

SUMMARY

1. Aims of this research

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

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

2. Structure and methodology of this research

This research embodies three perspectives: a national legal perspective (Part II), an international legal perspective (Part III) and a sociological perspective (Part IV). The socio-legal conclusions at the end of this research are accordingly a *mélange* of these three interrelated, yet distinct angles.

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

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

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

provides the results of a number of follow-up interviews conducted with respondents from those persons who had responded to the detailed questionnaire.

The results of these three perspectives have subsequently been combined with each other to form the basis for the basis conclusions. In answering the main research questions posed at the commencement of this research, a distinction has been made between the problems experienced as a result of the legislation, the differences between the two formal relationship forms in Dutch law and the possible recommendations for removing these problems and differences. It is important to note that not all differences lead to problems, and not all problems are a result of differences. In the conclusions, attention is first devoted to summarising the problems experienced in relation to these two pieces of legislation. Thereafter, focus shifts to the proposed recommendations put forward by the research team, aimed at tackling the problems and/or removing the differences. In §6 of the conclusions, the arguments for and against the abolition or retention of registered partnership (assuming that the amendments and recommendations listed in §5 are carried out) are laid out.

3. Aims of the legislation

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

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

4. Research results

4.1 Act opening marriage to same-sex couples

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

Substantial problems arise in relation to the recognition of same-sex marriages once a couple leave The Netherlands. The fear that same-sex marriages may not be recognised, appreciated by both Dutch practitioners active in this field as well as the couples themselves, is confirmed by the information collated in the international legal perspective. The non-recognition of a couple's marriage can have important and far-reaching consequences for those concerned. From the international legal research it would appear that in many instances no clear answer can be

provided as to whether, and if so how, these marriages will be recognised abroad. The answer to the question is heavily dependent upon the substantive law rules in force in that country. In those countries to have opened civil marriage to same-sex couples, the recognition of Dutch same-sex marriages is generally not problematic. In those countries where a domestic form of registered partnership has been created, same-sex marriages celebrated abroad are often afforded recognition as this domestic form of registered partnership. In those jurisdictions where no substantive law regime is available for same-sex couples to formalise their relationship, the chances are great that a Dutch same-sex marriage will not be recognised.

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

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

4.2 Act introducing registered partnership

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

In attempting to fulfil the obligations imposed by the principle of equality, the Dutch legislature sought to sculpt the institution of registered partnership as far as possible according to the marital model. As is clear from the national legal perspective, legislation with respect to registered partnership and marriage are indeed very similar, in terms of the establishment of the relationship, the conversion of one relationship into another, the rights and duties attributed to the relationship and the procedures available for terminating the relationship. Nevertheless, a number of exceptions to this overall resemblance deserve particular attention. Two aspects deserve particular attention. The first difference relates to the marital presumptions of parentage that are not *mutatis mutandis* applicable to registered partnerships. In this respect it is important to draw a distinction between different-sex and same-sex couples.

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

The initial objectives of the Government were, however, to introduce a formalised relationship scheme which was only to have consequences for partners themselves. Between 1998 and 2001, this was indeed the case, but over time this legislation has been amended. Since 2001, legislative change granting joint parental authority by operation of law to registered partners over a child born during a registered partnership has come into force. This change coupled with the results from the sociological perspective which indicate that a majority of those different-sex registered partners questioned were raising children, indicates that it can no longer be said either that registered partnership has no effect on the parent-child relationship, nor that no children are being born in or growing up in registered partnerships. It is therefore vital that the problems signalled by the legal professionals and the couples themselves in relation to the absence of a legal presumption of paternity be rectified immediately. A subsidiary argument is that this difference in treatment is contrary to the principle of equality.

When turning one's attention to same-sex couples, the questions raised are to some extent more complicated, due to the presence of a third party. No legal distinction is drawn as regards legal parentage or parental responsibility in relation to children born during or growing up in a marriage or registered partnership between couples of the same-sex. No presumption of parentage results with regards same-sex couples, obliging same-sex couples wishing to establish legal parentage to adopt. Furthermore, as demonstrated in the sociological perspective, a significant minority of same-sex couples are indeed raising children. It is therefore important that these children are afforded adequate legal protection in field of legal parentage.

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

Regardless of the societal demand for a marital alternative, a number of problems have been revealed by this research. Firstly, as stated above in relation to same-sex marriages, the possibility that the relationship will not be recognised abroad is great. Two separate problems in this respect need to be distinguished. First of all, the chances of non-recognition, especially in relation to same-sex registered partnerships, are high, and secondly legal uncertainty. In nearly all of the jurisdictions studied (apart from Belgium), it was unclear how different-sex registered partnerships will be dealt with. It may be that they will be recognised, and it may be that they will not be recognised. Both these problems could lead to "limping relationships" (relationships recognised in one country, yet not recognised in another). It is noteworthy to mention that although a distinction is made in The Netherlands between registered partnership and marriage,

in the majority of countries researched this distinction is not respected. In Germany for example, both same-sex marriages and Dutch registered partnerships will be recognised as *Lebenspartnerschaft*, whilst at the other end of the spectrum in Belgium both relationship forms will be recognised as marriages. It would also appear from both the national legal perspective and the sociological research that those professional involved with the registration of partnerships as well as the couples themselves regard the potential non-recognition of the relationship as a problem.

5. Conclusion

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

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

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