

## PRIVATE INTERNATIONAL LAW ASPECTS OF HOMOSEXUAL COUPLES: THE NETHERLANDS REPORT

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### 1. Introduction

Prior to 1998, same-sex couples were by-and-large ignored in the Dutch legal system. Same-sex couples were not entitled to formalise their relationships being left in regulation limbo-land, having to organise their own affairs. Since 1998, this situation has changed radically and since 2001 same-sex couples have been able to choose from one of four different types of relationship form.<sup>1</sup>

- Since the 1<sup>st</sup> April 2001,<sup>2</sup> same-sex couples can opt to get married: same-sex marriage.
- Since the 1<sup>st</sup> January 1998,<sup>3</sup> they can opt to register their partnership: registered partnership.
- Same-sex couples can also choose to enter into a cohabitation contract: cohabitation contract.
- Finally, they can also choose to do nothing at all: informal cohabitation.

Only the first two of these relationships forms will be discussed in this paper. Although the number of couples living in informal relationships is on the increase,<sup>4</sup> this paper is too restricted in ambit in order to deal with the complicated problems associated with the private international law aspects of couples living in informal relationships. Before delving into the private international law rules and procedures with respect to same-sex couples, it is important to first appreciate the background to these pieces of legislation.

<sup>1</sup> Prior to 1998, same-sex couples were only presented with the latter two of these options (namely informal cohabitation and a cohabitation contract).

<sup>2</sup> *Staatsblad* 2001, No. 9.

<sup>3</sup> *Staatsblad* 1997, No. 324.

<sup>4</sup> See, for example, Schrama 2004.

## 1.1. *Historical Precursors*

### 1.1.1. Dutch Court Decisions

The legal journey resulting in the legislative enactment of registered partnership was not smooth. Around the beginning of the 1990s, two cases brought the legal problems facing same-sex couples to the forefront of judicial awareness. In 1989, the District Court in Amsterdam decided the first case (involving two men)<sup>5</sup> and in 1989 the Dutch Supreme Court eventually decided the second case (involving two women).<sup>6</sup> Both courts held against the petitioners, with the Dutch Supreme Court holding that,

Civil marriage is since time immemorial understood to be an enduring bond between a man and a woman to which a number of legal consequences are attached, which partly relate to the difference in sex and the consequences connected therewith for the descent of children. Marriage has these characteristics not only in The Netherlands but in many countries. Moreover, it cannot be said that the general opinion in the legal community has developed such that the considerations just mentioned do not justify the distinction in treatment on the grounds of sexual orientation, which can manifest itself in the impossibility to enter a relationship-like marriage with a person of the same sex as oneself.<sup>7</sup>

Nonetheless, although the Dutch Supreme Court held that it was not discriminatory to deny same-sex couples the *possibility* to get married,<sup>8</sup> it made no ruling on whether the denial of the *legal effects* of marriage was discriminatory. The court insinuated that this scrutiny was a task for the legislature and not for the judiciary.

### 1.1.2. First Kortmann Committee

The insinuation by the Dutch Supreme Court for parliamentary scrutiny was duly heeded and led to the formation of the First Kortmann Committee. The committee published its report, *Leefvormen* (Lifestyles), on the 20<sup>th</sup> December 1991. It suggested the introduction of one of two schemes: a registration scheme at the local city council (so-called 'light registration') or a registration at the Registry of Births, Deaths and Marriages (so-called 'heavy registration'). The report also suggested that any scheme should be open to same-sex and different-sex couples as well as within the prohibited degrees

<sup>5</sup> Rb Amsterdam, 13 February 1990, *NJCM* 1990, 456-460. For the situation prior to 1990, Boele-Woelki & Tange 1989, p. 1537-1543.

<sup>6</sup> HR (Dutch Supreme Court) 19 October 1990, *NJ* 1992, 129. For earlier decisions see Rb Rotterdam, 5 December 1988; Hof Den Haag, 2 June 1989, *NJ* 1989, 871.

<sup>7</sup> HR 19 October 1990, *NJ* 1992, 129 (translated C. Forder in: Maxwell 2001, p. 147).

<sup>8</sup> In 1990 besliste de Hoge Raad dat een huwelijk tussen personen van hetzelfde geslacht niet mogelijk is, in: HR 19 October 1990, *NJ* 1992, 129.

of marriage. After initial research conducted by the *Instituut voor onderzoek naar Overheidsuitgaven* (Institute for Review of Public Expenditure), only the latter proposal for a 'heavy' registration scheme was maintained.<sup>9</sup> Even so, the Bill submitted to Parliament in 1994 did not provide for the registration of different-sex couples,<sup>10</sup> instead limiting registration to same-sex couples and those within the prohibited degrees of marriage. However, in view of an influential memorandum published in September 1995, the possibility of registering was again opened to both different-sex couples and same-sex couples (although not to couples within the prohibited degrees of marriage).<sup>11</sup> It was hoped that this amendment would meet complaints raised principally from the COC (Dutch homosexual lobby group) that registered partnership was in essence a second-class marriage.<sup>12</sup> Others, including many academics, were nonetheless extremely critical of the move.<sup>13</sup>

Meanwhile, as the First Kortmann Committee was discussing a national system of partnership registration, municipalities all over The Netherlands were already tackling the problem first hand. According to Dutch law, municipalities are allowed to maintain an unlimited number of registers. As a result, a number of city councils began to create registers for same-sex relationships, despite the fact that these registrations had no legal consequences. In 1991, the town of Deventer registered the first same-sex relationship. In the following years more than 130 municipalities also established such a register.<sup>14</sup>

### 1.1.3. Second Kortmann Committee

Despite the political activity of the early 1990s, the pressure to allow same-sex couples to marry in the same manner as different-sex couples continued to intensify.<sup>15</sup> A majority of the Parliament was in favour of opening civil marriage to couples of the same-sex.<sup>16</sup> In April 1996, this pressure led the Dutch House of Representatives<sup>17</sup> of Parliament to adopt two non-binding

<sup>9</sup> Boele-Woelki 1999, p. 3.

<sup>10</sup> *Kamerstukken II* 1993/94, 23 761, nr. 3, p. 2.

<sup>11</sup> *Kamerstukken II* 1994/95, 22 700, nr. 5 (*Notitie Leeftijden*).

<sup>12</sup> *Kamerstukken II* 1994/95, 22 700, nr. 5, p. 5 and 23 761, nr. 7, p. 10.

<sup>13</sup> Van Mourik 1997, p. 225-226; Hoevenaars 1997, p. 226-232; Koppen & Lekkerkerker 1992, p. 774.

<sup>14</sup> Van Velde 2001.

<sup>15</sup> For an English overview see Maxwell 2001, p. 141-207.

<sup>16</sup> Those parties which supported the opening of civil marriage to same-sex couples were: the Labour Party (*Partij van de Arbeid*), Democrats 1966 (*D66*), Green Left (*Groen Links*) and the Party for Democracy and Freedom (*Volkspartij voor Vrijheid en Democratie*).

<sup>17</sup> The term *House of Representatives* has been used as a translation for the term *Tweede Kamer*, although this author prefers the term *Second Chamber*, the presidents of both chambers of Parliament have opted for the terms 'House of Representatives' and 'Senate'. These translations have been used throughout this paper.

resolutions submitted by Van der Burgh and Dittrich demanding the swift introduction of same-sex marriage.<sup>18</sup> The Government, wary of unleashing an anti same-sex marriage backlash in neighbouring countries, decided instead to appoint a committee to examine the issues surrounding the introduction of same-sex marriage. As a result the Second Kortmann Committee was established on the 28<sup>th</sup> May 1996, with the aim of investigating whether the institution of marriage should also be open to same-sex couples. In the meantime, passage of the Registered Partnership Bill continued and was eventually enacted in 1997.<sup>19</sup>

In October 1997, the Second Kortmann Committee published its report. The Committee agreed that whatever the eventual result was to be, only one institution should exist and registered partnership should be abolished.<sup>20</sup> A second area of consensus was that no familial legal ties should be created by operation of law as a result of celebrating a same-sex marriage since this would involve too great an abstraction from the biological reality that same-sex couples cannot conceive children naturally.<sup>21</sup> It was here, however, that the unanimity of the Committee floundered. Only five of the eight members supported the opening of civil marriage to same-sex couples. Three discernible categories of arguments were forwarded by the members of the Committee on both sides. The first category concerned arguments related to the principle of equality; the second, the social meaning of the marital bond and finally the international repercussions of such a move. The majority of the Committee recognised the flexible and continually evolving nature of marriage and stressed the importance of the principle of equality above all other issues. The minority did not see equality as an issue, believing instead that same-sex and different-sex couples were not equal since same-sex couples were unable to reproduce naturally. It was noted by all members that international recognition of such an institution could cause problems for those couples wishing to have their partnership recognised abroad, but the majority indicated that such couples would be aware of the difficulties and eventually the opening of civil marriage in The Netherlands could have a positive rather than negative effect on international recognition.<sup>22</sup>

The Cabinet, led by Prime Minister Kok, felt that the scales were not tilted in favour of opening civil marriage to same-sex couples, although the Cabinet did agree to allow same-sex couples to adopt Dutch children. Nonetheless, after the 1998 general elections and the reappointment of the

<sup>18</sup> *Kamerstukken II* 1995/96, 22 700, nr. 18 and 14; *Handelingen II*, 1995-1996, p. 4883. These resolutions were supported with 81 votes to 60.

