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MARRIAGE AND ALTERNATIVE STATUS RELATIONSHIPS IN THE NETHERLANDS

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Introduction

Over the last 20 years the trend set by the Netherlands (following Denmark, Norway and Sweden) in 1998 with the introduction of registered partnership and in 2001, with the opening up of marriage for same-sex couples, has been followed by a growing number of jurisdictions.¹ Meanwhile the status of marriage not only altered as a result of the movement towards equal rights for same-sex couples but also by the growing number of non-marital cohabitants. As a result of these changes, the position of marriage has been profoundly changed. The Netherlands therefore provides a good case study of a jurisdiction which has moved to a strongly diversified system of models for interpersonal relationships.²

In this contribution the legal developments in relation to marriage in the Netherlands over the past decades will be discussed. The central thesis is that the law dealing with intimate relationships evolved over the last two decades from a model based exclusively on marriage as the only relationship provided for and protected by the law to a more fluid relationship model. Next, attention will be paid to the challenges for the future. The first challenge is how to balance the trend of further individualization in marriage law with the fact that people still tend to make certain decisions which ask for a higher level of protection. Secondly, non-marital cohabitation,³ which is a blind spot in the Dutch Civil Code where it concerns inter-partner relationships, will put pressure on the system.

The term 'relationship law' is used to identify the law regulating intimate relationships and in particular relationships between partners. Relationship law includes marriage law,⁴ registered partnership law and the law in relation to non-marital cohabitation, which in the Netherlands is mostly case law.

1 See the developments described J. Scherpe, 'The Past, Present and Future of Registered Partnerships', in J. Scherpe and A. Hayward (eds), *The Future of Registered Partnerships*, Cambridge: Intersentia, 2017, and J. Scherpe, *The Present and Future of European Family Law*, Cheltenham: Edward Elgar Publishing Limited, 2016.

2 J. Miles, 'Unmarried Cohabitation in European Perspective', in J.M. Scherpe (ed.), *European Family Law*, vol. 111, Cheltenham: Edward Elgar, 2016, Ch. 3.

3 Different concepts are used for non-marital cohabitation such as unmarried cohabitation, informal cohabitation, de facto union, informal couples relationship, informal relationship. Here mostly the term non-marital cohabitation will be used.

4 Marriage law in the Netherlands only deals with civil marriage. Religious marriages are only allowed after a civil marriage has been concluded.

Legal change affecting the status of marriage

Three major themes, all centring around equality, have profoundly influenced relationship law. Equality is the driving force that influenced the relationship between men and women, between parents and children and between opposite-sex partners and same-sex partners.⁵ In this section the legal changes which affected the status of marriage and which are the result of rapid social change are dealt with.

Equality and gender in relationship law

The legal position of men and women has been subject to substantial change over the last four decades. Many social developments initiated or triggered this legal reform.⁶ (For further discussion of gender issues, see Chapter 5.1 of this book.) In the early 1970s marriage was the preferred and prescribed model for families. The Dutch system was, albeit implicitly, based on a marriage model in which the man's duty was to provide for the family and the woman's was to take care of the children and household. This was based on supposed differences between men and women.⁷ Both spouses were important but contributed to the marriage in their own ways. Marriage law did not treat men and women alike.⁸

During the last three decades the legal position of women has improved. In 1974 gender equality was put on the government's agenda.⁹ The policy changed from a separate but equal concept towards a marriage model in which men and women should be treated alike. Secularization accelerated the process. The traditional division of a full-time job for the male and no (paid) job for the female partner altered to a combination of a full-time job for men and a part-time job for women.¹⁰ As a result of the legal changes in the Civil Code, marriage law is now gender neutral, at least in the books.¹¹ Society and the law no longer prescribe an exclusive type of marriage based on a gender-specific role division. Individuals have more freedom how to arrange their married lives.

Equality and children

Not only did the position of men and women change but so did the relationship between parents and children.¹² The explicit legal differences resulting in an inferior position for chil-

5 W.M. Schrama, 'Ontwikkelingen in het familierecht, Een blik in het verleden en op de toekomst van Boek 1 BW', *Ars Aequi* 2, 2012, 144–50.

6 For instance the general availability of contraceptives, individualization, secularization, increased welfare, economic growth and increasing labour participation of women.

7 See also E. Beck-Gernsheim, 'From Rights and Obligations to Contested Rights and Obligations: Individualization, Globalization, and Family Law', *Theoretical Inquiries in Law* 13, 2012, 1–14.

8 For instance, under the Civil Code until 1970 the man was the head of the family. Since 1957 women no longer lose their legal capacity when they marry. Asser-De Boer, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk recht, Personen- en familierecht*, Deventer: Kluwer, 2010, No. 182.

9 F. Bucx, 'Gezinnen en gezinsbeleid, Een introductie', in F. Buck (ed.), *Gezinsrapport 2011, Een portret van het gezinsleven in Nederland*, The Hague: Sociaal en Cultureel Planbureau, 2011, p. 22.

10 J. van Thor, W. Portegijs and B. Hermans, *Gaan vrouwen steeds meer werken?, Emancipatiemonitor*, Den Haag: SCP/CBS, 2018.

11 Not in its operation. For example, maintenance law is in itself gender neutral, but in reality the overwhelming majority of creditors are women.

