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Addressing the Legal Status of Cohabitation in Britain and France: Plus ça change...?

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Summary

The incidence of cohabitation and births outside marriage in France is similar to that in England and Wales. Although they have traditionally adopted very different approaches to family law, their response to the phenomenon of cohabitation has traditionally been surprisingly similar. In both, the law has developed piecemeal, leaving cohabitants with inadequate legal remedies, and the article first compares the current law in the two jurisdictions. However, the French government has now demonstrated its willingness to confront the legal needs of cohabitants. Proposed French legislation both acknowledges a legal status of cohabitation – whether heterosexual or homosexual and in addition will permit all unmarried cohabitants to enter into a civil union contract known as a PACS. This will approximate their position more closely to that of married couples for all purposes, including social security benefits, inheritance, maintenance and property division on relationship breakdown. In contrast, the British Government's Consultation Document *Supporting Families* (1998) virtually ignores the needs of cohabitants focusing instead on strengthening marriage. The article goes on, therefore, to analyse and contrast the impact of this new divergence in approach between the two jurisdictions, and assesses its significance in the light of reforms being implemented elsewhere in Europe.

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Introduction

In both Britain and France there is evidence of restructuring away from marriage on a large scale, a process termed *démariage* by Thery (Thery 1997). The difficulty of making cross-cultural comparisons is compounded by the fact that the two jurisdictions use different methods for determining the extent of heterosexual cohabitation. However, as a rough estimate, around one million heterosexual couples are living together without being married in Britain, while in France the number has reached two and a half million. Nor is this merely what Kiernan has termed 'nubile' cohabitation: there has been an increase in the numbers cohabiting across all age categories and cohabitation is more common among the divorced than among those who have never married (Kiernan 1996, Haskey 1992). Overall, the respective national statistics show that one in five of all couples cohabit in France as compared with 27% of never-married women and 32% of divorced women between 18-49 in Britain (L'Insee 1998, Social Trends 1999). Moreover, while many cohabiting couples go on to marry (Leridon 1990, Haskey 1997), cohabitation is increasingly seen as a longer-term alternative, rather than simply a prelude, to marriage (Lewis 1999, pp 53-55). The lack of any official documentation makes it more difficult to provide a figure for the numbers of homosexual cohabitants. Neither jurisdiction currently collects statistics on homosexual cohabitation, although it has been stated that the next British census, due in 2001, will seek to do so. In France it is estimated that there are between a quarter and a half a million gay cohabiting couples who are a driving force behind the attempts at legislative reform (*Le Nouvel Observateur*, 23 August 1998). The significant numbers involved mean that the Napoleonic adage that 'cohabitants ignore the law and the law ignores them' is no longer acceptable.

The current law

One would expect the two jurisdictions to approach the issue of cohabitation in very different ways. The common law tends to favour incremental reform, dealing with particular problems on a piecemeal basis. By contrast, the French civil law jurisdiction has most of its family law codified within the First Book of the Civil Code and lacks a formal

system of binding precedent. Thus a more global legislation-based approach to reform would be anticipated. However, the failure of a number of legislative initiatives has led to France, like England, adopting a piecemeal approach to the issue of cohabitation. Not only does this feature *ad hoc* legislation, under which rights similar to those granted to married couples are extended to (usually just heterosexual) cohabitants, but it also involves an active and important role being played by judge-made law, even in the French jurisdiction.

The most extensive reforms on both sides of the channel have occurred in the context of children. To this extent an acceptance of the reality of the restructuring of family life away from marriage toward the heterosexual couple with dependent children can be observed, although a more cynical view might be that both Governments are more willing to impose obligations than to extend rights. In both France and Britain, parents, regardless of their marital status, have a duty to provide financial support for their children (Civil Code (CC) art 334; Children Act 1989 and Child Support Act 1991). The inheritance rights of children are also unaffected by the status of their parents (CC art 757 *Loi* no 72-3 1972; Family Law Reform Act 1969, s. 15). Joint parental responsibility has been automatic in France since 1993 (*Loi* no 93-22, art 38) and it has been proposed that joint registration of the birth should be sufficient to confer it here (LCD 1998). The co-parenting issues that arise in the context of gay and lesbian couples are rather different and it has been noted that discrimination is still a very real issue here (Barlow 1998).

The scope for private ordering remains contentious. The validity of cohabitation contracts has not yet been established in England (Pawlowski 1996). However, in the event that such a contract were litigated, it is likely that the courts would prefer to adopt the approach taken in several Commonwealth countries of declaring it valid,¹ rather than following the older precedents, such as *Upfill v Wright* [1911] 1 KB 506, that struck down such contracts on the ground of immorality. By contrast, French cohabitants are entitled to enter into a contract to regulate their financial affairs (CC art 1134), although contracts attempting to regulate the personal lives of the parties are unlikely to be upheld (Fenouillet 1997, pp 152-3). They may also confirm their eligibility to certain rights conferred under the general law by obtaining a *certificat de concubinage* (Code des Communes art L.122-26). Most town halls are willing to issue such certificates to heterosexual cohabitants upon proof that the parties live together and a number are willing to grant similar certificates to same-sex couples. The effect of a certificate is largely symbolic in the case of the latter, as they have fewer rights under the general law and the certificate confers no new rights. Should the town hall refuse to issue the certificate, it is possible for the parties to make a declaration that they are living together, which, if

¹ See *Kutsenko v Wasilenko* (1959) 19 DLR (2d) 665; *Seidler v Schallhofer* [1982] 2 NSW 80; *Kainz v Bleiler Estate* (1994) 1 RFL (4th) 188. In addition, New Zealand, three Australian states and six Canadian provinces have legislated that cohabitation contracts should be enforceable.

signed by the parties and two witnesses, will have the same effect as the certificate.

