

Happy ever after? The problems of terminating registered partnerships

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1. Introduction

The past few decades have been witness to a gradual turn in the tide in the fortunes of same-sex couples in Europe. At this moment in time, seven European Union member states (namely Belgium, Denmark, Finland, France, Germany, The Netherlands and Sweden) offer national, domestic forms of same-sex partnership regulation.¹ Some autonomous regions in Spain also offer limited protection (Aragon, Asturias, Balearic Islands, Catalonia, Madrid, Navarra and Valencia) and two other E.U. countries have proposals in preparation (United Kingdom and Luxembourg). Outside the E.U. the same trend can also be seen. Proposals (with varying degrees of success) have been or are being prepared in Switzerland, Liechtenstein, the Czech Republic and Latvia, thus following the development already made in Norway and Iceland.

Although, this mammoth achievement should never be underestimated, it is unfortunately not true to say that these registration schemes are the panacea to the problems of same-sex couples. Once registered, same-sex couples do not necessarily live "happily ever after". In the same way that relationships between opposite-sex couples break down, so too do those between couples of the same-sex. This paper will deal with the various termination procedures available in five European jurisdictions, namely Belgium, England and Wales, France, The Netherlands and Switzerland. The countries chosen differ in numerous features. Some are member states of the European Union whilst others are not; some countries have schemes which are already in force while in others the discussion is still ongoing; in some nations the registration scheme is open to couples of the opposite-sex as well as the same-sex and in others it is restricted to couples of the same-sex; in some jurisdictions the rights and responsibilities are almost identical to marriage and in others the schism between marriage and registration is vast. These differences and similarities will hopefully provide colour to the discussion and depth to the analysis.

2. Domestic legislation

2.1 Belgium

On the 23rd November 1998 the Belgian Government, amidst great discussion, introduced a new form of legal partnership recognition: the so-called "statutory cohabitation" (*wettelijke samenwoning* or *cohabitation légale*). The law entered into force on the 1st January 2000.² Although this form of non-marital registered relationship is much weaker in form and content than its Dutch, Swiss or English counterparts, one of the aims of the institution is to protect stable relationships and thus it deserves attention here when one discusses the consequences of non-marital registered relationships. The four methods of

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¹ In some countries, namely Belgium, France and The Netherlands, this is also extended to opposite-sex couples.

² Royal Decree, 14th December 1999, *Belgisch Staatsblad* 23rd December 1999.

termination enumerated in Article 1476(2) of the Belgian Civil Code will be discussed in this section.

2.1.1 *Entry into marriage*

According to Article 1476(2), a statutory cohabitation is brought to an end when either one or both of the parties enters into a marriage, whether with the other party to the statutory cohabitation or with a third party. The statutory cohabitation is terminated by operation of law and occurs at the moment of celebration of the marriage.³ As such the statutory cohabitation poses no obstacle to enter into marriage. It was seen to be unnecessary and superfluous for a couple already in a statutory cohabitation, to first end their statutory cohabitation before celebrating a marriage.

2.1.2 *Death or Presumed Death*

Article 1476(2) also provides for the termination of a statutory cohabitation by the death of a statutory cohabitee, along similar lines to the dissolution of a marriage.⁴ The date of death is thus recorded as the date the statutory cohabitation is terminated.⁵ It should be noted that according to Belgian law, the absence of one of the spouses never leads to the termination of the marriage.⁶ This rule has consequently been maintained for statutory cohabitees. Such a rule prevents a spouse or statutory cohabitee from remarrying or entering into another statutory cohabitation. However, if this nonetheless happens and a bigamous relationship is entered into, then only the absent spouse or statutory cohabitee is allowed to ask for an annulment of the second marriage or statutory cohabitation.⁷

2.1.3 *Joint Agreement to Terminate*

If the statutory cohabitation is terminated by joint declaration, this joint declaration must be handed to the Registrar of Births, Deaths and Marriages in the municipality where both parties have their common residence, or if the parties do not have a common domicile then with the Registrar of the municipality where one of them has their domicile.⁸ If the latter occurs, then the Registrar to whom the declaration is handed must send a signed letter of notification to the Registrar of the municipality of the other party within eight days.

The joint declaration must comply with certain conditions: the document must state the date of the declaration; the first name, surname, as well as the place and date of birth of both parties; the signature of both parties; the residence of both parties; a statement that the parties wish to end their statutory cohabitation. No reason need be given on the declaration as to the need to terminate the partnership.

2.1.4 *Unilateral declaration to terminate*

Either one of the parties is entitled to end the statutory cohabitation unilaterally.⁹ This declaration must be delivered to the Registrar of Births, Deaths and Marriages of the common domicile of parties or if the parties do not have a common domicile, to the Registrar of one of their domiciles. The Registrar must give notice by means of a bailiff's instrument to the other party within eight days. He or she must also inform the Registrar of the domicile of the other party. The formal requirements are the same as those for the

³ P. Senaevé, "De weetelijke samenwoning en het geregistreerd partnerschap in het Belgisch recht" (1998) 11 *Tijdschrift voor Familie- en Jeugdrecht* 254 at 257.

