

Transformers – Marriages In Disguise?

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In 1998, The Netherlands became the fifth European country to introduce a form of registered partnership.¹ Some 3 years later it also became the first country in the world to open up civil marriage to couples of the same sex.² Although the similarities between these two institutions cannot be underestimated, it is important that these two forms of regulated partnership are analysed as distinct institutions. Each has its own place in the Civil Code,³ diverse terminology, different methods of termination and varied effects with respect to children.⁴ Perhaps the most important and obvious distinction between the two institutions is in their history. Marriage has played a noteworthy role in European societies for hundreds of years, forming the 'cement of society'⁵ and an 'emblem of continuity and reproduction of the race'.⁶ Registered partnership, on the other hand, is still relatively innovative, with only limited international recognition and acceptance.⁷ These distinctions and subtle differences are no more clearly seen than in the possibility under Dutch law to convert a marriage into a registered partnership and vice-versa. If registered partnership was regarded as a replica of marriage, then why would couples wish to convert their marriage into a registered partnership? And similarly if both institutions were regarded by the Government as identical legal institutions, then why would the Government have introduced a conversion procedure in the first place?

This article will deal specifically with the provisions for the conversion of a marriage into a registered partnership. It is hoped to show that the ability to end one's registered partnership after the conversion procedure by means of an out-of-court agreement can be regarded as one of the driving forces behind the recent quadrupling in the number of opposite-sex partnership registrations.⁸ The associated private international law questions will also be addressed. It will be submitted that the combination of an instrument of conversion and a certificate certifying that a registered partnership is at an end, should be deemed to fall within the applicable scope of the Council Regulation (EC) 1347/2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses (2000) OJ L 160/19.⁹

History of Registered Partnership

The introduction of registered partnership in The Netherlands cannot be seen as a purely legislative development. It must be placed within the social context from which it derives its source. Developments and socio-familial trends beginning in the 1960s and continuing until the 1990s brought new forms of family life to the forefront of the political debate.¹⁰ The increased number of childless, unmarried couples facilitated the increasing social acceptance of extra-

marital cohabitation. As homosexuality itself was no longer seen as deviant, not only did heterosexual extra-marital cohabitation become more commonplace, but homosexual relationships also became more acceptable.¹¹ Furthermore, marriage itself was no longer considered to be concluded for life and the divorce rate in The Netherlands increased to one in three of all marriages. At the same time, an important international development also took root. The European Court of Human Rights recognised that family life, as laid down in Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, related not only to marital family life but also to de facto family life.¹² This recognition was not really a social change but recognition of the aforementioned developments.¹³

These developments were witnessed across the Western world and culminated in the introduction of homosexual registration schemes throughout Scandinavia. In 1989, Denmark introduced an innovative legal regime restricted to couples of the same sex:¹⁴ 'registered partnership'.¹⁵ This was later transplanted into Norwegian,¹⁶ Swedish¹⁷ and Icelandic legislation.¹⁸ In 1998, The Netherlands followed suit and enacted partnership legislation of its own.

The legal background to such legislative steps was not smooth. Two cases brought these issues to the forefront of judicial awareness. The first (involving two women) initially decided by a district court in Rotterdam,¹⁹ followed by an intermediate appellate court in The Hague,²⁰ eventually went on appeal to the Supreme Court of The Netherlands, the Hoge Raad, and was decided in October 1990.²¹ The second case (involving two men) was decided by the district court in Amsterdam in 1989.²²

In summary, the Supreme Court held that it was not discriminatory to deny homosexuals the possibility of marriage,²³ but made no ruling on whether the denial of certain legal effects of marriage was discriminatory.²⁴ The court suggested action by the legislature, which was duly heeded and led to the formation of the First Kortmann Committee. The Committee reported on the 20 December 1991 that a registration scheme outside of marriage should be instituted for homosexual and heterosexual couples, as well as for couples within the prohibited degrees of marriage. Nonetheless, the Bill submitted to Parliament in 1994 did not provide for the registration of heterosexuals.²⁵ Instead it limited registration to homosexuals and those within the prohibited degrees of marriage. However, in view of an influential memorandum published in September 1995,²⁶ the possibility of registering was again opened to both heterosexual and homosexual couples (although not to couples within the prohibited degrees). It was hoped that this alteration would meet complaints raised principally from the Dutch Homosexual Movement (COC) that registered partnership was, in essence, a

second-class marriage.²⁷

At the same time as the First Kortmann Committee was discussing introducing a system of national registration, municipalities all over The Netherlands were having to deal with the problem first hand. Under Dutch law, municipalities are allowed to maintain an unlimited number of registers. Same-gender couples began at the start of the 1990s to begin to ask for their relationships to be registered within such parameters. In 1991, the first same-sex relationship was registered in the town of Deventer,²⁸ which became one of more than 130 municipalities in the following years to establish such a register.

