



# European Family Law

## Forms of Relationships: Marriage

*Monday, 19<sup>th</sup> November 2007*

*Dr. Ian Curry-Sumner, Universiteit Utrecht*

# Introduction

## What is marriage?

No universal definition:

- Monogamous? *E.g.* India
- Opposite-sex? *E.g.* The Netherlands
- Lifelong? *E.g.* England and Wales
- Reproductive? *E.g.* USA
- Religious? *E.g.* Belgium

# Contract v. Status

## Contract

- ◆ Why is marriage similar to a contract?
  - Agreement between two people
  - Imposes mutual obligations and rights on the parties concerned
  - Similar problems: capacity, form *etc*
  
- ◆ Why is marriage unlike a contract?
  - Capacity unlike any other form of contract
  - Valid only if special formalities observed
  - Grounds on which void/voidable completely different to most contracts
  - Marriage cannot be discharged by agreement, frustration or breach.

# Contract v. Status

## Status

- ◆ What makes marriage like a status?
  - “Condition to belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incapacities”
  - Terms to the marriage contract are fixed by law and not open to agreement
  - Also affects the rights and duties of third parties and therefore requirements are often very different.
  
- ◆ What makes marriage unlike a status?
  - Contractual nature of the form and capacity



# Substantive Law

## Conditions

Number of formal conditions imposed on future spouses:

- Age
- Sex
- Monogamy
- Residence
- Prohibited Degrees

# England and Wales

## Age

At common law, could be contracted if parties reached the age of puberty:

- 14 for men and 12 for girls

After Marriage Act 1929 passed (now in s.2 Marriage Act 1949)

- 16 for both parties
- Marriages void if either party under this age

However, if between 16-18 still need to ask for parental consent to marry.

# England and Wales

## Sex

### (a) Transsexuals

- Need to be of opposite sex: s.11(c) Matrimonial Causes Act 1973
- *Corbett v. Corbett (1971)*: chromosomal, gonadal and genital tests. Creates problems when people are male by one and female by another.
- ECtHR: *Rees v. UK (1986)*, *Cossey v. UK (1991)*, *Sheffield & Horsham v. UK*, *Goodwin v. UK*

### (a) Homosexuals / same-sex

- Difference needs to be made between homosexual and same-sex!
- Not currently allowed.

# England and Wales

## Monogamy (exclusivity)

Two facets as decided in *Hyde v. Hyde*

- Only consecrated between two people
- Only involved in one marriage at any one time

## Residency

- ◆ In England a distinction is made between Church of England weddings and civil ceremonies (other religious ceremonies).
  - *Church of England*: 3 consecutive Sundays need to read banns
  - *Civil Ceremonies*: 7 days residency + 15 days notice period



# England and Wales

## Prohibited Degrees of Marriage

### Consanguinity (relationships by blood)

- On moral grounds; often seen as abhorrent
- Set out in Part 1, Schedule to Marriage Act 1949
- Not all of these relationships are however criminal!

### Affinity (relationships by marriage)

- Theological concept because husband and wife were one
- Now more to do with the fact that will create tension (state interference?)
- More complicated restrictions – not absolute (what does this mean?)

### Adoption

# The Netherlands

## Age

- ◆ Prior to 1984, age for men was 18 and for women 16.
- ◆ After 1984, this equalised at 18 (Article 31(1), Book 1).
- ◆ However a couple of exceptions:
  - If both parties are 16 **and** she is pregnant or just given birth, then can also marry: Art. 31(2)
  - Minister of Justice may also remove the obligation: Art. 31(3).
    - Examples: a necessary trip abroad where unmarried cohabitation is not accepted (DC, Amsterdam, 7<sup>th</sup> March 1995)
    - Appeal is possible to the district court if consent refused.

# The Netherlands

## Sex and Same-Sex Marriage

- ◆ Supreme Court, 19 October 1990: Case decided that not discriminatory to refuse marriage to couples of same-sex, but it was discriminatory to deny the *benefits* of marriage to couples of the same-sex.
- ◆ On the 25<sup>th</sup> June 1996, Kortmann Commission II established to analyse the question.
- ◆ In October 1997, the Kortmann Commission Report II was published.
- ◆ The majority (5/8) of the members thought it best to open marriage to couples of the same-sex and then remove RP.

# The Netherlands

## Majority Standpoint

- ◆ The grievance that same-sex couples excluded from marriage not solved by introducing RP.
- ◆ Same-sex and opposite couples are the same (apart from in parentage cases)
- ◆ Commission noted that marriage has been a flexible institute and has followed social change (equalisation of men and women for example)
- ◆ Civil marriage is not a sacred institute but a legal institution recognised by the law.
- ◆ No parentage consequences – because would lead to too great a split with reality.



# The Netherlands

## Minority Standpoint

- ◆ They saw no discrimination if not opened because they are not the same.
- ◆ They were concerned that the core element of reproduction would be lost.
- ◆ They saw the introduction of same-sex marriage as introducing a second marriage
- ◆ Also considered that would lead to problems at international level



# The Netherlands

## Monogamy

- Article 30, Book 1: Only between two people
- Article 33, Book 1: Only one marriage at any one time

## Residency

- If both not Dutch and neither live in NL – cannot marry in NL
- If both not Dutch, and one lives in NL – may marry in NL
- If both one Dutch – may marry in NL
- Requirements contained in the Aliens Act 2000 (*Vreemdelingewet 2000*)

# Transsexual Marriages

## **ECHR: *Rees (1986)*; *Cossey (1990)***

- ◆ *Facts*: Rees (F-M TS), and Cossey (M-F TS). After treatment changed name and lived as male. Refused to change birth certificate
- ◆ *Court*: No violation of Arts 8 or 12. Wide margin of appreciation and fair balance must be struck between interests of individual and community. Art. 12 is a guarantee to opposite *biological sex*.
- ◆ **Note** Commission voted 10-6 in *favour* of violation of Art 12! However Court said no difference with *Rees*

# Transsexual Marriages

## **ECHR: *B v. France* (1992); *Sheffield and Horsham* (1997)**

- ◆ *B v. France*: Admitted that violation because onerous on the parties to provide for personal identification on regular basis. Differs from UK decision. Thus taking into account local situation.
- ◆ *Sheffield & Horsham*: No sufficient new findings since *Rees* and *Cossey*. Explicit reference made to *B v. France*, in terms of distinguishing the facts.
- ◆ *X, Y and Z*: No difference



# Transsexual Marriages

## **ECHR: *Goodwin v. UK (2001)***

- ◆ *Facts:* Post-operative M-F TS. Problems concerning payment of National Insurance contributions. Different age for men and women to contribute (65 v. 60). Complained of treatment in terms of employment, marriage *etc.*
- ◆ *Court:* Although ECtHR could not find conclusive reasons for the cause of transsexuality, it was clear that many countries allowed for operations. Increased trend of recognition of post-operative sex. Reliance on *Bellinger*. Ball passed to Parliament. Move away from *Corbett*.