either cohabited continuously for a period of not less than five years or who have cohabited in a relationship of some permanence, to whom a child has been born and who have cohabited during the period of one year preceding the application.[45] The New Zealand Matrimonial Property Bill 1975 contained a provision for the conferment upon the parties to a de facto marriage of a right to make application to the Court concerning each other's property, if there had been cohabitation for not less than

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[38] Notes 35 and 36 *supra*.
[39] S. 16.
[40] S. 11(1).
[41] *Cf.* Wrongs Act 1936-1975 (S.A.) ss. 3a, 20(3).
[42] *Id.*, s.23(b).
[43] Inheritance (Family and Dependants Provision) Act 1972 (W.A.) s. 7(1).
[44] Superannuation Act 1976 (Cth) s. 3. See R. Bailey, note 27 *supra* for a detailed account of these and some other provisions.
[45] S. 14.

two years, provided that the cohabitation had not ceased more than twelve months before the date of the application.[46]

We are thus faced with the mechanism of a term of years of cohabitation as a common criterion, but with no commonly accepted period of cohabitation as giving rise to a presumption of a marriage-like relationship. One year, two years, three years, five years are used more or less, it seems, at random and the only common factor is the circumstance of a period of time as the basis for an inference of an ongoing and stable relationship. Occasionally, the birth of a child to such a union may be used instead of a period of time. The use of a period of cohabitation has a parallel in the use of a period of separation from which the irretrievable breakdown of a marriage may be inferred.[47] It is a rule of thumb, for converting a complex behavioural situation which is non-justiciable[48] into a factual situation readily assessable by a court of law. As such, it has the merit of certainty, but like any rule of thumb it may give a wrong result.[49]

Therefore it is clear that no consistent requirement runs through the legislation. What is common to most of the legislation is the device of a period of time during which there has been cohabitation as "husband and wife". It cannot even be said, however, that the period that has been stipulated is proportional to the seriousness of the consequences.[50] It seems desirable that the question of extramarital cohabitation should be made the subject of study and that the policy considerations which should govern its recognition by law be examined, and a consistent policy be formulated and carried into effect. In the absence of such a consistent policy it may be asked whether anything is to be learned by examining how the courts have approached these problems, particularly when little or no guidance was available to them from the legislation. Particularly illustrative are some of the recent English decisions.

VIII JUDICIAL OR STATUTORY RECOGNITION

The courts, when they have not had the advantage of a statutory rule of thumb, have shown themselves capable of assessing a marriage-like situation on the facts and in the light of a particular remedy being claimed. This may be seen in connection with another kind of problem which surfaced also in relation to legal marriage. That problem concerned the apportionment of beneficial interests in property owned and/or used

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[46] Clause 49; however, this provision was omitted when the Bill was enacted: Matrimonial Property Act 1976 (N.Z.).

[47] Family Law Act 1975 (Cth) s. 48; Matrimonial Causes Act 1973 (U.K.) s. 1(2)(d) and (e); Matrimonial Causes Act 1959 (Cth) s. 28(m).

[48] Report of the Law Commission, note 1 *supra; cf. Pheasant* v. *Pheasant* [1972] 1 All E.R. 587, [1972] 2 W.L.R. 353.

[49] For a criticism of such rules of thumb see H. Finlay, "Reluctant but Inevitable: The Retreat of Matrimonial Fault" (1975) 38 *Mod. L. Rev.* 153.

[50] *E.g.*, contrast five years in Ontario with one year in Tasmania for support, and with two years in respect of property under the New Zealand Bill.

by the parties to a marriage, most commonly the matrimonial home. The problem usually arises on the dissolution of marriage. It is compounded by the increase in value in the property or in the equity of one or both parties in the property over the years. That increase will be due to a variety of factors, but more likely than not the husband will also have increased the value by making monetary reductions in the amount owing under mortgage. Equally typically, the wife's contributions are likely to be more indirect. She then has to rely on her contribution as a home-maker or parent[51] for her part in the economic partnership of the marriage. In modern times, the value of the partnership property has also been greatly enhanced by inflation. Looking at it another way, the loss that would be occasioned by this factor if one of the marriage partners were unable to participate in a sharing of the partnership assets upon its winding up would make the loss of that partner the more inequitable.

