Registered Partnerships and Private International Law: Great Britain and The Netherlands Compared

I. Introduction

Despite the frantic activity that the field of partnership registration\(^2\) has witnessed over the last decade, legislative activity has not been as forthcoming in the field of private international law.\(^3\) A quick scan across the European playing field reveals the variety of solutions and approaches adopted.\(^4\) Denmark, the first country to introduce a system of registration for same-sex couples in 1989, saw little need to embark upon a wide-ranging investigation of private international law provisions.\(^5\) In Sweden, on the other hand, the private international law rules in the field of marriage were simply made directly applicable to registered partnership and registered partners.\(^6\) In Finland, a separate chapter relating to private international law has been inserted into the Act itself.\(^7\) In the other two Nordic countries, namely Norway and Iceland, other factors play a role in explaining the undeveloped state of the private international law provisions in the field of registered partnerships.\(^8\) In both France and Belgium when introducing their regulatory schemes for the registration of partnerships, questions relating to private international law were left

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2 This article will make reference to «registered partnership» (the term used in The Netherlands) and «civil partnership» (the term used in England and Scotland). These terms are to be seen as equivalent in terms of private international law.

3 For example, France, Belgium and The Netherlands have all failed to introduce specific private international law rules for registered partnership despite the introduction of a substantive law institution. Proposals have however since been submitted to the Dutch and Belgian parliaments.


5 The chances were that such a scheme would not have been recognised abroad, by virtue of a public policy exception (ordre public). Therefore, the Danish legislation rejected mutatis mutandis application of international treaties.

6 The method adopted in Sweden for questions relating to private international law is to first state the main rule and then list the exceptions to such a main rule. For further detail see M. Jänterå-Jareborg, «Registered partnerships in private international law: the Scandinavian approach» in: K. Boele-Woelki and A. Fuchs (eds.), Legal Recognition of Same-Sex Couples in Europe, Antwerp, Intersentia, 2003, p. 137 at 143-146; also see M. Bogdan, «Amendment of Swedish private international law regarding registered partnerships», IPRax, 2003, pp. 353-354.

7 Chapter 4. Finnish Act on Registered Partnership (Enacted 1\(^{st}\) March 2002).

8 See M. Jänterå-Jareborg, «Registered partnerships in private international law: The Scandinavian approach» in: K. Boele-Woelki and A. Fuchs (eds.), Legal Recognition of Same-Sex Couples in Europe, Antwerp, Intersentia, 2003, p. 137 at 157. In this article the author states that in both nations (as well as Denmark), private international law is generally in a relatively undeveloped state and the majority of rules remain judge based, whereas in Finland and Sweden, private international law rules tend to be codified.
unanswered. In Switzerland, private international law provisions have been included in the proposed registered partnership Bill that has recently been debated in Parliament. The situation in Spain is even more complex with eleven regions having introduced substantive law legislation to provide for same-sex couples.

In 1998, The Netherlands became the fifth European country to introduce a form of partnership registration. Although questions concerning the international recognition of the institution were raised in the Parliamentary discussions, the Act that was eventually enacted failed to deal with the multitude of questions in this field. However, the questions were not left completely unaddressed. On the 16th January 1997, the Secretary of State for Justice requested the Dutch Government Standing Committee on Private International Law (herein called the «Standing Committee») to advise on the private international law aspects of the proposed registered partnership scheme.

The United Kingdom, on the other hand, has been somewhat more reticent in introducing a form of non-marital partnership regulation. It was not until June 2003 that the Women and Equality Unit (a section of the Department of Trade and Industry) published a consultation paper containing the plans of the English Government to create a form of civil partnership for same-sex couples. Despite attention being drawn to the problems of private international law, the consultation paper lacked further explanation of the intentions of the Government. These proposals were subsequently mirrored in Scotland in the form of similar proposals.

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9 The current proposals for the codification of Belgian private international law do however contain reference to the notion of cohabitation. Articles 58-60 of the proposed code deal with the concept of cohabitants.


12 Staatsblad 1997, No. 324 tot wijziging van Boek 1 van het Burgerlijk Wetboek en van het wetboek rechtsvordering in verband met opneming daarin van bepalingen voor het geregistreerd partnership.


14 The presentation accompanying this article was delivered prior to the publication of Civil Partnership Bill in the House of Lords, therefore reference to the Bill has not been made in this Article. The Civil Partnership Bill was introduced into the House of Lords on the 30th March 2004. This has since received its second reading in the House of Lords on the 22nd April 2004, and has since been committed to committee stage. The Bill itself is extremely extensive (271 pages in total) and consists of substantive law rules for England & Wales, Scotland and Northern Ireland. The Bill also provides for private international law rules for these three jurisdictions. At substantive law level, the Bill aims to introduce a registered form of same-sex partnership for those over the age of eighteen not related within the prohibited degrees of relationship. The registration would then have the same effects as marriage including next of kin rights, property rights and inheritance rights (including inheritance tax rebates. Even though this is not expressly stated in the Bill itself, this is the intention of the British Government). The registration and dissolution procedures are almost identical to that of civil marriage, which the exception that adultery does not serve as a ground for dissolution for a civil partnership. For a copy of the bill and accompanying explanatory notes see www.publications.parliament.gov.uk/pa/ld200304/ldbills under Civil Partnership Bill [HL].

15 §4.21, «Civil Partnership – A framework for the legal recognition of same-sex couples» (June 2003) This paragraph draws attention to the multitude of private international law problems that will arise as a result of the adoption of a partnership scheme in England & Wales, yet provides no indication of the solution which will be adopted.

It is the current situation in these last three jurisdictions (England & Wales, Scotland and The Netherlands) that will form the focal point of this paper. At present all three jurisdictions have proposals pending before their respective Parliaments concerning the private international law issues raised by registered partnerships. This article will first briefly outline the substantive law background to these schemes. In identifying the requirements to enter into a registered partnership in these jurisdictions, a springboard will be provided to examine the corresponding laws related to the characterisation of registered partnerships, as well as the recognition and enforcement of partnerships celebrated in abroad, and in particular in England & Wales and Scotland. Finally, this paper will conclude with overall conclusions related to the private international law queries raised.

II. Substantive Law

A. The Netherlands

On the 1st January 1998, The Netherlands introduced a regulatory form of non-marital partnership registration commonly known as registered partnership (in Dutch geregistreerd partnerschap). The aim of the legislation was to allow couples who were not able to marry (i.e. same-sex couples) as well as those who did not want to marry for whatever reason (i.e. opposite-sex couples) the chance to formalise their relationship and be entitled to certain rights and benefits as well as having certain responsibilities and duties imposed upon them. The institution, as it was eventually enacted, resembled marriage in all but a few minor aspects as well as a couple of substantial areas. This section will outline the main formal requirements that must be met before parties are able to enter into a registered partnership in The Netherlands.

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17 Although English lawyers tend to use the word «characterisation», European lawyers would use English terms such as qualification or classification. The core issue at stake is that which in French is termed qualification, in Dutch kwalificatie and in German Qualifikation. The term characterisation has been used throughout this text for the same reasons as expressed by J.D. Falconbridge, Essays on the conflict of laws, Canada Law Books Company, Toronto, 1954, p.55.

18 As can be seen from this list of topics, attention will neither be paid to the choice of law rules in the field of partnership rights (e.g. property regime, inheritance, maintenance etc.) in these jurisdictions, nor to the dissolution proceedings involved.

19 Staatsblad 1997, No. 324 tot wijziging van Boek 1 van het Burgerlijk Wetboek en van het wetboek rechtsvordering in verband met opneming daarin van bepalingen voor het geregistreerd partnerschap.

20 For example the method of formalising the ceremony is not exactly the same (Article 67, Book 1, Dutch Civil Code is not applicable to registered partnerships), and partners are able to first celebrate a religious registered partnership prior to civil ceremony (Article 68, Book 1, Dutch Civil Code also not applicable to registered partners).

21 For example, the presumption of paternity (Article 199(a) and (b), Dutch Civil Code) was not (and still is not) extended to registered partners; joint parental authority (regulated Articles 251-253y, Dutch Civil Code) was also not granted to registered partners. However since the 1st January 2002 such rights are granted automatically (Articles 253aa and 253sa, Dutch Civil Code) (Wet van 4 oktober 2001 tot wijziging van Boek 1 van het Burgerlijk wetboek in verband met het gezamenlijk gezag van rechtswege bij geboorte tijdens een geregistreerd partnerschap, Staatsblad 2001, No. 468, entered into force by virtue of Staatsblad 2001, No. 544). Another difference surfaces in the field of the dissolution whereby registered partners are provided with the possibility to dissolve their partnership non-judicially (Article 80(c)(d), Book 1, Dutch Civil Code) whereas married couples are only able to dissolve their marriage in a court of law (divorce, judicial separation or annulment).
A.1 Exclusivity

According to Article 80a, Book 1, Dutch Civil Code a person may only be involved in one registered partnership with one other person at any one time, whether of the same or opposite sex. Consequently a person can only be involved in one registered partnership at any one given time and that partnership can only be celebrated between two people. This is comparable to a similar provision in relation to marriage. Registration is also only possible if both parties are legally single. Although both or either of the parties may have already been married or involved in a registered partnership, they must be properly, validly and legally separated before they will be allowed to enter into a (another) registered partnership. If the parties had previously been registered or married then a statement with the name of the previous partner/spouse must be delivered to the Registrar of Birth, Deaths, Marriages and Registered Partnerships in the place of residence of one of the parties. Registration is therefore only possible if the parties are not registered and not married at the time of registration, whether with each other or with a third party.

A.2 Gender

According to Article 80a(1), Book 1 a person can enter into a registered partnership with another person irrespective of his or her gender. The law is gender neutral and makes no reference to the partners’ sexual orientation. A homosexual man is therefore allowed to enter into a registered partnership with a heterosexual man. Since a registered partnership is open to both genders and sexuality is not an issue, the problem of transsexual registered partnerships is also obsolete.

