Chapter 12
The Netherlands

12.1. Constitutional framework

The number of provisions in the Dutch Constitution that are of direct relevance for the present case study on legal recognition of same-sex couples is fairly limited. The Dutch Constitution does not contain a right to respect for family life, nor is the right to marry constitutionally protected. Article 10(1) of the Constitution protects the right to respect for private life, and it may be said to also cover a right to establish personal and intimate relationships with other persons of one's choosing.[1] However, as pointed out by Boele-Woelki et al. in 2006, this right has not been invoked in any legal procedures, presumably because Dutch legislation sufficiently protected this right,[2] as this chapter will confirm. Also of importance are the rights of the child, which are not expressly protected by the Constitution either; the protection of these rights was further explained in Chapter 6, section 6.1.2. By contrast, an important provision of the Dutch Constitution for the present case study is its Article 1, which protects the right to equal treatment.

As stressed before, because the Netherlands' constitutional system adheres to a relatively 'monist theory' of International Law, international guarantees binding upon the Netherlands such as the ECHR, directly filter into the national legal system. Therefore, the ECHR as interpreted and applied in the ECtHR's case law, and as set out in Chapter 8, basically makes up for an important part of the Dutch constitutional framework in respect of legal recognition of same-sex couples.

12.1.1. Equal treatment (Article 1)

Since 1983 the Dutch Constitution has contained a non-discrimination clause which prohibits '[d]iscrimination on grounds of religion, belief, political opinion,

1 See W.C.J. Robert and J.M.A. Waaijer (eds.), *Relatievrijheid en recht: inleidingen en verslag van de Leidse Conferentie van 25 en 26 mei 1982* [Relationship freedom and the law: introductory remarks to and report of the Leiden Conference of 25 and 26 May 1982] (Deventer, Kluwer 1983) p. XI.

2 K. Boele-Woelki et al., *Huwelijk of geregistreerd partnerschap? Een evaluatie van de Wet openstelling huwelijk en de Wet geregistreerd partnerschap in opdracht van het Ministerie van Justitie* [Marriage or registered partnership? An evaulation of the Act opening up marriage and the Registered Partnership Act by order of the Ministry of Justice] (The Hague, WODC, Ministerie van Justitie 2006, Annex to *Kamerstukken II* 30800-VI no. 32), p. 13, referring (in footnote 60) to W. Schrama, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht* [Non-marital cohabitation in Dutch and German law] (Amsterdam, Ars Notariatus Kluwer 2004) pp. 233–234.

race or sex or on any other grounds whatsoever'.[3] The wording 'or any other grounds whatsoever' was inserted first of all because Parliament explicitly wished to also cover discrimination against lesbians and gays.[4] This was accompanied by discussions in Parliament about the introduction of equal treatment legislation. In 1994 the *Algemene Wet Gelijke Behandeling* (General Equal Treatment Act (GETA)) entered into force. It outlaws discrimination on grounds of sexual orientation in the area of employment and the provision of services.[5] Further, under Article 429*quater* of the Criminal Code it is a criminal offence to 'discriminate against persons on the grounds of their race, religion, beliefs, sex or heterosexual or homosexual orientation', in the execution of a 'profession, business or official capacity'.[6]

Over the past decade in particular, the Dutch government has taken an active stance against discrimination on grounds of sexual orientation, for example by means of a national action plan to improve the social acceptance and empowerment of LGBT citizens.[7]

12.2. (De-)criminalisation of homosexual activities

When the Netherlands were under French rule after the French Revolution, in 1791, the criminalisation of homosexual acts was abolished. This was confirmed in the *Code Pénal* of 1811.[8] A century later, however, in the year 1911, as part of the Legislation on Public Morals ('*Zedelijkheidswetgeving*') a new Article 248*bis* was included in the Criminal Code, which criminalised 'lewd acts' ('*ontuchtige handelingen*') between an adult and a consenting minor of the same sex who had not reached the age of 21 years.[9] Fundamental societal changes during the 1960s

3 *Stb.* 1983, 70.

4 See C. Waaldijk, 'Constitutional Protection Against Discrimination of Homosexuals', 13 *Journal of Homosexuality* (1986/1987) p. 57 at pp. 59–60.

5 *Stb.* 1994, 230.