12 As a result of a number of social trends, including individualization and secularization, the law's approach towards children changed to a more individualized approach. See for instance: J. Noordman and H. van

dren born to unmarried mothers have been gradually abolished.¹³ However, whereas a married father is a child's parent as a matter of law and shares parental responsibilities with the mother automatically, unmarried fathers still have to formally recognize the child no matter how long they cohabit with the child's mother and take formal steps to obtain parental responsibilities with the mother.¹⁴ Recently, a more child-centred divorce law developed which also improved fathers' rights after a divorce.¹⁵ By stressing the equality of parents after divorce, not only is the child's right to have a relationship with both parents reinforced but so are the father's rights (for further discussion, see Chapters 3.3–3.5 of this book). The position of children and fathers in informal relationships has been the topic of debate. It has been argued that family law should take societal trends into account.¹⁶ The number of children born out of wedlock is still increasing.¹⁷ Some Members of Parliament introduced a bill proposing to automatically grant joint parental responsibilities at the time the child is recognized by the father or second mother. Since then three years passed in which not much happened, which makes it rather unlikely that a concrete new act will be the result.¹⁸

Equality and same-sex couples

The most recent influence of equality on the law concerns the legal position of same-sex partners compared to that of opposite-sex partners (for further discussion, see Chapters 1.3–1.5 of this book). In 1991, in its report *Leefvormen* (Lifestyles), the Kortmann Committee recommended the creation of two types of registration for opposite-sex and same-sex partners. The first would be with the local municipal administration and would mainly have public law effects.¹⁹ The second would be in the civil status register and would bring about the same effects as marriage. This was meant as an alternative to marriage for all couples, regardless of their sex. In 1993 the government agreed with the view of the committee that different lifestyles should be taken into account in the legislation, but rejected the proposed municipal registration.²⁰ The government adopted the form of registration in the civil status register, but excluded partners of the opposite sex. The subsequent government, however, changed the

Setten, *De ontwikkelingen van de ouder/kind-verhouding in het gezin*, in H. Peeters e.a., *Vijf eeuwen gezinsleven*, Nijmegen: SUN, 1988, pp. 140–62.

13 Asser-De Boer op. cit., n 6, nos 689–91a.

14 W.M. Schrama, 'Family Function over Family Form in the Law on Parentage?', *Utrecht Law Review* 4, 2008, 83–98. Available at www.utrechtlawreview.org.

15 Wet van 27 november 2008, Stb. 2008, 500; Wet van 9 oktober 2008, Stb. 2008, 410.

16 W.M. Schrama, 'Over vaders, seks en afstamming: het afstammingsrecht voor verwekkers kritische beschouwd', *Ars Aequi*, maart 2016, 212–18; W.M. Schrama, *Aanpassing afstammings- en gezagsrecht gewenst voor ongehuwd samenwonende ouders*, Justitiële Verkenningen 2016, nr. 4, Den Haag: Boom Juridische Uitgevers 2016, pp. 30–44; M. Vonk, Niet samen zijn, NTM/NJCM-bull. 2013/40.

17 Central Statistics the Netherlands. Available at <https://opendata.cbs.nl/statline/#/CBS/nl/dataset/82056NED/table?ts=1572515292622> (accessed 31 October 2019). In 2018 93.500 children were born out of married parents, and 55.800 out of unmarried parents. It is not exactly known how many of these parents cohabit.

18 Parliamentary Papers II, 2016–2017, No. 34605, *Voorstel van wet van de leden Bergkamp en Van Wijn-gaarden tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met directe koppeling van erkenning en gezamenlijk gezag voor ongehuwde en niet-geregistreerde partners*. Available at www.eerstekamer.nl/behandeling/20161115/voorstel_van_wet/document3/f=/vk97n9jt1fzh.pdf (accessed 31 October 2019).

19 For instance in the field of social security law. With regard to private law effects the partners would be obliged to maintain each other during the registration and for a short period thereafter.

20 It would be too expensive while the aim (prevention of fraud) would not be met.

proposals. It extended the possibility of registration to couples of the opposite sex, but excluded it for the small group of people who are not permitted to marry by reason of being too closely related by blood.

Making marriage available to same-sex partners was not seriously considered at the initial stage, but later during the debates in Parliament the question arose whether it would still constitute discrimination if same-sex partners were allowed only to register their relationship, but not to marry. The second Kortmann Committee was appointed to report on this subject and on relationships with children in these types of relationship. Meanwhile, the bill on registered partnership continued its way through the legislative process. In October 1997, by a majority of five to three, the committee recommended that marriage should be opened up to same-sex couples, because only in this way could discrimination be removed. The committee however unanimously concluded that registration of a partnership should have no such effects on parentage. Protection of the legal position of children should be achieved through shared custody and guardianship, but not by making the partners legal parents.

In February 1998 the government initially expressed the view that it was opposed to giving same-sex couples the right to marry, but a majority in Parliament did not agree. Following the general election in May 1998 the new coalition government agreed to prepare a bill to make marriage available to same-sex couples. In December 1998 the bill was presented to the Council of State.²¹ Then in 2001 marriage was opened up to same-sex couples as the first jurisdiction in the world to do so.²² Between 2011 and 2017, 11,420 male and 12,722 female couples have married.²³

The next stage in the equal rights development relates to parenting rights and duties for same-sex couples. First, the social mother was allowed to adopt her partner's child.²⁴ Furthermore, the same act allowed intercountry adoption for married same-sex couples, from which they were previously excluded.²⁵ In addition, the option to obtain joint parental responsibilities was extended to social parents, although a court order was necessary.²⁶ Next, the system of joint parental responsibilities was changed so that the mother and the social mother obtained joint parental responsibilities as a matter of law if they were married or registered partners.²⁷ This was regardless whether the spouses were the legal parents of the children.²⁸ Part of the package to improve the legal position of parents and children in this situation was a change in the law concerning names as a result of which children could acquire the surname of the social parent. Subsequently, the adoption conditions for internal Dutch adoptions have been relaxed for mothers. The social mother can apply to the court for an adoption order even before the child's birth.²⁹ The conditions which normally apply in case of adoption are exempted, which makes it easier, faster and less risky to become a parent.

21 An advisory body.

22 Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk), Stb. 2001, 9.

23 Central Statistics, Statline database (<http://statline.cbs.nl>). See table: 'Huwten; huwelijkssluitingen en huwende personen naar diverse kenmerken' (accessed 31 October 2019).