The pressure to allow homosexuals to marry in the same manner as heterosexuals continued to intensify and led, in April 1996, to the adoption of non-binding resolutions which demanded the introduction of same-sex marriage.²⁹ These resolutions in turn led to the appointment on the 28 May 1996 of the Second Kortmann Committee to investigate whether marriage should be made available to homosexuals.³⁰ In the meantime, passage of the Registered Partnership Bill continued and was eventually enacted in 1997.³¹

History of Same-Sex Marriage Legislation

It was evident by 1997 that almost all the rights open to homosexuals and heterosexuals were identical. However, this fact did not silence the call for same-sex marriage since a meaningful distinction remained – marriage itself was intrinsically heterosexual.³² The introduction of registered partnership served to highlight the legal diversity between homosexual registration and heterosexual marriage. The perceived inequality in social status between the two institutions prevented registered partnership from becoming a homosexual version of marriage. Calls for full equality were strengthened with the publication of the Second Kortmann Committee Report only a few months after the enactment of the Registered Partnership Act.

The Committee was divided on the question of allowing homosexuals to marry. All members were, however, agreed that no more than two institutions should co-exist. Besides the institution of marriage there should either be registered partnership or a modified form of marriage for which same-sex partners would be eligible.³³ The majority of the Committee opted for the latter, allowing a new form of marriage with no legal effects regarding the parentage of children. The minority saw no indication of discrimination in the retention of registered partnership, since they viewed heterosexual and homosexual partnerships as ‘different but equal’.

On the 6 February 1998, the Cabinet endorsed the minority’s view.³⁴ However, after the general election in May of the same year and the subsequent renewal of the Partij van de Arbeid (Labour Party – PvdA), Volkspartij voor Vrijheid en Democratie (People’s Party for Freedom and Democracy – VVD) and Democraten ‘66 (Democrats ‘66 – D66) coalition, with the notable absence of the Christen Democratisch Appel (Christian Democrats – CDA), an agreement was reached that the marriage laws would be amended. This

would enable homosexuals to marry in accordance with the recommendation of the majority of the Committee.³⁵

The interest of heterosexual couples in registered partnership indicated that there was, at least socially, a significant difference between the two institutions. According to Scherf’s survey the reasons given by heterosexual couples for preferring partnership to marriage, not only include ‘aversion to marriage as a traditional institution’ but also that ‘registered partnership is less binding than marriage’ and that it can be arranged ‘more quickly and at a lesser cost’.³⁶

On 8 July 1999, two proposed laws were submitted to the Second Chamber, one concerning the opening up of same-sex marriage³⁷ and the other concerning the opening up of adoption to same-sex couples.³⁸ Both bills were enacted on 14 January 2001,³⁹ after gaining Royal Assent on 21 December 2000.⁴⁰ The law became effective on the 1 April 2001, after the last political obstacles were removed by the Same Sex Marriage and Adoption Adjustment Act.⁴¹ Over 3,600 such marriages have been celebrated since the introduction of the legislation.⁴²

The Legal Conversion

Parliamentary History

The passing of the same-sex marriage legislation created a difficult question for the Government: how should one regulate for those homosexual couples who have already registered their relationship under the registered partnership scheme but instead want to make use of the newly instituted marriage legislation, since this opportunity was not available to them when they registered? The Government thought that it was injudicious to force homosexual registered partners to first end their registered partnership before they entered into a marriage and consequently introduced a conversion procedure. Numerous questions were evidently raised by political factions in the Second Chamber during the discussion surrounding the Bill. The VVD questioned whether it would not be easier if all registered partnerships were simply transferred to the marriage register. Some politicians believed that since both institutions were almost identical in terms of legal rights, duties and responsibilities, they should be treated as legally identical institutions. This would obviously eventually have the ensuing effect of abolishing one of the systems. The Gereformeerd Politiek Verbond (Reformed Political Party – GPV) and the Reformatorische Politieke Federatie (Reformed Political Federation – 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 relating to divorce.⁴³

In response to the question posed by the VVD, the Government believed that the introduction of an automatic conversion system would necessarily include associated costs, which would be avoided with the introduction of a voluntarily system of registration.⁴⁴ 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 end 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.⁴⁵ It was also admitted that the dissolution procedure available to registered partners allowed for a straightforward dissolution procedure under Art 80d, Book 1 of the Dutch Civil Code (explained below). However, the termination of a registered partnership using this method still requires both partners to be in agreement with one another concerning the termination of the partnership.

