Berichte

Conference on the Legal Status of Cohabitants
Hamburg, April 2–3, 2004

"Les concubins ignorent la loi, la loi ignore donc les concubins". Napoleon Bonaparte's famous dictum quoted by *Frédérique Ferrand* (Lyon) in her report on French law of cohabitation could have been both motto and conclusion of the conference on the legal status of cohabitants which took place in Hamburg from April 2–3, 2004 and which was organised and hosted by *Jens M. Scherpe* and *Nadja Yassari* (both Hamburg) on behalf of Max Planck Institute for Foreign Private and Private International Law. Indeed, Napoleon's words apparently have retained much of their truth: Today's cohabitants still live together without bothering with their legal relations and the law still does not provide adequate rules for cohabitation.

Nobody can blame cohabitants for being unaware of their legal status, but in times when the social importance of marriage significantly declines the law should not ignore cohabitation, at least, as far as children and the protection of the weaker cohabitant is concerned. Therefore, an assessment of different legal landscapes appears to be necessary in order to identify issues which should be addressed by future juridical and legislative activities. The Hamburg conference tackled that need.

I. National reports

After the opening words of *Reinhard Zimmermann* (Hamburg) for the Institute and State Secretary *Carsten-Ludwig Lüdemann* (Hamburg) for the Free and Hanseatic City of Hamburg and further introductory remarks by *Scherpe*, the first day of the conference was devoted to national reports on cohabitation law in thirteen selected jurisdictions.

The first report was delivered by *Ferrand* on the French alternative to marriage for homosexual or heterosexual couples, the so-called "Pacte Civil de Solidarité" (PACS). PACS is based on a contract between the cohabitants which is registered before the Tribual d'instance. It obliges the cohabitants to live together and to assist each other mutually. As far as third parties are concerned, PACS establishes joint and several liability and grants privileges in labour and tenancy as well as in social security, immigration and tax law. However, PACS does not concede rights to inherit on intestacy or to adopt a child jointly. *Ferrand* pointed out that besides

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PACS there still remains factual concubinage where the partners live together without formal act and which, hence, has only little legal consequences.

Owing to its constitutional structure the legislative competence for family law in Spain is split between the different autonomous communities. Thus, as *Cristina González Beilfuss* (Barcelona) reported, there are no common rules on cohabitation in Spain, but eleven different legal regimes. Some of the local laws require formal acts as registration to trigger the consequences of cohabitation. Others only presuppose a factual living-together over a certain period of time. The legal form of cohabitation varies in detail, too, albeit that the Spanish solutions share some commonalities. For example, in most communities no legal property regime exists, but the cohabitants are required to provide support and maintenance mutually. Additionally, in some communities cohabitants can adopt children jointly and have inheritance privileges. *González Beilfuss* concluded that in effect the autonomous communities had, by and large, only codified recent developments within the judiciary, without conceiving comprehensive sets of rules. *González Beilfuss* rounded off her presentation by glancing at the situation in Portugal, where the major legal consequences of cohabitation are to be found within public rather than private law.

Walter Pintens (Leuven/Saarbrücken) gave an account of the legal status of cohabitants in Belgium where cohabitants have mainly the choice between two legal schemes: Since 2003 marriage was opened to same sex couples, cohabitants irrespectively of their sex can marry. Additionally, Belgium law affords a registered partnership eligible even for relatives, though, with fairly weak effects: Under such a partnership, the partners owe maintenance only during the partnership period, they have no kinsman-like relation, property remains separated and there is no right to inherit on intestacy, or right of joint adoption. The latter, however, *Pintens* expected to be dealt with by future legislation. He moreover alluded to privileges of partners in tax and social security law. Apart from marriage and registered partnership there are no comprehensive rules in Belgium on factual cohabitation, but the general law of obligations and contract law remains applicable. As a consequence, non-registered cohabitants may regulate their relations freely by contract.

The Netherlands provide a variety of options for cohabitants as well. Apart from marrying, cohabitants can, as *Katharina Boele-Woelki* (Utrecht) explained, conclude a registered partnership which is in its legal consequences almost similar to marriage, but can be dissolved without intervention of the courts. Thus, couples increasingly convert their marriage into a registered partnership. However, there are no comprehensive rules for non-marital cohabitation or other forms of factual cohabitation. The few existing rules relate only to tenancy, inheritance, tax and social security law.

