

Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands

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INTRODUCTION

THE NETHERLANDS APPEARS to be the first country in the world where a legislative proposal to open up marriage to same-sex couples has become law and come into force. This landmark bill was introduced by the Government on 8 July 1999, passed by the Lower House on 12 September 2000, passed by the Upper House on 19 December 2000, and signed into law by Queen Beatrix on 21 December 2000.² The law came into force on 1 April 2001. In every other country where same-sex marriage has become a topic for intense social, political and legal debate, such legislation has yet to be adopted (as of August 2001). Test cases attempting to acquire full marriage rights for same-sex couples were more or less unsuccessful in Germany, Spain, New Zealand, Hawaii, Vermont, and indeed in the Netherlands itself. Legislation introducing a registration system more or less similar to marriage, but not called marriage, has been enacted in Denmark, Norway, Sweden, Greenland, Iceland and the Netherlands, as well as in Vermont. A greater number of jurisdictions has been providing some legal recognition of same-sex *de facto* cohabitation, and/or introducing a registration scheme with far less legal consequences than marriage. But so far the law of most jurisdictions in the world does not recognise the relationships of partners of the same sex at all. This begs the question: Why are the Dutch so fast?

In this chapter, I will try to answer that question, by describing the legal steps that paved the way for this legislation. I will present the Dutch road towards the opening up of marriage as an example of the working of what I call “the law of small change”. By doing this, I will implicitly suggest that, and how, and when, same-sex marriage can be achieved in other countries

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² See Apps II, III (App means an Appendix to this chapter.)

THE LEGAL AND SOCIAL RECOGNITION OF HOMOSEXUALITY
IN THE NETHERLANDS

At the outset, it should be noted that the Netherlands has not always been the leader in the field of legal recognition of homosexuality. Admittedly, homosexual acts were decriminalised as early as 1811, but only because the country was then integrated into the French empire (France having been the first country to decriminalise in 1791, and having exported that decriminalisation to Belgium and Luxembourg in 1792). The Netherlands may have been the first country in Europe where legislation was passed to equalise the minimum ages for homosexual and heterosexual sex (1971), but unequal age limits had never existed in Turkey (which decriminalised homosexual sex in 1858), in Italy (where decriminalisation for the whole of the country was completed in 1889), and in Poland (decriminalisation in 1930).³ And although implicitly the Dutch Constitution has been prohibiting discrimination on the basis of sexual orientation since 1983,⁴ explicit anti-discrimination legislation covering that ground only entered into force in 1992 and 1994, i.e. several years after Norway (1981), Denmark (1987), Sweden (1987), Ireland (1989) and several parts of Australia, Brazil, Canada and the United States had set an example.⁵ Registered partnership legislation was invented in Denmark (1989), and first copied in Norway (1993), Sweden (1995), Greenland (1996) and Iceland (1996), before such a marriage-like institution was established in the Netherlands (1998).⁶ And finally, as regards second-parent and/or joint adoption by same-sex partners, several parts of Canada and the United States have led the way, recently followed by Denmark (1999).⁷ In the Netherlands such adoptions only became possible on 1 April 2001, when the law of 21 December 2000 on adoption by persons of the same sex came into force.⁸

³ For a detailed overview of the history of the criminalisation and decriminalisation of homosexual sexual activity, see H Graupner, *Sexualität, Jugendschutz und Menschenrechte*, Teil 2 (Frankfurt, Peter Lang, 1997), and "Sexual Consent: The Criminal Law in Europe and Overseas", (2000) 29 *Archives of Sexual Behavior* 415

⁴ In 1983, a new Article 1 was inserted into the Dutch Constitution "discrimination on the grounds of religion, belief, political opinion, race, sex or any other ground whatsoever is prohibited" The words "or any other ground whatsoever" were added with the explicit intention of covering homosexual orientation. See K Waaldijk, "Constitutional Protection Against Discrimination of Homosexuals", (1986/1987) 13 *Journal of Homosexuality* 57 at 60

⁵ See R Wintemute, *Sexual Orientation and Human Rights* (Oxford, Oxford University Press, 1997) at xi and 266 (updated at App II to this book, pp 781–88)

⁶ Years in which the legislation came into force. See p 462, Lund Andersen, chap 21, Ytterberg, chap 22

⁷ See Polikoff, chap 8, Casswell, chap 11, Lahey, chap 12, Lund Andersen, chap 21, N Maxwell, A Mattijssen & C Smith, "Legal Protection for All the Children: Dutch-United States Comparison of Lesbian and Gay Parent Adoptions", (2000) 17 *Arizona Journal of International and Comparative Law* 309, (1999) 3 1 *Electronic Journal of Comparative Law* (<http://law.kub.nl/ejcl/general/archive.html>) See also N Maxwell, "Opening Civil Marriage to Same Gender Couples: A Netherlands United States Comparison", (2000) 4 3 *Electronic Journal of Comparative Law*

⁸ See Apps IV, V. The proposal for this law was prepared and approved parallel to that on the opening up of marriage

Although not always first, the Netherlands can certainly be ranked as one of the most gay/lesbian-friendly societies and jurisdictions in the world. Is there any other country where, since the early 1980s, the percentage of the population agreeing that homosexuals should be as free as possible to live their own lives, and should have the same rights as heterosexuals in such fields as housing, pensions and inheritance, has been 90 per cent or more?⁹ Or where anti-homosexual discrimination in the armed forces was declared unlawful by the highest court as early as 1982?¹⁰

All this can be attributed to various social characteristics of the Netherlands. For example, it seems that no other country is as secular as the Netherlands – no country in the world has a less religious population. The Netherlands prides itself on a firm tradition of accommodating all kinds of minorities. And it has often been claimed that the interaction between the various minorities, especially through their political, social and academic elites, is faster and more productive than in most other countries. Furthermore, the Netherlands has a less direct, and therefore less populist, democratic system (no referendums, no district-based elections) than many other countries.¹¹ The combination of these factors may have made the Netherlands the country most likely to be the first to lift the heterosexual exclusivity of marriage. However, this lifting has been a very slow process. Before describing that process, I shall first sketch the general trends of legal recognition of homosexuality in Europe. Against the background of these trends, it becomes apparent that the Dutch opening up of marriage is not out of step with the rest of Europe. The Netherlands is following the same trends as most other European countries. In that light, the opening up of marriage to same-sex couples is only natural.

THE PATTERN OF LEGAL RECOGNITION OF HOMOSEXUALITY IN EUROPE

If you look at the legislative history of the recognition of homosexuality in European countries, it seems that this process is governed by certain trends, that can tentatively be formulated as if they were “laws of nature”. At the very least, there is a clear pattern of *steady progress* according to *standard sequences*. Since the early 1970s, hardly any European countries have introduced new anti-homosexual legislation. On the contrary, in almost all European countries legislative progress has been made in the legal recognition of homosexuality. And where progress has taken place, it seems to be following *standard sequences* legislative recognition of homosexuality starts (most probably after some form

⁹ *Sociaal en Cultureel Rapport 1992* (Rijswijk, Sociaal en Cultureel Planbureau, 1992) at 465, Martin Moerings, “The Netherlands” in D J West and R Green (eds), *Sociolegal Control of Homosexuality* (New York, Plenum Press, 1997) 299 at 300

¹⁰ Centrale Raad van Beroep, 17 June 1982, (1982) *Militair Rechtelijk Tijdschrift* 300

¹¹ I will leave it to sociologists and political scientists to substantiate these generalisations about my country

of association of homosexuals and information on homosexuality has become legal) with (1) decriminalisation, followed or sometimes accompanied by the setting of an equal age of consent, after which (2) anti-discrimination legislation can be introduced, before the process is finished with (3) legislation recognising same-sex partnership and parenting.¹²

The “law of standard sequences” implies two things. Firstly, that normally the next step only becomes possible after the previous step has been taken (although this might sound tautological). For example, you could not logically outlaw employment discrimination on the basis of homosexual orientation while you preserve the criminal punishability of homosexual acts.¹³ Secondly, and more importantly, each step seems to operate as a stimulating factor for the next step.¹⁴ For example, once a legislature has provided that it is wrong to treat someone differently because of his or her homosexual orientation, it becomes all the more suspect that the same legislature is preserving rules of family law that do precisely that.

I have argued before that each step in this standard sequence is in fact a sequence in itself.¹⁵ Decriminalisation normally is a process consisting of several legal steps, the equalisation of ages of consent often being the last step (which in turn may be split into two steps, as has happened in France, Germany and the United Kingdom, where the age difference was first reduced, before being abolished several years later).¹⁶ The same can be said about anti-discrimination (in Ireland, Denmark and Sweden, for example, employment discrimination was only covered, fully or at all, by later supplementary legislation),¹⁷ as well as about partnership and parenting legislation. And it is precisely in those more detailed sequences that I perceive the working of what I would like to call the “*law of small change*”, which could be formulated as follows:

- “Any legislative change advancing the recognition and acceptance of homosexuality will only be enacted,
- if that change is either perceived as small, or
 - if that change is sufficiently reduced in impact by some accompanying legislative ‘small change’ that reinforces the condemnation of homosexuality”.