⁴ Article 227, Belgian Civil Code elucidates the same rule for the ending of a marriage.

⁵ P. Senaevé, *Compendium van het Personen- en Familierecht. Deel 3* (2003, Acco, Leuven, 6th edition) p.218.

⁶ P. Senaevé, *Compendium van het Personen- en Familierecht. Deel 1* (2003, Acco, Leuven, 6th edition) p.44.

⁷ By analogy from P. Senaevé, *Compendium van het Personen- en Familierecht. Deel 1* (2003, Acco, Leuven, 6th Edition) p.44.

⁸ Article 1476(2)(3), Belgian Civil Code.

⁹ P. Senaevé, "De wettelijke samenwoning en het geregistreerd partnerschap in het Belgisch recht" (1998) 11 *Tijdschrift voor Familie- en Jeugdrecht* 254 at 257.

joint declaration, as stated above. After the termination of statutory cohabitation either by means of a joint or unilateral declaration, there is no provision for maintenance to be paid by one cohabitant to the other, even if this is necessary and irrespective of the length of the statutory cohabitation.¹⁰

2.2 England and Wales¹¹

The new civil partnership registration scheme in England and Wales proposes to introduce dissolution arrangements for registered partnerships broadly similar to those required to bring a marriage to an end by decree of divorce.¹² The English Government believes that the procedure for dissolution of a registered partnership should be court based and that partners should have to make a formal application to the court to commence proceedings.¹³ The partner applying for dissolution of the partnership will have to show that the registered partnership has irretrievably broken down before the court will make an order for the dissolution of the partnership.¹⁴

In fact, according to the Government proposal, the grounds for dissolution would be exactly the same as those currently available in the divorce procedure, namely: unreasonable behaviour, *i.e.* behaviour of any kind that the applicant could not reasonably be expected to continue living with their partner,¹⁵ or the fact that the parties had been separated for a period of either two years (with the consent of the other party)¹⁶ or five years (without such consent).¹⁷ An interesting point is the absence of reference to sections 2(1)(a) and 2(1)(c) of the Matrimonial Causes Act 1973. These sections deal with the grounds of adultery and desertion. Adultery may not be relied upon by itself; it must be supported with evidence that the petitioner finds it intolerable to live with the respondent.¹⁸ The absence of such a ground is questionable since it gives one the impression that adultery within registered partnerships is acceptable, thereby undermining the significance of the relationship, in stark contradiction to the proposed aims of the legislator.¹⁹ "In the response to the consultation procedure, the Government has now decided to retract its decision to exclude desertion as a ground for termination of the registered partnership. A decision, which this author welcomes in terms of the equality that this provides with respect to married couples.

The absence of a ground for desertion is also somewhat perplexing. In the context of divorce, the petitioner may show that the respondent has deserted him or her for a continuous period of at least two years immediately preceding the presentation of the petition. Desertion is understood as the unjustifiable withdrawal from cohabitation without the consent of the other spouse and with the intention of remaining separated permanently. Perhaps the absence of this ground stems from the fact that the ground is rarely used nowadays since petitioners normally opt for a divorce on the ground of two

¹⁰ P. Senaev, *Compendium van het Personen- en Familierecht. Deel 3* (2003, Acco, Leuven, 6th edition) p.218.

¹¹ Reference in this paper will only be made to the jurisdiction of England and Wales. Scotland has recently published a consultation paper entitled "Civil Partnership Registration. A Legal Status for Committed Same-Sex Couples in Scotland" (2003, Edinburgh, Scottish Executive).

¹² One must here talk of England and Wales as the jurisdiction to be discussed, since the British Government has no competency to decide for Scotland and Northern Ireland on issues in this field.

¹³ Women and Equality Unit, "Civil Partnership. A framework for the legal recognition of same-sex couples" (June 2003), §5.2, p.27

¹⁴ This is already the case for divorces: section 1(1) Matrimonial Causes Act 1973.

¹⁵ Section 1(2)(b) Matrimonial Causes Act 1973.

¹⁶ Section 1(2)(d) Matrimonial Causes Act 1973.

¹⁷ Section 1(2)(e) Matrimonial Causes Act 1973.

¹⁸ N. Lowe and G. Douglas, "Bromley's Family Law" (1998, Butterworths, London, 9th Edition) p.228.

