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LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS

A Study of National, European and International Law

Edited by Robert Wintemute and Mads Andenæs

*The “Pacte Civil de Solidarité” in
France: Midway Between Marriage
and Cohabitation*

DANIEL BORRILLO*

FOLLOWING IN THE footsteps of Denmark (1989), Norway (1993), Sweden (1994), Iceland (1996), the Netherlands (1997), Belgium (1998) and Spain (Catalonia 1998 and Aragon 1999), France has introduced a new form of conjugal relationship into its law. In November 1999, the campaign for legal recognition of same-sex partnerships in France, which began after the passage of the Danish law on registered partnerships in 1989, culminated in the adoption of a law creating a new legal institution, the *Pacte civil de solidarité* (PaCS or “Civil Solidarity Pact”).¹ Before the PaCS, there were only two types of legal recognition of partnerships in France, civil marriage and *concubinage* (cohabitation), and both were limited to different-sex partners. While civil marriage requires a formal expression of the will of the parties, through a marriage ceremony, *concubinage* involves the legal recognition of the fact that two persons are living together as spouses, and does not depend on the will of the parties. The PaCS aims to introduce an intermediate status for non-marital unions, in between civil marriage and *concubinage*, thereby permitting, in particular, the recognition of non-marital homosexual unions.

Premised like marriage on a voluntarist approach, the PaCS is an act of will that immediately creates a legal situation and produces juridical consequences, rather than a situation of fact to which juridical consequences are attached. Although the PaCS is open to two and only two individuals, it does not modify the civil status of the parties, who remain “single”. And the conditions governing the formation and termination of a PaCS are much more flexible than those applicable to civil marriage. There is no obligation to publicise the existence of the PaCS, it is not subject to medical requirements, and as will be seen below, its termination is much easier than a divorce. Even though the French legislature

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¹ *Loi no. 99-944 du 15 novembre 1999 relative au pacte civil de solidarité*, http://www.legifrance.gouv.fr/html/frame_jo.html.

wanted to differentiate strongly between the PaCS and civil marriage, it did not go so far as to create a special form of contract reserved to same-sex couples. As a result, unlike Scandinavian registered partnerships, the PaCS is open to all couples, regardless of gender. The French traditions of "equality" and "universality of legal rules" preclude special laws applying only to minority groups.²

THE PROPOSALS THAT PRECEDED THE PACS LAW

From 1989 to 1999, a political and social movement whose stated aim was to reform the law concerning conjugal life inspired many parliamentary bills and two government-commissioned reports.³ Despite the generality of its stated aim, this movement's primary goal was the legal recognition of the union between two persons of the same sex. Indeed, it was mainly groups concerned with defending the rights of homosexuals and/or active in the fight against AIDS who articulated law reform claims and who rallied around the various parliamentary bills.⁴ The HIV epidemic dramatically brought to the fore the precarious legal position of people with AIDS, both as individuals and as members of couples. In 1997, in *Vilela v. Weil*, the highest civil court in France, the *Cour de cassation*, held that the doctrine of *concubinage* cannot be applied to homosexual

² Only the sociologist Irène Théry publicly proposed a special status for same-sex couples. In so doing, she departed paradoxically from the republican tradition she had previously always advocated. See I Théry, "Le CUS en question", [1997] *Notes de la fondation Saint Simon* 26, and also in [Oct. 1997] *Revue Esprit*.

³ The parliamentary bills are: *Proposition de loi* n° 422 on the *Contrat de partenariat civil*, Senate, 25 June 1990 (Socialist); *Proposition de loi* n° 3066 on the *Contrat d'union civile*, National Assembly, 25 Nov. 1992 (Socialist); *Proposition de loi* n° 880 on the *Contrat d'union civile*, National Assembly, 23 Dec. 1993 (Movement of Citizens); *Proposition de loi* n° 3315 on the *Contrat d'union sociale*, National Assembly, 23 Jan. 1997 (Socialist); *Proposition de loi* n° 3367 relating to the rights of non-married couples, National Assembly, 20 Feb. 1997 (Communist); *Proposition de loi* n° 88 on the *Contrat d'union civile et sociale*, National Assembly, 23 July 1997 (Radical, Movement of Citizens, Green); *Proposition de loi* n° 94 on the *Contrat d'union sociale*, National Assembly, 23 July 1997 (Socialist); *Proposition de loi* n° 249 on the rights of unmarried couples, National Assembly, 30 Sept. 1997 (Communist); *Proposition de loi* n° 138 on unmarried couples, Senate, 1 Dec. 1997 (Communist). From the collaboration between J-P Michel (Movement of Citizens sponsor of *Proposition* n° 88), J-M Ayrault (Socialist sponsor of *Proposition* n° 94, an amended version of which became the Socialist version of the *Pacte civil de solidarité* on 29 May 1998), and G Hage (Communist sponsor of *Proposition* No. 249) arose the first common MOC-Socialist-Communist version of the *Pacte civil de solidarité* (Rapport n° 1097, 23 Sept. 1998; Opinion n° 1102, presented to the National Assembly on 1 Oct. 1998). The subsequent versions of the PaCS bill had the numbers 1118, 1119, 1120, 1121 and 1122, as a result of amendments by the Assembly and the "shuttles" to the Senate. The two reports are: J Hauser, *Comité de réflexion sur les conséquences financières de la séparation des couples. Le projet de pacte d'intérêt commun* (Ministry of Justice, April 1998); I Théry, *Couple, filiation et parenté aujourd'hui, le droit face aux mutations de la famille et de la vie privée* (Ministry of Justice & Ministry of Employment and Solidarity, May 1998; Paris, O Jacob, June 1998) (see particularly the chapter concerned with *concubinage*).