During the past thirty years or so, the courts, particularly the Court of Appeal in England, have sought to develop an approach to this problem which was designed to do justice as between the parties to a marriage, by bringing about a more equitable distribution of the partnership assets upon its dissolution, and thereby attempting to make good the absence of a legal framework for a system of community property. The rise and fall of "palm tree justice" is now history. Under that principle, the courts sought to use section 17 of the Married Women's Property Act 1882 (U.K.) for a reapportionment of the partnership equities. But in 1970, the House of Lords ruled that the section could not be used in this freehanded way.[52]

Lord Denning, who was in large part responsible for the initial development of "palm tree justice", has briefly traced its development in *Cooke* v. *Head*.[53] After the use of section 17 of the Married Women's Property Act had failed, the courts tried to use the common intention of the parties. But when this led to difficulties, the court used the law of trusts. In the words of Lord Denning: "whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts owner is bound to hold the property on trust for them both".[54] The key may impose or impute a constructive or resulting trust . . . The legal to all this is the expression "by their joint efforts". This includes joint efforts such as monetary contributions, physical work on the property[55] or work as a housekeeper or homemaker and bearer and raiser of children.

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[51] *Cf.* Family Law Act 1975 (Cth) s. 79(4)(b).

[52] *Pettitt* v. *Pettitt* [1970] A.C. 777.

[53] [1972] 2 All E.R. 38, [1972] 1 W.L.R. 518; and see the account given by Lord Denning in *The Due Process of Law* (1980) parts 7 and 8.

[54] [1972] 2 All E.R. 38, 41, [1972] 1 W.L.R. 518, 520.

[55] As in *Cooke* v. *Head* note 53 *supra* and in *Eves* v. *Eves* [1975] 3 All E.R. 768, [1975] 1 W.L.R. 1338.

It may be that these cases highlight the deficiency in Anglo-Australian law of the absence of a system of community property in relation to marriage. With this we are not primarily concerned here, except as a parallel to the situation of the informal marriage. The reliance of the courts upon the principles of trust and equity have had an unintended result as regards informal marriages. These principles are equally applicable to the case of a partnership within and outside marriage. Indeed they are not necessarily confined to relationships between men and women. "This trust . . . applies to husband and wife, to engaged couples, and to man and mistress, and may be to other relationships too".[56]

Thus, we have been given a kind of recognition of extramarital relationships by the courts. However, it would be more correct to say that the courts no longer find themselves prevented by the kind of attitude that prevailed in *Fender* v. *St. John Mildmay*[57] from extending to extramarital cohabitation the same degree of protection in property and contractual relationships that they are prepared to extend to marriage, or indeed to other relationships. The Court of Appeal, again under the leadership of Lord Denning, has developed the concept of a broad equity which is designed to prevent a wife, or a "mistress" from being deprived of certain benefits of property merely by the application of strict principles of the laws of property and contract. In *Davis* v. *Johnson*[58] Lord Denning M.R. characterised an insistence upon the proprietorial rights as between husband and wife as

> quite out of date. It is true that in the nineteenth century the law paid quite high regard to rights of property . . . Even though (a husband) may have, in point of law, the absolute title to property as owner, no matter whether it be the freehold of a fine residence, or the tenancy of a council house, his property rights have been made in this court to take second place . . . I prefer to go by the principles underlying the legislative enactments rather than the out-dated notions of the past.[59]

If precedent seemed to stand in the way, the learned Master of the Rolls would either override it, as in *Davis* v. *Johnson* itself (which was rejected by the House of Lords[60]) or perhaps more validly, as he did in *Dyson Holdings Ltd* v. *Fox*.[61] In *Davis* v. *Johnson* his rationalisation for departing from precedent was based on the view that the previous decision was wrong, saying that in an exceptional case the Court should

