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MARRIAGE AND NON-MARITAL RELATIONSHIPS – CONSTRUCTING A COMPLEMENTARY HIERARCHY THROUGH A COMPARATIVE STUDY

Arthur C.W Wong[1]

Abstract: *The fact that divorce is more common than ever suggests that a flurry of affection can be dazzling as it may blind people to make a commitment they cannot hold. To avoid the repercussions of divorce, a substantial amount of couples around the world prefers to simply live together without binding themselves to the institution of marriage. While it is a welcoming trend that relationships short of marriage are increasingly recognized globally, this paper wishes to highlight the dilemma of aligning too closely the category of recognized unmarried cohabitation with marriage. It would be respectfully submitted that in order to offer couples a meaningful alternative option on the "menu", the gulf between marriage and cohabitation must be maintained and the element of protection, especially when the interest of children is at stake, would better be achieved through institutional design. In other words, marriage and legally-recognized non-marital relationship should be treated as two interacting and complementary regimes serving different purposes. Such a suggestion is proposed after studying, evaluating, analyzing and comparing the latest legal systems regulating heterosexual relationships in four different countries – the Netherlands, France, Australia and England. It is hoped that the selection of these four jurisdictions could represent a wide enough spectrum to facilitate more constructive discussions on this controversial topic.*

Keywords: Comparative law, French law, Australian law, Dutch law, Common law, Family law, European family law, International family law, European law.

PROLOGUE

"Say you need me with you here, beside you. Anywhere you go let me go too." Raoul said ardently. "Say you'll share with me one love, one lifetime. Say the word and I will follow you." Christine replied wholeheartedly (Hart and Stilgoe, 1986). Both expressed their deepest affection for each other in the rawest and purest form. They were so bewitched by each other that even the enigmatic Phantom found himself powerless to evaporate the vacuum of shelter and solace Raoul and Christine shared. Given the circumstances, Raoul and Christine would probably settle for simply having themselves engulfed by their scalding fire of love without regard to the formality of their union. While not every couple in reality covet to set sail for such an indelible romantic adventure, many of them do treasure the fruits of a sustainable relationship, i.e. function, more than form of their relationship and for different reasons would feel complacent for a union less than marriage as long as felicity showers them.

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INTRODUCTION

The famous quote from Napoleon – that "the cohabitants ignore the law, the law is not interested in protecting them either" – demonstrated a rather ignorant, if not sarcastic, attitude towards cohabitation in the early days which was resonated in many other societies in the west.

Gradually, in the twentieth century, the law became more tolerant to cohabitation thanks to the recognition of personal autonomy. Following the phenomenon of démariage where, in Borrillo and Fassin's (2004: 24), words that "marriage is a private option, not a social obligation", cohabitation without going through registration and formal celebration becomes more and more popular among modern couples romantically involved. To them, solemnity of marriage may be nothing more than a piece of certificate to decorate the wall. They may not think there is a need to evidence their commitment or they prefer the liberty of entering and exiting a relationship burden-free. Three types of motives have been identified by Schrama (2008a: 314): pre-marital cohabitation which is most popular among young people; post-marital cohabitation where one or both partners were previously involved in a relationship that lasted for some considerable time; and long-term non-marital cohabitation in which the essence is almost identical to marriage.

Today, aided by permission of faultless divorce, marriage no longer necessarily stands for a lifelong commitment but has become a more "negotiable partnership" (Barlow, 2004: 59). Adding to fuel the flames of this surge of liberal partnership is the more lenient and modern stance taken by the European Court of Human Rights. In X, Y and Z v United Kingdom ([1997] 75/1995/581/667 E.C.H.R.), it has been made in clear wordings that "family life" referred to in article 8 of the European Convention on Human Rights "is not confined solely to families based on marriage and may encompass other de facto relationships". In determining whether a relationship amounts to "family life", factors like "whether the couple live together", "the length of their relationship" and "whether they have demonstrated their commitment to each other by having children together or by any other means" are all relevant (ibid). The explicit judicial recognition and emphasis on the substance, rather than form, of the relationship represents a diametrically different attitude from that of Napoleon's era more than a century ago. In light of this, both common law and civil law jurisdictions, though varying in degree, recognize the existence of this alternative mode of romantic companionship outside marriage and agree that some mechanisms ought to be established to protect this form of family dynamics. Given such increasing prevalence, several questions inevitably ensued and have stirred up much intriguing discussions: Would the sanctity of the institution of marriage be derogated? Would marriage be rendered an obsolete procedure and concept? Whether and how the development of law should catch up with this modern way of living?

This paper wishes to highlight the dilemma arising from the choosing between function and form and thus protection and autonomy. If the law goes all-in to favour "form" over "function", there is an obvious risk that individual autonomy will be relegated disproportionately and unjustifiably which renders the state over-paternalist or interventionist. That said, some form, such as the requirement of registration, remains inevitably essential if the scope of private liberty is to be properly delineated and preserved. One further concern that must be considered is the aim of the

law. Given the fact that a substantial portion of the public is unaware of their legal position and rights , a balance between state protection and autonomy must be sought meticulously if the law makes protection of cohabitants, and in particular those economically vulnerable, a starting point. It would be respectfully submitted that in such a case, the gulf between marriage and cohabitation must be maintained and the element of protection, especially when the interest of children is at stake, would better be achieved through institutional design. In other words, marriage and legally-recognized non-marital relationship should be treated as two interacting and complementary regimes, rather than distinct and separate.

Four jurisdictions, namely the Netherlands, France, Australia and England, will be compared in terms of i) threshold and dissolution requirements, ii) parental responsibility and property relations and iii) division of properties upon separation. It is submitted that these four jurisdictions enthrallingly represent four distinct points of reference on a broad legal spectrum regulating heterosexual unmarried couples. In the sequence stated above they represent active registration with marriage-like rights and protection, active registration with distinct set of rules, passive recognition with marriage-like rights and protection and non-recognition without regulations or protections. Since the purpose of this paper is to explore the proper interaction between marriage and a legally-recognized non-marital relationship regime, less emphasis would be placed on unregistered couples in jurisdictions where legally-recognized category does exist to avoid unnecessary complication and thus leaving England as the major representative for the category of unregistered heterosexual non-marital relationship for comparison. The primary focus of this paper would be heterosexual relationships though occasional mention of same-sex relationships must be forgiven since the latter is usually the catalyst behind judicial progression in the area of heterosexual relationship.

NATURE, THRESOLD, ELIGIBILITY AND DISSOLUTION

NATURE

Even before April 2001, the marriage statute provided in the Dutch Civil Code (Art. 1:30) did not employ gender-specific language and this had led to cases challenging the prohibition of same-sex marriage. All those cases unanimously failed. Breakthrough came in 1999 when the Dutch government proposed a bill to amend the marriage statute to explicitly provide that "two persons of different sex or of the same sex" can conclude a marriage (Kamerstukken II, 1998/99, 26 672) which came into force in April 2001. After France became the fourteenth country where same-sex couples are entitled to get married (Reuter, 2013), the latest position in France is basically identical to that of in the Netherlands where both heterosexual and same-sex couples can choose from three layers of relationships: marriage, legally-recognized non-marital relationship regime (Registered Partnership in the Netherlands and "civil solidarity pact", Pacte civil de solidarité (Pacs) in France) and unregistered cohabitation (concubinage). However, unlike the striking similarity between marriage and registered partnership in the Netherlands, marriage is significantly different from Pacs in France. It is worth noting at the outset that contractual freedom forms the spine of Pacs as this scheme is officially defined as "a contract concluded between two persons who have reached the age of majority, of opposite sex or same gender, for the purposes to organize their lives in common" (French Civil Code, Art. 515-1).