A.3 Age

In line with the conditions for marriage, a registered partnership cannot be celebrated if either of the parties has not attained the age of majority, currently set at eighteen. The Minister of Justice can remove this age requirement on request, although only for important reasons. If this is the case, minors need the permission of their parents in order to enter into a registered partnership. This permission is

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23 Article 33, Book 1, Dutch Civil Code.
24 Article 80a(2), Book 1, Dutch Civil Code.
25 The phrase «legally separated» must be distinguished from the term «judicial separation» (scheiding van tafel en bed). One is here talking of a legal dissolution of the registered partnership of the legal termination of the marriage.
26 Article 80a(4), Book 1, Dutch Civil Code.
27 With respect to marriage, the European Court of Justice recently decided in the case of KB v. National Health Service Pensions Agency, C-117/01, Judgment delivered on the 7th January 2004, that Article 141 EC precludes legislation which prevents a couple from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other. This basically reinforces the 2002 decision of the European Court of Human Rights in the joined cases of Goodwin v. United Kingdom and L v. United Kingdom, Judgment 11th July 2002.
28 Article 80a(6), Book 1 in conjunction with Article 31, Book 1, Dutch Civil Code.
29 Article 31(3), Book 1, Dutch Civil Code. An appeal to the district court is also possible should such a request be refused. A further appeal is also allowed to the Administrative Division of the Council of State, J.H. NIEUWENHUIS et al, Tekst & Commentaar. Personen- en Familierecht, Deventer, Kluwer, 1998, pp. 64-66.
30 Article 80a(6), Book 1 in conjunction with Article 35(1), Book 1 Dutch Civil Code.
not required should the mental capacity of the parents be so severely impaired that he or she is not in a fit state to determine his or her own will or to understand the meaning of the declaration.\textsuperscript{31}

\textbf{A.4 Residency}

When the Registered Partnership Act was first introduced in 1997, many members of the Dutch Parliament expressed concern that The Netherlands would become a haven for sham registrations and wished to prevent the onset of «registration tourism».\textsuperscript{32} As a result, the residency requirements that were imposed on the registration of partnerships were more stringent than the equivalent rules with respect to marriage. Old Article 80a(2), Book I required \textit{both} parties to either:

- be in possession of Dutch nationality; or
- be a citizen of a European Union or European Economic Area nation;\textsuperscript{33} or
- have a valid residence title.\textsuperscript{34}

In 2001, the Government passed an Act that changed these conditions and at the same time enacted legislation to allow for same-sex marriage.\textsuperscript{35} This Act harmonised the residency rules with respect to the eligibility criteria for entry into a marriage and a registered partnership. For a registered partnership to be validly celebrated, only \textit{one} of the parties needs to satisfy one of the following conditions:

- one of the parties must possess Dutch nationality; or
- one of the parties must live in The Netherlands;\textsuperscript{36} or
- one of the parties must have a permanent residency in The Netherlands.

The rules relating to the formalities of the residence title are contained in the Aliens Act 2000 (\textit{Vreemdelingenwet 2000}).\textsuperscript{37} This Act along with a host of other regulations including EC Regulation 1612/68 requires that a person’s main residence be in The Netherlands. In summary, so long as one of the parties has a connection with The Netherlands, either by virtue of their Dutch nationality or due to the fact that

\begin{itemize}
\item Article 80a(6), Book I in conjunction with Article 35(2), Book I Dutch Civil Code.
\item \textit{Parliamentary Proceedings. Second Chamber, 1996-1997, 23761, No. 3 p.5; No. 7, p.15; No. 11, §§22-26. It was stated that a tourist visa is not enough to satisfy the conditions and that one also needs to fulfill Articles 9, 9a and 10 of the \textit{Vreemdelingenwet}.}
\item According to old Article 80a(1) an EU or EEA citizen also needed to be in possession of a valid residency title (a \textit{verblijfsstitel}) which required him or her to be registered with the Basic Municipality Administration (\textit{Gemeentelijke Basis Administratie}).
\item The phrase «residence title» should be understood to make reference to a residence entitlement on the basis of the old Articles 9, 9a and 10 of the Aliens Act, \textit{Parliamentary Proceedings, Second Chamber, 1996-1997, No 23761, No. 11, p.7.}
\item \textit{Staatsblad, 2001, No. 11} tot wijziging van de regeling in Boek 1 van het Burgerlijk Wetboek met betrekking tot het naamrecht, de voorkoming van schijnhuwelijk en het tijdstip van de toestandkoming van de scheidning van tafel en bed alsmede van enige nadere wetten.
\item When one talks of «leving» this must be taken in it’s legal connotation, and \textit{not} in a broad common sense. The requirement thus entails registration with the \textit{Gemeentelijke Basis Administratie} (General Municipal Administration) and six months minimum residency in The Netherlands.
\item \textit{Staatsblad, 2000, No. 454} wet van 23 november 2000 tot algehele herziening van de \textit{Vreemdelingenwet}, zoals deze wet is gewijzigd bij de Wet van 22 maart 2001.
\end{itemize}
their main place of residency is in The Netherlands, they will be allowed to register their partnership in The Netherlands.\textsuperscript{38}

A.5 Prohibited degrees of relationship

Partnership registration is prohibited between relatives in the direct descending or ascending line, as well as between brothers, sisters or between a brother and sister.\textsuperscript{39} For important reasons the Minister of Justice may grant dispensation from this prohibition to persons who by means of adoption are brothers, sisters or brother and sister.\textsuperscript{40} Persons not related in the direct ascending or descending line \textit{i.e.} aunts, uncles, nephews, nieces and cousins, are hence permitted to register their partnerships.

B. Great Britain: England & Wales and Scotland\textsuperscript{41}

This section will deal with two separate legal jurisdictions: England & Wales on the one hand and Scotland on the other.\textsuperscript{42} Together these two jurisdictions form the territory of Great Britain.\textsuperscript{43} The two systems have been dealt with simultaneously due to the fact that their historical backgrounds lend themselves to such an analysis, as too does the factual, legal content of their rules in the fields of both family law and private international law.\textsuperscript{44} However, it must be noted that the law differs in many areas.\textsuperscript{45} Despite their similarities and differences, it is crucial that should Scots

\textsuperscript{38} This, in effect, means that in relation to the aforementioned impossible situations, the first three are now also possible due to the fact that one of the parties will have satisfied the prerequisite conditions. Only the fourth situation remains impossible.

\textsuperscript{39} Article 80a(6), Book 1 in conjunction with Article 41, Book 1, DCC; \textit{Parliamentary Proceedings, Second Chamber}, 1995-1996, 23761, No. 5.

\textsuperscript{40} Article 80a(b), Book 1 in conjunction with Article 41(2), Book 1, DCC. For further historical information see J. DE BOER, \textit{Mr. C. Asser's handeling tot de beoefening van het Nederlands burgerlijk recht. Personen- en familierecht}, Deventer, Kluwer, 2002, 16th Edition, pp. 123, §123.

\textsuperscript{41} This paper will therefore not discuss the legal rules and framework of Northern Ireland legislation. The Northern Irish Executive has however issued a memorandum expressing its intention to launch a consultation on the creation of a new legal status for committed same-sex couples. This consultation process has now been completed and the recently published Civil Partnership Bill also provides for detailed regulation for Northern Ireland. Reference to Northern Ireland has however not been made in this paper.

\textsuperscript{42} This is in fact how the legislation will also be presented since the Scottish Executive has asked Westminster (the UK government is only competent in this field for legislating for England & Wales) to include provisions in the proposed bill for Scotland. This has been done by virtue of a Sewel motion (for objections to such a route see K.McK. NORRIE, \textit{Sewel motions, devolution and family law}, \textit{Family Law Update}, 2003).

\textsuperscript{43} Preamble and Part 1, Union with Scotland Act 1706; Article 1, Union with England Act 1707; Schedule 2(5), Interpretation Act 1978.

\textsuperscript{44} It must be noted at the outset that the term \textit{private international law} is not the preferred term in Scotland, where \textit{international private law} is more commonly used: see for example E. CRAWDEN, \textit{International Private Law}, Edinburgh, W. Green, 1998, p.3; E.M. CLIVE, \textit{The Law of Husband and Wife in Scotland}, Edinburgh, W. Green, 1992, 3rd Edition, p. x-xii.

\textsuperscript{45} Big differences between the two jurisdictions lie in areas such as the English notion of voidable marriages; a lack of guardianship and wards of court in Scotland, as well as there being no requirement that the marriage has lasted one year prior to being able to file for divorce. For further information see: E.M. CLIVE, \textit{The Law of Husband and Wife in Scotland}, Edinburgh, W. Green, 1992, 3rd Edition; A.B. WILKINSON and K.M. NORRIE, \textit{The Law relating to Parent and Child}, Edinburgh, W. Green, 1993 and J.M. THOMSON, \textit{Family Law in Scotland}, Edinburgh, Butterworths, 1996, 3rd Edition.
law fail to be applied by an English court, it is nonetheless Scots law that will be applied, even though the rule itself may be identical.\textsuperscript{46}

In June 2003, England & Wales joined the ranks of nations around the world issuing a consultation document on the introduction of civil partnership.\textsuperscript{47} The consultation paper proposed the introduction of a new legal status for same-sex couples in England & Wales. These proposals will be sent shortly to the House of Lords for further deliberation. Should these proposals survive the Parliamentary battering which they will undoubtedly receive in both Houses,\textsuperscript{48} the Bill will confer a similar legal status on same-sex couples as marriage confers on opposite sex couples who choose to enter into marriage. In doing so, the proposal would create a new legal status entitled «civil partnership».\textsuperscript{49} Those who subsequently choose to enter into a civil partnership would then be granted rights and responsibilities akin to those conferred on married couples.\textsuperscript{50} Such an opt-in system would thus «support individual choices, and would not impose responsibilities on those who do not want them».\textsuperscript{51}

Soon after the publication of English consultation paper, the Scottish Executive followed suit and published its own proposals.\textsuperscript{52} However, by virtue of a Sewell motion, the Scottish executive has granted Westminster the power to legislate on these issues. Such a move is a result of the complicated devolution procedure enshrined in the Scotland Act 1998. The Scottish Parliament may legislate in any area unless the Westminster Parliament has reserved that area. However, at the same time as devolving power, the Scotland Act also allows for the Scottish Parliament to allow Westminster to legislate on devolved matters should the Executive agree.\textsuperscript{53}

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\textsuperscript{46} Although in Attorney General for New Zealand v. Oratz [1984] AC 1, the House of Lords seemed to apply English case law to the interpretation of New Zealand statutes. Thus where the law is identical, English judges, even though in theory should apply the law of the land which has been deemed applicable, will often make reference to English law should the law be identical. For further explanation on this case in particular see J. Collier, Conflict of Laws, Cambridge University Press, Cambridge, 2001., 3rd Edition, p. 366-367.

\textsuperscript{47} Women and Equality Unit, Department of Trade and Industry, «Civil Partnership – A framework for the legal recognition of same-sex couples», June 2003.

\textsuperscript{48} After the discussions in the House of Lords, the Bill will proceed through the normal parliamentary avenues and be sent for first reading in the House of Commons. The current Government Bill comes fast on the heels of two private members bills from the House of Commons and House of Lords in 2001, for further information see I. Sumner, «The Legal Position of Same Sex Couples in English Law» in: K. Boele-Woelki and A. Fuchs (eds.), Legal Recognition of Same Sex Couples in Europe, Antwerp, Intersentia, 2003, pp. 99-121.

\textsuperscript{49} In how this would be incorporated in the ongoing changes of the Registry of Births, Deaths and Marriages see the Government’s Consultation Paper, «Civil Registration: Vital Change» (January 2002) and «Civil Registration: Delivering Vital Change» (2003).

\textsuperscript{50} At present it is unclear as to whether tax concessions granted to married couples will be extended to civil partners. In the responses to the consultation paper, a large number of people raised concerns that the consultation document did not sufficiently address issues surrounding inheritance tax. The Government responded stating that the budget process will take full account of the comments that have been raised. Women and Equality Unit, Responses to Civil Partnership: A framework for the legal recognition of same-sex couples (2003, London, Women and Equality Unit) p.18.

\textsuperscript{51} «Civil Partnership – A framework for the legal recognition of same-sex couples», June 2003, p.17.