Vesna Rijavec (Maribor) drew a progressive image of the Slovenian law where factual cohabitation causes numerous legal consequences which are – though not regulated generally, but rather in specific pieces of legislation – comparable to the rights and duties of married couples as far as maintenance, joint and several liability and inheritance law are concerned. The Slovenian law does not require a formal act to establish cohabitation, but rather refers to a "permanent living together", though, without determining an exact period of time.

Such an exact time period is provided in Croatia, where the law recognizes a factual cohabitation after three years unless the cohabitants have joint children. *Dubravka Hrabar* (Zagreb) pointed out that the major consequences caused by cohabitation relate to property, post-cohabital maintenance and joint custody for children. Additionally, in the realm of labour and social security law cohabitants are equated with married spouses.

In Sweden non-marital cohabitation has a long tradition and plays a major social role since nearly one third of people who live together in Sweden do so as cohabitants. *Eva Ryrstedt* (Lund) set out that couples who permanently live together in a relationship similar to marriage in joint households with joint finances are regarded as cohabitants without any particular form of registration. The legal consequences of cohabitation notably relate to the division of property after separation. However, cohabitants have no inheritance rights, no joint custody ex lege, no right to joint adoption and no maintenance rights.

Though, Danish law disposes of no comprehensive rule on cohabitation, *Ingrid Lund-Andersen* (Århus) pointed out that apart from paternity, custody, tenancy and social security the general structures apply. Thus, there are no maintenance and inheritance rights and cohabitants cannot adopt children jointly. The mutual rights after dissolution of the cohabitation are governed by unjust enrichment. *Lund-Andersen* additionally reported on Norway where the situation is fairly similar to Denmark. However, within the Norwegian legislature there are plans to establish cohabitation in Norway as a weaker form of marriage.

In Canada the legislative competence to regulate cohabitation is split between the federal government and the provinces. Thus, as *Winifred Holland* (Ontario) expounded in her presentation, different definitions of cohabitation exist. Some provincial laws refer to a permanent living together of one to five years or to the birth of a child, others avail themselves of more flexible criteria. As to the legal consequences cohabitation tends to be treated like marriage. Hence, for instance, the male cohabitant is deemed to be the father of a child born during cohabitation. Differences to marriage relate especially to property and inheritance law.

As to the constitutional background the Australian situation resembles the Canadian. *Owen Jessep* (Sydney) explained that the eight provinces legislated on cohabitation. None of the provincial laws requires a mandatory registration but rather condition the legal consequences with a factual living together of a certain period of time. So in New South Wales a couple has to live together for at least two years, although the courts have the discretion to consider a shorter period as sufficient. The legal status of cohabitants differs from province to province: Some provincial laws, for example, provide for a marriage-like post-relationship maintenance others have no maintenance duties at all. As to property law the courts can divide the property whereas, in principle, the partner who spent the money to purchase a certain item gets the same. Cohabitants have no mutual inheritance rights. In New Zealand, *Jessep* explained, cohabitation is close to marriage as far as property, maintenance and inheritance law is concerned. Cohabitation normally is recognized after three years unless there are children involved, in which case it is recognized ealier.

During the discussions there was a general understanding that from a comparative point of view there are two models of cohabitation evolving: One ap-

proach regards cohabitation as a permanent factual living together and triggers rights and duties of the cohabitants without presuposing consent of the cohabitants. The other system favours a formal act demonstrating consent and requires the cohabitants to register their partnership. However, as to the status of cohabitants and the consequences of cohabitation a common approach is not discernable, for the differences between the legal systems are too large.

II. The German approach

The second day of the conference focussed on the topic "The Need for Reform in Germany – A model for Europe?" and addressed the legal problems arising during cohabitation, after its dissolution and occurring in connection with children.

Dieter Martiny (Frankfurt/Oder) opened the debate by delivering an overview on legal aspects regarding non-marital cohabitation according to German law. He stressed that despite growing social acceptance of unmarried cohabitation, there is no comprehensive set of rules dealing with the situation of heterosexual and homosexual cohabitants. In fact, only some isolated statutory rules apply; especially, recently enacted provisions are often broad enough to cover non-marital cohabitation as well. Thus, there are only few consequences of cohabitation and the legal status of cohabitants is far from comparable with the rights and duties of married couples: There are no special statutory maintenance obligations and no duties of mutual support. Rather the general rules on property and the law of obligations apply, so that the cohabitants can meet contractual arrangements regulating their relations. *Martiny* pointed out that a future reform of the German law was limited by constitutional barriers according to same scholars: On the one side, art. 6 I of the Grundgesetz (GG) grants a special protection of marriage as an institution and a comprehensive reform could perhaps weaken the position of marriage. On the other side art. 2 I GG guarantees the right of self-determination which could be violated by the imposing rights on duties of cohabitants who just want to live together without a special legal framework. Apart from this constitutional background *Martiny* expressed doubts whether it would be sensible to introduce a registered form of cohabitation, for marriage or registered same sex partnership are open for all couples and it does not make much sense to offer a second set of rules which may not be accepted by cohabitants as well. A realistic alternative could be rules which regulate permanent factual cohabitation.

