

REGISTERED PARTNERSHIPS : LEGISLATION OF THE NETHERLANDS

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1. Introduction

Ten years ago, the Nederlands Juristenblad published an article of mine on the Danish law on registered partnerships. In that article I asked, amongst other things, whether the Danish legislation could serve as a model for Dutch law. At that time I never imagined that I would today find myself before the International Commission on Civil Status to describe the Dutch legislation on registered partnerships. I am particularly grateful to the organisers of this Colloquy for having invited me to explain this legislation, which in the meantime has celebrated its first anniversary and is in its turn a potential model for other countries. I shall endeavour to show why this last statement is justified.

Since the early 1990's the Netherlands legislature, when drafting new texts, has taken account of the existence of lifestyles different from marriage. In the private-law field, it has been more particularly concerned with homosexual cohabitation. This has raised numerous questions. How can the legislature bring about public recognition of their relationship? What should be the effects of such recognition? What should be the rules on their relationship to children? Since the entry into force on 1 January 1998 of the Act on registered partnerships, some of these questions have been answered. Since that date heterosexual and homosexual couples can have their partnerships registered by a civil status official. Statistics show that the number of partnerships registered in the first twelve months of application of the Act totals 4, 556. Of these, 1,320 were entered into by two women, 1,686 by two men and 1,550 by partners of a different sex (http://www.cbs.nl/nl/cijfers/kerncijfers/sbvo_6039.htm).

In principle, a registered partnership has the same effects as marriage, save for the rules on filiation. « Effects of marriage » is to be understood in the strict sense, that is to say excluding divorce. I shall deal later and separately with the question of dissolution of the partnership.

Nevertheless, this does not mean that the debate on the opening of marriage to same-sex couples is over. When the new Government was formed in 1998, this problem was entered on the agenda of the agreed governmental programme. It was understood that examination of the question of the opening of marriage to persons of the same sex would commence before 1 January 1999. Today, a Bill is under examination by the Conseil d'Etat.

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2. The texts

2.1 In general

After the entry into force of the Act on partnerships, Book 1 of the Netherlands Civil Code was supplemented by a Chapter 5a, entitled « Registered partnership » and comprising five Articles. In addition, some provisions of Book 1 of the Netherlands Civil Code and of the Code of Civil Procedure had to be amended.

The transitional provisions in the Act warrant special attention. Any reference to marriage and its legal effects appearing in a will, company statutes, regulations or contracts drafted or entered into before the entry into force of the Act is to be read as a reference to registered partnership as well, save express provision to the contrary.

The transitional provisions had but limited consequences. This is because a reference to the rights and obligations flowing from marriage or to the status of a married person will rarely be found in agreements concluded between persons of the same sex, given that they were then and still are unable to marry.

If a contract concluded after 1 January 1998 provides that a given legal effect attaches to the institution of marriage, that effect will not attach to a registered partnership, unless it is expressly so agreed.

2.2 History of the legislation

To understand why the Netherlands legislature opted for the current rules on registered partnership, it is necessary to go back to the origins of the Act. What prompted Parliament to legislate, what were the reasons for this legislation and were any other alternatives envisaged ?

2.2.1 Social and legal developments

Since the 1960's, several social and legal developments have been instrumental in the appearance of the Act on registered partnerships. I shall cite only developments in national and international case-law, which may themselves be regarded as reactions to social changes. At the national level, the Netherlands Court of Cassation (Hoge Raad) made its contribution by a judgment delivered in 1990. It decided, in an obiter dictum, that there was no justification for attributing certain legal effects to marriage but not to cohabitation between two persons of the same sex when that cohabitation was a matter of common knowledge. According to the same judgment, bringing the position of such persons into line with that of married couples was a matter for the legislature, not the courts. This decision added significant impetus to legislative activities on the legal position of same-sex couples and illustrates the growing importance of the principle of equality.

One cannot overlook developments in connection with Article 8 of the European Convention on Human Rights, which guarantees the right to private and family life. The protection to be afforded under this Article extends also to de facto families and thus to family life which is not based on marriage. This is the result of an ever-broader interpretation of this provision by the European Court of Human Rights.