The Procedure Itself

The procedure itself, as laid down in Art 77a, Book 1 of the Dutch Civil Code, states that if two people have notified the Registrar of Births, Deaths, Marriages and Registered Partnerships (hereafter referred to as 'the Registrar') that they wish their registered partnership to be transformed into a marriage, the Registrar of the residency of one of the parties *may* draw up an instrument of conversion.⁴⁶ 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 Art 18b of Book 1 of the Dutch Civil Code.⁴⁷ One of the future spouses must live in The Netherlands, and the spouses need not necessarily live together,⁴⁸ or alternatively one of them must possess Dutch nationality.⁴⁹ In the latter case, the conversion must take place at the Registry of Births, Deaths, Marriages and Registered Partnerships in The Hague. It is also stated that the conversion shall constitute a termination of the marriage and cause the registered partnership to commence on the date of drawing up the deed of conversion in the register of marriages. Importantly, the provision also states that the conversion does not change any pre-existing parentage with children born prior to the conversion.⁵⁰ The mirror procedure to convert a registered partnership into a marriage is elucidated in Art 80g, Book 1 of the 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.⁵¹ For example, imagine that a woman in a heterosexual marriage becomes pregnant. The couple decide that 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 father has not recognised the child before the birth, the father of the child acquires no automatic paternity rights 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 Art 252 procedure?⁵² 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.

The possibility of such a conversion procedure allows for a married couple (whether of the same or different sex) to effectively divorce, if both parties are in agreement, within 24 hours. The question rises whether this form of dissolution is simply a form of administrative divorce.⁵³ Recent figures indicate a quadrupling in the number of heterosexual registered partnerships which (may be coincidentally) coincides with the introduction of the conversion procedure from marriage to registered partnership.⁵⁴ Little research has been conducted in this field, although the Dutch Central Bureau for Statistics has agreed to look into whether it is possible to maintain statistics on the number of couples utilising this procedure.

Agreement to Terminate

Once parties have converted their marriage into a registered partnership, all the legal consequences attached to a registered partnership are extended to the parties. This includes the forms of dissolution open to registered partners. According to Art 80c, Book 1, there are five ways to end a registered partnership:

- (1) by death;
- (2) by one of the partners being missing followed by a new registered partnership or by the marriage of the other partner in accordance with the provisions of s 2 of Title 18;
- (3) with mutual consent by registration by the civil status registrar of a dated declaration signed by both partners and one or more advocates or notaries from which it appears that and at what time the partners have entered into an agreement in respect of the termination of their registered partnership;

Features

- (4) by dissolution at the request of one of the partners; and
- (5) by conversion of a registered partnership into a marriage.

The agreement to terminate a registered partnership, under Art 80c, Book 1 does not require the parties to attend court. Under such a declaration, Art 80d, Book 1 requires that the parties declare that their relationship has irretrievably broken down and that they wish it to be terminated. The declaration must be delivered to the Registrar. It must be dated and signed by both parties and one or more lawyers or notaries. According to Art 80d(3), Book 1, the declaration referred to in Art 80d, Book 1 can only be registered in the register if it is received by the Registrar of Births, Deaths and Marriages within 3 months of the agreement being entered into. Furthermore, it is stated that the declaration may, but not must, deal with the following matters:⁵⁵

- (1) maintenance payments for the support of the registered partner who lacks sufficient means to support himself or herself, and cannot reasonably be expected to do so;
- (2) 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;
- (3) 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 Civil Code; and
- (4) the equalisation or compensation of superannuation rights.

Several provisions, which apply on the dissolution of a marriage, are expressly provided to apply in the case of this form of dissolution.⁵⁶ However, a more interesting point concerns those provisions that are not extended, which include:

- (1) 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;⁵⁷
- (2) the power of the court to order maintenance of one partner by the other;⁵⁸
- (3) the power of the parties to agree regarding maintenance, notably a number of protective provisions regarding termination; and⁵⁹
- (4) the power of the court to regulate the use of the former dwelling of the partners.⁶⁰

Since a marriage cannot be terminated by agreement, there can be no comparison made to marriage. The

legislature believed that since the parties are regulating their own termination, the state should remain outside the field of the negotiations and that this is really a question of legal advice.⁶¹ It is, however, important to notice a number of underlying problems.