¹² For a few exceptions to these “laws” of steady progress and of standard sequences, see Waaldijk, chap. 23

¹³ There have been a few exceptions outside of Europe, e.g., Minnesota

¹⁴ K. Waaldijk, “Civil Developments: Patterns of Reform in the Legal Position of Same Sex Partners in Europe”, (2000) 17 *Canadian Journal of Family Law* 61 at 85. For political analysis, see Adam, Duyvendak & Krouwel, *The Global Emergence of Gay and Lesbian Politics* (Philadelphia, Temple University Press, 1999) at 345; J. Donnelly, “Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime” in Baehr, Flinterman & Senders, eds., *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Amsterdam, Royal Netherlands Academy of Arts and Sciences, 1999) at 93–110

¹⁵ K. Waaldijk, “Standard Sequences in the Legal Recognition of Homosexuality—Europe’s Past, Present and Future”, (1994) 4 *Australasian Gay & Lesbian Law Journal* 50

¹⁶ See Graupner, *supra* n 3

¹⁷ See Wintemute, *supra* n 5

Clear examples of the working of the “law of small change” can be found in the process of decriminalisation of homosexual acts in countries like Bulgaria, the United Kingdom, Cyprus and Romania;¹⁸ and in the piecemeal development of anti-discrimination policies and legislation with limited fields of application, with various exceptions and with limited enforcement structures all over Europe.¹⁹ But let me now present, as a prime example of the operation of this “law of small change”, the extremely gradual and almost perversely nuanced (but highly successful) process of legislative recognition of same-sex partnership in the Netherlands.

THE RECOGNITION OF SAME-SEX COHABITATION

Since 1979, Dutch cohabiting couples have increasingly been given legal rights and duties similar to those of married couples.^{19a} One after the other, changes were introduced in rent law, in social security and income tax, in the rules on immigration, state pensions and death duties, and in many other fields. In none of these fields was any distinction made between heterosexual and homosexual cohabitation. Therefore, there was never a need for any specific law on same-sex cohabitation: all recognition was given as part of the recognition of non-marital cohabitation in general, and usually in the context of a more general overhaul of the rules of a specific field. Simultaneously, cohabitation contracts and reciprocal wills became common (among different-sex and same-sex partners), and were fully recognised by the courts. This evolution was more or less completed when it was made illegal for any employer, and for any provider of goods or services, to distinguish between married and unmarried couples.²⁰ The Netherlands seems to be one of very few countries in Europe where such discrimination on the basis of civil status has been forbidden.

With regard to parenting (a field where rights and duties traditionally were strongly linked to marriage), some gradual improvements were also made. In the 1970s, fostering children became a possibility for gay and lesbian and other unmarried couples. Having a homosexual orientation or relationship ceased to be a bar to child custody or visitation rights after a divorce. And providing

¹⁸ In all these countries the decriminalisation of sexual activity between adult men (and women) was accompanied by the maintenance or introduction of various specifically homosexual offences, including bans on homosexual activity “in public” (United Kingdom and Romania), or leading to “public scandal” (Bulgaria, Romania and formerly Spain), as well as on “proselytism” for it (Austria, Cyprus and Romania). See Graupner, *supra* n 3, Scott Long, *Public Scandals Sexual Orientation and Criminal Law in Romania* (New York, Human Rights Watch/International Gay and Lesbian Human Rights Commission, 1998) at 37–8.

¹⁹ See Wintemute, *supra* n 5, and K. Waaldijk, “The Legal Situation in the Member States” in Waaldijk & Clapham (eds.), *Homosexuality a European Community Issue* (Dordrecht, Martinus Nijhoff Publishers, 1993) 71 at 81, 108–10.

^{19a} See p. 777.

²⁰ General Equal Treatment Act of 2 March 1994, *Staatsblad* (Official Journal) 1994, nr. 230, Articles 1, 5, 6, 7 (in force since 1 Sept. 1994).

artificial insemination and other means of medically assisted reproduction to lesbian or other unmarried women, was never legally banned in the Netherlands—although four of the thirteen clinics for *in vitro* fertilisation have been refusing this service to women in lesbian relationships.²¹

Nevertheless, there are still certain differences between the position of married spouses and cohabiting partners. Normally, the latter will have to demonstrate that they have been living together for a certain period (three months, two years, five years). Some private pension funds still do not pay pensions to unmarried surviving partners, although unmarried employees generally pay exactly the same premiums as their married colleagues.²² In the immigration rules, until 1 April 2001, a higher income was required of an unmarried person before his or her foreign partner would be given a residence permit. In the fields of tax, property, inheritance and death duties, it can be difficult and sometimes impossible to obtain (through contracts and wills) the same advantages as married couples. And numerous other small differences between married and unmarried partners can be found throughout Dutch legislation.

Until recently, the difference between marriage and unmarried cohabitation remained especially large in the field of parenting: a child born to a married mother automatically has the mother's husband as its legal father, who then automatically shares the mother's authority and responsibilities over the child.²³ An unmarried male partner of a mother can only become the legal father by acknowledging the child as his own.²⁴ (A female partner does not have that possibility.) Until 1986, unmarried partners could not have joint authority over their children. When the Supreme Court finally did allow unmarried parents to have joint authority over their children (until then a privilege of properly married parents), the Court withheld this new possibility from same-sex couples, thus introducing a rare inequality between unmarried same-sex couples and unmarried different-sex couples.²⁵ And until 1998, only a married couple (and neither an individual nor an unmarried couple) could adopt a child.²⁶

Thus, although cohabitation had been recognised to a large degree in the Dutch legal order, there remained a variety of reasons why the exclusion of same-sex couples from marriage was seen as discriminatory and disadvantageous to the persons involved.

²¹ According to the Equal Treatment Commission (opinion of 7 February 2000, nr 2000-04, <http://www.cgb.nl>) such a refusal is prohibited by Art 7 of the General Equal Treatment Act. In answering a parliamentary question about that opinion, the Minister for Health agreed with the Commission (*Aanhangsel* Parliamentary Debates II 1999/2000, nr 930).

²² This form of discrimination is specifically permitted by Art 5(6) of the General Equal Treatment Act.

²³ Civil Code, Book 1, Art 199 (a), (b).

²⁴ *Ibid*, Art 199(c).

²⁵ Hoge Raad, 24 Feb 1989, (1989) *Nederlandse Jurisprudentie* nr 741, *Kerkhoven v Netherlands* (No 15666/89), declared inadmissible, 19 May 1992 (European Commission of Human Rights), <http://www.echr.coe.int/hudoc>. See Wintemute, chap 40.

²⁶ Civil Code, Book 1, Art 227.

FIGHTING THE HETEROSEXUAL EXCLUSIVITY OF MARRIAGE

As in some other countries, the exclusion of same same-sex couples from marriage and from certain marriage-related rights and duties, led to several test cases in the 1980s and 1990s. Some of these focused on particular privileges of marriage, such as joint parental authority, adoption, partner immigration, widow's pensions, or specific tax benefits. These cases were generally unsuccessful. In two other test cases, admission to marriage itself was claimed. In the case of two men, the Amsterdam District Court did not want to rule whether their human rights were violated, because it considered it to be up to the Government and Parliament to remedy any discrimination that might exist.²⁷ Two women lost their parallel case three times, finally in the Supreme Court on 19 October 1990.²⁸ It ruled that the exclusion of same-sex couples from marriage was not unjustified (and therefore not discriminatory under Article 26 of the International Covenant on Civil and Political Rights), because one of the legal consequences of marriage was that the spouse of a woman giving birth was legally considered to be the father of her child.²⁹ However, in an *obiter dictum*, which has since been interpreted as a clear signal towards the legislature, the Supreme Court referred to the "possibility" that there might be insufficient justification for the fact that specific other consequences of marriage are unavailable in law for same-sex couples in a lasting relationship.