6 For the purposes of this provision, Art. 90 quater Sr defines discrimination as '[…] any form of distinction or any act of exclusion, restriction or preference that intends or may result in the destruction or infringement of the equal exercise, enjoyment or recognition of human rights and fundamental freedoms in the political, economic, social or cultural field, or in any other area of society'.

7 For example, during the period 2008–2011, a comprehensive LGBT national action plan entitled 'Simply Gay', was in implemented, which encompassed 60 different measures, including 24 projects sponsored by various government departments to improve the social acceptance and empowerment of LGBT citizens. Dutch Ministry of Education, Culture and Science (2007), *Gewoon homo zijn; Lesbisch en homoemancipatiebeleid 2008–2011* [Simply gay; Dutch Government LGBT Policy document 2008–2011], Netherlands: Ministry of Education, Culture and Science, online available (in Dutch) at www.rijksoverheid.nl/documenten-en-publicaties/notas/2007/11/14/notalesbisch-en-homo-emancipatiebeleid-2008–2011-gewoon-homo-zijn.html, visited April 2011.

8 G. Hekma, *Homoseksualiteit in Nederland van 1730 tot de moderne tijd* [Homosexuality in the Netherlands from 1730 to the modern age] (Amsterdam, Meulenhoff 2004) p. 40.

9 Act adopted on 20 May 1911, *Stb.* 1911, 130, entry into force 15 June 1911, *Stb.* 1911, 135. The present author is not aware of any official statistics on the number of prosecutions based on this provision in the Dutch Criminal Code. Historian Hekma has reported (without references) that in the period 1911–1971 a total number of approximately 5,000 persons were prosecuted on the basis of Art. 248*bis* Sr (*old*), of which approximately 2,800 were convicted, while 1,500 cases were dismissed. Hekma 2004, *supra* n. 8, at p. 70. Hekma notes (at p. 96) that the number of criminal convictions on the basis of Art. 248*bis*

resulted in the crossing out of Article 248*bis* of the Criminal Code in the year 1971.[10] Since that time, the minimum age of 16 years for consensual intercourse also applies to acts between persons of the same sex.[11]

12.3. Legal recognition of same-sex relationships under Dutch law

The question of legal recognition of same-sex relationships was briefly discussed in parliament in 1970, in the context of the abolition of the criminal prohibition on homosexual acts (see 12.2 above).[12] In the early 1990s it became the subject of several court proceedings, but in most of these cases, the applicants were unsuccessful. For instance, the Court of Appeal of The Hague ruled in 1981 that under Dutch law same-sex marriage could not exist.[13] While this ruling triggered discussion on same-sex marriage in legal scholarship,[14] eventually the issue only really got political attention after a judgment of the Supreme Court of 1990.[15]

12.3.1 The 1990 Supreme Court judgment on same-sex marriage

In 1988 a woman appealed to the District Court of Rotterdam against the refusal of a registrar of the municipality of Ridderkerk to conclude a marriage between her and

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did not increase considerably during the Second World War. He claims (at p. 100) that the factual persecution of gay men even increased after the War. The author furthermore notes (at p. 234) that is it very probable that under the Act on Public Morals many gay men were prosecuted and convicted of public indecency/outrage to public decency, which concerned another provision in the Criminal Code. Hekma refers in this context to P. Koenders, *Tussen christelijk Réveil en seksuele revolutie. Bestrijding van zedeloosheid in Nederland, met nadruk op de repressie van homoseksualiteit* (IISG Amsterdam 1996) pp. 830–831.

10 Amendment of 12 May 1971, *Stb.* 1971, 212. For the Explanatory memorandum, see *Kamerstukken II* 1969/70, 10347 no. 3. See also Boele-Woelki et al. 2006, *supra* n. 2, at p. 3.

11 Art. 245 Sr.

12 *Kamerstukken II* 1969/70, 10 347, no. 5, p. 2. See C. Waaldijk, 'Partnerschapsregistratie en huwelijk: toenemende rechtsgelijkheid voor geslachtsgelijke partners en hun kinderen' [Partnership registration and marriage: increasing equality before the law for same-sex partners and their children'], in: H. Lenters et al., *De familie geregeld?* [The family taken care of?] (Lelystad, Koninklijke Vermande 2000) p. 121 at p. 126.

