

**ASPECTS DE DROIT INTERNATIONAL PRIVÉ DE LA COHABITATION
HORS MARIAGE ET DES PARTENARIATS ENREGISTRÉS**

Note établie par le Bureau Permanent

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**PRIVATE INTERNATIONAL LAW ASPECTS OF COHABITATION
OUTSIDE MARRIAGE AND REGISTERED PARTNERSHIPS**

Note drawn up by the Permanent Bureau

*Document préliminaire No 9 de mai 2000
à l'intention de la Commission spéciale de mai 2000
sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 9 of May 2000
for the attention of the Special Commission of May 2000
on general affairs and policy of the Conference*

PRIVATE INTERNATIONAL LAW ASPECTS OF COHABITATION OUTSIDE MARRIAGE AND REGISTERED PARTNERSHIPS

INTRODUCTION

1 The Permanent Bureau's first "Note on the law applicable to unmarried couples" was drawn up in December 1987. It concluded that "the problem of the law applicable to unmarried couples should not be ignored by the Conference, even though it does not require urgent consideration at this time" (at paragraph 8). The subject was adopted for study, but without any particular priority, at the Sixteenth Session of the Conference.¹

2 A second Note on the same subject was drawn up by the Permanent Bureau in April 1992 for the attention of the Special Commission of June 1992 on General Affairs and Policy of the Conference.² Annex II of that Note contained a general survey of the field compiled by Miss Valérie Judels. That study surveyed the status of the unmarried couple in comparative law, and possible approaches to resolving the private international law problems surrounding "free unions". The Note summarised the findings of the study as follows:

"It shows, through a comparison of internal legal systems, that a wide range of solutions has evolved. Some systems regulate all the relationships arising from cohabitation; others focus on certain aspects only; still others leave the whole subject outside the law. As far as private international law is concerned, legal writers have so far offered few solutions, and the positive law elements are few and far between."

The Note concluded, nevertheless, that the phenomenon of "international cohabiting couples" is an established one in Western Europe, that it is likely to gather momentum now that the frontiers of Eastern Europe have largely opened up, and that the same situation is to be found in Latin America where free unions are extremely common.

3 The matter was further considered by the Special Commission on General Affairs and Policy of the Conference of 20-23 June 1995. Some experts considered that the area of homosexual couples should be included in the project, but others were worried that this might give rise to controversy. A number of experts questioned the desirability of separating out the property rights of unmarried couples from such rights in other relationships.³ The Eighteenth Session decided to retain the item on the Agenda of the Conference without priority, but extending its scope to include "jurisdiction, applicable law, and recognition and enforcement of judgments in respect of unmarried couples".⁴

¹ *Proceedings of the Sixteenth Session (1988)*, Tome I, *Miscellaneous matters*, pp. 253 *et seq.*

² Preliminary Document No 5 of April 1992 for the attention of the Special Commission of June 1992 on General Affairs and Policy of the Conference.

³ Conclusions of the Special Commission of June 1995 on General Affairs and Policy of the Conference, Preliminary Document No 9 of December 1995, *Proceedings of the Eighteenth Session (1996)*, Tome I, *Miscellaneous matters*, at pp. 108 *et seq.*

⁴ *Final Act of the Eighteenth Session of the Hague Conference on Private International Law*, 19 October 1996, under Part B 4 c.

INCIDENCE OF COHABITATION

4 The trends identified in the Note of April 1992 and in Annex II of that Note remain largely valid. The number of persons cohabiting outside marriage continues to expand in many parts of the world. Nevertheless, the phenomenon of increased cohabitation remains an elusive one, defying generalisations with respect to its characteristic forms, its social causes and the personal motivations involved. The legal responses to the growth in unmarried cohabitation in different systems remain equally diverse.⁵

5 Within Europe, it has been suggested that countries can be separated into three groups, those where unmarried cohabitation is well established, those where unmarried cohabitation is an emerging phenomenon, and those where it scarcely exists.⁶ Among the first group are the Nordic countries where cohabitation is seen as an alternative to marriage. As one moves south, patterns of cohabitation, though not uniform, are less marked, with a greater concentration on pre-marriage and post-divorce cohabitation. Further south in countries such as Italy, Spain and Portugal, cohabitation is less common.⁷ It appears that this same north-south divide operates with respect to the incidence, or at least the social acceptability, of same sex partnerships. The patchwork of cohabitation patterns is similarly complex in other parts of the world.

6 Viewed from the perspective of the individuals concerned, the reasons for choosing unmarried cohabitation (whether heterosexual or same sex) in different countries include rejection of the traditional marriage contract, a wish to avoid specific incidents of marriage (such as a mutual obligation of support), a wish to postpone marriage or to engage in a "trial marriage", alienation from forms of marriage imposed by a dominant culture,⁸ or the existence of some legal impediment or bar to marriage. In framing an appropriate private international law response, it may be wise to bear in mind these different motivations, and to avoid the temptation of assuming, for example, that the phenomenon of unmarried cohabitation invariably arises from a rejection of the standard terms of the marriage contract, or indeed that it is always an act of free will or informed choice.

