

# THE EVALUATION OF SAME-SEX MARRIAGES AND REGISTERED PARTNERSHIPS IN THE NETHERLANDS

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## I. Introduction

This contribution summarizes research that on the 1<sup>st</sup> of November 2006 was submitted by the authors to the Dutch Ministry of Justice.<sup>1</sup> On the 14<sup>th</sup> of December 2006, the report was sent to the second Chamber of the Dutch Parliament. It addresses both same-sex marriages and registered partnerships, a topic which, in the first volume of this *Yearbook*, was tackled by the late Petar Šarčević in his contribution about the private international law aspects of these non-traditional relationships.<sup>2</sup>

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<sup>1</sup> BOELE-WOELKI K., CURRY-SUMNER I., JANSEN M.D., SCHRAMA W.M., *Huwelijk of geregistreerd partnerschap? Een evaluatie van de Wet openstelling huwelijk en de Wet geregistreerd partnerschap*, Ars Notariatus, No. 134, Kluwer Deventer 2007.

<sup>2</sup> ŠARČEVIĆ P., 'Private international law aspects of legally recognised regulated forms of non-marital cohabitation and registered partnerships', in: this *Yearbook* 1999, pp. 37-48.

## II. Aims of the Research

The research was aimed at evaluating two central pieces of Dutch family law legislation, namely the Act which opened civil marriage to same-sex couples in 2001 (*Wet openstelling huwelijk*) and the Act introducing registered partnership in 1998 (*Wet geregistreerd partnerschap*). Although initially the Act introducing registered partnership was to be evaluated five years subsequent to its implementation, the Dutch Minister of Justice announced in 2001 the intention to evaluate both of these pieces of legislation simultaneously in 2006.

How do these legislations function in practice? Have they attained the objectives that lay at the foundation of their implementation? Have there been technical or practical problems associated with their introduction, and exactly what role does registered partnership now fulfil alongside a marital institution open to couples regardless of sex? These and many other questions have formed the basis for the evaluation of these two pieces of Dutch legislation.

## III. Structure and Methodology

This research embodies three perspectives: a national legal perspective, an international legal perspective, and a sociological perspective. The socio-legal conclusions at the end of this research are, accordingly, a *mélange* of these three inter-related, yet distinct angles.

The *national legal perspective* consists of an analysis of the statutory rules relating to registered partnership and marriage, concentrating on the similarities and differences between these two regimes. This research is based on an analysis of the relevant legal provisions, case law, and legal literature. This black-letter and case law analysis has been complemented by a questionnaire-study, distributed amongst Dutch notaries and Dutch Registrars of Births, Deaths, Marriages and Registered Partnerships, as well as by interviews with Dutch lawyers practicing in this field of law.

The *international legal perspective* is divided into two sections. In the first section, the registration schemes for non-married couples in fourteen European jurisdictions are described and compared. The systematic description of the establishment, rights, duties, and termination of the registered relationship in each of these systems forms the basis for a comprehensive overview of the internal substantive regime. Furthermore, this description contains the necessary information for a fertile external comparison. The second section focuses on the private international law rules of thirteen European and non-European jurisdictions, in relation to the recognition of Dutch registered partnerships and same-sex marriages. This research is based on an analysis of the relevant legal provisions, case law, and legal literature.

The *sociological perspective* is aimed at ascertaining insight into the reasons underpinning a couple's choice to formalise their relationship, as well as the reasons associated with their choice of formal relationship, *i.e.* registered partnership or marriage. This perspective is comprised of three sections. In the first section, demographic information relating to the number of marriages and registered partnerships is analysed. In the second section, the results of a large-scale, representative sociological survey are expounded. A detailed questionnaire was sent to approximately 2,500 partners, of whom approximately 1,200 responded. The survey was limited to those partners who had either celebrated a marriage or registered a partnership since 2001. The third and final section provides the results of a number of follow-up interviews conducted with respondents of the questionnaire.

The results of these three perspectives have subsequently been combined to form the basis for the conclusions. In answering the main research questions posed at the commencement of this research, a distinction has been made between the problems experienced as a result of the legislation, the differences between the two formal relationship forms in Dutch law, and the possible recommendations for removing these problems and differences. It is important to note that not all differences lead to problems, and not all problems are a result of differences. In the conclusions, attention is first devoted to summarizing the problems experienced in relation to these two pieces of legislation. Thereafter, focus shifts to the proposed recommendations put forward by the research team, aimed at tackling the problems and/or removing the differences. In the conclusions, the arguments for and against the abolition or retention of registered partnership (assuming that the amendments and recommendations listed in earlier are carried out) are laid out.

