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Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in Europe

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I. NEW FORMS OF NON-MARITAL COHABITATION IN EUROPE

During the last decade, a number of European countries have introduced the concept of a "registered partnership" for same-sex couples or have alternatively enacted similar statutory regulations for this purpose. Denmark took the lead in 1989 with the introduction of the registered partnership, followed by Norway (1993), Sweden (1995), Iceland (1996), and the Netherlands (1998).¹ The hallmark of the registered partnership is that, in principle, all legal consequences of marriage are equally applicable to registered partners, with the exception of consequences arising from the right of legal status as a child. Similar, but less far-reaching unions, intended for homosexual couples, have applied since October 23, 1998, in Catalonia,² while France implemented the *Pacte Civil de Solidarité* (PaCS) on October 16, 1999.³ In Belgium, the Statutory Cohabitation Act was published on January 12, 1999, in the Bulletin of Acts, Orders and Decrees.⁴ Elsewhere in Europe, statutory regulations are being prepared to regulate cohabitation, especially between same-sex couples. In Germany, a bill on the *eingetragene Partnerschaft* concerning same-sex couples is expected very shortly.⁵ The Max Planck Institute in Hamburg has been commissioned by the German Ministry of Justice to compile a comparative law report in which the developments in the countries which have introduced this institution are analyzed and compared so that a proposal may be elaborated in this respect. Influenced by the comprehensive discussion over the

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1. See, for a comparative overview, C. Forder & S.H. Lombardo, Civil Law Aspects of Emerging Forms of Registered Partnerships, report written for the Fifth European Conference on Family Law organized by the Council of Europe and the Dutch Ministry of Justice, 15-16 (March 1999), and B. Verschraegen, Nichtehele Partnerschaften—Eine rechtsvergleichende Einführung, *Zeitschrift für das gesamte Familienrecht* (FamRZ) 65-69 (2000).

2. Ley de Uniones Estables de Parejas of July 15, 1998.

3. PaCS is a contract between two persons of the same sex or different sexes and must be entered into a register at the *tribunal d'instance*. See R. Cabrillac, *Libres propos sur le PaCS*, *Recueil Dalloz* 71-74 (1999). On the emergence of this regulation see the website of the French newspaper *Liberation* <<http://www.liberation.fr/pacs/index.html>>.

4. The Act dates from November 23, 1998. Its effective date was planned for January 1, 2000. See W. Pintens, Partnerschaft im belgischen und niederländischen Recht, *Zeitschrift für das gesamte Familienrecht* (FamRZ) 69-77 (2000).

5. See A. Röthel, Nichtehele Lebensgemeinschaften! Neue Rechtsfragen und Regelungsaufgaben im In- und Ausland, *Zeitschrift für Rechtspolitik* 511-19 (1999) en G. Ring/R. Olsen-Ring, Dänemarks Vorreiterrolle bei der Etablierung des Instituts einer registrierten (Lebens) Partnerschaft in Europa, *Zeitschrift für Rechtspolitik* 459-61 (1999).

PaCS in France, the Spanish Government, at the beginning of 1998, introduced a bill concerning the implementation of a *contrato de union civil* which was intended for heterosexual, homosexual, and asexual couples. Finally, in Switzerland, on February 23rd of this year, a symposium was held on cohabitation outside the confines of marriage.⁶ Further legislative initiatives will undoubtedly follow in other European countries. It is merely a question of time.

Given the increasing internationalization of relationships, these new statutory regulations provide sufficient reason to study and to make proposals concerning rules of jurisdiction, conflicts, and recognition. In the Netherlands, this subject has received extensive attention in the form of a proposal by the Netherlands Standing Committee on Private International Law for a number of private international law (conflicts of law) provisions on registered partnerships. This proposal was published in May 1998.⁷ As far as the Belgian situation is concerned, Erauw and Verhellen have recently made some proposals dealing with questions concerning the applicable law.⁸ Finally, it should be mentioned that at the Fifth European Conference on Family Law, which was held in the Hague in March 1999, and organized by the Council of Europe and the Dutch Ministry of Justice, this issue was discussed at great length.

II. VARIOUS ANSWERS TO THE PRIVATE INTERNATIONAL LAW QUESTIONS ARISING FROM THE NEW REGULATIONS

The countries which have introduced the institution of the registered partnership, or have otherwise regulated stable unions, have attached divergent legal consequences thereto.⁹ To date, not one single national regulation is completely in conformity with another national regulation. Two major differences must be mentioned. First, there are the regulations covering registered partnerships, as well as those covering legalized cohabitation for distinct couples (solely for homosexuals or also for heterosexuals). Second, in a number of countries, the new regulations are considered merely to create a simple contractual relationship,¹⁰ while in other legal systems, the regulations determine personal status.