The dearth of remedies upon the breakdown of the relationship has in both jurisdictions led to reliance upon the general rules of property and contract law, which do not, in theory, take any account of the status or relationship of the parties. In England the law relating to constructive trusts and proprietary estoppel has been developed to deal with the issue, while in France the concepts of the *société*² and *enrichissement sans cause*³ have been applied in the domestic context. However, it is difficult to agree with Willekens's contention that the use of such property law and contract law techniques in both the French and English jurisdictions 'has made it possible....to obtain more or less the same results with regard to the division of property upon family break-up as in family law.' (Willekens 1998, p 56).

Three factors may be identified as posing problems for cohabiting couples. First, cohabitants that discuss their respective rights tend to be in a better position than those who simply trust the other person. Secondly, evidence that contributions were made out of love and affection tends to be fatal to a claim, as it is assumed that this implies a willingness to make the contributions regardless of any expectation of an interest in the property (Lawson 1996, Bell et al 1998, p 413). Thirdly, little weight is given to domestic contributions, as opposed to financial contributions or work to which a commercial value can readily be ascribed (Bell 1998, p 256; Labbee 1996). Thus in both jurisdictions, cohabitants who exchange or reduce their labour market role for an unpaid domestic role receive no financial compensation from their partner on relationship breakdown.

In the field of succession law cultural differences have led to a greater divergence between the approaches of the two jurisdictions than is to be observed in other areas. In France succession is strictly controlled. The major difference between the two systems is the restriction which French law places on freedom of testation. A specified portion of the estate is reserved for lineal ascendants and descendants. The unreserved part of the estate ranges from one-quarter where there are three or more children (CC art 913), to three-quarters where there are only ascendants

2 This is defined in art 1832 of the Civil Code as 'a contract in which two or more persons agree to combine assets or efforts with a view toward sharing the benefits or savings that may result. The partners are bound to contribute to losses'.

3 This concept translates literally to 'unjust enrichment'. It has been developed by case law but it is a fairly narrow window of opportunity. It has however, been successfully applied in the family law context as in the decision of the Court of Cassation in Civ. (1) 26.10.82, *JCP* 1983, II, 1992 note Terré. Here an anaesthetic nurse who for 10 years worked unpaid in her professional capacity for her surgeon husband whom she had married under a separate property regime, succeeded in her claim of *enrichissement sans cause*. These services were found to go beyond those *charges du mariage* required of spouses under Art. 214 C.C. If founded such a claim will give rise to a personal right of indemnity rather than a right in property as would be the case in respect of a constructive trust in the English jurisdiction.

in either the paternal or maternal line (CC art 914). Thus the ability of a cohabitant to make provision for his or her partner is limited where there are surviving relatives or children. Moreover, high rates of tax apply to such gifts: any amount over 10,000F will be taxed at 60%. By contrast, in England there exist no such limitations on testamentary freedom and a cohabitant is free to make a will leaving everything to his or her partner. It is also possible for a cohabitant to make a claim for provision even if no provision was made. 'Reasonable financial provision' may, at the discretion of the court, be awarded to a heterosexual cohabitant that has been living with the deceased for two years (Inheritance (Provision for Family and Dependents) Act 1975 ss 1(1)(ba) and (1A), inserted by Law Reform (Succession) Act 1995 s. 2). A person who was 'dependent' upon the deceased may also claim (Inheritance (Provision for Family and Dependents) Act 1975, s. 1(1)(e)).⁴

By contrast, France has been more generous in extending social security rights to cohabiting couples. Both heterosexual and homosexual cohabitants are entitled to rely upon one another's contributions for the purposes of sickness and maternity benefits (Loi no 78-2 art 13 and Loi no 93-121, art 78 respectively). In England there is no such status-based entitlement to contributory benefits outside marriage. Moreover, heterosexual cohabitation will be taken into account in assessing eligibility for means-tested benefits – thus imposing a dual penalty upon them (Barlow 1997, ch 4).

Thus the law in both jurisdictions takes the form of a tiered system, although the tiers are not entirely consistent. In some contexts a three-tiered system may be observed, with decreasing rights being accorded to married couples, heterosexual cohabitants and homosexual cohabitants in turn. In other areas there are only two tiers, although this may be either because heterosexual cohabitants are being equated to married couples or because they are treated in the same way as homosexual cohabitants. Thus, despite the fact that new rights have been accorded to cohabitants in the past few years, the piecemeal and sometimes incoherent nature of these rights mean that it is not possible to talk of a 'status' of cohabitation (Fenouillet, p 149).