24 Wet van 24 december 1997; Wet van 21 december 2000.

25 Wet van 24 oktober 2008, Stb. 2008, 425.

26 Wet van 30 oktober 1997.

27 On condition that the child does not have another parent. Wet van 4 oktober 2001.

28 Art. 1:253sa Civil Code.

29 Wet van 24 oktober 2008, Stb. 2008, 425. in force since 1 January 2009.

In the meantime the Kalsbeek Committee³⁰ advised the government in 2007 to introduce statutory provisions to the effect that the social mother was allowed to legally acknowledge the child born within the relationship thus establishing a legal parental relationship with the child.³¹ A study was commissioned by the Ministry of Justice³² concerning the position of a donor and what this might imply for the child's right to know its father. This culminated in a bill regarding the parentage of the social mother, which was accepted by the Second Chamber of Parliament in 2013. To summarize, a social mother who is married to the biological mother of a child who is conceived with an unknown³³ donor, is as a matter of law its legal parent. If a known donor is used or if the child is born outside marriage, the social mother may acknowledge the child. A known donor who shares 'family life' with the child (that is, who has close personal ties with the child) may also acknowledge the child. In some cases, the court will have to decide on competing claims on parenthood if both the social mother and the donor with family life apply for replacing consent to acknowledge the child because a child can only have two parents. These changes fundamentally alter the biological concept of the law on descent, since in most heterosexual relationships both parents are the biological parents, whereas in homosexual relationships they never both are. In the Second Chamber a large majority supported the bill, but in the First Chamber a critical approach seems to prevail, so it remains to be seen what will be the outcome (for further discussion, see Chapters 3.1–3.2 of this book).

Although the law has been profoundly altered, these changes hardly raised any protest. No mass demonstrations occurred, such as happened in France when marriage was opened up to same-sex couples and there is hardly any debate in relation to the plans to change the law of descent.³⁴ In only 20 years family law fundamentally changed, mostly on a step by step basis.

In 2016 a government appointed committee (*Staatscommissie Herijking Ouderschap/Government Committee Reassessment Legal Parentage*) published its report.³⁵ It had *inter alia* to take up the legal rethinking of parentage, parenthood and parental responsibilities in the light of the rise and lobbying of multi-parent families for a better legal position for children and parents. Would it be wise to adopt a new act on multi-parentage and parental responsibilities for more than two parents? This is particularly relevant for same-sex couples, for example a two-father family which will conceive and raise a child with a two-mother family. The far-reaching advice of the

30 Appointed as a result of a motion in the Second Chamber of Parliament: Parliamentary Papers II 2006/07, 30 800 VI, No. 60. Commissie lesbisch ouderschap en interlandelijke adoptie, *Rapport lesbisch ouderschap*, The Hague, October 2007 and *Rapport interlandelijke adoptie, Alles van waarde is weerloos*, The Hague 29 May 2008.

31 Parliamentary Papers II, 2007–2008, Letter of the Minister of Justice of 12 August 2008 to the Second Chamber.

32 C. Forder, *Erkenning door de vrouwelijke partner van de moeder*, The Hague, 2 February 2009. Available at www.tweedekamer.nl/images/305510024bijlage01_118-188576.pdf.

33 Unknown is relative: insemination will only take place with sperm of registered donors and information about the donor is at different stages available to the parents and the child.

34 In the literature some critical remarks have been made, for instance: A.J.M. Nuytinck, 'Lesbisch ouderschap. Bespreking van het rapport van de Commissie lesbisch ouderschap en interlandelijke adoptie', *commissie-Kalsbeek*. Available at <http://repub.eur.nl/res/pub/11421/Lesbisch%20ouderschap.pdf>; M.J.A. van Mourik, *Interview with the Volkskrant*. Available at www.volkskrant.nl/vk/nl/2844/Archief/archief/article/detail/446407/1996/04/18/Met-homohuwelijk-schaf-je-in-wezen-het-huwelijk-af-Echtverbintenis-verwordt-volgens-notaris-en-hoogleraar-Van-Mourik-tot-een-organisatiemodel.dhtml.

35 Staatscommissie Herijking Ouderschap, *Kind en Ouders in de 21ste eeuw*, The Hague, 2016. English summary of the report is available at www.government.nl/documents/reports/2016/12/07/childand-parent-in-the-21st-century.

Committee was to give legal recognition to these new types of family, both in parentage law and in terms of parental responsibilities.³⁶ A maximum of four adults is foreseen, who live in at most two households. They could make a preconception agreement on various issues regarding the child: division of care, main residence of the child, financial obligations of all the parents, the surname to be given to the child, and how intended parents plan to address possible disputes and changes to the agreement. The family court would then have to test this agreement in light of the best interest of the child (which is, at this point, not even conceived yet). If the judge grants the order, all parents will become a legal parent from the child's birth with all of them having full parental responsibilities.

Objections were raised in particular regarding parental responsibilities, because three or four parents with full parental responsibilities would substantially raise the potential for conflicts if the parents separate or are no longer able to cooperate together.³⁷ The government then commissioned research: into the implications of deviating from the classical two-parent family in other areas of law. Inheritance and succession law, tax law, social security law and immigration law are not as easily adapted as family law could be to more than two legal parents. In July 2019 the government's reaction was published to these reports. Given the far-reaching nature of the advice, the policy of the government is rather restricted. The step forward is the plan to introduce shared parental responsibilities for a maximum of four adults. Only two of the adults would have full parental responsibilities; the other two would have a far more limited type of parental responsibility (in Dutch: *deelgezag*, translated as partial parental responsibilities) which does not exist under the current law. It would basically only give a right to take simple everyday decisions and actions, such as being present at a parent-teacher meeting, which are not very problematic anyway. But adults with partial parental responsibility would have a right to veto a substantial change in the allocation of care, which the parents with full parental responsibilities could only overcome with the consent of the family court. So the government did not follow the advice to introduce a multi-parent legal framework, nor did it introduce full parental responsibilities for more than two parents.³⁸ It refers to the higher level of conflicts which is expected to occur if that were to be introduced. This is striking, since the debate in the legal doctrine focused mostly on problems resulting from shared parental responsibilities and not in respect of parentage.