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[56] *Cooke* v. *Head* note 54 *supra*, and *cf. Hussey* v. *Palmer* [1972] 3 All E.R. 744, [1972] 1 W.L.R. 1286.
[57] Note 26 *supra*.
[58] [1978] 1 All E.R. 841.
[59] *Id.*, 849.
[60] [1979] A.C. 317.
[61] [1976] Q.B. 503.

be at liberty to depart from precedent "if we think it right to do so".[62]

Therefore, as matters now stand, the doctrines of trust and/or of a contractual licence[63] developed in the Court of Appeal go some way towards creating a kind of community property, a kind of *Zugewinngemeinschaft*[64] as between spouses or the parties to de facto unions. In spite of the protestations of the learned Master of the Rolls which would ascribe the paternity of such an approach to Lord Diplock,[65] they appear to bear the stamp of the Master of the Rolls himself.[66] A similar kind of reasoning gave rise to another of Lord Denning's offsprings, the "High Trees" doctrine of promissory estoppel. Here, as in that case, it is the notion of the unconscionable bargain that lies at the bottom of the court's intervention. If orthodox legal doctrine prevents the alleviation of a situation of injustice, then there is a contradiction in terms: a law which supports an injustice. It is the merit of Lord Denning to have cut through the dead wood and to have used the law in order to do justice, even in apparent defiance of some of the forms of the law itself.[67] If there is no law for doing justice, then one must be fashioned. It is on this basis that the informal marriage needs to be recognised and protected.

The devices by which the Court of Appeal has time and again found a way of intervening have not been entirely uncontroversial or unopposed. The use of section 17 of the Married Women's Property Act 1882 (U.K.) was a case in point. Just as was the case with palm tree justice, so the use presently made by the Court of Appeal of the constructive, imputed or resulting trust as between spouses or cohabitees, may yet turn out to be illusory and a false scent. If or when this happens, the

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[62] [1979] A.C. 317, 324-329, 336-337, 343-345, 349-350. For a discussion of the various aspects of this case, both in the Court of Appeal and in the House of Lords see H. Finlay, "The Battered Mistress and the Violent Paramour" (1978) 52 *A.L.J.* 613.

[63] As in *Tanner* v. *Tanner* [1975] 3 All E.R. 776, [1975] 1 W.L.R. 1346.

[64] "Community of gains" or "community of surplus", as the modern West German statutory matrimonial property regime is known. It has been described as being "more precisely, a 'separation of property with an equalisation of gains': that is, each spouse retains equal, and, within certain restrictions . . . independent power to use and administer property during the marriage; at the end of the marriage, for example in the case of divorce, each spouse is entitled to half the surplus, that is, the amount by which the total of the property owned by both of them at the end of the marriage exceeds the value of the property owned by them before the marriage": D. Giesen, "Sex Discrimination in Germany (W)" (1978) 41 *Mod. L. Rev.* 526; *cf.* W. Müller-Freienfels, "Family Law and the Law of Succession in Germany" (1967) 16 *Int. & Comp. L.Q.* 410; E. Graue, "The German Law of Matrimonial Property" in A. Kiralfy (ed.), *Comparative Law of Matrimonial Property* (1972) 114.

[65] In *Gissing* v. *Gissing* [1971] A.C. 886.

[66] *Cf.* Samuels J.A. in *Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685, 700-701: "I would respectfully suggest that Lord Diplock's speech in *Gissing* v. *Gissing* gives no warrant for identifying him as midwife".

[67] See also Lord Denning, *The Discipline of Law* (1979) for an account of some of the iconoclastic activities of the Master of the Rolls.

