

REGISTERED PARTNERSHIPS : CURRENT PROPOSALS

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It is never easy in a legal system to deal with issues laden with history and religious connotations. The notion of the couple remains a subject that receives special treatment in nearly all civilisations, even if the answers are very different¹.

There are probably three reasons for this.

The first reason is probably political and exists even without any visible link between the couple and procreation, which presupposes some degree of observation. The couple remains the basic economic and social unit, even though it often becomes merged in fuller intermediate units such as hordes, tribes or enlarged families. The second reason is scientific because the couple remains the place of procreation and hence of renewal of society. The third reason is social because, despite attempts on the part of the authorities, the couple remains in the majority of cases the place where children are prepared for life in society.

The reply to this challenge faced by the couple² proceeded for a long time by way of the religious and then the legal consecration of a formalised commitment with a highly compulsory status, coupled with a ban on, or close regulation of, dissolution. Marriage is a place where the individual encounters society through a legal act that is of necessity novel.

The development of individual rights, a certain cultivation of hedonism, a society that finds its intermediaries elsewhere than in the couple, a more and more socialised education of children and an exceptional longevity all cause the preceding analysis to be revised to a greater or lesser extent. For a lawyer the question can be very simply summarised : should a union between human beings come to be defined as a purely private matter, with the law confining itself to a measure of neutrality or even of indifference ?

The replies given by the various laws are very diverse. None of them has yet envisaged the abolition of marriage, something which, after all, is not entirely inconceivable. Many laws are in a process of evolution, which renders this statement very provisional.

It seemed to us that the different approaches and laws could be put into three groups.

Outright and clear refusal has become rare, but if the test is the absence of specific legislation, one does find some countries in this group, though they may nevertheless make a reservation for possible solutions in case-law.

The richest group still comprises those countries that have adopted special legislation on registered partnerships or an equivalent, but the content of such legislation is extremely varied and often depends on the discussions on matters of principle that preceded the drafting of the text.

¹ *The International Survey of Family Law, which is an excellent barometer of the concerns of the legislatures of the various countries, has for several years been showing that they are focussing their attention on the couple, its definition and its composition ; see, most recently, the 1997 edition, edited by A. Bainham, published by Martinus Nijhoff, April 1999.*

² *On this notion see « La notion juridique de couple », edited by C. Brunetti-Pons, Economica, 1998 and our article « Couple et différence de sexe » pp. 96 et seq. ; by the same author, L'émergence d'une notion de couple en droit civil, RTDciv. 1999.27 – See also for France, 95th Congress of French Notaries, Demain la famille, May 1999, especially pp. 200 et seq.*

Finally, one could discern the growth of a group of laws which appear to persist in treating the question of living together as a mere fact that sometimes entails important consequences but does not necessarily give rise to any commitment¹.

I. No acceptance of an institution of partnership

A sizeable group of States does not contemplate legislating or is simply at a stage of reflection, which does not imply any commitment to legislate in the near future.

Nevertheless, some of these States can also be included in the third group, which confers certain rights on partners in fact. For the time being this is the situation in Germany despite an agreement between political groups in the new majority on a Bill, to which impetus might be given by certain symbolic initiatives on the part of the Länder, for example the Land of Hamburg. This is still the situation in Greece, Hungary, Luxembourg, Portugal, Switzerland and Turkey. In Italy there have been a number of Bills, but none of them seems to have been finally adopted.

In these various States, as in France until recently, the arguments in favour of taking no action are of two kinds.

1°) First, there are reasons based on society's interest in consecrating the couple. Since marriage has been chosen as a reference point, and is sometimes even expressly mentioned in the Constitution, emphasis is generally laid on the reciprocity of rights and obligations – something that a priori is to be excluded between mere partners, who seek above all rights vis-à-vis the State – and on the value of stability of the relationship, which comes down to the procedures for dissolution. It is alleged that potential partners in a registered partnership would not have the slightest intention of entering into any obligations or committing themselves to a relationship of any duration, and that this warrants having recourse to partial and limited solutions without creating a genuine status that could only be of a duration that is not desired.

2°) To the foregoing there are generally added technical reasons relating to the impossibility of defining the couple for whom the partnership model is designed. Whereas the minimum common features of the standard married couple could be listed, this would not be true of the unmarried couple and the formulation of any precise rules would thereby be excluded. Moreover, and this is a real problem that is clearly revealed by the current French experience, the avoidance of any element of discrimination based on sex has the result of comparing couples who are very different in kind and between whom there is necessarily an element of competition. The criterion of living together can embrace a multitude of situations, some of which have nothing to do with sexual relations. The successive misadventures of the French Bill show clearly that, alongside couples imitating marriage, there exist couples or « pairs » who have absolutely no connection with marriage but nevertheless encounter similar problems that would warrant similar solutions.

This point underlies the current discussion on « brotherhoods » which, in France, complicates, amongst other things, the taking into account of cohabitation in general.

In point of fact, most legislatures have abandoned any idea of giving any positive coherence to the texts adopted and have confined themselves to the negative determination of all those who cannot or do not wish to marry.