13 Hof 's-Gravenhage 18 June 1981, *NJ* 1983 No. 94, ECLI:NL:GHSGR:1981:AC7248. Waaldijk has explained that […] '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.' C. Waaldijk, 'Small change; how the road to same-sex marriage got paved in the Netherlands', in: R. Wintemute and M. Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships – A Study of National, European and International Law* (Oxford, Hart Publishing 2001) p. 437 at p. 443. See also Waaldijk 2000, *supra* n. 12, at p. 128, where the author, *inter alia*, referred (in footnote 30) to Hof Amsterdam 6 May 1993, *NJ* 1994 No. 681, ECLI:NL:GHAMS:1993:AB9423.

14 E.g. C. Waaldijk, 'Beantwoording rechtsvraag (170). Gelijkheidsbeginsel. Homohuwelijk' ['Answer to legal question (170). The principle of equal treatment. Same-sex marriage'], 36 *Ars Aequi* (1987) p. 644.

15 E.g. I. Stroosnijder, 'Aandacht fracties gewekt. Beweging in landelijke politiek over homohuwelijk', *NG* no. 41, 12 October 1990, p. 8.

another woman. The District Court held that to rule, as the plaintiff petitioned, that Book 1 of the Dutch Civil Code allowed same-sex partners to enter into marriage, would be to go beyond an acceptable interpretation of the law. Since such a decision would conflict with the system of the law, it would in fact be tantamount to creating a new right.[16] The Court held this to be a matter for the legislature, not the judiciary, even more so because a ruling to that effect would have far-reaching consequences for legislation on matters like parentage, inheritance and adoption. Because of the Dutch prohibition on constitutional review of acts of parliament ('*toetsingsverbod*'),[17] the Court did not examine the law in the light of the principle of equality ex Article 1 of the Dutch Constitution. Referring to the *Rees* judgment, where the ECtHR had ruled that Article 12 ECHR (the right to marry) pertained to the traditional marriage between persons of opposite biological sex (see Chapter 8, section 8.2.1), the District Court furthermore held that the relevant Dutch legislation was not in violation of this provision. Because of this interpretation of Article 12 ECHR, it also found no discrimination in violation of Article 14 ECHR. On largely similar grounds, the District Court dismissed the claims based on Articles 23 and 2 ICCPR, protecting the right to marry and the prohibition of discrimination.

The District Court's ruling was confirmed on appeal.[18] The Court of Appeal of The Hague held that the laws on marriage primarily served to legitimate reproduction between man and woman. Because same-sex couples did not have such a possibility of procreation, they did not come within the scope of the (existing) marriage laws. The Appeals Court endorsed the finding of the District Court that it was for the legislature to decide upon lifting the ban on access to marriage for same-sex couples. It held that if the Court were to rule to that effect, the result would be a definitive amendment of the law, which would be done entirely outside the democratic decision-making process, and which related to a complex subject-matter. Moreover, the present legislation was based on the notion that marriage was open to man and woman only, an idea that was firmly embedded in the entire western world, which had existed for many centuries and which many at the time still considered entirely natural. The plaintiff subsequently lodged a cassation appeal with the Supreme Court.

A few months before the Supreme Court gave a final ruling in this case, the District Court of Amsterdam issued a judgment in a similar case brought by two men who appealed against a refusal by a civil servant to register their same-sex marriage.[19] On the basis of teleological and systematic interpretation, the District Court ruled that a same-sex marriage did not exist under Dutch law. In line with the judgments of the Rotterdam District Court and the Court of Appeal, the District Court refused to

16 Rb. Rotterdam 5 December 1988, NJ 1989 No. 871, as referred to by C. Waaldijk, 'De heteroseksuele exclusiviteit van het huwelijk na Hoge Raad 19 oktober 1990' ['The heterosexual exclusivity of marriage after Supreme Court 19 October 1990'], 40 *Ars Aequi* (1991) p. 47 at p. 47.