¹⁹ "It [the registration scheme] would provide for the legal recognition of same-sex partners and give legitimacy to those in, or wishing to enter into, independent, same-sex couple relationships that are intended to be permanent." §1.2, p.13, Women and Equality Unit, "Civil Partnership. A framework for the legal recognition of same-sex couples" (June 2003).

years separation.²⁰ In the responses to the consultation process, the Government has maintained its decision to exclude adultery from the grounds of termination open to registered partners. In response to the question why this has been done, the Department of Trade and Industry replied,

Adultery has a specific meaning within the context of heterosexual relationships and it would not be possible nor desirable to read this across to same-sex civil partnerships. The conduct of a civil partner who is sexually unfaithful is as much a form of behaviour as any other. Whether it amounted to unreasonable behaviour on which dissolution proceedings could be grounded would be a matter for individual dissolution proceedings.²¹

Although the current author is not in favour of adultery as a ground for the termination of a marriage, it is argued that if this *is still* a ground for the dissolution of marriage, then this should also be a ground for the dissolution of a civil partnership. The absence of such a ground gives an incorrect message to the general population, that such behaviour is acceptable in a civil partnership and not in a marriage. If such behaviour can be deemed to fall within the boundaries of unreasonable behaviour, then why has this also not been done in the field of divorce?

Other similarities are also evident if one compares and contrasts the dissolution procedure for marriage and the proposed registered partnership scheme.²² It is stated that, in accordance with the Government's intention of "supporting stable relationships", no application for an order for dissolution of a partnership would be allowed until at least one year had passed since the partnership was originally registered.²³ A judicial separation procedure would also be available. Judicial separation was intended to relieve the petitioner of the duty to cohabit with the respondent, even though the parties remained husband and wife. A similar scheme is proposed for registered partnership, whereby if the parties have fulfilled the requirements for an order for dissolution of a partnership, they would be allowed to apply for an order for separation.²⁴ This is in stark contrast to the absence of such a scheme in The Netherlands.²⁵

2.3 France

In 1999, France joined the ever-increasing list of countries to legislate for non-married cohabitants. The *pacte civil de solidarité* was the result of more than a decade of parliamentary debate and political activity. One of the principal objectives of the legislation was to provide a legislative instrument for the recognition of same-sex relations. Even though, the PACS has been opened to couples of opposite-sex, it has been remarked that this was only permitted to ease passage of the legislation through the French parliament.²⁶

One of the founding principles of the PACS is that of contractual liberty, namely the ability for the parties to end the contract at any time.²⁷ Although in principle this is true, the law does, nonetheless, prescribe time periods that must first be satisfied before the partnership can be dissolved.²⁸ In all cases of dissolution, the clerk of the district court

²⁰ N. Lowe and G. Douglas, "Bromley's Family Law" (1998, Butterworths, London, 9th Edition) p.229.

²¹ "Responses to the Civil Partnership. A framework for the legal recognition of same-sex couples" (2003, London, Department of Trade and Industry), p.36.

²² Similarities are also evident in the grounds for void and voidable marriages.

²³ See section 3(1) Matrimonial Causes Act 1973.

²⁴ §5.13, p.29, Women and Equality Unit, "Civil Partnership. A framework for the legal recognition of same-sex couples" (June 2003).

²⁵ See section 2.4.

²⁶ E. Steiner, "The spirit of the new French registered partnership law - promoting autonomy and pluralism or weakening marriage?" (2002) *Child and Family Law Quarterly* 1-14 at 1.

²⁷ J-L. Vivier, *Le pacte civil de solidarité. Un nouveau contrat* (2001, Paris, L'Harmattan) p.109.

²⁸ See Article 515(7)(3), French Civil Code.

registers the dissolution, but does not register the reason for the dissolution unless the PACS is ended by reason of the death of one or both of the partners.²⁹

2.3.1 *Death and presumption of death*

Upon the death of one of the partners, Article 515(7)(4) states that the PACS will be deemed to be ended. The surviving partner or any other interested party must provide the district court with a copy of the death certificate. Once the death certificate has been received and verified, the PACS will be deemed to have ended as of the date of death.³⁰ Articles 88-92, French Civil Code lay down general rules concerning the date upon which a person's death may be presumed or declared where the body cannot be found.³¹ In cases where death is certain but the body of the deceased cannot be found, or where a person has disappeared in or outside French territory in circumstances that were likely to imperil his or her life, then the *Procureur de la République* may judicially declare the death.³² Since these rules apply to the date upon which death is presumed to have taken place, they are equally applicable to those people joined by virtue of a PACS.

2.3.2 *Joint declaration to terminate*

Dissolution of the PACS can also be effected by means of a joint declaration. In this case, the joint declaration is deposited with the clerk of the district court of their common domicile.³³ If the partners live abroad then the declaration should be deposited with the French Embassy or French Consulate of the county in which they are domiciled.³⁴ It is important to note that the competent district court clerk is *not* the one who receives the declaration, as is the case if the parties wish to modify their PACS, but the clerk of the district court of their common domicile. The district court clerk who receives the declaration must send the declaration without delay to the competent district court clerk. If in fact he or she is the competent district court clerk, then the clerk should register the joint declaration immediately. As soon as the declaration is registered then the PACS is declared to be at an end.³⁵

2.3.3 *Unilateral declaration to terminate*

The end of the PACS can also be declared by one of the parties alone, without consultation with the other.³⁶ At first sight, this form of dissolution is a simple formality. The person who wishes to end the partnership simply informs the other of his or her intention to end the PACS. This declaration is made by means of a bailiff's instrument.³⁷ The PACS will then be deemed dissolved three months after the declaration has been received.³⁸

In justifying the constitutionality of this provision, the French Constitutional Court referred to Article 4 of the Declaration of the Rights of Man 1789. It stated that a private law contract for an undetermined period of time can be ended unilaterally by one or other of the contracting parties.³⁹ The court also considered that informing the co-contractor of this termination and the possibility of damages arising from a breach of the conditions of the termination should be guarantees of the principle of the immutability of a contract.⁴⁰

²⁹ Advice from the *Commission Nationale d'Informatique et des Libertés*, 25 November 1999.