Proposals for reform

The inconsistencies and inadequacies of the law relating to heterosexual and homosexual cohabitants are apparent in both jurisdictions. However, the similarities in the legal position of cohabitants mask very different political agendas despite the fact that left-wing Governments not known for championing traditional family values have recently been elected in both jurisdictions.

The Law Commission for England and Wales has, for the past seven

⁴ For the meaning of 'dependency' in this context see *Jelley v Iliffe* [1981] Fam 128 and *Bishop v Plumley* [1991] 1 All ER 236, c.f. *Re Watson (Deceased)* [1999] 1 FLR 878.

years, been examining the property rights of all persons who share a home, including married couples, cohabitants, relations and friends (Law Commission 1993, para 2.40, Harpum 1995). The need for reform has been endorsed by a number of interest groups (Thompson 1996) and numerous proposals for reform have been advanced by academics. Members of the judiciary have added their voice to this, emphasising at the same time that reform is a matter for Parliament rather than the courts. However, with the exception of a Theresa Gorman's 1991 Cohabitation (Contract Enforcement) Bill, the issue of reform of the law relating to cohabitation has not found its way onto Parliament's agenda. The fact that the recent consultation document, *Supporting Families*, (Home Office, 1998) makes little reference to the particular needs of cohabiting couples, and none to the work of the Law Commission in this area, would also seem to suggest that reform of 'cohabitation law' is not a priority for the Government. Whilst it espouses a rhetoric of neutrality, and on one level claims that intervention aims to help the parenting relationship, whether married or not, to succeed, New Labour's focus for family policy is one which still clings to the ideal of 'strengthening marriage'. Chapter 4 of the Green Paper is devoted to this very pursuit, para 4.12 of which states:

"Marriage does provide a strong foundation for stability for the care of children. It also sets out rights and responsibilities for all concerned. It remains the choice of the majority of people in Britain. For all these reasons, it makes sense for the Government to do what it can to strengthen marriage."

The paper, dubbed by some the 'the Government's Make'em Marry Crusade' (Campbell 1998), proposes a number of measures to strengthen marriage, whilst barely mentioning other family forms. This approach, however, displays a wilful blindness to the fact that an increasing percentage of the population, which is cohabiting outside marriage, is being left in a complex legal wilderness. A number of measures to strengthen marriage, including better marriage preparation, a clear statement of rights and responsibilities for married couples, prenuptial agreements and access to counselling and mediation when difficulties arise, are envisaged (ch 4). Yet the sole concession in the paper to the existence of the cohabiting family *per se* is the rather grudging suggestion that 'it might be worthwhile' producing a guide for cohabitants, setting out their legal rights in relation to income, property, tax, welfare benefits and children (para 4.8). The guide, if produced, would be available in libraries and Citizens' Advice Bureaux. But this clearly would do little to address the complexity and inadequacies of the law relating to cohabitation.

By contrast, in France the issue of the legal status of cohabitants has been brought before Parliament numerous times over the last seven years. However, there has been a divergence of opinion as to when and how such a legal status should arise. The first Bill to be debated in the

National Assembly concerned a *contrat d'union civile* (No 3066 25th November 1992). This involved an opt-in regime. The relationship created by entering into a contract would have lasted for a minimum of six months and required the parties to offer each other *secours et assistance*. It would also have imposed a regime of community of property on acquests and conferred parental authority on both parties. While this last proposal has become law in the meantime, commitment to some of the other ideas seems to have waned in subsequent attempts to introduce legislation.

The Government has now endorsed the need for reform. It announced on 27 June 1996 that a study of the issue would be undertaken. Following the issue of the Hauser report (Hauser 1998),⁵ legislation on the *pacte civil de solidarite* (PACS) was introduced in October 1998. The first attempt at reform failed. However, the legislation was reintroduced and passed its first reading in the National Assembly on 9 December 1998 by 316 votes to 249, with voting patterns splitting along a broad left-right axis.

The Senate, which is dominated by right wing groups, did not agree with this approach. The report by the Commission of Finances argued that PACS would cost too much and was based on confused values (Marini, 1998-9). The Senate accordingly decided to take a more inclusive approach and to confer a more limited range of rights upon all cohabiting couples (*Proposition de loi, modifiée par le Senat, relative au mariage, au concubinage et aux liens de solidarité*, text adopted no 100, 23 March 1999). This essentially involved the assertion of the validity of cohabitation contracts (art 1(C)) and certain tax concessions for dependants (art 2 and art 3(bis)) and nominated persons (art 3). The Bill also defined cohabitation as 'the fact of two persons living together as a couple without being married' (Art 1(C)). In view of the limited range of rights envisaged by the Bill, this definition may at first sight seem a little superfluous. However, it was intended that it should be inserted in the Civil Code as the standard definition of cohabitation for the purposes of existing rules, which would eliminate many of the discrepancies between heterosexual and homosexual cohabitants.

The National Assembly refused to be swayed from its plans for reform. Barely a fortnight after the first reading of the draft legislation in the Senate, the National Assembly gave a second reading to a version that bore little evidence of the Senate's modifications, by a slightly narrower margin of 300 votes to 253.⁶

⁵The Committee appointed by the Minister of Justice to study the financial implications of the separation of couples was chaired by Professor Jean Hauser, of the Université Montesquieu, Bordeaux IV, and comprised 8 professionals, the majority of whom were academic or practising lawyers.