17 Article 120 Gw.

18 Hof 's-Gravenhage 2 June 1989, *NJ* 1989 No. 871, ECLI:NL:GHSGR:1989:AB8024.

19 Rb. Amsterdam 13 February 1990, *Rekest no.* 89.2072 H. See also K. Boele-Woelki and P.C. Tange, 'Geen huwelijk tussen personen van hetzelfde geslacht' ['No marriage between partners of the same sex'], *NJCM-Bulletin* 1990, p. 456.

review the matter on the basis of International treaty law. It held that even if the refusal were in violation of a Treaty provision, it was not for the judiciary to determine the manner in which the equal treatment of same-sex couples and different-sex couples was to be established.[20]

In cassation, the Supreme Court ('*Hoge Raad*') ruled, on the basis of grammatical and teleological interpretation of the relevant section of the Dutch Civil Code,[21] that same-sex couples could not enter into marriage.[22] Even if developments in society supported the view that it was no longer justified that civil marriage was not open to same-sex couples, this could not justify an interpretation of the law which unmistakably deviated from the spirit of the law. This was even more so, since a matter was at stake which concerned public order and in relation to which legal certainty played an important role. The view that the law had to be interpreted in conformity with the principle of equality (Article 1 of the Constitution) could not alter this conclusion. The Supreme Court furthermore agreed with the Court of Appeal that Articles 12 ECHR and 23 ICCPR concerned the traditional marriage between man and woman and that the case disclosed no discrimination in violation of Article 14 ECHR or Article 2 ICCPR. The Supreme Court considered that there was no ground for interpreting Article 12 ECHR in conjunction with Articles 8 and 14 ECHR 'more dynamically' than the ECtHR had done so far in its case law.[23] According to the Supreme Court, civil marriage was traditionally defined as a durable civil union between a man and a woman, to which a series of legal effects were given which partly related to the difference in sex between the spouses and the thereto related legal consequences in respect of their future children. The fact remained, the Supreme Court considered, that it was possibly insufficiently justifiable to exclude certain legal effects that follow from marriage from the durable cohabitation of two partners of the same sex. The Supreme Court held, however, that such an issue – which could generally only be decided by the legislature anyway – was not under discussion in the case at hand. Accordingly, it dismissed the appeal.

The Supreme Court's ruling met with both approval and criticism in legal scholarship. Most scholars considered the Court's interpretation of the national and international law reasonable,[24] but some claimed that the 'heterosexual exclusiveness' of marriage as defined by the Supreme Court was in violation of the relevant ECHR and ICCPR provisions.[25] It was the *obiter dictum* in the Court's judgment – where the Court

20 *Idem*, para. 4. The Court furthermore considered the matter not to be that urgent that it could not be left to the legislature.

21 The relevant Art. 1:30 BW (*old*) read at the time: 'The law only sees at the civil aspects of marriage' ('De wet beschouwt het huwelijk alleen in zijn burgerlijke betrekkingen'). It thus did not refer to the combined gender of the future spouses.

22 HR 19 October 1990, *NJ* 1992 No. 129, ECLI:NL:HR:1990:AD1260. See also L. Mulder, 'Té gelijk voor de wet: het 'homo-huwelijk' als heet hangijzer' ['Too equal for the law: same-sex marriage as controversial issue'], 46 *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (1991) p. 307 and Waaldijk 1991, *supra* n. 16, at p. 47.

23 Critical on this point was E. Alkema in his case note to this judgment in *NJ* 1992 No. 129. The author found this exercise of judicial restraint by the Supreme Court striking.

24 *Inter alia*, the case note by E.A.A. Luijten to the ruling in *NJ* 1992 No. 129.

25 Waaldijk 1991, *supra* n. 16, at p. 54.

held that it was possibly insufficiently justifiable to exclude certain legal effects that follow from marriage from the durable cohabitation of two partners of the same sex – that laid the foundations for legislative change in the field.[26]

12.3.2. The first legislative initiatives towards legal recognition of same-sex relationships

Very soon after the Supreme Court judgment, most political parties embraced the idea of the introduction of a registered partnership for partners with a marriage impediment.[27] In the early 1990s a special commission, the Kortmann Commission, was installed by the government to investigate whether legal effects could be given to other forms of durable relationships than marriage.[28]