³⁰ Article 515(7)(7)(3), French Civil Code.

³¹ This is extended by Article L-142(3), French Civil Aviation Code.

³² Article 88, French Civil Code.

³³ Article 515(7)(1), French Civil Code.

³⁴ J-F. Pillebout, *Le PACS. Pacte civil de solidarité* (2001, Pairs, Litec) p.79.

³⁵ Article 515(7)(7)(1), French Civil Code.

³⁶ Article 515(7)(2), French Civil Code.

³⁷ J-F. Pillebout, *Le PACS. Pacte civil de solidarité* (2000, Paris, Litec) p.82.

³⁸ Article 515(7)(7)(2), French Civil Code.

³⁹ French Constitutional Court, 9 November 1999, Decision N° 99-149, published in the Official Journal of 16 November 1999, §61.

⁴⁰ French Constitutional Court, 9 November 1999, Decision N° 99-149, published in the Official Journal of 16 November 1999, §§62 and 63.

2.3.4 Entry into marriage

The PACS may also be ended by marriage, by one or both of the parties to each other or third persons, in keeping with the principle of freedom of marriage.⁴¹ Accordingly, Article 515(7)(7)(3) states that the PACS will come to an immediate end, by operation of law, upon the solemnisation of the marriage. As was the case for Belgian law, this form of dissolution causes certain technical problems in the field of private international law.

2.3.5 Placement under guardianship

If one of the partners is placed under the permanent care of a guardian (*tutelle-guardianship*), the PACS can be brought to an end if the guardian, with the consent of the family court, makes a joint declaration with the other partner to such end.⁴² In the case where the guardian is absent, the guardianship judge may also declare the PACS to be at an end.

2.4 The Netherlands

The Dutch Civil Code is divided into eight books each dealing with a different area of private law. Book 1 deals with all issues related to family law, therefore including the conditions for entry into marriage, civil status, the statutory community of property, divorce and so forth. The Act of 5 July 1997 created the institution of registered partnership under a new Title 5^A in Book 1. The positioning of the institution of registered partnership in this book illustrates Parliament's intention to regard this as an institution akin to that of marriage; affecting family life and having consequences for one's civil status. This can also be seen if one examines the parliamentary history in relation to this proposal.⁴³

The termination of a registered partnership is governed by Articles 80c-80e, Book 1, Dutch Civil Code. Article 80c deals with the different ways a registered partnership can be ended. For the most part, these methods can be compared to those available to married couples.⁴⁴ The ending of a registered partnership also by operation of law ends the community of property existing between the parties.⁴⁵ Judicial separation, which is available to married couples who wish to draw their marriage to a close, is not available to registered partners.⁴⁶ This procedure is, generally speaking, only used by spouses who for religious reasons do not wish to divorce. Due to the fact that these reasons are not present in the case of registered partnerships, the legislature saw no reason to open up the possibility of such a judicial separation.⁴⁷

2.4.1 Death and presumption of death

Article 80c(a) and (b), Book 1, Dutch Civil Code provides for the termination of a registered partnership by the death or presumed death of a registered partner, along similar lines as the dissolution of a marriage.⁴⁸

2.4.2 Agreement to terminate

This form of dissolution does not require the parties to attend court. In such an agreement, Article 80c(c), Book 1, Dutch Civil Code requires that the parties declare that

⁴¹ Article 515(7)(3), French Civil Code.

⁴² Article 517(7)(2), French Civil Code.

⁴³ The following sections have kindly been reproduced with permission of Family Law from I. Sumner, "Transformers - Marriages in Disguise?" (2003) 1 *International Family Law* 15 at 18 *et seq.*

⁴⁴ Article 149, Book 1, Dutch Civil Code.

⁴⁵ Article 99, Book 1, Dutch Civil Code.

⁴⁶ For more detailed information on judicial separation see K. Boele-Woelki, O. Cherednychenko, L. Coenraad, "National report of the Netherlands" in K. Boele-Woelki, B. Braat, I. Sumner (eds.), *European family law in action. Volume 1: Grounds for divorce* (2003, Antwerp, Intersentia) p.121-126.

⁴⁷ A. Heida, *Gids geregistreerd partnerschap* (2000, Deventer, Kluwer) p.41.