Although the rights of same-sex couples were the catalyst in terms of the provision of both Registered Partnership and Pacs, the approach adopted by the Dutch and French government was very different. "The Netherlands has moved the farthest in equalizing cohabitation and marriage" as research by Perelli-Harris and Gassen (2012: 458-459) showed that Registered Partners are given the same legal status as spouses in most aspects in terms of provision and coverage of explicit laws. This notion is supported by De Rijksoverheid voor Nederland (n.d. (a)) as they could only specify three differences between the two institutions – the first two relate to parental relationship and separation procedure which will be discussed later and the third, interestingly, is that when the couple marries, each has to declare a "yes" ('ja-woord') to the other while this is not required for Registered Partnership. Thus, Curry-Sumner (2005: 3) aptly described the Dutch Registered Partnership regime as a "strong registration scheme" in terms of rights and duties afforded to registrants. In contrast, French legislation has been much less extensive to cover les pacsés (Pacs registrants) in terms of explicit laws. For instance, while it is provided that there are differences in terms of parental relationship between spouses and Registered Partnership in the Netherlands, there is no explicit law regulating this important aspect under Pacs (Perelli-Harris and Gassen (2012: 459). Internally, regarding marriage and Pacs in France, one interpretation may be that Pacs was merely intended to be a "by-product of the initiative to provide legal status to same-sex couples" (ibid: 459). Since the legalization of same-sex marriage this year, however, it is submitted that upholding private autonomy is a better explanation regarding the liberal attitude French law exudes. Taken together, the fact that French government exerts less effort in regulating private lives between couples than their Dutch counterpart and at the same time preserves the institution of Pacs even after same-sex marriage is legalized means that Pacs with its contractual nature is truly another option on the menu open to couples regardless of sex, especially those who embrace liberty. This surely is the reason why Curry-Sumner (2005: 3) described Pacs as a "weak registration scheme". In a higher level as between the Netherlands and France, different ideologies can be distilled. While Pacs tends to have a narrower concept of "family" in mind thereby regulating primarily matters between the partners, the concept of "family" (and thus protection afforded) under Registered Partnership is much broader given that relationship between parents and children is explicitly regulated.

Development of the law regulating romantic relationships outside marriage has been equally intriguing in common law jurisdictions but it is rather hard to discern a principled approach across the common law world.

As at the date of writing, no Australian state allows same-sex marriage. Closest to allowing this is Tasmania but very recently a bid to reintroduce same-sex marriage legislation into the state's parliament has been postponed (Smith, 2013). Thus, Australian heterosexual couples have three choices open to them namely marriage, legally-recognized relationship and unrecognized relationship. Note that, as demonstrated by the Australian context, common law world in general is more passive in a sense that they place more emphasis in "recognition" by law, rather than the more active "registration" approach that is adopted in the Netherland and France. This has the advantage of "catching-all" without requiring partners to actively register their status but at the cost of uncertainty or arbitrariness that the partners must prove their de facto relationship to qualify for certain rights. This is so for all Australian states, except Tasmania (Cooper, 2005: 46), that legal obligations are attached to de facto relationships once certain thresholds are fulfilled

with the choice of "opting out". Since Tasmania offers both active registration and passive recognition to qualify for the legally-recognized status, this innovative practice stands out from other states and deserves our fuller attention.

The effect of Relationships Act 2003 (Tas) (RAT), as with other similar legislations across Australia, aims to equate the legal rights of unmarried heterosexual and same-sex couples with married couples (Cooper, 2005: 45). Since same-sex marriage is yet to be legalized, this is the only provision that offers legal status to same-sex couples. The category of non-marital relationship that enjoys legal status is called "Personal Relationships". This can be attained through two means. First, it is the route of active registration to obtain a Deed of Relationship, i.e. the Tasmanian equivalent of Registered Partnership and Pacs. RAT s.14 provides that once a Deed of Relationship is registered, the partners are taken to be in a "Personal Relationship" without the need to prove anything further. Another is the more complicated passive recognition route which can be evoked according to RAT s.4 ("significant relationship") or s.5 ("a caring relationship") – two limbs distinguishing romantic and "carer" relationships under "Personal Relationships" (RAT s.6). Under this route, a range of factors such as duration of relationship, nature and extent of common residence, degree of mutual commitment to a shared life, performance of household duties etc. will all be considered to determine whether a "Personal Relationship" can be established for legal purposes. Regardless of whether the active or passive route is taken, the effect of being in a "Personal Relationship" is that these partners enjoy almost all rights and protections conferred to spouses and in certain aspects even more protection than spouses (Cooper, 2005: 50). This highly resembles the Dutch approach.

In terms of recognition or regulation of non-marital relationship, England, with full respect, presents the most inexplicable solution. While heterosexual couples face an "all-or-nothing" situation as they can either get married and enjoy comprehensive protection from various legislations or they will be left in the dark in most areas, same-sex couples can choose from three options just like their counterparts in the Netherlands, France and Australia since they are afforded legal status almost identical to married couples under Civil Partnership Act 2004 and they can also get married under Marriage (Same Sex Couples) Act 2013. Contrary to what a lot of unmarried heterosexual cohabiting couples have in mind, the mythical informal "common-law marriage" has been abolished 260 years ago by the Clandestine Marriages Act of 1753 (Barlow, 2004: 58). In other words, such cohabitation is actually a non-existent concept to the law in England regardless of the duration of cohabitation and the law treats cohabitants as strangers generally despite its prevalence in England. Only in a few limited areas that the rights of cohabiting couples are more explicitly referred to, such as the right to apply for transfer of tenancy upon relationship breakdown (Schedule 7 to Family Law Act 1996), the right to joint parental responsibility subject to registration (Adoption and Children Act 2002) and the right to reasonable maintenance from the deceased partner's estate (Inheritance (Provision for Family and Dependants) Act 1975, s.2).

THRESHOLD AND ELIGIBILITY

Threshold conditions applied to marriage are essentially identical in the Netherlands and England. Under Dutch law, the partners may not be married to someone else or have already entered into a

registered partnership (Dutch Civil Code, Art. 1:42). The partners must be at least 18 years of age (Ibid, Art. 1:31) though minors between 16 and 18 years of age may get married with their parents' or guardians' consent (Ibid, Art. 1:35). Marriage between persons of close blood-ties, such as parents and children and siblings (Ibid, Art. 1:41, 1), is prohibited with the exception where siblings are related through adoption (Ibid, Art. 1:41, 2). Where, however, a minor is pregnant, the Minister of Security and Justice may exercise discretionary power to grant permission for marriage (De Rijksoverheid voor Nederland (a)).