First, even though these Articles 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 that the parties will have been advised of the legal consequences of both including, as well as excluding, certain information in such a declaration. If such details, as those provided for in the above mentioned Articles, are not regulated, then the parties must pay the consequences. It has been suggested that since Art 80d(2), Book 1 does not expressly declare these provisions applicable, does not mean that they are not per se applicable.⁶² However, it is the author's opinion that this would be a step too far for the Dutch judiciary to interpret this provision in this way, especially since Art 80d(2), Book 1 expressly states that some provisions and not others are applicable, and even more so when one analyses Article 80e(1), Book 1, which expressly states that these provisions are to be extended to the dissolution of a registered partnership.

Secondly, can these Articles 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.

The parties make no provision on 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, for example Wortmann, believe there to be no obstacle to prevent the application of the provision.⁶³ It is the current author's opinion that the application of Art 157, Book 1 of the Dutch Civil Code cannot be used at all in relation to the agreement to terminate since Art 80d(3), Book 1 does not extend its applicable scope to these agreements.

The parties agree a provision on maintenance but without stipulating a time period

According to Art 157, Book 1, maintenance obligations are limited to a period of 12 years from after the registering of the termination. However, once again, it is submitted that this provision is not applicable and, therefore, if no time period is stipulated, then the parties are unable to rely on Art 157 in enforcing a 12-year limitation clause.

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.

Statistics on Registered Partnership

Registered partnership was introduced on the 1 January 1998. Since then, over 20,000 registrations have been concluded. From Table 1 below, it is clear that the number of opposite-sex registrations will have more

than quadrupled since its introduction. If one takes the monthly figures for registrations, then the increase in opposite-sex registrations after the introduction of the same-sex marriage legislation (which also coincides with the introduction of the conversion procedure) is even more apparent (see Table 2).

Table 1

Year	Total	Male-Male	Female-Female	Male-Female	Total Homosexual Registrations
1998	4626	1686	1324	1616	3010
1999	3256	897	864	1495	1761
2000	2922	815	785	1322	1600
2001	3342	337	314	2691	651
2002 (Nov.)	7542	397	381	6764	778
Total	21688	4132	3668	13888	7800

Table 2

Month	Male-Female
January 2001	102
February	94
March	114
April	102
May	141
June	120
July	167
August	227
September	318
October	432
November	465
December	409
January 2002	542
February	545
March	607
April	567
May	583
June	601
July	598
August	733
September	603
October	704
November	755

The Dutch Central Bureau for Statistics has agreed to look into whether it is possible to maintain statistics on the number of couples utilising this conversion procedure.⁶⁴ The Minister of Justice has the impression that the number of dissolutions of a registered partnership after the conversion into a marriage is increasing. Nevertheless, he does not believe that the conversion of a marriage into a registered partnership necessarily leads to an impulsive divorce. After all, the only way to dissolve a registered partnership speedily is by an agreement to terminate.⁶⁵ The President of the Association for Family Lawyers has also stated that the number of such lightning divorces is on the decrease.⁶⁶

Private International Law Aspects

General

Although this above mentioned procedure is being used to bring marriages to a speedy conclusion, the same procedure could also last a number of years. A couple, for example, married in the 1960s may have decided in 2001 to convert their marriage into a registered partnership. After a period of time, they decide to end their registered partnership by means of a mutual agreement. The whole out-of-court process will have lasted a number of years, however, in essence, the

same private international law issues will be at stake. The central question being: are the parties divorced? Should this procedure be regarded as two individual and separate steps, or should, in contrast, the two steps be regarded as one procedure? This section will deal with the private international law issues in relation to this 'out-of-court divorce' procedure.⁶⁷

Recently, a civil servant from the Belgian Registry of Births, Deaths and Marriages was confronted with the recognition of a Dutch 'lightning' or as it will be referred to in this section 'out-of-court divorce' between a Japanese man and a Dutch woman (both had habitual residence in Belgium).⁶⁸ This sort of case provides a perfect example of the private international law problems associated with the 'out-of-court divorce' procedure. The couple married in The Netherlands in 1995. A few months after the conclusion of the marriage, they moved to Belgium. However, soon after their marriage began to fail and in April 2000 they separated. In December 2001, they returned to The Netherlands to convert their marriage into a registered partnership and in January 2002 ended their registered partnership. The question arose how this 'divorce' was to be classified according to Belgian law.