⁴ In Nov. 1999, all of the major associations concerned with AIDS and/or the rights of gays and lesbians created an umbrella group called "*L'observatoire du PaCS*" ("PaCS Watchdog Group"), in order to monitor the law's application and to fight for civil marriage for same-sex couples. For the 1999 Report of "*L'observatoire du PaCS*", see <http://www.chez.com/obspacs>.

unions.⁵ According to the Court, cohabitation is modelled on the institution of marriage and thus can only concern heterosexual couples. Having decided that there is no legal equivalent to heterosexual *concubinage* for same-sex couples, the Court held that when one member of such a couple dies from AIDS, the lease of an apartment, in the name of the deceased, cannot be assigned to his surviving partner. The bereaved survivor, after losing his partner, can therefore legally be evicted from his home. In reaching this decision, the Court rejected the opinion of the *Avocat Général*: "Without waiting for the legislature to intervene, mere statutory interpretation permits you to adapt your case-law to the reality of society today".⁶

Concubinage is merely a legal recognition of an existing situation of fact. All the *Cour de cassation* had to do was recognise the *de facto* situation of two people of the same sex living together under the same roof, enjoying both a sexual and economic relationship. Even polygamy, where it exists in fact, may generate social welfare rights in France.⁷ But the union of two people of the same sex, with a view to a communal life together based on reciprocal affection and support, was completely ignored by the legislature and the courts.⁸

The refusal of the *Cour de cassation* to recognise same-sex *concubinage* in 1997 was consistent with the first two same-sex couple cases the Court decided in 1989. In *Secher v. Air France*, a male steward sought a reduced price air ticket for his male partner. The Court held that the applicable regulations made the benefit available to a "spouse living in a free union" ("*conjoint en union libre*"),

⁵ *Cour de cassation, Chambre civile 3e*, 17 Dec. 1997, Bull. civ. 1997.III.151, No. 225, Dalloz.1998.Jur.111. The trial court, the *Tribunal d'instance* of the 4th *arrondissement* in Paris, in an unpublished judgment of 5 Aug. 1993, had ruled that leases could be transferred, as "the legislation identifies an acknowledged partner in a totally neutral and general manner, the only condition being the stability of the union. The evidence . . . shows that the homosexual partnership between Mr W and Mr X had been acknowledged and stable for several years". The judge's ruling went even further, however, stating that "owing to changes in social behaviour, the term *concubinage* now signifies cohabitation as a couple, and no longer requires the partners to be of different genders as was previously the case". The *Cour d'appel de Paris* (court of appeal) disagreed, in a judgment of 9 June 1995, [1995] *Revue trimestrielle de droit civil* 607, holding that the *Loi no. 89-462 du 6 juillet 1989* "authorising the transfer of a lease to a *concubin notoire* (well-known or manifest partner) who had been living with the deceased for at least one year at the time of death" did not apply to same-sex couples. An eviction order was therefore issued. The *Cour de cassation* affirmed, in its judgment of 17 Dec. 1997, *supra*, holding that "*concubinage* can only result from a stable and continuous relationship having the appearance of marriage, therefore between a man and a woman".

⁶ Dalloz.1998.Jur.111 at 113.

⁷ Both French legislation and case law are tolerant with regard to polygamy: a female spouse and a female concubine can simultaneously be beneficiaries of the social security of the same insured man (*Code de la sécurité sociale*, Arts. L313-3, L164-14); gifts by a married man to his female concubine are valid (*Cour de cassation, Chambre civile 1re*, 28 Jan. 1997, [1997] *Droit de la famille*, No. 184).

⁸ Several decisions by lower courts, not reversed on appeal, have recognised same-sex couples: *Tribunal d'instance de Bobigny*, 11 May 1992, unpublished, RG 4255/92 (assignment of lease to partner following death of tenant); *Tribunal correctionnel de Belfort*, 25 July 1995, *La Semaine Juridique* (J.C.P.) 1996.II.3903 at 60 (claim for compensation after death of partner in road accident); *Tribunal d'instance d'Aubervilliers*, 12 Sept. 1995, unpublished, RG 1195584 (assignment of lease); *Tribunal d'instance de Toulouse*, 20 Sept. 1996, unpublished (assignment of lease).

and that living like spouses outside marriage "can only concern a couple consisting of a man and a woman".⁹ In *Ladjka v. Caisse primaire d'assurance maladie de Nantes*,¹⁰ a woman was denied the benefit of her female partner's (public) health and maternity insurance coverage. Again, the Court held that the concept of "marital life" ("*vie maritale*") used in the applicable social security legislation could only apply to an unmarried different-sex couple.

In view of the repeated refusal of the French courts to recognise same-sex partnerships, new legislation seemed the only way to find a suitable solution. Since 1989, there have been many proposals for legislation. The first bill was presented by Senator Jean-Luc Mélenchon on 25 June 1990,¹¹ approximately one year after the passage of the Danish registered partnership law. It proposed a *Contrat de partenariat civil* (CPC or "Civil Partnership Contract") and was inspired by suggestions from homosexual groups such as *Gays pour les libertés* ("Gays for Freedoms") and *Homosexualité et Socialisme* ("Homosexuality and Socialism"). The CPC aimed to be universal, in that it would have been open to any two persons regardless of their sexes, or of the nature of their relationship. Thus, the CPC would have been open, not only to couples, but also to siblings or mere pairs of friends or two persons who decided to live together. The CPC bill did not make the headlines and did not benefit from a parliamentary debate.