⁶ *Proposition de loi adoptée avec modifications par l'Assemblée Nationale en deuxième lecture, relative au pacte civil de solidarité* [text adopted no 278, 7 April 1999]. Text available on <<http://www.assemblee-nationale.fr/2/dossiers/pacs/ta0278.htm>>.

The final text provides that two adults, of the same or opposite sex, may enter into a *pacte civil* as long as they are neither related to one another nor already linked to another person by a marriage or *pacte* (Art 1er, proposed art 515-2 CC). The parties are required to draw up a written agreement together and submit it to the clerk of the local magistrates' court for registration (proposed art 515-3 CC). The clerk must also be notified of any subsequent modifications to the agreement. A *pacte* may be terminated in a number of ways. Consistently with the insistence that 'a *pacte* is not a marriage', there is no requirement that the parties go through the procedure of a divorce. There is no minimum duration for a *pacte*, although where only one of the parties wishes to bring it to an end it will subsist for three months after a declaration to this effect. A joint declaration by the parties or the marriage or death of either of the partners automatically terminates the *pacte* (proposed art 515-8 CC).

The content of the agreement is left up to the parties, although there are certain guidelines. The parties are entitled to determine the form of the 'mutual and material assistance' that they are required to offer one another (proposed art 515-4 CC). Both parties are jointly liable for any debts contracted by one of them for their daily needs or household expenses (proposed art 515-4 CC). Property acquired during the relationship is generally to be held jointly⁷ but the parties are entitled to make alternative arrangements (proposed art 515-5 CC). In determining the consequences of the breakdown of the relationship, the onus is again placed upon the parties themselves, although if they cannot agree the matter will be referred to a judge (proposed art 515-8 CC). It is unclear whether this confers discretion upon the courts or whether it simply allows the shares of the parties to be determined in accordance with their strict property rights.

The legislation deals with the public law consequences of entering into a *pacte* in rather more detail. Entitlement to certain benefits is guaranteed simply by entering into a *pacte*. These include social security benefits (art 4bis) and the right to succeed to a tenancy in the name of a partner who has either deserted the home or is deceased (art 9). However, eligibility to other rights will depend in addition upon the duration of the *pacte*. The parties must generally have been linked by a *pacte* for two years before they are entitled to benefit from the more generous provisions relating to the taxation of *inter vivos* gifts or legacies (art 3).⁸ Joint taxation for the purposes of income tax only occurs after the third anniversary of registration (art 2).

The National Assembly did make two substantive changes in the course

⁷ The form of ownership is *indivision*, which is governed by art 815 CC and roughly corresponds to the concept of the tenancy in common in English law: see R. Dyson, *French Real Property and Succession Law* (Robert Hale Ltd, 1988), ch. 9.

⁸ This provides that the first 300,000F will not be taxed. The next 100,000F will be taxed at 40% and any sums above this at 50%. Exceptions to the time periods may be made for couples who have a long-standing relationship but who have only recently entered into a *pacte*.

of the second reading. The first can be seen as an acknowledgement of the views of the Senate in that a definition of *concubinage* has been retained (art 1(ter), proposed art 515-8 CC). A number of differences in the way in which this is defined should be noted. There is no longer any reference to the fact that the parties have not married: the term *union de fait* (de facto union) is adopted instead. The new definition also makes it explicit that the de facto union may exist between a couple of the same or opposite sex. However, it is no longer sufficient for the parties simply to live together: their relationship must present '*un caractère de stabilité et de continuité*'. Interestingly, the consequential amendments contained in this version of the Bill, which primarily affect social security, tax and employment legislation, aim to standardise legislative references to cohabitation in line with the definition of *concubinage* set out in the proposed art 515-8 CC. Thus, in addition to amending legislation to give rights to couples who are *pacsé*, phrases which define cohabitation with reference to marriage such as '*qui vit maritalement*' (living together as husband and wife), have been uniformly replaced by the phrase '*qui vit en concubinage*' (e.g. arts 4(bis), 5(bis) & (ter)).

The second change concerns the position of relations. In this case the National Assembly has directly rejected ideas put forward by the Senate. The original draft passed by the National Assembly envisaged that the provisions relating to tax and succession to tenancies would be extended to two siblings who share a home. The Senate took this idea a stage further. Its proposals were intended to confer as many fiscal rights upon relations as upon cohabitants. There were obvious similarities between this approach and the inclusive concept of 'home-sharing' upon which the Law Commission's project is premised (Harpum 1995). However, in the new draft adopted by the National Assembly, no mention is made of the position of siblings or other family members. Thus the focus has shifted subtly away from home-sharing towards the regulation of adult sexuality.

It should be noted that this final draft is weaker than earlier attempts at reform. Although the substance of the formal requirements have remained more or less constant, the current draft gives the task of supervision and registration to the clerk of the magistrates' court rather than the prefecture or *officer d'état civile*. Other analogies with marriage have also been whittled away. The parties owe one another mutual and material assistance, rather than the *secours et assistance* required of spouses and suggested in the original *contrat d'union civile*. Community of acquests has been replaced by *l'indivision* and the succession rights of the parties are still considerably less than their married counterparts. There is no mention of the children of the relationship. The proposals combine State recognition and registration with a considerable degree of freedom for the parties to arrange their affairs as they wish.