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

<sup>20</sup> Kortmann Commissie 1997, p. 24, § 5.5.

<sup>21</sup> Kortmann Commissie 1997, p. 23, § 5.4.

<sup>22</sup> Kortmann Commissie 1997, p. 17-21, Chapter 4.

'purple coalition',<sup>23</sup> the Cabinet agreement stated that it would submit a proposal to Parliament before the 1<sup>st</sup> January 1999 calling for the opening of civil marriage to same-sex couples. In the meantime, such a proposal was sent to the Council of State along with a proposal to allow same-sex couples to adopt children. Less than two years later both Chambers accepted the proposals. On the 1<sup>st</sup> April 2001, The Netherlands became the first country in the world to allow for same-sex civil marriage.<sup>24</sup>

## 1.2. *Structure of this Paper*

This paper has been divided into three main sections. **Section 2** will deal briefly with the substantive law rules relating to the celebration of a same-sex marriage and the registration of a partnership. **Section 3** will deal solely with the private international law aspects of same-sex marriage, whilst **Section 4** will be devoted to an analysis of the relevant private international law rules in relation to registered partnership. In order to aid simultaneous comparison between the relevant rules for these two institutions the same structure has been used in each section. However, from the outset it must be mentioned that this paper can, in the limited space available, only attempt to deal with some of the aspects related to such relationships. A choice has therefore been made to limit this paper to the structural aspects of such relationships, *i.e.* the establishment of the relationship (**Sections 3.1** and **4.1**) and the dissolution thereof (**Sections 3.2** and **4.2**). In **Section 5** a number of conclusions will be reached with regards the approaches taken and the possible improvements which can be made. The following abbreviations have been used throughout this paper:

WCE	Private International Law (Divorce) Act <i>Wet conflictenrecht echtscheiding</i>
WCGP	Private International Law (Registered Partnerships) Act <i>Wet conflictenrecht geregistreerd partnerschap</i>
WCH	Private International Law (Marriages) Act <i>Wet conflictenrecht huwelijk</i>
Neth. CC	Dutch Civil Code <i>Burgerlijk Wetboek</i>

<sup>23</sup> The Cabinet was called the 'purple coalition' because when the colours of the main political parties in the Cabinet are mixed, purple is the result.

<sup>24</sup> There were of course those academics who were against the opening of marriage to same-sex couples, although these commentators represented a minority in Dutch literature: *e.g.* Nuytinck 1996, p. 125.

## 2. Substantive Law Regulations

### 2.1. Same-sex Marriage

The legal changes made to the marriage laws in The Netherlands in 2001 did not fundamentally alter the procedure by which two persons are allowed to marry. Only the *eligibility* criteria were amended. In this way, The Netherlands has retained one marital institution, which since the 1<sup>st</sup> April 2001 has been open to both different-sex and same-sex couples. Nonetheless, it must be noted that Dutch law only defines marriage in its civil law context.<sup>25</sup> No religious marriage ceremony may take place prior to the parties having informed the minister of religion that a civil marriage has already taken place.<sup>26</sup>

Prior to the celebration of a marriage, information must be submitted to the Registrar in the place of residence of one of the parties.<sup>27</sup> If both parties have a place of residence outside of The Netherlands, this information must be given to the Registrar in The Hague.<sup>28</sup> The Registrar is under a legal duty to then prepare an instrument of registration unless he or she believes that making such an instrument would be against public policy.<sup>29</sup> A number of documents must be lodged with the Registrar pursuant to Article 1:44, Neth. CC.<sup>30</sup> The parties are entitled to select a different municipality for the celebration of the marriage or registration of the partnership than that where the information has been deposited.<sup>31</sup> This is known as a *keuzegemeente* or a 'municipality of choice'. If the marriage is not celebrated within a year of the date of the instrument, a new instrument must be drawn up.<sup>32</sup> Once the instrument has been deposited with the Registrar, the parties must wait fourteen days.<sup>33</sup> This period allows the Registrar to determine whether there are any important reasons why the marriage should not be celebrated.<sup>34</sup>

<sup>25</sup> Article 1:30, Neth. CC.

<sup>26</sup> Article 1:68, Neth. CC. A minister of religion who does not abide by this legal rule can face a pecuniary fine of up to € 2,250, Article 449, in combination with Article 23, Dutch Criminal Code.

<sup>27</sup> **Marriage:** Article 1:43(1), first sentence, Neth. CC; **Registered Partnership:** Article 1:80a(4), first sentence, Neth. CC.

<sup>28</sup> **Marriage:** Article 1:43(1), second sentence, Neth. CC; **Registered Partnership:** Article 1:80a(4), second sentence, Neth. CC.

<sup>29</sup> Article 1:80a(4), in conjunction with Article 1:18b(2), Neth. CC.

<sup>30</sup> This includes a birth certificate of each of the parties and a certified true copy of their registration in the personal records database, an instrument of consent to the marriage if required, a death certificate all of those whose consent would have been required, evidence proving previous marriages or registered partners have been properly terminated, and an instrument of declaration to marry.

<sup>31</sup> Article 1:80a(4), in conjunction with Article 1:43(2), Neth. CC.

<sup>32</sup> Article 1:80a(4), in conjunction with Article 1:46, Neth. CC.

<sup>33</sup> Vlaardingerbroek *et al.* 2004, p. 103, § 3.9.1.

<sup>34</sup> Article 1:80a(6), in conjunction with Article 1:62, Neth. CC.

In terms of the dissolution of a marriage, the same options are available to same-sex couples as to opposite-sex couples. According to Article 1:149, Neth. CC, a marriage ends upon the death of one of the parties,<sup>35</sup> if one of the parties goes missing and this is followed by a new marriage or registered partnership,<sup>36</sup> by divorce,<sup>37</sup> by the dissolution of a marriage after a judicial separation<sup>38</sup> or by the conversion of a marriage into a registered partnership.<sup>39</sup> At present, although there are proposals to introduce a form of administrative divorce,<sup>40</sup> divorce can only be petitioned via the court.<sup>41</sup> The rules are identical regardless of whether the divorce concerns a same-sex marriage or a different-sex marriage.

## 2.2. Registered Partnership

When the institution 'registered partnership' was introduced in 1998, a separate title was inserted into the Dutch Civil Code. The positioning of this new title, entitled Title 5<sup>A</sup>, is significant when one is analysing the Dutch approach to this new institution. Being positioned between *Title 5: Marriage* and *Title 6: Rights and Duties of the Spouses*, it is clear that the Dutch Government saw this institution as a new institutionalised relationship form akin to marriage. Nonetheless the creation of a new title in the Civil Code, also shows that the Government wished to make a distinction between registered partnership on the one hand and marriage on the other.<sup>42</sup>

As well as all the preliminary procedures prior to the registration of a partnership being identical to those for the celebration of a marriage, the ceremony for the registration of a partnership also closely resembles that of marriage, apart from two important differences.<sup>43</sup> Firstly, the future parties to a registered partnership, as with parties to a future marriage, must declare that they consent to the registration. However, with registered partnerships, the parties do not need to give this consent in any particular prescribed format.<sup>44</sup> The second difference is that registered partners may celebrate a religious ceremony before the civil ceremony takes place,<sup>45</sup> whereas future

<sup>35</sup> Article 1:149(a), Neth. CC.

<sup>36</sup> Article 1:149(b), Neth. CC.

<sup>37</sup> Article 1:149(c), Neth. CC.

<sup>38</sup> Article 1:149(d), Neth. CC.

<sup>39</sup> Article 1:149(e), Neth. CC.

<sup>40</sup> *Kamerstukken II* 2005/06, 30 145 (Proposal from Minister Donner) and *Kamerstukken II* 2005/06, 29 676 (Proposal from Mr. Luchtenveld).

<sup>41</sup> Article 1:51, Neth. CC.

<sup>42</sup> For more on this topic see, Curry-Sumner 2005, p. 117-158.