⁴⁸ Articles 412-425, Book 1, Dutch Civil Code are therefore applicable to missing persons and Articles 426-430, Book 1, Dutch Civil Code are applicable to presumed dead persons.

their relationship has irretrievably broken down and that they wish to terminate it. The declaration must be delivered to the Registrar for Births, Deaths, Marriages and Registered Partnerships. It must be dated and signed by both parties and one or more lawyers or notaries. According to Article 80d(3), Book 1, Dutch Civil Code, the declaration referred to in Article 80c must be registered in the Registry of Births, Deaths, Marriages and Registered Partnerships within three months of the agreement being entered into.

Article 80(d) provides the necessary framework and explanation to accompany this separation procedure. This article stipulates that both partners must have agreed that the relationship has irretrievably broken down and that they wish to terminate the relationship. Furthermore, it is stated that the declaration *may* but not *must* deal with the following matters:⁴⁹

- a) maintenance payment for the support of the registered partner who lacks sufficient means to support himself, and cannot reasonably be expected to do so;
- b) which of the partners is to be the tenant of their main residence hitherto, or which of the partners shall be entitled to use the dwelling and its contents belonging to one or both of the partners, or which one or both of the partners enjoys use-rights, and for how long such entitlement is to continue;
- c) the division of any community entered into by the partners on the registration of partnership or the compensation agreed pursuant to the conditions in Title 8, Book 1 of the Dutch Civil Code.
- d) the equalisation or compensation of superannuation rights.

Several provisions that apply on the dissolution of a marriage are expressly provided to apply in the case of this form of dissolution.⁵⁰ However, a more noteworthy point of interest is those provisions that are not extended, which include:

- a) the power to refuse termination in the event that the entitlement of one partner to death benefits (in respect of the death of the other partner) would be lost or significantly reduced;⁵¹
- b) the power of the court to order maintenance of one partner by the other;⁵²
- c) the power of the parties to agree regarding maintenance, notably a number of protective provisions regarding termination;⁵³
- d) the power of the court to regulate the use of the former dwelling of the partners.⁵⁴

There has been very little, if any, research conducted in this area. Since a marriage cannot be terminated by agreement, there can be no comparison made to marriage. The legislature believed that since the parties are attempting to regulate their partnership termination themselves, the State should remain outside the negotiations. Therefore, it falls for the notary or lawyer to advise the parties as to the underlying problems.

Firstly, even though the above-mentioned provisions are not expressly stated to be applicable in the case of termination by agreement, can they still be used? Article 80c(3), Book 1 ensures that legal advice is a requirement for the validity of the declaration, which therefore indirectly guarantees the parties will have been advised of the legal consequences of including, as well as excluding, certain information in the declaration. If details such as those provided for in the above mentioned Articles are not regulated, then the parties must pay the consequences. It has been suggested that although Article 80d(2) does not expressly declare these provisions applicable, they may still be applicable.⁵⁵ However, it is the author's opinion that the Dutch judiciary would consider this

⁴⁹ Article 80d(1), Book 1, Dutch Civil Code.

⁵⁰ Article 80d(2), Book 1 which states that Articles 155, 159(1) and (3), 159a, 160 and 164, Book 1, Dutch Civil Code are all applicable.

⁵¹ Article 153, Book 1, Dutch Civil Code.

⁵² Article 157, Book 1, Dutch Civil Code.

⁵³ Article 158, Book 1, Dutch Civil Code.

⁵⁴ Article 165, Book 1, Dutch Civil Code.

⁵⁵ C. Forder, "National report on the Netherlands" (15 March 1999, Den Haag, Fifth European Conference on Family Law) p. 22.

interpretation to be a step too far, especially since Article 80d(2) expressly states that some provisions and not others are applicable; even more so when one analyses Article 80e(1), which expressly states these provisions are to be extended to the dissolution upon request of a registered partnership.

Secondly, can these provisions be used after the conclusion of a termination agreement in a subsequent case before the court? It is proposed here to take the issue of maintenance as an example. There are three possible problematic scenarios.

(a) *The parties draft no maintenance provision:* Can one of the parties at a later date request that maintenance be paid even though it was not one of the provisions laid down in the agreement? Some authors believe there nothing would prevent a future incorporation of a maintenance provision that is not initially drafted into a termination agreement.⁵⁶ However, it is the current author's opinion that the application of Article 157, Book 1, Dutch Civil Code cannot be used *at all* in relation to the agreement to terminate since Article 80d(3) does not extend its applicable scope to these agreements.

(b) *The parties agree a provision on maintenance but without stipulating a time period:* According to Article 157, Book 1, Dutch Civil Code, maintenance obligations are limited to a period of twelve years from the date of the registration of the termination. However, once again, it is submitted that this provision is not applicable and therefore if no time period is stipulated, the parties are unable to rely on Article 157 in enforcing a twelve-year limitation clause.