#### **IV. Aims of the Legislation**

Two distinct objectives underpin the implementation of the *Act introducing registered partnership*. The institution of registered partnership was primarily created to ensure equal treatment for same-sex couples wishing to formalise their relationship. It was argued that same-sex couples should also be provided with an opportunity to have their relationship publicly recognised. In doing so, this Act aimed to provide those couples opting to register their relationship with the same rights and duties as attached to marriage. To have done otherwise would once again have created an unjustified distinction. The second objective was to provide an alternative to different-sex couples who may have preferred to register a partnership rather than get married. Although registered partnership was similar to marriage, it was clearly distinguishable from it.

Equal treatment of same-sex couples also formed the foundation-stone of the *Act opening marriage to same-sex couples*. The creation of registered partnership was, in the eyes of the legislature, not sufficient to satisfy the requirements imposed by the principle of equality, as laid down in the Dutch Constitution. This

principle requires that *exactly* the same institution be open to both same-sex and different-sex couples.

## V. Research Results

### A. Act Opening Marriage to Same-Sex Couples

On the whole, the *Act opening marriage to same-sex couples* has satisfied the principle of equal treatment, the core objective at the heart of its enactment. As a result of this Act, the same legislation applies to spouses regardless of their sex; thus, one marital institution is open to couples regardless of sex. Nevertheless, this research has substantiated two previously indicated problems in relation to same-sex marriages. Firstly, the legal recognition of same-sex marriages abroad, and secondly, the legal position of social parents and children born in or being raised in same-sex marriages.

#### 1. Recognition of Dutch Same-Sex Marriages Abroad

Substantial problems arise in relation to the recognition of same-sex marriages once one or both of the partners leave the Netherlands. The fear that same-sex marriages may not be recognized, appreciated by both Dutch practitioners active in this field as well as the couples themselves, is confirmed by the information collated in the international legal perspective. The non-recognition of a couple's marriage can have important and far-reaching consequences for those concerned. From the international legal research, it would appear that in many instances no clear answer can be provided as to whether, and if so how, these marriages will be recognized abroad. The answer to the question is heavily dependent upon the substantive law rules in force in that country. In those countries that have opened civil marriage to same-sex couples, the recognition of Dutch same-sex marriages is generally not problematic (Belgium and Spain). In those countries where a domestic form of registered partnership has been created, same-sex marriages celebrated abroad are often afforded recognition as this domestic form of registered partnership. A Dutch same-sex marriage will be recognised in Germany as an *eingetragene Lebenspartnerschaft*,<sup>3</sup> whereas in the United Kingdom, it will be recognised as a civil partnership.<sup>4</sup> However, in France, where to date same-sex couples can only conclude a *pacte civil de solidarité*, a Dutch same-sex marriage will,

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<sup>3</sup> Art. 17b EGBGB. See RÖTHEL A., 'Anerkennung gleichgeschlechtlicher Ehen nach deutschem und europäischem Recht', in: *IPRax* 2006, pp. 250-253.

<sup>4</sup> Schedule 20 Civil Partnerships Act 2004.

according to high-ranking French ministerial officials, also be recognised as a marriage.<sup>5</sup>

*Recognition of Dutch Same-Sex Marriages in 11 Members States of the EU with a Statutory Legislation Scheme for Same-Sex Couples*

<i>Country</i>	<i>Marriage (same sex) recognised as</i>
Belgium	Marriage
Czech Republic	Registrované partne rství
Denmark	Registreret partnerskab
Finland	Rekisteröidystä parishteesta
France	Marriage
Germany	Lebenspartnerschaft
Luxembourg	Partenariat
Slovenia	Partnerski skupnosti
Spain	Marriage
Sweden	Registrerat partnerskap
United Kingdom	Civil partnership

In those jurisdictions where no substantive law regime is available for same-sex couples to formalise their relationship, the chances are great that a Dutch same-sex marriage will not be recognized. The following public policy arguments are used. First, and most importantly, reference is made to the traditional concept of marriage. Marriage is considered to be a union between persons of the opposite sex. Second, it is argued that this concept is protected by the national constitution (this is, for instance, the case in Latvia). Finally, it is submitted that the non-recognition does not violate the European Human Rights Convention (Articles 8, 12 and 14 ECHR). It belongs to each national state's margin of appreciation whether or not to regulate the formalization of same-sex relationships according to its constitution, culture, religion, and family system. All these arguments were put forward in the recent decision of the Irish High Court, in its decision of the 14<sup>th</sup> of December 2006.<sup>6</sup> It was held that a marriage concluded in Canada between two Irish women could not be recognized in Ireland.