All this does not make things easier for private international law. Apart from this, it can be observed that among the European countries there has been no mutual

6. *Cohabitation non maritale: évolution récente en droit suisse et étranger*, organized by the law faculty of the University of Lausanne.

7. Tijdschrift voor Familie- en Jeugdrecht (FJR) 146-59 (1998). See J.S. Joppe, *Het geregistreeerd partnerschap in het Nederlands IPR*, Weekblad voor Privaatrecht, Notariaat en Registrat nos. 6403/6404, 371-77, 391-95 (2000).

8. See J. Erauw & J. Verhellen, *Het conflictenrecht van de wettelijke samenwoning. Internationaal aspecten van een niet-huwelijkse samenlevingsvorm*, *Epochscheidingsjournaal* 150-61 (1999).

9. See also the comparative law overview in P. Senaev & E. Coene, *Geregistred partnerschap* 145-227 (1998).

10. The French regulation does not affect civil status, the law of descent, the law of adoption, parental authority or the law of succession. See B. Braat, *Nieuw Frans relatierrecht: de PaCS*, *Tijdschrift voor Familie- en Jeugdrecht (FJR)* 75-81 (2000).

collaboration concerning the introduction of a new institution such as the registered partnership or other comparable regulations. Despite extensive comparative law studies, the fear remains that this situation will not change. This also holds true for the countries which are preparing legislation in this field. As a consequence, private international law will have to enter the framework as a makeshift solution because, in a united Europe, international non-marital relationships between homosexuals and heterosexuals will, in any case, not remain at bay. The question arises whether the problems of private international law must be solved by the national legislators and the national courts independently of each other. Should these problems not be solved collectively on a regional or inter-national basis?

Before this question is analyzed, a short overview of the various approaches regarding the private international law aspects will be presented. If one were to compare the proposed Dutch private international law regulations concerning the registered partnership with the statutory regulations in the Scandinavian countries, it would appear that different approaches have been chosen. In the Dutch proposal, practically all the conceivable private international law questions concerning the registered partnership are regulated in 35 articles; whereas the Scandinavian legislators have basically restricted themselves to regulating the question of who can enter into a registered partnership. They impose the condition that at least one of the partners must be a national of their country and must permanently reside there.¹¹ As far as the mutual recognition of their registered partnerships is concerned, only oral agreements have been made between the Ministers of Justice of Denmark, Norway and Sweden.¹² The question is how these countries view the Dutch registered partnership, the French PaCS, and the Catalonian Stable Couples Act—which differ from the Scandinavian regulations because they also encompass heterosexual couples—considering the fact that before the agreement between their Ministers, these countries did not mutually recognize such partnerships. If problems of recognition already exist within the circle of countries which have introduced the registered partnership, partly with various legal consequences, then outside this circle the problems will only be enhanced. Are the registered partnership and the stable union susceptible to recognition in countries which have not yet introduced this institution, or which have legally regulated cohabitation outside the confines of marriage, or which in any case offer a degree of legal protection to partners who cohabit outside marriage?¹³ Limping legal relationships cannot be excluded in this respect. The whole question of recognition tends to prompt further investigation into the desirability of treaty regulations in this field. Before going into this aspect in more detail, a brief investigation will follow

11. According to the Catalan Act at least one of the partners must be a Catalan national.

12. See L. Schutte-Heide-Jørgensen, *Recht op homohuwelijk*, *Ars Aequi* 88 (1997).

13. An even more difficult question is that of the recognition abroad of a marriage between persons of the same sex if it should be introduced in the Netherlands. A similar bill is currently with the Lower House of Parliament (*Tweede Kamer*) together with a bill introducing adoption by homosexual couples. See generally N.G. Maxwell et al., *Legal protection for all the Children: Dutch-American Comparison of Lesbian and Gay Parent Adoptions*, *Electronic Journal of Comparative Law (EJCL)*, <<http://law.kub.nl/ejcl/31>>.

into the question of which private international law regulations are applicable as far as non-institutionalized cohabitation outside marriage is concerned.

III. PRIVATE INTERNATIONAL LAW REGULATIONS ON NON-STATUTORILY REGULATED COHABITATION OUTSIDE MARRIAGE

To date, cohabitation between non-married or non-registered couples has been, if at all, only rudimentarily statutorily regulated.¹⁴ As a consequence, almost no specific private international law regulations have been formulated in this field.