On the 29 May 2000 the Council of the EU agreed upon a regulation concerning jurisdiction and recognition and enforcement of judgments in matrimonial cases and concerning the parental responsibility for children of both spouses.⁶⁹ On 1 March 2001, the Regulation came into force and since then has force in all EU member states except Denmark.⁷⁰

Brussels II

According to para 10 of the preamble, the Regulation should be confined to civil proceedings and non-judicial procedures. This is further emphasised in Art 1(2) where it is stated that:

'other proceedings officially recognised in a Member state shall be regarded as equivalent to judicial proceedings. The term "court" shall cover all the authorities with jurisdiction in these matters in the Member States.'

In some countries outside the EU spouses are able to dissolve their marriage by means of an administrative procedure.⁷¹ At present, Portugal is the only Brussels II member state which recognises a form of administrative divorce.⁷² In countries such as Portugal where administrative divorce is possible, it would seem reasonable, in the author's opinion, that such a divorce should fall within the scope of Brussels II.

Since the definition of a divorce procedure under Art 1(1) of the Hague Convention on the Recognition of Divorces and Legal Separations 1970, has been broadly interpreted, it is submitted that this broad interpretation should also be used when interpreting Art 1(2) of Brussels II. Therefore, it is argued that administrative divorce procedures should fall within the scope of the Brussels II, hence supporting the view of Mostermans.⁷³

As already stated in this article, the effective

difference between the Dutch 'out-of-court divorce' procedure and an administrative divorce is negligible. The combination of, on the one hand, an instrument of conversion and, on the other, a declaration certifying that the registered partnership is at an end, effectively results in a marriage being ended outside of any judicial proceedings. It is proposed that the Dutch 'out-of-court divorce' procedure (irrespective of the time period between the two steps: conversion and separation) should not be considered as two individual, separate steps, but instead as one whole non-judicial procedure. In contrast, Mostermans argues that the Dutch 'out-of-court divorce' should fall outside community divorce recognition rules.⁷⁴ The conversion of a marriage into a registered partnership is, in her opinion, not a divorce in accordance with the Regulation.

If one imagines a situation where neither the instrument of conversion nor the declaration certifying the end of the registered partnership were regarded as falling within the scope of Brussels II, then one would generate a situation where, the couple would be legally separated according to Dutch law, but would still be legally married according to the law of other jurisdictions, in view of the fact that no effective divorce proceedings had taken place. Consequently, the ensuing conflicts of law dilemmas would be prodigious.

Instead, it is submitted that the procedure should fall within the scope of Brussels II. On the prerequisite, however, of a number of conditions. First, there must be an instrument of conversion. The conversion must be from a marriage into a registered partnership.⁷⁵ The conversion from a registered partnership into a marriage causes few private international law problems, since a marriage is deemed to have been celebrated upon the date of conversion.

As well as the instrument of conversion, the parties should also submit a certificate certifying that their registered partnership is at an end by means of an agreement to terminate. These two documents together would form the basis of the non-judicial procedure necessary to fall within the scope of Brussels II. The date of the 'out-of-court divorce' would then be deemed to be the date when the termination of the registered partnership is included in the Register of Births, Deaths, Marriages and Registered Partnerships. This could obviously cause other associated problems from a private international law perspective. For example, imagine the following situation: a Dutch woman and an English man are married in 1990 in The Netherlands. They convert their marriage into a registered partnership on 1 April 2001 since they are having marital troubles and believe that having a registered partnership may help to relieve some of the pressure. They later decide that their choice to convert their marriage into a registered partnership has not helped with their difficulties and decide to end their registered partnership. On 31 January 2003, they go to the Register of Births, Deaths, Marriages and Registered Partnerships and end their registered partnership on the same day. Some time after the ending of their registered partnership the man emigrates to Belgium and the woman moves to Germany. Both eventually find new partners and both wish to marry their new partners.

According to the solution adopted by Mostermans, neither the instrument of conversion nor the certificate certifying the end of the registered partnership would fall under the scope of Brussels II, and, therefore, the parties would still be considered to be married in both Germany and Belgium. According to the solution proposed above, the parties would be considered divorced as of 31 January 2003. However, according to Dutch law they would be considered to be no longer married since 1 April 2001. Nonetheless, pragmatically speaking, this raises few problems, given that according to Dutch law the legal effects of the marriage and registered partnership are the same.⁷⁶ The parties would still be prevented from entering into a subsequent marriage or registered partnership,⁷⁷ and hence although the name of their relationship inside and outside The Netherlands would be different, the legal effects would be the same. According to the proposed solution, on the 31 January 2003, Brussels II would consider the marriage to be at an end, while according to Dutch law, the registered partnership would be terminated. Therefore, any problems associated with limping relationships would be avoided.