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<sup>5</sup> 'Effets en France du mariage homosexuel valablement célébré dans un pays de l'Union européenne', in: *Rep. Min* no. 41533, justice: JOAN 26 July 2005, p. 7437. See also *La semaine juridique, édition notariale et immobilière*, no. 35 of 2<sup>nd</sup> September 2005. The French recognition rules regarding marriage also contain a choice of law test, which ensures that a Dutch same-sex marriage will only be recognized in France, should it satisfy the French choice of law rules. As a result, both parties to a same-sex marriage celebrated in The Netherlands will need to possess the nationality of a State which permits the celebration of marriages between persons of the same-sex if this marriage is to be recognized in France.

<sup>6</sup> Irish High Court in *Zappone/Gilligan v. Revenue Commissioners Ireland*, 14<sup>th</sup> December 2006.

## **2. Same-Sex Marriages and Children**

The second problem, substantiated by the research, in relation to same-sex marriages arises in relation to children. Unlike children born in different-sex marriages, legal parentage is only created by operation of law as regards the birth mother in same-sex marriages. The fact that a third party is required for the conception and/or the birth of the child, implies that same-sex married couples are not comparable to different-sex married couples for purposes of the principle of equality. Nonetheless, the question remains how children born and raised in such relationships can be protected. According to current Dutch law, only the legal parentage of the birth mother is determined by operation of law upon the child's birth. The female spouse of the birth mother is not permitted to recognize the child. Adoption is therefore the only alternative, along with the associated costs, conditions, judicial intervention, and waiting periods. In relation to the adoption of a foreign child, a prohibition still operates preventing same-sex married couples from jointly adopting abroad. Thus, same-sex married couples wishing to adopt a foreign child are obliged to first follow the single-person adoption procedure, and then at a later stage make use of step-parent adoption. The question can be raised as to whether or not this prohibition against joint same-sex adoption of a foreign child is contrary to the principle of equality. At present, a legislative proposal before the Dutch Second Chamber aims to repeal this prohibition, thus, permitting same-sex couples to jointly adopt a foreign child.

Other problems associated with the opening of civil marriage to same-sex couples have not been uncovered in the research. The opening of same-sex marriage is, therefore, to be regarded as a success, since hereby justice has been done to the principle of equality.

### **B. Act Introducing Registered Partnership**

In evaluating the Act introducing registered partnership it is important to draw a distinction between the two distinct objectives underpinning this legislation, namely, the primary aim of equal treatment of same-sex couples and the secondary aim of providing an alternative for different-sex couples who do not wish to marry. It is plausible that the discussion enveloping the introduction of registered partnership paved the way or, at the very least, contributed to the opening of civil marriage to same-sex couples. In this respect the legislation was indispensable.

In attempting to fulfil the obligations imposed by the principle of equality, the Dutch legislature sought to sculpt the institution of registered partnership, as far as possible, according to the marital model. As is clear from the national legal perspective, legislation with respect to registered partnership and marriage are indeed very similar, in terms of the establishment of the relationship, the conversion of one relationship into another, the rights and duties attributed to the relationship, and the procedures available for terminating the relationship. Nevertheless, a number of exceptions to this overall resemblance deserve mentioning, two of which deserve particular attention. The first difference relates to the marital pre-

sumption of parentage that is not *mutatis mutandis* applicable to registered partnerships. In this respect it is important to draw a distinction between different-sex and same-sex couples.

The second objective upon which the *Act introducing registered partnership* is based was the creation of an alternative for different-sex couples who did not wish to marry. From the sociological research, it would appear that registered partnership is regarded by both same-sex and different-sex couples as an alternative to marriage. Registered partnerships are regarded more as a business arrangement, whereas the reasons for choosing to marry lie more embedded in the symbolic and emotional sphere. Even though the absolute number of partnerships registered each year is relatively small compared to the absolute number of marriages, it can still be concluded that, of the couples who since 2001 have decided to formalize their relationship, a small, but not insignificant group of people have chosen to register their partnership instead of getting married. In this sense, registered partnership would seem to fulfil an apparent demand from a small group of couples.