In its report entitled 'Ways of living together' ('*Leefvormen*'),[29] the Kortmann Commission observed that over the years a complex web of laws regulating forms of *de facto* cohabitation had come into existence which lacked coherence. The Commission therefore suggested creating three forms of registration of relationships: (1) marriage, open to different-sex couples only; (2) a life partnership ('*levensgezelschap*') which resembled marriage, but was also open to couples with marriage impediments, such as same-sex couples and relatives; and (3) a 'light' registered partnership ('*partnerschap*') which formalised *de facto* cohabitation, but with legal effects which were more limited than marriage. The report was generally positively received in the political arena.[30] The government agreed with the finding of the report that everyone had to have the possibility to have his or her durable union with another person formally registered and recognised by public law. The government also agreed that cohabiting partners who, because of an impediment to marriage, could not marry, should be enabled to officially register their durable relationship in the Registry of Births, Deaths and Marriages. Such registration was not to have any effect in regard to parental links, but the government held that it

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26 Boele-Woelki et al. 2006, *supra* n. 2, at p. 4.

27 Waaldijk 1991, *supra* n.16, at p. 56 and Waaldijk 2001A, *supra* n. 13, at p. 443.

28 In practice, various municipalities began to register same-sex relationships in special registers. These registrations had no legal effect. According to Curry-Sumner about 130 municipalities established such registers in the early 1990s. I. Curry Sumner, *All's well that ends registered?: the substantive and private international law aspects of non-marital registered relationships in Europe: a comparison of the laws of Belgium, France, The Netherlands, Switzerland and the United Kingdom* (Antwerp, Intersentia 2005) pp. 119–120. See also P.P.M. Hoevenaars, 'Het wetsvoorstel partnerschapsregistratie' ['The bill on partnership registration'], 128 *WPNR* (1997) p. 226 at p. 227.

29 Kortmann I Commission, *Leefvormen* [Ways of living together], Annex to *Kamerstukken II* 1991/92, 22 300 VI, no. 36. *Handelingen II* 1990–91, 18, pp. 907–908. See also. C. Waaldijk, 'Vrij samen. Over het advies van de commissie-Kortmann inzake de vrijwillige registratie van leefvormen' ['Free together. On the Advice of the Kortmann Commission in respect of voluntary registration of ways of living together'], *Regelmaat* (1992) p. 43.

30 *Kamerstukken II* 1991/92, 22 700, no. 1 and *Kamerstukken II* 1992/93, 22 700, no. 3.

should be possible for a registered partner to share in the partner's parental authority (see also 12.3.6 below).[31]

In 1994 the government tabled a bill for the introduction of a registered partnership, with legal effects which were very similar to those of marriage.[32] There was one principled exception: the registered partnership would have no legal effects in respect of parental rights. Matters relating to (joint) parental authority were covered by another bill (see 12.3.6 below).[33] The original partnership bill introduced registration only for couples who were prevented from marrying because of kinship or because they were of the same sex.[34] It was held that because marriage was reserved for man and woman, an alternative form of registration for same-sex couples was desirable.[35] During the deliberations this was, however, soon amended. The registration for close relatives was rejected and the registered partnership was also opened to couples of different sexes who were not prevented from marrying, as this was considered to meet a need of different-sex couples.[36]

The (amended) registered partnership bill was adopted with a majority vote in the Lower House of Parliament ('*Tweede Kamer*') in December 1996.[37] The Senate ('*Eerste Kamer*') adopted the bill without voting in July 1997.[38] The *Wet Geregistreerd Partnerschap* (Act Introducing Registered Partnerships) entered into force on 1 January 1998.[39] It was evaluated for the first time in 2006, together with the 2001 Act which opened up marriage (see 12.3.5 below).[40]

12.3.3. The Act Introducing Registered Partnerships (1998)

With the Act Introducing Registered Partnerships, two objectives were pursued: (1) to ensure equal treatment for same-sex couples who wished to formalise their

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31 *Kamerstukken II* 1993/94, 23 714, nos. 1–3. The intention to draft this bill was yet announced in a Government Memorandum of 1993. *Kamerstukken II* 1992/93, 22700, no. 3.

32 *Kamerstukken II* 1993/94, 23 761, no. 3, p. 2. As Hekma rightly points out the 1994 so-called 'purple' government was the first in many decades in which no Christian political party was represented. Hekma 2004, *supra* n. 8, at p. 174. For an analysis of the bill see L. Schutte-Heide-Jorgensen, 'Recht op homohuwelijk?' ['A right to same-sex marriage?'], 47 *Ars Aequi* (1997) p. 86.

33 *Kamerstukken II* 1993/94, 23 714, nos. 1–3.

