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**STUDY ON MATRIMONIAL PROPERTY REGIMES
AND THE PROPERTY OF UNMARRIED COUPLES
IN PRIVATE INTERNATIONAL LAW AND INTERNAL LAW**

ADDENDUM
THE NETHERLANDS

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The Netherlands

1. Statistical data

The Netherlands Bureau of Central Statistics publishes certain data with respect to the number of marriages and the number of divorces. From the perspective of a private international law analysis, the data collected only provide indications on the number of times that such a marriage or a divorce would have an international element. The only relevant element that is listed concerns the country of birth of the spouses.

Tables concerning the number of marriages (including the number of marriages entered into abroad by at least one spouse who is registered in the Netherlands basic administration) are set out in annex to this report. Some observation can be made. The total number of marriages has decreased between 1996 and 2001, but the number of marriages celebrated abroad has increased. Of all heterosexual marriages, about a quarter involves at least one spouse who was born abroad. In 2001, 1339 marriages were celebrated between two males, more than a quarter involving at least one 'spouse' who was born abroad. Only fifteen of the marriages between two males involved spouses who were both born outside the Netherlands. About ten percent of all marriages between two males involved a spouse from another EU Member State. Of the 1075 marriages that were celebrated in 2001 between two females, about 10 percent involved a spouse who was born abroad, and about 5 percent of the total of all female marriages involved a spouse who was born in another EU Member State. Only nine marriages between two females involved spouses who were both born abroad.

With respect to partnership registration, an interesting phenomenon is the impressive increase of partnerships that are registered between heterosexual spouses. Certainly before the introduction of the 'open' marriage (open in the sense that it can be entered into by spouses of the same sex), it was thought that partners of the same sex would mostly enter into the registered partnership. However, data suggest that heterosexual spouses now enter into the vast majority of registered partnerships. The probable explanation for this phenomenon (88% percent of all registered partnerships in 2002 involved a heterosexual couple) lies in the attractiveness of the so-called flash divorce: the marriage is turned into a registered partnership, which is subsequently dissolved (by mutual consent). The whole procedure would be quicker than an ordinary divorce and will be less costly.¹ However, although the

¹ See K. Boele-Woelki, Registered partnership and same-sex marriage in The Netherlands, in: Legal Recognition of Same-sex couples in Europe, Boele-Woelki/Fuchs, eds, Intersentia, Antwerp, 2003, p 51.

‘flash divorce’ may lead to a quick dissolution of the registered partnership, it may not rule the need for a separate procedure to deal with property issues that can not be agreed upon (the law applied to those issues is identical for matrimonial property and for registered partnerships).

2. Internal law. Discussion as to reform

In the past years a limited debate has taken place with respect to a possible reform of the present legal regime, the full community of property. This debate has begun following the publication of a comparative legal report commissioned by the Ministry of Justice.² Following the report further debate has taken place.³ On the basis of the report and the ensuing discussion one author, Reinhartz, has concluded that ‘there is no clear system of matrimonial property within Europe’ and that therefore the argument that the Dutch legal regime should not be maintained because it is different from the solutions followed in other European countries is invalid, as matrimonial property differs in every state.⁴ However, other writers have argued that the system of community property should disappear.⁵

The government has introduced changes into Dutch legislation in the area of matrimonial property. These changes should take place in three steps, of which the first two steps concerning the rights and obligations of spouses and a change of the rules on ‘verrekenbedingen’ (‘compensation clauses’) has been realized, but the content of the final step (which might contain a proposal to bring changes into the current legal regime) has not yet been unveiled.

Private international law

There are no clear statistics on the number of cases involving p.i.l. issues of matrimonial property law. The T.M.C. Asser Instituut collects and publishes cases on private international law issues since 1983 in the journal *Nederlands Internationaal Privaatrecht*. Not every case on private international law is published, but publication of cases is not limited to cases that contain a new element. Review of the cases published since 1983 demonstrates that (in March

² *Huwelijksvermogensrecht in rechtsvergelijkend perspectief* : Denemarken, Duitsland, Engeland, Frankrijk, Italië, Zweden; B. Braat, A.E. Oderkerk, G.J.W. Steenhoff, K. Boele-Woelki, 2000, Amsterdam/Deventer.