resulting gap will have to be remedied by legislative intervention. The judgments of Glass[68] and Samuels JJ.A.[69] in *Allen* v. *Snyder* demonstrate the way in which fallacies may be imputed to the approach of the learned Master of the Rolls. In particular, Glass J.A. destroys the reliance placed on the passage from the judgment of Lord Diplock in *Gissing* v. *Gissing* as giving rise to the novel constructive trust. The doctrine is said to be repugnant to both *Pettitt* v. *Pettitt* and *Gissing* v. *Gissing*. There is reference also to the decisions of the High Court of Australia in *Wirth* v. *Wirth*[70] and *Hepworth* v. *Hepworth*,[71] which followed an orthodox line and refused to adopt the Denning approach in relation to palm tree justice. We may sum up this aspect of the matter with the quotation from Windeyer J. in *Hepworth* v. *Hepworth* which occurs in Samuels J.A.'s judgment: "Community of ownership arising from marriage has no place in the common law".[72]

Thus, the extent to which courts have been prepared to protect the informal marriage has varied. Therefore, this method lacks the certainty of statutory intervention, but the foregoing account illustrates that judicial legislation is nevertheless a possible and, up to a point, effective method of dealing with a legal vacuum in response to a social demand. Judicial legislation raises other problems which cannot be fully explored here, involving fundamental jurisprudential and policy issues. It gives rise to the question whether it is desirable to leave the regulation of informal relationships to judicial lawmaking or whether as a matter of principle they ought to be subject in all cases to statutory resolution. On the one hand, it might be thought that in an area of such diversity there is much to be gained by leaving matters to the courts, enabling them to tailor some specific remedy to a given situation that could not perhaps be foreseen in its specific form and context.

To adopt such an attitude is to assume that a given court will be disposed to find a remedy at all, and that if it does, it will do so in similar fashion to that adopted in another similar case. The problem with judicial lawmaking is twofold. One is uncertainty. If the availability of the remedy is to depend simply on the idiosyncracy of the judge acting in accordance with his or her perception of a need to ameliorate a situation involving an injustice, and who does so without the certainty of enacted prescription, then unless judges come to act in such a way as a matter of predictable habit and are thereby seen to be charting a new law, and unless appellate tribunals are prepared to recognise that new law, the injustice cannot be said to have been removed.

The other problem inherent in relying upon judicial initiative is the delay to which it is apt to subject the progress of law reform. If a

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[68] [1977] 2 N.S.W.L.R. 685, 688-696.
[69] *Id.*, 697-701.
[70] (1956) 98 C.L.R. 228.
[71] (1963) 110 C.L.R. 309.
[72] *Id.*, 317.

particular injustice is customarily remedied by the courts acting without legislative prescription, then arguably the legislature may consider action on its own part superfluous. In this way it may well be the case that the development of palm tree justice postponed the enactment of legislative remedies, until at least after the House of Lords had struck it down.[73] Thus, it might have been better if the courts, in their time-hallowed manner had continued to shrug their shoulders, denying the remedy they perceived to be needed, and left the matter to an omnipotent if not necessarily compassionate legislature. That of course is where the difficulty arises: is a judge who thinks he can find a remedy, even though on dubious legal grounds, to desist from applying it and to offer up the litigant before him at the altar of judicial orthodoxy? Which comes first: the legal system or the litigant? What does the judicial oath enjoin upon the judge in this context?

Apart from the consoling reflection that the unorthodox judge has been able to do something for the litigant to help him achieve justice, it is possible that his very unorthodoxy has spurred on the cause of law reform. Perhaps an uneasy legislature is moved by a shamefaced realisation of a legislative hiatus to remedy it. Undoubtedly the one man crusade of Lord Denning has done much to help the law keep up to date in this and other areas. Nevertheless, the lone crusader is rarely a reliable law reformer in twentieth century conditions, for there is little to stop him from tilting at windmills when he has finished fighting dragons.[74] Instead, the sophisticated apparatus needed to keep the law up to date is constituted today by means of bodies such as the Law Commission particularly if it can take an initiatory role and does not have to wait for a reference from Parliament.[75]

IX THE NEED FOR RECOGNITION

Two propositions follow from what has been said. One concerns the attempt by the courts to supply a kind of community property regime where the law has failed to do so.[76] How satisfactory a solution this is remains to be seen, but it must be subject to doubts flowing from the equivocal reception accorded to the attempts of the Court of Appeal to evolve a consistent and contemporary philosophy in this respect. The other proposition is more immediately relevant. There has to a large

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[73] See *e.g.* Matrimonial Homes Act 1967 (U.K.).