The National Assembly's proposals have been criticised by both the left (*Le Monde* 27.1.99) and the right. Religious and right wing groups

marched in protest in Paris on 31st January 1999 (*Le Monde*, 31.1.1999). It will be necessary for the draft legislation to be considered by the Senate one more time. Even if they continue to oppose the concept of PACS, it is still possible for the National Assembly to force legislation through by giving it a third reading.⁹ Thus, bearing in mind the fact that the National Assembly has so far shown itself unwilling to accommodate the views of the Senate, it is likely that reform will be in the form described above.

Plus ça change?

Clearly, the French government is willing to engage with the issue of cohabitation outside marriage and instigate legislative reform, in a way that the British government is not. It might be argued that this merely reflects the fact that cohabitation is less prevalent in England and Wales and that the critical mass necessary for reform has not yet been established. It might also reflect the fact that France began the process of extending rights to cohabiting couples at an earlier stage (Glendon 1977, pp 83-91). Alternatively, there may be real differences of substance between the two countries that affect the reform process. In order to evaluate the proposed reforms in France and the possibility that this jurisdiction might take a similar route, this final section will analyse their respective approaches against the background of similar reforms in a wider range of jurisdictions.

Recognition

In the past, two distinct trends in the definition of cohabitation could be observed. The claims of heterosexual couples to particular rights were strengthened by an analogy with their situation and that of married couples. By contrast, if legislation extended rights to homosexual couples, it rarely did so explicitly, preferring to adopt more general, de-sexualised terms. Both trends showed deference to marriage, the former in limiting claims to those whose relationship was sufficiently similar to marriage, the latter in refusing to draw such an analogy in the case of those who were not entitled to marry.

In recent years this dichotomy has broken down in a number of jurisdictions, with rights being extended to heterosexual cohabitants on the basis of more neutral criteria, the explicit recognition of homosexual cohabitants and even, in certain cases, the application of the marriage-model to homosexual cohabitants. The draft legislation in France is an example of the first two of these practices. It may be questioned whether

⁹ In fact the Senate refused to undertake another reading of the Bill scheduled for 5 May 1999. Instead on the 11 May 1999, they requested that the Bill be examined by a joint committee of both houses. This request was refused and the final reading of the Bill will now take place in the National Assembly on the 30 June 1999.

the fact that the definition of *concubinage* has been shorn of all reference to marriage is due to a residual reluctance to apply the terminology of marriage to same-sex couples. A more positive way of regarding it is that the simple concept of coupledness amounts to a formal recognition of cohabitation – whether between couples of the same or opposite sex – as a valid family form.¹⁰

By contrast, English legislation remains firmly wedded to the marriage-model in defining cohabitation. This may be illustrated by two recent pieces of legislation. The Law Reform (Succession) Act 1995 and the Family Law Act 1996, both products of the recommendations of the Law Commission, adopted this model while implying that cohabitation was inferior to marriage. In the 1995 Act this was implied by the requirement that a cohabitant should have lived with the deceased as their spouse for at least two years before making a claim for reasonable financial provision: s 1(1)(ba). The definition of cohabitants in the Family Law Act 1996 s 62(1)(a) as ‘a man and a woman who, although not married to each other, are living together as husband and wife’ seems somewhat grudging, conveying the impression that they should be married to one another. Just in case this was not sufficiently clear, right-wing groups forced an amendment during the passage of the Act that would require judges to ‘have regard to the fact that [cohabitants] have not given each other the commitment involved in marriage’: s 41.

The definitions allowing homosexual couples to make claims for protection from domestic violence or for reasonable financial provision on divorce are also de-sexualised. Under the Family Law Act, s 62(3)(c) any person who lives or has lived ‘in the same household’ is an associated person and as such entitled to claim a non-molestation order (s 42). However, only married couples, cohabitants, or those entitled to an interest in the house may make a claim for an occupation order (s 33) (Lind and Barlow 1995). Reasonable financial provision may be awarded to ‘dependants’ under the Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(e). Thus Parliament has yet to confront an overt extension of rights to gay cohabitants.¹¹ This approach is echoed in the courts, with the Court of Appeal decision in *Fitzpatrick v Sterling* [1998] Ch 304¹² that homosexual cohabitants are neither living together

10 The link between recognition and regulation should not, however, be overlooked: see F. Gaudu, ‘A propos du “contrat d’union civile”: critique d’un profane’ (1998) *Recueil Dalloz*, 2nd Cahier, p 19. Similar arguments have been advanced by D. Bradley in the context of Sweden, see *Family Law and Political Culture* (Sweet & Maxwell, 1996).