Another argument put forward by the government for its decision is that multi-parentage is really exceptional worldwide, so there is hardly any experience of it and it is not clear whether more conflicts are a serious threat to the child's development. Finally, perhaps the most important reason, even if not explicit, is that introduction of multi-parentage and parental responsibilities for more than two adults would require large-scale adaptation of other areas of law (tax law, social security, etc.) as well a complete revision of the civil and population registry. This would be costly and complex.³⁹ Taking the experiences from the past as a crystal ball for future developments, I expect that it is a matter of time, just as it was with registered partnership and the opening of marriage for same-sex couples, before further steps will be announced. In the meantime the government is buying time to come up with adequately prepared legislation.⁴⁰

36 I. Boone, 'Co-Parenting before Conception: The Low Countries' Approach to Intentional Multi-Parent Families', *Family & Law*, February 2018. DOI: 10.5553/FenR/.000034.

37 See Boone, n 36, in the Conclusions.

38 Parliamentary Papers II, 2018–2019, 33863, No. 45.

39 *Ibid.*, at pp. 10–11.

40 For further discussion of these issues, see G. Kessler, 'The Parentage Disruption: A Comparative Approach', *Int. J. Law, Policy & Fam.* 33(3), 2019, 316–36.

The status of marriage

The changing status of marriage is marked by changes in relationship behaviour. As a result of individualization, secularization and the emancipation of women, the popularity of marriage has diminished.⁴¹ (See Chapter 1.1 of this book.) The marriage rate decreased, whereas the divorce rate rose.⁴² (See Chapter 2.2 of this book.) Furthermore, the number of single-person households rose,⁴³ as did the number of relationships without children.⁴⁴ Lifestyles different from traditional marriage became more prominent, including serial monogamy and stepfamilies.⁴⁵ Registered partnership, which, from a legal perspective, is very similar to marriage, became more popular than expected.⁴⁶ About 10,000 couples (both opposite and same-sex) register their partnerships every year compared to 69,000 to 75,000 couples who marry every year. There has been an increase in couples who opt for registered partnership. In 2018, 20,000 registered a partnership, which is twice the number in 2014.⁴⁷ The number of cohabiting couples is estimated at one million.⁴⁸ Some data indicate that non-marital cohabitation as a permanent alternative to marriage is increasing,⁴⁹ including a growing proportion of second and third children who are born to non-marital cohabitants.⁵⁰ New data show that of all couples who started to cohabit in 2000, 53 percent were still together after 15 years. Of the couples still together, almost all had children and 80 percent had married. Another 8 percent had children and were still cohabiting.⁵¹ Obviously marriage is no longer perceived as the only acceptable relationship in which to have children. The percentage of children born out of wedlock rose from 2 percent in the 1970s to 42 percent in 2012, but dropped to 38 percent in 2018.⁵² Thus, the exclusive link between procreation and marriage has been broken.⁵³

Nevertheless, marriage remains the prevailing type of relationship, out of a number of possible relationship types people may choose, but both registered partnership and unmarried cohabitation are on the rise.⁵⁴

41 Bucx, op. cit., n 9, p. 20.

42 Ibid., p. 14: one in four marriages are estimated to end in a divorce.

43 The average number of children dropped from 2,6 in 1970 to 1,66 in 2018: Central Statistics: <http://statline.cbs.nl>, in the table: 'Geboorte; kerncijfers vruchtbaarheid, leeftijd moeder, regio' (accessed 31 October 2019).

44 A. De Graaf, 'Gezinnen in cijfers', in F. Buck (ed.), *Gezinsrapport 2011, Een portret van het gezinsleven in Nederland*, The Hague: Sociaal en Cultureel Planbureau, 2011, pp. 36–7.

45 Ibid., p. 35; Bucx, op. cit., n 9, p. 20.

46 K. Boele-Woelki, I. Curry-Sumner, M. Jansen and W.M. Schrama, *Huwelijk of Geregistreerd Partnerschap?*, Deventer: Kluwer, 2007.

47 S. te Riele and K. Stückradt, *Ruim twintig jaar geregistreerd partnerschap*, The Hague: CBS, 2019. Available at www.cbs.nl/nl-nl/achtergrond/2019/25/ruim-twintig-jaar-geregistreerd-partnerschap (accessed 31 October 2019).

48 Central Statistics. Available at <https://opendata.cbs.nl/#/CBS/nl/dataset/82905NED/table?ts=1572593196398>.

49 J. Latten, *De schone schijn van de burgerlijke staat*, CBS, Bevolkingstrends, 4e kwartaal 2004, pp. 46–60. A. de Graaf, *Gezinnen in cijfers, Gezinsrapport*, The Hague: SCP, 2011, pp. 45–6.

50 Central Statistics. Available at <http://statline.cbs.nl>.

51 Central Statistics. Available at www.cbs.nl/nl-nl/nieuws/2019/06/helpt-eerste-samenwoners-na-15-jaar-nog-samen.

52 Central Statistics. Available at <https://opendata.cbs.nl/#/CBS/nl/dataset/82055NED/table?ts=1572592694019>.

53 Compare G.F. Douglas, 'Marriage, Cohabitation, and Parenthood: From Contract to Status?', in S. Katz, J. Eekelaar and M. Maclean (eds), *Cross Currents: Family Law and Policy in the US and England*, Oxford: Oxford University Press, 2000, pp. 211–33 at p. 212.