In 1992, certain *députés* in the National Assembly, among them Jean-Yves Autexier, Jean-Pierre Michel, and Jean-Pierre Belorgey presented a new bill proposing a *Contrat d'union civile* (CUC or "Civil Union Contract").¹² An unmarried individual could enter into a CUC with any unmarried person, whether related or not. The only exception was for the individual's ascendants and descendants (parents, grandparents, children, grandchildren, etc.). The bill thus extended a certain number of rights, not only to unmarried different-sex or same-sex couples, but potentially also to every person living under the same roof with another person and, of course, not covered by the exception. This was to avoid attaching any personal identity labels to the parties to a CUC (e.g., two women who entered into a CUC would not be assumed to be lesbian). Although the bill was never debated in its entirety, two provisions were voted on: one concerned the availability of social welfare benefits to a dependent cohabitee regardless of sex; the other dealt with the possibility of assigning a lease to a cohabitee regardless of sex. Only the first provision was finally adopted in 1993,¹³ and effectively overruled the 1989 *Ladjka* decision of the *Cour de cassation*.¹⁴ The second was declared unconstitutional in 1993 by the *Conseil constitutionnel* (Constitutional Court) on procedural grounds.¹⁵ The victory of the

⁹ *Cour de cassation, Chambre sociale*, 11 July 1989, Bull. civ. 1989.V.311, No. 514.

¹⁰ *Cour de cassation, Chambre sociale*, 11 July 1989, Bull. civ. 1989.V.312, No. 515.

¹¹ *Proposition de loi n° 422, supra n.3.*

¹² *Proposition de loi n° 3066, supra n.3.*

¹³ *Loi no. 93-121 du 27 janvier 1993.*

¹⁴ *See supra n.10.*

¹⁵ Decision No 92-317 DC, 21 Jan. 1993, [1993] *Recueil des décisions du Conseil constitutionnel* 1240.

Right in the legislative elections of 1993 discouraged the homosexual community. Only a few activists associated with the *Collectif pour le CUC*, which had originally proposed the CUC, continued the struggle timidly.

In the face of public apathy, the HIV/AIDS organisation "Aides" (established by Daniel Defert in 1985, one year after the death from AIDS of his partner, the philosopher Michel Foucault), took a central role in the new debate. Trying to combat various forms of discrimination linked to the AIDS epidemic which the association witnessed daily, in 1995, *Aides* proposed a new bill creating a *Contrat de vie sociale* ("Social Life Contract"), limited to couples. Later that year, this bill was merged with the CUC to give rise to the proposed *Contrat d'union sociale* (CUS or "Social Union Contract"). On 1 March 1996, a group of intellectuals, including Pierre Bourdieu, Jacques Derrida, Didier Eribon, Michelle Perrot and Pierre Vidal-Naquet, signed a manifesto in the newspaper *Le Monde* advocating the recognition of same-sex couples. On 19 June 1996, Socialist senators introduced a bill in the Senate (*Proposition de loi* no. 454) that would broaden the right to transfer a lease after the death or desertion of the tenant to any person who had lived with the tenant for at least one year. Three days later, *Le Monde* published a new appeal ("Towards a Better Citizenship: The CUS") cosigned by a former Prime Minister, Michel Rocard, and six future Ministers, Elisabeth Guigou, Catherine Trautmann, Dominique Voynet Daniel Vaillant, Bernard Kouchner and Martine Aubry, as well as numerous well-known intellectuals and artists.

On 23 January 1997, the CUS was introduced in the National Assembly for the first time (*Proposition de loi* no. 3315) ("CUS I"). Socialist senators introduced a similar bill in the Senate on 19 March. On 24 April, the President of France dissolved the National Assembly and called early elections, which the Left won. During the electoral campaign, the parties of the Left all supported the CUS. On 23 July, after the Euro Gay Pride in Paris in June, attended by nearly 300,000 people, National Assembly *député* Jean-Pierre Michel, with his colleagues from the Radical, Movement of Citizens and Green parties, introduced a bill (*Proposition de loi* no. 88) that would have created a *Contrat d'union civile et sociale* (CUCS or "Civil and Social Union Contract"). On the same day, the Socialists introduced for the second time the CUS bill (*Proposition de loi* no. 94) ("CUS II"). The main difference between the CUS on the one hand, and the CUCS and the CUC on the other hand, was that the CUS excluded all close family members and focussed on couples, whereas the CUCS and the CUC could apply to any two persons (except between ascendants and descendants), including brothers and sisters. The reasoning behind the restriction of the CUS to couples was not explained. It is also surprising that the CUCS and the CUC, which did not purport to regulate the life of a couple, were limited to two persons. And if the relationship did not have to be sexual, why were ascendants and descendants excluded from such a contract? The answer is probably that these restrictions were a political manoeuvre to avoid shocking public opinion, which was considered chilly with regard to homosexuality.

On 30 September, the Communist Party introduced a bill on the rights of unmarried couples (*Proposition de loi* no. 249). In contrast with its predecessors (CPC, CUC, CUS I, CUCS, CUS II), the Communist text sought to put civil marriage and *concubinage* legally on the same level, without giving rights of filiation to same-sex couples. A consensus of sorts developed among the parties of the Left whereby the legal notion of "couple" would be opened to same-sex unions, while closing or at least not mentioning the delicate question of parental rights. At this time, an association which had been very discreet until then began to emerge in the public arena: the *Association des parents et futurs parents gays et lesbiens* (APGL).

None of the CUCS, CUS II and Communist bills was passed. The following spring of 1998 saw the publication of two reports, commissioned by government ministries, which proposed different solutions to the problems experienced by couples living in a free union outside marriage. The first report, prepared by Professor Jean Hauser, had been requested by the former conservative Justice Minister, Jacques Toubon. The Hauser Report¹⁶ proposed a *Pacte d'intérêt commun* (PIC or "Common Interest Pact"), open to any two persons, of different sexes or the same sex. The PIC avoided the question of emotional and sexual relationships, seeking instead to resolve questions of property law, and provide certain social welfare and tax rights to regulate the economic aspects of the parties' daily lives. This was to be achieved by inserting new articles into the Civil Code between the sections concerning the setting up of a business and joint ownership.