A committee set up by the Netherlands Government, known as the Kortmann committee, entered the question of lifestyles other than marriage on its 1991 agenda. It also examined the question of the appropriate form of administrative registration, which would enable the partners to attach legal effects to their stable relationship.

2.2.2 The Kortmann committee's report on « lifestyles »

At the end of 1991 the Kortmann committee published its report on « lifestyles ». It proposed two different kinds of registration : optional registration in the local municipal administration (so-called « light » registration) and a « heavy » registration in the civil status register. « Light » registration, possibly of unlimited duration, would entail public-law effects and also a short-term obligation to provide for the partner's needs after the end of the registration.

2.2.3 Points discussed between 1992 and 1998

The report was relatively well received by the Government of the day and lay at the origin of the current legislation on registered partnerships. The idea of « light » registration in the local municipal administration was not retained. The Institute for Review of Public Expenditure (Instituut voor onderzoek naar overheidsuitgaven ; IOO) came to a negative conclusion after examining the (financial) consequences of this proposal. It found that introducing this kind of registration would involve high costs, but would not contribute to the implementation or maintenance of the regulations, or to the prevention of fraud.

On the other hand, registration in the civil status register was approved by the Government and a Bill containing the rules on this form of registration was introduced in June 1994.

The opening of registered partnership to partners of different sex met with extensive criticism both in Parliament and in legal writings. During the Parliamentary debates, two reasons were relied on for opening partnership to heterosexuals. It was asserted, firstly, that heterosexuals who do not wish to marry should have the possibility of making their relationship publicly known ; and secondly, that homosexuals and heterosexuals should be afforded equal treatment. These two reasons demonstrate the paradox inherent in the question.

(1) Opening registered partnership to heterosexuals implies that marriage and registered partnership are not equivalents. If they were, why should persons of different sex who do not wish to marry nevertheless have their partnership registered ?

Furthermore, (2) this opening provides couples of different sex with a choice which homosexuals do not have.

2.3 Conclusion of a registered partnership

2.3.1 The substantive conditions

What are the substantive conditions for the conclusion of a registered partnership ? Registration is open : (a) to any person of Netherlands nationality and (b) to any person holding a valid residence permit (Art. 1 : 80 a, paras. 1 and 2, Burgerlijk Wetboek).

A partnership cannot be entered into by more than two persons, their sex being irrelevant (Art. 1 : 80 a, para. 3, Burgerlijk Wetboek).

Neither partner may be married to a third-party or have entered into another partnership (Art. 1 : 80, para. 4, Burgerlijk Wetboek).

Besides, Art. 1 : 80, para. 8, provides that certain substantive conditions for the conclusion of a marriage are applicable by analogy to registered partnerships :

Registration is forbidden when the mental health of one of the partners renders him incapable of expressing his wishes or comprehending the meaning of his declaration.

Partnership between direct ascendants or descendants or between brothers and sisters is forbidden.

The minimum age for entering into a partnership is set at 18. However, if one or both of the partners have not attained the prescribed age, the Ministry of Justice may waive this rule if there are serious reasons for doing so.

Minors cannot enter into a partnership without the consent of their father and mother. In the event of refusal, consent may be given instead by a first-instance court.

For persons under guardianship, consent must be sought from the guardian or the first-instance court.

Before the Act on registered partnerships entered into force, some municipalities had, pursuant to their local-authority powers, created so-called « cohabitation » registers. Homosexual couples could have their relationship recorded therein and so have it recognised. However, no legal effects were attributed to such an entry. The publicity given to these municipal initiatives by the national media served in part as a catalyst for the developments in the context of registered partnerships.

Are these entries to be automatically treated, after the entry into force of the Act, as registrations for the purposes of the Act ? The answer must be in the negative. It cannot be assumed, without more, that all those covered by such entries wish to enter into a registered partnership, given the (important) effects that step entails. If they do, they must register anew.

2.3.2 Formal and procedural conditions

The substantive conditions are to a very large extent equivalent to those for marriage ; the same is true for the procedure and the ceremony. The formalities, the conclusion, the ceremony, the annulment and the proof of a registered partnership are governed by rules equivalent to those concerning marriage.