34 *Kamerstukken II* 1993/94, 23 761, no. 3, p. 2.

35 *Idem,* at p. 3.

36 *Kamerstukken II* 1994/95, 23 761, no. 5. See also S.F.M. Wortmann, 'Zo zijn we niet getrouwd. De openstelling van het huwelijk voor personen van hetzelfde geslacht' ['That was not what we agreed on. The opening up of marriage for same-sex couples'], 49 *Ars Aequi* (2000) p. 82 at p. 83. Critical was M.J.A. van Mourik, 'Privaatrecht Aktueel. Geregistreerd partnerschap!' ['Topical issues of private law. Registered partnership!'], 128 *WPNR* (1997) p. 225.

37 *Handelingen II* 1996/97, 14, pp. 3374–3375. The Christian Democrats (CDA), who voted against the bill, critically noted that precision and legal certainty suffered from the haste with which this bill had been drafted. This political party, *inter alia*, felt that insufficient attention had been paid to the legal effects of this partnership in other countries. *Handelingen II* 1996/97,14, p. 3375.

38 *Handelingen I* 1996/97, 33, p. 1963.

39 Act of 5 July 1997, *Stb.* 1997, 324. The Act entered into force on 1 January 1998.

40 Boele-Woelki et al. 2006, *supra* n. 2.

relationships; and (2) to provide an alternative to different-sex couples who preferred registering a partnership over getting married.[41] To a certain extent, these objectives were difficult to reconcile: while the first objective implied that registered partnerships had to be equalised with marriage as much as possible, the second implied that the two institutions had to be 'clearly distinguishable'.[42] The result was that, while the institution of the registered partnership was sculpted 'as far as possible according to the marital model', a 'number of exceptions to this overall resemblance' were created.[43] These concerned primarily parental rights (see section 12.3.6 below).

The rights and duties of registered partners are generally equal to those of married partners.[44] The legal effects of the registered partnership are for the most part also similar to those of marriage. This in any case holds for legislation concerning property, name, inheritance, taxes, social security, criminal procedure and nationality.[45]

A registered partnership can be entered into by two persons, either of different or the same sex.[46] The partners may not be married at the time they enter into the registered partnership. The conditions for establishment of a registered partnership are broadly similar to those for marriage. The future partners must give notice of their intention to enter into a partnership to the Registry of a Dutch municipality at least two weeks before the registry ceremony.[47] The ceremony takes place in the presence of a Registrar, who draws up a certificate of registration, which is archived in the Registry of Registered Partnerships.[48] Also with regard to termination, the legislation on the registered partnership is broadly similar to that in respect of marriage.[49] A registered partnership may be dissolved by a court order at the request of one of the registered partners or of both of them.[50] If both partners consent to the termination of their partnership, they can have their partnership terminated by registration through the Registrar of Civil Status of a dated declaration, signed by both registered partners and one or more solicitors or notaries, which confirms that the registered partners have made an agreement with regard to the termination of their registered partnership.[51] Hence, while court intervention is always required for

41 *Idem*, *supra* n. 2, at p. 246. The Evaluation Report furthermore concluded (at p. 247) that '[f]rom the sociological research it would appear that registered partnership is regarded by both same-sex and different-sex couples as an alternative to marriage. Registered partnerships is regarded more a business arrangement, whilst the reasons for choosing to marry lie more embedded in the symbolic and emotional sphere.'

42 *Idem*.

43 *Idem*, at pp. 246–247.

44 Art. 1:80b BW. The exception is what is provided for in regard of a legal separation of married partners.

45 Boele-Woelki et al. 2006, *supra* n. 2, at p. 219.

46 Art. 1:80a (1) BW.

47 Art. 1:80a (4) BW. Where both prospective registered partners, of whom at least one has the Dutch nationality, have their domicile outside the Netherlands, but intend to enter into a registered partnership with each other in a Dutch municipality, the formal notice of registered partnership must be given to the Registrar of Civil Status of the municipality of The Hague.