³ *Algehele gemeenschap van goederen : afschaffen!?* K. Boele-Woelki, ed.

⁴ *Op cit nt 3*, p. 90-91.

⁵ See Duynstee, *Algeheel gemeenschap van goederen: Afschaffen!*

2003) 476 cases have been categorized as dealing with matrimonial property law. Of these cases, 41 cases involved the Hague convention on Matrimonial property law of 1978. Not all these cases applied the Convention, some cases were rendered before the entry into force of the Convention.

The inference of these cases is that most cases lead to application of article 4 of the Convention leading in most cases to connecting the applicable law on the basis of joint nationality or on the basis of the first residence of spouses after the marriage. A few cases force the courts to take into account the content of foreign private international law, i.e. in cases where spouses had a common nationality and set up first residence in another state. Looking at recent cases, the following issues have come up in case law:

- Automatic changes of the applicable law because of joint nationality: when the husband who was Turkish, obtained Dutch nationality; as the wife was of Dutch nationality and the couple was resident in the Netherlands, Dutch law became applicable under the convention. Property acquired from the moment that both spouses had Dutch nationality would be full community property in accordance of the Netherlands legal regime: property acquired before that moment would be subject to the legal regime of the foreign law (which in all cases meant a division of property) (see similar decisions in Rechtbank. Arnhem, 3 january 2002, not yet reported; Rechtbank 's-Gravenhage, 13 augustus 2001, NIPR 2001 251; Rechtbank 's-Gravenhage, 2 September 2002 , NIPR 2002 244; Rechtbank 's-Gravenhage, 16 oktober 2002, NIPR 2003, 11)
- Absence of a common nationality and of a first habitual residence after marriage in the same state: the court was unable to find the most closely connected law, but applied full community property, as the only states connected with the case were the Netherlands and Surinam, states that both have adopted this legal regime (Rechtbank 's-Gravenhage, 16 September 1998, NIPR1999 62)
- In case of registered partners, the 1978 Hague Convention was inapplicable, but the partners had to designate the applicable law by a notarial deed, and could not designate the applicable law in their petition to the court (in this case this decision did not influence the outcome of the case, in the petition an ineffective choice was made for Dutch law, but the District Court held that Dutch law was applicable anyway as the

registered partnership had been entered into in the Netherlands) Rechtbank Roermond, 29 March 2001, NIPR 2001, 188);

- As spouses had lived most of their married life in the Netherlands, Netherlands law was applied as the law that was most closely connected to the marriage; spouses had not established a first residence within six months after celebration of the marriage) Rechtbank 's-Gravenhage, 10 July 2002 , NIPR 2002 243);

Literature has given some attention to possible flaws of the 1978 Hague Convention. Apart from literature dating from before the ratification of the convention, arguing that the Netherlands should not ratify the convention, some literature has identified practical problems in application of the convention, such as when it can be said that there is a first residence after marriage.⁶ Warnings have also been issued in respect of the automatic mutation of the applicable law after ten years of residence in the Netherlands.⁷

Jurisdiction

Few cases turn on jurisdiction of the Dutch courts. A notable case is Gerechtshof Leeuwarden, 21 August 2002, NIPR 2002 241. In this case the Dutch husband, married to a Philippine wife tried to contest jurisdiction of the Dutch courts under Brussels II regulation. The main argument put forward of lack of domicile in the Netherlands. The arguments of the husband were rejected

⁶ Schmidt

⁷ Frohn

Echtscheidingen en van echt scheidende personen; diverse kenmerken

Onderwerp Echtscheidingen

en	Totaal echtscheidingen	<u>Wederzijds geboorteland</u>										
		<u>Man in Ned., vrouw in buitenland geboren</u>										
		Beide partners in Nederland geboren	Totaal buitenland	Totaal EU-landen	Totaal westerse landen	Totaal niet-westerse landen	België	Duitsland	Marokko	Ned. Antillen + Aruba	Suriname	Turkije
Perioden	<i>absoluut</i>											
1996	34871	23186	2551	766	1527	1024	134	325	133	77	235	62
1997	33740	22690	2451	743	1469	982	135	312	126	95	186	50
1998	32459	22808	2349	708	1413	936	121	336	106	91	192	60
1999	33571	24130	2402	704	1429	973	125	327	92	72	202	65
2000	34650	25499	2317	733	1438	879	144	325	72	74	208	74
2001	37104	27334	2542	794	1568	974	144	325	82	80	204	88