Like marriage, couples can enter into a Registered Partnership in the Netherlands regardless of the combination of their gender (Dutch Civil Code, Art. 1: 80a, 3). In fact, even the Dutch government groups the conditions of marriage and entrance into Registered Partnership together which implies that the same substantive laws apply. The assimilation between the two institutions in the Netherlands is heightened by the fact that, contrary to the French approach in which marriage and Pacs are treated differently in terms of registration procedures, both marriage and Registered Partnership have to be concluded before a Registrar at the Town Hall with the presence of witnesses (Bradley, 2001: 29; Schrama, 1999: 319).

In France, similar to the Netherlands, prohibition based on affinity and consanguinity applies to both marriage and Pacs (French Civil Code, Art. 161-173 and 515-2 respectively) with the exception that marriage between uncle and niece or aunt and nephew may be allowed with serious reasons (ibid, Art. 164). Monogamy is also upheld for both marriage and Pacs (ibid, Art 147 and 515-2 respectively). Similar to the Netherlands, the minimum age for marriage is 18 though minors between 15-18 years of age may get married with parental consent (ibid, Art. 144). Although French Civil Code provides explicitly that partners registering Pacs must be of legal age (ibid, Art 515-1), apparently minors under legal age may also register a pacte with consent from, depending on age, guardian or court (Service-Public.fr, 2012a). A difference between marriages and Pacs is that while the former are celebrated in Town Halls with at least two witnesses, the latter is simply registered at the Court of First Instance (tribunal d'instance) by a clerk (Godard, 2007: 313).

Across Australia, marriage must be between a man and a woman and same-sex marriage conducted overseas will not be recognized. Other threshold conditions are almost identical to that in the Netherlands and France – for example the monogamy principle, consanguinity restriction and the minimum age of 18 save where court's approval has been obtained for minors between 16 to 18. A written notice of intention to marry has to be served to an authorized celebrant and only authorized celebrants can perform marriage in either civil or religious form. There is no mention that a marriage can only be concluded in Town Halls (Australian Government, n.d.). In the case of registering a Deed of Relationship, the rules are largely identical to marriage – for example a person already being a party to a Deed cannot register another one. An additional threshold is that to qualify as a "significant relationship", the two adults must have "a relationship as a couple" (RAT s.4(1a)) regardless of whether active or passive route is taken. In the case of a caring relationship, an additional certificate stating that independent legal advice has been obtained must be lodged together with the application for registration of the Deed (RAT s.11(3)) and the carer cannot be under payment or employment (RAT s.5(2)). Unlike in the European countries

aforementioned, there is seemingly no discretion for minors under the age of 18 to register a Deed of Relationship.

In terms of nationality requirement, the couple is only allowed to marry in the Netherlands if at least one of them is a resident in the Netherlands or one of them is a Dutch national if both do not reside in the Netherlands or both live in the Netherlands even though neither is a Dutch national (Antokolskaia and Boele-Woelki, 2002: 55). Entrants to Registered Partnership are subject to identical rules (Curry-Sumner, 2005: 9). To be eligible to get married in France, generally one of the partners must have resided in France for 40 days continuously prior to the marriage (Embassy of France in Washington, 2012). For Pacs, however, eligibility is not simply based on duration of stay but instead the partners must have a "fixed common residence" in France so that they can apply to tribunal d'instance of that region (French Civil Code, Art. 515-3). To conclude a pacte at a French Embassy overseas, at least one of the partners must be of French nationality (ibid). There is no requirement to be an Australian citizen or a permanent resident of Australia to legally marry in any Australian state (Australian Government, n.d.). To register for the Tasmanian Deed of Relationship, however, the two adult persons must domicile or are ordinarily residents of Tasmania (RAT s.11(1a)). In England, couples seeking to get married can be foreign nationals but those who are not from member nations of European Economic Area must first apply for visa (Gov.uk, 2013).

DISSOLUTION

In the Netherlands, divorce and legal separation (3 years) are the two grounds for dissolution of a marriage and the only ground for divorce is irretrievable breakdown of the marriage (Dutch Civil Code, Art. 1: 151) regardless of whether the application is unilateral or mutual (Antokolskaia and Boele-Woelki, 2002: 58). Contrary to Registered Partnership, it used to be the case that spouses must apply to the court even if they have both agreed to divorce (Schrama, 1999: 322). However, they can now seemingly seek divorce administratively in the Rutte-Asscher if there are no children involved and the couple has reached an agreement on the separation (De Rijksoverheid voor Nederland (b)). This has to some extent aligned with Registered Partnership that the partnership can be ended on the basis of mutual agreement without making an appearance at court (Schrama, 1999: 322).

The combined effect of Art. 1:80 of the Dutch Civil Code means that, like Australia, courts play the role of a "gatekeeper" when dealing with unilateral application for dissolution of a Registered Partnership. But unlike marriage, there is no need to prove irretrievable breakdown. There are two more major differences and one similarity when comparing Registered Partnership with marriage regarding the separation process. First of the two differences is that legal separation is inapplicable as it was deemed needless (Schrama, 1999: 321). Second, Registered Partners are allowed to dissolve the partnership by mutual consent as long as a declaration stating that their Registered Partnership has irretrievably broken down and they wish to have it ended is drawn up and signed by the partners and a notary or lawyer (cf. to Rutte-Asscher for married couples), providing that no children are involved (Government of the Netherlands). The involvement of a notary or lawyer is a careful design to ensure the fairness of settlement between the parties

(Curry-Sumner, 2005: 24) as it offers an additional layer of protection – in contrast, the French approach requires only a statement of dissolution of the pacte, unilaterally or jointly, be merely served to the court or a notary without the court or notary playing an active role in scrutinizing the statement (Décret n°2006-1806 Art. 4 & 5) . Turning to similarity, Registered Partners in the Netherlands, like spouses, are entitled to adjudication by court if they do not agree with each other as to the dissolution of the partnership (Dutch Civil Code, Art. 1:80). In contrast, family court (le juge aux affaires familiales) in le tribunal de grande instance in France will only intervene over financial consequences upon dissolution when the partners (les pacsés) cannot reach an agreement (Service-Public.fr, 2012b).

There are four grounds for divorce in France to meet specific scenarios as compared to only one general ground in the Netherlands. First, divorce can be based on mutual consent (French Civil Code, Art. 230 – 232). Couples are not required to state a reason for divorce and they only need to submit to the judge an agreement which regulates the consequences. It is only if the judge considers the agreement fails to adequately protect the interests of the children or one of the spouses that the judge may refuse to make an order of divorce. Another ground is accepted divorce (ibid, Art. 237-238). This can be submitted by either spouse or both where they accept the breakdown of their relationship in principle. If one party disagrees as to the legal consequences of the divorce, it will be for the judge to decide on any conflicting issues. The third ground is irretrievable breakdown (ibid, Art. 233-234) if either the spouses have been living separately for 2 years or the application of divorce based on fault is unsuccessful. The last ground is divorce based on fault (ibid, Art. 242-246) where the other spouse has violated the duties and obligations of their marriage and render the continuance of their community life unendurable.