\textsuperscript{52} Scottish Executive, «Civil partnerships registration. A legal status for committed same-sex couples in Scotland» (2003, Edinburgh, Scottish Executive).

\textsuperscript{53} For further explanation of the technical mechanism of the Sewell Convention and its present usage, see N. Burrows, «This is Scotland’s Parliament; let Scotland’s Parliament legislate», The Juridical Review, 2002, pp. 213-236.
B.1 Exclusivity

As in all countries thus far to have enacted regulatory registration schemes for same-sex (and also opposite sex) partnerships, the English proposal prohibits polygamous registrations.\(^{54}\) This rule prevents a couple from entering into a civil partnership if they are already married (whether with each other or with a third party) or involved in another civil partnership.\(^{55}\) If persons succeed in celebrating multiple registrations or a mutually concurrent registration and marriage, then an offence similar to the offence of perjury will have been committed.\(^{56}\) There is no indication whether such a rule will also be adopted in Scotland.\(^{57}\) Each civil partnership must also be monogamous and can hence only be concluded between two people.

B.2 Gender

According to the Government’s proposal, only same-sex couples will be allowed to register their civil partnership in the jurisdictions of England & Wales, and Scotland.\(^{58}\) No reference is made to the sexual orientation of the parties. Although it is clear that this scheme is intended for homosexual couples, this is not an explicit requirement in the registration of the partnership. In §1.2 the consultation paper refers to «committed same-sex relationships». §4.1 of Annex A also states that «Stonewall estimates that lesbian, gay and bisexual people constitute 5-7% of the total adult population» (italics added).\(^{59}\) Nonetheless, from the proposals issued thus far, there seems to be no requirement that the parties be of a homosexual persuasion. This could have serious implications in terms of the eventual dissolution procedures available. Imagine the following situation: John and Steve decide to register their partnership. After solemnising the partnership John informs Steve of his bisexuality and Steve wishes to nullify the partnership. Is this possible? According to the proposal, this would not be allowed. According to §5.8 of the consultation paper, it is proposed that the partnership should only be deemed to be void should the parties be related within the prohibited degrees of relationship; should either party be below the age of sixteen or should the parties have disregarded the requirements of registration. The grounds for voidability also offer no recourse in this situation.\(^{60}\)

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\(^{55}\) §§3.3-3.7 English proposal; §8 Scottish proposal.

\(^{56}\) The Perjury Act 1911 codified the law on perjury in England & Wales. The maximum sentence for perjury is seven years and through a series of Court of Appeal cases it can be discerned that a custodial sentence is nearly always recommended.


\(^{58}\) Once the forthcoming Gender Recognition Bill has been enacted this will allow post-operative transsexuals to register their partnership with someone of the same post-operative gender. For more information on the Gender Recognition Bill see, H.L. CONWAY, «The Gender Recognition Bill – a turning point», Family Law, 2004, pp. 140-141.

\(^{59}\) Stonewall is the largest gay rights organisation in Great Britain: www.stonewall.org.uk.

\(^{60}\) See §5.10 of the consultation paper.
This situation is however analogous to marriage where the sexual orientation does not play a role either. 61

B.3 Age
Both parties to any registration must have attained the age of majority on the date of registration of the partnership. 62 The current age of majority is set at sixteen. This is comparable to marriage where both parties to a future marriage must also have reached the age of sixteen. In England & Wales persons aged sixteen or seventeen would also be required to first gain written parental consent (either from their parent or legal guardian) before being allowed to register the partnership. 63

B.4 Residency
According to both the English and Scottish proposals, the formal procedure for registering a civil partnership, including any residency requirements, will be identical to the procedure currently in operation for the celebration of a marriage. 64 Consequently, one must examine the requirements with respect to marriage to identify the relevant rules for civil partnerships.

Since the passing of the Marriage (Scotland) Act 1977, there have been no residence requirements imposed on parties wishing to get married in Scotland. This means that, provided there is no legal impediment to marry, any person can enter into a marriage in Scotland; facilities are not limited to United Kingdom or European Union citizen, or to those who are domiciled or resident in Scotland. Therefore, the notice that must be given prior to a marriage can be sent by post by someone resident abroad. It is nevertheless necessary for both parties to be present at the ceremony, however this cannot really be seen as a particularly large obstacle! §6.20 of the Scottish proposal lays down the relevant procedure to be adopted in Scotland in relation to civil partnerships. This mirrors the current procedure for marriage, since the giving of notice can be done by post, thus maintaining the absence of a residence requirement for registering a civil partnership in Scotland. 65

Although outright residency is not a requirement to get married in England & Wales, one must still differentiate between: (a) a marriage before the Church of England; (b) a marriage according to another religion; and (c) civil marriages. 66 For Church of England marriages a distinction is made between those couples who opt for the publication of the banns and those opting for common licences. Banns must

61 Section 11(d), Matrimonial Causes Act 1973 states that a marriage will be void should it be celebrated between people of the same sex. Nothing is mentioned with regard to sexuality of the parties involved. Thus two homosexuals may validly celebrate a marriage, so long as they are of opposite sex, Corbett v. Corbett [1971] P 83.
62 §6.7, Scottish proposal; §3.2 English proposal.
64 §4.2-§4.17 English proposal; §6.11-6.19 Scottish proposal.
65 §6.13 Scottish proposal explicitly states that there should be no residency requirement.
normally be published on three consecutive Sundays prior to the marriage in the parish in which the parties reside (thus imposing a residency requirement upon future spouses).\textsuperscript{67} If the parties opt for a common licence then at least one of the parties must have resided in the parish in which the service is to be held for at least fifteen days.\textsuperscript{68}

The rules in relation to the civil ceremonies have recently been changed and unified.\textsuperscript{69} The law now requires a common fifteen-day notice procedure; a requirement for each party to the marriage to personally give notice of their intention to marry; and a requirement for each party to the marriage to declare their nationality.\textsuperscript{70} Both the parties must have lived in a registration district in England & Wales for at least seven days immediately prior to giving notice at the register office. If both the parties live in the same registration district, then they are both required to attend the register office together to give notice of the marriage.\textsuperscript{71} If the parties live in different registration districts then each one of them needs to give notice separately in their respective districts.\textsuperscript{72} After giving notice the parties must wait a further sixteen days before the marriage can take place.

**B.5 Prohibited degrees of relationship**

Those related by close blood ties in the direct or indirect ascending or descending line, by adoption (in particular circumstances) or by a degree of affinity will be prohibited from registering a civil partnership.\textsuperscript{73} It is here that the law of England & Wales diverges from that of Scotland.\textsuperscript{74} The lists in both jurisdictions are exclusive, in the sense that if the relationship is not mentioned in the Schedule to the Marriage Act 1949 and the Marriage (Scotland) Act 1977 respectively, then the parties may validly marry.\textsuperscript{75} The situation becomes even more complex when one begins to examine the possibilities for stepfamily registration. A person is not able to register his or her partnership with his or her stepchild or step-grandchild unless both parties have attained the age of twenty-one and the latter was not at any time before reaching the age of eighteen a «child of the family» in relation to the other.\textsuperscript{76}

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\textsuperscript{67} Section 6(1), Marriage Act 1949. However, once the banns have been published, no residency requirement is imposed: Section 24(1), Marriage Act 1949.

\textsuperscript{68} Section 16(1), Marriage Act 1949. Another option exists for the issuance by the Archbishop of Canterbury of a special licence, but since this is only granted in exceptional circumstances, it will not be discussed here.

\textsuperscript{69} Changes have been made to the Marriage Act 1949 as a result of the Immigration and Asylum Act 1999. These changes came into effect on the 1\textsuperscript{st} January 2001. These changes basically abolish the possibility to marry by licence.

\textsuperscript{70} Section 27, Marriage Act 1949.

\textsuperscript{71} Section 27(1)(a), Marriage Act 1949.

\textsuperscript{72} Section 27(1)(b), Marriage Act 1949.

\textsuperscript{73} £3.11 English proposal; £6.9 Scottish proposal.

\textsuperscript{74} As well as all the prohibitions laid down in English law (contained in Schedule 1, Marriage Act 1949) Scotland also prohibits marriages between a man and his great-grandmother or his great-granddaughter (Column 1, Schedule 1, Marriages (Scotland) Act 1977), as well as between a woman and her great-grandfather or her great-grandson (Column 2, Schedule 1, Marriages (Scotland) Act 1977).

\textsuperscript{75} E.g. Section 2(3), Marriages (Scotland) Act 1977, unless it would be contrary to their lex domicilii or the lex loci celebrationis.

\textsuperscript{76} Section 1(1), Marriage (Prohibited Degrees of Relationship) Act 1986; Section 1(2), (3) and Schedule 1, Part II, Marriage Act 1949 as amended by Schedule 1 to the 1986 Act.
C. Comparison

C.1 Differences attributable to essential differences in nature, aims or function

The most noticeable difference between the three jurisdictions appears in relation to the gender restriction imposed in England & Wales and Scotland. In The Netherlands, both opposite-sex and same-sex couples are entitled to register a partnership, whereas in England & Wales and Scotland only same-sex couples are entitled to do so. In England & Wales and Scotland the aim of introducing a civil partnership scheme is confined to the protection of intimate relationships between same-sex couples. Although in The Netherlands this was indeed one of the aims of the legislator, it is also clear that the legislator also strived for the improvement in the situation of opposite-sex couples who do not get married. It could thus be argued that one of the core or principle aims of all three institutions is the same: the protection of same-sex couples and the recognition of their intimate relationships. The fact that the Dutch institution is also open to couples of the opposite-sex does not detract from the aforementioned common objective. This ancillary aim simply enlarges the extent or scope of the institution itself. Of course, there are those who would argue otherwise, stating that such an important difference in substantive law requirements of these institutions necessarily renders the two institutions incompatible for harmonised rules. With such differing aims, these two institutions cannot be dealt with under the same category. However, if the Dutch legislator believed that these aims were so closely related and intertwined that they would indeed be dealt with under the same common piece of legislation why should such a difference be crucial when one compares the institutions on an international basis? It is the opinion of this author, that arguments for separate private international law rules for same-sex registered partnerships and opposite-sex registered partnerships significantly lack foundation. Why is the gender of the parties one of the most important requirements for entry into a registered partnership? Why should the gender of the parties be singled out above all the other requirements as being crucial to the nature of the institution? The nature of the institution remains the same whether the institution itself be open to same-sex or opposite-sex couples or both. Of course imposing the same private international law characterisation on all three forms of registered partnership does not mean that the countries need in turn alter their substantive law definitions of registered partnership. On the contrary, when one talks of marriage, one is hardly talking of an institution with an inherent cohesive definition around the world. The rules relating to marriage differ substantially around the world and yet private international law deals with a host of wide-ranging notions of marriage under the same rules. Why should that be different for registered partnerships?