The publicity around the two marriage cases (especially the men's case, which was actively supported by a popular gay magazine) ensured that the legislature was in fact listening when the Supreme Court spoke. Within two weeks after the judgment, the Minister of Justice, having been pressed to do so by a majority in Parliament, asked the Advisory Commission for Legislation to report on the issue. Further political pressure resulted from the decisions of over one hundred Dutch local authorities to start offering semi-official registration of lesbian and gay partnerships. In the absence of parliamentary legislation on this subject, these registrations had only political and symbolic, but no legal, significance. In the meantime, in 1989, Denmark had become the first country to enact legislation introducing registered partnership. Not surprisingly, the Advisory Commission for Legislation produced a report in 1992, recommending the introduction of registered partnership, more or less along the lines of the Danish model.³⁰

²⁷ Rechtbank Amsterdam, 13 Feb 1990, (1990) *NJCM Bulletin* 456

²⁸ Hoge Raad, 19 Oct 1990, (1992) *Nederlandse Jurisprudentie* nr 129

²⁹ See *supra* n 23

³⁰ Parliamentary Papers (*Kamerstukken*) II 1991/1992, 22300–VI, nr 36

THE INTRODUCTION OF REGISTERED PARTNERSHIP AND
SOME PARENTING RIGHTS

A bill on registered partnership was introduced in Parliament in 1994, together with a bill on joint authority and joint custody. Both bills were heavily amended on their way through Parliament, before they became law in 1997 and took effect in 1998.

The original 1994 partnership bill (introduced under a coalition government of Christian Democrats and Social Democrats) still provided for many differences between marriage and registered partnership. It proposed to offer the possibility of partnership registration not only to same-sex couples, but also to close relatives who were not permitted to marry each other (like brother and sister, parent and child, grandparent and grandchild).³¹ A new coalition government (Social Democrats, Liberals and Social-Liberal Democrats) changed the bill in 1995 and 1996 so as to base the formalities and consequences of registered partnership more on the marriage model. The close relatives were thrown out of the bill, but the scope of the bill was increased considerably by also allowing (not closely related) different-sex couples to choose to be registered as partners.³² Thereby, the Dutch legislation diverged from the examples from Denmark, Norway, Sweden, Greenland and Iceland, where only same-sex partners can register.

The partnership bill was approved and entered into operation on 1 January 1998,³³ and together with the Registered Partnership Adjustment Act effected changes to more than one hundred existing statutes.³⁴ In many hundreds of provisions, registered partnership is now put on the same footing as marriage. In spite of this cumbersome method of amending legislation, registered partnership is almost a clone of marriage. Unlike (unregistered) cohabitants, registered partners do not have to wait for three months or more to get most of the rights and duties attached to marriage. And in the fields of tax, property, inheritance and death duties, partners that register are now in exactly the same position as married spouses.

However, using registered partnership as a means to realise full equality appeared to be too big a step for the Dutch legislature. As a result, some awkward exceptions were included in the partnership legislation. The three main exceptions related to parenting, foreigners and pensions.³⁵

³¹ Parliamentary Papers II 1993/1994, 23761, nr 2

³² Parliamentary Papers II 1994/1995, 23761, nr 5, and *idem* 1995/1996, nr 8

³³ Act of 5 July 1997 providing for the amendment of Book 1 of the Civil Code and of the Code of Civil Procedure, concerning the introduction therein of provisions relating to registered partnership (*Staatsblad* 1997, nr 324) See App I, W Schrama, "Registered Partnership in the Netherlands", (1999) 13 *International Journal of Law, Policy and the Family* 315

³⁴ Act of 17 Dec 1997 providing for the adjustment of legislation to the introduction of registered partnership in Book 1 of the Civil Code (Registered Partnership Adjustment Act, *Staatsblad* 1997, nr 660)

³⁵ The other differences between registered partnership and marriage (apart from numerous mistakes and oversights in the partnership legislation) are minimal and include the following (1) the

Parenting

The existence of a registered partnership generally does not affect the position of the children of either partner. For example, the registered (female or male) partner of a woman who gives birth is not deemed to be the second parent of the child.³⁶ Consequently, the partner will not automatically have any authority over, or maintenance duties towards, the child. The maintenance duties that married spouses have towards their stepchildren³⁷ do not apply to registered partners. However, for the purposes of tax law, all children of a taxpayer's spouse or registered partner are deemed to be the taxpayer's children, as are the spouses and registered partners of the taxpayer's children.³⁸

Foreigners

Since 1998, registered partners have had the same immigration rights as married partners. However, until 2001, foreigners did not have the same right to partnership registration. A foreigner without a "residence entitlement" was not allowed to take part in a registered partnership—neither with a Dutch citizen, nor with another foreigner.³⁹ So each foreigner wishing to register as a partner first had to acquire a residence entitlement on other grounds.⁴⁰

parties to a marriage marry each other through their declarations (Civil Code, Book 1, Art. 67), whereas the parties to a registered partnership are registered by the registrar (Art. 80a(5)), (2) a church "wedding" (which has no legal consequences in Dutch law) can only take place after the marriage has taken place at the registry office (Art. 67), whereas the parties to a registered partnership can go to church before the partnership registration takes place, (3) the King or Queen, or a person in line for the throne, does not need permission by Act of Parliament before entering into a registered partnership (Art. 28 of the Constitution requires such permission for a marriage), (4) even in the case of mutual consent of the married spouses, a divorce can only be obtained in court (Arts. 150–165), whereas in the case of mutual consent, a registered partnership can be dissolved through a contract (Art. 80c(c)), (5) the rules on separation (Arts. 168–183) do not apply to registered partnerships, (6) most rules of private international law, and rules based on international or European law, that apply to marriage have not been declared applicable to registered partnership, (7) some rules of Dutch secondary legislation might not yet have been made applicable to registered partnership, (8) in law, words like "marriage", "spouse", "divorce", "widow", etc., remain the exclusive domain of married persons (including married lesbians and gays since 1 April 2001)

³⁶ The paternity rule, *supra* n 23, still only applies to married husbands

³⁷ Civil Code, Book 1, Arts. 392, 395, 395a. See *infra* pp. 450–51, for further developments

³⁸ General Act on National Taxes, Art. 2, as amended by the Registered Partnership Adjustment Act

³⁹ Civil Code, Book 1, Art. 80a (1), (2). It should also be remembered that in the case of two foreigners, at least one of them needs to be officially residing in the Netherlands, the same condition applies to heterosexual marriage (Art. 43)

⁴⁰ Parliamentary Papers II 1996/1997, 23761, nr. 11, p. 7, Parliamentary Debates (*Handelingen*) II 1996/97, p. 3143. It was not quite clear what exactly amounted to a "residence entitlement". A residence or settlement permit, or recognition as a refugee, would be enough, but a mere tourist visa certainly would not, according to parliamentary statements of the State-Secretary for Justice. See *infra* pp. 450–51 for the end to this confusing bit of discrimination.

Pensions

The surviving registered partner is entitled to a pension, but that pension may be much smaller than that paid out to a married widow or widower. Pension funds which had not yet extended their payments to non-married partners were allowed to calculate the pension of a surviving registered partner on the basis of only those premiums that were paid after 1997.⁴¹

In these three main areas of discrimination between marriage and cohabitation, the introduction of registered partnership did not end the discrimination, but only reduced it slightly. However, in the field of parenting, the differences between (same-sex) cohabitation and (different-sex) marriage were further reduced by two other laws that came into effect in 1998

On 1 January 1998, legislation introducing joint authority and joint custody where one partner is not a legal parent came into operation.⁴² A parent and his or her (same-sex or different-sex) partner can now obtain a court order giving the couple joint authority over the child of the parent.⁴³ Similarly a (same-sex or different-sex) couple of foster parents can now obtain a court order giving them joint custody over their foster child.⁴⁴ Such joint authority or joint custody entails a maintenance duty for both partners towards the child, and may be accompanied by a change of family name for the child. It also reduces the inheritance tax to be paid when the child benefits from the will of the “non-parent”. Other parental rights and duties have so far not been attached to it.

A further change in parenting law came into operation on 1 April 1998. Adoption ceased to be a privilege of married couples.⁴⁵ Since that date, a child can also be adopted by a heterosexual cohabiting couple, or by an individual (even if that individual is living with a partner of the same sex).⁴⁶

DEBATING THE OPENING UP OF MARRIAGE TO SAME-SEX COUPLES

After the 1998 reforms relating to parenting, the number of *legal* reasons why a same-sex couple could prefer marriage to registered partnership became almost zero (see above).⁴⁷ By 1998, a very great proportion of the (traditionally marriage-related) special rights of heterosexual couples had also become available

⁴¹ Pension Funds Act, Art. 2c, inserted by the Registered Partnership Adjustment Act. This Act applies to collective pension schemes for public and private sector employees. Most Dutch employees are covered by such a scheme. See *infra* pp. 650–51, for further developments.

⁴² Act of 30 Oct. 1997, *Staatsblad* 1997, nr. 506.

⁴³ Civil Code, Book 1, Arts. 253t–253y.

⁴⁴ *Ibid.*, Arts. 282–282b.

⁴⁵ Act of 24 Dec. 1997, *Staatsblad* 1997, nr. 772.

⁴⁶ Civil Code, Book 1, Art. 227.