In principle, the ceremony takes place at the town-hall, in the presence of at least two witnesses and the partners. Art. 1 : 67 of the Burgerlijk Wetboek, which specifies the form in which the future spouses must give their joint consent at the marriage ceremony, does not apply to registered partners. They are free to choose the contents of their declaration and the town-hall must, as far as possible, take account of their wishes.

2.4 Effects

As already mentioned, a registered partnership should in principle have the same effects as a marriage. However, it creates no relationship of filiation between the child of one partner and the other partner.

In other respects, a registered partnership has numerous effects in both private and public law.

The most important effects in private law are the following :

1. *the partners can use each other's names ;*
2. *a family relationship is created between the parents of one of the partners and the other partner ;*
3. *one partner is the heir of the other by the same token as one spouse is the heir of the other ;*
4. *a minor is automatically emancipated as a result of the registration of his partnership*
5. *one partner may apply to have the other placed under guardianship and, on certain conditions, will be preferred when it comes to nominating the guardian ;*
6. *a registered partnership will suspend the running of time for the purposes of limitation periods on legal proceedings between the partners.*

The rules on the partnership property are the following :

7. *The partners are obliged to aid and assist each other and to provide for their respective needs ; they must be faithful to each other : Art. 1 : 81 of the Burgerlijk Wetboek.*
8. *Unless the partners have otherwise agreed, the rules on the statutory matrimonial regime apply to them. In that event their assets are subject to the regime of full community of property : all their assets form part of the community property, save for those acquired during the partnership by way of succession, gift or legacy with a provision excluding them from the common property and save for assets and debts attaching exclusively to one of the partners : Art. 1 : 93 and 1 : 94 of the Burgerlijk Wetboek.*
9. *A maintenance obligation arises on dissolution of the partnership.*
10. *Each partner is entitled to manage the assets included, through him, in the community property : Art. 1 : 85, para. 1, of the Burgerlijk Wetboek.*
11. *The partners are jointly responsible for certain debts contracted for the normal running of the household : Art. 1 :85, para. 1, of the Burgerlijk Wetboek.*
12. *The partners are obliged to live together unless there are serious reasons for departing from this rule.*
13. *The authorisation of the other partner is required for certain transactions concerning particular assets such as the family home (Art. 1 : 88 and 1 : 89 of the Burgerlijk Wetboek).*
14. *Where the full community property regime applies, bankruptcy of one partner is treated as bankruptcy of the community.*

In the public-law field there is also complete equivalence between registered partners and spouses. This means that registered partners have the same rights, duties and powers as spouses in the public-law field.

These prerogatives concern taxation, social security, retirement pension and criminal law, and also other laws which attach consequences to the married status, such as the law on the donation of organs.

2.5 Termination of a registered partnership

What are the ways of dissolving or terminating a partnership ? A registered partnership comes to an end in the following cases :

- 1. death of one of the partners ;*
- 2. absence of one of the partners followed by a new marriage or a new registered partnership ;*
- 3. registration of a joint declaration by the two partners putting an end to their partnership ;*
- 4. dissolution by a court on application by one of the two partners.*

As regards dissolution of the partnership by a court, a parallel was sought with divorce granted by a court. However, the two sets of rules are not fully identical. Thus, application for the dissolution of the partnership by a court can be made only by one of the partners, whereas a divorce can be granted on joint application by the two spouses. Moreover, divorce on joint application is granted only when the two spouses consider that their marriage has irretrievably broken down. The fact that the partnership has irretrievably broken down is irrelevant as regards dissolution of a registered partnership.

Dissolution of a partnership by mutual consent of the partners without the intervention of a court has no equivalent in the law of marriage. This is one difference between the effects of marriage and of partnership. This difference was alleged, during the parliamentary debates, to be justified by the fact that a registered partnership creates no relationship of filiation. The question of protection of a child does not arise at the end of a registered partnership.

The partners must draw up a declaration, which must be signed by a notary or a lawyer and by the two partners. It must disclose that the partners have come to an agreement putting an end to their partnership and indicate the time when this agreement was made. However, the contents of the agreement do not have to be recited in the declaration.

In their agreement, the partners must, on pain of nullity, state that their partnership has irretrievably broken down and that they wish to end it. As has just been mentioned, it is not necessary to submit any grounds in the case of dissolution by a court. In addition, the agreement must include provisions on maintenance payments, attribution of the (temporary) use of the common home, division of the assets and participation in pension rights. However, the absence of agreed provisions on these specific points does not render the agreement invalid.