[74] It is interesting to note, that Lord Denning himself has perceived an affinity between himself and Don Quixote: *The Due Process of Law*, note 53 *supra*, 206.

[75] The Law Commissions Act 1965 (U.K.) s. 3. The Australian Law Reform Commission does not have so free a hand, but must act on references to it by the Attorney-General of the day, see Law Reform Commission Act 1973 (Cth) s. 6(1).

[76] In the Australian context this statement must be subject to two qualifications, neither of them entirely satisfactory. One is that in the law of the state of Victoria only, the orthodox principles governing the married women's property jurisdiction, as interpreted following the rejection of palm tree justice in *Pettitt* v. *Pettitt*, have

extent been an assimilation in the position of a mistress to that of a legal wife. Subject to such legal differences as the diminishing presumption of advancement,[77] it seems clear that the courts are prepared increasingly to accept the informal marriage on the same footing as the legal marriage.

This brings us back to the crux of the matter, how to identify an informal marriage and the parties to such a union. The traditional concept of legal marriage has this to be said for it at all events: it has certainty. Leaving aside the unusual case where some doubt attaches to a purported marriage, in the vast majority of cases there is no such doubt. The fact that a marriage has taken place is a matter of public record. The parties' legal rights and duties are fixed by law.

As against this, the parties to an informal or "unregistered" marriage lack the kind of legal recognition that is available to the parties to a regular marriage. Whereas in a legal marriage, once the initial consensus has resulted in solemnisation, the marriage continues by operation of law until it is dissolved by death or divorce; in an informal marriage the continuing legal relations between the parties depend on continuing consensus. Only when the relationship breaks down and court intervention is sought are the legal incidents and consequences of the relationship determined. Legal marriage supplies a prospective criterion, while usually the informal marriage is recognised, if at all, and given legal remedies, if any, only retrospectively. Of course, it is also true of legal marriage that a determination of the legal rights and obligations of the parties is normally made upon breakdown, when the intervention of a court is sought. But the difference lies in the uncertainty which exists as between the parties to an informal marriage during the subsistence of the arrangement in relation to their mutual legal rights and obligations. This uncertainty is productive of great inconvenience. It is also productive of injustice, since the recognition of rights is dependent on the perception of individual judges and the extent to which they are prepared to give legal effect to the incidents of such arrangements, and the extent to which they are not deterred by the *Fender* v. *St. John Mildmay* attitude. In view of the prevalence of de facto unions, the degree to which they have found public acceptance, and the extent to which it may be regarded as contrary to public policy that particular

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been replaced by the enactment of a limited kind of statutory palm tree justice, which has modified the law relating to the matrimonial home—Marriage Act 1958 (U.K.) s. 161. The other is that in relation to the federal subject matter of matrimonial causes, the Family Law Act of the Commonwealth has applied wider criteria for dealing with property, *e.g.* ss. 78, 79 of the Act. These Australian provisions must, however, be read subject to the requirements of the Australian federal Constitution which prevents the simple creation of an Australia wide property regime—see discussion in *Family Law in Australia* (2nd ed. 1978) ch. 2.

[77] See the remarks of Lord Diplock in *Pettitt* v. *Pettitt* [1970] A.C. 777, 824, *cf. Doohan* v. *Nelson* [1973] 2 N.S.W.L.R. 320.

relationships should be unprotected by law and the parties to them exposed to exploitation, it seems appropriate that they should be given legal recognition. Such recognition would be general, instead of being limited for specific purposes as for example in relation to workers' compensation, income tax or maintenance. There are several ways in which legal recognition can be given to informal marriages. Some forms of legal recognition are retrospective, being based on an examination of past conduct upon which it is possible to predicate the existence of a cohabitation arrangement which had some of the characteristics of a marriage. Such *ex post facto* recognition is sufficient for the purpose of providing a remedy after the union has come to an end, although the claimant may not have any certainty during the subsistence of the arrangement that a remedy will be found should one be needed.