<sup>43</sup> Although the law requires no specific form for the registration of the partnership, such form can be provided: Vlaardingerbroek *et al.* 2004, p. 117-118, § 4.3.5.

<sup>44</sup> Article 1:67, Neth. CC is not applicable to registered partnerships. See Curry-Sumner 2005, p. 127-128.

<sup>45</sup> Article 1:68, Neth. CC is not applicable to registered partnerships. Article 449, Dutch Criminal Code, stipulates that the celebration of a religious wedding prior to a civil

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spouses are prohibited from doing so.<sup>46</sup> The reasoning for the fact that Article 449, Dutch Criminal Code is not extended to registered partners lies in the fact that registered partnerships are not celebrated in church.<sup>47</sup>

The termination of a registered partnership is governed by Articles 1:80c-1:80g, Neth. CC. For the most part, these methods have been inspired by the methods available to married couples to terminate their marriage.<sup>48</sup> However, judicial separation, available to married couples wishing to terminate their marriage, is not available to registered partners.<sup>49</sup> The majority of spouses using the judicial separation procedure often do not wish to divorce for religious reasons.<sup>50</sup> The Government, believing that those involved in a registered partnership would not have such religious convictions, saw no reason to extend the possibility of such a judicial separation procedure to registered partnership.<sup>51</sup> This reasoning can, however, be challenged,<sup>52</sup> and some commentators have called for an extension of the rules on judicial separation to registered partners.<sup>53</sup> Furthermore, unlike marriage, registered partnerships may be terminated by means of an administrative procedure devoid of judicial intervention. The registered partnership in this case must be terminated by a mutual agreement. A distinction must be drawn between the agreement to terminate (*beëindigingsovereenkomst*) and the declaration to terminate (*beëindigingsverklaring*).<sup>54</sup>

### 3. Same-sex Marriage and Private International Law

#### 3.1. Establishment

According to Dutch law, no difference is drawn between same-sex and different-sex marriage in terms of the residency requirements imposed on

wedding will be fined up to a maximum of € 2,250. Article 90-*octies*, Dutch Criminal Code, states that the term 'marriage' must be interpreted to include 'registered partnerships' throughout the Dutch Criminal Code except in Article 449. For more information on the relationship between Arts. 1:68 and 1:80a, Neth. CC and Article 449, Dutch Criminal Code see Loonstein 2005, p. 126-128.

<sup>46</sup> Some authors have called for the repeal of the prohibition on religious marriages prior to civil marriages: Roes 2001, p. 111-113; Plasschaert 2002, p. 654; Loonstein 2005, p. 126-128.

<sup>47</sup> *Kamerstukken II* 2001/02, 28 078, nr. 2, p. 2, Sumner & Forder 2003, p. 266.

<sup>48</sup> Article 1:149, Neth. CC.

<sup>49</sup> For detailed information see Boele-Woelki, Braat & Sumner 2003, p. 121-126.

<sup>50</sup> De Boer 2002 p. 477, § 667. *Kamerstukken II* 1993/94, 23 761, nr. 3, p. 9; nr. 7, p. 20.

<sup>51</sup> Heida 2000, p. 41.

<sup>52</sup> Judicial separation brings to an end the community of property and up until the abolition of the duty of cohabitation, also brought such a duty to an end (Art. 1:83 (old), Neth. CC). The judicial separation also affects certain provisions with respect to children, maintenance and the use of the common household.

<sup>53</sup> See, for example, Waaldijk 2000, p. 178.

<sup>54</sup> See further, Curry-Sumner 2005, p. 150-152.



aspirant spouses. According to Article 1:43, Neth. CC, aspirant spouses must make a declaration of their intent to marry at the Registry of Births, Deaths, Marriages and Registered Partnerships of the residency of one of the parties.<sup>55</sup> If neither of the parties is resident in The Netherlands, but at least one of them is a Dutch citizen, then they may declare their intent to marry at the Registry in The Hague.<sup>56</sup> These provisions apply equally to same-sex and different-sex couples. However, these rules are only part of the story, since reference must also be made to the relevant Dutch choice of law rules.

### 3.1.1. 1978 Hague Marriage Convention

The choice of law rules governing the celebration of a marriage in The Netherlands stem from the 1978 Hague Convention on the Celebration and Recognition of the Validity of Marriages.<sup>57</sup> This Convention, currently in force in The Netherlands, Luxembourg and Australia, entered into force on the 1<sup>st</sup> May 1991. The central question which the *Staatscommissie* posed was whether same-sex marriages could be regarded as falling within the ambit of this Convention. On this point, the members of the *Staatscommissie* appeared deeply divided. Some members, agreeing with the position eventually adopted by the Dutch Government,<sup>58</sup> believed that same-sex marriages could not be regarded as falling within the scope of this Convention.<sup>59</sup> These members highlighted the absence of a definition of the term 'marriage' in the Convention, and that the term needed to be understood in *its broadest, international sense*.<sup>60</sup> According to these members the emphasis should be placed on the word 'international' (and not on the term 'broadest') in that certain minimum criteria need to be satisfied.

The other members of the *Staatscommissie* argued otherwise. Although these members also referred to the absence of any definition of the term 'marriage', they also referred to the explicit discussion of same-sex marriages during the preparatory meetings, leading to the eventual adoption of the 1978 Marriage Convention. According to the answers to the preparatory questionnaire promulgated prior to the drawing up of the Convention, a small majority of States believed that matters such as the sex of the parties 'should be governed by the law applicable by the Convention. Any seriously offensive results that might be reached under this law could presumably be

<sup>55</sup> Article 1:43, first sentence, Neth. CC. The term residency in this context refers to the definition provided in Article 1:10, Neth. CC. For translations of Book 1, Dutch Civil Code, see Sumner & Warendorf 2003.

<sup>56</sup> Article 1:43, second sentence, Neth. CC.

<sup>57</sup> *Tractatenblad* 1987, No. 137.

<sup>58</sup> *Kamerstukken II* 1999/00, 26 672, nr. 3, p. 5 (Explanatory Notes), and 1999-2000, 26 672, nr. 5, p. 19 (Note as a result of report).

<sup>59</sup> *Staatscommissie Internationaal Privaatrecht* 2001, p. 8-9.

<sup>60</sup> *Staatscommissie Internationaal Privaatrecht* 2001, p. 9. This is a quote from the explanatory report accompanying the Convention.

avoided by the public policy exception'.<sup>61</sup> Furthermore, from an examination of the Dyer Report, accompanying the Convention,<sup>62</sup> it would appear that the issue of same-sex marriages was explicitly discussed during the preparations, and therefore to speak of a lacuna in the legislation would be simply incorrect. The choice therefore to avoid any definition of the term 'marriage' was therefore an explicit choice, made in full awareness that in the future same-sex marriages may well be deemed to fall under the Convention, and thereby resort to the public policy exception may well have to be made.<sup>63</sup>

At this point, it is perhaps fitting to note, that in an article on the *Staatscommissie's* report, Pellis refers to a passage by Batiffol made during a meeting of the Special Commission on the 15<sup>th</sup> October 1976,<sup>64</sup> where it is stated:

M. Batiffol (France) est de l'avis de ceux qui estiment indispensable d'introduire une clause générale d'ordre public. Pourquoi? Parce que l'expérience montre que les législateurs, quel qu'ils soient, s'avèrent incapables de donner une liste exhaustive des cas qui pourraient se présenter. A l'instar du Délégué espagnol, il signale que toutes les législations sont sujettes à transformation et que l'on ne sait pas ce que deviendront demain des hypothèses considérées aujourd'hui comme manifestement contraires à l'ordre public (il en va ainsi de l'homosexualité: peut-elle revêtir ou non le form d'un mariage? La question est posée, et il n'est pas exclu que dans certaines systèmes on y réponde par l'affirmative).

### 3.1.2. Private International Law (Marriages) Act

Although the *Staatscommissie* remained divided on the question whether same-sex marriages fell within the ambit of the 1978 Hague Convention, in Dutch terms this impasse remained somewhat theoretical since a Dutch judge or Registrar would readily apply the Private International Law (Marriage) Act to such cases, without first seeking reference from the Convention. Although the WCH refrains from providing a definition of the term 'marriage', as a result of the legislation opening marriage to same-sex couples, the WCH was amended. Article 3(1)(d) of the Act had previously stated that the celebration of a marriage could be refused if it would be in breach of the provision that a man may only be united with a woman and a woman with a man at any one time. As a result of the legislative amendments broad about by the introduction of same-sex marriage, Article 3(1)(d) of the Act now reads that the solemnisation of a marriage will be

<sup>61</sup> Quotation from the answers by the United States of America to Question 6 of the questionnaire, see further *Acts et Documents de la Treizième Session, Tome II, Mariage - 1978*, p. 334. All those States to have ratified the Convention also provided a similar response.