(c) *The parties agree that no maintenance will be paid:* If this is the case, it seems that all commentators, including the present author, are in agreement that this cannot be changed subsequently at a later date.⁵⁷

2.4.3 Dissolution on request

A dissolution order can be requested by either one or both of the partners and is effective when the court's judgment is recorded in the Register of Births, Deaths, Marriages and Registered Partnerships.⁵⁸ Unlike the problems stated above with the application of Article 80d, Article 80e declares that all the provisions related to a separation by divorce are applicable to a separation by means of court order.⁵⁹ If one or both of the parties do not request that the judgment be recorded within six months of the final judgment, then the judgment will from that date onwards be of no effect.⁶⁰

According to Article 80f, Book 1, Dutch Civil Code special provision is made for subsequent registrations between the same parties. This form of "reparation-registration" revives all the consequences of the registration and treats the partnership as if there had been no termination of the registered partnership.⁶¹ This was to be found in Article 80e(3), but by virtue of a statutory change this has now been moved to form a new Article 80f.⁶² This article provides that if parties whose registered partnership has been terminated enter into a registered partnership or a marriage with one another, then all the consequences are revived. All transactions entered into between the termination of the old registered partnership and the entry into the new registered partnership/marriage, are considered to have taken place at the time of the transaction (right word?).

Prior to 2002, a problem arose with such a presumption in relation to children. As already stated one major difference between marriage and registered partnership lay in the

⁵⁶ S.F.W. Wortmann, "Rechtsontwikkelingen in het personen- en familierecht: flitsseparaties en verrekenbedingen" (2002) 6477 *Weekblad voor Privaatrecht, Notariaat en Registratie* 165-172.

⁵⁷ I. Sumner, "Transformers: Marriages in disguise?" (2003) 1 *International Family Law* 15 at 18.

⁵⁸ Article 80e(2), Book 1, Dutch Civil Code.

⁵⁹ Article 80e(1), Book 1 states that Articles 151, 153, 155, 157-160, 164, 165, Book 1, Dutch Civil Code are all applicable.

⁶⁰ Article 163(3), Book 1, Dutch Civil Code.

⁶¹ Article 80f, Book 1, Dutch Civil Code.

⁶² Wet van 13 december 2000 tot wijziging van de regeling in Boek 1 van het Burgerlijk Wetboek met betrekking tot het naamrecht, de voorkoming van schijnhuwelijken en het tijdstip van de totstandkoming van de scheiding van tafel en bed alsmede van enige andere wetten. *Staatsblad*, 2001, No. 11.

relationship imposed between parties and children. Prior to 2002, if a couple married, had children, divorced and then remarried, Article 253, Book 1 stated that the parental authority rights were automatically revived. If the couple registered, had children, separated and then married, parental authority rights were not imposed. Since the passing of the Shared Custody and Guardianship Act 2002,⁶³ this situation has been rectified and is the couple marry having entered a registered partnership (or they get reregistered), the duties and responsibilities which they had towards the child(ren) before the dissolution are reinstated. As stated by Forder, this is entirely logical and stems from the fact that a registered partnership does not grant such parental authority rights in the first place.

2.4.4 Conversion into a marriage

The passing of the same-sex marriage legislation created a difficult question for the Dutch Government: How should one regulate for those same-sex couples who have already registered their relationship but wish to convert their partnership into a marriage, since the opportunity was not available when they registered? The Dutch Government thought that it was unwise to force same-sex registered partners to first terminate their registered partnership before they entered into a same-sex marriage and consequently introduced a conversion procedure. However, numerous questions were raised by political factions in the Second Chamber during the discussion surrounding the Bill. The *Partij voor Vrijheid en Democratie* (VVD) questioned whether it would not be easier if all registered partnerships were simply transferred to the marriage register. The *Gereformeerd Politiek Verbond* (GPV) and the *Reformatische Politieke Federatie* (RPF) questioned whether the Government had devoted enough time to the question of those couples who would wish to convert their marriage into a registered partnership, and felt that the ability to convert a marriage into a registered partnership would undermine and avoid the legal provisions of divorce.⁶⁴

In response to the question posed by the VVD, the Government believed that the introduction of an automatic conversion system would necessarily include costs, which are avoided by a voluntarily system.⁶⁵ In response to the RPF and GPV questions, the Government gave extended and detailed responses. It was reiterated that the Government had chosen a simple method for parties to convert their relationships from one institution to the other. Without such a system, registered partners would have to first terminate their partnership before entering into a marriage. The Government admitted that the system of conversion was equally open to couples of the same-sex and opposite-sex and also open in both directions.⁶⁶ It was also admitted that the dissolution procedure associated with the registered partnership is easier under the provisions of Article 80d. However, the termination of a registered partnership using this method requires that both partners are in agreement.

The procedure itself, as laid down in Article 80g, states that if two people have notified the Registrar of Births, Deaths, Marriages and Registered Partnerships that they wish their registered partnership to be converted into a marriage, the Registrar of the residency of one of the parties may draw up an instrument of conversion. It would seem that this provides the Registrar with a discretionary competence to refuse to draw up such a document. However that is not the case. The Registrar is only allowed to refuse to draw up such an instrument on the grounds listed in Article 18b.⁶⁷ The future spouses must live in the Netherlands, although not necessarily together or one of them must possess Dutch

⁶³ Act of 4 October 2001, *Staatsblad*, 2001, No. 468.