LEGAL RESPONSES IN NATIONAL LAW

7 The legal response to unmarried cohabitation in national law presents a similarly diverse picture. States where traditional marriage continues to enjoy a preferred status and special privileges have been generally slow to accord status to non-marital unions, in contrast with those States which have adopted a more pragmatic position, or even a position of neutrality, with regard to preferred living arrangements between adults. Again the picture does not present a simple black and white image, but a moving spectrum of colours. For example, the principle of non-

⁵ A bibliographical overview of books and articles published between 1977-1987 appears in the Note of April 1992. John Eekelaar and Thandobantu Nhlapo, *The Changing Family, Family Forms and Family Law*, Hart Publications, Oxford 1998, contains a number of relevant chapters.

⁶ Kathleen Kiernan, Partnership Behaviour in Europe: Recent Trends and Issues, in David Coleman, *Europe's Population in the 1990's* (Oxford, U.P. 1996), pp. 62-91.

⁷ Franz Rothenbacher, Social Change in Europe and its Impact on Family Structures, in *The Changing Family, Family Forms and Family Law*, *supra* footnote 5, pp. 4-31.

⁸ This is sometimes a product of colonisation. See, for example, B. Rwezaura, The proposed abolition of *de facto* unions in Tanzania: a case of sailing against the social current, in *The Changing Family, Family Forms and Family Law*, *supra* footnote 5, pp. 175-195.

discrimination between children has led to increasingly general acceptance that the legal relationship between a parent and child should not differ in accordance with the status of the relationship between the parents. Social welfare systems have also tended to give recognition to cohabitation, whether as an entitling or disentitling factor, with concentration on the factual aspects of adult living arrangements including actual dependency and actual support. There has also been an increasing tendency to extend legal remedies against physical abuse within the family to relationships which are not based on marriage. On the other hand, movement has been slower in the recognition of mutual maintenance, property and succession rights between cohabitantes.

8 A variety of techniques has been used to widen the legal effects of relationships based on cohabitation. Judicial developments have included the use and extension, especially in relation to property rights of general principles deriving from contract, trusts, and unjust enrichment. Judges have become inclined more recently to employ constitutional equality norms in situations where legislation has extended rights or privileges only to limited categories of cohabitantes.⁹ Legislation has been the preferred option in several States for the extension of property or succession rights to cohabiting partners.

9 One of the consequences of the piecemeal development of legal regimes for cohabitation has been proliferation in the definitions of cohabitation. The required permanence or length of cohabitation is often defined contextually to accord with the policy underlying particular legal rules. Thus definitions of cohabitation differ, not only from one legal system to another, but within legal systems according to the particular legal context whether it be social welfare, property, taxation, succession to a controlled tenancy, succession more generally, access to protective remedies, etc. Indeed, even within such specific legal contexts, there may be variations in the definition of cohabitation.

REGISTERED PARTNERSHIPS¹⁰

10 In contrast with this pattern of piecemeal development, there has in the last decade been a movement in some countries towards granting a much broader status to certain types of cohabitation. The development of the "registered partnership" has in effect established an institutional framework similar to marriage for certain forms of cohabitation, usually for same sex couples who are debarred from marriage, but also in some countries available to heterosexual couples as an alternative to marriage. The consequence of registering a partnership are, with the exception of child related matters, broadly similar to those of marriage. The institutional framework includes rules relating to capacity, dissolution, etc. This development began in Denmark in 1989.¹¹ Since then registered partnership legislation has been

⁹ See for example the decision of the Canadian Supreme Court in *Attorney General for Ontario v. M. and H.* No 25838 (20 May 1999), and the decision of the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, Case CCT 10/99 (2 December 1999).

¹⁰ See generally Caroline Forder (assisted by Silvina H. Lombarde), *Civil Law Aspects of Emerging Forms of Registered Partnerships*, Ministry of Justice, The Hague, 1999, and Martha Bailey, *Marriage and Marriage-like Relationships*, Law Reform Commission of Canada, 1999, (*Le Mariage et les Unions Libres*, Commission du droit du Canada, 1999).

¹¹ Registered Partnerships Act, Act No 372, 7 June 1989 (in force 1 October 1989).

introduced in Norway,¹² Sweden,¹³ Iceland,¹⁴ and the Netherlands.¹⁵ In France, the analogous *pacte civil de solidarité* was introduced in 1999.¹⁶ In the Spanish autonomous region of Catalonia, legislation was introduced in 1998,¹⁷ extending some of the rights and obligations of marriage to registered opposite sex and same sex couples and to opposite sex couples who have cohabited two years and have a child together. Also of note is the Catalan Mutual Assistance Act of 1998, which regulates cohabitation of persons (for example, elderly couples, adults caring for parents, brothers and sisters or even friends) who provide each other with mutual assistance, but does not extend to those cohabiting in a conjugal relationship. There has been active discussion of partnership registration at the national level in Spain and in other European and non-European States.