Other methods of recognition are prospective and therefore share the certainty of legal marriage. Below are some tentative suggestions which should not be taken as in any sense definitive. In this area law reformers will need to concentrate and systematise their efforts. The courts have shown that the need exists and that it is possible to find remedies. The objection that it is premature to engage in this kind of exercise does not appear to be valid. The objection is based on the supposition that we are dealing with a new and possibly transitory phenomenon; and that until it becomes clear whether extramarital cohabitation is here to stay, a wait and see attitude is more appropriate. Marriages are based on an attitude of mind, not on a piece of paper. In this sense marriage has been around for a very long time indeed; whether in a given case marriage falls into the legal or the informal category does not go to its essence. It is up to the law to recognise it for what it is: a very ancient, multi-faceted institution.

X RECOGNISING THE INFORMAL MARRIAGE

It has been the main purpose of this article to argue for a full measure of legal recognition to the informal marriage. It has been shown that in many areas a measure of recognition is already being given either by the courts or by statute, or by both. Daunting difficulties still have to be confronted. In the Australian context, these difficulties are exacerbated by the federal-state dichotomy caused by the distribution of powers in the Constitution. The regulation of marriage and of divorce are within the federal power of the Commonwealth of Australia. Other areas of private relationships are within the powers of the states. As a result, some areas of family law are now dealt with by one governmental apparatus, while others are dealt with by another. Giving the kind of legal recognition to informal marrige that has been discussed in this article would probably introduce yet another range of anomalies that have been troubling the High Court as the ultimate Australian tribunal for the decision of constitutional questions. Such legislative measures

as are suggested below would require agreement between the six states if they are to be uniform throughout the Commonwealth of Australia. Alternatively it may be that the High Court would accept an argument that the marriage power should be extended to informal marriages. The dicta of Windeyer J. in the Marriage Act case[78] could be thought to lend colour to such a view, although it is difficult to envisage the High Court, as presently constituted, taking such a great leap forward.

If the argument that the law ought to provide the necessary mechanism for giving legal recognition to the informal marriage be accepted, the next question is how this is to be done. To answer that question would open up a wide area of law and policy for discussion. It cannot be attempted here on any scale that would do the subject justice, but some tentative suggestions can be put forward. Any legislative measures designed to achieve this objective fall into two broad categories: prospective and retrospective. The first would seek to attach to the informal marriage certain legal consequences, similar to those attaching to legal marriage. This presupposes of course the presence of criteria enabling recognition being given to the relationship from its inception. Where such criteria are lacking, prospective recognition will not be possible. The parties may not themselves have any settled intention of forming a durable relationship. There may not be any perception by them during the subsistence of their relationship that it has, or is likely or intended to have, any marriage-like attributes. Yet to an impartial observer, such as a court of law, looking at the relationship after its termination it may be apparent that such attributes were present and that the parties or one of them is in need of legal protection or a legal remedy. In that situation, some retrospective mechanism will be required to allow a remedy to be given.

It will therefore be necessary to allow for recognition both prospectively and retrospectively. Whatever method or methods be adopted, statutory intervention will be required. The kind of spontaneous judicial legislation of which Lord Denning has been so dauntless a practitioner did not succeed in England in the long term, except as an opinion-forming device.[79] The Australian courts have been more conservative[80] and our legal tradition has not been conducive to the spontaneous rise of tilters at windmills or slayers of dragons. What we have lost in colour and vigour, we have perhaps gained in a settled reliance on legislation as the basis for innovation. It is all the more necessary that such legislation should be forthcoming. Subject to such overriding enabling legislation, one could perhaps envisage the following methods of recognition.

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[78] *Attorney-General for Victoria* v. *Commonwealth* (1962) 107 C.L.R. 529.
[79] See notes 53, 67 and 74 *supra.*
[80] See notes 66, 68-72 *supra.*

1. *Prospective recognition*

(a) *By declaration of intention*

Provision could be made for parties to an informal marriage to place their intention to cohabit on record thus supplying a criterion for prospective recognition. Upon such a declaration being filed legal consequences would attach as in the case of those unions declared to have come into existence on the basis of a period of past cohabitation. Such a union would come to an end upon "deregistration" or upon being adjudged to have come to an end where this is material and comes before a court to be determined. However, this would not put an end to any rights acquired during the subsistence of the union and capable of surviving its termination, for example in relation to children.