54 See also Beck-Gernsheim, op. cit., n 7.

Current policy challenges

Policy goals of relationship law

From a policy perspective it is clear that in recent decades the government has not encouraged people to choose marriage over non-marital cohabitation. Rather, one of the most important policy goals has been to promote equality and to give people the opportunity to choose their own type of relationship. The right to self-determination and tolerance towards different family forms are predominant; the liberal orientation of the state includes an open-minded approach in which the state does not prescribe what type of relationship people should live in.⁵⁵ Have we attained this goal?

Important questions have been left unanswered, which may be partially due to the focus on equality. The first is: what is the role of the state in relation to intimate relationships, other than realizing fundamental rights, like equality? Twenty-five years ago, some Dutch and Belgian legal scholars were of the opinion that it would be best to abolish marriage.⁵⁶ The state could leave it to the parties to agree on the legal effects of their relationship. If partners wished to celebrate marriage, they could go to church. Those ideas are faintly echoed today,⁵⁷ but the large majority of legal scholars are of the opinion that the state does have a role in the field of relationship law. But what that role is or should be is often unclear.

In order to answer that question, we will have to disentangle what the policy goals of relationship law are. Remarkably, little is to be found in the Dutch legal literature on this subject. More inspiration is to be derived from the Anglo-Saxon debate on what family law is and what it is for. Ferguson and Brake recently argued that family law ‘can serve as crucial state endorsement to individuals’ relationships through permitting individuals to enter into a formal legal ‘status’ such as marriage or parenthood; it can serve as a mechanism for the enforcement of rights and obligations between and against ‘family’ members, as well as signalling the justifiability of such enforcement; and it can serve as a mechanism for privileging ‘familial’ above ‘nonfamilial’ relationships (...), as well as suggesting the justifiability of such privileging’.⁵⁸ Diduck concludes that family law should deal with defining (and thus creating) responsibilities both in the relation of partners, but also in relation to the state.⁵⁹ Eekelaar puts the role of family law over time in perspective and comes to the conclusion that, while in earlier times its primary purpose was to uphold existing power structures, this had declined through the development of countervailing rights to protect the interests of individuals against the way power is exercised and that, while it still has a role in constructing supportive frameworks (whether marriage or equivalent

55 See also Beck-Gernsheim, op. cit., n 7, who sees a general trend that legislators do not prescribe particular forms of family life.

56 For instance: A. Heyvaert, ‘Het wezen van de instituten afstamming en huwelijk’, *Rechtskundig Weekblad* 1979–1980, 737; H. Willekens, ‘De werking van grondrechten in de verhouding tussen samenwonende sexuele partners’, in K. Rimanque (ed.), *De toepasselijkheid van grondrechten in private verhoudingen*, Antwerpen: Kluwer 1982, p. 341; J. Hes, ‘Dereguleren en bezuinigen: schaf het huwelijk af’, *Nederlands Juristenblad* 1984, 233; H. van Maarseveen, ‘Het huwelijk privatiseren’, *Tijdschrift voor Familie- en Jeugdrecht* 1985, 37–9; W.M. Schrama, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht*, Deventer: Kluwer 2004, p. 566; F. Swennen, *Het huwelijk afschaffen?*, Antwerpen: Intersentia, 2004.

57 F. Schonewille, *Partijautonomie in het relatievermogensrecht*, Apeldoorn: Maklu, 2012. For a US discussion see A. Bernstein (ed.), *Marriage Proposals: Questioning a Legal Status*, New York and London: New York University Press, 2006.

58 R.J.S. Schwitters, *Recht en samenleving in verandering: inleiding in de rechtssociologie*, Deventer: Kluwer 2008, p. 27; W.M. Schrama, ‘Een redelijk en billijk relatierecht’, *Tijdschrift voor Privaatrecht* (4), 2010.

59 A. Diduck, ‘What Is Family Law For?’, *Current Legal Problems* 64, 2011, 288.

institutions) the emphasis has, according to him, shifted to dealing with the consequences of casualties of damaged personal relationships.⁶⁰ Leckey writes: ‘The general idea is that the state benefits from the stability and caregiving produced when individuals invest in long-term relationships’.⁶¹

Although there seems to be some differences between the various authors on what the role of family law actually is, these views accord with a socio-legal point of view, expressed in the Netherlands, where at least four policy goals of relationship law have been discerned. The first is to regulate the effects of living together and sharing a life on the basis of an intimate relationship. If there was no relationship law, the interpersonal effects of the relationship would be governed by general property and contract law. These are not particularly suited to deal with these types of relationship. A second, closely related, function is to prevent or minimize conflicts between the partners. By regulating intimate relationships, the potential conflict level between the ex-partners will probably be lower, since the terms and conditions of the relationship are clear. In this way, the law can indirectly contribute to relationship stability, although (perhaps remarkably), this is not the explicit policy of the government.⁶² The third function is to protect weaker spouses and indirectly the children by imposing a certain minimum level of mandatory partner solidarity, in particular after a relationship breakdown. The community of property system,⁶³ the spousal maintenance system⁶⁴ and the effects of marriage on pensions,⁶⁵ are typical examples of this protection. This seems to be most closely related to Eekelaar’s dealing with the consequences of damaged relationships. A fourth function is to promote rights of individuals, such as equality for same-sex couples and men and women; this reflects the power structure inherent in family law and its exclusive character which not only affects partners and children, but also the relation vis-à-vis the state.

These policy aims are presumably not only in the interest of individual partners, but they also serve a public policy goal. If the law could to some extent prevent poverty in families after a divorce or separation in low-income families or if it could indirectly promote relationship stability and distribute the risks of a relationship (and the division of roles between spouses), it would serve a general interest. There are clear indications from research of Dutch sociologists that lower-educated families in particular opt more often for informal relationships, and have at the same time a higher risk of separation. Almost 33 percent of unmarried couples with a lower educational level who have a child are separated after 15 years as opposed to 12 percent of higher-educated couples with children. This higher risk of a relationship breakdown has potential high financial risks for women and for children who usually reside with their mothers after separation.⁶⁶

60 J. Eekelaar, ‘Family Law and Legal Theory’, in E. Brake and L. Ferguson (eds), *Philosophical Foundations of Children’s and Family Law*, Oxford: Oxford University Press, 2018, pp. 41–58.