⁶⁴ *Parliamentary proceedings, Second Chamber*, 1999-2000, 26672, No. 4 55.

⁶⁵ *Parliamentary proceedings, Second Chamber*, 1999-2000, 26672, No. 4 55.

⁶⁶ The conversion of a registered partnership into a marriage and vice-versa.

⁶⁷ If the Registrar considers the documents inadequate, the party fails to submit the documents or it is contrary to Dutch public policy, for the precise wording of Article 18b see I. Sumner and H. Warendorf, *Family Law Legislation of The Netherlands. A translation including Book 1 of the Dutch Civil Code, procedural and transitional statutory provisions and private international law legislation* (2003, Antwerp, Intersentia).

nationality.⁶⁸ In the latter case, the conversion must take place at the Registry in The Hague. It is also stated that the conversion shall constitute a termination of the registered partnership and cause the marriage to commence on the date of drawing up the deed of transformation in the register of marriages. Importantly, the provision also states that the conversion does not change any pre-existing parentage relationship with children born prior to the conversion.⁶⁹ The mirror procedure to convert a marriage into a registered partnership is elucidated in Article 77, Book 1, Dutch Civil Code.

One would imagine that the issue of conversion would have been heavily discussed in both academic and legislative circles. However, it appears that the issues surrounding the conversion procedure were not thoroughly thought through and many consequential problems now need to be addressed.⁷⁰ For example, imagine that a woman in a heterosexual marriage becomes pregnant. The couple decide they would like to convert their marriage into a registered partnership. After the conversion is complete, the child is born. This has the consequence that, assuming the biological father has not recognised the child before the birth, the male partner (and biological father of the child) does not acquire automatic parental authority over the child, even though the child was conceived during a marriage and the same parties are still connected in a state-regulated institution which is equated in all but a few respects to that of marriage. Is it really justifiable that the father must then seek parental authority under the Article 252 procedure?⁷¹ These issues have rarely been addressed in Dutch literature, and it is the author's opinion that this legal loophole needs to be tightened, or at the very least addressed, by the legislature.⁷²

2.5 Switzerland

On the 1st January 2000, new legislation relating to marriage and divorce came into force in Switzerland.⁷³ The legislation overhauled the existing provisions of the Swiss Civil Code, which dated from the Swiss Civil Code of 1907 as amended by subsequent Federal Statutes.⁷⁴ Extensive reference will be made to the new legislation, since it provides an excellent example of how reference has been made to existing marriage legislation in a "pick 'n' mix" fashion.

⁶⁸ S.F.W. Wortmann, "Rechtsontwikkelingen in het personen- en familierecht: flitsscheidingen en verrekenbedigen" (2002) 6477 *Weekblad voor Privaatrecht, Notariaat en Registratie* 165-172.

⁶⁹ Article 80g(3), Book 1, Dutch Civil Code.

⁷⁰ See C. Forder, "Spiegel matrimoniael" (1999) 32 *Nederlandse Juristenblad* 1559-1560 and S.F.M. Wortmann, "Rechtsontwikkelingen in het personen- en familierecht: flitsscheidingen en verrekenbedigen" (2002) 6477 *Weekblad voor Privaatrecht, Notariaat en Registratie* 165-172; B.E. Reinhartz, "Flitsscheidingen in Nederlands-Duits verhoudingen" in H.F.G. Lemarie and P. Vlas (eds.), *Liber Amicorum I.S. Joppe* (2002, Deventer, Kluwer) p.155-166.

⁷¹ Before being able to use the Article 252 procedure, the male partner and biological father must first recognise the child in accordance with Article 204, Book 1, Dutch Civil Code. He must apply under Article 253c, Book 1, Dutch Civil Code but is not regarded as the legal father until he has recognised the child. The Article 252 procedure requires both the legal parents of the child to register together with a county court registrar. It requires no court intervention and the Registrar has only limited competency and cannot determine whether the parental authority order is in the best interests of the child. For more information see W. Schrama, "Reforms in Dutch family law during the course of 2001: Increased pluriformity and complexity" in A. Bainham (ed), *The international survey of family law 2002 edition* (2002, London, Family Law) p.278-282.

⁷² See recently, K. Boele-Woelki, "De administratieve echtscheiding is een feit:" (2003) 6 *Tijdschrift voor Familie- en Jeugdrecht* 121.

⁷³ Federal Statute of 26 June 1998 (*Federal Gazette*, 1996, I, 1).