The second report, by Irène Théry on "Couples, Filiation and Kinship Today",¹⁷ which was presented to the government a few weeks after the Hauser Report, was more ambitious in its analysis. It aimed to go beyond property issues and touched upon an individual's relationships without, however, examining issues of family law for homosexual couples. Indeed, the author refused not only the right to a civil marriage for homosexuals, but also any possibility of joint parental rights for a same-sex couple. She did so in defence of the "symbolic order"¹⁸ of western culture! However, the author suggested recognising *concubinage* for homosexuals (by means of an article in the Civil Code's section on personal rights), and at the same time strengthening certain tax benefits and welfare rights. Indeed, she devoted a specific chapter to cohabitation, with a spe-

¹⁶ J Hauser, *Comité de réflexion sur les conséquences financières de la séparation des couples. Le projet de pacte d'intérêt commun* (Ministry of Justice, April 1998).

¹⁷ I Théry, *Couple, filiation et parenté aujourd'hui, le droit face aux mutations de la famille et de la vie privée* (Ministry of Justice & Ministry of Employment and Solidarity, May 1998; Paris, O Jacob, June 1998).

¹⁸ In France, anti-homosexual discrimination has been justified less by a religious discourse of a "natural order" than by a "learned" discourse of a "symbolic order" informed by a specific use of anthropology and psychoanalysis. For a criticism of this notion, see M Iacub, "Le couple homosexuel, le droit et l'ordre symbolique", (Oct. 1998) 12-13 *Revue Le Banquet* 111; Fassin (*Témoin*), *infra*, p.492.

cial section on homosexual cohabitation. The Théry Report went beyond questions of property, proposing to insert the following article into the section on personal rights in the Civil Code: "Cohabitation consists in the existence of a natural couple, irrespective of whether the cohabitantes are of the same sex or not". Putting aside the problems of proof, it was an interesting approach.

However, although the proposals in the Théry Report responded to the urgent needs identified by the associations concerned with fighting AIDS, it was only a small step towards the recognition of homosexual couples. The acceptance of *de facto* cohabitation does not imply legal recognition of the union. Just as occupation without title does not imply the recognition of a property right, cohabitation is nothing more than a precarious union which does not automatically presuppose its legal stability. The sole legal institution in France today which recognises a union is civil marriage. A proposal to recognise cohabitation between homosexuals should be within the context of enlarging the institution of marriage. Because Irène Théry's proposal categorically refuses the right to marriage for homosexuals, it loses all credibility.

PASSAGE OF THE PACS LAW

By ignoring both the Hauser Report and the Théry Report, the government abandoned the idea of introducing a government bill (*projet de loi d'initiative gouvernementale*). This clearly demonstrated the embarrassment of the Socialist Party, which continued to support the project very tentatively. Catherine Tasca, President of the Parliamentary Law Commission, asked National Assembly *députés* Patrick Bloche and Jean-Pierre Michel to prepare a report on a new bill synthesising the preceding bills. Their report led to the first version of a bill that would ultimately become law: the *Pacte civil de solidarité* (PaCS or "Civil Solidarity Pact"). This new bill, supported by all the parties of the Left, was presented in the National Assembly on 1 October 1998. By introducing an obligation of mutual financial support and liability between partners, by prohibiting a union between ascendants, descendants and close relatives, and by excluding married individuals and those already united by an earlier PaCS, the bill covered "couples" and not merely two persons living under the same roof. In this, it resembled the "couples-only" CUS, and differed from the "any two persons" CUC, CUCS and PIC.

The bill was first presented for debate in the National Assembly on Friday, 9 October 1998, and enjoyed the theoretical support of the governing Socialist Party and other parties of the Left holding a majority of seats in the Assembly. However, only 16 per cent (50 out of 320) of the Socialist, Communist, Radical, Movement of Citizens, and Green deputies were in the Assembly that day. Parties of the Right, even though feebly represented (60 deputies), were thus able to win a vote ruling that the bill was inadmissible because the text violated the Constitution (a rare procedure, used for only the second time in the Fifth

Republic). As *Le Monde*'s headline astutely observed on 10 October, "[t]he Socialist members were ashamed of the PaCS". Their lukewarm support was difficult to understand as the PaCS had become an extremely timid proposal, and according to a survey carried out by Iftop-Libération on 8 September 1998, 57 per cent of unmarried different-sex couples were for it.¹⁹

The Right's rout of the Left on 9 October 1998 permitted them to rediscover an ephemeral union and a common enemy: the "homosexual lobby" and its allies on the Left. The Right's attitude radicalised the debate by obliging the Left to strengthen its support for the PaCS. One month later, a slightly modified text was presented in the National Assembly once again. The debates on the new bill lasted nearly 70 hours between 3 November and 9 December. Christine Boutin, a conservative *député* and an advisor to the Vatican's "Pontifical Council for the Family", opened the first debate with a speech of five and one-half hours, during which she brandished a bible. After discussions that were fierce and sometimes insulting towards homosexuals,²⁰ and despite more than a thousand obstructive amendments proposed by the Right, the bill's first reading ended on 10 December with the majority of *députés* voting in favour.

On 31 January 1999, nearly 100,000 persons demonstrated in Paris against the bill, with Christine Boutin in the lead.²¹ Among the thousands of signs, one could read slogans such as "The homosexuals of today are the paedophiles of tomorrow", "*Pas de neveux pour les tantouzes*" ("No nephews [young lovers passed off as nephews] for the big aunties [a very pejorative term for older gay men considered 'effeminate']"), or "*Jospin fais gaffe à tes arrières!*" ("[Prime Minister Lionel] Jospin take care of your behind!"). Several family associations and representatives of every religious community (Catholic, Protestant, Muslim, Jewish) marched beside representatives of the Right and the extreme

¹⁹ The poll used a representative sample of 407 unmarried different-sex couples. Support varied as follows: women (59%), men (55%); persons aged 25 to 49 (more than 60%); a majority in all professions except retired persons; Paris (62%), provinces (56%); Green supporters (66%), supporters of parties of the Right (53%). A more recent poll, by Sofres for the magazine *Têtu* on 1–2 Sept. 2000, found that 70% of adults in France were in favour of the PaCS, 48% were in favour of same-sex marriage, and 29% were in favour of adoption by same-sex couples.