11 Outside Parliament, immigration rights have been extended to homosexual couples under a concession. The rules are tucked away in annex z of ch 8 of the Immigration Directorate’s Instructions. Even so, there does seem to be a reluctance to include the words ‘homosexual’ and marriage’ on the same page. The marriage-model applies in that the couple must have been ‘living together in a relationship akin to marriage which has subsisted for four or more years’. However, while same-sex couples are obviously included within the requirement that the parties are legally unable to marry under English law, they are not its sole object. For a discussion of this, see Barlow et al, *Advising Gay and Lesbian Clients: A Guide for Lawyers* (Butterworths, 1999), ch 6.

12 An appeal to the House of Lords was concluded on 13 April 1999 where judgment

as husband and wife nor members of one another's families.

Thus there is neither an acceptance of cohabitation as an independent family form nor any recognition that homosexual couples may be cohabitants. Nor does it seem that this is likely to change in the near future. The Law Commission's concept of 'home-sharers' follows the pattern identified above in being over-inclusive and evasive at the same time. All those who share a home are included regardless of their relationship, but the concept does not identify why the mere fact of sharing a roof should be the trigger for rights. Moreover, its scope will depend on the way in which 'home' is defined. The origins of the project in the deficiencies of the law relating to constructive trusts raise a suspicion that only the owner-occupied home is being considered. In the light of evidence that cohabitants across all social classes are more likely to rent than to buy a house together, (DETR 1998, pp 97-8) to focus exclusively on the owner-occupied family home will not achieve a code for cohabitants as a whole. Indeed, given that the Family Law Act now permits the transfer of a tenancy of the family home on relationship breakdown as between heterosexual but not same-sex cohabitants (Family Law Act 1996, Schedule 7), the introduction of remedies for all owner-occupier homesharer-cohabitants would create yet further anomalies in the law. Similar criticisms may be levelled at *Supporting Families*, which focuses on parenting rather than marriage or cohabitation in the context of tax and social security. However, it is exclusive in that it does not mention same-sex couples at all.

In searching for reasons for the recent divergence in their response to broadly similar demographic trends in Britain and France, the inherent differences in the underpinning philosophies of a civilian as opposed to a common law legal system may provide some insight. The French have been attempting to effect global reform of the law relating to cohabitants since 1991. Earlier reforms achieved by a combination of case law and piecemeal legislation in that jurisdiction have not been accepted as sufficient by politicians and pressure groups alike. This is the case even though, as we have seen, rights have been extended to both heterosexual and same-sex couples in this way. Only global reform formally amending the Civil Code and acknowledging a legal status for all cohabitants would be satisfactory from the legal intellectual standpoint. This view is nicely illustrated by the Hauser Committee in their second report:

"Judicial decision-making has encountered difficulties in its treatment of different situations arising out of living together (*la vie en commun*) and would not be capable of responding to the central question of conceding rights and of putting it beyond dispute. To legislate *a priori* is to go from a factual situation regulated at the margins and retrospectively by case law into a law-based situation regulated globally by statute." (p 1, translated by the authors).

The latter position has come to be regarded as the most satisfactory, despite the traditional position of not legislating to retain the legal monopoly of marriage. Thus whereas common law jurisdictions regard situations regulated retrospectively by case law as the normal course of events, the legal treatment of cohabitation in this way was exceptional in the eyes of the codified French jurisdiction. Once the numbers of people affected by the inconsistencies and inadequacies in the law made it politically inappropriate if not irresponsible for the law to continue to ignore cohabitants, the idea of global legislative reform of the Civil Code was embraced. One can of course point to the greater numbers of cohabitants in France and the more active lobbying of the French gay rights movement on this particular issue, as reasons why France has confronted this issue more readily than in Britain. However, their persistence with an attempt to create a formal legal status for unmarried couples in the face of vociferous opposition of the Church and the political right (Boutin 1998), can also be seen to be driven by a stronger intellectual desire for legislative cohesion than would ever be found in England. This might also offer some explanation why global reform has been achieved in other European countries with far lower levels of cohabitation than in Britain, such as Belgium and the Spanish provinces of Aragon and Catalonia. A difference in legal culture of this kind combined with the type of constitutional rights offered to citizens also impacts upon the strategies of those campaigning for reform. Thus seeking concessions on an issue by issue basis may be accepted as the most effective strategy in England, whereas a campaign for global reform may have a more realistic chance for success in a civilian jurisdiction. It remains to be seen whether the implementation of the Human Rights Act 1998 will have any effect on the English approach to such issues.

Freedom or imposition

The issue as to whether rights should be extended only to those who take some affirmative action or should be imposed on all those who meet certain criteria is one that has been debated many times (Deech 1980; Freeman 1984; Bailey-Harris 1996). In the debate inevitably centred on the question as to whether rights should be conferred on cohabitants at all, as the only means of opting in was to marry. Now more and more jurisdictions are choosing to create a new institution that offers a half-way house between marriage and cohabitation, despite the argument that such an approach, allowing couples to opt into a new institution, represents more of a threat to marriage than the extension of rights to cohabitants (Leveneur 1998). The fact that the National Assembly has chosen to follow this route is indicative of the influence that the concept of *union libre* has on the French psyche.