This method would also create a contract of adhesion in the way that legal marriage does, so that the legal consequences would be spelt out and known in advance. Variations could be introduced by allowing the parties a degree of freedom of choice as to these legal consequences. This could be done by providing a series of *pro forma* clauses, acceptance of all or any of which would be by an optional choice on the part of the parties.[81] Perhaps it would be necessary to stipulate certain minimal requirements incapable of being waived; requirements that should be kept within the control of the state on the grounds of public policy. Thus the supervisory jurisdiction of the courts as *parens patriae* over children within the jurisdiction would be incapable of being ousted.

(b) *By contract*

This would be an extension of the previous method. Whereas declarations would probably be useful where certain standard provisions were all that the parties desired, the cohabitation contract would allow a far greater range of options and provide greater flexibility. It would allow the parties to regulate the legal incidents of their relationship as they wished. The rule could provide for recognition of such a contract, perhaps upon its being registered, and by declaring the parties to have the status of parties to an informal marriage. Provision for termination of the relationship would presumably be made in the contract itself, but in the absence of such a provision the same arrangement for termination could apply as in the case of the deregistration of an informal marriage constituted by simple declaration. Termination could be by a unilateral act of repudiation, either in writing, or by conduct inconsistent with the continuation of the contract. The most obvious example of such inconsistent conduct would be the entering by one of the parties into a fresh cohabitation contract with another party or *a fortiori* a legal marriage.

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[81] See *e.g.* L. Weitzman, note 32 *supra.*

A cohabitation contract which is terminated in this manner would of course still be enforceable in respect of rights or liabilities previously acquired or incurred, although the statute may also provide that certain such rights and liabilities might be modified by a subsequent contract or marriage. For example, it is a notorious fact that most people cannot afford to maintain two families. This factor has been taken into account in the Family Law Act in "the responsibilities of either party to support any other person",[82] although recent judicial interpretation does not appear to have given this clause the kind of dominant effect that it might have been thought to have been intended.[83] It is also one of the reasons for abolishing imprisonment for failure to pay maintenance.[84]

The best argument in favour of allowing parties to "write their own ticket" is that it would enable them to avoid what they consider objectionable or irksome, and to provide those kinds of provisions which they consider best meet their own preferences and circumstances. The legislative sanction or authority for this kind of development, apart from certain mandatory provisions (for example in relation to children) is needed chiefly to ensure that a cohabitation contract is not set aside by the courts as being *contra bonos mores.*

2. *Retrospective recognition*

This would apply to those informal marriages where the parties did not initially realise that their association was acquiring a marriage-like character, or where they deliberately refrained from giving expression to any intention of forming such a relationship. If subsequently one of the parties were to feel in need of a remedy or of redress after the association had ceased to exist, it would be necessary to set up criteria for the retrospective recognition of the relationship, so that remedies could be created or extended in relation to it. This may perhaps appear as going a step further than in the last mentioned situation where the parties themselves had acted of their own accord to put the relationship on record at the outset. Yet it is logical to take this step, if the arguments that have been canvassed above are followed through. However, the extension is not as radical as may at first appear since in relation to any children of the union the supervisory and paternal role of the courts is already accepted as a reality.

Again, two possible methods come to mind.

(a) *By statute*

A general provision could be enacted declaratory of a status similar to that conferred by legal marriage upon certain conditions being

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[82] Family Law Act 1975 (Cth) s. 75(1)(e).

[83] *E.g. In the Marriage of Ostrofski* [1979] F.L.C. 78,933; *In the Marriage of Lutzke* [1979] F.L.C. 78,827.