Vrouw in Ned., man in buitenland geboren

Totaal buitenland	Totaal EU-landen	Totaal westerse landen	Totaal niet-westerse landen	België	Duitsland	Marokko	Ned. Antillen + Aruba	Suriname	Turkije
3422	676	1366	2056	118	215	457	86	165	483
3205	645	1272	1933	104	230	407	100	147	474
2682	663	1245	1437	96	209	268	92	145	298
2650	684	1306	1344	113	233	277	86	159	256
2628	652	1213	1415	96	218	293	89	186	292
2860	703	1308	1552	122	207	300	107	174	327

Beiden in hetzelfde buitenland geboren

Totaal buitenland	Totaal EU-landen	Totaal westerse landen	Totaal niet-westerse landen	België	Duitsland	Marokko	Ned. Antillen + Aruba	Suriname	Turkije	Beiden in verschillend buitenland geb.
3643	219	463	3180	68	76	635	92	1085	750	2069
3716	197	470	3246	59	66	690	99	925	797	1678
3320	179	416	2904	45	66	611	94	823	712	1300
3424	204	463	2961	44	72	676	131	737	674	965
3292	214	466	2826	51	90	664	119	708	652	914
3474	193	498	2976	50	58	735	102	638	772	894

Huwelijkssluitingen en huwende personen: diverse kenmerken

Onderwerpen		Perioden	1996	1997	1998	1999	2000	2001
Huwelijkssluitingen	Totaal alle huwelijkssluitingen	<i>absoluut</i>	85140	85059	86956	89428	88074	82091
	In Nederland gesloten huwelijken		78590	79227	80550	81866	79526	73190
	In buitenland gesloten huwelijken		6550	5832	6406	7562	8548	8901
	Totaal alle huwelijkssluitingen	<i>absoluut</i>	85140	85059	86956	89428	88074	82091
In Nederland gesloten huwelijken		78590	79227	80550	81866	79526	73190	
In buitenland gesloten huwelijken		6550	5832	6406	7562	8548	8901	
Huwelijkssluitingen tussen man/vrouw	Huwelijkssluitingen tussen man/vrouw		85140	85059	86956	89428	88074	79677
	Totaal westerse landen		3513	3356	3610	3833	3868	3655
	Totaal niet westerse landen		2339	2450	2668	3002	3274	3157
	België		316	310	324	329	307	299
	Duitsland		735	734	766	764	728	631
	Marokko		125	132	197	238	261	303
	Ned. Antillen + Aruba		205	200	178	198	197	168
	Suriname		471	529	503	548	616	468
	Turkije		251	275	340	372	434	478
	Vrouw in Nederland geboren	Totaal buitenland	4365	4517	4744	5126	5107	4863
		Totaal EU-landen	1331	1315	1319	1417	1301	1161
		Totaal westerse landen	2137	2170	2189	2252	2137	1901
		Totaal niet westerse landen	2228	2347	2555	2874	2970	2962
		België	219	223	242	257	245	190
		Duitsland	439	474	437	458	465	416
		Marokko	334	430	443	539	632	630
		Ned. Antillen + Aruba	184	184	177	205	193	188
		Suriname	338	355	369	386	387	352
		Turkije	559	574	697	795	871	963
	Beiden in hetzelfde buitenland geboren	Totaal buitenland	5696	5543	5848	6036	6468	6342
		Totaal EU-landen	210	197	220	183	203	191
		Totaal westerse landen	593	563	649	676	812	779
		Totaal niet westerse landen	5103	4980	5199	5360	5656	5563
		België	25	38	36	35	33	42
		Duitsland	95	82	99	68	65	68
		Marokko	1280	1379	1606	1599	1781	1791
		Ned. Antillen + Aruba	134	118	130	147	168	155
		Suriname	1074	1019	1047	1073	1032	784
		Turkije	1732	1461	1349	1326	1335	1461
	Beiden in verschillend		1436	1333	1531	1692	1660	1702