<sup>62</sup> *Acts et Documents de la Treizième Session, Tome II, Mariage - 1978*, p. 41.

<sup>63</sup> Van Rijn van Alkemade 1989, p. 223.

<sup>64</sup> Pellis 2002, p. 165.

refused if 'it would be in breach of the provision that a person may only be united in marriage with one person at one time'.<sup>65</sup> Furthermore, as a result of the passing of private international rules in the field of registered partnership, a further restriction has been imposed namely that the solemnisation of a marriage may also be refused 'if it be in breach of the provisions that those who wish to celebrate a marriage, may not already be involved in a registered partnership'.<sup>66</sup>

### 3.1.3. The End Result

It is therefore clear that a Dutch judge or Registrar will apply the relevant rules of the WCH in determining whether or not a party is allowed to celebrate a same-sex marriage in The Netherlands. Article 2(a), WCH states that the celebration of a marriage will be permitted if 'each of the future spouses meet the requirements of Dutch law for entry into a marriage and one of them possesses Dutch nationality or has his or her habitual residence in The Netherlands'. In combining this rule with the abovementioned residency rules, as long as one of the parties has his or her habitual residence in The Netherlands, or one of the parties has Dutch nationality, the couple will be allowed to marry in The Netherlands. Nonetheless, should neither of the parties have their habitual residence in The Netherlands nor possess Dutch nationality, the alternative choice of law rule laid down in Article 2(b), WCH can be used. This rule allows a marriage to be performed in The Netherlands if both of the parties satisfy the law of the State of their nationality with regard to the marriage conditions. As a result of all these different rules the following can be deduced.

<sup>65</sup> *Staatsblad* 2001, No. 128.

<sup>66</sup> Article 3(1)(e), WCH, introduced as a result of Wet van 6 juli 2004, houdende regeling van het conflictenrecht met betrekking tot het geregistreerd partnerschap, *Staatsblad* 2004, No. 621.

Table 1: Couples allowed to celebrate a same-sex marriage in The Netherlands

Nationality	Habitual Residence		
	Both parties habitually resident in NL	One party habitually resident in NL	Neither party habitually resident in NL
Both parties possess Dutch nationality	Marriage permitted	Marriage permitted	Marriage permitted
One party possesses Dutch nationality and the other a nationality which permits the marriage	Marriage permitted	Marriage permitted	Marriage permitted
One party possesses Dutch nationality and the other a nationality which does not permit the marriage	Marriage permitted	Marriage permitted	Marriage permitted
Both parties possess a nationality which permits the marriage	Marriage permitted	Marriage permitted	Marriage permitted
One party possesses a nationality which permits the marriage and the other a nationality which does not	Marriage permitted	Marriage permitted	Not permitted
Both parties possess a nationality which does not permit the marriage	Marriage permitted	Marriage permitted	Not permitted

#### 3.1.4. Recognition of Marriages celebrated Abroad

Although in 2001, when the *Staatscommissie* published its report on the private international law aspects of same-sex marriage no other country in the world recognised such a marital form, this is no longer the case in 2005. Belgium,<sup>67</sup> Spain<sup>68</sup> and Canada<sup>69</sup> have all since passed legislation allowing same-sex couples to marry, and the Supreme Court of Massachusetts<sup>70</sup> and the Constitutional Court of South Africa<sup>71</sup> have held that same-sex couples should be allowed to marry. These marriages will be recognised in the Netherlands according to the same rules applicable to marriages between different-sex couples, *i.e.* those laid down in Article 5 WCH.<sup>72</sup>

<sup>67</sup> Wet van 13 februari 2003 tot openstelling van het huwelijk voor personen van hetzelfde geslacht en tot wijziging van een aantal bepalingen van het Burgerlijk Wetboek, *Belgisch Staatsblad* 2003, 20 February 2003.

<sup>68</sup> Ley 13/2005 de 1 julio 2005 por la que se modifica el Código Civil en materia de derecho a contraer matrimonio, BOE No. 153.

<sup>69</sup> Act C-38, An Act respecting certain aspects of legal capacity for marriage for civil purposes, 2005, c.33.

<sup>70</sup> *Goodridge v Department of Health*, 18 November 2003, 440 Mass. 309, 798 N.E.2d. 941.

<sup>71</sup> *Fourie and Bonthuys v. Minister of Home Affairs et al*, Case CCT 60/04, Decide on 1 December 2005.

<sup>72</sup> For more information on the working of this rule, see Frohn 2001, p. 166-170.

### 3.2. *Dissolution*

#### 3.2.1. Jurisdiction

In The Netherlands, as in 23 other European Union Member States, the Brussels IIbis Regulation is applicable in the field of divorce jurisdiction.<sup>73</sup> The question, which remains, as yet unanswered, is whether same-sex marriages fall within the scope of this Regulation. From a Dutch point of view, there is only one marital institution, which is open to couples regardless of their sex.<sup>74</sup> To introduce a distinction would be discriminatory and contrary to the policy behind opening marriage to same-sex couples. Although the ECJ has already determined that a registered partner is not to be understood as equivalent to a spouse in the context of European legislation,<sup>75</sup> the ECJ has yet to address the issue whether a couple legally and validly 'married' in one Member State is entitled to be treated as married in other Member States. Nevertheless, regardless of the outcome of any future case, The Netherlands has already chosen to apply the same rules as those laid down in Brussels IIbis to all those cases not falling within the material scope of this Regulation.<sup>76</sup>

However, unlike registered partnerships,<sup>77</sup> no *forum necessitatis* has been created for same-sex married couples. Take the following example,

Yolanda, a female Belgian national, and Roxelana, a female Turkish national, celebrate their marriage in Rotterdam, The Netherlands. Two years later they decide to move to Austria. Once there, they realise that their relationship has hit rocky ground and wish to divorce. Their relationship not being recognised in Austria would mean that they would be without recourse to a forum to dissolve their relationship.

In order to avoid this situation, a so-called *forum necessitatis* should be introduced. This is the case for those couples having entered into a registered partnership, but is not the case for those having married.<sup>78</sup> This situation should be rectified as soon as possible.

#### 3.2.2. Choice of Law Rules

Due to the fact that there are no international treaties, conventions or bilateral agreements applicable in this field of law, reference in this section can only

<sup>73</sup> EC Regulation No. 2201/2003 of 27 November 2003, all EU Member States apart from Denmark.

<sup>74</sup> Article 1:30, Neth. CC.

<sup>75</sup> *D and Kingdom of Sweden v Council of the European Union*, C-122/99P and C-125/99P, 31 May 2001.

<sup>76</sup> A situation supported by the Staatscommissie Internationaal Privaatrecht 2001, p. 20.

<sup>77</sup> Curry-Sumner 2005, p. 441-444.

<sup>78</sup> Article 4(4), Dutch Code of Civil Procedure.

be made to the relevant domestic Dutch law, which is to be found in the Private International Law (Divorce) Act (*Wet conflictenrecht echtscheiding*, hereinafter abbreviated to WCE). Issues relating to choice of law can arise in two situations, either in terms of a divorce or in terms of the conversion of a marriage into a registered partnership.<sup>79</sup> However, as a result of debates in the Dutch Parliament in October 2005, the conversion procedure allowing couples to convert a marriage into a registered partnership, and subsequently dissolve their registered partnership by means of an administrative declaration will more-than-likely be abolished.<sup>80</sup> The private international law issues surrounding this lightning divorce will thus not be discussed in this paper.<sup>81</sup>

If the marriage is dissolved other than by means of a conversion into a registered partnership (that is to say, by divorce or conversion of a judicial separation into a divorce) then the ordinary rules of the Private International Law (Divorce) Act (*Wet conflictenrecht echtscheiding*, hereinafter abbreviated to WCE) will apply.<sup>82</sup> In applying this legislation the parties are in principle permitted to choose Dutch law as the applicable law to their divorce.<sup>83</sup> This choice must be made by the parties together or by one of them and uncontested by the other. If such a choice is absent then the reference will be made to the choice of law ladder in Articles 1(1) to (3), WCE.

### 3.2.3. Recognition

As already stated, a number of countries have, since the opening up of civil marriage to same-sex couples in The Netherlands, also allowed same-sex couples to marry. It is, therefore, possible that couples married in these countries may get divorced and seek recognition of their divorce in The Netherlands. Furthermore, it is also possible that countries although not allowing same-sex couples to marry domestically, would recognise same-sex marriages celebrated abroad and thus allow these parties to petition for divorce. In all these cases, the ordinary rules surrounding the recognition of divorces obtained abroad would apply to same-sex divorces.