### **1. Recognition of a Dutch Registered Partnership Abroad**

Regardless of the societal demand for a marital alternative, a number of problems have been revealed by the research. Firstly, as stated above in relation to same-sex marriages, the possibility that the registered partnership will not be recognized abroad is great. Two separate problems in this respect need to be distinguished: First, the high chances of non-recognition, especially in relation to different-sex registered partnerships, and second, legal uncertainty. Those jurisdictions which provide the possibility for same-sex couples to formalize their relationship will most likely recognize the Dutch same-sex registered partnership as their 'local' institution. In nearly all of the jurisdictions studied (apart from Belgium), it was unclear how different-sex registered partnerships will be dealt with. It may be that they will be recognized, and it may be that they will not be recognized. Both of these problems could lead to 'limping relationships' (relationships recognized in one country, yet not recognized in another). It is noteworthy to mention that although a distinction is made in The Netherlands between registered partnership and marriage, in the majority of countries researched this distinction is not respected. In Germany, for example, both same-sex marriages and Dutch registered partnerships will more-than-likely be recognized as *eingetragene Lebenspartnerschaft*, whilst at the other end of the spectrum, in Belgium, both relationship forms are recognized as marriages. It would also appear from both the national legal perspective and the sociological research that those professionals involved with the registration of partnerships, as well as the couples themselves, regard the potential non-recognition of the relationship as a problem.

*Recognition of a Dutch registered partnership in 11 Members States of the EU  
with statutory legislation schemes other than marriage*

<i>Country</i>	<i>Registered partnership (same sex) recognized as</i>	<i>Registered partnership (different sex) recognized as</i>
Belgium	Marriage	Marriage
Czech Republic	Registrované partne rství	Not known
Denmark	registreret partnerskab	Not known
France	Not known	Not known
Germany	Lebenspartnerschaft	Not known
Luxembourg	Partenariat	Not known
Finland	Rekisteröidystä parishteesta	Not known
United Kingdom	Civil partnership	Not known
Slovenia	Partnerski skupnosti	Not known
Spain	Not known	Not known
Sweden	Registrerat partnerskap	Non-marital cohabitation

## **2. Registered Partnerships and Children**

Unlike in different-sex married couples where the legal parentage of both the birth mother and her husband are legally established at the moment of birth, the birth mother's male registered partner is not regarded as the legal father of the child by operation of law. Consequently, he must formally recognize the child. Should he fail to recognize the child for whatever reason, the consequences can be far-reaching (especially in the field of name law, contract, inheritance law, nationality law, and public law).

The initial objectives of the Dutch Government were, however, to introduce a formalized relationship scheme which was only to have consequences for the partners themselves. Between 1998 and 2001, this was indeed the case, but over time this legislation has been amended. Since 2001, legislative change granting joint parental authority by operation of law to registered partners over a child born during a registered partnership has come into force. This change, coupled with the results from the sociological perspective which indicate that a majority of those different-sex registered partners questioned were raising children, indicates that it can no longer be said that registered partnership has no effect on the parent-child relationship, or that no children are being born or growing up in registered partnerships. It is, therefore, vital that the problems signalled by both legal professionals and the couples themselves with the absence of a legal presumption of paternity be rectified immediately. A subsidiary argument is that this difference in treatment is contrary to the principle of equality.

When turning one's attention to same-sex couples, the questions raised are to some extent more complicated, due to the presence of a third party. No legal distinction is drawn between children born during or growing up in either a marriage or registered partnership between couples of the same-sex when it comes to

legal parentage or parental responsibility over the children. No presumption of parentage results for same-sex couples, obliging those wishing to establish legal parentage to adopt. Furthermore, as demonstrated in the sociological perspective, a significant minority of same-sex couples are indeed raising children. Therefore, it is important that these children are afforded adequate legal protection in the field of legal parentage.

## **VI. Conclusion**

This research was aimed at evaluating two fundamental pieces of Dutch family law legislation. The *Act opening civil marriage to same-sex couples* and the *Act introducing registered partnership* clearly illustrate the complex process which has formed the basis for the current legislative situation of two almost identical legal institutions functioning side-by-side, both open to couples regardless of sex. At the start of the 1990s, it was almost impossible to foresee that within ten years it would have been possible to open civil marriage to same-sex couples. Changes in the political composition of the government and unremitting social change both contributed to the rapid legal developments in this field.

The *Act introducing registered partnership* smoothed the path for civil marriage to be opened to same-sex couples. It is plausible that this piece of legislation provided the catalyst for the debate surrounding the opening of civil marriage. In this respect, any evaluation of this Act should view this point positively. However, in evaluating the Act and the resulting institution of registered partnership through the eyes of the current legislature, one must balance the need for clear legislation and the prevention of limping relationships against the need for access to a well-regulated formalized institution without the symbolism and tradition of marriage.

The *Act opening civil marriage to same-sex couples* has satisfied the obligation embodied in the principle of equality in the context of formalized relationships. In spite of the problems of international recognition and the vital question of how best to protect children born in or growing up in same-sex relationships, there are no problems with the implementation or functioning of this Act. Therefore, the opening of civil marriage to same-sex couples is to be regarded as a success.