77 §3.1 English proposal; §6.6 Scottish proposal.
C.2 Differences attributable to correspondingly different rules in the field of marriage

Despite the fact that all three jurisdictions restrict access to a registered partnership to those who are not related either by blood or by adoption, differences are evident in the extent of these prohibitions. All three jurisdictions prohibit partnerships between those in the direct ascending or descending line, although England does not prohibit partnerships between a great-grand son and his great-grand father or a great-grand daughter and her great-grand mother. England & Wales and Scotland also prohibit civil partnerships between people who are related in the direct ascending or descending line, i.e. between an aunt and her niece, an uncle and his nephew, and between cousins of the same-sex, but these are not forbidden in The Netherlands. Differences also surface in the field of non-blood relatives: i.e. adoptive relatives and step-relatives. In all three jurisdictions prohibitions are imposed on partnership registration between an adoptive parent and his or her adopted child. In The Netherlands the possibility exists for the prohibition on partnership registration between adoptive children themselves to be lifted by the Minister of Justice for special reasons; in England and Scotland no such prohibition is imposed in the first place.

If one turns one attention to the minimum age requirements, one witnesses a similar pattern. The age of majority is set at eighteen in The Netherlands, in Scotland at sixteen and England & Wales at sixteen, although parental consent is necessary for those under the age of eighteen. The fact that the requirements with respect to age and prohibited degrees of relationships vary is more a reflection of the corresponding differences in the rules of marriage, than an indication of a fundamental difference in the nature, aim or function of these partnership registration schemes. In both these fields the rules with respect to marriage have simply been replicated when the legislator created requirements for the entry into registered partnership. To speak of an essential divergence in the nature of the registered partnership schemes would thus be incorrect.

C.3 Similarities

All three jurisdictions restrict these new forms of partnership regulation to two people. An exclusivity requirement imposed not only with respect to registered partnership but also with respect to marriage. This is of vital importance, since this requirement forms one of the core aspects to be examined later when one deals with the characterisation of such partnerships. The fact that the parties cannot be involved in a registered partnership or a marriage signifies that these two institutions are independent or exclusive from each other; each one creating a status distinct from the other.

Depending on one’s level of abstraction, one could also talk of similarities in the field of the minimum age requirements and prohibitions imposed with respect to relatives. All three jurisdictions impose a minimum age requirement. The fact that

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78 A problem that it is believed not to be of pressing importance to regulate!
79 Nor are they forbidden between parties of the same-sex.
the relevant age is different is, as already stated, a reflection of a corresponding disparity with respect to the marriage requirements in these jurisdictions. If the question posed is whether all jurisdictions impose a minimum age requirement, the answer is yes. If the question one poses is whether all jurisdictions impose the same minimum age requirement with respect to marriage and registered partnership, then the answer is yes. Only should one pose the question whether the age requirements imposed are the same with respect to registered partnership in these three jurisdictions is the answer in the negative. The same can also be said of prohibitions with respect to relatives. Prohibitions are indeed imposed, the extent of which differs with respect to the corresponding substantive law requirements for marriage.

In conclusion, it is submitted that the fundamental approach and aims of the legislation are very similar. All three systems create a statutorily regulated, legal institution imposing rights and responsibilities on both of the future partners. It is with this in mind, that one is able to continue further with the comparison of these essentially similar institutions, despite the aforementioned disparity between them.

III. Private International Law

As stated in the introduction to this article, legislative activity in the field of private international law has not generally been as forthcoming as substantive law legislation in this field. The absence of such legislation certainly does not assist in the array of problems triggered by the emergence of these disparate institutions. A fully in-depth comparison of the private international law rules of Great Britain and The Netherlands would require a much more detailed and longer analysis, and hence this article will be restricted to three fundamental problems in particular. Firstly, questions concerning the choice of law rules to be used in dealing with the formal and essential validity of registered partnerships. Secondly, questions surrounding the recognition and enforcement of foreign registered partnerships, and finally, a discussion of the curious problems stemming from the unique Dutch conversion procedure.

After the enactment of the Registered Partnership Act in 1997, the Dutch Government requested the Dutch Standing Committee on Private International Law to prepare an advice on the most appropriate action to be taken. In May 1998, the Standing Committee published its findings with a detailed thirty-seven article proposed Act. Since the publication of this proposal, judges have simply applied these proposals as if they were the law. However, as yet no Act has been enacted.

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80 Both these systems create a state sanctioned, statutory legal institution which affects the civil status of the parties involved, whilst at the same time imposing rights, duties, obligations and responsibilities on the parties. The extent of these rights and duties is irrelevant should one be considering the necessary characterisation of these institutions; see Section IIIA below.

81 It is intended that a comprehensive comparison will form the core of my PhD to be completed in November 2005. Alongside the rules of Great Britain and The Netherlands, the legal institutions and the associated private international law rules created in Belgium, France, and Switzerland will also be analysed, as well as supplementing the rules of the United Kingdom with those of Northern Ireland.

82 District Court Roermond, 29th March 2001, Case No. 41642 where the provisions in the Standing Committee’s proposal were applied and District Court The Hague, 27th August 2003, (2003) Nederlandse Internationaal Privaatrecht 383 (No. 253) where the provisions in the proposed bill before Parliament were applied.
In June 2003, the Government announced its intention to advance the progress of the suggestions of the Standing Committee and a proposal was subsequently sent to the Second Chamber of the Dutch Parliament.

The proposed Act on private international law rules concerning registered partnerships differs from the majority of the current rules in the field of Dutch private international law.\textsuperscript{83} The Bill itself consists of nine chapters, each dealing with a different aspect of the problem. Chapter I deals with the entry into a registered partnership in The Netherlands, whereas Chapter II deals with the recognition of registered partnerships entered into abroad. This division removes the necessity to introduce multi-sided choice of law rules.\textsuperscript{84} Instead, one-sided choice of rules are proposed to deal with registered partnerships celebrated inside The Netherlands and then recognition rules to deal with registered partnerships celebrated outside The Netherlands. Although this solution must be commended on its intelligibility, it also creates a certain degree of overlap, repetition and eventual complexity. This complexity arises due to the inconsistent use of this method. Chapters III (legal personalities) and IV (partnership property regime) are examples of multi-sided choice of law, creating one rule for all situations.\textsuperscript{85} This must be borne in mind when one turns one’s attention to the rules themselves, especially in attempting to compare them with the rules used in England and Scotland.

As of the 1\textsuperscript{st} March 2004,\textsuperscript{86} no Bill has yet been published in Great Britain concerning either the substantive law institution of civil partnership\textsuperscript{87} or the private international law aspects of such partnerships. The consultation papers outlining the Government’s aims failed to address the host of private international law issues.\textsuperscript{88} It is expected that a Bill will be presented to Parliament before the Easter recess.\textsuperscript{89} Consequently, reference in this article has often been made to the relevant rules in the field of marriage in order to assess and propose the most appropriate rule for registered partnerships.

A. Choice of law rules for celebration of a registered partnership

Although reference will be made here to the distinction between formal and essential validity in registered partnerships (and marriages), it is not the aim of this text to delve into the national differences between the precise content of formal and


\textsuperscript{84} For further comment see K. Boele-Woelki, \textit{Kantern. Internationaal Privaatrecht. Ars Acqui}, 2003.

\textsuperscript{85} Article 6, Private International Law (Registered Partnerships) Bill is an example of a multi-sided choice of law rule.

\textsuperscript{86} As already stated the Civil Partnership Bill was published after this presentation (20\textsuperscript{th} March 2004) and thus will not be discussed here.

\textsuperscript{87} The aims of the both Governments have however been outlined in consultation papers.

\textsuperscript{88} \$4.21 English proposal. Intra-national conflicts have also been left unaddressed. However, according to the Northern Irish consultation paper it seems that the best way forward would be for a United Kingdom wide civil partnership bill. See Mr. Pearson’s comments at: www.northernireland.gov.uk/press/dfp/031218h-dfp.htm.

\textsuperscript{89} Knowledge derived from discussions with the Department of Trade and Industry (ongoing since October 2003).
essential validity.90 The aim of this section is to compare the choice of law rules themselves. It has been taken for granted that the precise boundaries of the categories formal and essential validity will not differ as between marriage on the one hand and registered partnership on the other. If problems have arisen in relation to this distinction with respect to marriage, then it is expected that the same or similar problems will also occur with respect to registered partnerships.

A.1 Formal validity

There is no rule more firmly established in English and Scots private international law than that which applies the maxim *locus regit actus* to the formalities of a marriage *i.e.* that an act is governed by the place where it is done. The formalities of a marriage are governed by the place of celebration of the marriage, thus applying the *lex loci celebrationis*.91 Such a rule is also mirrored in the traditional orthodoxy of Dutch law.92 Even if the sole purpose of celebrating the marriage abroad is to avoid some inconvenient rule of the parties' national law, the law of the *lex loci celebrationis* will still apply.93 By deduction, a marriage celebrated in England will have to comply with English law,94 in Scotland with Scots law,95 and in the Netherlands with Dutch law.96 All three jurisdictions are unanimous on this point.

With respect to registered partnership, the current proposals before the Second Chamber of the Dutch Parliament state that registered partnerships entered into in

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91 ENGLAND: Scrimshire v. Scrimshire (1752) 2 Hag Con 395; Dalrymple v. Dalrymple (1811) 2 Hag Con 54; Warrender v. Warrender (1835) 1 Cl & Fin 488; Harvey v. Farnie (1882) 8 App Cas 43; Berthaumee v. Dastous (1930) AC 79 PC; Kenward v. Kenward (1951) P 124; R v. Bhum (1966) 1 QB 159; Re X' Marriage (1983) 65 FLR 132; Burke v. Burke (1983) SLT 331 and McCabe v. McCabe (1994) 1 FCR 257. In McCabe, a marriage ceremony was performed in Ghana. The respective parties, Irish and Ghanaian domiciliaries, were absent from the ceremony but the putative husband sent £100 and a bottle of gin to those family members in Ghana who were to attend the ceremony. The relatives for both sides of the union were present and toasted the health of the absent spouses, and distributed the dowry amongst themselves. The marriage in compliance with African custom and valid according to the laws of Ghana was upheld. SCOTLAND: A.E. ANTON and P.R. BEAUMONT, *Private International Law: A treatise from the standpoint of Scots law*, Edinburgh, W. Green, 1990, 2nd Edition, pp. 421.

92 Article 4, Private International Law (Marriages) Act.

93 See for example, in terms of ENGLISH and SCOTS law the decision of Simion v. Malliac (1860) 2 Sw & Tr 67. The only exception to this rule under DUTCH law relates to marriages celebrated at consular or diplomatic institutions. In ENGLAND and SCOTLAND this exception is only one of a number of exceptions (as contained in the Foreign Marriages Acts 1892 and 1947), as well belligerent occupation (Taczanowska v. Taczanowska [1957] P 301), and marriages between service personnel. In ENGLISH law another exception relates to marriages that are celebrated as close as possible in accordance with the requirements of common law in a country in which the use of the local form is impossible or in which there is no such form. For example Lord Conlanry's Case (1811) 6 St. Tr. (NS) 87, there was evidence of an exchange of consent between two Protestants in Rome. Since under Italian law no provision was made for Protestant marriages, it was held valid under English law. The existence of this exception under SCOTS law is questioned: E.M. CLIVE, *The Law of Husband and Wife in Scotland*, Edinburgh, W. Green, 1997, pp. 124-125.