Naturally, dissolution of Pacs resembles the flexibility of termination of a contract in non-familial context but judicial intervention is not necessary. As mentioned above, the pacte can be dissolved jointly or unilaterally. If it is declared jointly, the parties need only to serve the joint written declaration to the office of tribunal d'instance for registration and the partnership would be terminated with immediate effect. If declared unilaterally, the party invoking the termination needs only to serve the declaration on the other party in addition to the office of tribunal d'instance for registration and the termination would be effective after three months (ibid, Art. 515-7). This simple administrative nature of procedure without adjudication by court or even perusal by a notary, while conspicuously upholds individual autonomy, has been criticized of affording the weaker party no protection at all and the possibility of termination by will renders the pacte more fragile than commercial contracts (Curry-Sumner, 2005: 24).

Similar to the Netherlands, irretrievable breakdown of marriage is the only ground for divorce across Australia (Family Law Act 1975 (Cth), s.48(1)). Further, the only means to prove such a irretrievable breakdown is by living separately for a continuous period not less than 12 months immediately prior to the divorce order application (ibid, s.48(2)). In addition, the court will only grant a divorce order if it is satisfied on a balance of probability that there is no reasonable likelihood of cohabitation being resumed (ibid, s.48(3), Bates and Sawyer (1977) FLC 90-319). Such irretrievable breakdown need not involve any fault element and the court would not consider why the marriage ended (Australia Family Law Courts, n.d.).

Although the Tasmanian Deed of Relationship shares the similarity with Pacs that one party may unilaterally apply for dissolution and the other party, together with the Registrar, must be served with a notice to the said effect (RAT s.15(2) and s. 16(2)), the court retains its power to make the "final say" (RAT s.17(b)) in exceptional cases. If there is no direction from the court with contrary effect, the Registrar will then be obliged to revoke the Deed after 90 days from the date of lodgment of the revocation application (RAT s.17(a)). Interestingly, Tasmania bears a special feature that the Deed may be revoked by a magistrate on application by "an interested person" (RAT s.18). In other words, it seems that a third party may seek to have the "Personal Relationship" dissolved.

Like the Netherlands and Australia, the only ground for divorce in England is irretrievable breakdown (Matrimonial Causes Act 1973 (MCA) s.1(1)). However, contrary to the aforementioned countries, specific "means" are given to prove such a breakdown, namely adultery, unacceptable behavior, desertion, separation of two years together with consent to divorce by the other party and separation of five years without the need of the other's consent (MCA s.1 (2)). It can be observed that procedurally divorce in England is the hardest among the four countries compared. For instance, a minimum of two years of separation is required without fault (in a broader sense) by one party, as compared to one year of separation in the Australia and the possibility of immediate separation as long as agreement is reached between both parties in the Netherlands and France. The substantive means of proving irretrievable breakdown are also more stringent than the grounds in France as the former does not provide the option of divorce by mutual consent with immediate effect without having to make the reason known.

There is of course no law regulating dissolution of cohabitants in England as the law does not confer legal status to unmarried cohabitants. Whereas in all three countries that relationship registration regime is available, those registrations can all be dissolved with ease but the lack of protection afforded to les pacsés is worth noting.

PARENTAL RESPONSIBILITY

The focus of this section is a comparison of legal parentage and parental responsibilities between married couples and partners in a non-marital relationship. The law on parentage has profound impact as it extends beyond immediate parental rights and duties to issues regarding inheritance and inheritance tax and so on (Schrama, 2008a: 320).

In the Netherlands, custody includes both parental authority and guardianship (Dutch Civil Code, Art. 1:245 (2)) . The former is our focus since it refers to the legal parent or parents of the child (Ibid, Art. 1:245 (3)) and this can be exercised by one legal parent alone or two legal parents jointly. Parental authority is broadly defined as "the duty and the right of the parent to care for and raise his or her minor child" for the "mental and corporal well-being of the child and fostering the development of the child's personality" (ibid, 1:247). The content of custody covers a wide variety of parental rights such as the right to raise and to educate the child, the right to usage of surname of the child, the right to represent the child and to administer the child's property and also an obligation to maintain the child (Antokolskaia and Boele-Woelki, 2002: 72). The concept of parental authority in France is almost identical (French Civil Code, Art. 371-1). In both the Netherlands and France, a duty and right to maintain personal contact with the child is generally

conferred to the parent without parental authority which shall remain unaffected even if the relationship between the parents breaks down (Dutch Civil Code, Art. 1:277a and 1:277b; French Civil Code, Art. 373-2). The term "parental responsibility" is adopted in both Australia and England and in both jurisdictions it is broadly defined to include all the rights, duties, power, responsibilities and authority a parent has in relation to the child. In addition, the child's property is also mentioned in England's definition (Family Law Act 1975 (FLA), s.61B for Australia; Children Act 1989 (CA 1989), s.3(1) for England).

In terms of maternity, the relationship status of the mother makes no difference. A woman would be the legal parent automatically as long as she has given birth to or adopted a child regardless of whether she is married, in a Registered Partnership or in any unregulated form of relationship (Dutch Civil Code, Art. 1:198 & Art. 1:253b).

The exciting part thus lies on establishing paternity. Under Dutch Civil Code Art. 1:199, the legal father is the man who is either i) married to the mother of the child; ii) has recognized the child; iii) has established parentage in court proceedings or iv) has adopted the child (Antokolskaia and Boele-Woelki, 2002: 66). However, marital paternity is only a presumption limited to heterosexual spouses and this can be challenged by the mother or the child or the mother's husband if he was not aware of his wife's pregnancy or his wife has misled him as to the genetic origins of the child (ibid, 67). It follows that married parents normally are entitled to joint parental authority by means of law (Dutch Civil Code, Art. 1:251). Since an unmarried father is not by law a legal parent automatically, to establish paternity, fathers in a Registered Partnership, like their counterparts in an unregulated relationship, used to be required to formally recognize the child (Schrama, 2008a: 319) and this requires the mother's consent (Antokolskaia and Boele-Woelki, 2002: 70). To be able to exercise joint parental authority, the father also needs to file a joint application with the mother to the Custody Register (Dutch Civil Law, Art. 1:252). This process cannot be underestimated since if a father wishes to recognize the child after the relationship with the mother has broken down, the father may have a mountain to climb in terms of seeking the mother's cooperation even though the court may grant him the right if the mother refuses (Schrama, 2008a: 320). As Antokolskaia and Boele-Woelki (2002: 68) pointed out, the mother may well refuse to consent since she will not be deprived of maintenance against the begetter of the child under Dutch law anyway. Though this is still the position for fathers in unregulated relationships, the position of fathers in Registered Partnerships has been substantially improved as partners in a Registered Partnership can now, normally, automatically acquire joint parental authority over a child born during their relationship (Dutch Civil Code, Art. 1:253aa). This is so even if the male spouse or partner is not the genetic father (ibid, Art. 253sa). For a child born prior to a recognized relationship, the new partner of the sole legal parent can obtain joint parental authority with that sole legal parent (this usually refers to the mother) according to Dutch Civil Code Art. 1: 253t with the qualification that the new partner has a close personal relationship with the child - for instance raises and educates the child (Antokolskaia and Boele-Woelki, 2002: 71).