61 R. Leckey, ‘Cohabitants, Choice and the Public Interest’, in E. Brake and L. Ferguson (eds), *ibid.*, pp. 121–2.

62 As in some other jurisdictions has been considered to be an important goal, eg Douglas *op. cit.*, n 53. In the Netherlands an explanation might be that tolerance and self-determination is perceived as so important that it is the role of the state is to facilitate these choices.

63 It includes all assets of both spouses regardless whether they are acquired before or after the marriage celebration and includes donations or inheritance; art. 1:94 CC.

64 In principle a maximum of twelve years under the old law and 5 under the new law (having effect from 1 January 2020), related to the financial position of the spouses during marriage, art. 1:157 CC.

65 In principle spouses are both entitled to the old age pension one of them acquired during the marriage: art. 1:153 CC.

66 R. van Gaalen, K. van Houdt and A.-R. Poortman, ‘Trouwden, kinderen krijgen en (echt)scheiden naar opleidingsniveau, Demografische beslissingen binnen huishoudens aan het begin van de 21e eeuw’, in *Statistische trends*, Den Haag: CBS, 2019, p. 14.

One of the difficulties in identifying policy challenges is that in order to assess the effectiveness of the current policy, empirical insight is necessary. However, in the Netherlands hardly any empirical legal studies in this field have been carried out, which makes it difficult to develop evidence-based policy.⁶⁷ Evidence-based research is necessary in order to see what is going on in the real world and to assess the effects of family law and family policy.⁶⁸ Both economic research and sociological knowledge helps to underpin family law with a solid base in reality.⁶⁹ In the absence of empirical data, in the next sections some thoughts concerning future challenges will be presented.

A first challenge: individualized or care-based relationship law

One challenge relates to the ongoing individualization, which will probably increasingly affect relationship law.⁷⁰ A more individualized relationship law would reduce the legal effects of the relationship; each partner would only be responsible for his or her acts and there would be little room for a common perspective and little place for taking into account acts which serve a common interest, such as taking care of the children. One could argue that in the light of the diminishing differences in role division between working men and caretaking women, the need for protection by way of state intervention will be reduced (for further discussion, see Chapters 6.1–6.2 of this book). In some respects, the loosening of the post-relationship ties has already begun in relation to maintenance. In 1994, the lifelong duty to maintain a needy ex-spouse was reduced in principle to 12 years.⁷¹ On January 2020, a new act entered into force in the Netherlands, introducing a shorter duration of spousal maintenance rights and duties.⁷² The reduction is substantial, from 12 years to five years with some exceptions for older spouses and couples with young children. In January 2018 new legislation was introduced on the scope of the community of property system. Previously, the Dutch community of property had a universal nature, absorbing almost all assets, regardless how they were acquired by the spouses. Now the Netherlands finally has a system in line with most other countries, which have a matrimonial property regime whereby premarital assets are excluded from the community of property, as are

67 One example is the study which addresses the issue whether a high level of legal commitment (e.g. marriage versus non-marital cohabitation) results in more investment by the partners in the relationship in the Netherlands, which turned out not to be the case. A.-R. Poortman and M. Mills, 'Investments in Marriage and Cohabitation: The Role of Legal and Interpersonal Commitment', *Journal of Marriage and the Family* 74, 2012, 357–76.

68 For instance: K. Bogenschneider, H. Normandin, E. Onaga, S. Bowman and S.M. MacDermid, 'Generating Evidence on Disseminating Evidence to Policymakers', in K. Bogenschneider and T. Corbett (eds), *Evidence-Based Policymaking: Insights from Policy-Minded Researchers and Research Minded Policymaker*, New York: Taylor & Francis, 2010, pp. 253–90; Bogenschneider, K. and T.J. Corbett, 'Family Policy: Becoming a Field of Inquiry and Subfield of Social Policy', *Journal of Marriage and Family* 72, 2010, 783–803.

69 M.J. Brien, L.A. Lillard and S. Sterni, 'Cohabitation, Marriage, and Divorce in a Model of Match Quality', *International Economic Review* 47, 2006, 451–94; M. Brinig (ed.), *Economics of Family Law*, Northampton: Edgar Elgar Publishing, 2007; C. Vogler, 'Cohabiting Couples: Rethinking Money in the Household at the Beginning of the Twenty First Century', *The Sociological Review* 53, 2005, 1–29; J. Pahl, 'Individualisation in Couple Finances: Who Pays for the Children?', *Social Policy and Society* 4, 2005, 381–91.

70 See also Beck-Gernsheim, op. cit., n 7.

71 Wet Limitering alimentatie van 28 April 1994, Staatsblad 324.

72 Wet van 18 juni 2019 tot wijziging van Boek 1 van het Burgerlijk Wetboek en van enige andere wetten in verband met de herziening van het stelsel van partneralimentatie (Wet herziening partneralimentatie), Staatsblad 2019, 283.

gifts and assets inherited during marriage. On the one hand, this change makes perfect sense, since the extent of solidarity under a universal community of property appears out of line with social norms of more individuality. On the other hand, almost all married couples have lived together as a couple before entering into marriage. Many unmarried couples have children. That implies that imbalances between partners arise long before marriage but are no longer compensated for, whereas under the old system the premarital assets became part of the community property. Basically, there is more individualism at the cost of a more relational concept of choices made during the lifespan of the relationship – whether that is married or unmarried. A more individualistic approach comes at a price, since there is a clear gender dimension in this respect.⁷³ (For further discussion, see Chapter 2.6 of this book.)