As a result, the Netherlands would apply the Brussels Ibis recognition regime to divorces obtained in other Member States, *e.g.* in Belgium or Spain. According to Article 21, Brussels Ibis, a judgment issued in a Member State shall be recognised in the other Member states without any special procedure

<sup>79</sup> The procedure to convert a marriage into a registered partnership is laid down in Article 1:77a, Neth. CC.

<sup>80</sup> *Kamerstukken II 2005/06*, 30 145, nr. 4 and *Kamerstukken II 2005/06*, 29 676, nr. 35, Article Fa. The same proposal was also made in the original proposal by Minister Donner, *Kamerstukken II 2003/04*, 29 520, nr. 1-9.

<sup>81</sup> For further information on this issue, see Sumner 2003, p. 15-23 and Sumner 2004a, p. 231-237.

<sup>82</sup> Staatscommissie Internationaal Privaatrecht 2001, p. 19.

<sup>83</sup> Article 1(4), WCE.

being required.<sup>84</sup> In terms of divorces falling outside the scope of Brussels IIbis, *i.e.* those divorces obtained in non-Member state countries, the ordinary rules of Dutch private international law apply. In this case, the Hague Convention of the 1<sup>st</sup> June 1970 on the recognition of divorces and legal separations,<sup>85</sup> and the International Commission on Civil Status Convention on the recognition of decisions relating to the marital bond signed in Luxembourg on the 8<sup>th</sup> September 1967 as in force.<sup>86</sup> In the eyes of the Dutch authorities, divorces pertaining to cease the bond established as a result of a same-sex marriage, fall within the material scope of these conventions and thus international obligations under these obligations will be honoured.

Should none of the international instruments be applicable, resort will be made to the WCE. In this case the divorce will be recognised, as long as:

1. The foreign divorce must have been obtained by a competent authority.<sup>87</sup>
2. If the divorce was obtained as a result of a unilateral petition, it will only be recognised if it was obtained as the result of a proper legal process (*behoorlijke rechtspleging*).<sup>88</sup> Nonetheless, even if either of these first two criteria are not met then the dissolution may still be recognised if the other party either expressly or implicitly consented to the procedure.<sup>89</sup>
3. A foreign decision may also not be contrary to Dutch public policy.
4. Finally, a decision will not be recognised, even if it complies with the aforementioned criteria if it is not in conformity with a previous decision.<sup>90</sup>

<sup>84</sup> This replaces the old Article 14, Brussels II rule. The removal of the exequatur procedure forms one of the general principles of the legislation. See further, Storme 2005, p. 64, § 27.

<sup>85</sup> Australia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, Hong Kong, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Slovakia, Sweden, Switzerland and the United Kingdom have all ratified this Convention.

<sup>86</sup> This Convention has been ratified by The Netherlands, Austria and Turkey, and has been signed by Belgium, France, Germany and Greece.

<sup>87</sup> With respect to divorces, no definitive answer has yet been given as to whether administrative divorces fall within the scope of Article 2, WCE. In *Rb Amsterdam*, 6 June 1984, *NIPR* 1985, 111, the *rechtbank* decided that an administrative decision granted by a Thai Registrar fell within the scope of Article 2, WCE. It has been suggested that administrative divorces do fall within the scope of these rules, see Boele-Woelki 2000, p. 3971-3973; HR, 13 July 2001, *NJ* 2002, 223, annotated T. de Boer, § 9; Mostermans 2003, p. 96, § 271. *Contra Hof Den Haag* 3 May 2000, *NIPR* 2000, 175, which regarded such divorces as falling under Article 3, WCE.

<sup>88</sup> Article 2(1), WCE. Mostermans 2003, p. 97-98, § 275-278; Strikwerda 2002, p. 289-290, § 270.

<sup>89</sup> Article 2(2), WCE.

<sup>90</sup> Mostermans 2003, p. 102-103, § 289-293.

### 3.3. *Interregional Consequences*

Although in 2001 it was unclear whether a same-sex marriage celebrated in The Netherlands would be recognised in the other parts of the Kingdom of The Netherlands,<sup>91</sup> this has now been affirmatively answered by the Joint Court of Appeal of the Netherlands Antilles and Aruba.<sup>92</sup> The case concerned a lesbian couple, one Dutch and one Aruban, married in The Netherlands. The couple sought recognition of their marriage in Aruba, which was initially refused by the Registrar. The Joint Court of Appeal held that the marriage must be recognised on the basis of Article 40, Charter for the Kingdom of The Netherlands (*Statuut voor het Koninkrijk der Nederlanden*), and thus registered the Population Register, but not in the Registers of Civil Status. According to Article 1:26, Aruban Civil Code, only marriages celebrated in Aruba can be registered in these registers. In terms of the legal consequences for the couple themselves, this difference is insignificant.<sup>93</sup>

## 4. Registered Partnership

The introduction in 1998 of a new formalised institution alongside marriage created a great deal of attention not only in family law circles, but also in Dutch (and of course foreign) private international law circles. How were international cases to be dealt with? Was this family form to be governed by the same rules as those on marriage, or according to the rules on contractual agreements? Were foreign nationals allowed to register their partnership in The Netherlands? These and many other questions were answered in a report published by the *Staatscommissie* in May 1998. Although the *Staatscommissie* published explicit proposals for legislation, these proposals lay virtually untouched for more than five years, before eventually becoming law on the 1<sup>st</sup> January 2005.<sup>94</sup> The influential nature of the *Staatscommissie* report is to be found in the explanatory notes to the Private International Law (Registered Partnerships) Act (*Wet conflictenrecht geregistreerd partnerschap*, hereinafter abbreviated to PIL(RP)A). Save for a few minor amendments, the text of the explanatory notes is more-or-less identical to the 1998 *Staatscommissie* report.<sup>95</sup>

<sup>91</sup> *Staatscommissie Internationaal Privaatrecht* 2001, p. 42. See also De Boer 2001, p. 764-765. Jessurun D'Oliveira 2001, p. 807-808, met naschrift van J. de Boer.

<sup>92</sup> *Gemeenschappelijk Hof van Justitie van de Nederlandse Antillen en Aruba*, 23 August 2005, Case No. EJ 2101/04 - H.12/05.

<sup>93</sup> Boele-Woelki 2005, p. 221.

<sup>94</sup> Nonetheless, even before these rules become effective, they were being referred to by courts and Registrars. See, for example, Rb Roermond, 29 March 2001, *NIPR* 2001, 188.

<sup>95</sup> *Kamerstukken II* 2002/03, 28 924, nr. 3 (explanatory notes).



## 4.1. *Establishment*

### 4.1.1. Choice of Law Rules

As the *Staatscommissie* had already pointed out in May 1998,<sup>96</sup> registered partnerships do not fall within the ambit of the abovementioned 1978 Hague Marriage Convention or the WCH. Therefore, new choice of law rules needed to be formulated to deal with such relationships. In so doing, the Dutch Government opted to maintain a distinction between the formal and essential validity of the relationship. Furthermore, a distinction was also made between partnerships registered in The Netherlands (with unilateral choice of law rules being applied) and partnerships registered abroad. Although these distinctions have been made, the end result is unsurprisingly uniform. According to Articles 1(1) and 1(2), WCGP questions related to the formal and essential validity of partnerships registered in The Netherlands will be governed by Dutch law. This therefore means that all partnerships registered in The Netherlands will need to be registered in accordance with Articles 1:80a *et seq.*, Neth. CC. The alternative choice of law rule applicable to (same-sex) marriages is therefore not replicated with respect to registered partnerships.<sup>97</sup> The absence of such an alternative is easy to explain when one realises that the institution of registered partnership is not widely accepted. Both the *Staatscommissie* and the Dutch Government therefore felt that it was not unreasonable to force couples wishing to register their partnership in The Netherlands to comply with Dutch law.

### 4.1.2. Recognition of Foreign Relationships

When dealing with the recognition of relationships registered abroad, one must first address the preliminary issue of characterisation. Before one can determine whether particular form of 'registered partnership' will be recognised in The Netherlands, the question must first be answered whether the registration can even be considered to be a form of 'registered partnership'. This legal issue can, however, be approached from two different perspectives. On the one hand, one can emphasise the contractual nature of the relationship. The parties to a non-marital registered relationship agree upon certain legal effects pursuant to a mutual agreement; the moment the relationship is registered the contract becomes enforceable.<sup>98</sup> Alternatively, one could place more emphasis on the effect on the parties' personal status. Upon registering the relationship, the parties acquire a status as registered partners, with certain rights and duties, capacities and

<sup>96</sup> Staatscommissie Internationaal Privaatrecht 1998.

<sup>97</sup> See Article 2(b), WCH.