⁴⁷ See also *supra* n. 35. And, although “marriage” is a universal status (recognised in all countries), it is hardly likely that Dutch same-sex marriages will get more (or less) recognition abroad than Dutch same-sex registered partnerships. Foreign authorities inclined to reject a same-sex marriage

to same-sex couples. However, this did not silence the call for the opening up of marriage. On the contrary, the social and political pressure increased. In retrospect, it seems that the whole legislative process leading to the introduction of registered partnership and joint custody, served to highlight the remaining discrimination caused by the exclusion of same-sex couples from marriage: the awkward exceptions listed above, and the *separate and unequal social status* of registered partnership as compared to marriage. With the introduction of the very marriage-like institution of registered partnership (alongside joint authority and joint custody, and individual adoption), the number of legal reasons *not* to open up marriage to same-sex couples was of course also approaching zero.

Politically, the time was right for it too. Since 1994, the Netherlands has been governed, for the first time in eighty years, by a coalition not including Christian Democrats. The current, so-called “purple” coalition, renewed in August 1998, consists of Social Democrats, right-of-centre Liberals and Social-Liberal Democrats. And they have quickly found out that family law reform is an area in which they can reach agreement fairly easily (as opposed to areas like the economy or the environment). Against that background, it became possible for some very “out” and skilful gay and lesbian and gay-friendly members of Parliament (in all three governing parties) to effectively push for fuller equality for same-sex partners and their children. Their efforts led to the adoption by the Lower House of the Dutch Parliament, in April 1996, of (non-binding) resolutions demanding the opening up of marriage and adoption to same-sex couples.⁴⁸ The Government responded by establishing an advisory commission of legal experts, the “Commission on the opening up of civil marriage to persons of the same sex” (the “Kortmann Commission”), which reported in October 1997.⁴⁹

The Commission recommended unanimously that same-sex couples be allowed to adopt (either jointly or as stepparents), and that other parental rights and duties be extended to them. The Commission made this unanimity possible by simultaneously recommending that the conditions for adoption be made somewhat stricter. On top of the existing requirement that the adoption is “in the evident interest of the child”,⁵⁰ it should become a requirement “that the child has nothing to expect anymore from its parent or parents”.⁵¹ That

(registered partnership), could pretend that it is not a “marriage” (that a registered partnership is not largely equivalent to a marriage), or they could invoke the public policy exception of private international law. See *D v Council*, discussed in Bell, chap 37, Waaldijk, chap 36, and at pp 767–69

⁴⁸ On 16 April 1996, the marriage resolution obtained a majority of 81 against 60, and the adoption resolution a majority of 83 against 58. Parliamentary Papers II 1995/1996, 22700, nrs 18 and 14, Parliamentary Debates II 1995/1996, 4883–4884

⁴⁹ The Kortmann Commission consisted of eight members (including this author) and was chaired by Professor S C J J Kortmann, who teaches private law at the Catholic University of Nijmegen (i.e. the brother of Professor C A J M Kortmann, who teaches constitutional law at the same university, and who chaired the Advisory Commission for Legislation that recommended the introduction of registered partnership in 1992)

⁵⁰ Civil Code, Book 1, Art 227(3)

⁵¹ *Rapport Commissie inzake openstelling van het burgerlijk huwelijk voor personen van het zelfde geslacht* (Den Haag, Ministerie van Justitie, 1997) at 24

condition would, of course, always be met in the case of artificial insemination with semen from an anonymous donor.

By proposing this extra condition, the Commission accommodated a prevalent ambiguity in the current opinions about adoption (which is in fact a two-sided institution, both creating and severing parental ties). On the one hand, a great number of people would support the idea of adoption being used to give a child the security and benefit of one or two new fully responsible parents; on the other hand, many people are critical of adoptions being used to sever whatever links the child might still have with its original parent(s). It seems to me that this ambiguity, which surrounds the issue of adoption in general (and post-divorce stepparent adoption in particular), is central to the whole debate about the specific issue of adoption by same-sex partners.

By a majority of five against three, the Commission also recommended that same-sex couples be allowed to marry, the majority (including this author) considering it discriminatory to exclude gay men and lesbian women from this legal institution and its symbolic importance. The Commission was able to reach this majority conclusion by first agreeing (unanimously) that the presumed paternity of the spouse (see above) should not apply in the case of two (married) women. A child born to a married lesbian couple would therefore only have its biological mother as its legal mother. However, the Commission also recommended that the two married women would automatically acquire joint authority over the child (plus a maintenance duty towards the child).⁵² Full legal parenthood for both women would only be available through the adoption procedure (during which the biological father, if known, could be heard).⁵³

By thus removing the paternity issue (which had been the deciding factor for the Supreme Court when denying same-sex couples the right to marry, see above), the Commission further reduced the number of issues involved in the debate about same-sex marriage. And by simultaneously recommending that—in a lesbian marriage—the most important parental rights and responsibilities should be acquired at birth, and that the status of legal parent should be available to the mother's female partner through adoption, the majority of the Commission could nevertheless maintain that it was proposing full equality.

In February 1998, the Dutch Cabinet decided how it would act on the recommendations of the Kortmann Commission. It promised to prepare legislation giving effect to the unanimous recommendations on parenting, but not to the majority recommendation on marriage. As far as the question of same-sex marriage was concerned, the Government agreed with the minority of the Commission. The Government considered that the new law on registered partnership, together with the extended possibilities for joint authority/custody and adoption, offered virtual equality of rights for homosexual couples. The main reason why the Government was not prepared to create a fully equal status for

⁵² For two women wishing to have joint authority, it would thus no longer be necessary to go to court. See *supra* n 43.

⁵³ *Rapport, supra* n.51, at 23–4.

homosexual couples, seemed to be that same-sex marriage would not generally be recognised abroad.⁵⁴ (The Commission had in fact carried out a survey of governmental family law experts in the Council of Europe. The outcome had suggested that same-sex registered partnership would be met with only marginally more recognition abroad than same-sex marriage).⁵⁵

Parliament was not happy with the Government's response to the Kortmann Commission. In April 1998 (just before the national elections in May), the Lower House of Parliament passed new resolutions demanding legislation to open up marriage and adoption.⁵⁶ After the elections, the three governing parties renewed their coalition, and committed themselves in the coalition government manifesto of August 1998 to introducing (and passing) bills to open up marriage and adoption to same-sex partners.⁵⁷

ALMOST THERE

The introduction of registered partnership in January 1998 had been welcomed by such large numbers of same-sex and different-sex couples that a real demand for same-sex marriage was to be expected. Anecdotal evidence suggested that many same-sex couples were not registering their partnerships, because they preferred to wait for real marriage. Nevertheless, during the first years of the possibility of registered partnership, a greater number of male couples, and a far greater number of female couples, chose to register than in any Nordic country.⁵⁸ In 1999 and 2000, the number of same-sex partnership registrations in the Netherlands was 1761 and 1600 respectively.⁵⁹ If you compare that to a total of around 87,000 marriages annually in the Netherlands, it seems that there have been *two* same-sex registrations for every hundred different-sex weddings. This is not a low percentage, because the number of persons enjoying a homosexual preference tends to be estimated as somewhere around 5 per cent of the total population, and many of them do not have the same reasons to formalise their relationship as many heterosexuals (most same-sex couples do not have, or plan on having, children; and if they do, having their partnership registered would hardly make a difference). And in comparison with Denmark, the percentage is quite high.⁶⁰

⁵⁴ Parliamentary Papers II 1997/1998, 22700, nr 23, p 7

⁵⁵ *Rapport*, *supra* n 50, at 17–9

⁵⁶ On 16 April 1998, the resolutions were adopted with the slightly larger majorities of 81 against 56 for marriage, and of 95 against 42 for adoption. Parliamentary Papers II 1997/1998, 22700, nrs 26 and 27, Parliamentary Debates II 1997/1998, 5642–5643. See *supra* n 48

⁵⁷ Parliamentary Papers II 1997/98, 26024, nr 9, p 68

⁵⁸ See App VI

⁵⁹ The number for 1998, the first year that the Dutch partnership law was in force, was 3010

⁶⁰ Since 1991 (the second full year the Danish partnership law was in force), the annual number of same sex registrations has varied between 178 (1997) and 258 (1991), i.e. 0.8% or less of the annual number of marriages of 31,000. See J. Eekelaar, "Registered Same-Sex Partnerships and Marriages—A Statistical Comparison", (1998) *Family Law* 561 at 561 ("the take up of the institution seems to be very low" in Denmark)

In a survey commissioned by the Ministry of Justice, it was found that eighty per cent of the same-sex partners who did register would have chosen to marry if that option had been available. And 62 per cent of them said that they would like to convert their partnership into a marriage, once that would be possible. As their main reason for that desire, most respondents gave “full equality” or the notion that “marriage has more significance”.⁶¹

Similarly, the interest of heterosexual couples in registered partnership (in 1999 and 2000, heterosexuals were almost as big a user-group as lesbians and gays together)⁶² indicates that there is at least socially a significant difference between marriage and registered partnership. According to the same survey, the reasons given by different-sex couples for preferring partnership over marriage include not only an “aversion to marriage as a traditional institution”, but also the notions that “registered partnership is less binding than marriage” and that it can be arranged more quickly and at a lesser cost.⁶³ These reasons cannot be referring to the *legal* aspects of registered partnership (in law, marriage and registered partnership are equally binding and cost exactly the same amounts of money and time), but presumably to the symbolic value socially attached to getting married (as evidenced by the amounts of time and money required for traditional wedding parties). This is support for the argument that full equality for gays and lesbians has not been accomplished by the introduction of registered partnership. This in turn explains why many lesbians and gays would rather get married.