Since the latest position is that both parents acquire joint parental authority over children born within their marital or Registered Partnership relationship, the next vital question is whether this joint parental authority continues after divorce or dissolution. The answer regarding both marriage and Registered Partnership is that this continues unless one or both parents request the court to

determine that, in the best interests of the child, custody should fall into one parent solely (Dutch Civil Code, Art. 1: 251 (2); Statute of 30.10.1997, Staatsblad 1997; Antokolskaia and Boele-Woelki, 2002: 70). As mentioned before, couples with children cannot divorce or separate without going to court. This is because parents are not allowed to agree upon themselves the allocation of parental authority and they individually or jointly must apply to the court if either of them wishes to cease joint parental authority (Dutch Civil Code, Art. 1:251 (3)).

In France, there are generally three ways to prove filiation: i) by giving birth to a child, ii) by the act of recognition or iii) by acquiring "apparent status" through establishing sufficient facts that point to a bond of parentage or relationship (French Civil Code, Art. 310-3). Maternity is "designated" by the act of giving birth to a child (ibid, Art. 311-25). However, French mothers enjoy the right to give birth secretly or anonymously (accouchement sous X) so as to avoid parental authority (ibid, Art. 326). There have been some amendments in the area of presumption of paternity lately. The latest position is that the husband is presumed to be the father if a child is born within wedlock (ibid, Art. 312) but this presumption of paternity would be rebutted if the husband is not designated as the father of the child at the child's birth (ibid, Art. 313). However, if paternity was excluded under Art. 313, presumption of paternity can be restored by operation of law if "apparent status" can be established between the husband and the child (ibid, Art. 314) – but this privilege of restoration is not extended to unmarried father. Where parentage is not established by any of the methods above, Art. 315 provides three additional means. First, only for married couples, each spouse may during the minority of the child requests to have the paternity restored by proving the husband is indeed the father. The child can initiate an action to such effect within ten years after reaching legal age (ibid, Art. 329). Second, primarily for unmarried couples, both paternity and maternity can be established by acknowledgment ("par la reconnaissance") made before or after the birth of the child (ibid, Art. 316). Third, also primarily for unmarried couples, is by means of court procedure through proving acquisition of "apparent status" ("par la possession d'état") (ibid, Art. 317). For children born outside wedlock, paternity may also be judicially declared but such a right is reserved to the child only (ibid, Art. 327). The conclusion is that while a husband stands the possibility of acquiring paternity even if he has omitted the step of registering himself as the father upon the child's birth, an unmarried father must take additional steps to establish the same effect. In this regard, unlike in the Netherlands where male Registered Partners acquire parental authority over his child born during the Registered Partnership, French law does not explicitly elevate male Pacs partners to enjoy such a privilege as they are simply grouped under the category of unmarried fathers. Perelli-Harris and Gassen (2012: 459) thus aptly commented Pacs as mainly regulating couples, not parents-child relationship.

Theoretically, under accouchement sous X, a child can have no parent, one parent or two parents. There is only one gender-neutral rule stating that if one parent seeks to recognize his or her child after more than a year after the child's birth and that the other parent has already acknowledged the child, the second parent will not be granted parental authority (i.e. parental authority shall be vested solely on the first parent) (French Civil Code, Art. 372). There is however a proviso that parental authority may be exercised in common when the mother and father together make a joint declaration before the chief clerk of the tribunal de grande instance or upon a court's decision (ibid). In other words, contrary to the situation in the Netherlands where there is every possibility that the mother is the sole legal parent and the father will never be the sole parent by the same

token, it is possible that in France a father is the sole parent if only he recognizes his child. Moreover, recognition means attachment of parental authority. Thus, an unmarried father in France need not do anything further to establish parental authority after recognizing his child whereas in the Netherlands joint application with the child's mother's consent is required.

It follows that in France (and this is true for married couples, les pacsés and unregistered unmarried couples), unlike in the Netherlands, no one is directly presumed to be a legal parent or vested with parental responsibility by dint of law upon the birth of a child.

A plain reading of the French Civil Code contains no express provision of whether or how a new partner of a legal parent can obtain parental responsibility. The closest is that a family court judge may determine the details of a relationship between a child and a third party person (relative or not) if it is in the interest of the child (French Civil Code, Art. 371-4), which is short of granting a full parental authority. The court may also "entrust" a child to a third person (ibid, Art. 373-3) but the responsibility of this third person is only limited to supervision and education while parental authority still rests on the legal parent(s) (ibid, Art. 373-4). Thus, a non-genetic parent apparently only stands a chance to establish parental authority through delegation with court's approval (ibid, Art. 377) or adoption.

Similar to the Netherlands, upon divorce, a parent in France cannot relinquish from joint parental authority by agreement with the other parent without the court's approval (ibid, Art. 376) since France also upholds joint parental authority even after divorce (ibid, 373-2) unless the court decides otherwise in the child's interest (French Civil Code, Art. 373-2-1). The parents can only submit to the court jointly as to how they have agreed to coordinate the terms of exercising their respective parental authority and the court would usually approve such agreement unless the child's interest is not protected sufficiently (ibid, Art. 373-2-7). The same applies to les pacsés and other unmarried couples.

In Australia, the starting point is that each of the parents of a child under 18 has parental responsibility subject to court orders (FLA s.61C (1)). As explained by Rice , parents generally share parental responsibility for their children and "only when disputes about children come within the sphere of the FLA that the need to "allocate" parental responsibility arises". This will not be affected by subsequent marriage, separation or re-marriage of the parents (FLA s.61C (2)). In other words, what matters is the status of parentage vis-à-vis the child rather than the status of relationship between the parents and thus married and unmarried couples are treated alike. This is encapsulated by the Object of the statute that it is to ensure "children have the benefit of both of their parents having a meaningful involvement in their lives" (FLA s.60B (1)(a)) and therefore "parents jointly share duties and responsibilities concerning the care, welfare and development of their children" (FLA s.60B (2)(c)).

Under the option of parenting plan (FLA s.63B), Australia is the only country studied here that allows private allocation of parental responsibility. In other words, both parents may theoretically divest themselves of the responsibility (FLA s. 63C (2)(c)) though the court retains its power to vary or nullify the plan (FLA s.63H). Apparently, contrary to the Netherlands, France and England, Australia encourages private settlement of family matters concerning children through "an informal way" (without court's intervention). This is also a means for a third party, like a new

partner of a parent, to acquire parental responsibility for a child since a parenting plan can refer to or include a person other than the parent of the child (FLA s.63C (2A)) and, like England, more than two persons can share parental responsibility for a child (FLAs.63C (2)(d)). The court will not generally intervene and will only set aside a registered parenting plan (one that its content cannot be varied after registration: FLA s.63D) when it is satisfied that: the concurrence of a party was obtained by fraud, duress or undue influence; or the parties want the plan set aside; or it is in the best interests of a child to set aside the plan (FLA, s.63H (1)). They may also vary child welfare provisions in the plan or substitute the plan with a court order (FLA, s.63H (3)). If the parents want to seek an enforceable arrangement whether or not they could agree on the terms regarding the children among themselves, court orders are required but this can only be applied as a last resort (FLA, s.63B).