Once the partnership is terminated, the partners can marry each other (or another person) or enter into a new registered partnership. In principle, they can continue to use their respective names. If there was community of property, no further assets will be included therein.

At the beginning of my presentation, I gave you statistics on the number of partnerships registered during the first twelve months of application of the Act. Unfortunately, no figures are yet available for the termination of registered partnerships.

3 Critical remarks

The creation of the institution of registered partnership was, as I said, the object of lively debates.

1st discussion point : It is often asked why persons of different sex should wish to enter into a registered partnership. Why opt for a registered partnership when this institution can be regarded more or less as an alternative to marriage ? Materially the same rules are to apply to both institutions, with the exception of those on filiation and divorce. Yet this last point does not seem to be a good reason for not wishing to choose marriage. The cause can perhaps be found in the symbolic meaning of marriage and probably in a degree of reticence towards the effects of marriage as regards filiation.

2nd discussion point : Is the fact that an alternative is being offered a valid justification for opening registered partnerships to heterosexuals ? Is it not really a pretext concealing a wish on the part of the legislature, taken to the extreme, to put heterosexual and homosexual couples on an equal footing ? Whilst registered partnership should not be considered as a second-class marriage, its creation has brought about a further distinction between heterosexual and homosexual couples, the former having a choice between marriage and registered partnership, which the latter do not have.

3rd discussion point : Passing from a registered partnership to marriage remains problematical. It is far from easy under the current legislation. To enter into marriage the partners must first terminate their partnership. It goes without saying that for this purpose they will opt for dissolution by mutual consent, without the intervention of a court. As a ground for dissolution, it will therefore have to be alleged that the partnership has irretrievably broken down, which is the exact opposite of the reality. After dissolution of the partnership, the parties must publish banns and wait, for at least two weeks, before the marriage can be celebrated. The inconvenience caused by this transitional period can be attenuated because the Public Prosecutor can shorten the time-limit. This provision will enable the marriage to be celebrated very soon after the end of the partnership.

However, an interval will remain during which the partners are neither registered nor married. Whilst it is true that all the effects of the registered partnership are revived after the marriage of the same partners, this does not eliminate the problem of this transitional period, for example in the event of the bankruptcy or death of one of the partners before the marriage has been celebrated. During the parliamentary debates, some speakers argued for a simple transition from one institution to the other. It is to be hoped that the legislature will follow up this proposal, under which the conclusion of a marriage would terminate the partnership and vice versa. Whether such a transition is desirable will be examined only when the functioning of the Act comes to be evaluated.

4th discussion point : *One comment must be made regarding dissolution of a partnership by mutual consent. This is possible only on the ground of irretrievable breakdown. This ground must be mentioned in the agreement. Here again, the principle of equality rears its head, although not very convincingly. There is no way of dissolving a marriage without the intervention of a court.*

Since it is a question of dissolution by mutual consent, the two partners must be agreed that their partnership is finished. Neither the notary or lawyer who must sign the declaration nor the civil status official will verify whether there really is an irretrievable breakdown. If it is accepted that the object of this provision is to ensure that the partners' consent is genuine at the time of dissolution, it would have been preferable to require that the wish to dissolve the partnership be expressly mentioned in the dissolution agreement.

5th discussion point : *In the case of dissolution of the partnership by a court, the partners do not have to allege that their relationship has irretrievably broken down. This rule is not entirely clear, because a rule on the same point exists in divorce law itself. A divorce can be granted only if the spouses consider that their marriage has irretrievably broken down, but whether this really is the case will not be verified.*

6th discussion point : *Does the principle of equality mean that all the effects of marriage must be applied by analogy to registered partnership ? Should not a distinction be drawn according to the various aspects of a legal effect ? In this connection an example can be found in the work of the committee on the rights and duties of spouses, which turned in 1997 to the law of matrimonial regimes and made a certain number of recommendations for the reform of the law of marriage and the law of matrimonial regimes. Since the Act on registered partnerships was already at an advanced stage at that time, further amendment which would have delayed its entry into force was not thought to be desirable. Consideration could have been given to creating specific rules tailored to registered partnership instead of declaring that all the rules on marriage were also applicable to partnership. In that way, one might have been able to do without the obligation to live together and the rules on bearing the household expenses and a settled contribution to debts.*

The statutory matrimonial regime of full community of property is also under discussion. This regime was designed notably for families with children, where there is some sharing-out of tasks. Yet the households of homosexual couples do not generally include children. It might have been preferable to select another legal regime, subject to a possibility for the partners to agree that the regime of full community should apply to them. In any event, the legislature should have provided a better motivation for the choices it made.