Conclusions

The introduction of same-sex marriage in April 2001 has opened the gates, not only for homosexuals to marry, but also for all married couples to end their marriages outside of a judicial procedure. If a married couple is in agreement concerning their wish to separate, then the termination agreement provision in the registered partnership provisions provides the easiest and quickest possible solution. However, as shown, there are numerous associated problems with the current system. Problems as shown in relation to maintenance and children have not been adequately dealt with by the Government. These problems, although in existence before the introduction of the Same-Sex Marriage Act, will simply be exacerbated as married couples begin to use the termination agreement as a form of 'out-of-court divorce'. These problems, however, will only begin to surface some time after the termination of the registered partnership as parties decide (or realise) that they were entitled to further rights upon termination of the relationship. The area also raises complex issues of policy. If such a possibility exists, what is the justification for a continued lack of a form of administrative divorce? If married couples can, by converting their marriage into a registered partnership and then terminating it by agreement, succeed in ending their partnership within 24 hours, then what policy lies behind the rejection of a form of straightforward administrative divorce?

The associated private international law problems also deserve attention both at national and European level. It is now time for the Dutch legislature to actively pursue the previous proposals concerning the introduction of an administrative divorce procedure.⁷⁸ It is also suggested that the European legislature should also make a clear guideline on this issue and take the practical, non-formalistic approach adopted in this article, thus bringing the 'out-of-court divorce

procedure' within the scope of the Brussels II Regulation. Surely the time is now ripe for the introduction of administrative divorce in the Netherlands. If such a conversion procedure is already available and frequently used, then why bring the law into disrepute and refuse to introduce administrative divorce? Remove the conversion procedure and introduce administrative divorce and thus avoid these complex questions of private international law.