94 That is to say the rules laid down in the Marriage Act 1949. Thus polygamous marriages (*R v. Ali Mohamed* [1964] 2 QB 350); marriages in unregistered buildings (Section 41, Marriage Act 1949); gipsy marriages (National Insurance Decision No R(S)4/59) are prohibited.

95 The rules are to be found in the Marriage (Scotland) Act 1977.

96 The rules are to be found in Title 5, Book 1, Dutch Civil Code.
The Netherlands will be tested according to Dutch law, adhering accordingly to the maxim of *locus regit actum*. However, this one-sided choice of law rule does not provide one with an answer to the applicable law in terms of registered partnerships celebrated outside The Netherlands. Questions falling outside the scope of this Article are instead regulated by the recognition rule laid down in Article 2 of the proposed Act. It is expected that England & Wales and Scotland will undoubtedly adhere to the same rule utilised for marriage *i.e.* that questions of formal validity of registered partnerships will be determined according to the law of the place of celebration of the registered partnership. There appears to be no indication that the Government will adopt a rule that would provide otherwise. If this were the case, then all three jurisdictions would adhere to the choice of law rule that the formal validity of a registered partnership is to be determined according to the law of the country where the partnership was registered.

### A.2 Essential validity

Before one embarks upon an analysis of the choice of law rules for determining questions essential to the validity of marriages, it is important to delineate the rationale and policy-objectives behind such a rule. With respect to marriage, the legislator has, in all three jurisdictions studied, aimed to expedite the validity of marriages by allowing for broad choice of law rules. In adopting broad choice of law rules, one increases the chance that the foreign institution will be recognised, thus respecting the reasonable expectations of the parties. In attempting to broaden the ambit of the choice of law rule, one can opt for one of two different approaches. Firstly, a choice of law ladder that provides for multiple choice of law rules. Each subsequent rung of the ladder becomes effective should the previous rung be inapplicable. The second option is to utilise connecting factors that allow for the widest possible scope of application. In doing so, not only are the reasonable

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97 Article 1(1), Private International Law (Registered Partnerships) Bill for registered partnerships entered into in The Netherlands and Article 2(1) for registered partnerships entered into outside The Netherlands.

98 As much as possible, the Dutch government has attempted to align the rules for registered partnership alongside the current rules on marriage *i.e.* those laid down in the Private International Law (Marriages) Act, flowing from the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages.

99 One-sided choice of law rules only provide for when one’s own law is applicable and do not provide for all-encompassing solutions. An example of a one-sided choice of law rule is to be found in Article 6, *Wet van 18 mei 1929 houdende algemene bepalingen der Wetgeving van het Koninkrijk. For further detail on the use of one-sided choice of law rules in The Netherlands see, L. Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, Deventer, Kluwer, 2002, 7th Edition, pp. 27. Discussed in Section III.B.


102 Such an approach has been adopted in the Private International Law (Adoption) Act. See for example Article 3(2).
expectations of the parties protected but one also assists in the pursuit of legal certainty and predictability.\textsuperscript{104}

With all this in mind, and with the restriction that any choice of law adopted must be deemed to be appropriate to the given circumstances, a variety of connecting factors have been tendered in relation to questions related to the essential validity of a marriage. With respect to relationships that affect the personal status of the parties to the relationship, the «proper» connecting factor have been deemed probably to be one that impacts the personal law of the parties: whether that is a party’s domicile, nationality, habitual residence or the place of their intended residence. It must nevertheless be remembered that one faces an important distinction when one attempts to forge a choice of law rule for non-marital registered partnerships as opposed to marriage: the limited acceptability of the new phenomena of registered partnership.\textsuperscript{105} Whilst it is important to seek guidance from the rules for marriage, this inherent difference will have an important impact on the eventual choice of law rule adopted. This section is divided into three subsections. The first will deal with the proposed rules relating to the registered partnerships in The Netherlands. It is important to seek guidance from the rules on marriage to identify the available possibilities. These rules will be described in the second subsection. The third and final subsection will compare the various proposals and theories. On this basis, suggestions as to the most appropriate choice of law rule for registered partnerships will be made.

A.2.a Registered Partnership

According to the proposal before the Dutch Parliament, the ability to enter into a registered partnership in The Netherlands will always be governed by Dutch law.\textsuperscript{106} Although application of the \textit{lex loci celebrationis} is maintained as the choice of law rule, reference is made neither to the common nationality of the parties nor to their habitual residence. Both the Standing Committee and the Government are of the opinion that the decision to adopt such a rule is not unacceptable. Should the future registered partners possess neither Dutch nationality nor satisfy the eligibility requirements of Dutch substantive law, then their partnership will simply not be allowed.\textsuperscript{107} Since no proposals have yet been published in England & Wales or in Scotland it is necessary to examine the rules with respect to marriage in order to gain an insight into the possible available solutions. The following section thus outlines the current rules in place in all three jurisdictions with respect to questions relating to the essential validity of marriages.

\begin{footnotesize}
\begin{enumerate}
\item As of 1\textsuperscript{st} March 2003, the following jurisdictions have, as far as I am aware, introduced or are debating proposals concerning registered partnerships: Denmark, Sweden, Norway, Iceland, Finland, France, Belgium, The Netherlands, Germany, England & Wales, Scotland, Northern Ireland, Luxembourg, Switzerland, Republic of Ireland, United States (Vermont, California, Hawaii), Canada (Nova Scotia, British Columbia, Quebec, Ontario) Spain (Catalonia, Aragón, Navarra, Madrid, Valencia, Asturias, Balearic Islands, Canary Islands, Andalucia, Extremadura, Basque Country). I would be very grateful for updates concerning this list.
\item Article 1(2), Private International Law (Registered Partnerships) Bill.
\end{enumerate}
\end{footnotesize}
A.2.b Marriage

It is with respect to the essential validity of a marriage that opinions differ the most as to the most appropriate choice of law rule by virtue of the divergent attitudes to the most appropriate connecting factor. A plethora of solutions have been tendered in the three jurisdictions researched. The following section will outline the variety of solutions tendered in these jurisdictions.

(a) Place of celebration of the marriage

The essential validity of a marriage is, according to Article 3(1) of the 1978 Hague Convention, assessed according to the lex loci celebrationis, on the condition that one of the future spouses possesses the nationality of this jurisdiction or is habitually resident in that jurisdiction. This Convention, having been ratified by the Netherlands, also serves as the rule in Dutch private international law in this field. This rule has also gained some credence in recent English case law. In Vervaeke v. Smith Lord Simon stated that issues of quintessential validity might be referred to the place of celebration of the marriage. Such an approach is heavily criticised by the joint Law Commissions of England and Scotland, nor has it received widespread support by English commentators. However, a distinction may be drawn between marriages celebrated in England & Wales and those celebrated abroad. It is probably true to say that marriages celebrated in England must comply with English law, not only as to formal validity but also as to matters of essential validity. This latter position has been formally adopted in Scotland.

(b) Nationality

Article 6 of the Dutch Wet van 15 mei 1829 houdende algemene bepalingen der wetgeving van het Koninkrijk states that questions of essential validity should be determined according to the nationality of each of the future spouses. This rule has subsequently been reiterated in Article 2(b) of the Private International Law

109 Article 2(a), Private International Law (Marriages) Act.
110 [1983] I AC 145 at 165-166.
111 See Law Commission Working Paper (No. 89) (1985) §§3.21-3.23. Questions have actually been raised as to the actually accuracy of this decision, since the cases referred to by Lord Simon pre-date the classic distinction made between formal and essential validity in Brook v. Brook (1861) 9 HL Cas 193.
112 Support for such a statement can be inferred from the decision of Pugh v. Pugh [1951] P 482 at 491-492. Authority for such a statement can also be gleaned from the English case of Breen v. Breen [1964] P 144 and the Scottish case of Lendrum v. Chakravarti (1929) SLT 96 at 103. However, such a rule has also received judicial criticism in various Commonwealth jurisdictions: In the Will of Swan (1871) 2 VR (IP & M) 47 (Australia) and Reed v. Reed (1969) 6 DLR (3d) 617 (British Columbia, Canada). The rule laid down in Sottomayor v. De Barros (No. 2) also confuses the matter somewhat in stating that the validity of a marriage celebrated in England between parties one of whom is domiciled in England and the other elsewhere is governed by English law. It is uncertain whether such a rule is present under Scots law: E.M. Clive, The Law of Husband and Wife in Scotland, Edinburgh, W. Green, 1992, 3rd Edition, pp. 138-140.
113 Sections 1(2) and 2(1)(a), Marriage (Scotland) Act 1977.
114 Staatsblad 1829, No. 28. This rule subsequently resurfaced in the 1902 Hague Convention relating to the settlement of the conflict of the laws concerning marriage. This rule is also to be found in Article 3(3), French Civil Code and Article 3(3), Belgian Civil Code.
(Marriages) Act. In this case, questions of essential validity will be determined according to the law of the parties' nationality; the essential validity of each spouse being determined according to the law of his or her own nationality. Article 2(b) also provides for situations when a spouse possesses more than one nationality. In such cases, the law of the nationality with which the spouse has his or her closest connection will be deemed to be applicable. In England and Scotland, nationality has never played a role in the essential validity of the parties.

(c) Law of the intended matrimonial home

It is argued, most ardently by the late Professor Cheshire in *Cheshire and North's Private International Law*, that,

«Whether the intermarriage of two persons should be prohibited for social, religious, eugenic or other like reasons is a question that pre-eminently, if not exclusively, affects the community in which the parties live together as man and wife.»

This has since been reiterated by numerous English and Scottish judges including Molesworth J., Lord Campbell, Lord Greene, Lord Denning, Lord Som, Cumming-Bruce J., and Sir David Cairns. Cheshire goes on to argue that it is surely more logical to maintain that the place where the parties are intending to establish their home is the country with the most interest in their marriage. If the parties after their marriage intend to leave their respective domiciles and set up home elsewhere, then it is this law and no other that is most affected by the

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115 This rule was inserted as a more favourable alternative to Article 3(b) of the 1978 Hague Convention.

116 Dutch Supreme Court, 9th December 1965, (1966) *Nederlands Juristenblad* 378. The case concerned a woman who possessed both Norwegian and Dutch nationality. The Supreme Court applied Norwegian law since it was decided that she had more connections with Norway than with the Netherlands. In coming to such a decision, all relevant circumstances must be taken into account: Court of Appeal The Hague, 5th July 2000 (2000) *Nederlandse Internationaal Privaatrecht* 266 and Court of Appeal Amsterdam, 21st September 2000 (2002) *Nederlandse Internationaal Privaatrecht* 83. For more information see L. STRIKWERDA, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, Deventer, Kluwer, 2002, 8th Edition, pp. 81-82. The current codification of Dutch private international law could present a slight problem in this field. The rule laid down in Article 4, General Provisions, proposal by the Standing Committee elucidates a different way of establishing the effective nationality should a party possess more than one nationality. The question arises which rule will take precedence: see further H.U. JESSURUN D'OOLVIERA, «De artikelen 4, 5, 7 en 17 van het Ontwerp», *Weekblad voor Privaatrecht, Notarieda en Registratie*, 2003, 454-460.