¹ On these aspects of comparative law two publications edited by J. Rubellin-Devichi remain essential reading : *Les concubinages en Europe et les concubinages dans le monde*, CNRS 1989 and 1990. See, most recently, *Working documents of the French Senate, Comparative Legislation Series, The Civil Solidarity Pact (Le pacte civil de solidarité)*, December 1998. — See also, *The International Survey of Family Law*, op. cit., and the numerous articles on this subject in the various countries. — On the choice between the various legislative techniques, J. Hauser, *Le symbolique, le quotidien et la vie à deux*, in *Famille, nouvelles unions, bonheur privé et cohésion sociale*, Revue « Témoin », Sep./Oct. 1998, published by Balland.

But is this really the symbol awaited by those who wanted public recognition ? Is it satisfactory to be placed in a category that, intellectually, is residual ? In our view, a thorough reconsideration of the inherent value of living together, in a society where the scourge of isolation entailed by the collapse of traditional structures is a real problem, would have made it possible to take more far-reaching and more positive steps, leaving marriage, which is something different, more to one side. It is by no means certain that, after several years of application, the various types of status chosen will not lead inevitably to a reconsideration of this kind, which will have been avoided only provisionally¹.

Neither can it be excluded that this group of laws, if it were to continue to take no action, will not generate, through solutions adopted in its case-law on the mere fact of living together, a genuine philosophy the development of which would be facilitated by the absence of texts, whereas the other groups, encumbered by hastily-adopted texts that often lack precision and are more symbolic than legal, would in their turn fall behind with the appearance of a new type of couple.

II. Partnership as a commitment

The overall design of this group of laws is largely derived from a copy of marriage, the copy being more or less divergent or more or less detailed. Both the conditions and the effects differ greatly from one State to another.

1) The conditions

The conditions for the acquisition of this new status very often depend on the state of the legislation before the new law was adopted.

- a) For those laws that already very broadly, if not completely, assimilated heterosexual cohabitants to married persons, the main aim of registered partnership is to meet the demands of the homosexual couples who were excluded from marriage. This is generally the case of the Scandinavian countries. The French Senate, which wishes at all costs to avoid any competition with marriage, thus skilfully employed the policy of rushing ahead (17 March 1999) by proposing that, as regards property, heterosexual or homosexual cohabitants should be closely assimilated to married persons, a step that would avoid creating a pact akin to marriage².
- b) Other countries have adopted a partnership designed, without differentiation, for all persons living together, whatever their sex. This is the situation in the Netherlands and in the Spanish province of Catalonia. The Belgian Bill on legal cohabitation, which has been adopted but the entry into force of which is subject to a condition, makes no distinction according to the sex of the parties. The same will apply to the draft civil solidarity pact proposed by the French Government – though its evolution in the course of the Parliamentary debates is rapid –, which would offer the possibility of a registered commitment to partners of whatever sex.
- c) The degree to which partnership is assimilated to marriage can be seen to vary greatly according to the country, the test remaining whether partnership is open to people who are related. On the whole such opening is generally refused, but to a greater or lesser extent. Again, and this is a surprising rule, all the laws in question refuse partnerships between more than two persons and

¹ Jean HAUSER, *Les communautés taisibles*, D. 1997, chr. 255.

² Following the addendum introduced by the French Senate, according to the draft (May 1999) adopted on a second reading in April 1999, an Article 515-8 will be inserted in the Civil Code. It will read : « Cohabitation is a factual union, characterised by living together in a stable and continuous manner, between two persons, of different or the same sex, who live as a couple ». This addendum which should, according to the Senate, lead to exclusion of the draft civil solidarity pact should, according to the National Assembly on the other hand, be combined with it. See in particular the opinion of Mr Carbonnier on this draft, in *Droit de la famille*, *Post-scriptum*, pp. 693 et seq., published by PUF, March 1999.

thus recreate monogamy within cohabitation, even in the case of homosexuals. The same applies to the impossibility for someone who is already bound by the ties of marriage to enter into a partnership. The bias in favour of liberty on the part of the enthusiasts for these partnership proposals is thus curiously combined with very classic references back to the characteristics of couples.

- d) Fairly substantial diversity is also found as regards the formalities for entering into this kind of partnership. Whilst provision is made for a real celebration in those States that have devised a partnership for the exclusive use of homosexuals – something that in general meets the very strong desire on the part of this sector of the population to have a symbol –, in the other countries the procedure varies but, as for example in Belgium, comes down to registration with a local authority or, as in the French draft, with a court registry. It should be noted that often mere registration does not satisfy the authors of demands, who subsequently manage to obtain a ceremony or even, as in the proposals current in certain countries, a celebration akin to that for marriage.

2) The effects

It is often quite difficult to gauge exactly the effects of these partnerships, since they are not always specified in the text of the Act itself but rather by means of a reference back to other texts, or even a mere reference to a similar situation dealt with by other texts, a technique which assumes that the legislation in question will be examined in detail.