In the meantime, the continued push for full equality had led the Government to promise and prepare legislation to remedy the three main areas of difference between marriage and registered partnership (indicated above).

Parenting

- Firstly, legislation was prepared to allow same-sex couples to jointly adopt a Dutch child, including the adoption of the child of one partner by his or her same-sex partner. This 1999 bill was signed into law in 2000 and entered into force on 1 April 2001. It contains the extra condition proposed by the Kortmann Commission.⁶⁴
- Secondly, amendments to the rules on registered partnership were prepared to give registered partners exactly the same duties towards each other’s children as married spouses have towards their stepchildren.⁶⁵

⁶¹ Y Scherf, *Registered Partnership in the Netherlands A quick scan* (Amsterdam, Van Dijk, Van Someren en Partners, 1999) at 22

⁶² See App VI

⁶³ Scheif, *supra* n 61, at 21

⁶⁴ See Apps IV, V

⁶⁵ These amendments were attached to the bill on the opening up of marriage for persons of the same sex, and therefore took effect on 1 April 2001 See App II

- Thirdly, a bill was drafted to provide for automatic joint authority over the children born in a registered partnership (of two women, or of a man and a woman). This bill was introduced in March 2000 and approved by the Lower House of Parliament on 27 March 2001.⁶⁶
- Fourthly, there is talk of attaching further legal consequences to the joint authority that a parent and his or her partner may have acquired over a child.⁶⁷ It is uncertain whether this will lead to more than the introduction of certain provisions regulating *testate* inheritance.

Foreigners

In October 1999, a bill was introduced to allow a foreigner without a valid residence entitlement to enter into a registered partnership with a Dutch citizen, or with a foreigner who is a legal resident of the Netherlands. The bill was signed into law on 13 December 2000.⁶⁸ This law, which entered into force on 1 April 2001, makes the position of foreigners wishing to register a partnership identical to the position of foreigners wishing to marry under Dutch law: only one of the partners needs to have either Dutch citizenship or his or her domicile in the Netherlands.

Pensions

In July 1999, a bill was introduced to abolish the exception for registered partners in the Pension Fund Act. The resulting law entered into effect on 23 June 2000.⁶⁹ However, full equality was not achieved here, because a transitional provision allows pension funds to continue using the exception when calculating the payment to a surviving registered partner whose partner died, retired or changed to another pension scheme before the effective date of the law. This means that, for the next thirty years or more, a few dozen surviving registered partners will receive a lesser pension than surviving married spouses in similar situations. Such was the legislative “small change” which was necessary to break the opposition of the pension funds to full equality. An end to this small-scale scandal could come once the lesser pension is recognised (by the relevant pension fund, by a Dutch court, or by the European Court of Human Rights) as a discriminatory restriction of the property and privacy rights of the gay men and lesbian women involved.

⁶⁶ Parliamentary Papers II 1999/2000, 27047. After approval by the Upper House (expected in Oct.), it could take effect later in 2001. This bill also provides (in a new Art. 253sa in Book 1 of the Civil Code) for automatic joint authority over the children born in a same sex *marriage* (i.e. a lesbian marriage).

⁶⁷ See App. III, para. 2.

⁶⁸ See App. I. (The same law contains a list of corrections of minor errors made in the legislation introducing registered partnership.)

⁶⁹ Act of 25 May 2000 (*Staatsblad* 2000, nr. 256). See *supra* pp. 445–46.

THE FINAL STEP

As a result of these bills equalising the position of (registered) same-sex partners and (married) different-sex partners, only one national rule of marriage law remained an issue: the presumption of paternity of the husband of the woman who gives birth. Not surprisingly, that presumption became the one exception in the field of national family law, when in July 1999 the Dutch Government finally introduced a bill concerning the opening up of marriage for persons of the same sex.⁷⁰ (The only other differences foreseen between same-sex marriage and different-sex marriages are in the area of private international law⁷¹).

The possible application of the presumption of paternity to lesbian marriages proved too controversial. This, in itself, should not be seen as the continuation of discrimination, because the Dutch rules on paternity are aimed at settling in law who is most probably the biological father. However, the second function of the presumption of paternity is making sure that, from the moment of birth, most children have *two* legal parents. This result could have been reached for children born in lesbian marriages by a rule which would merely state that the female spouse of a woman who gives birth will in law be deemed the second parent (or second mother) of the child.

This rule, too, seemed too big a step for many. This is strange if you take into account that it will soon be possible, through adoption, for a child to have two parents of the same sex. However, the compromise reached, first in the Kortmann Commission,⁷² and then also in politics, is a useful one. This one legal difference between same-sex and different-sex marriage has been considered by most advocates of same-sex marriage as a tiny bit of “small change”, which we would gladly pay for this important increase in equality. (The difference is indeed tiny, because from the moment of birth, both women will have parental authority over, and maintenance duties towards, the child, with full parental status being obtainable after a little while through adoption). On the other hand, the same legal difference can also be used to present the opening up of marriage to same-sex couples as really only a “small change” in the law. In line with what I have labelled the “law of small change”, this perception must have improved the bill’s chances.⁷³

But even small changes take time. Originally the Government’s aim was to let the marriage and adoption bills of 8 July 1999 become law by the end of 2000, so that they would enter into force in January 2001. The committee stages and plenary debates in both houses of Parliament took a little more time than anticipated. The final vote in the Lower House was on 12 September 2000. The

⁷⁰ See App II.

⁷¹ The Royal Commission on Private International Law is expected to report in 2001 on the question of which changes in this area of law are necessary as a result of the opening up of marriage

⁷² See *supra* nn.49, 51

⁷³ See *supra* p 440.

proposal to open up marriage was approved with a majority of 109 against 33 votes, and the adoption proposal with a similar but uncounted majority.⁷⁴ On 19 December 2000, both bills gained an (uncounted) majority in the Upper House, and two days later the Queen and her State-Secretary for Justice, Mr M J Cohen, signed them into law.⁷⁵

In the meantime, a separate law was needed to adjust the language of other legislation to the opening up of marriage.⁷⁶ This Adjustment Act introduces gender-neutral language into provisions that formerly used gender-specific words for parents and spouses (e.g. in the definitions of polygamy and half-orphans). The Act replaces the old rule, that the child benefit to which all parents are entitled is paid to the mother in the event of a disagreement between father and mother, by a gender-neutral rule; now the benefit office will decide to whom to pay the benefit in such circumstances. And the Act also specifies that an intercountry adoption will only be possible by different-sex married couples or by one individual (this is so because the authorities in the original country of the child would not allow it to be adopted by Dutch same-sex partners).

The Act on the Opening Up of Marriage, the Adoption Act and the Adjustment Act took effect on 1 April 2001. At the stroke of midnight the first four same-sex couples had their registered partnerships converted into full civil marriages. Later that month, 300 registered same-sex couples did likewise, and 82 unregistered same-sex couples married.

The passage of the marriage and adoption bills became possible because of the constant reduction in the Netherlands of the number of issues involved in the opening up of marriage, which made it into a topic that could be discussed in an orderly and reasonable fashion. In such an orderly discussion, it could more easily be established that there is hardly a reasonable argument against it. In fact, the debate could focus on whether there were any acceptable arguments against reducing the legal distinctions between same-sex and different-sex partners *a little further*.

The difference between the Netherlands and other jurisdictions in the world is that the debate in other jurisdictions remains burdened with all kinds of issues that really should be divorced from the notion of marriage: the position of churches, tax revenues, the burdens of social security, the influx of foreigners, the finances of pension funds, the upbringing of children, the plight of adoptive children, the integrity of family trees, etc. So what to mankind may seem a giant step—the opening up of the institution of marriage to same-sex couples—is, for the Dutch, only a small change.