117 For further explanation as to why this rule has never played an important role in these jurisdictions see *Joint Law Commissions, Private International Law. The Law of Domicile*, HMSO, London, 1987, pp. 10-11.


119 In the Will of Swan (1871) 2 VR (IE & M) 47. Although, here a similar result would have been achieved with reference to the dual domicile test.

120 Brook v. Brook (1861) 9 HLC 193 at 207, 212, 213.

121 De Reneville v. De Reneville [1948] P 100 at 114.

122 Kenward v. Kenward [1951] P 124 at 143. This judgment can be heavily criticised since it basically applies different rules to different forms of incapacity: «nothing in this judgment bears upon the capacity of minors, the law of affinity or the effect of hagimony upon capacity to enter into a monogamous marriage». This author is in agreement on this issue with North and Fawcett who argue for the same rule being applied in all cases: P.M. NORTH and J.J. FAWCETT, *Cheshire and North's Private International Law*, London, Butterworths, 1999, 13th edition, pp. 734-35.


marriage. However, the objections to such a rule are, in this author's opinion, weighty. It is surely objectionable to adhere to a rule that renders it impossible to decide whether a marriage is valid or invalid at the time of celebration.\textsuperscript{126} Although in some cases the questions raised by the applicable law to the marriage will occur after the marriage has been celebrated, there are cases where such questions will be raised prior to the celebration of the marriage. Further reservations can also be levied towards the practical implications of such a rule: what happens if it is not clear where the parties intend to establish their matrimonial home? What happens if they intend to delay the decision for a year or more? What would be the result if the parties subsequently change their mind and do not establish their home in that jurisdiction? It is also contended that it is somewhat paradoxical to determine pre-nuptial capacity according to a post-nuptial intention. This «looking into the crystal ball» type of choice of law rule should, in this author’s opinion, be avoided at all costs, for not only does it increase legal uncertainty but increases the opportunities for costly litigious proceedings not to mention failing to respect the parties reasonable expectations. Choice of law rules, especially in the field of marriage and since this forms the springboard to registered partnerships, there as well, should be clear, concise, simple and easy to apply. A choice of law rule making reference to the intended matrimonial home contradicts such principles. In Scotland this rule is, fortunately, believed to be erroneous in principle.\textsuperscript{127}

(d) Dual domicile theory

This test has attracted the most support not only from the judiciary,\textsuperscript{128} but also from academics and lawmakers alike.\textsuperscript{129} The dual domicile theory conforms to the reasonable expectations of the parties, allows capacity to be determined definitively prior to the marriage and recognises that marriage is an issue of status, which should be governed by the personal law of the parties.\textsuperscript{130} The country of domicile, the theory states, is the country to which the future spouse «belongs».\textsuperscript{131} The theory furthermore respects the inherent value of both parties to the marriage by examining the law of the domicile of both parties.\textsuperscript{132} Despite North and Fawcett’s objection,\textsuperscript{133} the

\begin{itemize}
\item \textsuperscript{126} This is a viewpoint supported by \textit{Lawrence v. Lawrence [1985] Fam 106} at 127-128.
\item \textsuperscript{127} See for example the ruling of Lord Machaghten in \textit{Cooper v. Cooper’s Trustees (1888) 15 R(HL) 21} at 31. It is thought that the rule is too difficult to apply in practice to prospective spouses because such a decision is not always clear.
\item \textsuperscript{129} Dicey and Morris, \textit{Private International Law (11\textsuperscript{th} Edition)} p. 622-623; \textsc{Joint Law Commissions, Consultation Document on Choice of Law Rules in Marriage}. Edinburgh, Scottish Law Commission Memorandum No. 64, 1985, p.92-93. A number of statutory provisions also support such a claim: section 1(3), Marriage (Enabling) Act 1960; section 11(d), Matrimonial Causes Act 1973; sections 1(2), 2(1), 2(3) and 5(4)(t), Marriage (Scotland) Act 1977.
\item \textsuperscript{132} Although, Hartley argues for a rule that determines questions of essential validity according to the law of the domicile of either one of the parties at the time of the marriage, \textit{ibid}.
\end{itemize}
dual domicile theory offers at a very minimum a priori certainty to the celebration of the marriage. The parties know prior to the celebration of the marriage whether they are able to celebrate their marriage in England & Wales; a situation that can, in this author’s opinion, only be commended. On the other hand, the cumulative nature of the test generally increases the likelihood of the marriage being declared invalid than if a single law was determinate. Such a result runs counter to the policy objective of the choice of law rules as expounded earlier. Difficulties also arise due to the idiosyncratic nature of the English rules on domicile. However, surely the problem with such an outcome lies with the rules on domicile and not with the choice of law rules that utilises such a connecting factor.

(e) Dual reference test

Some commentators in Scotland have suggested that it is not sufficient to simply examine whether impediments to the future marriage existed in the parties respective states of domicile but that one must also examine the rules of the lex loci to see whether the parties were capable of marrying in that country. This can also be supported by some scarce case law, especially by Lord Dunedin in Berthiaume v. Dastous. However such a rule lends itself not only to complexities, but also the fact that there exists a greater chance that the marriage will be deemed invalid.

(f) Real and substantial connection

This test derived from the proper law test in issues of contract, and the English common law test for foreign divorce recognition established in Indyka v. Indyka, designates the proper law of the marriage as the system of the law that has the most real and substantial connection. This will undoubtedly often correlate to the state where the parties intended to establish their matrimonial home, but need not necessarily be the case. The inherent flexibility of the test allows consideration of a multitude of relevant factors including residence, nationality, domicile, intention and place of celebration. The test, although first proposed by Sykes in 1955, lay quiescent until Lord Simon of Glaisdale referred to the «real and substantial connec-

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136 Walston on Husband and Wife (3rd Edition) p.317
138 [1930] AC 79 at 83: «If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere.»
139 Strong support against such a rule can also be found in the JOINT LAW COMMISSIONS, «No. 15: Joint Report of the Law Commission on Choice of Law Rules in Marriage», London, Law Commission, 1987, pp. 4.
tion» for questions of «quintessential validity» in *Vervaeke v. Smith.* This test has received support on the basis of its flexibility and the fact that its sound, policy-orientated solution ameliorates some of the problems encountered with the dual domicile or intended matrimonial home tests. This test has however been strongly rejected by both the English and Scottish Law Commissions. Although this author expresses sympathy with the intentions of Lord Simon in the *Vervaeke* case, it seems far-fetched to expect such an in-depth analysis to be undertaken every time such a question arises. This is thus an inherently vague and unpredictable test, which would introduce an unacceptable degree of uncertainty into the law. It was in fact for this very reason that such a connecting factor was in fact removed from the recognition rules in terms of foreign divorces in 1971.

(g) Alternative reference test

It has also been propounded that another viable test is a rule of alternative reference: a marriage should be held to be valid if it is valid either under the dual domicile test of the intended matrimonial test. The English and Scottish Law Commissions have however rejected such a test since it would elevate the general policy of supporting the validity of marriages into a general rule.

A.2.c Comparison

It is clear from this exposé that a wealth of connecting factors can be presumed relevant in attempting to identify the «proper» connecting factor for questions relating to the essential validity of registered partnerships. Modern private international law is increasingly leaning towards connecting factors based upon objective criteria, that is to say focusing on the aim and function of the substantive law institution, rather than the previous affixation with the nature or nomenclature of the legal relationship. It can be argued that the same should also be true when one deals questions of essential validity of registered partnerships. The aim and function of the proposed civil partnership scheme in England & Wales is to «provide for the legal recognition of same-sex partnerships and give legitimacy to those in, or wishing to enter into, interdependent, same-sex couple relationships». The pro-

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142 [1983] 1 AC 145 at 165-166. Lord Simon proposes in this passage two solutions to the essential validity in marriages. See above for his proposal (*i.e.* lex loci celebrations). This is also supported in *Lawrence v. Lawrence* [1985] Fam 106.
144 The Recognition of Divorces and Legal Separations Act 1971 abolished the rule laid down in *Indyka v. Indyka* [1969] 1 AC 33. This Act has subsequently been replaced by Part II, Family Law Act 1986 and further still by the Brussels II Regulation.
148 §1.2, English proposal.
proposals in Scotland mirror these aims,149 and the Dutch registered partnership addressed similar problems with respect to both same-sex and opposite-sex couples.

The aim of all three jurisdictions is to provide legal recognition to partnerships between couples of the same-sex (and in the case of The Netherlands, between couples of the opposite-sex as well) by virtue of their effective and efficient regulation. With this aim in mind, one must attempt to select a connecting factor with significant relevance to the parties’ situation, as well as providing for the best opportunity to recognise these partnerships. In making such choices, one must remember that the institution of registered partnership is not widely recognised. It is suggested that the same policy aims apply to the questions raised by the essential validity of registered partnerships as are raised with respect to marriages: the policy of upholding the reasonable expectations of the parties as to the law governing their affairs based on fairness. Should all things be equal, one should attempt to conceive a rule which prefers the system of law most favourable to the validity of the registered partnership. Finally, it is important to note the underlying policy in the field of partnership registration which is concerned with promoting the uniformity of status. Similarly to the undesirability of limping marriages, one must strive towards a choice of law rule which limits the possibilities of limping partnerships. It is with these policy objectives in mind and with an eye on the fact that although countries throughout Europe are increasingly recognising the need to introduce such forms of registration, no two schemes are alike,150 that one must attempt to galvanise a choice of law rule for questions of essential validity utilising the most «appropriate» connecting factor. Since not a single nation in Africa, South America or Asia has introduced a non-marital form of registered partnership,151 all references to the nationality or the domicile of the parties will in turn lead to an increased chance that the registered partnership will not be recognised. It can be argued that these connecting factors should indeed be abandoned with respect to registered partnership. They provide for a system of law to be applied which more-than-likely will not adhere to the policy objectives of the choice of law rules in this field. Should one make use of the connecting factors related to the personal law of the parties (domicile, nationality, habitual residence, intended home after registration of the partnership etc.) then the reasonable expectations of the parties are severely undermined. Such a rule suffers not only from an intrinsic lack of certainty (a disadvantage which should, as already stated, be avoided at all costs) but also from the fact that in attempting to improve the situation of the parties concerned in turn creates too much flexibility thus hindering the pursuit of legal certainty.

Although countries throughout Europe are increasingly recognising the need to introduce such forms of regulation and protection, no two schemes are alike. Furthermore, outside of Europe, such a trend is not as apparent. As far as this author

149 §2.4, Scottish proposal.
151 Although recently a Supreme Court judge in Brazil stated that the Government must now introduce a form of civil partnership for same-sex couples. South Africa has also made steps towards the equalisation of partnership rights between same-sex and opposite-sex couples. For greater detail see the relevant chapters in R. WINTEMUTE and M. ANDENÉS (eds.), Legal recognition of same-sex partnerships, Oxford, Hart Publishing, 2001, pp. 279-414.
is aware, there is as yet not a single nation in Africa, South America or Asia to have introduced a non-marital registered partnership scheme and the debate in the United States of America has recently once again hit the headlines. Therefore, all references to the nationality or domicile of the parties would in turn lead to an increased chance that the registered partnership would not be recognised. It can therefore be argued that these connecting factors should not be used in determining questions related to the essential validity of a registered partnership. Should one not therefore resort to a connecting factor based on a «real and substantial connection» as suggested in the Vervaeke v. Smith? The question must be answered in the negative for the same reasons it has been rejected with respect to marriage. Such a factor is not only difficult to ascertain but also provides for too much flexibility, in turn hindering the pursuit of legal certainty.