<sup>98</sup> See Curry-Sumner 2005, p. 46, 86-89, 125-127, 171-173, 217-221, and 265-266.

incapacities attendant upon that status.<sup>99</sup> Accordingly, one is confronted with a choice between two traditional private international law legal categories: personal status and contract.<sup>100</sup> Although this dilemma has been important in other jurisdictions, in The Netherlands a clear choice has been made for the latter of these two approaches.

In terms of the issue of characterisation, the legislation passed by the Dutch parliament differs markedly from the recommendations of the *Staatscommissie*. Unlike, the *Staatscommissie*, which left the question of characterisation open-ended, Article 2(5), WCGP provides for a list of criteria in order to determine whether a foreign relationship can be characterised as a 'registered partnership' for the purposes of the WCGP.<sup>101</sup> Article 2(5), in conjunction with Article 2(4), ordains the following criteria:

- the registration was completed before a competent authority in the place where it was entered into;<sup>102</sup>
- the institution is exclusive, *i.e.* that a registered partnership cannot be concluded alongside another registered partnership or marriage;<sup>103</sup>
- the partnership must only be concluded between two persons;<sup>104</sup>
- the solemnisation of the registered partnership creates obligations between the partners that, in essence, correspond with those in connection to marriage;<sup>105</sup>
- the partnership must be based on a legally regulated form of cohabitation.<sup>106</sup>

The dearth of a characterisation provision in the original proposals by the *Staatscommissie* and in the current work on the codification of Dutch private international law has, fortunately, not been followed in this field.<sup>107</sup> Nonetheless, although these criteria appear clear and workable, a certain degree of confusion surrounds the precise application of Article 2(5)(c), WCGP. According to the wording of the Article, the obligations which the

<sup>99</sup> Allen 1930, p. 288. He comments on the fact that a status is the state of being from which a number of capacities and incapacities flow. A status is thus, according to him, '... the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incapacities or both'.

<sup>100</sup> Some authors believe one should distinguish between the category of marriage and the category of contract: Henneron 2004, p. 464-468 and Kessler 2004, p. 69-76.

<sup>101</sup> On the interaction of Articles 2(1) and 2(5), WCGP see Sumner 2004, p. 55-57.

<sup>102</sup> Articles 2(4) and 2(5)(a), WCGP.

<sup>103</sup> Article 2(5)(b), WCGP.

<sup>104</sup> Article 2(5)(b), WCGP.

<sup>105</sup> Article 2(5)(c), WCGP.

<sup>106</sup> Article 2(5), WCGP.

<sup>107</sup> On the lack of a provision dealing with characterisation in the proposals for the codification of Dutch private international law, see Jessurun d'Oliveira 2003, p. 1-6 and Vlas 2003, p. 443.

partners owe to each other should correspond with those in connection to marriage. However, in the explanatory notes to the Act it is stated,

'The proposed rules also lend themselves to application on legal institutions which do not have the name "registered partnership", but still possess the key characteristics thereof, even if this is not complete. Examples are the Belgian statutory cohabitation, the PACS in France and the statutory regulated cohabitation forms in Catalonia and Aragon'.<sup>108</sup>

It is, therefore, not entirely clear how these criteria will be interpreted. Although the explanatory notes refer to the subsequent promulgation of information on these criteria, no such information has been released. Which foreign relationships satisfy these criteria is thus still an unanswered question. A better solution would have been if certain 'registered partnerships' would have been *a priori* listed as fulfilled such criteria, leaving the criteria to be applied on an *ad hoc* basis for new forms of 'registered partnership'.<sup>109</sup>

Nonetheless, once it has been determined that a foreign relationship can be characterized as a 'registered partnership' for the purposes of the WCGP, the question is whether such a relationship will then be recognised. The starting point for both the Dutch Government and the *Staatscommissie* was that the recognition rules on registered partnership should correspond to the equivalent recognition rules for marriage.<sup>110</sup> As a result, Article 2(1), WCGP is a replica of Article 5(1), WCH, subject to the standard public policy exception.<sup>111</sup>

The distinction thus created between registered partnership and marriage in terms of foreign relationships is a very difficult one and will thus often turn on semantics. For example, a Swedish registered partnership, which in Sweden is virtually identical to marriage, will more-than-likely be recognised in The Netherlands in accordance with the rules laid down by the WCGP and not under the WCH.<sup>112</sup> Although in the majority of cases this will not lead to differences in the legal rights offered to same-sex couples, this may be of importance should the parties have children. Take the following example,

<sup>108</sup> *Kamerstukken II* 2002/03, 28 924, nr. 3, p. 3.

<sup>109</sup> Such a solution has, for example, been adopted in the United Kingdom. See further Curry-Sumner 2005, p. 341-343.

<sup>110</sup> Article 18, *Staatscommissie Internationaal Privaatrecht* 1998, p. 29 and *Kamerstukken II* 2002/03, 28 924, nr. 3, p. 10.

<sup>111</sup> Article 3, WCGP.

<sup>112</sup> This solution would thus follow the approach adopted the European Court of Justice in the case of *D and Sweden v. Council* where a Swedish registered partnership was held not to be considered as equivalent to a marriage in determining eligibility to spousal housing allowance.

Lotta and Janik, both Swedish nationals, register their partnership in Stockholm. They subsequently use the possibilities for artificial insemination and Lotta conceives a child. According to Swedish law both Lotta and Janik are the legal parents of the child. The following year the parties decide to move to Almere, The Netherlands.

Two questions arise. The first in relation to the recognition of the parties' relationship. Their relationship would satisfy the characterisation criteria laid down in Article 2(5), WCGP. As such they would be determined to have validly registered a partnership according to Swedish law. However, the second question then relates to the issue of parentage. According to Article 1(1), *Wet Conflictenrecht Afstamming* (Private International Law (Parentage) Act), the parentage of the birth mother and her 'husband' will be determined according to the law of the parties' common nationality, or in the absence thereof of their common habitual residence, or in the absence thereof according to the habitual residence of the child. Two issues arise on the basis of this Article. Firstly, the Article is phrased in non-gender neutral terminology, causing problems for the recognition of joint legal parentage of same-sex couples. Secondly, if the parties have already been determined to have registered a partnership and not celebrated a marriage, this Article would more-than-likely deemed not be applicable. Further analysis of the *Wet Conflictenrecht Afstamming* also indicates no rule which would allow Janik to have her legal parentage recognised. Obviously there appears to have been little thought paid to the ensuing consequences of characterisation of a particular relationship as a marriage or a registered partnership. It will thus have to be seen whether these distinctions are able to stand the test of time.

## 4.2. *Dissolution*

### 4.2.1. Jurisdiction

In crafting international jurisdictional rules for the dissolution of registered partnerships The Netherlands has strived for simplicity. By virtue of Article 4(4), Dutch Code of Civil Procedure, the Brussels Ibis regime is *mutatis mutandis* applicable to all questions of international jurisdiction with respect to the dissolution of registered partnerships. In this way The Netherlands endorses one set of international jurisdictional rules applicable in all situations; the same grounds apply whether the case falls inside or outside the material scope of Brussels Ibis and whether the case involves the dissolution of a marriage or registered partnership. Alongside these rules, Dutch law also provides for the residuary jurisdiction of Dutch courts if the

relationship was registered in The Netherlands.<sup>113</sup> In this way, Dutch law recognises the need for a *forum necessitatis*.<sup>114</sup>

When the Dutch *Staatscommissie* published its proposals in 1998, there were in fact only four countries besides The Netherlands that had introduced equivalent legislation, namely Denmark, Norway, Sweden and Iceland. It was thus deemed suitable to provide an unconditional forum to all those couples who had registered their partnership in The Netherlands. However, by the time the Government eventually enacted legislation in this field, the number of jurisdictions to have introduced a form of registered partnership had increased dramatically. It would therefore have been advisable for the Government to restrict this *forum necessitatis* to those couples who are unable to dissolve their relationship outside of The Netherlands.<sup>115</sup>

Furthermore, as a result of the passing of the WCGP, Article 1:80c, Neth. CC has also been amended so as to provide a general rule of competency for the Dutch Registrar of Births, Deaths, Marriages and Registered Partnerships with respect to the administrative dissolution of non-marital registered relationships. Article 1:80c(2), Neth. CC now provides that the Dutch Registrar is competent on identical grounds to those laid down in Brussels IIbis,<sup>116</sup> thus furthering the simplicity in jurisdictional grounds for relationship breakdown in The Netherlands.

#### 4.2.2. Choice of Law Rules

Despite the apparent complexity of the Dutch choice of law rules laid down in the WCGP, the ultimate scheme is based on a simple distinction. It is

<sup>113</sup> Last sentence, Article 4(4), Dutch Code of Civil Procedure.