²⁰ On 7 Nov., in response to *député* A Touret's statement that "it is up to Parliament to legislate once social evolution has crystallised", conservative *député* J Myard shouted: "There are zoophiles too!". On 8 Nov., when the Minister of Justice stated that the PaCS would not give rise to adoption rights for same-sex couples, conservative *député* P Lalouche shouted: "So sterilise them!" Conservative catholic *député* P de Villiers added: "your innovation, this PaCS, is simply a return to barbarism".

²¹ The demonstration was only the visible part of the iceberg. In April 1998, as the PaCS was being discussed, the signatures of 12,000 French mayors against "*le mariage homo*" were collected. In Sept. 1998, a Christian sect, *Avenir de la Culture* (Future of Civilisation) flooded the Prime Minister's office with nearly 100,000 letters against "the unspeakable and repugnant proposal for homosexual marriage", while the Conference of (Catholic) Bishops of France declared that the PaCS is a "useless and dangerous law". Meanwhile, the very active Association of Catholic Families and the powerful association Families of France were running an extremely organised campaign against the alleged "homosexual lobby". For an in-depth analysis, see C Fourest & F Venner, *Les anti-PaCS ou la dernière croisade homophobe* (Paris, ProChoix, 1999).

Right. When they passed a sign saying "Homophobes", held up by Act-Up Paris, the crowd let loose with: "*Sales pédés! Brûlez en enfer!*" ("Filthy fags! Burn in hell!"), and "*Arrêtez de nous faire chier avec votre sida*" ("Stop making us shit [annoying us] with your AIDS"). The euphoric mob shouted throughout the march: "*Les pédés au bûcher!*" ("Burn the fags at the stake!").

It was in this context, and after several public hearings,²² that the bill reached the Senate. The majority in the Senate rejected the PaCS (by 216 to 99) but, to avoid having too conservative an image, adopted a proposal for a new Civil Code article dealing with *concubinage*, while declining to state expressly that *concubinage* could also involve a same-sex couple.²³ This manoeuvre by the Senate introduced the question of *concubinage* into the parliamentary debate. Thus, when the bill returned to the National Assembly, a new Civil Code article was added defining *concubinage* as "a union of fact, characterised by a common life presenting a character of stability and continuity, between two persons, of different sexes or of the same sex, who live as a couple".²⁴ On second reading, the National Assembly also amended the bill by excluding the possibility of a PaCS between an individual and their brother, sister, uncle, aunt, nephew or niece. When the bill returned to the Senate for a second reading, the Senate simply refused to discuss it. Faced with this impasse, a "*commission mixte paritaire*" (joint National Assembly-Senate commission) was established in May 1999 in order to find a compromise. The commission could not reach an agreement and sent the bill to the National Assembly for a third reading. On 30 June, the final day of the parliamentary session, the Senate refused to adopt the bill on third reading and, through delaying tactics, stopped the National Assembly from finally adopting it.²⁵

Finally, on 13 October 1999, during a new parliamentary session, the decisive vote took place. The National Assembly adopted the PaCS law by 315 votes for (Socialist, Communist, Green, Movement of Citizens, and one conservative *député*, Roselyne Bachelot), 249 votes against (the RPR, UDF and other parties of the Right), and 4 abstentions. The same day, 213 *députés* and 115 senators of the Right filed an application with the *Conseil Constitutionnel*, arguing that the Left had not followed proper parliamentary procedures, and that the PaCS law contained numerous violations of the French Constitution (provisions on equality, division of powers, the national government's budget, etc.).²⁶ On

²² Senate, *Rapport* n° 258, by Senator P Gélard in the name of the *Commission des Lois constitutionnelles*, ordinary session, 1998–1999.

²³ The Senate also proposed a Civil Code amendment defining marriage as "the union of a man and a woman celebrated by a civil status officer".

²⁴ *Code civil*, Art. 515–8.

²⁵ After three *navettes* (shuttles) between the National Assembly and the Senate, the National Assembly has the final say under Art. 45 of the French Constitution.

²⁶ Under Arts. 61–62 of the French Constitution, an ordinary law can only be declared unconstitutional by the *Conseil Constitutionnel* if it has been referred to the *Conseil* within the 15-day period before the President would normally promulgate it. Once it has been promulgated by the President, after having been upheld by the *Conseil*, or if there was no reference, no court in France can declare it unconstitutional.

9 November 1999, the *Conseil* declared the law consistent with the Constitution.²⁷ The law was promulgated by President Jacques Chirac on 15 November 1999, and published in the *Journal Officiel* on 16 November 1999,²⁸ with the first PaCSs contracted a few days later. The PaCS law inserts a new Title XII, consisting of two chapters, “Of the civil solidarity pact” (Articles 515–1 to 515–7), and “Of *concubinage*” (Article 515–8), into Book I (“Of persons”) of the Civil Code. It also amends the Social Security Code, the Labour Code, the rules regarding the right of foreigners to reside in France, the General Tax Code, and several laws dealing with the civil service. The *décrets d’application* providing more detailed rules on the procedures for applying the law, were published on 21 December 1999 (Nos. 99–1089, 99–1090, 99–1091) and 3 February 2000 (Nos. 2000–97, 2000–98). The fruit of a veritable national debate, the PaCS is the result of numerous negotiations and compromises, and reveals the degree of tolerance or recognition of French society with regard to homosexuality.