4 Opening of marriage to same-sex couples

The entry into force of the Act on registered partnerships has not put an end to the debate on the opening of marriage to same-sex couples.

Book 1 of the Netherlands Civil Code does not expressly lay down any impediment to the marriage of homosexual couples. Nevertheless, the prevailing opinion of legal writers is that marriage has an exclusively heterosexual character and is not open to same-sex couples. Legislative intervention is therefore required to permit « homosexual marriage ».

The debate on the opening of marriage to same-sex couples has to a large extent taken place outside the legal arena. Political arguments seem to take precedence over legal arguments. After the May 1998 elections the Government undertook in the agreed governmental programme that, with a view to ensuring equal treatment of homosexual couples, it would present two Bills before 1 January 1999, one dealing with the opening of marriage to homosexual couples and the other with adoption by homosexual couples of children of Netherlands nationality. On 11 December last a Bill on the opening of marriage to homosexual couples was transmitted to the Conseil d'Etat (Raad van State) for an opinion. It seems that, in the immediate future, registered partnership will in any event remain. After an interval of five years, an assessment should be made as to whether it is necessary for the two institutions to continue to co-exist.

Before marriage is actually opened to homosexual couples, some difficult questions and issues need to be considered.

- Firstly : Attention must be given to the international aspects of opening marriage in this way. Taking such a step will certainly be exceptional in an international context. Bearing in mind that numerous international treaties and treaties on private international law contain references to marriage, a question arises as to the consequences for international law of divergent interpretations of the notion of marriage. What problems will spouses of the same sex encounter when they have contacts with foreign countries ? In 1998, the State Committee on Private International Law issued an important opinion on the private-international-law aspects of registered partnerships. This opinion, and also the Bill containing 35 sections that accompanied it, will have to be completely revised if it is decided to open marriage to same-sex couples and abolish registered partnership.
- Secondly : Another question is that of international adoption. Are foreign countries prepared to make children available for adoption if, in the Netherlands, spouses can also be two men or two women ? Some reticence is to be expected on this point.
- Thirdly : The next point is the question of the link between filiation and the opening of marriage to same-sex couples. Under the current rules of the law on filiation, the man to whom the mother of a child is married is automatically the father of the child. This raises the issue whether the link between filiation and marriage will subsist if the legislature decides to open marriage to homosexual couples, given that under those rules the female spouse of the child's mother would be the child's father. Quite apart from questions of terminology, it is not immediately apparent that a divergence between potential biological filiation and legal filiation would be acceptable.
- Fourthly : In all probability registered partnership will continue to exist. However, it can be assumed that only one of the two institutions, which in material terms have virtually identical legal effects, will have a long lifespan. It is not conceivable that the institution of marriage will be abolished, given that it is firmly rooted in Netherlands society and that the right to marry is guaranteed by international conventions. If registered partnership is nevertheless abolished, account will have to be taken of the fact that a certain number of partnerships have already been entered into and that they cannot be automatically converted into marriage without the parties' consent. In more concrete terms, that means that the institution of registered partnership will die a slow death, which may take several years.

5. Conclusion

The creation of registered partnership is certainly a step forward. It is, however, regrettable that the legislature approached registered partnership from too narrow a perspective, namely the principle of equality. In other respects, the legislature did not proceed with great care. There now exists an institution equivalent to marriage, having roughly the same effects.

Nevertheless, the principle of equality does not seem to have been fully exploited. The preparation of the Bill on the opening of marriage to same-sex couples, barely a year after entry into force of the Act on partnerships, shows that proper thought had not been given to the form to be taken by the change in civil status of two same-sex partners by virtue of their cohabitation. The Act on registered partnership is not a masterpiece but a rush-job.

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