One is therefore left with a connecting factor based on the place of celebration of the registered partnership, as indeed has been adopted in The Netherlands. It is this author’s submission that such a rule should also be adopted by England & Wales, and Scotland. Although, this would in fact signal a marked departure from current English and Scottish orthodoxy, this would indeed support the policy objectives of the institution itself and would decrease the possibility of limping relationships. Although this would result in the choice of law rules for questions related to the formal and essential validity of registered partnerships being identical, it is not suggested that these categories should be combined into one all-encompassing choice of law rule. The distinction should be retained since at a later stage, once the institution of registered partnership has gained more widespread acknowledgement, a more suitable connecting factor in terms of essential validity can instead be utilised.

B. Recognition and enforcement of foreign partnerships

B.1 Characterisation

The fundamental problem which one is confronted with when one attempts to categorise legal concepts or connecting factors is not a mere conjectural or abstract exercise. The problem surfaces persistently in all areas of law including the field of family law. Today, private international law in the field of family law is once again confronted with a new predicament: the phenomenon of non-marital registered partnerships.

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152 With reference to the recent «same-sex marriages» in San Francisco. One will have to wait and see whether the legal challenges to such same-sex marriages succeed, before one can talk of same-sex marriages in California, Vermont (civil unions), Hawaii (reciprocal benefits) and California (domestic partnerships) are currently the only states with forms of registered partnership. Again, I would be very grateful if anyone has any updates to this list.

153 In the preceding section, the number of cases relating to family law matters is evidence of this statement e.g. parental consent, capacity to marriage, polygamous marriage etc.

154 For a contrary viewpoint that characterisation is irrelevant see F. RIGAUX, «The law applicable to non traditional families» in: J. Basedow et al., Liber Amicorum Kriet Siehr, The Hague, T.M.C. Asser Press, 2000, pp. 647 at 654. The phrase «non-marital registered partnerships» has been chosen to exclude reference to all forms of «marital partnerships» as well as «unregistered partnerships».
Before one embarks upon the task of characterisation, one must understand where one is aiming to arrive and what tools one requires in order to achieve it. In the case of non-marital registered partnerships, it is the juridical nature of the relationship in question, which one is attempting to characterise. One must therefore address the fundamental constitutent tenets of that registration. If one supports such a proposition then one is confronted with a question of characterisation. According to a traditional private international law approach, there are two possible categories to which the institution can be assigned: characterisation as a contractual obligation or characterisation as a relationship that affects the status of a person.

The question is a somewhat token gesture in relation to the jurisdictions selected for this article. All three jurisdictions have clearly opted to create a legal institution that resembles marriage in such a way that a characterisation as a relationship that affects the status of a person is almost impossible to avoid. Despite the fact that with respect to these three jurisdictions the answer to the question is solved prior to the question even being asked, one must not be impetuous in overlooking the fact that this question must be answered if a partnership has been registered in Belgium or France, where registered partnerships are perceived as more contractual in nature.\footnote{Article 515(1), French Civil Code and Articles 1476-1479, Belgian Civil Code respectively characterise the PACS and the wettelijke samenwoning as contracts. Although disagreement exists in French literature on this point. For a characterisation as a contractual obligation see: M. Revillard, «Le pacte civil de solidarité en droit international privé, Défroïnois, 2000, pp. 337 at 340; M. Revillard, «Les unions hors mariage» in: Des concubinages. Études offertes à J. Rubellin-Devich, Litec, Paris, 2002, pp. 588-590; J-J. Lemouland, Pacte civil de solidarité. Formation et la dissolution du pacte civil de solidarité, JCP Edition Notarielle, 2002, pp. 408; B. Beigner, «Aspects civils», Hors série. Droit de la famille. Décembre 1999; J-P. Michéel and J-P. Puliquen, «L’élue, l’expert, le citoyen et le Conseil constitutionnel», Hors série. Droit de la famille. Décembre 1999, pp. 25. For a contrary point of view and a characterisation as a relationship affecting a person’s status see: H. Chanteleou, «Menus propos autour du pacte civil de solidarité», Gazette du Palais, 2000, pp. 1715 at 1716-1720; H. Fulconnon, «Reflexions sur les unions hors mariage en droit international privé», Journal de Droit International, 2000, pp. 889 at 899; M. Micnot, «Le partenariat enregistré en droit international privé», Revue Internationale de Droit Comparé, 2001, pp. 601 at 614; A. Huer, «La separation des concubins en droit international privé» in: Études offertes à J. Rubellin-Devich. Des concubinages. Litec, Paris, 2002, pp. 543-544.}

In The Netherlands, the recently published Private International Law (Registered Partnerships) Bill provides for a number of criteria which must be satisfied before a so-called foreign «registered partnership» will be regarded as eligible for recognition.\footnote{For further discussion of this provision and the associated problems thereby see H.U. Jessurun D’Oliveira, «Autonome kwalificatie in het international privaatrecht: geregistreerde niet-huwelijkse relaties» in: K. Boele-Woelki et al (eds.), Het plezier van de rechtsvergelijking, Kluwer, Deventer, 2003, pp. 1-37 at 1-4.} Article 2(5), in combination with Article 2(4), provides for the following criteria:

(a) The registration was completed before a competent authority in the place where it was entered into;\footnote{Article 2(4) and 2(5)(a), Private International Law (Registered Partnerships) Bill.}

(b) The institution is exclusive i.e. that a registered partnership cannot be concluded alongside another registered partnership or marriage;\footnote{Article 2(5)(b), Private International Law (Registered Partnerships) Bill.}

(c) The solemnisation of the registered partnership creates obligations between the partners that, in essence, correspond with those in connection to marriage.\footnote{Article 2(5)(c), Private International Law (Registered Partnerships) Bill.}
(d) The partnership must only be concluded between two persons;\textsuperscript{160} 
(e) The partnership must be based on a legally regulated form of cohabitation.\textsuperscript{161}

This list of criteria is a good starting point and the Dutch legislator should be commended on the simplicity with which it has drafted these provisions.\textsuperscript{162} However, it is submitted that the definition is too restrictive and based purely on the Dutch notion of registered partnership. The criteria correspond entirely to the substantive law requirements for entry into a registered partnership in The Netherlands: only those non-marital registered partnerships that are almost identical to a Dutch registered partnership will be eligible for recognition. For example, reference is made in the criteria list to the «obligations between the partners that, in essence, correspond with those in connection to marriage».\textsuperscript{163} It is questioned whether the second strand of this criterion is necessary or even desirable. If one turns one's attention to the recognition of a marriage, one does not examine whether the obligations created between the spouses are similar to those created between the spouses should they have married according to Dutch law. With respect to registered partnerships, such an approach has however been adopted. Although The Netherlands has created a registered partnership scheme which is almost an identikit of marriage, other jurisdictions have not proceeded along such a route, instead opting for less far-reaching models.\textsuperscript{164} So long as obligations are indeed created between the parties, the extent of those rights and obligations are, it is submitted, irrelevant. As Kahn-Freud said,

> What matters is not the caractère technicojuridique which a foreign law gives to an institution and whether this corresponds to that envisaged by the conflicts norm of the forum.\textsuperscript{165}

As we attempt to compare and contrast the non-marital registered partnership forms currently available in Europe, it is surely more valuable to identify that these schemes are essentially similar in that they are statutorily regulated, legal institutions imposing rights, responsibilities, duties and obligations on both of the future partners to the registration.\textsuperscript{166} Whether a foreign jurisdiction has attempted to create a marital \textit{doppelganger} or not, should not be a determining factor in whether the institution should be recognised.

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\textsuperscript{160} Article 2(5)(b), Private International Law (Registered Partnerships) Bill.
\textsuperscript{161} Article 2(5), Private International Law (Registered Partnerships) Bill.
\textsuperscript{162} Especially since in the ongoing work on the codification of Dutch private international law no provision has been adopted at all with respect to characterisation. See P. VLAAS, «De Algemene Bepalingen als sluitstuk van de codificatie van het Nederlandse IPR», \textit{Weekblad voor Notariskundig, Privaatrecht en Registratie} 2003, pp. 443; H.U. JESSURUN D’OLIVEIRA, «Autonome kwalificatie in het international privaatrecht: geregistreerde niet-huwelijks relatie» in: K. Boele-Woelki \textit{et al} (eds.), \textit{Het plezier van de Rechtsvergelijking}, Kluwer, Deventer, 2003, pp. 1-37 at 1-4; P. VLAAS, «De codificatie van het Nederlandse IPRs», \textit{Tijdschrift@ipr.be}, 2004, pp. 106-115. Also in the original \textit{Staatscommissie} proposals, no provision relating to characterisation was included.
\textsuperscript{163} Article 2(5)(c), Private International Law (Registered Partnerships) Bill.
\textsuperscript{164} See for example the institutions in France (\textit{PACS}), Belgium (\textit{wettelijke samenwoning/cohabitation légale}) and Germany (\textit{Lebenspartnerschaft}).
\textsuperscript{166} See Section II.C.
It is more than likely, that England & Wales and Scotland will adopt a similar approach to the characterisation or definitional problem. Should the British Governments tackle the issues in a similar fashion, then it is to be expected that recognition will not be extended to registered partnerships between couples of the opposite-sex. The difficulty with such a definition is that the problem does not disappear. England & Wales and Scotland will still have to deal with opposite-sex registered partnerships. If a recognition rule were indeed ever formulated for such opposite-sex registered partnerships, would this not be identical to that for same-sex registered partners? Would it not be simpler to broaden the definition of registered partnership and extend recognition to opposite-sex partnerships? The same is also true of The Netherlands: would it not be more advisable to extend the criteria with respect to the obligations created upon registration to those institutions were such obligations do not necessarily correspond to marriage? In doing so, it is submitted that we should strive towards an autonomous definition of registered partnership in Europe. As has already been seen in Section II, similarities do exist and should not be hastily overlooked. One must ask oneself whether it is really enviable to create distinct categories at private international law level if the private international law rules themselves are in essence indistinguishable.

B.2 Registered Partnership

In the explanatory notes accompanying the Dutch Bill, it is stated that Article 2 of the Private International Law (Registered Partnerships) Bill is in conformity with Article 5 of the Private International Law (Marriages) Act. However, a substantial difference is evident; Article 2(5) provides for a list of criteria for the definition of a registered partnership. The question arises how to interpret the interaction of Article 2(1) and 2(5). Despite, the apparent clarity of the Articles themselves, no reference is made to the interplay between them. Should Article 2(5) be regarded as a characterisation of the term registered partnership or should these rules in fact be seen as two facets of the same recognition rule? Before examining the interplay between these two Articles, it must be noted that one reaches the same conclusion whichever interpretation one espouses. However, from a theoretical and methodological point of view, the interrelationship of the two Articles is important.