Whilst on the whole one finds a minimum base that is generally granted in the shape of social rights or elementary rights such as the right to housing, the differences are much more marked when it comes to fiscal rights, where there is not always assimilation, or again as regards rights in the matter of nationality.

As for obligations, the diversity is also fairly substantial. For certain laws, having regard to the breadth of the obligations imposed, the question arises as to what is left to distinguish cohabitation from marriage, at least for heterosexual couples. It might be thought that the difference lies in the means of dissolution but, knowing that a number of these laws have accepted divorce by a mere declaration, the difference is really no longer apparent.

In order to detect a substantial distinction, it is necessary to look at the rules regarding children and the possibility of adopting or of having recourse to medically-assisted procreation. Whilst the ban on adoption by a couple of heterosexual cohabitants clearly seems to amount to a rear-guard action – it is still being conducted by France under pressure from adoption lobbies –, the issue of adoption by a homosexual couple is giving rise to profound differences of opinion. For the moment such adoption is generally refused, but the Netherlands seem to be on the way to allowing it, a step which other countries are far away from taking, probably for a long time. The same applies to the possible organisation of a recomposed family between the children of one of the partners and the other partner.

In these circumstances, it would not be out of place to observe, as do certain French sociologists, that it is pointless to approach the problem from the angle of the scope of a commitment. It is impossible to standardise this commitment and impossible to define its limits and content. A sounder course would be to tackle the problem from the opposite direction, by taking account of the mere fact without requiring any declaration of consent.

III. Partnership as a fact

In the discussions in France, this last remark represents the position taken by the sociologist Mme I. Théry¹, for whom the mere fact of living together ought to entail the consequences of marriage. In reality, this is partly the situation in a number of laws, but under her proposal it would become automatic and be provided for by law.

1) *In the case of those laws where there has been no full-scale intervention by the legislature, it would be wrong to believe that unmarried couples enjoy no rights. Very often – and this is true of Spain, France and many other countries –, case-law has for a long time met essential demands by relying on simple techniques based on facts, notably for example the fairly generalised techniques relating to de facto partnerships.*

Moreover, if no general text has been adopted, there is often no shortage of special legislative solutions, notably in the areas of fiscal or social law.

However, these solutions, which recognise partnership as no more than a fact, come up against some obstacles :

- *first, a lack of a symbol, since being treated as a fact is far from what is claimed, especially by homosexual couples ;*
- *highly unclear definitions, since the courts adopt for example, as in France, very inconsistent solutions on the question of the rights of homosexuals living as a couple ;*
- *finally, a relative uncertainty, since what is involved are situations on which decisions are always taken a posteriori, although this criticism could be thrown back, at least for heterosexuals, against couples who precisely did not wish to make a long-term commitment.*

2°) *Would it be possible to generalise this taking into account of pure facts ?*

As is usual with this sort of question, one runs up against the insoluble problem of how to prove facts. Whilst proof of a commitment, whatever its strength, is conceivable, a pure fact is generally proved only a posteriori or when a dispute arises ; accordingly, this does not solve the problem of conferring rights for the future. The proposals of the French sociologist included having recourse to the purely French notion of generally recognised enjoyment of a status (possession d'état)², but the point is that proving this enjoyment of a status does not work very satisfactorily in French law.

Moreover, and this brings us back to a discussion of principle, if partners were granted all rights, without any commitment or counterpart, on the sole basis of their living together, one could scarcely discern any more the justification for retaining the institution of marriage.

In truth, it is beginning to become a little clearer in these discussions that one must simply start again at the end, that is with the nature of the rights one wishes to confer.

¹ I. Théry, *Couple, filiation et parenté aujourd'hui, Le droit face aux mutations de la famille et de la vie privée*, Ed. La documentation française et O. Jacob, 1998.

² On recourse to this notion in the French drafts, see G. Hénaff, *La communauté de vie du couple en droit français*, RTDciv. 1996, 551.

If it is a question of rights that can be qualified as fundamental (right to housing, certain social rights, etc.), mere cohabitation in fact, subject to a minimum condition of stability and duration, could be considered to warrant them, without even attempting to qualify the couple on whom they are to be conferred.

If there is a wish to obtain fuller rights, society is entitled to require certain commitments in exchange for a symbolic and legal recognition. There would then be two degrees :

- *either the composition and content of this commitment would remain optional and the law would attach to it certain rights enumerated and provided for in general or in special texts,*
- *or this commitment would comply with norms imposed by the law with a view to ensuring stability and efficacy and would attract all the rights attached by law thereto.*

This would be the price for maintaining a measure of dialectic between society and the family model. The view could also be taken that from now on this is a question that falls outside the domain of the law and so belongs (reverts ?) to the realm of custom and usage. In that event, everything would be simplified : family law would be destined to disappear because there would be no reason for not doing the same thing with relations between parents and children. Some legislatures seem to be preparing for this, but it may also be a trend of the moment, whereas decisions on family law are not taken on the strength of a few laws and just a few years.