Court order takes the form of parenting order and the court will decide the matters regarding the child including the allocation of parental responsibility. The amended FLA inserted a "presumption of equal shared parental responsibilities when making parenting orders" (FLA s.61 DA). As Rice (in Fogarty, 2009: 87) pointed out, though a variety of persons can apply for the parenting order, this presumption is only confined to the two original parents and the presumption can be rebutted if it is not in the child's interest to do so. In other words, parental order is another route for a third party to acquire parental responsibility since parents of the child or any persons other than the parents of the child can all apply (FLA s.64B(2)).

Since Australia places emphasis on the parental status rather than the relationship between the parents, as aforementioned, it is not surprising that there is no special provision regarding parentage under the "opt-in" Deed of Relationship under Tasmania's Relationships Act.

Identical to the Netherlands, a married father and mother in England each has parental responsibility for the child automatically (CA 1989, s.2(1)). An unmarried mother shall alone have parental responsibility for the child if the father does not acquire it separately (CA 1989 s.2(2)). An unmarried father can acquire parental responsibility by 3 means: i) he jointly registers the birth of the child with the mother on the child's birth certificate; ii) he makes a parental responsibility agreement with the mother subject to formalities or iii) he successfully applies for a court order to have parental responsibility (CA 1989, s.4(1), as amended by Adoption and Children Act (ACA) 2002 s.111). If the father was not married to the mother but subsequently did so, he would then have acquired parental responsibility provided that the child has not reached legal age (CA 1989, s.2(1), Family Law Reform Act 1987, s.1)). It is interesting to note that similar to in the Netherlands, the first route requires the mother's consent or authorization (Birth and Deaths Registration Act 1953, s.10 and s.10A). Also interesting is that unlike in the Netherlands and France, English law explicitly provides that unmarried couples can establish parental responsibilities among themselves under the second route. Moreover, unlike some countries, there is no "quota" for parental responsibilities over one child – s.2(5) CA merely provides that "more than one person may have parental responsibility for the same child at the same time." It seems that in England parental responsibility is a lifelong commitment once it is acquired.

It is explicitly provided that:

"a person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf." (CA 1989, s.2(9)).

Thus, by analogy, parental responsibilities are not affected by either divorce or separation of the unmarried couple. There is apparently no provision that a biological mother's or her husband's parental responsibility can be relinquished. The responsibility of an unmarried father who has acquired parental responsibility through the aforementioned means can only be terminated by court on the application by himself, the mother or the child (ibid, s.4(2A), (3)).

A step-parent's ability to acquire parental responsibility is also stipulated by statute. According to the amended version of s.4A (1) CA 1989, the parent who subsequently marries (or becomes a civil partner with) another person can by agreement empower the step-parent to acquire parental responsibility for the child concerned. If there were originally two legal parents, the agreement should involve all three parties. The formalities of the agreement and relinquishment of such a responsibility are identical to those as between the biological parents (ibid, s.4A(3),(4)).

Since England does not have a legally-recognized category for heterosexual unmarried cohabitants, there is no special provision but the above rules governing unmarried fathers apply. A resident/contact order may also be sought (ibid, s.8). In this sense, England law and French law share a high degree of similarity by placing all unmarried fathers in the same bracket.

To conclude, interesting differences and similarities both internally and externally across the four countries can be observed. In deciding the continuation of parental responsibility of a parent, all four countries weigh the interests of the child the heaviest. In all countries but France, maternity automatically attaches through the act of giving birth regardless of marital status of the mother. Thus, it is possible to say that all these countries share the belief that it is the mother who should be primarily responsible for her child as she bears the burden of raising her child in any case. Paternity is more complicated. A child born within wedlock automatically has a father in the Netherlands and England at birth. A child born outside wedlock automatically has a father in the Netherlands if the parents are Registered Partners. Children in Australia are the "luckiest" as they are guaranteed to have both parents by default. In terms of principle, since marital status is irrelevant in Australia and the law between married and unmarried couples has almost assimilated in France and England, it can be generalized that these three countries all place emphasis on the status of parentage (or the biological linkage between the parents and their child) rather than the relationship between the parents as in the Netherlands. Hence, there is no need to regulate parent-child relationship born within a legally-recognized heterosexual unmarried relationship in particular in Australia and France.

PROPERTY RELATIONS AND FINANCIAL PROVISION UPON SEPARATION

This is the aspect that divergence between different types of relationship has been the widest and brightest both internally and externally.

We can see three different types of regimes governing matrimonial properties – universal community of property in the Netherlands; community acquests in France and judges' discretion in common law jurisdictions (ed. Scherpe, 2012).

In the Netherlands, everything owned before or acquired during the marriage will be treated as joint property to be divided equally upon divorce (Dutch Civil Code, Art. 1:94). Gifts and inheritances, unless specified by the donor or the deceased, fall within joint property (ed. Scherpe, 2012: 448). Given the nature of universal community, almost all personal debts incurred before or after marriage become community debts (Boele-Woelki, Schonewille and Schrama, 2008: 16). Liabilities incurred by one of the partners can be settled by that spouse's own property or joint property but that spouse has to compensate for the value drawn from the joint property. (Dutch Civil Code, Art. 1:94 (3), 1:96). Unless a property is exclusively under the name of one spouse, both are entitled to its administration (ibid, Art. 97). Like France, the matrimonial home cannot be disposed of without the other spouse's consent (Dutch Civil Code Art. 88(1); French Civil Code Art. 215). Upon separation, spouses have the right to ask the court to decide the occupation and rental of the matrimonial home (Boele-Woelki, Schonewille and Schrama, 2008: 25). The default position is that pension rights accrued during marriage will generally be shared equally upon separation except those within Pension Rights Equalization (Separation) Act and are sufficiently close enough to one spouse only (Dutch Civil Code, Art. 1:94 (2)) , but the spouses can agree on an alternative division on their own through nuptial or divorce agreement (ibid, Art. 1:155). Universal community of property is still the default regime today despite ongoing debates for reform and is also the default regime for Registered Partners . Both married couples and Registered Partners can mitigate such rigidity or harshness by their own agreement subject to general contract law rules (ibid, Art 1:114). Thus, the default regime for both married couples and Registered Partners are identical.

As a separate pillar, maintenance for an ex-partner, under marriage or Registered Partnership, is not guaranteed in the Netherlands. It is only when one spouse cannot maintain similar living standard as he or she had enjoyed during the relationship that the court may order maintenance payment from the other spouse. Calculation of the exact amount to be "compensated", thus, involves a comparison between the financial ability of the paying party and the financial needs of the receiving party (ibid, Art. 157). The normal maximum period for maintenance payment is twelve years (ibid, Art. 157 (4)) but the parties are free to agree on their own whether maintenance is to be paid and if so the amount and duration.

