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NATIONAL REPORT: DENMARK

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1. GENERAL INTRODUCTION

Denmark was the first country in the world to introduce a marriage-like institution open to same-sex partners when the Act on Registered Partnership was passed in 1989.¹ The Act provided a civil registration scheme; the registered partnership. The registered partnership only copies the legal institute of marriage. It is not the same. The legal regulation was almost identical with two important exceptions: 1) In the first place, all religious aspects of registered partnership were removed from the Act, and it was not discussed in parliament how the registration would take place. Later, an administrative decision was made to use the common civil marriage ceremony. Thus only civil registration is possible whereas marriage may be alternatively entered into civilly or in a religious ceremony. 2) Secondly, the regulation with respect to children (parentage, parental authority and adoption) was originally not extended to apply to partners in a registered partnership. This has been altered recently.

The main stated purpose of the Act on registered partnership was to equalize the social status of same-sex partners. Having this purpose in mind, the Act may be characterized as liberal and idealistic in nature. While the Danish regulation has been amended since the introduction in 1989, Danish law has not stayed in the lead internationally with respect to achieving equality for same-sex partners. Marriage remains open only to opposite sex partners.

2. DANISH LAW

2.1. *Nordic Family Law (Q 13)*

In a comparative legal perspective Denmark belongs to the group of

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1. *Lov om registreret partnerskab*, Act No. 372 of 07.06.1989.

Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) which may be considered as a separate legal family distinct from both common law and civil law.² The Nordic countries share a common history and the law has some common origins often characterized as divided between “the east” (Sweden and Finland) and “the west” (Denmark, Iceland and Norway).³ In the first part of the previous century there was successful co-operation between Denmark (at that time including Iceland), Norway, and Sweden resulting in the unification of the law concerning marriage, divorce, maintenance and matrimonial property. Although legal co-operation between these countries has continued (since 1953 in the realm of the Nordic Council, also including Finland from 1956) the relevant family laws have diversified. Nonetheless, the Nordic countries often take inspiration from the other Nordic countries with respect to legal institutions and regulations. The Danish registered partnership act was factually copied in many of the other Nordic countries.

2.2. Legal Framework (Q 1)

Denmark has a codified system of law. The primary source of law are singular acts of parliament and secondary legislation issued on the basis hereof; there is no civil code. The constitution *Grundloven* was last revised in 1953 but the larger part dates back to its introduction in 1849.⁴

Greenland and the Faroe Islands are part of Denmark, yet they have their own parliaments and the law is not always identical. Greenland has the registered partnership since 1996 while the Faroe Islands does not have the registered partnership.

2.3. Constitutional Regulations (Q 2)

The Danish Constitution *Grundloven* is an old constitution and its catalogue of human rights contains classical freedom rights such as freedom of religion and, expression and the right to assemble and associate. But it does not, for example, contain a general principle of equality⁵ or a right to family life. In 1849, marriage was the legal framework of the

2. D. Tamm, “The Danes and their Legal Heritage” in B. Dahl, T. Melchior, D. Tamm (Eds.), *Danish Law in a European Perspective* Copenhagen: Forlaget Thomson, 2002, p. 43.

3. P. Lødrup, “The Reharmonisation of Nordic Family Law” in K. Boele (Ed.), *European Challenges in Contemporary Family Law*, Antwerpen: Intersentia, 2008, p. 17-26.

4. Grundloven, Act Nr. 169 of 05.06.1953.

5. A number of acts regulate the equality principle in relation to discrimination on the basis of sex, race, ethnicity, age, handicap, religion, ethnic or social origin and sexuality. The major part of these acts has only limited scope as they regulate equality solely in relation to, for example, the labour market.

legitimate family and homosexuals were criminalized. The closest the constitution gets to mentioning the family is in relation to social security. Article 75, para. 2, provides that an individual without means, who cannot support himself *or his family* and who cannot rely on any private party for the support has a right to obtain assistance from the state. Constitutional review based upon the Danish Constitution has not played a role in the development of Danish substantive family law and cannot be expected to play such a role in the future given the contents of its human rights catalogue. The Constitution also does not contain provisions which would directly conflict with same-sex marriage. However, the Danish national church defined in the Constitution and the possibility of entering a marriage in a religious ceremony does give rise to difficulties with respect to the possibility of introducing same-sex marriage.⁶