THE CONTENT OF THE PACS LAW

Midway between civil marriage and *concubinage*, the PaCS creates a third type of union. For heterosexual couples who already have the choice between the two types already mentioned, the PaCS may be considered as a less formal alternative to marriage, or a more formal version of *concubinage*. A PaCS is “a contract concluded between two adult individuals, of different sexes or of the same sex, to organise their life in common (*vie commune*)”.²⁹ Although “life in common” does not necessarily imply a sexual relationship, the *Conseil Constitutionnel* upheld the PaCS law as constitutional subject to its interpretation of “life in common” as meaning “life as a couple (*vie de couple*)”:

“the notion of life in common does not involve only a community of interests and is not limited to a requirement of simple cohabitation between two persons; . . . the life in common mentioned in the referred law supposes, beyond a common residence, a life as a couple, which is all that justifies the legislature’s providing for certain causes of the nullity of a pact which, either reproduce the obstacles to marriage aimed at preventing incest [no PaCSs between close relatives], or avoid a violation of the obligation of fidelity resulting from marriage [a married person may not enter into a PaCS]”.

This interpretation is binding on all courts and other public authorities under Article 62 of the French Constitution, and would seem to render the celebration of a PaCS between two persons who are merely friends and not a couple fraudulent and void. “Common residence” does not necessarily mean a single resi-

²⁷ Decision No. 99–419 DC, <http://www.conseil-constitutionnel.fr/decision/1999/99419/index.htm>.

²⁸ See *supra* n. 1.

²⁹ Code civil, Art. 515-1.

dence. If a PaCS is treated like a civil marriage, under Civil Code Article 108, partners joined by a PaCS will be able to have two separate residences, but a "common life" including "life as a couple" will remain essential. Through its restrictive interpretation of the PaCS law, the *Conseil Constitutionnel* clearly wanted to avoid "PaCSs of convenience".

Your proposed partner must be 18 years old and capable of entering into contracts, must not be married or a party to another PaCS, and cannot be your parent, grandparent, child, grandchild, parent-in-law, child-in-law, brother, sister, uncle, aunt, nephew or niece, but can be your cousin.³⁰ In France, the union must be declared at the registry of the *Tribunal d'instance* (county court) of the area in which the partners establish their common residence.³¹ Two non-European Union nationals can sign a PaCS, as long as one of them has a residence permit. Outside France, at least one partner must be a French national, and the PaCS is registered with the French consular officials of the country in which the partners have their common residence.³² Partners joined by a PaCS undertake to help one another "mutually and materially", and they are jointly liable to third parties for debts contracted by either of them "for the necessities of their daily life and for expenses relating to their common residence".³³ Unless otherwise agreed, movable and immovable (real and personal) property purchased by the partners after the conclusion of the PaCS is presumed to be jointly owned with 50 per cent shares and no right of survivorship (*indivision par moitié*).³⁴ The partners may choose another regime, either in the PaCS agreement they submit to the county court (in the case of future purchases of furniture and appliances), or in each document granting them title to each item of property (in the case of future purchases of other property).

The partners are subject to joint taxation of their combined incomes in the year of the third anniversary of the registration of their PaCS.³⁵ However, joint taxation of their combined wealth begins immediately, and the partners are jointly and severally liable for the wealth tax.³⁶ If one partner dies without making a will, the other partner has no automatic inheritance rights. However, two years after their PaCS, the first 375,000 French francs in testamentary and *inter vivos* gifts between partners will be exempt from gift taxes.³⁷ If one partner is the official tenant of the partners' common residence and abandons the residence or dies, the lease continues for the benefit of, or is transferred to, the other partner.³⁸ (This provision effectively reverses the 1997 *Vilela v. Weil* decision of

³⁰ Code civil, Art. 515-2.

³¹ Code civil, Art. 515-3.

³² *Ibid.*

³³ Code civil, Art. 515-4.

³⁴ Code civil, Art. 515-5.

³⁵ *Code général des impôts*, Art. 6(1).

³⁶ *Ibid.*, Arts. 885 A, 1723 ter-00 B.

³⁷ *Ibid.*, Art. 779(III).

³⁸ *Loi no. 89-462 du 6 juillet 1989*, Art. 14.

the *Cour de cassation* mentioned above.³⁹) If one partner cannot claim social security benefits in any other capacity, he or she can benefit from the other partner's (public) health and maternity insurance coverage.⁴⁰ Partners enjoy the same rights as spouses to request a transfer for the partner left behind when the other partner is transferred to another city for professional reasons (if both partners are civil servants),⁴¹ to simultaneous vacations (if they are working in the same company), to two days of bereavement leave if one partner dies,⁴² and to the return to the surviving partner of the capital of certain social security contributions made by a deceased partner.⁴³

As for non-European Community nationals, unlike the previous proposals, the PaCS does not grant the automatic right to a residence permit. However, the existence of a PaCS is an "element" to be considered in deciding whether the non-EC national partner's "personal" (not "family") ties with France are such that "the refusal to authorise residence would violate his or her right to respect for his or her private and family life in a manner disproportionate to the reasons for the refusal".⁴⁴ A non-EC national joined by a PaCS to a French or other EC national must show a "life in common" in France of at least three years, regardless of the date the PaCS was contracted. A non-EC national joined by a PaCS to another non-EC national must show five years of cohabitation in France, or the PaCS must have existed for at least three years.⁴⁵

As with the registered partnerships of Scandinavian countries, a PaCS does not permit the partners to adopt a child jointly (only married heterosexual couples may do so),⁴⁶ or to have joint parental authority over the child of one of the partners (married and cohabiting heterosexual couples may obtain it),⁴⁷ or to have access to medically assisted procreation (infertile married and cohabiting heterosexual couples have access).⁴⁸ It is clear from the text of earlier bills, and from the parliamentary debates on the PaCS bill, that parental rights are not covered. Nor will the reform of family law have any provisions on same-sex couples who are, or would like to be, parents.⁴⁹

A PaCS is terminated with immediate effect if (i) both partners agree to file a declaration with the *Tribunal d'instance*, (ii) one partner marries, or (iii) one partner dies. Otherwise, one partner may terminate the PaCS by notifying the other partner. A unilateral termination takes effect three months after the notice

³⁹ See *supra* n.9.