Community property in France is limited to goods acquired during marriage but inheritances and gifts are normally excluded (ed. Scherpe, 2012: 449; French Civil Code, Art. 1400, 1404, 1405). Income derived from personal assets, such as rents from a house or dividends from shares, however, is included in the community of asset (ed. Scherpe, 2012: 450). As in the Netherlands, creditors may recover debts that a spouse has incurred for whatever reasons, personal use or for the benefit of the relationship, during the community from communal property (French Civil

Code, Art. 1413). Likewise, if a communal property is used to set off a personal debt, reimbursement from that spouse is to be expected (ibid, Art. 1416). However, communal property cannot be used to set off personal debts incurred before marriage. Each spouse is entitled to administer alone or even dispose of any common property but would be accountable for faults so committed. One spouse, however, may not without the other's consent dispose of inter vivos gratuitously a common property or make it a surety for a third person's debt (ibid, Art. 1421, 1422) Although in principle communal property is to be divided equally, one party will have to compensate the other for the other's sole contribution towards the communal property before equal division takes place (ed. Scherpe, 2012: 451). For instance, money transferred from one spouse's parents to settle a joint debt accrued to a third party (French Civil Code, Art. 1405). Also, a spouse may request preferential allotment or occupation of the matrimonial home but the final decision lies on the court (ibid, Art. 1476). Pension rights are treated as personal asset and thus the impact on financial relief upon separation is only indirect, contrary to the Netherlands (Ibid, Art. 1404). Like the Netherlands, spouses are free to draw up their own agreement but must not be immoral (ibid, Art. 1387).

In France, similar to in the Netherlands, "maintenance" is only available when disparity in standard of living is resulted because of divorce. However, unlike in other jurisdictions studied, "maintenance" in France is in the nature of a lump sum and takes the form of a capital amount fixed by the judge – thus it is called des prestations compensatoires (compensatory benefit) rather than maintenance in the general sense (ibid, Art 270). Note that the impact, or sacrifice, one spouse has made towards the upbringing and education of children, which is a hot topic in common law jurisdictions as to how and whether this should be taken into account, is enunciated explicitly as a criterion that French judges have to consider when granting prestations compensatoires, together with other factors like the means and needs of the respective spouses, duration of the marriage, professional status of the parties, their pension rights etc. (ibid, Art. 271).

In both England and Australia where judges have wide discretionary power to order financial relief upon divorce to tailor-make the fairest possible solution (or so they perceive) under individual circumstances, properties, maintenance and pensions are not treated as independent pillars as in continental Europe (ed. Scherpe, 2012: 460) but will be "mixed and matched". Although in England the court has advised judges to "check [their] tentative views against the yardstick of equality of division" and "equality should be departed from only if…there is good reason for doing so" (White v White [2001] 1 AC 596), it should not be concluded lightly that equal division is the main rule as a vast amount of cases suggest that "fairness" and "equality" are not synonymous. In both jurisdictions judges may seek guidance from a range of factors listed out in statute but the locus may not be exactly the same – in Australia it is stipulated that property orders must only be made when it is "just and equitable" to do so (FLA s.79 (2)) while in England welfare of minor children of the family should be given "first consideration" (MCA, s.25 (1)) . Nevertheless, financial and non-financial contributions made to the family by the parties, financial status of each spouse and their future needs are the prime features that judges ought to consider in both jurisdictions. Like in the Netherlands and France, one spouse may request for preferential allotment of the matrimonial home and this may be done through outright transfer or right to occupation until certain events happen (Mesher and Martin orders). Since no "communal

property" is created during marriage in common law jurisdictions unless a property or liability is jointly acquired or responsible, creditors can only go after properties under the name of his debtor or seek a charge against the debtor's portion in any jointly owned assets. By analogy, the issue of administration of properties is of less significance in common law jurisdictions.

Similar to the Netherlands and France, maintenance is not guaranteed but can be granted based on needs and means of each party under the principle of fairness aforementioned and can be in the form of periodic or lump sum payments (MCA s.21). This is just another aspect of ancillary relief upon divorce.

Across the three jurisdictions that a category of legally-recognized unmarried heterosexual relationship exists, two approaches regarding property relations and division upon separation can be observed: assimilation of position as with married couples in the Netherlands and Australia but maintenance, if not widening, of the gulf between marriage and Pacs in France following the effect of the latest law.

In the Netherlands the default position for Registered Partnerships is identical to married couples. This is also quite true in many Australian states. In Tasmania where a registration regime is available, registrants of "Personal Relationships" have virtually the same rights as married couples. For instance, in terms of property division, factors such as duration of relationship, financial and non-financial contributions, and financial resources of both partners and future needs are all relevant (RAT s.40). In addition, maintenance claim can also be made (RAT, s. 36). This is the same for those who do not actively register but have been qualified for state's recognition. In other states, as long as the relationships are "recognized" by court (because of duration or existence of children), the partners will be treated largely alike as married couples in terms of factors to be taken into account though in some states future needs will not be considered and in some states maintenance will not be available (Cooper, 2004: 53-54).

For Pacs registrants, the latest law amended in 2009 (LOI n°2009-1436 du 24 novembre 2009 - art. 37) replaced the former default regime of l'indivision (undivided co-ownership and thus equal division upon dissolution) by a separation of property regime (French Civil Code, Art. 515-5). Thus, unless otherwise stated in their pacte, each partner can administer and dispose of their personal assets on their own and each is responsible for their own personal debts arising before or during the pacte except those incurred personally but intended for the partners' joint daily life. Each partner can prove exclusive ownership of a property and only those that exclusivity cannot be established will be subject to equal division. Les pacsés can still opt for the régime de l'indivision if they wish but this has to be stated clearly in the pacte.

Finally, we see one unilateral treatment (and the only treatment for unmarried heterosexual couples in England) for unrecognized couples – resorting to general property law. The situation in England best exemplifies this chaotic consequence. Since there are no special rules regulating these delicate love-oriented relationships, common law doctrines such as resulting trust, constructive trust and proprietary estoppel which are primarily designed to settle commercial dealings will be applied. This often leads to arbitrary and unpredictable outcomes since these doctrines rely heavily on rather vague elements such as "intention", "common intention" and "conduct giving rise to certain expectations". If a claimant did not provide any actual financial

contribution during the period of cohabitation, it is not too exaggerating to say that his or her fate rests purely on the judge's mercy. Burns v Burns ([1984] Ch 317) provides a good illustration on this point where without making financial contributions, the lady claimant who stayed at home to look after the children could not obtain a share in the common residence (let alone maintenance) even after cohabitating with the male legal owner of the house for almost two decades. Her non-financial contribution would have been taken into account in, say, Australia given the duration of the relationship and the existence of children. Besides, regrettably, consistency of a convincing degree in terms of which particular doctrine should be invoked in such cases has not been reached. In the leading case of Stack v Dowden [2007] UKHL 17, for instance, the majority based their decision on constructive trust approach while Lord Neuberger, the minority, relied on resulting trust approach but nonetheless reached the same result. It is submitted that the mere fact that an identical result was reached could not downplay the deficiency in inconsistency since this affects the lines of arguments and evidence to be adduced. Vagueness generated from the current state of law only adds more anxiety and misery to claimants who are already heartbroken. In Australia, the additional concept of unconscionability of conduct in relation to constructive trust does not fundamentally alleviate the confusion and injustice caused by these property law doctrines (Law Commission: 2002).