Constitutional review of legislation would be more likely based upon the European Convention on Human Rights and its catalogue of human rights including the principle of non-discrimination contained in article 14.⁷ While Denmark has been a party to the Convention since 1953 the Convention was incorporated into Danish law by an act of parliament in 1992.⁸ The Convention was incorporated to provide the courts with a clearer mandate to apply the convention. The incorporation has provided the Convention with a legislative basis in Danish law, which makes it indisputably an official source of law beyond the status of other international law. It remains a question if and to what extent the convention can be used to review and set aside national legislation. As yet there are no examples from case law where clear national legislation has been set aside on the basis of the Convention.⁹

In a recent judgment from the European Court of Human rights the Court states that Austria was not obliged to recognize same-sex couples in regards of marriage. It follows from the judgment (para. 105): “The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of

6. See further below “The complexity of religious marriage/registration in Danish law,” section 4.2.

7. Denmark has not ratified the broader non-discrimination principle contained in the 12th protocol to the Convention. See further: S. Lagoutte (Ed.), “*Prohibition of Discrimination in the Nordic Countries: The Complicated fate of Protocol No. 12 to the European Convention on Human Rights*”, Proceedings from the Nordic Round Table on ECHR, held in Copenhagen on the 13th and 14th of December 2004, The Danish Institute for Human Rights.

8. Act No. 285 of 29.04.1992 replaced by Act No. 750 of 19.10.1998.

9. A clear legal practise concerning the establishment of paternity and adoption was set aside on the basis of art. 8 of the Convention (the right to family life) by the Danish Western High Court in a decision of 15.12.1994, Vestre Landsret, UFR 1995.249V.

appreciation in the timing of the introduction of legislative changes.”¹⁰

The promotion of gay and lesbian rights in Denmark has largely been a political process.¹¹ There is no tradition for a rights based discourse before the Danish courts or administrative authorities. This probably has to do with, on the one hand, the content of the human rights catalogue in Danish law and the lack of a tradition for such procedures and, on the other hand, the results achieved in the political process.

3. REGISTERED PARTNERSHIP

3.1. The Act on Registered Partnership (Q 5)

The Act on Registered Partnership contains only eight articles. The shortness of the Act has to do with its design. It mainly contains references to other family law regulation stating whether this regulation is applicable or not. Consequently the Act states that registration of partnership carries the same legal consequences as marriage with some stated exceptions. The Act also states that when Danish law refers to “marriage” or “spouse,” such references automatically include registered partnerships and registered partners. But the terms “husband” and “wife,” or rules in which the spouse is defined by the sex, do not include registered partners. This refers to very few provisions from the period of traditional matrimonial law based on the family pattern with a male bread winner and a female house wife. The most relevant provision in 1989 concerned the right to a widow pension. This provision was amended to become gender-neutral in 2006.¹² Only same-sex couples may enter a registered partnership.¹³

3.2. Conditions for Entering a Registered Partnership (Q5)

The formal and substantive conditions for entering a registered partnership are identical to the marriage conditions as found in the Danish marriage act.¹⁴ They revolve around conditions concerning age and

10. Case of Schalk and Kopf v. Austria, Judgment Strasbourg, 24 June 2010.

11. See for an extensive deliberation of the political aspects of the act on registered partnership: E. Albæk, *Political Ethics and Public Policy: Homosexuals Between Moral Dilemmas and Political Considerations in Danish Parliamentary Debates*, Scandinavian Political Studies, 2003, Vol. 26, No. 3, p. 245-267.

12. Act No. 484 of 06.07.2006.

13. See for a general description of the Act on Registered Partnership: L. Nielsen, *Family Rights and the Registered Partnership in Denmark*, International Journal of Law and the Family, 1990, No 4, p. 297-307 and I. Lund-Andersen, *The Danish Registered Partnership Act*, Legal Recognition of Same-sex Couples in Europe, ed. by K. Boele-Woelki and A. Fuchs, 2003, Antwerpen: Intersentia, p. 13-23.

14. Lov om ægteskabs indgåelse og opløsning, Act Nr. 38 of 15.01.2007, chapter 1. Lov om registreret partnerskab, Act Nr. 938 of 10.10.2005, art. 2.

capacity and prohibitions concerning kinship and bigamy.¹⁵

An immigration reform in 2002 contained two new conditions of marriage. One condition is that both partners need to have Danish citizenship or a residence permit. Thus, people who only remain in the country because their migration case is being tried by the Danish authorities are not allowed to marry or register in Denmark. This group of people is considered to represent a risk because they are suspected of abusing the rights to family reunion in order to enter the country by way of a “fake” marriage. An exemption from these requirements may be granted by the marriage authorities if the marriage or registered partnership does not represent an abuse of the rights to family reunion but are considered to reflect an existing personal relationship between the partners. Relevant criteria for a permission to marry according to this provision are: the length of time the applicant has stayed in Denmark before the marriage and whether or not the couple is expecting a child. The last mentioned criterion is more difficult to fulfill for a homosexual couple. The second condition is that future spouses or registered partners have to confirm that they are informed about the conditions of family reunion. The purpose of this condition is to make them aware that even though they marry or register, they are not automatically entitled to live together in Denmark.