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- * The author is a PhD researcher at the Molengraaff Institute for Private Law in Utrecht, The Netherlands. Many thanks to Dr Ellen Mostermans for her remarks on an earlier version of this article. This article is dedicated to my parents, Jean and Ray Sumner.
- 1 Staatsblad, 1997, No 324 (introduction of Art 80a, Book 1 into the Dutch Civil Code).
 - 2 Staatsblad, 2001, No 9 (altering Art 30, Book 1 of the Dutch Civil Code).
 - 3 Marriage being regulated in Title 5 and Registered Partnership in Title 5a of Book 1 of the Dutch Civil Code.
 - 4 Although the majority of the legal effects are the same, the institutions should still be seen as distinct since the conclusion of one automatically precludes the conclusion of the other.
 - 5 N. Bamforth, *Sexuality, Morals and Justice* (Caswell, 1997), at p 148.
 - 6 K. O'Donovan, *Family Law Matters* (Pluto Press, 1993).
 - 7 The first form of registered partnership arrived in 1989 with the introduction of legislation in Denmark. This was soon followed in Norway, Sweden, Iceland, The Netherlands, Belgium, France, Germany, regions in Spain, Luxembourg, Finland, states in the US, Canada and Australia.
 - 8 The number of opposite-sex registrations has increased to over 700 in October 2002 from a figure of 114 in March 2001 (before the introduction of the conversion procedure).
 - 9 Brussels II.
 - 10 I. Sumner, 'Comparative analysis and assessment of the gradual recognition of homosexuality with respect to The Netherlands and England' (2002) 9 *Maastricht Journal* 29.
 - 11 W. Schrama, 'Registered Partnership in The Netherlands' (1999) 13 *International Journal of Law, Policy and the Family* 317.
 - 12 *Marckx v Belgium* (13 June 1979) A-31, s 31.
 - 13 I. Sumner, 'The Charter of Fundamental Rights of the European Union and Sexual Orientation' [2002] *IFL* 156.
 - 14 L. Nielsen, 'Family Rights and the Registered Partnership in Denmark' (1990) 4 *International Journal of Family Law* 297.
 - 15 Law No 372 (HMSO, 1989); Law No 821 (HMSO, 1989).
 - 16 Law No 40 (HMSO, 1993).
 - 17 Law No 1994: 1117.
 - 18 Act No 87 of 12 June 1996.
 - 19 District Court Rotterdam, 5 December 1988 (1989) *Nederlandse Jurisprudentie* 871.
 - 20 Court of Appeal The Hague, 2 June 1989 (1989) *Nederlandse Jurisprudentie* 871.
 - 21 Supreme Court, 19 October 1990 (1992) *Nederlandse Jurisprudentie* 192.
 - 22 District Court Amsterdam, 13 February 1990 (1990) *NJCM-Bulletin* 456.
 - 23 'In 1990 besliste de Hoge Raad dat een huwelijk tussen personen van hetzelfde geslacht niet mogelijk is', in Supreme Court, 19 October 1990 (1992) *Nederlandse Jurisprudentie* 192.
 - 24 C. Forder, 'Civil Aspects of Emerging Forms of Registered Partnership' (15 March 1999, Den Haag, Fifth European Conference on Family Law), at p 24.
 - 25 Parliamentary Proceedings, Second Chamber, 1993-1994, 23,761 No 3, at p 2.
 - 26 Parliamentary Proceedings, Second Chamber, 1994-1995, 22,700 No 5.
 - 27 Parliamentary Proceedings, Second Chamber, 1994-1995, 22,700 No 5, at p 5; Parliamentary Proceedings, Second Chamber, 1995-1996, 23,761 No 7, at p 10.
 - 28 H. van Velde, 'The Long Road to Civil Marriage' (1 April 2001, Gay Krant).
 - 29 Parliamentary Proceedings, Second Chamber, 1995-1996, 22,700 Nos 18 and 14; Parliamentary Discussions, Second Chamber, 1995-1996, at p 4883.
 - 30 C. Forder, 'National Report on The Netherlands' (15 March 1999, Den Haag, Fifth European Conference on Family Law), at p 9.
 - 31 Staatsblad, 1997, No 324 tot wijziging van boek 1 van het Burgerlijk Wetboek en van het wetboek rechtsvordering in verband met opnemng daarin van bepalingen voor het geregistreerd partnerschap.
 - 32 K. Waaldijk, 'Small Change: How the Road to Same Sex Marriage Got Paved in The Netherlands', in R. Wintemute, *Legal Recognition of Same-Sex Partnerships* (Hart Publishing, 2001), at p 450.
 - 33 D. Verlegh and H. Maarseveen, 'Het huwelijk de rechtsorde uit' (1984) *Nederlandse Jurisprudentie* 857.
 - 34 *NRC Handelsblad* (7 February 1993), at p 3.
 - 35 Parliamentary Proceedings, Second Chamber, 1997-1998, 22,700, Nos 26 and 27; Parliamentary Discussions, Second Chamber, 1997-1998, at p 5642.
 - 36 Y. Scherf, 'Registered Partnership in The Netherlands' (Den Haag, Ministerie van Justitie, 1999), at p 21.
 - 37 Parliamentary Proceedings, Second Chamber, 1998-1999, 26,672, A, B and Nos 1-3.
 - 38 Parliamentary Proceedings, Second Chamber, 1998-1999, 26,673, A, B and Nos 1-3.
 - 39 Staatsblad, 2001, Nos 9 and 10.
 - 40 Staatsblad, 2001, No 128.
 - 41 Staatsblad, 2001, No 145.
 - 42 <http://www.cbs.nl>, 1,980 male-male marriages and 1,708 female-female marriages. Correct as of December 2002.
 - 43 Parliamentary Proceedings, Second Chamber, 1999-2000, 26,672, No 4, s 5.
 - 44 Parliamentary Proceedings, Second Chamber, 1999-2000, 26,672, No 5, s 5.
 - 45 The conversion of a registered partnership into a marriage and vice-versa.
 - 46 Emphasis is that of the author.
 - 47 Article 18b, Book 1 allows the Registrar to refuse to make an entry in the register on grounds that the parties remain in default in submitting the required documents; or that such documents are of insufficient quality; or that it would be contrary to Dutch public policy.
 - 48 Article 83, Book 1 Dutch Civil Code had imposed a cohabitation condition, but has since been repealed.
 - 49 S. F. W. Wortmann, 'Rechtsontwikkelingen in het personen- en familierecht: flitscheidingen en verrekenbedingen' (2002) 6477 *Weekblad voor Privaatrecht, Notariaat en Registratie* 165.
 - 50 Article 77a(3), Book 1 Dutch Civil Code.
 - 51 See C. Forder, 'Spiegel Matrimonial' (1999) 32 *Nederlandse Juristenblad* 1559 and S. F. W. Wortmann, *Rechtsontwikkelingen in het personen-en familierecht: flitscheidingen en verrekenbedingen* (2002) 6477 *Weekblad voor Privaatrecht, Notariaat en Registratie* 165; B. E. Reinhartz, *Flitscheidingen in Nederlands-Duits verhoudingen*, in H. F. G. Lemaire and P. Vlas (eds), *Flitscheidingen in Nederlands-Duits verhoudingen* (Kluwer, 2002), at p155.
 - 52 Before being able to use the Art 252 procedure, the father must first recognise the child in accordance with Art 204, Book 1 Civil Code. He must apply under Art 253c, Book 1 but is not regarded as the father until he has recognised the child. The Art 252, Book 1 procedure requires both the 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 A. Bainham