<sup>114</sup> *Kamerstukken II 1999/00*, 26 855, nr. 3, p. 33 and thus following the advice of the Dutch *Staatscommissie*, see *Staatscommissie Internationaal Privaatrecht 1998*, p. 35. Such a solution has also found academic support, e.g. Joppe 2000, p. 393-394 and Mostermans 2001, p. 304.

<sup>115</sup> This solution has, for example, been followed in **Switzerland** (Art. 65b, Swiss Code of Private International Law) and the **England & Wales** (Sec. 221(1)(c)(iii), Civil Partnership Act 2004 (Civil Partnership Act 2004) (dissolution), Sec. 221(2)(c)(iii), Civil Partnership Act 2004 (nullity) and Sec. 222(c), Civil Partnership Act 2004 (presumption of death)), **Scotland** (Sec. 225(1)(c)(iii), Civil Partnership Act 2004 (dissolution), Sec. 225(3)(c)(iii), Civil Partnership Act 2004 (nullity) and Sec. 1(3)(c), Presumption of Death (Scotland) Act 1977 as amended by § 44, Sch. 28, Civil Partnership Act 2004 (presumption of death)) and **Northern Ireland** (Sec. 229(1)(c)(iii), Civil Partnership Act 2004 (dissolution), Sec. 229(2)(c)(iii), Civil Partnership Act 2004 (nullity) and Sec. 230(c), Civil Partnership Act 2004 (presumption of death)).

<sup>116</sup> Article 1:80c(2), Neth CC refers to Article 4(4), Dutch Code of Civil Procedure, which in turn refers to Article 4(1), Dutch Code of Civil Procedure and thus to the application of the jurisdictional grounds stated in Brussels IIbis.

assumed that Dutch law will apply in all cases unless certain conditions are present.<sup>117</sup> As a result, three categories must be distinguished, namely,

- registered partnerships registered in The Netherlands;
- registered partnerships registered abroad where dissolution is sought on grounds of mutual consent and,
- registered partnerships registered abroad where dissolution is sought on grounds of a sole petition.

In the first category, Dutch law, as both *lex fori* and *lex loci registrationis*, will be applied in all cases.<sup>118</sup> In the second category, Dutch law will be applied,<sup>119</sup> unless the parties have made a choice for the *lex loci registrationis*.<sup>120</sup> In the third category, Dutch law will also be applied,<sup>121</sup> unless either the parties have jointly chosen for the *lex loci registrationis* or this choice has been made by one party and is not contested by the other,<sup>122</sup> or one party has made a choice of law for the place where the relationship was registered and both parties have close ties with that country.<sup>123</sup> The choice is, however, restricted to the substantive requirements of the dissolution; the form and manner in which the dissolution takes place will be determined according to Dutch law.<sup>124</sup> This approach is therefore based on the choice of law rules in the field of divorce as proposed by the Dutch *Staatscommissie*, save for the replacement of the choice for the *lex patriae* with the *lex loci registrationis*.

#### 4.2.3. Recognition

In drafting rules dealing with the recognition in The Netherlands of dissolutions obtained abroad a distinction has been drawn between those relationships terminated with mutual consent and those dissolved upon the request of one of the parties. Although this distinction has been made, the requirements therefore are identical. Four minimum conditions must therefore be satisfied, namely:

1. A foreign relationship dissolution must have been obtained by a competent authority.<sup>125</sup> Whether the authority was competent is to be judged according to 'international standards' and not the jurisdictional

<sup>117</sup> Joppe 2000, p. 393; Frohn 2004, p. 293; Reinhartz 2004, p. 495-496.

<sup>118</sup> Article 22, WCGP.

<sup>119</sup> Article 23(1), WCGP.

<sup>120</sup> Article 23(2), WCGP.

<sup>121</sup> Article 23(1), WCGP.

<sup>122</sup> Article 23(3), first sentence, WCGP.

<sup>123</sup> Article 23(3), second sentence, WCGP.

<sup>124</sup> Article 23(4), WCGP.

<sup>125</sup> With respect to registered partnerships, administrative decisions have been expressly included: Mostermans 2003 p. 112-113, § 328-329.

rules of the issuing country or Dutch law.<sup>126</sup> However, if the Dutch authorities would have been competent on identical grounds, then it would appear somewhat hypocritical to refuse recognition on the basis that jurisdiction was assumed on grounds not in accordance with international standards. This could thus be important in cases where a foreign judge assumes jurisdiction on the basis of an unconditional *forum necessitatis*.<sup>127</sup>

2. If the dissolution was obtained as a result of a unilateral petition, it will only be recognised if it was obtained as the result of a proper legal process (*behoorlijke rechtspleging*).<sup>128</sup> Nonetheless, even if either of these first two criteria are not met then the dissolution may still be recognised if the other party either expressly or implicitly consented to the procedure.<sup>129</sup>
3. A foreign decision may also not be contrary to Dutch public policy.
4. Finally, a decision will not be recognised, even if it complies with the aforementioned criteria if it is not in conformity with a previous decision.<sup>130</sup>

## 5. Conclusions

Same-sex couples in The Netherlands are offered an array of legal options when wishing to regulate their relationship. Since 2001, same-sex couples in The Netherlands are able not only to register a partnership or conclude a cohabitation contract, but are also entitled to legally marry. The opening up of civil marriage to same-sex couples in 2001 was an important milestone not only in The Netherlands but also worldwide. It signalled a fundamental paradigm shift in our notion of the term 'marriage'. It would appear that the challenge now is for private international law to deal with this modernised notion. It has thus been necessary not only to adapt various private international law rules in the field of marriage law, but also create an entirely new set of rules for the international regulation of registered partnerships.

<sup>126</sup> Strikwerda 2005, p. 289, § 270; Mostermans 2003, p. 99-100, § 279-282.

<sup>127</sup> An unconditional *forum necessitatis* is not an internationally recognised standard of jurisdiction and would thus, under normal circumstances not be recognised. However, such a ground is also recognised in Dutch internal procedural law, and it would therefore be rather hypocritical to refuse to grant recognition to a foreign dissolution on this basis, if a Dutch court would be able to grant a dissolution having declared itself competent on identical grounds. For more on this ground of jurisdiction, see Curry-Sumner 2005, p. 436-437 and the evaluation of such criteria in Curry-Sumner 2005, p. 438-445.

<sup>128</sup> Article 24(2), WCGP. Mostermans 2003, p. 97-98, § 275-278; Strikwerda 2002, p. 289-290, § 270.

<sup>129</sup> Article 24(2), WCGP. This is another example of the *favor divortii* and *favor dissolutionis* principles explained in Curry-Sumner 2005, p. 446-463.

<sup>130</sup> Mostermans 2003, p. 102-103, § 289-293.

Anno 2006, the fortunes of same-sex couples in The Netherlands are reasonably well protected. Both in terms of domestic legislation and the recognition of foreign relationships, The Netherlands provides for extensive regulation of such relationships. The time is now ripe to take a step backwards and assess the situation. Although one is able to now provide answers to questions, the provision of such answers simply leads to more questions. Are the differences between these various domestic institutions still necessary? What consequences does the distinction between registered partnership and marriage have in the field of private international law? Should more attention be paid to the function of foreign institutions instead of to semantic differences (which are often made for political reasons) in dealing with issues of characterisation. Nonetheless, it can easily be concluded the same-sex couples in The Netherlands are fortunate. Same-sex couples are treated practically identically to the different-sex couples in virtually all legal fields of law. Same-sex couples are provided with choices in terms of the legal regulation of their relationship, and same-sex couples having entered into relationships abroad are provided with a large certain degree of legal certainty in requesting recognition of their relationship.



## References

### Allen 1930

Allen, C., 'Status and capacity', *Law Quarterly Review*, 1930, p. 277-310.

### Boele-Woelki 1999

Boele-Woelki, K., *Le partenariat enregistré: législation des Pays-Bas*, Questions d'actualité en droit des personnes dans les Etats de la CIEC, Paris: Commission de l'Etat Civil, 26 March 1999.

### Boele-Woelki 2001

Boele-Woelki, K., 'Internationaal Privaatrecht', *Ars Aequi, Katern 77*, 2000, p. 3971-3973.

### Boele-Woelki 2005

Boele-Woelki, K., 'Editorial: Erkenning van het homohuwelijk op de Nederlandse Antillen en Aruba', *Tijdschrift voor Familie- en Jeugdrecht*, 2005, p. 221.

### Boele-Woelki, Braat & Sumner 2003

Boele-Woelki, K., Braat, B. & Sumner, I. (eds.), *European family law in action, Grounds for divorce*, volume I, EFL Series, 2, Antwerp: Intersentia, 2003.

### Boele-Woelki & Tange 1989

Boele-Woelki, K. & Tange P.C., 'De Deense Wet inzake het geregistreerd partnerschap: een voorbeeld voor Nederland?', *Nederlands Juristenblad*, p. 1537-1543.