An exception—insofar as I have been able to ascertain—is Article 39 of the Yugoslav Act on Private International Law of 1982,¹⁵ wherein the “proprietary relationships” between persons cohabiting outside marriage are subjected to the law of common nationality as an alternative to the law of common residence. In the case of a “contractual proprietary relationship” between cohabitees outside marriage, it is determined in this provision that the applicable law is the one which applied at the time when the contract governing the proprietary relationship was entered into. This specific conflicts regulation covering aspects of proprietary rights in cohabitation outside marriage was included in the Yugoslav Act on Private International Law upon the initiative of Petar Sarcevic. In 1985, he wrote on this issue, among other things, in *Zeitschrift für die vergleichende Rechtswissenschaft*.¹⁶ A Ph.D. thesis written by Peter Striewe on the foreign and private international law pertaining to cohabitation outside marriage appeared in Germany a year later.¹⁷ In this thesis, two judicial decisions were reported. In 1982, the Austrian *Oberste Gerichtshof* of Vienna¹⁸ determined that the claims of partners against each other after the termination of their non-marital cohabitation were subjected to the private international law regulations of the law of obligations. A year later, the *Tribunal de grande instance* in Paris¹⁹ held that the benefits that accrued during the course of cohabitation outside of marriage are to be characterized as circumstances which are to be governed by the law of the country where these circumstances arose.

A clear law of obligations or property law characterization of the proprietary relationships between the partners was also initially advocated in Germany. In the meantime, more voices were raised to advocate the conflict regulations in the field

14. On the protection of non-marital cohabitation in a number of countries, see P. Sarcevic, Paare ohne Trauschein—eine Herausforderung für das internationale Privatrecht?, *ZVglRWiss* 275-76 (1985).

15. Act of 15 July 1982, no. 43-525, (effective Jan. 1, 1983). For a French translation of this Act see E. Vassilakakis, Orientations méthodologiques dans les codifications récentes du droit international privé en Europa 435-57 (1987).

16. See Sarcevic, *supra* note 14, at 274-81.

17. P. Striewe, Ausländisches und internationales Privatrecht der nichtehelichen Lebensgemeinschaft, 1986.

18. *Oberster Gerichtshof* February 18, 1992, *Zeitschrift für das gesamte Familienrecht*, 1010 (FamRZ) 1982. See P. Striewe, Zum internationalen Privatrecht der nichtehelichen Lebensgemeinschaft, *Praxis des internationalen Privat- und Verfahrensrechts (IPRax)* 248 (1983).

19. *Revue critique de droit international privé (Rev. crit. dr. int. pr.)* 628 (1984), with a note by P. Lagarde.

of family law or, in any event, conflict regulations pertaining to persons, along the same lines as those regulations applicable in the case of marriage.²⁰ An analogical application of the private international law regulations pertaining to marriage would, according to the German literature, for the most part not apply.²¹ With regard to the termination of cohabitation outside marriage, on the other hand, a full analogy with the conflict regulations concerning divorce would also not apply, but a so-called *Teilanalogie* has been advocated. Such termination should not without any reason be subjected to the private international law principles governing the law of obligations or the law of partnerships. The personal bond between the partners constitutes a strong family law characteristic, and this factor should be taken into account when determining the law applicable to termination of cohabitation. This point of departure leads to the following proposal as a general starting-point: one should commence with the common nationality or, if there is none, with the common habitual residence, and subsequently, with the law with which the partners have the closest connection.²² Insofar as can be determined, possible contractual agreements in the form of a choice of law between the partners has not been taken into account.

After the publication of Striwe's thesis in 1986, the problem passed somewhat into obscurity. This might be attributed to the fact that the recent private international law legislation in Germany,²³ Switzerland, and Italy devotes no attention to cohabitation outside marriage. It is reported, however, that the new Belgian Act on Private International law devotes attention to non-marital cohabitation. In principle, the provisions of that Act dealing with marriage apply also to cohabitation outside marriage.²⁴

IV. NON-MARITAL COHABITATION ON THE AGENDAS OF INTERNATIONAL AND EUROPEAN ORGANIZATIONS

How can the new institutions of the registered partnership and stable union be internationally attuned to each other? This question must be placed in a broader framework. Non-institutionalized non-marital cohabitation should also be included. The international organization which has usually been designated for such an exercise is the Hague Conference on Private International Law. The topic of

20. Striwe, *supra* note 18, at 394, has the following to say: "Wir sollten uns der Erkenntnis nicht verschließen, daß nichteheliches Zusammenleben aufgrund der persönlichen Beziehungen der Lebensgefährten ein familienähnlich gefärbtes Rechtsverhältnis darstellt und daraus für das Kollisionsrecht die Konsequenzen ziehen, die internationalfamilienrechtlichen Grundsätze einheitlich zur Anwendung zu bringen."