[84] Family Law Act 1975 (Cth) s. 107.

satisfied. These criteria would operate retrospectively, by setting out certain tests which would indicate attribution of the status, such as cohabitation for a certain period of time, or the birth of a child.

A policy decision would have to be made at the outset. What if one or both of the parties to an informal marriage should be married already? To recognise the existence of an informal marriage in relation to such a party might be to condone a kind of informal polygamy. However, it is suggested that the purpose of the present proposal is the protection of the legal rights of persons who are parties to an informal marriage. Its basis is the recognition of a social phenomenon founded on fact and the observable conduct of members of the community. If these principles are to be given effect, there seems nothing incongruous in according a degree of recognition by operation of law to an informal marriage. The statute should provide that recognition of an informal marriage be expressed to be subject to the recognition of any prior or concurrent rights in any other person and arising from an antecedent or contemporaneous legal or informal marriage. For the sake of completeness rights arising from a union, legal or informal, should probably be made subject also to rights arising from a competing legal or informal union subsequently entered into. It may seem hard that a legal marriage should be affected by an informal union subsequently entered into. However, when it is realised that the subsequent union may result in the production of children, and that status of children legislation has already largely removed from such children the disadvantages of ex-nuptial birth, it seems logical to carry that policy to its natural conclusion. The present discussion is more concerned with the legal machinery for dealing with informal marriage than with the policy to be adopted. If policy dictated a discrimination against an informal marriage when there is competition between it and a legal marriage, the proposed law could be so designed as to attract different consequences in relation to the parties to such respective arrangements, though such discrimination is not being advocated in this article.

(b) *By judicial recognition*

There will still be cases where the parties, whether from choice or mere neglect, do nothing whatever about putting their cohabitation on any legal footing. It may simply be a case of a casual drifting together, without any initial intention of forming a lasting attachment but which subsequently assumes that character. However this may be, it would still be open to a party to obtain redress in the courts for any rights or equities violated or infringed, with the courts acting in the way that the Court of Appeal has done in England. In fact, this method could be complementary to the last one: statutory recognition of certain equities springing up between the parties to an informal marriage in the course and arising out of the arrangement. Nevertheless, in view of the criticisms of judicial legislation that have been implied here this can only be

recommended as a last resort and in the absence of adequate regulation by any of the other methods. It is too unreliable to be capable of resolving the problems consistently and comprehensively. Probably all that could be done is to set up guidelines for the exercise of the judicial discretion in favour of recognising the relationship where "equity and good conscience" demands that a remedy should be given where none applies. It could provide the kind of judicial lawmaking power that Lord Denning unsuccessfully sought in section 17 of the Married Women's Property Act 1882,[85] but only to the extent to which no appropriate remedy was otherwise available.

XI CONCLUSION

Sketchy as these suggestions have been, it is submitted that they point the way in which the law should be moving. They would go far towards assimilating in law the informal and legal marriage as it is already in fact. These suggestions would confirm the evolutionary trends in human relationships assumed to have taken place in recent times in our society, and to fill an existing vacuum in our social laws. The result would not be as startling as may at first sight appear. It would be in keeping with what marriage has traditionally been as to its formation, and with what it has become in modern times as to its duration. Before Lord Hardwicke's Act of 1754 the marriage relationship required no rigid adherence to legal formalities for its inception. A simple bilateral declaration of intent was all that was necessary followed by consummation. There was no necessary publication or public notoriety, and there was no systematic or centralised provision for its recording or registration. And since 1857, and increasingly so in modern times, it has become a relationship that endured only so long as it met the desires and needs of both parties in fact and in law. The law has become adapted to giving effect to those desires by allowing the parties to adjust their legal relationship in accordance with them. The law has remained as the watchdog over rights and liabilities arising out of the relationship. If seeing that justice is done is the proper role of the law there can be no justification for a refusal to exercise that role where the parties by their conduct have indicated that a relationship in the nature of a marriage exists between them, merely because they have not chosen to make use of a particular ritual or evidentiary formula. It is too late in the day for the law to continue a discrimination between the legal and the informal marriage.

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[85] See notes 53, 67 and 74 *supra*.