Huwelijkssluitingen tussen twee mannen	Huwelijkssluitingen tussen twee mannen					1339	
	Wederzijds geboorteland	Beide mannen in Nederland				1027	
		Eén in Ned., ander in buitenland geboren	Totaal buitenland			289	
			Totaal EU-landen			111	
			Totaal westerse landen			192	
			Totaal niet westerse landen			97	
			België			15	
			Duitsland			45	
			Marokko			2	
			Ned.				
			Antillen + Aruba			16	
			Suriname			19	
			Turkije			2	
			Beiden in hetzelfde buitenland geboren				8
			Totaal EU-landen			3	
			Totaal westerse landen			3	
			Totaal niet westerse landen			5	
			België			-	
			Duitsland			-	
			Marokko			-	
Ned.			-				
Antillen + Aruba			-				
Suriname			3				
Turkije			-				
Beiden in verschillend					15		
Totaal huwelijkssluitingen twee vrouwen					1075		
Huwelijkssluitingen tussen twee vrouwen	Totaal huwelijkssluitingen twee vrouwen				950		
	Wederzijds geboorteland	Beide vrouwen in					
		Eén in Ned., ander in buitenland geboren	Totaal buitenland			110	
			Totaal EU-landen			50	
			Totaal westerse landen			83	
			Totaal niet westerse landen			27	
			België			13	
			Duitsland			24	
			Marokko			-	
			Ned.				
			Antillen + Aruba			9	
			Suriname			8	
			Turkije			-	
			Beiden in hetzelfde buitenland geboren				6
			Totaal EU-landen			2	
			Totaal westerse landen			2	
			Totaal niet westerse landen			4	
			België			-	
			Duitsland			1	
			Marokko			-	
Ned.			-				
Antillen + Aruba			1				

					1339
					1027
					289
					111
					192
					97
					15
					45
					2
					16
					19
					2
					8
					3
					3
					5
					-
					-
					-
					-
					-
					3
					-
					15
					1075
					950
					110
					50
					83
					27
					13
					24
					-
					9
					8
					-
					6
					2
					2
					4
					-
					1
					-
					-
					1

				Suriname	-							
				Turkije	-							
			Beiden in verschillend		9							
Alle huwelijkssluitingen	Wederzijds geboorteland	Beide partners in	Één in Ned., ander in buitenland geboren	Totaal buitenland	67791	67860	68555	69739	67697	61935		
				Totaal EU- landen	10217	10323	11022	11961	12249	12074		
				Totaal westerse landen	3087	3003	3125	3160	3026	2933		
				Totaal niet westerse landen	5650	5526	5799	6085	6005	5831		
					4567	4797	5223	5876	6244	6243		
				België	535	533	566	586	552	517		
				Duitsland	1174	1208	1203	1222	1193	1116		
				Marokko	459	562	640	777	893	935		
				Ned. Antillen + Aruba	389	384	355	403	390	381		
				Suriname	809	884	872	934	1003	847		
				Turkije	810	849	1037	1167	1305	1443		
					Beiden in hetzelfde buitenland geboren	Totaal buitenland	5696	5543	5848	6036	6468	6356
						Totaal EU- landen	210	197	220	183	203	196
						Totaal westerse landen	593	563	649	676	812	784
					Totaal niet westerse landen	5103	4980	5199	5360	5656	5572	
					België	25	38	36	35	33	42	
					Duitsland	95	82	99	68	65	69	
					Marokko	1280	1379	1606	1599	1781	1791	
					Ned. Antillen + Aruba	134	118	130	147	168	156	
					Suriname	1074	1019	1047	1073	1032	787	
					Turkije	1732	1461	1349	1326	1335	1461	
			Beiden in verschillend	1436	1333	1531	1692	1660	1726			
	Huwenden in man/vrouw huwelijken											
			Huwende personen (man/vrouw)	163367	164047	167000	171132	167346	150180			
			Huwende mannen (man/vrouw)	82372	82546	84085	86299	84573	76050			
			Huwende vrouwen (man/vrouw)	80995	81501	82915	84833	82773	74130			