⁴⁰ *Code de la sécurité sociale*, Art. L 161-14.

⁴¹ *Loi no. 99-944 du 15 novembre 1999*, Art. 13.

⁴² *Loi no. 99-944 du 15 novembre 1999*, Art. 8; *Code du travail*, Arts. L 223-7, L 226-1.

⁴³ *Code de la sécurité sociale*, Art. L 361-4.

⁴⁴ *Loi no. 99-944 du 15 novembre 1999*, Art. 12; *Ordonnance no. 45-2658 du 2 novembre 1945*, Art. 12bis(7).

⁴⁵ *Circulaire du Ministère de l'intérieur du 10 décembre 1999* (Nor/Int/DJ/00251 C.).

⁴⁶ *Code civil*, Art. 343.

⁴⁷ *Ibid.*, Arts. 371-387.

⁴⁸ *Code de la santé publique*, Art. L152-2.

⁴⁹ See D Borrillo, "La protection juridique des nouvelles formes familiales : le cas des familles homoparentales", (March-April 2000) *Mouvements* n° 8, p. 54.

is delivered to the other partner, provided that a copy of the notice has been sent to the registrar of the *Tribunal d'instance*. Rights to property and financial support may be determined by the partners when they sign their PaCS. If their PaCS is silent on these matters, and they are unable to agree on them, a court may determine the proprietary and financial consequences of the breakdown of their PaCS.⁵⁰

Before the PaCS law, different-sex couples had two choices as to the law governing their relationship: civil marriage or *concubinage*. Same-sex couples had neither choice and were not legally recognised. After the PaCS law, different-sex couples can choose civil marriage, a PaCS or *concubinage*, and same-sex couples can choose a PaCS or *concubinage*, but not civil marriage. Same-sex couples who enter into a PaCS will not enjoy all the advantages of marriage. Their relationship will not be recognised outside of France, except possibly in certain countries with registered partnership institutions similar to the PaCS. Nor does a PaCS resolve the question of recognising a family unit, because the partners are still considered "single". Partners joined by a PaCS must wait several years to enjoy certain rights that married couples are granted immediately, receive a less generous tax deduction in relation to gifts, cannot adopt jointly or have access to medically assisted procreation, do not receive social security allowances for widows and widowers or resulting from accidents in the workplace, and cannot represent each other judicially or extra-judicially. All this shows that, instead of granting equality, the PaCS confirms the inequality of same-sex couples.

Despite these limitations, the PaCS has been relatively successful. By May 2000, six months after the promulgation of the law, more than 15,000 PaCSs had been signed. Thus, it would appear that, in the first year of the PaCS, over 30,000 or 7 per cent of the 450,000 cohabiting couples formed in France each year, according to the *Institut d'études démographiques*, could be expected to opt for a PaCS. Although it is much too early to attempt a sociology of the PaCS, the majority of those contracting a PaCS would seem to be same-sex couples from the urban middle class.⁵¹

THE ONGOING STRUGGLE FOR THE EQUALITY OF COUPLES

Now that the debate on the PaCS is over in France, a new question arises: why should civil marriage, and with it the right to adopt children jointly and to use assisted reproduction techniques, not be made available to same-sex couples?⁵²

⁵⁰ *Code civil*, Art. 515-7.

⁵¹ See "Les petits ratés du Pacs", *Le Monde* (26 April 2000), at 10.

⁵² I have developed arguments for marriage between people of the same sex in "Homosexualité et liberté matrimoniale", (May 1998) 12 *Revue Témoin* 75 (Editions Balland, Paris); "Les unions de même sexe : entre mariage impossible et concubinage improbable", (Oct. 1998) 12-13 *Revue Le Banquet* 125 (Centre d'études et de réflexion pour l'action politique, Paris); "Le mariage homosexuel : vers une égalité radicale", (March 1999) *La Mazarine* G030 (dossier Homosexualité et famille)

If love, affection and the wish for a child are the same irrespective of whether the couple is of the same sex or of different sexes, why should the law treat the same-sex couple differently? The PaCS is a cowardly project,⁵³ resulting from the difficulty facing gays and lesbians in achieving equal rights, either through the legislature or the courts. But for this difficulty, how can it be explained that people were excited by a law that confines homosexual couples to a form of sub-standard marriage, while giving the false impression that their union is recognised in the same way as a civil marriage? The PaCS fails to comply with the European Parliament's 1994 "Resolution on equal rights for homosexuals and lesbians in the EC", which called on the Commission of the EC to draft a Recommendation seeking to end "the barring of lesbians and homosexuals from marriage or from an equivalent legal framework, and . . . guarantee the full rights and benefits of marriage, allowing the registration of partnerships", and to end "any restrictions on the rights of lesbians and homosexuals to be parents or to adopt or foster children".⁵⁴

Far from banishing discrimination, or providing "an equivalent legal framework", the PaCS restricts same-sex couples to an inferior status compared to different-sex couples. (See the table at the end of this chapter.) In choosing between civil marriage, a PaCS and *concubinage*, a different-sex couple must decide whether to emphasise liberty or security. Yet, it is difficult to imagine why a heterosexual couple, who preferred liberty, would want to confine themselves to a PaCS, a union which, if ended non-consensually, would submit the partners to considerable constraints. On the other hand, if security is a priority, why would they choose a PaCS, a status which gives rise to rights only after a certain number of years and which, moreover, does not give full social welfare protection to the couple. By creating an intermediate status between *concubinage* and civil marriage, which is likely to be of interest mainly to same-sex couples, the PaCS further institutionalises the exclusion of homosexuals from the marriage contract. The PaCS is an extraordinary indication of the impossibility for Western democracies to implement fully their frequently proclaimed values such as equality and non-discrimination.