- (ed), *The International Survey of Family Law 2002* (Family Law, 2002), at p 278.
- 53 See among others P. M. M. Mostermans, 'De wederzijdse erkenning van echtscheidingen binnen de Europese Unie' (2002) 3 *Tijdschrift voor het Nederlands Internationaal Privaatrecht* 263.
- 54 The number of heterosexual registered partnerships in 1998 was 1,616; in 1999 1,495; in 2000 1,322; 2001 2,691; and up until October 2002 already 6,083 heterosexual registered partnerships have been celebrated.
- 55 Article 80d(1), Book 1 Dutch Civil Code.
- 56 Article 80d(2), Book 1 Dutch Civil Code which states that Arts 155, 159(1) and (3), 159a, 160 and 164, Book 1 Dutch Civil Code are all applicable.
- 57 Article 153, Book 1 Dutch Civil Code.
- 58 Article 157, Book 1 Dutch Civil Code.
- 59 Article 158, Book 1 Dutch Civil Code.
- 60 Article 165, Book 1 Dutch Civil Code.
- 61 Parliamentary Proceedings, Second Chamber, 1995-1996, 23,761, No 7, at p 19.
- 62 C. Forder, 'National Report on The Netherlands' (15 March 1999, Den Haag, Fifth European Conference on Family Law), at p 22.
- 63 S. F. W. Wortmann, 'Rechtsontwikkelingen in het personen- en familierecht: flitscheidingen en verrekenbedingen' (2002) 6477 *Weekblad voor Privaatrecht, Notariaat en Registratie* 165.
- 64 *Flitscheidingen* (2002) 12 *Nederlandse Juristenblad* 648.
- 65 As provided for under Art 80c(c), Book 1 Dutch Civil Code in conjunction with Art 80d, Book 1 Dutch Civil Code.
- 66 'Flitscheiding stuk minder populair', *Algemeen Dagblad* (15 August 2002).
- 67 This term has been used to highlight the fact that the whole process need not take place within 24 hours. The same rules would apply, according to the author, for a marriage ended using the same means, where the out-of-court agreement came more than 2 years after the initial conversion from a marriage.
- 68 K. Jansegers, 'Problemen bij de erkenning in België van de Nederlandse flitscheiding' (2002) 4 *Tijdschrift voor Internationaal Privaatrecht* 61.
- 69 Brussels II.
- 70 Article 1(3) of the Regulation. Through the Treaty of Amsterdam, Denmark has excluded itself from provisions adopted under Title IV of the European Treaties.
- 71 Mostermans names Russia, Norway, Iceland, China, Mexico and Japan as countries currently falling into this category.
- 72 See the Portuguese, Danish and Norwegian answers to Question 7, K. Boele-Weolki, B. Braat and I. Sumner (eds) 'European Family Law in Action', *Grounds for Divorce* (Intersentia, 2003).
- 73 P. M. M. Mostermans, 'De wederzijdse erkenning van echtscheidingen binnen de Europese Unie' (2002) 3 *Nederlands Internationaal Privaatrecht* 263, at p 265.
- 74 P. M. M. Mostermans, 'De wederzijdse erkenning van echtscheidingen binnen de Europese Unie' (2002) 3 *Nederlands Internationaal Privaatrecht* 263, at p 264.
- 75 The European Court of Justice has also decided in *D and Sweden v Council of the European Union* [2001] ECR I-4319 that a registered partnership is not to be considered as equivalent to a marriage. Therefore, if parties begin with a registered partnership they should automatically fall outside the scope of Brussels II.
- 76 Even though the situation with respect to the children is regulated differently, since the parties had previously been married, the legal effects remain the same due to Art 77a(3), Book 1 of the Dutch Civil Code.
- 77 Article 80a(1) and (2), Book 1 Dutch Civil Code.
- 78 Parliamentary Proceedings, Second Chamber, 1997-1998, 25,451 and the Report from the Divorce Procedure Review Commission *Anders Scheiden* (Den Haag, Commissie De Ruiter, 1996)