The international jurisdiction to register a partnership is not as wide as for marriage. At the time of the introduction of the Act on registered partnership, one of the partners should reside permanently in Denmark and hold Danish citizenship. The aim was to avoid that partners travel to Denmark to enter into a registered partnership without the legal recognition from their home country since Denmark historically was in the front with the introduction of the registered partnership. From 1 June 1999, it became easier for foreigners to register a partnership in Denmark.¹⁶ The rules were altered so that a partnership could also be registered if both partners had permanent residence in Denmark two years prior to the registration, and Danish citizenship was no longer a requirement. Furthermore, a provision on Norwegian, Swedish, Finnish and Icelandic citizenships being on the same footing as a Danish citizenship was added. In addition to this, the Minister of Justice may decide that citizens of a country having legislation corresponding to the Danish legislation on registered partnership are also put on the same footing as Danish citizens. This has been the case for Dutch citizens.¹⁷ It should be noted that provisions about marriage laid

15. The number of conditions as introduced in 1922 has been reduced following the modern revision of the traditional marriage law as legally framed by the 1922 marriage Act.

16. Act No. 360 of 02.06.1999.

17. Ministerial Order No. 198 of 09.04.2001.

down in international treaties do not include registered partnership unless special agreement is made.

3.3. Children

The main difference between marriage and registered partnership when the Act was introduced concerned children. Registered partners could not obtain joint custody of children and step-child adoption and joint international adoption were not permitted. With respect to children registered partners were consequently not considered “a right family.” The reasoning behind was that it was considered best for the child to have a mother and a father. The Act has since then been modified to accommodate the needs of children—who live in a family framed by a registered partnership and the regulation on custody and adoption is now fully implemented in relation to registered partnership.

In 1999, stepchild adoption was allowed for registered partners.¹⁸ Stepchild adoption by registered partners now follows the general rules laid down in the adoption Act. Adoption may only be granted if the child and the stepparent have already been living together for a period – 3 months minimally and it is presumed to be in the best interests of the child. The reason why access to stepchild adoption was introduced was based on the following factual circumstances: if a person living in a registered partnership has a child, the child usually has only one legal parent, either because the mother has not disclosed the name of the father to the authorities (in such case paternity would be established), or because the other parent has died. In these cases, the child will be in a less advantageous legal position than children in a marriage with regard to issues such as inheritance and divorce. Secondly, it was stated that with regard to those circumstances in bringing up a child that requires contact with the authorities, it would be of great importance for the child that the registered couple had the same legal status as other parents. A follow up on step-child adoption was made in 2009.¹⁹ Stepchild adoption is now permitted even before the usual minimum of 3 months from the time of the birth of the child, if the registered partners are cohabitants and if the reproduction has been performed with anonymous donor sperm.

In 1997 an Act on assisted reproduction was introduced granting only heterosexual couples access to assisted reproduction by medical doctors in public and private clinics as well as in hospitals.²⁰ Services provided by others, for example midwives, were not covered by the Act. Consequently,

18. Act No. 360 of 02.06.1999.

19. Act No. 105 of 28.05.2009.

20. Act No. 460 of 10.07.1997.

women had access to more simple reproductive techniques involving, for example, donor insemination if they carried the costs themselves. In 2006 the provision was abolished in the name of equality and women were granted access to publicly financed reproductive treatment irrespective of their civil status as single, registered partner or spouse.²¹ Characteristic of this regulation is that it is framed as health law rather than family law, intrinsically linked to health aspects and the perception of services that should be provided in the Danish welfare state. Health law being more dominantly influenced by an equality principle than family law.

In March 2009 the Danish opposition in parliament called upon the government to propose an Act allowing registered partners to adopt internationally on equal footing with married couples and singles. This was followed and in 2010 the provision in the act on registered partnership which excepts registered partners from the regulation on adoption and custody was abolished. Registered partners are hereby allowed to adopt foreign children and stepchild adoption is also allowed in relation to international adoption. These changes were carried through with reference to experiences from Sweden, Island, Belgium and Great Britain where allowing for adoption was not considered as a problem in relation to the donor countries' policy.²²

For the legal construction of parenthood for homosexual couples, adoption is consequently the relevant legal instrument. If such takes place, the legal parents have the same rights and duties as heterosexual parents with respect to parental authority, maintenance, inheritance, etc. The registered partnership is in itself not relevant and the general rules for establishing legal parentage contained in the children Act are also not relevant (with respect to the non-legal parent).