However, objections to this approach have been voiced. First, it may be questioned whether cohabiting couples will be willing to enter into a

pacte. It might be argued that an opt-in system would work in France because of the existing system of obtaining a declaration of cohabitation. However, only 38% of heterosexual couples currently obtain such a declaration. This figure would seem to throw doubt upon the survey of cohabitants claiming that 57% would be interested in entering into a *pacte* giving them rights similar to those of married couples. On the other hand, it should be borne in mind that obtaining a declaration of cohabitation does not secure any greater rights for couples and that the fiscal advantages of a *pacte* may overcome reluctance to formalise the cohabiting relationship.

It has also been asserted that in practice only homosexual couples will bother to register a *pacte*, since heterosexual couples have the option of marrying. The evidence from the Netherlands suggests that there are a number of heterosexual couples who cohabit because of ideological objections to marriage but who are willing to express their commitment for one another in a different way. In 1998 1,550 heterosexual couples registered a partnership, more than the number of registrations by lesbian couples during the same period (Waaldijk 1999a). The low take-up of registered partnerships in both the Netherlands and Scandinavia (Lund-Anderson 1998; Eekelaar 1998) could be taken to suggest that many same-sex couples are not interested in formalising their relationship. However, once again the analogy between *PACS* and existing systems is not perfect. The more extensive rights and, at least in Scandinavia, greater restriction on leaving a partnership mean that the take-up of registered partnerships is only of limited use in predicting the possible response to *PACS*.

In the event that all cohabiting couples entered into a *pacte*, there would be a neat two-tiered system. The second objection to *PACS* is based on the fact that this is unlikely to occur and the proposed reforms would have the effect of proliferating the categories of cohabitant recognised by the law, with each being accorded a different legal status. A four-tiered system of regulation will result, with different rights being accorded to married or *pacsé* couples, heterosexual cohabitants and same-sex cohabitants. The force of this criticism has been blunted since the National Assembly gave the Bill its first reading last December. The definition of cohabitation in the new draft will eliminate many of the distinctions between the treatment of heterosexual and homosexual cohabitants. Thus while the system will still be multi-tiered, it will be no more complex than that currently in operation. It would also be more logical in terms of rights being extended to couples in proportion to their willingness to formalise their relationship.

The final criticism that has been levelled at *PACS* is that it may not protect the most needy. The couples who are willing to enter into a *pacte* will not necessarily be those who need assistance in determining their property rights when the relationship has broken down. Moreover, even where a couple does enter into a *pacte*, one party may be in a weaker

bargaining position, whether by reason of lack of finances or because he or she is dominated by the other party. In such a case the emphasis placed upon the private resolution of property rights and duties will operate to the detriment of that person. These criticisms have some force. They represent the most intractable problem for would-be reformers in this area, namely what approach should be taken where one party does not want to assume the obligations that are needed for the protection of the other.

Those who have discussed the appropriate mechanism for reform in this area from either the libertarian or protectionist point of view have tended to discuss cohabitants as if they are a homogenous group with identifiable wishes. This is hardly the case. As a broad generalisation, three main groups may be identified: those who both want rights, those where neither want rights and those where one wants rights and the other does not. An opt-in regime works well for couples who are agreed that neither or both of them are willing to assume rights and responsibilities. These problems are not solved if a more inclusive regime is adopted. If obligations are imposed on persons despite the fact that they have taken no positive action, the issue shifts to the extent to which they should be allowed to opt out. Should opting-out only be allowed where both parties agree or should anyone be entitled to evade responsibilities in this way? It should be borne in mind that a reluctance to assume the rights and responsibilities associated with marriage is not the same as an ideological objection to marriage. This distinction may be illustrated by the registration of partnerships by heterosexual couples in the Netherlands, despite the fact that this gives the parties practically the same rights as if they were married.

The division of opinion on this point is likely to continue. It should, however, be noted that the force of this ground of objection may again have been dulled by recent developments. If the passage of legislation allowing couples to enter into a *pacte* was seen as precluding the need for future reform relating to cohabitation, then it might operate to the disadvantage of cohabiting couples who did not wish to enter into such an arrangement. While they would be no worse off than under the present law, the legislative changes that might have ameliorated their position would not be passed. However, the inclusion of a definition of cohabitation in the Civil Code seems to suggest that *PACS* will not be seen as a substitute for future reform. This definition is thus not only a means of ensuring that same-sex cohabitants will be entitled to the same rights as their heterosexual counterparts currently enjoy but may also be used as a springboard for future legal and social developments.

Anderson has argued that 'registered personal relationships' might be a viable model for reform England and Wales, describing them as 'one realistic, secular legal answer to modern trends... [that] would also provide options for people actively to take control of their lives.' (Anderson 1997, p 176). However, she does not consider the problem that

many cohabitants are unaware of the necessity of taking control of their lives in this way. The lack of any notarial tradition and the fact that the validity of cohabitation contracts has still not been established has meant that cohabiting couples have little experience of formalising their relationship. The prevalence of disputes over the family home also indicates that few are aware of the need to regulate their property rights by making a declaration of the beneficial interests in the family home. This lack of awareness of legal rights may in part be due to the still prevalent belief in the existence of common law marriage (McRae 1993), despite the fact that this concept was abolished in 1753. Common-law marriage is conceptually very different from *union libre*. The latter conveys an impression of freedom from responsibility, implying also that this is the result of a deliberate choice. The former implies that 'common-law spouses' will be awarded the same rights as married couples after a certain period of time without any affirmative action being needed by the parties, although ironically even some of the forms of common-law marriage that existed before 1753 required some affirmative action (Stone 1992; Outhwaite 1995).