EVALUATION OF SOLUTIONS

Frankly, the solutions that each country adopts may be more affected by culture, tradition and politics than some grand underlying principles: Dutch Constitution does not favor marriage alone and thus there is much room to recognize and grant Registered Partners legal status close to married couples (Schrama, 2008a); France has a tradition of allowing mothers to give birth secretly which has huge impact on parentage; England encourages marriage (Barlow, 2004) partly due to the presence of influential Conservatives and partly the nature of common law (Bradley, 2001) and thus is less receptive to unmarried cohabitation – which makes the advancement in Australia more remarkable. Nevertheless, these four different approaches do shed light as to the questions posed at the beginning of this paper.

Would the sanctity of marriage be derogated if non-marital heterosexual relationships are legally recognized? Except England, all countries studied expressly respect pluralism of relationships by recognizing such a category through either active registration or passive recognition once certain threshold requirements are met. Among these countries, only France strives to maintain a visible gap between marriage and recognized relationship. Describing this demarcation encapsulated by the French approach as a "shadow of marriage" (Bradley, 2001: 37) may have inadvertently undermined the value of such an intermediate option that confers legal status without full marriage-like burden. This ought to be a "real alternative" (Barlow, 2004: 66) that couples can voluntarily choose and by the same token Dutch and Tasmanian couples are deprived of such a choice as these jurisdictions go for a bipolar approach of registration-or-nothing. From another angle, it can be implied that since the entitlement of the legally-recognized category is modeled after marriage, marriage is still the benchmark and its supremacy, far from being derogated, is actually emphatically reinforced.

An unprecedented submission may be presented if we venture further down this path – why can't extra-marital relationships (i.e. mistresses) be registered? Without entangling with subjective moral values, it is submitted that a lot of mistresses are in need of protection and are dependent on their "lover" as much as, if not more than, "legitimate" partners . "Stable relationship" is often present and could easily fall within most threshold requirements for a recognized relationship but for their "third-wheel" status. If we accept that recognized relationship is a distinct layer below marriage, there is no reason why these "lovers" could not be held responsible for each other. The principle of monogamy will not technically be offended if a person enters into one marriage and one recognized-relationship simultaneously since monogamy should be confined to marriage but whether one could register multiple recognized-relationships is debatable.

Would marriage be rendered obsolete if non-marital heterosexual relationships are legally recognized? It is submitted that the answer ought to be an unequivocal no if the gap between marriage and recognized-relationship is properly maintained as in the case in France. In this respect, it may be seen as unfortunate that the Netherlands has favored "function over form" to a rather extreme by equalizing the rights and burdens of married couples and Registered Partners. This inevitably mixes the two up and does render marriage redundant (apart from the symbolic Town Hall celebration) – a predicament that is totally avoidable. The same argument applies to Tasmania. However, by recognizing "carer" relationships, Tasmania has broaden the concept of recognized relationships. That said, this extension may not be as avant-garde as it seems since this type of "unromantic" relationship is also theoretically covered by both Registered Partnership and Pacs (Dutch Civil Code, Art 1:80a; Martin and Thery, 2001 for Pacs).

CONCLUSION – A NEW PERSPECTIVE

Whether and how the development of law should catch up with normalization of unmarried relationships? Plainly, registration embraces freedom of choice but automatic "catch-all" or "opt-out" regimes through qualification of threshold requirements maximizes protection, especially to those less-informed and thus most vulnerable. Debate regarding function or form at this level can go endlessly since this is a matter of subjective values. It is submitted that to seek a way out of this maze, we should treat marriage and the unmarried category in the broad sense as two distinct yet complementary and interactive institutions. Put it simply, couples should be given substantively different choices on a menu and will be sufficiently enticed to switch to another form when certain situation arises. This motive is to be provided through institutional design.

Marriage, naturally, is the highest layer in the hierarchy. In abstract terms, this is commitment in its highest form. The fullest set of rights and duties should be attached and thus the strictest rules on separation should ensue. Practically and ideally, a relationship based on such level of commitment between the couples would create the best environment to raise children. To foster this ideal, married couples should be treated more and sufficiently favorably through policies that are linked to children, such as children tax concession, "discounted" inheritance tax, priority public housing for families with children etc.

In the middle layer is the legally-recognized category of relationship. In terms of how to fall within this category, Tasmania is an innovative example as it demonstrates that active registration and passive recognition can co-exist. A balance is well-struck between autonomy and protection.

For those who choose to actively register their relationship, a self-governed approach like Pacs or the Dutch approach (prevalence of nuptial agreements) could be encouraged. Fairness can be ensured by the involvement of impartial lawyers (like notaries in Europe) and the court should not usually interfere with agreements so concluded. For those who do not draw up a contract among themselves as well as the category of passive recognition by law, echoing Barlow and James (2004), it is submitted that threshold requirements such as duration and presence of children must be retained to justify state's protection based on the "function" limb of the relationship. To make the existence of this category meaningful and to make different layers within the hierarchy complementary (rather than discriminatory) and also to maximize the effect of interaction between them, it is once again reiterated that a gulf in terms of consequences must be maintained or even widened. This widening does not have to take the form of taking away certain rights and duties but can through introducing additional ones like tax concessions, more stringent divorce procedure and better compensation upon separation for married couples. In this regard, the French approach should be lauded as it combines "private ordering and institutionalization" (Probert, 2001). The complementary nature of different layers of relationships will also mitigate Probert's (ibid) concern that Pacs does not take sufficient account of children's needs as couples should be motivated to get married when they have or expect children. Thus, while the qualified uninformed would be granted protection to a certain extent by the state, those who willingly opt to govern their relationships on their own terms will have to bear the costs associated with a higher degree of liberty.

True that those who do not seek registration or are not qualified to be recognized by law may be quite vulnerable. Regarding the former, Napoleon's argument applies as they do have a right just that they do not exercise it and the law respects their liberty. Regarding the latter, the relatively short period of cohabitation means either that the consequences would not be too severe or their "freelancing" relationship is not significant enough to trigger state's intervention.

To conclude, it is submitted that a hierarchy of relationship so viewed not only preserves the sanctity of marriage but offers a real choice to couples. Different types of relationship stand for different level of commitment and values and the law only plays a subtle role in regulating how people organize their relationship. If couples decide to marry, the high level of commitment and/or presence of children justify state's intervention to be the "last-guard" to ensure fairness and welfare of the spouses and children. If partners decide to actively register their relationship, they are free to agree among themselves the "terms" of their relationship and the state should only act to enforce this mutually agreed contract as in France, as long as the parties are well-advised, with minimal amount of rights and duties specified by the state. Those uninformed but sharing a sufficiently serious relationship shall also be granted a degree of rights and duties, but may be through the more general property law, to ensure that a safety net of justice and fairness is prepared to hold them should they fall. In any case, regardless of married or unmarried, registered or unregistered, a balance between autonomy and protection can hopefully be better struck.

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