⁷⁴ Federal Statute of 30 June 1972 (*Federal Gazette*, 1971, I, 1200); Federal Statute of 25 June 1976 (*Federal Gazette*, 1974, II, 1); Federal Statute of 29 September 1952 (*Systematic Collection of Swiss Law*, No. 141.0); Federal Statute of 5 October 1984 (*Federal Gazette*, 1989, II, 1191). For further history see K. Boele-Woelki, B. Braat and I. Sumner (eds.) *European family law in action. Volume I: Grounds for divorce* (2003, Antwerp, Intersentia) p.53.

2.5.1 Consensual dissolution

Although the possibility of consensual dissolution is offered to registered partners as well as married couples, the provisions differ remarkably in their wording, scope and legal effect. Articles 111 and 112, Swiss Civil Code regulate the joint application for divorce under Swiss law. If the spouses jointly request a divorce and agree on all the effects that the divorce will have, the court must hear them separately and jointly.⁷⁵ If the court is satisfied that the agreement is exhaustive, clear and neither contrary to the law nor manifestly unreasonable,⁷⁶ then upon a end of two month period of reflection, if the parties still wish to divorce, the court pronounces the divorce and approves the agreement.⁷⁷

Registered partners who wish to dissolve their partnership by means of a common request must likewise go before a judge.⁷⁸ The Code is absent on whether they are to heard separately or jointly. Article 29(1) also differs from Article 111(1) in that it is not only applicable for those couples who wish to dissolve their partnership and have agreed upon the legal effects of the termination, but also to those couples who have no such agreement.⁷⁹ The equivalent provision to Article 112 is provided for in Article 29(3), Swiss Civil Code, which states,

Les partenaires peuvent demander au juge par requête commune qu'il règle, dans le jugement qui prononce la dissolution, les effets de la dissolution sur lesquels subsiste un désaccord.

No period of reflection is imposed on the partners and nothing is mentioned in relation to a second hearing.⁸⁰ If one considers the recent introduction of the new marriage and divorce legislation, it is disappointing that the provisions on the same topic with respect to registered partnership are so poorly phrased and leave doubt as to the intentions of Parliament.

2.5.2 Non-consensual dissolution

Article 30 allows for the unilateral demand by one of the partners to dissolve the registered partnership. Such a unilateral demand may only be made if at the time when the demand is made, the partners had been in reality separated for a period of at least one year. A number of issues deserve discussion. If one of the spouses to a marriage wishes to make a unilateral demand, they have been separated for a minimum period of four years,⁸¹ or due to grounds that are not the responsibility of the petitioning spouse, the continuation of the marriage can no longer be expected.⁸² Since Article 30 is silent on the question of the criteria required for the submission of such a request, can one assume that no ground of unreasonableness is necessary? Or since the period of separation is less than that proposed for marriage, must one assume that in all cases, the petitioning party must prove unreasonable behaviour? It is the author's believe that a simple one-year period of separation is sufficient to allow a unilateral non-consensual dissolution of the registered partnership. A position, which it is argued, draws away from the original intentions of Parliament in emphasising the seriousness of the established bond.

⁷⁵ Article 111(1), Swiss Civil Code.

⁷⁶ Article 140(2), Swiss Civil Code.

⁷⁷ Article 111(2), Swiss Civil Code.

⁷⁸ Article 29(1), Swiss Civil Code.

⁷⁹ With respect to marriage, this is separately regulated in Article 112, Swiss Civil Code.

⁸⁰ See Article 111(3), Swiss Civil Code in relation to marriage.

⁸¹ Article 114, Swiss Civil Code.

⁸² Article 115, Swiss Civil Code. This is akin to a ground of unreasonable behaviour: H. Hausheer, "Swiss National Report" in K. Boele-Woelki, B. Braat and I. Sumner (eds.), *European family law in action. Volume I: Grounds for divorce* (2003, Antwerp, Intersentia).

3. Conclusions

It is clear from this brief overview that not only are the current registered partnerships schemes in these five countries extremely divergent with respect to their entry requirements, but that the associated termination procedures provide yet another layer of complexity. The easiness with which some of schemes can be ended, namely Belgium and France, is unfortunate. It is argued that if such fast-track schemes are not available to married couples then they should also be removed from the field of registered partnership. Registered partnership should not be seen as an easy way out: "easily entered, easily ended". In order to achieve the aims which all of the Governments have laid out in their proposals (for the protection of same-sex couples and the reduction in the amount of discrimination faced by such couples), the termination procedure is crucial is delivering a crucial signal concerning the stability of such partnerships. A partnership that can be entered into one day and ended the next will, obviously, be seen as less stable than one that requires a deliberate decision on the part of the parties before entering into the termination procedure. It is not this author's opinion that termination procedures should necessarily be difficult, tedious and lengthy. On the contrary, if the parties are in agreement, there is a valid argument for the introduction of an administrative procedure.⁸³ However, the procedures for registered partnership and marriage should be at the very least similar, if not identical. Otherwise can one really speak of equalisation of rights of same-sex couples with those of opposite-sex couples?

⁸³ See for example the arguments put forward in I. Sumner "Transformers: Marriages in Disguise?" (2003) *International Family Law* 15.