⁷⁴ Parliamentary Debates II 1999/2000, pp 6468–6469 All but two members of the opposition Christian Democrat Party voted against both bills, as did the small strict Protestant parties All liberal and left-of-centre parties voted in favour

⁷⁵ See Apps. II, IV

⁷⁶ *Staatsblad* 2001, nr 128, resulting from Parliamentary Papers II 1999/2000, 27256, nr. 2 (introduced on 22 Aug 2000, approved by the Lower House on 30 Jan 2001, approved by the Upper House on 6 March 2001, signed into law on 8 March 2001)

APPENDIX I

TEXT OF THE KEY ARTICLES ON REGISTERED PARTNERSHIP IN THE DUTCH
CIVIL CODE⁷⁷

The incorporation of the new civil status of “registered partner” into Dutch legislation has been effected by a series of Acts. The two most important acts are the Act of 5 July 1997 amending Book 1 of the Civil Code and of the Code of Civil Procedure, concerning the introduction therein of provisions relating to registered partnership (*Staatsblad* 1997, nr. 324); and the Act of 17 December 1997 providing for the adjustment of legislation to the introduction of registered partnership in Book 1 of the Civil Code (Registered Partnership Adjustment Act; *Staatsblad* 1997, nr. 660). Both laws came into operation on 1 January 1998, and effected changes in more than one hundred existing statutes. In Book 1 of the Civil Code several new articles were introduced, especially articles 80a to 80e. These and other articles have since been amended by the acts opening up marriage and adoption for persons of the same sex (see Appendices II to V), and by the Act of 13 December 2000 (*Staatsblad* 2001, nr. 11). All three acts entered into force on 1 April 2001. The resulting text of the key articles is as follows:

“Article 80a

- (1) A person can simultaneously be in a registered partnership with one other person only.
- (2) Those who enter into a registered partnership, may not already be married to someone.
- (3) Registration of partnership is effected by a document of registration of partnership drawn up by a registrar. . . .”

The further paragraphs of Article 80a declare applicable almost all provisions on the formalities of contracting a marriage. Article 80b declares applicable all provisions on the mutual rights and duties of married spouses and on matrimonial property.

“Article 80c

The registered partnership ends:

- (a) by death;
- (b) by disappearance of one partner followed by a new registered partnership or by a marriage of the other partner . . . ;
- (c) with mutual consent by the registrar’s recording . . . of a dated declaration, signed by both partners and by one or more advocates or public notaries, stating that, and at what moment, the partners have concluded a contract relating to the termination of the registered partnership [as specified in Article 80d];

⁷⁷ All the translations in Apps. I to V to this chapter are unofficial translations by this author, who is not a professional translator. Regularly updated versions can be found at <http://ruljus.leidenuniv.nl/user/cwaaldijk/www/>. Before publishing any of these translations elsewhere please consult with c.waaldijk@law.leidenuniv.nl. Text between square brackets or in footnotes is not a translation, but additional information.

- (d) by [judicial] dissolution at the request of one partner [as specified in article 80e, which declares applicable the provisions on marital divorce];
- (e) by conversion of a registered partnership into a marriage [as specified in article 80g].”

The hundreds of other new or amended articles merely state that certain (groups of) provisions relating to the procedures and/or consequences of marriage are also applicable to registered partnership. Thus, registered partnership is almost identical to marriage.⁷⁸ If a private law document (such as a contract or a will) attaches significance to someone’s being married, and the document dates from before 1998, then the transitional provision of Article V of the Act of 5 July 1997 provides that the same significance will be attached to someone’s being registered as partner. But if the document dates from after 31 December 1997, then such equality can only be based on the General Equal Treatment Act, which not only prohibits direct and indirect discrimination based on sexual orientation, but also discrimination based on civil status. The status of being a registered partner is now considered to be a new civil status. Because the General Equal Treatment Act only applies to employment and the provision of goods and services, private discrimination between married and registered partners in other fields might not always be unlawful.

APPENDIX II

TEXT OF DUTCH ACT ON THE OPENING UP OF MARRIAGE FOR SAME-SEX PARTNERS

Staatsblad van het Koninkrijk der Nederlanden

(Official Journal of the Kingdom of the Netherlands), 2001, nr. 9 (11 January)

Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage)⁷⁹

We Beatrix . . . considering that it is desirable to open up marriage for persons of the same sex and to amend Book 1 of the Civil Code accordingly;

Article I . . .

(D)

Amendment of Article 28.⁸⁰ . . .

(E)

Article 30 shall read as follows: “Article 30 (1) A marriage can be contracted by two persons of different sex or of the same sex. (2) The law only considers marriage in its civil relations”.⁸¹

⁷⁸ See *supra* pp. 445–46, 450–51 and n. 35 for the remaining differences.

⁷⁹ *Wet openstelling huwelijk*, *Staatsblad* 2001, nr. 9, <http://www.eerstekamer.nl/9202266/d/w26672st.pdf>. The Act resulted from a Bill introduced by the Government on 8 July 1999 (Parliamentary Papers II 1998/1999, 26672, nr. 2), amended by the Government on 3 May 2000 and 4 August 2000, adopted by the Lower House of Parliament on 12 Sept. 2000 and by the Upper House on 19 Dec. 2000, and signed into law on 21 Dec. 2000. It entered into force on 1 April 2001. See also *supra* nn 76, 77

⁸⁰ This article lists the conditions to be fulfilled if a transsexual wishes the sex on his or her birth certificate to be changed. The condition of not being married is now deleted.

⁸¹ New Art. 30(2) was previously the whole text of Art. 30.

(F)

Article 33 shall read as follows: "Article 33 Through marriage a person can at the same time only be linked with one person".⁸²

(G)

Amendment of Article 41.⁸³

(H)

A new Article 77a shall be inserted: "Article 77a (1). When two persons indicate to the registrar of the domicile of one of them that they would like their marriage to be converted into a registered partnership, the registrar can make a record of conversion to that effect. . . . (3) A conversion terminates the marriage and starts the registered partnership on the moment the record of conversion is registered in the register of registered partnerships. The conversion does not affect the paternity over children born before the conversion". . . .

(J)

Amendment of Article 80a.⁸⁴ . . .

(L)

A new Article [80g] shall be inserted. "Article [80g] (1). When two persons indicate to the registrar of the domicile of one of them that they would like their registered partnership to be converted into a marriage, the registrar can make a record of conversion to that effect. . . . (3) A conversion terminates the registered partnership and starts the marriage on the moment the record of conversion is registered in the register of marriages. The conversion does not affect the paternity over children born before the conversion". . . .

(N)

Article 395 shall read as follows. "Article 395 Without prejudice to article 395a, a stepparent is obliged to provide the costs of living for the minor children of his spouse or registered partner, but only during his marriage or registered partnership and only if they belong to his nuclear family".⁸⁵

(O)

Article 395a(2) shall read as follows. "(2) A stepparent is obliged to provide [the costs of living and of studying] for the adult children of his spouse or registered partner, but only during his marriage or registered partnership and only if they belong to his nuclear family and are under the age of 21".⁸⁶ . . .

Article III

Within five years after the entering into force of this Act, Our Minister of Justice shall send Parliament a report on the effects of this Act in practice with special reference to the relation to registered partnership.

⁸² Previously, Art 33 only outlawed heterosexual polygamy.

⁸³ Insertion of the words "brothers" and "sisters" into the provisions that previously only outlawed marriages between siblings if they were of different sexes (and between descendant and ascendant)

⁸⁴ The minimum age for marriage and registered partnership is eighteen, but it is reduced to sixteen if the woman is pregnant or has given birth. Previously, this reduction was only possible for marriage

⁸⁵ Previously, Arts 395 and 395a only applied to marriage, not to registered partnership

⁸⁶ *Ibid.*

Article IV

This Act shall enter into force on a date to be determined by royal decree.⁸⁷

Article V

This Act shall be cited as Act on the Opening Up of Marriage.

. . . Given in The Hague, 21 December 2000 Beatrix

The State-Secretary for Justice M.J. Cohen

APPENDIX III

EXPLANATORY MEMORANDUM ACCOMPANYING THE ORIGINAL BILL ON THE OPENING UP OF MARRIAGE FOR SAME-SEX PARTNERS⁸⁸

“ . . . 1. History

. From the government’s manifesto of 1998 (Parliamentary Papers II, 1997/1998, 26024, nr. 9, p. 68) it appears that the principle of equal treatment of homosexual and heterosexual couples has been decisive in the debate about the opening up of marriage for persons of the same sex

2. Equalities and differences between marriage for persons of different sex and marriage for persons of the same sex

. . . As to the conditions for the contracting of a marriage no difference is made between heterosexuals and homosexuals. ⁸⁹

The differences between marriage for persons of different sex and marriage for persons of the same sex only lie in the consequences of marriage. They concern two aspects firstly the relation to children and secondly the international aspect. .