The fact that a reform requiring positive action by the parties is unlikely to succeed in England and Wales does pose certain problems for those contemplating reform. It places a heavy onus on the definition of cohabitation. While it may be acceptable to confer rights upon a couple that have entered into a *pacte* on the very day that they begin living together, some greater evidence of the stability of the relationship will be needed where rights are imposed by the state. Presumably the Law Commission intends to qualify its concept of 'home-sharers' to reflect this problem.

Public v private

The willingness of the respective Governments to address the public and private law rights of cohabiting couples should also be compared. In France the focus is on the public law rights that are to be awarded to couples upon registration of a *pacte*. These rights can be seen as a means of encouraging couples to enter into such arrangements. The parameters of the parties' obligations *inter se* are stated broadly, giving them a considerable degree of freedom to arrange their affairs as they wish. Again, this reflects the respect accorded to the *union libre* as well as a different concept of the role of the State in securing provision for its members.

In England and Wales it is unlikely that such incentives will be enacted. The trend has been to achieve equality between married and unmarried couples by reducing the advantages of both. Thus the married couple's tax allowance, payable whether or not a married couple had dependant children, has been abolished and replaced with a combination of an increase in Child Benefit (implemented April 1999) and a Working

Families Tax Credit (to be implemented November 1999). Both are aimed only at parents with dependant children but take no account of marital status. Some contributory welfare benefits which traditionally provided an additional allowance for dependant spouses but not for cohabitants, have removed the spousal allowance altogether.¹³ In the case of the state retirement pension, however, the spousal allowance is retained although its extension to even heterosexual cohabitants is certainly not on the political agenda. The Law Commission is focusing on the private law rights of cohabitants. Yet the reaction to the Family Homes and Domestic Violence Bill 1995 indicates that this will not be an easy task. There were virulent protests in the media because of the mistaken perception that it extended property rights to cohabiting couples.¹⁴ It was withdrawn shortly before its third and final reading in the Commons, although its provisions, subject to some pro-marriage modifications, were subsequently enacted as Part IV of the Family Law Act 1996. The trends outlined above suggest some reasons for this resentment of the conferral of property rights upon cohabiting couples. If the State is to impose rights and obligations upon couples, some corresponding advantage may be expected by those who bear the brunt of those obligations. To impose obligations without advantages – whether this are fiscal or psychological – is to incur the risk of resentment already graphically displayed in public reactions to other efforts to deal with the issue of family restructuring.

Conclusion

Thus in neither jurisdiction is the reform process as global as family restructuring demands. The above discussion indicates that the objective of reform may be more easily achieved in France, partly because of Governmental support for the project and partly because of the different cultural factors. Whilst in France, they have at least addressed the legal status of cohabitants, which could provide an appropriate platform for future reform, the current proposals confer few substantive rights. In England, on the other hand, heterosexual if not same-sex cohabitants may have made greater gains in terms of substantive private law rights. Part IV Family Law Act 1996, for example, gives all cohabitants the right to apply for non-molestation orders and all heterosexual and some same-sex cohabitants the right to apply for occupation orders in respect of the family home. Heterosexual cohabitants are now recognised as a formal category of applicant who may seek provision from the estate of their deceased partner and same-sex dependant cohabitants have a similar right. Nonetheless, cohabitants still lack a formal legal status.

¹³ This occurred for example when sickness benefit was replaced by statutory sick pay (Statutory Sick Pay Act 1991) and unemployment benefit was replaced by jobseeker's allowance (Jobseekers Act 1995).

¹⁴ The Bill was actually a consolidating measure: the provisions to which the media took exception had been law since the passage of the Domestic Violence and Matrimonial Proceedings Act 1976.

It should also be noted that reform has been secured in other jurisdictions. No longer are the Scandinavian countries the sole jurisdictions to have addressed the issue of cohabitation. The Netherlands has created a registered partnership that is open to heterosexual and homosexual couples alike under the Registered Partnerships Act 1998 and has decided to extend the right to marry to same-sex couples (Waldijk 1999b). Legislation relating to *cohabitation légale* was passed in Belgium in 1998. Even in Spain, a jurisdiction more noted for its traditional family structures than its radicalism, Aragon and Catalonia have enacted reform. Thus changes in the laws relating to cohabitants are to be observed across Europe. Despite both France and Britain having traditionally preferred to allow the legal monopoly and privileging of marriage to dominate their approach to legal reform, Britain appears now to be alone in believing that strengthening marriage and denying the validity of other family forms is the better route to social inclusion. How attractive *Pacs* will prove to be in practice in France remains to be seen. However the adoption of a safety-net definition of *concubinage* in the Civil Code combined with the possibility of *Pacs* may well have avoided many of the difficulties posed by opting either for an inclusive or for an exclusive approach. Perhaps this combination will mean that the adage '*Plus ça change, plus c'est la même chose*' may not be entirely apt, at least in the French context.

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