### De Boer 2001

De Boer, J., 'Homohuwelijk en adoptie in het Koninkrijk', *Nederlands Juristenblad*, 2001, p. 764-765.

### De Boer 2002

De Boer, J., *Mr. C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht. Personen- en familierecht*, 16<sup>th</sup> edition, Deventer: Kluwer, 2002.

### Curry-Sumner 2005

Curry-Sumner, I., *All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe*, EFL Series, 11, Antwerp: Intersentia, 2005.

### Frohn 2001

Frohn, E.N., 'Sprookjeshuwelijk of spookhuwelijk?', *Tijdschrift voor familie- en jeugdrecht*, 2001, p. 166-170.

**Frohn 2004**

Frohn, L., 'De Wet conflictenrecht geregistreerd partnerschap', *Tijdschrift voor familie- en jeugdrecht*, 2004, p. 290-294.

**Heida 2000**

Heida, A., *Gids geregistreerd partnerschap*, Deventer: Kluwer, 2000.

**Henneron 2004**

Henneron, S., 'New forms of cohabitation: private international law aspects of registered partnerships', in: Boele-Woelki, K. (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, EFL Series, 4, Antwerp: Intersentia, 2004, p. 462-470.

**Hoevenaars 1997**

Hoevenaars, P.P.M., 'Het wetsvoorstel partnerschapregistratie', *Weekblad voor Privaatrecht, Notariaat en Registratie* (6264), 1997, p. 226-232.

**Jessurun D'Oliveira 2001**

Jessurun D'Oliveira, H.U., 'Het Nederlandse huwelijk en het Koninkrijk', *Nederlands Juristenblad*, 2001, p. 807-808, met naschrift van J. de Boer.

**Jessurun D'Oliveira 2003**

Jessurun d'Oliveira, H.U., 'Autonome kwalificatie in het internationaal privaatrecht: geregistreerde niet-huwelijkse relaties', in: Boele-Woelki, K., Brants, C.H. & Steenhoff, G.J.W. (red.), *Het plezier van de rechtsvergelijking. Opstellen over unificatie en harmonisatie van het recht in Europa, aangeboden aan prof. mr. E.H. Hondius bij gelegenheid van zijn afscheid als voorzitter en bestuurslid van de Nederlandse Vereniging voor Rechtsvergelijking*, Deventer: Kluwer, 2003, p. 1-37.

**Joppe 2000**

Joppe, I.S., 'Het geregistreerd partnerschap in het Nederlandse IPR (II)', *Weekblad voor Privaatrecht, Notariaat en Registratie*, 2000, p. 391-395.

**Kessler 2004**

Kessler, G., *Les partenariats enregistrés en droit international privé*, Paris: LGDJ, 2004.

**Koppen & Lekkerkerker 1992**

Koppen, P.A. & Lekkerkerker, J.G.C., 'Geregistreerd samenwonen, verbintenis en lotsverbondenheid (I)', *Weekblad voor Privaatrecht, Notariaat en Registratie*, (6067), 1992, p. 772-775.

**Kortmann Commissie 1997**

Kortmann Commissie, *Commissie inzake openstelling van het burgerlijk huwelijk voor personen van hetzelfde geslacht*, The Hague: Ministry of Justice, 1997.

**Loonstein 2005**

Loonstein, H., 'Geregistreerd partnerschap en het kerkelijk huwelijk', *Tijdschrift voor het familie- en jeugdrecht*, 2005, p. 126-128.

**Maxwell 2001**

Maxwell, N.G., 'Opening civil marriage to same-gender couples: A Netherlands-United States comparison', *Arizona Journal of International and Comparative Law*, (18) 2001, p. 141-207.

**Mostermans 2001**

Mostermans, P.M.M., 'Nieuw Europese scheidingsprocesrecht onder de loep: de rechtsmacht bij echtscheiding', *Nederlands Internationaal Privaatrecht*, 2001, p. 293-305.

**Mostermans 2003**

Mostermans, P.M.M., *Echtscheiding*. Praktijkreeks IPR, 5, 2<sup>nd</sup> edition, Deventer: Kluwer, 2003.

**Van Mourik 1997**

Van Mourik, M.J.A., 'Geregistreerd Partnerschap!', *Weekblad voor Privaatrecht, Notariaat en Registratie* (6264), 1997, p. 225-226.

**Nuytinck 1996**

Nuytinck, A.J.M., 'Het hete hangijzer van het homohuwelijk', *Tijdschrift voor familie- en jeugdrecht*, 1996, p. 125.

**Pellis 2002**

Pellis, L.Th.L.G., 'Het homohuwelijk: een bijzonder nationaal product', *Tijdschrift voor familie- en jeugdrecht*, 2002, p. 162-167.

**Plasschaert 2002**

Plasschaert, J.N.E., *Burgerlijke Stand*, Amsterdam: Staddrukkerij Amsterdam, 2002.

**Reinhartz 2004**

Reinhartz, B.E., 'Het wetsvoorstel Wet conflictenrecht geregistreerd partnerschap', *Weekblad voor Privaatrecht, Notariaat en Registratie*, 2004, p. 491-498.

**Van Rijn van Alkemade 1989**

Van Rijn van Alkemade, 'Nieuwe regels van conflictenrecht betreffende het huwelijk', *Tijdschrift voor familie- en jeugdrecht*, 1989, p. 220-225.

**Roes 2001**

Roes, S., 'De scheiding van kerk en Staat en het huwelijk', *Tijdschrift voor het familie- en jeugdrecht*, 2001, p. 111-113.

**Schrama 2004**

Schrama, W., *De niet-huwelijkse samenleving in het Nederlandse en het Duitse recht*, Deventer: Kluwer, 2004.

**Staatscommissie Internationaal Privaatrecht 1998**

Staatscommissie voor het Internationaal Privaatrecht, *Advies van de Staatscommissie voor het Internationaal Privaatrecht inzake geregistreerd partnerschap*, Den Haag: Staatscommissie, 1998.

**Staatscommissie Internationaal Privaatrecht 2001**

Staatscommissie voor het Internationaal Privaatrecht, *Advies van de Staatscommissie voor het Internationaal Privaatrecht inzake het internationaal privaatrecht in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht*, Den Haag: Staatscommissie, 2001.

**Storme 2005**

Storme, H., 'Brussel IIbis Vo van toepassing met ingang van 1 maart 2005', *Ipr.be*, 2005, p. 50-65.

**Strikwerda 2002**

Strikwerda, L., *Inleiding tot het Nederlands Internationaal Privaatrecht*, 8<sup>th</sup> edition, Deventer: Kluwer, 2002.

**Sumner 2003**

Sumner, I., 'Transformers: Marriages in Disguise?', *International Family Law*, 2003, p. 15-23.

**Sumner 2004**

Sumner, I., 'Private international law aspects of registered partnership: Great Britain and The Netherlands compared', in: Bonomi, A. & Cottier, B. (eds.), *Aspects de droit international privé des partenariats enregistrés en Europe*, volume No. 49, Zurich: Schulthess, 2004, p. 29-59.

**Sumner 2004a**

Sumner, I., 'Dissolution of partnerships: An excursion in conversion!', *International Family Law*, 2004, p. 231-237.

**Sumner & Forder 2003**

Sumner, I & Forder, C., 'Bumper Issue: All you ever wanted to know about Dutch family law (and were afraid to ask)', in: Bainham, A. (ed.), *International Survey of Family Law*, 2003 edition, Bristol: Family Law, 2003, p. 263-321.

**Sumner & Warendorf 2003**

Sumner, I & Warendorf, H., *Family law legislation of the Netherlands*, EFL Series, 5, Antwerp: Intersentia, 2003.

**Van Velde 2001**

Van Velde, H., 'The long road to civil marriage', *Gay Krant*, 1<sup>st</sup> April 2001.

**Vlaardingerbroek et al. 2004**

Vlaardingerbroek, P. et al., *Het hedendaagse personen- en familierecht*, 4<sup>th</sup> edition, Deventer: W.E.J. Tjeenk Willink, 2004.

**Vlas 2003**

Vlas, P., 'De Algemene Bepalingen als sluitstuk van de codificatie van het Nederlandse IPR', *Weekblad voor Privaatrecht, Notariaat en Registratie*, 2003, p. 443-449.

**Waldijk 2000**

Waldijk, K., 'Partnerschapsregistratie en huwelijk: toenemende rechtsgelijkheid voor geslachtsgelijke partners en hun kinderen', in: Lenters, H. et al. (red.), *De familie geregeld?*, Preadvies voor KNB, Lelystad: Vermande, 2000, p. 121-184.