Marina Wellenhofer (Hamburg), who was represented by her assistant *Juliane Richter* (Hamburg), examined the legal problems arising in connection with dissolution of non-marital cohabitations either by death one of the partners or inter vivos. First, she stressed that household property acquired during cohabitation will not be divided equally, as under German law no presumption of co-ownership of the cohabitants exists. Rather the cohabitant who has paid for the acquisition of the object will normally be deemed its owner. *Wellenhofer* further elaborated on compensatory claims for services and expenses provided during cohabitation by one of the cohabitants to support the mutual living together. This question arises if, for example, one cohabitant does the chores, or works in the under-

taking of the other cohabitant voluntarily, or invests capital in jointly held real property or businesses. *Wellenhofer* stressed that the German Bundesgerichtshof (BGH), in principle, still sticks to its doctrine of non-compensation ("Grundsatz der Nichtausgleichung") according to which cohabitation does not establish a legal community with respect to economic matters. Hence, after dissolution of the cohabitation there are no special compensatory claims unless the cohabitant's substantial services or expenses exceeded the realisation of the cohabitants' relationship. This is the case, if the added value rather than the mutual support is the decisive factor for providing the services or expenses in question. In such exceptional constellations the BGH applies the rules on civil law partnerships (Gesellschaft bürgerlichen Rechts) which grant restitution after dissolution of such a partnership. As far as the cohabitant's contributions for daily life are concerned, *Wellenhofer* regarded the BGH's doctrine as appropriate, because it would be virtually impossible to specify or even to set-off each everyday shares made retrospectively. However, she criticised that the criterion of added value is not suitable and the rules on the Gesellschaft bürgerlichen Rechts do not fit as far as real property is concerned or the cohabitation is terminated by death of one of the cohabitants. *Wellenhofer* rather preferred a solution under which compensatory claims are governed by the doctrine of frustration of contracts. According to that doctrine, one cohabitant could claim compensation if he or she increased the other's assets, the cohabitation formed the basis for his or hers contribution considering its nature and purpose, and it would be unreasonable if the latter cohabitant retains the pecuniary advantages of the contribution after separation without adequate compensation.

Nina Dethloff (Bonn) analysed the German legal background for cohabitants with children – an important issue, as the importance of traditional family concepts increasingly declines and thus more and more children grow up with their parents not married. However this question relates, as *Dethloff* stressed, not only to the relationship between biological non-married parents and their children but also the relations within modern "patch-work" families where children are brought into the family by one or both parents or may be jointly produced. In this area the law must provide adequate rules because the fact that the law still emanates from traditional models should not penalize children. *Dethloff* delivered an overview of the different relations of cohabitants with their children and stepchildren pursuant to current German family law. She notably alluded to the possibility for one cohabitant to adopt the children of the other in order to obtain joint parenthood – a possibility, however, which under German law is only open to heterosexual couples. *Dethloff* further explained the relations of the cohabitants to each other with regard to children. This concerns especially maintenance duties, if one cohabitant is caring for the children after separation, or if he or she could not work during the cohabitation and now needs support. *Dethloff* advocated that future legislation on the legal relations between cohabitants or spouses, as far as they concern children, should not deviate from the legal nature of the relation between the parents as cohabitants or spouses but rather focus on the relation of the parents as parents and conceive general rules which are unaffected by marriage or cohabitation law.

The second's day discussion showed that most of the participants saw a need for legislative intervention to promote legal certainty and protect the interests of the

weaker cohabitant and children. As to the concept of a future cohabitation law a model which follows the factual living together rather than requires a formal act as registration was favoured.

As a result, despite the lasting truth of Napoleon's words, the conference showed a great interest of the circles involved in cohabitation law. This was evidenced by the participation of not only academics and practitioners as lawyers and judges even from the BGH and the European Court of First Instance, but also representatives of the German Federal Ministry of Justice, political parties and the churches. One can only look forward to the collection of the talks and detailed reports on the discussions which will be published soon by the Max Planck Institute under editorship of *Scherpe* and *Yassari* in its series "Beiträge zum ausländischen und internationalen Privatrecht".

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