On the other hand one could argue that, although the former gender-specific role division has been changed, differences between men and women as regards social roles and social norms are still substantial, in particular in the Netherlands with a strong mother culture⁷⁴ and where a one-and-a-half-earner model is dominant for couples with children.⁷⁵ The presence of children and the related loss of earning capacity justify a higher level of protection in order to balance the risks of an unequal, gender-based division of work and caretaking. In this respect more evidence-based knowledge would be welcome. Does maintenance after divorce actually make a difference? How many children in one-parent divorced families headed by the mother are facing financial difficulties? What are the effects of the community of property system? With more evidence about actual practice, it would be possible to design a more effective policy. This type of research could also explore the arguments in favour and against a care-based model.

A second challenge: non-marital cohabitation

The second challenge concerns non-marital cohabitation (for further discussion, see Chapters 1.1, 1.3 and 1.5 of this book). This topic has received attention in large comparative family law projects. The first is the Empowering European Families project,⁷⁶ carried out by principal investigators Christiane Wendehorst and Wendy Schrama (author of this chapter) together with a working group consisting of both academics and legal professionals from various countries in Europe.⁷⁷ On the basis of a questionnaire 27 reporters explained their legal system as regards informal couple relationships. Particular attention was given to the level of party autonomy for couples to arrange their own legal affairs. On the basis of these reports a toolkit for legal professionals has been developed when they deal with cross-border informal couples, published

73 A.J.M. Nuytinck, *Van huwelijksvermogensrecht naar samenlevingsvermogensrecht?*, Ars Notariatus LXX, Deventer: Kluwer, 1996.

74 A culture in which mothers are deemed to be the best carers for children: W. Portegijs, S. Alejandro Perez and M. van den Brakel, 'Wie zorgt er voor de kinderen?', in *Emancipatiemonitor*, The Hague: SCP/CBS, 2018.

75 Ibid. In 2017, men worked on average 39 hours, and women 28. Women spend more hours on family care, for children but also other relatives (older parents). Part of the couples aims for a more equal division, but only 20 percent actually manages.

76 See the website: www.europeanlawinstitute.eu/projects-publications/completed-projects/completed-projects-sync/empowering-european-families/. Country reports will be published at a later date.

77 The Working group consisted of Anne Barlow (professor, United Kingdom), Kerstin Bartsch (mediator, Germany), Margareta Brattström (professor, Sweden), Pedro Carrión García de Parada (Notary, Spain), Mark Harper (solicitor, United Kingdom); Maarit Jänäterä-Jareborg (professor, Sweden), Matthias Neumayr (Judge, Austria), Eve Pötter (notary, Estonia), François Trémosa (notary, France).

on the website. The second large comparative law project was carried out by the Commission on European Family Law (CEFL), chaired by Katharina Boele-Woelki. The country reports⁷⁸ on *de facto* unions (as they are called within the CEFL context) were used for the development of European Principles of Family Law on this topic.⁷⁹ Both projects show an increasing number of jurisdictions where specific laws have been introduced for non-marital cohabitation, providing both legal certainty as to the applicable rules, as well as protection.⁸⁰ The contents of these laws differ considerably, ranging from an (almost) equal-to-marriage-model to a more ad hoc approach, dealing with some legal aspects of the relationship, but not all. The Netherlands is, however, one of the many countries which has still not adopted a policy in this respect. The approach of the Dutch system is ‘schizophrenic’, a term used by Barlow in the context of English law⁸¹ but equally suitable for the Dutch approach.⁸² In most areas of law, non-marital cohabitation is legally recognized, for instance in tax law, social security law, criminal law, but not in family and inheritance law where non-marital cohabitation is unrecognized in the Civil Code. Instead of specific relationship law, general contract and property law apply in the relation between the partners, which often result in unpredictable and unfair outcomes.⁸³ The conflict level is high and many partners go to court to resolve their financial and property issues. One might think that party autonomy is the key to the solution, since the partners can make their own relationship model. The percentage of couples with a cohabitation contract drawn up by a notary is relatively high, at about 50 percent,⁸⁴ which is the highest in Europe. However, we know little about their characteristics, for example whether or not they later marry. But even with a contract, the problems are not resolved. Explorative empirical research indicates that the contents of the contract seem to be more determined by the notary than by the actual situation of the couple.⁸⁵ Another essential problem is that life is dynamic, while cohabitation contracts are static. This creates problems, since cohabitants rarely return to the notary to update their contract. Besides, partners seem not to contract with an eye to an eventual separation, since they simply do not imagine they will ever separate.⁸⁶ Under present conditions, cohabitation contracts are no real solution for the absence of specific provisions in the Civil Code.

Given the very low level of protection, the lack of certainty and the high conflict potential, one would expect some government policy on the matter. But the Dutch government is slow in its actions, and instituted research only some years ago. The researchers have concluded that

78 See the CEFL's website: <https://ceflonline.net/> (accessed 31 October 2019).

79 K. Boele-Woelki, F. Ferrand, C. González-Beilfuss, M. Jänterä-Jareborg, N. Lowe, D. Martiny and V. Todorova, *Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions*, Antwerp: Intersentia, 2019.

80 In Europe: Finland, Hungary, Italy, Ireland, Malta, Portugal, Scotland, Slovenia, Spain, Sweden and Serbia (not included in both projects). Outside Europe Canada, Norway, Russia, Ukraine, different states in Australia and the US, New-Zealand.

81 A. Barlow, ‘Regulation of Cohabitation, Changing Family Policies and Social Attitudes: A Discussion of Britain Within Europe’, *Law & Policy* 26, 2004, 57–86.

82 W.M. Schrama, ‘The Dutch Approach to Informal Lifestyles: Family Function over Family Form?’, *International Journal of Law, Policy and the Family* 22, 2008, 311–32. See also W.M. Schrama, Dutch country report CEFL, See the CEFL's website: <https://ceflonline.net/> (accessed 31 October 2019).