[According to Civil Code Article 199, the husband of the woman who gives birth during marriage is presumed to be the father of the child.] It would be pushing things too far to assume that a child born in a marriage of two women would legally descend from both women. That would be stretching reality. The distance between reality and law would become too great. Therefore this bill does not adjust chapter 11 of Book 1 of the Civil Code, which bases the law of descent on a man-woman relationship. Nevertheless, the relationship of a child with the two women or the two men who are caring for it and who are bringing it up, deserves to be protected, also in law. This protection has partly been

⁸⁷ 1 April 2001 (*Staatsblad* 2001, nr. 145). Just after midnight on the night of 31 March to 1 April 2001, Mr J Cohen (now Mayor of Amsterdam) conducted the world’s first legal same-sex marriages in the council chamber of Amsterdam City Hall. One female-female and three male-male couples converted their registered partnerships to civil marriages. See http://news.bbc.co.uk/1/hi/english/world/europe/newsid_1253000/1253754.stm

⁸⁸ Parliamentary Papers II 1998/1999, 26672, nr. 3 (8 July 1999). This is a lengthy text (signed by Mr J Cohen, State-Secretary for Justice), of which some brief passages have been translated here. See *supra* n 77.

⁸⁹ For example, only one of the persons wishing to marry needs to have either his or her domicile in the Netherlands, or Dutch nationality.

realised through the possibility of joint authority for a parent and his or her partner (Articles 253t ff.) and will be completed with a proposal for the introduction of adoption by same-sex partners [see Appendix IV to this chapter], with a proposal for automatic joint authority over children born in a marriage or registered partnership of two women [introduced 15 March 2000, Parliamentary Papers II 1999/2000, 27047],⁹⁰ and with a proposal to attach more consequences to joint authority [not yet introduced]. . . .

As far as the law of the European Union is concerned, the Kortmann Commission concluded that it is certainly not unthinkable that the rules of free movement of persons relating to spouses will not be considered applicable to registered partners or married spouses of the same sex (report, p. 20).⁹¹ A recent judgment of the Court of Justice in Luxembourg strengthens this conclusion (see Court of Justice of the EC 17 February 1998, *Grant v. South-West Trams*, case C-249/96). . . .

Treaties relating to marriage are almost all dealing with private international law. . . . An interpretation of these treaties based on a gender-neutral marriage seems improbable. Just Because of this it will be necessary, when opening up marriage for persons of the same sex in the Netherlands, to design our own rules of private international law. The Royal Commission on private international law will be asked to advise on this, as soon as this bill will have been approved by the Lower House of Parliament [report expected after the summer of 2001].

3. Relation to registered partnership; evaluation

Registered partnership was introduced in the Netherlands on 1 January 1998. In 1998 4556 couples (including 1550 different-sex couples) have used the possibility of contracting a registered partnership . . . Compared to other countries with registered partnership legislation the interest in registered partnership in the Netherlands is relatively high.⁹² . . .

The relatively high number of different-sex couples that contracted a registered partnership in 1998 and the results of a quick scan evaluation research⁹³ make it plausible that there is a need for a marriage-like institution devoid of the symbolism attached to marriage.

Therefore the government wants to keep the institution of registered partnership in place, for the time being. After five years the development of same-sex marriage and of registered partnership will be evaluated. Then . . . it will be possible to assess whether registered partnership should be abolished. . . .

4. International aspects

. . . As the Kortmann Commission has stated (p. 18) the question relating to the completely new legal phenomenon of marriage between persons of the same sex concerns the interpretation of the notion of public order to be expected in other countries. Such interpretation relates to social opinion about homosexuality. The outcome of a survey by the

⁹⁰ See *supra* n.66

⁹¹ See *supra* nn.49, 51.

⁹² See also App VI

⁹³ See Scherf, *supra* n.61.

said Commission among member-states of the Council of Europe was that recognition can only be expected in very few countries. This is not surprising. . . .

Apart from the recognition of marriage as such, it is relevant whether or not in other countries legal consequences will be attached to the marriage of persons of the same-sex. . . .

As a result of this spouses of the same sex may encounter various practical and legal problems abroad. This is something the future spouses of the same sex will have to take into account. . . . However, this problem of “limping legal relations” also exists for registered partners, as well as for cohabiting same-sex partners who have not contracted a registered partnership or marriage. . . .

7. Explanation per article

. . . Article I . . . The principle of gender-neutrality of marriage is expressed by [new Article 30(1)]. . . .”

APPENDIX IV

TEXT OF DUTCH ACT ON ADOPTION BY PERSONS OF THE SAME SEX

Staatsblad van het Koninkrijk der Nederlanden
(Official Journal of the Kingdom of the Netherlands), 2001, nr. 10 (11 January)

Act of 21 December 2000 amending Book 1 of the Civil Code (adoption by persons of the same sex)⁹⁴

We Beatrix . . . considering that it is desirable to amend the rules on adoption and related provisions in Book 1 of the Civil Code as regards the introduction of the possibility of adoption by persons of the same sex; . . .

Article I (D)

Article 227 shall be amended as follows:

(a) The first paragraph shall read as follows:

“(1) Adoption is effected by a decision of the district court at the joint request of two persons or at the request of one person alone.⁹⁵ Two persons cannot make a joint adoption request if according to Article 41 they are not allowed to marry each other.”⁹⁶

⁹⁴ *Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek (adoptie door personen van hetzelfde geslacht)*, *Staatsblad* 2001, nr. 10, <http://www.eerstekamer.nl/9202266/d/w26673st.pdf>. The Act resulted from a Bill introduced by the Government on 8 July 1999 (Parliamentary Papers II 1998/1999, 26673, nr. 2), amended by the Government on 3 May 2000 and 4 August 2000, adopted by the Lower House of Parliament on 12 Sept. 2000 and by the Upper House on 19 Dec. 2000, and signed into law on 21 Dec. 2000. It entered into force on 1 April 2001. See also *supra* nn.76, 77.

⁹⁵ After the words “two persons”, the words “of different sex” have been deleted.

⁹⁶ See *supra* App. II

(b) A second sentence is added to the second paragraph, which shall now read as follows:

“(2) The joint request by two persons can only be done, if they have been living together during at least three continuous years immediately before the submission of the request. The request by an adopter who is the spouse, registered partner or other life partner of the parent, can only be done, if he has been living together with that parent during at least three continuous years immediately before the submission of the request”.

(c) The third paragraph shall read as follows:

“(3) The request can only be granted if the adoption is in the evident interest of the child, if at the time of the adoption request it is established, and for the future it is reasonably foreseeable, that the child has nothing to expect anymore from its parent or parents in his/her/their capacity of parent(s), and if the conditions specified in Article 228 are fulfilled as well”.⁹⁷ . . .

Article III

This Act shall enter into force on a date to be determined by royal decree.⁹⁸

. . . Given in The Hague, 21 December 2000: Beatrix

The State-Secretary for Justice: M.J. Cohen

APPENDIX V

EXPLANATORY MEMORANDUM ACCOMPANYING THE ORIGINAL BILL ON ADOPTION BY PERSONS OF THE SAME SEX⁹⁹

“. . . 1. Introduction

. . . A child being cared for and brought up in a lasting relationship of two women or two men, has a right to protection in that relationship, including legal protection. Both women or both men have taken on the responsibility for the care and upbringing of the child and readily want to have that responsibility. In the interest of the child this relationship with these adults deserves protection.

Instead of through changing the law of descent, such protection shall be offered in the form of the adoption possibilities provided for in this bill, in accordance with the advice of the Kortmann Commission,¹⁰⁰ as well as in the forms of joint authority for a parent and his partner and of joint custody (both introduced by legislation taking effect on 1 January 1998). An important difference between descent and adoption is that adoption

⁹⁷ One of the conditions (Art. 228(1)(f)) is the minimum period of pre-adoption care and upbringing. In case of individual adoption by someone who is not a stepparent, the minimum is three years. In case of joint adoption by two persons, the minimum is one year. In case of adoption by the spouse, registered partner or other life partner of the child, the minimum is also one year, unless the child is born in the relationship of the mother with another woman. Then there is no minimum period.

⁹⁸ 1 April 2001 (*Staatsblad* 2001, nr. 145)

⁹⁹ Parliamentary Papers II 1998/1999, 26673, nr. 3 (8 July 1999). This is a lengthy text (signed by Mr J Cohen, State-Secretary for Justice), of which some brief passages have been translated here. See *supra* n 77.

¹⁰⁰ See *supra* nn. 49, 51.

always is an abstraction from descent. . . . Because parenting by two persons of the same sex always involves a form of non-biological parenting, we have opted for a change of the law of adoption and not of the law of descent. . . .