21. See P. Winkler von Mohrenfels & Kurt Siehr, *Münchener Kommentar*, Band 10, *Internationales Privatrecht* 1998, Einl. IPR no. 480.

22. See Winkler von Mohrenfels, *supra* note 21, Art. 17 no. 84, and Siehr, *supra* note 21, at art. 14, nos. 139-40.

23. See Siehr, *supra* note 21, at art. 14 no. 139. But see E. Jakob, *Nichteheliche Lebensgemeinschaft und elterliche Sorge im IPR unter besonderer Berücksichtigung deutsch-rumänischer Sachverhalte*, 1999, Diss. Heidelberg.

24. See Erauw & Verhellen, *supra* note 8, at 161.

cohabitation outside marriage has been included in the agenda at the Hague for many years. During the Eighteenth Session it was decided to retain it on the Conference's agenda, but without priority of jurisdiction, applicable law, and recognition and enforcement of judgments with respect to unmarried couples.²⁵ Cooperation with other European organizations such as the Council of Europe or the International Commission on Civil Status could lead to fruitful results. An initiative in this respect has already been taken by the Fifth European Conference on Family Law.²⁶ A set of five questions was raised during this Conference. In the first place, the position of substantive law in a number of European countries was elucidated, especially in the legal systems where specific legislation in this field already exists or where there is ongoing debate concerning specific bills in this respect. Secondly, attention was devoted to the necessary consequences of introducing new institutions, such as the registered partnership, from the point of view of civil status. The third point which received attention concerns the significance of the emergence of new forms of cohabitation for private international law. Fourthly, the possibilities of international cooperation were discussed, and finally, the significance of human rights, such as those laid down in Articles 8 and 14 ECHR, were investigated.

V. ON THE ROAD TOWARDS INTERNATIONAL REGULATION

Thus far, a bird's eye view has been given of the current developments in Europe concerning (international) family law and cohabitation outside marriage.²⁷ Not only do the registered partnership and the stable union require new rules of private international law, but non-institutionalized forms of cohabitation are also in need of private international law regulation. This somewhat brief overview makes it clear that the solutions so far demonstrate broad differences.

In my opinion, two circumstances give immediate cause for necessary work in the area of new forms of union to be embarked upon and harmonized both regionally and internationally. First, in the immediate years to come more and more countries will be introducing the registered partnership or a similar institution. However, one should always consider that this institution will often receive a national color and will certainly contain more variations than the institution of marriage itself. Second, cohabitation outside marriage in many countries has in the meantime become socially acceptable. The total numbers of non-marriage or, alternatively, non-registered instances of cohabitation are increasing, and the legal protection of unmarried or non-registered partners is equally increasing. The result is that, in many legal systems, cohabiting partners and spouses have similar rights and obligations in the field of, for example, social insurance and labor law.

25. See Final Act, Proceedings of the Eighteenth Session September 30-October 19, 1996, vol. I, Miscellaneous Matters 47 (1999).

26. See W. Schrama, *Niet-huwelijkse leefvormen en het IPR*, Tijdschrift voor Familie- en Jeugdrecht (FJR) 131-33 (1999).

27. Also outside Europe, namely in a number of American states, recent legislation in this field has been implemented.

What will a European or private international law regulation look like? At the aforementioned Fifth European Conference on Family Law in the Hague, it was suggested that a treaty regulation should be drawn up which would consist of three parts: one part dealing with the registered partnership, one with legal cohabitation and the final part with non-legally regulated cohabitation. The parties to the convention should, by means of a reserved (and for them favorable) regulation, be able to make a choice without the legal consequences defined as forming the hardcore being unduly affected.²⁸ The applicable law will be considered to be the law of the country where the registered partnership has been entered into (*lex celebrationis*)²⁹ or the *lex patriae* of those concerned or, alternatively, the place of their habitual residence, whenever further countries have introduced the registered partnership.

Can one say that there is already sufficient agreement in order to attain a private international law consensus at this moment in time? Those who may doubt this do indeed have strong arguments. In my opinion, however, discrepancies in the substantive regulations should not discourage international organizations from collectively considering and preparing future private international law regulations in this field. International harmonization will require a great deal of time, however. Let us, therefore, make a start right away.

28. See Schrama, *supra* note 26, at 133.

29. Extremely critical are Erauw & Verhellen, *supra* note 8, at 154, who are of the opinion that the application of the *lex fori* boils down to a "missionary" approach on behalf of the countries which have introduced the registered partnership concerning subjects from countries which do not recognize this institution.