B.2.a Article 2(1) applied first: two facets of a recognition rule

According to Article 2(1), a registered partnership will only be recognised in The Netherlands if it satisfies the formal and essential validity requirements of the place where it is registered. If one applies this rule first, then Article 2(5) acts as a delineation of the material scope of this recognition rule. If the test laid down in

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167 When Lord Lester’s Bill was introduced in the House of Lords, the major concerns centred around the opening up of civil partnership to opposite sex couples or people within the prohibited degrees of marriage. For further explanation see the parliamentary discussions themselves and I. SUMNER, «Legal recognition of same-sex couples in English law» in: K. Boele-Woelki and A. Fuchs (eds.), Legal Recognition of Same-Sex Couples in Europe, Antwerp, Intersentia, 2003.


169 Article 2(1), Private International Law (Registered Partnerships) Bill.
Article 2(1) is not satisfied then the registered partnership would not be recognised. The criteria listed in Article 2(5) would only be applied should a valid registered partnership have been celebrated in the place where it was registered. If one construes the provisions in such a way, Article 2(5) would only have application once Article 2(1) has been applied and therefore would be confined to situations dealing with recognition.

B.2.b Article 2(5) applied first: characterisation and recognition

The starting position of both the Dutch Government and the Standing Committee is that the recognition rules on registered partnership conform to the equivalent rules in the field of marriage.\(^\text{170}\) Although, the Standing Committee did not delve into the difficult question of what should fall to be recognised under the term «registered partnership», the Government did breach the subject. It appears from section 2 of the explanatory note that the criteria mentioned in Article 2 are intended to demarcate the subject of the proposed Act.\(^\text{171}\) Article 2(5) therefore performs as a definition or characterisation of the term «registered partnership»: if one satisfies the criteria listed in Article 2(5) then one falls within the scope of the proposed Act.\(^\text{172}\)

The Government stated that a difference is nonetheless apparent if one compares the recognition rules in the field of marriage and registered partnership. Unlike marriage, the rules with respect to registered partnership provide for a list of definitional criteria that have to be fulfilled. On page 10 of the Government’s explanatory note, it is stated that the foreign registered partnership must satisfy the criteria in order to be eligible for recognition.\(^\text{173}\) This sentence suggests that Article 2(5) therefore acts as a pre-requisite to recognition. In order to be eligible to even apply the recognition rule in Article 2(1), one first has to satisfy the criteria laid down in Article 2(5). The first watershed or benchmark is therefore whether the partnership satisfies these criteria. Should the partnership satisfy these criteria then it will be tested in accordance with Article 2(1). Article 2(1) sets the second watershed or benchmark, testing validity of the registered partnership according to the place where it was registered.\(^\text{174}\)


\(^\text{172}\) A standpoint supported by the fact that Article 7(1) refers to the same criteria in attempting to identify the system of law applicable to the partnership property regime, see Explanatory Note, Second Chamber, 2002-2003, 28924, No. 3, p.14.

\(^\text{173}\) The explanatory note states (p.10): «In het vijfde lid van artikel 2 enige criteria opgenomen waaraan een buiten Nederland geregistreerd partnerschap moet voldoen om als zodanig voor erkenning in aanmerking te komen» (italics added). This phrase signifies the intention that the criteria must be satisfied prior to a registered partnership being recognised.

\(^\text{174}\) It should be noted that such provisions also occur elsewhere in Dutch law. Article 1(1) and 1(4) of the Private International Law (Dissolution of Marriages and Judicial Separations) Act provide for such an example. Article 1(4) is in fact the main rule and must be applied first. Only should this rule not be satisfied should Article 1(1) be applied. The same language is used in Article 2(1) and 2(5) of the Private International Law (Registered Partnerships) Bill, thus supporting such an application of these rules. For more information on the application of the Private International Law (Dissolution of Marriages and Judicial Separations) Act see P.M.M. MOSTERMANS, Echtscheiding. Deventer, Kluwer, 2003, 2\(^{nd}\) Edition, pp. 37-41.
Such an interpretation of these Articles would mean that the Dutch law on the recognition of foreign registered partnerships does not differ from the equivalent rules in the field of marriage. The disparity between the rules in the field of marriage and the rules with respect to registered partnership transpires in the expounding of a list of criteria for the term «registered partnership». Such a measure is, however, both logical and understandable considering the Government’s awareness that the institution of registered partnership is, at this moment in time, an institution limited in its worldwide acknowledgment. Further support for such an interpretation can be gleaned from a linguistic standpoint. How can one apply Article 2(1) is attempting to recognise a so-called «registered partnership» without first knowing what a «registered partnership» is?

Although the eventual result is unaffected by this question, the methodological aspects are interesting. It is submitted that Article 2(5) should indeed be regarded as an attempt to achieve definitional clarity or in other words an attempt to characterise equivalent foreign institutions. Article 2(1) is then to be regarded as the recognition rule with respect to registered partnerships. Such an interpretation also adheres to the intentions of Government. If such an approach is indeed the intention of the Dutch legislator, it is to be recommended that Article 2(5) be placed in a separate Article at the beginning of the Act, outlining the general material scope of the Act. Such a general provision would therefore leave no doubt as to questions of characterisation or the Governments’ intentions. If the question of characterisation occurs prior to deciding the legal issue at hand, it would also make more sense to place such a provision at the beginning of the Act. This is also the case with the recently enacted Private International Law (Adoption) Act.

The question arises which route the English and Scottish Governments will take in formulating an equivalent rule. Since no proposals with respect to the private international law questions raised have yet been published, one must refer to the equivalent rules in the field of marriage in order to deduce possible solutions. The following section therefore outlines the relevant rules referred to in the three jurisdictions dealt with in this article.

B.3 Marriage

Article 9 of the 1978 Hague Convention states that a marriage celebrated in another Convention State will be recognised if it satisfies the requirements of formal and essential validity of the place where the marriage is celebrated, i.e. questions answered according to the lex loci celebrationis. The Netherlands has ratified this Convention and subsequently translated this provision into Dutch law such that foreign marriages will be recognised in The Netherlands should they satisfy (both the formal and essential) requirements of the lex loci celebrationis. It is noticeable

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175 Explanatory Note, Second Chamber, 2002-2003, 28924, No. 3 p.3-4.
that Article 11 of the 1978 Hague Convention, which lists an extensive number of grounds for the rejection of this general rule,\textsuperscript{179} has not been transposed into Dutch law. Since the Dutch legislator had already provided for a public policy exception, it was regarded as unnecessary to list the Article 11 grounds as well.\textsuperscript{180} The public policy exception provided for in Article 6 is however rather strictly interpreted and can only be employed in cases of a (serious) violation of Dutch public policy.\textsuperscript{181}

On the other hand, neither England & Wales nor Scotland have ratified the 1978 Hague Convention. According to both English and Scots law, the same choice of law rules applying to marriages celebrated in England or Scotland apply to marriages celebrated abroad \textit{i.e.} a distinction is made between the formal and essential validity of the marriage.\textsuperscript{182} As already seen in Section III.A.1, the formal validity of a marriage is always determined according to the \textit{lex loci celebrationis}, irrespective of where the marriage should have been celebrated.

With respect to questions relating to the essential validity of the marriage, the current options available to the English and Scottish Governments are diverse. As already seen in Section III.A.2, the English and Scottish Governments could opt for a wholesale embrace of the rules in the field of marriage, thus recognising foreign registered partnerships should they satisfy the applicable choice of law rules. As already seen, the essential \textit{raison d’être} behind these choice of law rules is as diverse as the rules themselves, but the legislator aims in essence to avoid the creation of limping relationships, within certain boundaries (\textit{e.g.} with the notion of public policy in mind).\textsuperscript{183} It is obvious that the State does not want to encourage relationships to be celebrated in one jurisdiction which are subsequently not recognised in another. It is for this reason that this author believes that the English and Scottish Governments would best be advised to follow the lead of the Dutch Government and adopt a rule that tests the validity of a foreign registered partnership solely according the \textit{lex loci celebrationis}. Although this would signal a departure from the current rules on the recognition of foreign marriages, this departure can be suitably justified due to the scarcity of the institution of registered partnerships.\textsuperscript{184} If one begins to test the essential validity of foreign registered partnerships according to the \textit{lex domicilii} or the «intended home of the registered

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179 The public policy exception is listed in Article 6 of the Private International Law (Marriages) Act.


181 See above in Section III.A. It was in fact in relation to the recognition of a foreign marriage, that the crucial distinction between formal and essential validity was created in English law: \textit{Brook v Brook} (1861) 9 HL Cas 193, which concerned a Danish marriage celebrated between a domiciled Englishman and his deceased wife’s sister who was also domiciled in England. The marriage was legal by Danish law, but illegal at that date (1850) by English law.

182 For further explanation of the rationale behind the choice of law rules on essential validity see Section III.A.2.

183 Despite the fact that the majority of European Union countries now recognise some form of registered partnership, comparable institutions are virtually unknown outside the Western world.
partners», then one will encounter similar problems as one is expected to encounter in the choice of law rules for entering into a registered partnership in England. Although, a choice of law rule that mirrored the English or Scottish law in the field of marriage would be preferable, at this moment in time such a rule would be unsuitable in attempting to achieve legal certainty and avoid limping relationships.

By maintaining the distinction between formal and essential validity, the English and Scottish Governments would allow for a statutory amendment, if and when the institution of registered partnership gains more worldwide acknowledgment. Nonetheless, for the reasons outlined here and in Section III.A, at this moment in time recognition of foreign registered partnerships should be governed solely by the lex loci celebrationis, unless such recognition should be in violation of the public policy of the forum.185

IV. Conclusions

The ever-increasing number of jurisdictions to introduce forms of registered partnership increases the need and urgency for private international law rules to be developed. The three jurisdictions discussed in this article may well provide a good starting point for further research into the possibility of an international regulation in this field. Despite some commentators focus on the differences between the national systems, these systems show a strikingly similar trend and content, as was shown in Section II.C. Such similarity therefore provides one with a solid basis for the search for uniform private international law rules. The quest is now obviously on for the most appropriate rules for these situations. Should one apply the private international law on marriage mutatis mutandis? Are the issues raised by registered partnerships so fundamentally different from those raised by marriage, that recourse to the rules of marriage proves nothing more than a fruitless exercise? Should we begin to contemplate the creation of a separate private international law category for such relationships? From the information discussed in section III, it is clear that there limited unanimity is evident in certain fields, and less so in others. But despite the apparent differences and divergent attitudes in this field, it is nonetheless crucial that rules are promptly developed.

185 Such a rule is actually adopted with respect to marriage in a number of American states that follow the First Restatement on the Conflict of Laws (1934). According to the Second Restatement (1971) section 283(2) requires an exception if the marriage is not valid in the jurisdiction which has most interest in the marriage. The adoption of a choice of law which refers recognition entirely to the place of celebration has been criticised in the US by numerous commentators: H. BAADE, «Marriage and divorce in American conflicts of laws», Columbian Law Review, 1972, pp. 329.