I am not concerned here with taking a position vis-à-vis the institution of marriage, but rather to defend the legitimacy of the claim to a right to marriage. Regardless of what one thinks of the institution, it remains the best legal instrument for the protection of the couple, both at the international and the national level. For example, the right to marry is a fundamental freedom mentioned in international human rights instruments, such as the Universal Declaration of

(Paris); "Le mariage homosexuel : hommage de l'hérésie à l'orthodoxie", in Borrillo, et al., *La sexualité a-t-elle un avenir?* (Paris, Presses Universitaires de France, 1999); "Uniones del mismo sexo y libertad matrimonial", (July 1999) 35 *Jueces para la democracia* 15 (Madrid) and (Nov. 1998) 15 *Revista de Sociología del Derecho* 22 (La Plata, Argentina).

⁵³ See D Borrillo, E Fassin & M Iacub (eds.), *Au-delà du PaCS : l'expertise familiale à l'épreuve de l'homosexualité* (Paris, Presses Universitaires de France, 1999).

⁵⁴ Resolution A3-0028/94, [1994] Official Journal C 61/40.

Human Rights (Article 16), the International Covenant on Civil and Political Rights (Article 23), and the European Convention on Human Rights (Article 12). And European Community law fully recognises only legally married non-EC national "spouses" as having the right to move freely with an EC national throughout the European Union.⁵⁵ The PaCS gives homosexuals a poor substitute for marriage, the only status which—nationally and internationally—grants full legal recognition. Juridical doctrine has never offered a single legal reason why the choice of marriage, and the rights and obligations that accompany it, should not be open to same-sex couples. The arguments offered in opposition to extending the right to marry or to the PaCS are based on individual prejudices or explicit homophobia.⁵⁶

Would we find it normal for the law to exclude homosexuals from property rights, only allowing them to benefit from occupation without title (mere possession of land) or from usufruct (a life estate in land), but not full ownership (freehold title to land)? Likewise, as far as the right to vote is concerned, would we accept a law which states that gays and lesbians may only vote in regional elections but not in national ones? If this is absurd in other areas of law, why should such an exclusion be acceptable in the area of family law? The PaCS creates a specific form of sub-standard citizenship for same-sex couples. Its acceptance by many in the lesbian and gay minority suggests that they have accepted the dominant argument, which consists in making them believe that they cannot have equal rights and that their exclusion is, therefore, justified. The PaCS reveals the extraordinary political difficulties linked to homosexuality. "Between an old-fashioned Right and a faint-hearted Left", to quote *Le Monde's* editorial of 14 November 1998, same-sex couples in France found themselves, throughout the PaCS debate, in the middle of a disturbing spectacle which humiliated them and threw scorn upon their fight for equality.

⁵⁵ See Regulation 1612/68, Art. 10(1); Dir. 68/360, Art. 1; E Guild, chap. 38.

⁵⁶ See D Borrillo, "Fantasmes des juristes vs. *Ratio juris* : la *doxa* des privatistes sur l'union entre personnes de même sexe" in Borrillo, Fassin et Iacub, *supra* n.53.

COMPARISON OF CIVIL MARRIAGE, THE PACS AND CONCUBINAGE⁵⁷

Right or obligation	Civil marriage	PaCS	Concubinage
place of registration	<i>Mairie</i> (town hall)	<i>Tribunal d'instance</i> (county court)	no registration
minimum age	16 for women, 18 for men (or 16 if emancipated)	18	18
obligation of fidelity	Yes	No	No
mutual support obligations	Yes	Yes	No
liability to third parties for debts of partner	Yes	Yes	No
ownership of property	presumed 50% joint ownership, (<i>communauté</i>) unless agreed otherwise	presumed 50% joint ownership (no right of survivorship) (<i>indivision par moitié</i>), unless agreed otherwise	separate ownership, according to who purchased asset
voluntary termination	after divorce procedure before <i>Tribunal aux affaires familiales</i>	immediate if bilateral, 3 months if unilateral	immediate in all cases
joint taxation	from date of marriage	in year of 3rd anniversary of PaCS	none
health and maternity insurance of partner	Yes	Yes	Yes, if "effectively, totally and permanently" dependent on partner
joint job transfers (civil service) and simultaneous vacations (same employer)	Yes	Yes	No
bereavement leave	Yes	Yes	No
damages claim where partner's death caused by third party's negligence	Yes	Yes	Yes

⁵⁷ See also S Dibos-Lacroux, *PACS: Le guide pratique* (Paris, Editions Prat, 2000) at 97-135.

	Civil marriage	PaCS	<i>Concubinage</i>
Right or obligation			
inheritance on intestacy or in spite of will	surviving spouse receives a life interest in at least 25% of estate, regardless of will inheritance tax	none	none
first 10,000 francs	exempt	first 500,000 francs	first 375,000 francs
transfer of lease upon death of partner	Yes	Yes	Yes, after one year of living together
survivor's pension and widow or widower's allowance (social security)	Yes	No	No
return of capital of social security contributions	Yes, if no dependant invokes priority	Yes, if no dependant invokes priority	No, unless can invoke priority as dependant
residence permit for non-EC national partner	automatic	discretionary; PaCS is an "element" to be considered	discretionary; <i>concubinage</i> is an "element"
nationality for non-French national partner	automatic after one year of marriage	after five years of residence in France, if "assimilation" shown; PaCS is evidence	after five years of residence if "assimilation" shown; <i>conc.</i> is evidence
judicial or extra-judicial representation of one partner by the other	Yes	No	No
civil status	married	single	single
joint adoption of unrelated child	Yes	No	No
second-parent adoption of partner's child	Yes	No	No
joint parental authority over partner's child	Yes	different-sex—Yes same-sex—No	different-sex—Yes same-sex—No
access to medically assisted procreation	Yes	infertile different-sex—Yes (after two years) same-sex—No	infertile different-sex—Yes (after two years) same-sex—No

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