83 See also G. Douglas, J. Pearce and H. Woodward, *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown*, Report of a Research Study funded by the ESRC, Cardiff, 2007, p. 140.

84 A. de Graaf, *CBS, Webmagazine*, 10 February 2010. Available at www.cbs.nl.

85 Research by P. Kuik, W. Schrama and L. Verstappen, *Publication Aimed in: Familie & Recht*. Available at www.familienrecht.nl.

86 Schrama, op. cite., n 56, p. 588.

a small proportion of partners in a non-marital relationship encountered severe problems,⁸⁷ and that a number of specific legal instruments⁸⁸ could be introduced to overcome them. However, in 2012 the government declined to follow the recommendations.⁸⁹ It argued that the suggested legal instruments were not necessary, since contract and property law were sufficient. Although this might be true in theory, practice for over 20 years shows that lawyers and courts deal with these provisions quite differently. Moreover, some problems cannot be resolved within the legal system, even theoretically.⁹⁰ It is a missed opportunity. During the debates in Parliament on the shortening of spousal maintenance for married couples, questions regarding maintenance rights for informal couples were raised. The government is still not in favour, but promised an empirical legal study on this topic, expected in 2021. The existing pension splitting system for married couples has recently been evaluated. One issue was whether pension rights should be extended to unmarried cohabitants. The researchers concluded that it would be better not to do so. Reference is made to ‘facts’ that unmarried cohabitants themselves would not feel a need for sharing each other’s pension rights, that unmarried cohabitants are more often financially independent than married couples and that these couples would be fully legally aware in opting for less solidarity. These claims are not based on any facts or research. It is more likely that a second set of arguments in the report had been decisive, namely, that it would be difficult and more costly for pension funds to work with unmarried couples. The Minister of Justice agreed with the report and decided to leave things as they stand now.⁹¹

It should not be the form of the relationship that is decisive, but its function.⁹² If non-marital cohabitation is functionally equivalent to marriage, the law should also take non-marital couples into account in family law and inheritance law.⁹³ Care within families is crucial, not only in terms of parents for minor children but, increasingly, given the ageing of society, by adult children (-in law) for parents (-in law). This issue should definitely be considered by the state, because it is likely that informal couples will take care of older parents. In a marriage partners are to some extent protected against the negative effects. If the same support is provided during an informal relationship, this is seen as an individual choice. To my mind that is not wise.

87 M.V. Antokolskaia, B. Breederveld, J.E. Hulst, W.D. Kolkman, F.R. Salomons and L.C.A. Verstappen, *Koude uitsluiting, Materiële problemen en onbillijkheden na scheiding van in koude uitsluiting gehuwde echtgenoten en na scheiding van ongehuwd samenlevende partners, alsmede instrumenten voor de overheid om deze tegen te gaan*, The Hague: WODC, 2011. As a very rough estimation, about 20,000 women with children suffer serious financial difficulties after a relationship breakdown. The number of couples who experience an unfair dissolution of their non-marital relationship could not be estimated.

88 Including a maintenance right after separation based on a discretionary power of the court. The government at first seemed to opt for this solution, but after consultation of the judiciary, solicitors and notaries, decided against it, since it would not be practicable. Parliamentary Papers II 2011–12, 28 678 No. 29.

89 Parliamentary Papers II 2011–12, 28 867 No. 23.

90 In particular investments in the relationship by taking care for children are not in any way successfully to be redressed under the current provisions.

91 Letter of the Minister of Justice 8 March 2018, reference number 2018-0000025158, Evaluatie Wet verevening pensioenrechten bij scheiding.

92 Schrama, op. cit., n 82.

93 See A.-R. Poortman and M. Mills, ‘Investments in Marriage and Cohabitation: The Role of Legal and Interpersonal Commitment’, *Journal of Marriage and the Family* 74, 2012, 357–76. See for England: J. Eekelaar and M. Maclean, ‘Marriage and the Moral Bases of Personal Relationships’, *Journal of Law and Society* 31, 2004, 510–38.

Conclusion

Marriage law has been reformed in just a few decades to an unanticipated extent. The Dutch policy with respect to relationships and families has been primarily aimed at realizing equality and facilitating individual life choices. As a result of the social and legal changes, the law dealing with intimate relationships evolved from a model based exclusively on heterosexual marriage with children as the only relationship provided for and protected by the law to a more fluid relationship model in which a greater variety of choices is possible. A minimum level of prescribed solidarity is intact and protection of vulnerable spouses is seen as a task of the state.

The fast and fundamental changes present new challenges. It is up to the government to develop an up-to-date long-term perspective on relationship law. Relationship law will presumably become more individualized. It will be a real challenge to find a balance between party autonomy and protection. For those couples who, married or not, raise children, the state should intervene by imposing a higher protection level. Party autonomy is important, but it is up to the state to intervene when general interests are at stake. The persistent differences between men and women in relation to work and care which is typical for the Netherlands will require future attention.

It is inevitable that non-marital cohabitation will put the existing rigid boundaries between formal and informal relationships in family law and inheritance law under increasing pressure. The lack of any regulation, conflict prevention and protection for non-marital cohabitants results in conflicts, injustice and legal uncertainty. A functional approach could be helpful, in which not the legal form but the real function of the relationship is taken as a point of departure. Whether relationship law is the most suitable instrument to deal with these two challenges is a matter which needs further investigation on an empirical basis. Research could be very valuable in this respect in order to develop evidence-based policy and evidence-based law.

Despite the fundamental changes, marriage still holds a strong position. Furthermore, while equality has almost done its job, it is likely that non-marital cohabitation will become the newest branch of relationship law, in one way or another. Policy will also have to deal with families consisting of more than two parents. Introducing only partial parental responsibilities will probably not be a sustainable solution. Family law is, after all, always on the move.