2. Scope of the legislative proposal

The bill relates to adoption of children in the Netherlands. In recent years not more than sixty to one hundred Dutch children have been adopted annually under the Dutch law of adoption [not counting stepparent adoptions], for in the Netherlands only rarely does a mother not bring up her own child.

The bill primarily aims to make adoption by persons of the same sex possible. Probably this will mostly take the form of adoption by the female partner of the mother of the child, or of adoption by the male partner of the father of a child. This form is similar to the existing form of stepparent adoptions.

The reason why we do not propose to extend the possibilities for intercountry adoption, is that in that context other facts need to be taken into account. In 1997 the Ministry of Justice studied the legislation on intercountry adoption, and its application in practice, in six countries from which children come to the Netherlands, and in six other countries where such children are adopted. The study showed that in practice there is a strong preference for intercountry adoption by a married couple. . . .

3. The new condition for adoption

It is being proposed that adoption—apart from the already existing conditions—will only be possible if the child has nothing to expect anymore from its original parent or parents. This criterion is being proposed irrespective of whether it is adoption by persons of the same sex or adoption by persons of different sexes. . . .

The words “parent or parents” refer to legal parents as well as to biological parents.

. . .

The criterion that the child has nothing to expect anymore from its original parent or parents, relates to the parent-child relationship. Therefore the question is not whether the child has not or will not have any de facto contact with its original parents. The relevant issue is whether the child can expect that its parents are capable of giving substance to their parenthood. Only if it is certain that the child has nothing to expect from its original parents as parents, the new condition for adoption will be fulfilled. . . .

There will be cases in which this question can easily be answered, as in the case of duomothers where a child has been conceived through artificial insemination with semen of an anonymous donor. Since the ties with the legal mother, who has given birth to the child, will not be severed by the adoption, and because no other—biological—parent can be indicated, the new criterion shall be fulfilled.

The balancing may be different if the child is conceived with the semen of an acquaintance of the mother and/or of her partner. . . .

5. The relation to joint authority

. . . Since in the Netherlands joint authority is available as an adequate alternative for adoption, aimed at protecting the family life of a child with its *de facto* carers/upbringers, it may be stated that adoption in many cases is not really necessary anymore. . . .

7. Consequences for private international law

The bill, intending to allow adoption by persons of the same sex, only relates to adoptions of children with their habitual residence in the Netherlands. To these, as to adoptions in the Netherlands by persons of different sexes, Dutch law is applicable. So problems relating to the applicability of foreign substantive laws that do not know adoption by same-sex partners, will hardly arise . . .

The question whether adoptions by persons of the same sex, decided upon in the Netherlands, will be recognised in other countries is of a different nature. Since the legal developments abroad with respect to this form of adoption, have not progressed as far as in the Netherlands, it may be expected that, for the time being, the family ties created by such adoptions will not be recognised abroad . . . Possibly, the parental authority linked to these adoptions could be recognised in some countries". . . .

APPENDIX VI

NUMBERS OF PARTNERSHIP REGISTRATIONS IN FIVE EUROPEAN COUNTRIES¹⁰¹

Since 1989, several European countries have introduced legislation creating the marriage-like institution of registered partnership for same-sex couples (in the Netherlands also for different-sex couples). In these countries, partnership registration has almost all the consequences of marriage, with the exception of most rights and duties of parents and children. Partnership registration became possible in Denmark on 1 October 1989, in Norway on 1 August 1993, in Sweden on 1 January 1995, in Iceland on 27 June 1996, and in the Netherlands on 1 January 1998.¹⁰²

The table below gives an overview of the absolute numbers of partnership registrations,¹⁰³ and the relative frequencies of persons who register as partners.

- Female-female partnerships are indicated with "ff", male-male with "mm", and female-male with "fm".

¹⁰¹ At <http://ruijs.leidenuniv.nl/user/cwaaldijk/www/>, a regularly updated version will be available. Corrections and additions are always welcome (c.waaldijk@law.leidenuniv.nl).

¹⁰² It also became possible in Greenland (1996), but no figures from there could be found. Registrations in France, Belgium and (certain regions of) Spain have not been included, because of their having far less legal consequences than marriage.

¹⁰³ Sources: Statistics Denmark, Statistics Sweden, Statistics Iceland, Statistics Norway (<http://www.ssb.no/english/subjects/02/02/30/>, updated each year), Statistics Netherlands (http://statline.cbs.nl/statweb/index_ENG.stm, Population, Monthly Statistics, updated each month).

- The absolute numbers are for partnership *registrations*. The number of persons that registered their partnership will therefore be twice as high.
- The frequencies are an indication of the number of registered *partners* per 100,000 inhabitants over a twelve-month period. For periods longer than twelve months, the numbers have first been reduced to the average number per twelve months. For shorter periods no frequency has been calculated.

Partnership registrations in five countries

Country Population	Period	Absolute numbers				Frequency		
		total	ff	mm	fm	ff	mm	
Denmark 5.3 million (1997)	1989 (three months)	340	70	270	—			
	1990	450	120	330	—	5	12	
	1991	280	90	190	—	3	7	
	1992	240	80	160	—	3	6	
	1993	220	70	150	—	3	6	
	1994	230	100	130	—	4	5	
	1995	230	80	150	—	3	6	
	1996	220	100	120	—	4	5	
	1997	190	110	80	—	4	3	
	1998	210	120	90	—	5	3	
	1999	298	137	161	—	5	6	
Total		2908	1077	1831	—			
<i>First 15 months</i>		790	190	600	—	6	18	
Norway 4.4 million (1998)	1993 (five months)	158	42	116	—			
	1994	133	47	86	—	2	4	
	1995	98	34	64	—	2	3	
	1996	127	47	80	—	2	4	
	1997	117	43	74	—	2	3	
	1998	115	44	71	—	2	3	
	1999	144	62	82	—	3	4	
	Total		892	319	573	—		
	<i>First 17 months</i>		291	89	202	—	3	6
Sweden 8.8 million (1998)	1995	333	84	249	—	2	6	
	1996	160	59	101	—	1	2	
	1997	131	52	79	—	1	2	
	1998	125	46	79	—	1	2	
	1999	144	67	77	—	2	2	
	2000	179	70	109	—	2	2	
	Total		1072	378	694	—		
<i>First 12 months</i>		333	84	249	—	2	6	
Iceland 0.27 million (1997)	1996 (six months)	21	11	10	—			
	1997	12	7	5	—	5	4	
	1998	13	7	6	—	5	4	
	1999	11	5	6	—	4	4	
	Total		57	30	27	—		
	<i>First 18 months</i>		33	18	15	—	9	7
Netherlands 15.7 million (1998)	1998	4626	1324	1686	1616	17	21	
	1999	3256	864	897	1495	11	11	
	2000	2922	785	815	1322	10	10	
	Total	10,804	2973	3398	4433			
	<i>First 18 months</i>	6132	1740	2098	2294	15	18	

- Frequencies have been calculated by me using the given population number for 1997 or 1998.
- Some absolute numbers given may be a little too small, because of occasional non-reporting, and because Denmark, Sweden and Norway do not include all non-residents in their statistics. The numbers given for Denmark for 1989 to 1998 are only estimates, for 1999, actual numbers were available.¹⁰⁴
- To facilitate comparability, frequencies have also been calculated over the initial period of 12 to 18 months after the entering into force of the legislation.

SOME CONCLUSIONS FROM THE COMPARATIVE FIGURES

- If you add up the totals of the five countries, it can safely be said that by the end of 2000, more than 30,000 Europeans had obtained the civil status of being a registered partner.
- In the initial period after its introduction (i.e. the first twelve to eighteen months), registered partnership tends to be more popular than in later years. This contrast is sharpest with regard to men in Denmark and Sweden, and weakest with regard to different-sex couples in the Netherlands.
- During the initial periods, registered partnership has been much more popular in the Netherlands than in any other country. Partnership registration between women was eight times as popular as in Sweden, five times as popular as in Norway, and three times as popular as in Denmark (the difference with Iceland was much less). Partnership registration between men was more than three times as popular as in Sweden, and more than twice as popular as in Norway or Iceland (the difference with Denmark was small).
- After the initial period, the numbers of partnership registrations tend to stabilise. In Sweden, these numbers remain at much lower frequencies than in Norway, Denmark and Iceland. In the Netherlands, the frequencies are much higher.
- In all countries but Iceland, partnership registration has so far been more popular among men than among women. In recent years, however, this difference between men and women has become smaller in all countries.

¹⁰⁴ For the years 1989–1998, Statistics Denmark does not have the numbers of registrations, but only the numbers of people who were living as registered (or ex-registered) partners in Denmark on 1 January of the following year. On the basis of these numbers, I have made an estimate of the likely numbers of registrations. This means that registrations of partners living abroad are not included.