PRIVATE INTERNATIONAL LAW APPROACHES

11 The increased incidence of cohabitation outside marriage, combined with the varied but generally expanding legal consequences which States attribute to it present a challenge for private international law. The absence of clear private international law rules may inhibit free movement across borders by cohabittees where, for example, a status or legal right established in one jurisdiction is not recognised in another, or it may facilitate a partner who is intent on evading established obligations. On the other hand there is an underlying issue of public policy and a perception in certain States that the recognition of legal consequences for cohabitation may undermine a policy of preference of marriage.

12 There are also difficult problems of technique. Perhaps the least difficult are those raised by the development of the registered partnership. Here the obvious analogy is with marriage and consideration can be given to applying familiar techniques to the establishment, effects and dissolution of a partnership. This line of enquiry is followed in greater detail in the attached Annex, which reproduces a paper prepared by William Duncan, First Secretary, on "Civil Law Aspects of Emerging Forms of Registered Partnerships. Private International Law Issues", which was presented at the Council of Europe's Fifth European Conference on Family Law (organised in co-operation with the Hague Conference on Private International Law and the International Commission on Civil Status / *La Commission internationale de l'état civil*) in The Hague in March 1999.

13 Where legal consequences are attached to cohabitation on an *ad hoc* basis, with varying definitions of cohabitation applying for different purposes, the questions surrounding status do not assume the same significance. One task here is to explore the applicability of existing private international law solutions, or their possible extension by adaptation. For example, Article 16 of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* contains an applicable law principle with respect to the attribution or extinction of parental responsibility by operation of law which

¹² Act on Registered Partnership for Homosexual Couples, Act No 40, 30 April 1993 (in force 1 August 1993).

¹³ The Registered Partnership (Family Law) Act of 23 June 1994 (in force 1 January 1995).

¹⁴ Confirmed Cohabitation Act 1996, 12 June 1996 (in force 27 June 1996).

¹⁵ Registered Partnership Act of 5 July 1997 (in force 1 January 1998).

¹⁶ *Loi No 99-944 du 15 novembre 1999 relative au pacte civil de solidarité.*

¹⁷ Ley de Uniones Estable de Parejas (Stable Couples Act) Act 10 1998, 15 July 1998 (in force 23 October 1998).

may be applied in respect of cohabiting parents. The *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons* also contains applicable law principles which could be applied to cohabiting couples if the public policy exception in Article 18 is not invoked. The two Hague Maintenance Conventions of 1973¹⁸ apply to maintenance obligations "arising from a family relationship". Is it possible or appropriate for this concept of family relationship to be interpreted as including relationships based on cohabitation? Should the provisions of the *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes* be adapted or extended by analogy to non-marital cohabitation?

14 In view of the novelty of the "registered partnership" and the relative ease of devising rules for an institution which is analogous to marriage, there may be a temptation to give it priority for treatment under private international law. However, the number of persons living together outside marriage without registering their partnerships far exceeds the number of registered partners, and there continues to be a debate in a number of countries as to whether partnership registration is the most appropriate legal technique for extending the rights and obligations of cohabitants.¹⁹ A need for the Hague Conference to involve itself in the development of private international rules for both registered partnership and non-marital cohabitation has been asserted in recent academic writings.²⁰

CONCLUSIONS

15 In the light of these considerations, the view of the Permanent Bureau is that the private international law aspects of cohabitation outside marriage should remain on the Agenda of the Conference, to be considered along with the private international law aspects of registered partnerships. It is still premature to think in terms of developing a new convention on either or both subjects. Nevertheless, the time has arrived to begin a more intensive consideration of the options and of the feasibility of moving towards a uniform approach in private international law. One possibility which might be considered would be the establishment of a Working Group, comprising experts from interested States, with a mandate to review the current developments and to formulate a possible strategy for developing a uniform approach to the issues of private international law raised by cohabitation outside marriage and registered partnership.

¹⁸ *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* and the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*.

¹⁹ Some States have preferred the policy of legislating for cohabitation as a factual relationship giving rise to dependency. See, for example, the De Facto Relationships Act 1984 (New South Wales), now renamed the Property (Relationships) Act. See Property (Relationships) Legislation Amendment Act 1999.

²⁰ Boele-Woelki, K., De wenselijkheid van een IPR-verdrag in zake samenleving buiten huwelijk, in *FJR* 1999, pp. 11-13; Petar Sarcevic, Private International Law Aspects of Legally Regulated Forms of non-marital cohabitation and registered partnerships, *Yearbook of Private International Law*, Volume 1, 1999, pp. 37-48.