3.4. Statistics

On the 1st of January 2008 the Danish population amounted to 5,475,791. In 2007, there was 36,576 marriages of which 41.2% were entered into in church. Further 33,420 marriages were dissolved of which 42% through divorce.

Since the introduction of registered partnership in 1989, the number of registered partnerships has increased gradually but still it is a very small part of the population who lives in a registered partnership. On the 1st of January 2008 there were in total 3,761 men and 3,596 women living in a registered partnership. This amounts to approximately 0.13 % of the total population. Right after the introduction of the registered partnership in

21. Act No. 535 of 08.06.2006.

22. Act No. 537 of 26.05.2010.

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Denmark in 1989 it was mostly men who entered into a registered partnership. The difference between men and women gradually decreased and today more women than men enter into a registered partnership. In 2007, 189 male partnerships and 236 female partnerships were formed. The “divorce rate” amongst registered partners is higher than for married spouses.²³

4. FUTURE REGULATION

4.1. Same-Sex Marriage (Q9)

As yet, there has been one proposal in the Danish parliament favouring the extension of marriage to same-sex partners but it was not favoured by the majority of the parliament.²⁴ A marriage between two same-sex partners is considered invalid.²⁵

4.2. The Complexity of Religious Marriage Ceremony/Registration in Danish Law (Q13)

Denmark has a National Church (*Folkekirken*) supported by the Danish state and the Constitution.²⁶ It is a Christian Lutheran church. Membership is obtained by christening, but membership is voluntary and the Danish Constitution declares freedom of religion.²⁷ The National Church is organized in twelve dioceses each led by a bishop. The bishops decide together in religious matters and the Minister for Ecclesiastical Affairs heads the church in administrative and financial matters. It is a standing understanding that the Minister for Ecclesiastical Affairs and the government do not interfere in religious matters.

While marriages may be entered into alternatively in a religious ceremony in the National Church (as well as in another approved or authorised religious community in accordance with the rules of these communities)²⁸ or in a civil ceremony, registered partnership must be entered into in a civil ceremony. Soon after the introduction of the registered partnership, this inequality became a focal point. The question

23. Statistics Denmark on www.dst.dk, Danmarks Statistik: *Befolkningens udvikling 2007*. This publication as well as an older publication called *Vielser og skilsmisser – børn i skilsmisse* from 2005 contains more specific data on, for example, the socio-economic data of persons entering into a registered partnership.

24. Proposal L 67, 05.02.2008.

25. L. Nielsen, *Famlieretten*, Copenhagen: Gjellerup, 2006, p. 35.

26. Grundloven, art. 4.

27. Grundloven, art. 67.

28. Including, amongst others, Christian, Jewish, Muslim, Buddhist and Hindu communities.

whether the National Church should provide the possibility of a church blessing (of a civilly entered registered partnership) or provide a legally valid marriage/registration ceremony (without the need for a civil marriage/registration) is considered a religious matter. As such it is for the bishops to decide. Characteristic is that there is no consensus hereon in the National Church.

With regard to church blessings a compromise was reached in 1997. The bishops agreed that marriage was God's framework for the relation between a man and a woman, but this view of marriage was not affected by the fact that some people chose to live in a responsible community with a person of the same-sex, approved by society, that is the registered partnership. New rituals have not been made for a church blessing, but couples may receive a blessing of their (civilly entered into) registered partnership. It is up to the individual priest in the National Church whether he/she will perform such a blessing.²⁹

Recently the Minister for Ecclesiastical Affairs has set up a committee to discuss whether or not marriage—with legal effects—can be entered in church and how registered partners in this respect shall be treated. The committee shall finish its work before 15 September 2010.

5. CONCLUDING REMARKS

In Danish law it has until now been a political question whether or not registered partners should have the same rights as married couples. This question is framed by more general features of the Danish State. The only issue where same-sex partners still do not have the same rights as heterosexual marriage are related to an inherently religious aspect of the institution.

The general framework of the religious aspect is the connection between the state and the national church. It is not to be predicted whether or when same-sex marriage may include a religious ceremony or, alternatively, if marriage may become an exclusively civil institution. It may be noted that it requires a strong and independent church to defend the exclusiveness of marriage without influence of dominating values in Danish family law—such as freedom and equality.

²⁹ Declaration of the bishops on same-sex partnerships, Biskoppernes udtalelse, October 1997.