48 Art. 1:17(1) BW.

49 Boele-Woelki et al. 2006, *supra* n. 2, at p. 247.

50 Art. 1:80c (1)(d) BW.

51 Art. 1:80c (1)(c) BW. Translation taken from www.dutchcivilcode.com, visited June 2014. See also Art. 1:80d BW.

dissolution of a marriage, a registered partnership can be terminated without court proceedings. Further, a registered partnership may be converted into marriage.[52]

Over the years, the legislation regulating the registered partnership has been amended several times, with the main result that the differences regarding parental rights have levelled out and the institution of registered partnerships is now even more similar to marriage than it was before. This increased equalisation of registered partnerships with marriage is discussed hereafter. First, for reasons of chronology, the opening up of marriage to same-sex partners is discussed. It has been held to be '[…] plausible that the discussion enveloping the introduction of registered partnership paved the way for or, at the very least, contributed to the opening of civil marriage to same-sex couples.'[53]

12.3.4. Towards the opening up of marriage

The entry into force of the Act Introducing Registered Partnerships did not end the debate about equal treatment of same-sex couples. In fact, even before the adoption of this Act, there was much debate in Parliament on whether marriage should be opened up to same-sex couples.[54] The above-discussed 1990 Supreme Court judgment played an important role in this debate. In 1996, i.e., before adoption of the Registered Partnerships Act, a motion was adopted in Parliament which held that marriage had to be opened up to same-sex couples.[55] In response to the motion, the Secretary of State for Justice asked the Kortmann Commission – the same Commission that had published a report on ways of living together in 1990 – to map out the advantages and disadvantages, both at the national and the international level, of the opening up of marriage to same-sex couples.[56] When the report of this 'Kortmann II Commission' was published in 1997,[57] it was clear that the Commission was divided on the matter. Controversial issues were the implications of the principle of equal treatment, the (symbolic) meaning of marriage and the effects of opening up marriage at the international level, as well as the desirability of those effects.[58] It was

52 Art. 1:80g BW. For same-sex registered partners this has only been possible since the opening up of marriage in 2001. Until 1 March 2009 it was also possible to convert a marriage into a registered partnership, but the relevant Art. 1:77(a) BW (*old*) was repealed by the Wet bevordering voortgezet ouderschap en zorgvuldige scheiding [Act advancement of continued parenthood and divorce with care] Act of 27 November 2008, *Stb.* 2008, 500, entry into force per 1 March 2009.

53 Boele-Woelki et al. 2006, *supra* n. 2, at p. 247.

54 *Idem*, at, p. 7.

55 *Kamerstukken II* 1995/96, 22 700, no. 18. It has been pointed out that this suggestion was already made in 1990 by the political party D66. Boele-Woelki et al. 2006, *supra* n. 2, at p. 7, referring to *Handelingen II* 1990/91, 18, p. 926.

56 *Kamerstukken II* 1997/98, 22 700, no. 20. The Commission was installed following two motions adopted by Parliament. *Kamerstukken II* 1995/96, 22 700, nos. 14 and 18. See also P. Vlaardingerbroek, *GS Personen- en Familierecht, titel 5A Boek 1 BW, aant. 2*, update of 1 April 2011.

57 S.C.J.J. Kortmann, *Commissie inzake openstelling van het burgerlijk huwelijk voor twee personen van hetzelfde geslacht*, Den Haag Ministerie van Justitie, October 1997. The report was presented to the Secretary of State of Justice on 28 October 1997.

58 See Boele-Woelki et al. 2006, *supra* n. 2, at p. 8.

noted that the different views within the Commission reflected the different views within society on the matter.[59] A small majority of five out of eight Commission members was of the opinion that marriage had to be opened up to same-sex couples, the decisive argument being that the existing discriminating and grievous exclusion of this group had to be ended.[60] The minority was of the view that same-sex couples and different-sex couples were equally worthy of protection, but they were not in an identical position because of same-sex couples' inability to reproduce. The minority considered reproduction an essential element of marriage.[61] These three members of the Commission furthermore attached considerable weight to the international perspective of opening up marriage and warned that the problematic consequences of the creation of so-called 'limping relationships' – relationships that were legally recognised in one State, but not in another – were not to be underestimated.[62] The majority had held that those couples concerned had to consciously accept the legal phenomenon of limping relationships.

The government agreed with the minority of the Kortmann II Commission. It held that the aim of equal treatment of same-sex and different-sex couples could also be achieved through further development of the institution of registered partnership.[63] An important argument for the government was that various other countries had introduced registered partnerships for same-sex couples or were in the course of introducing such registered partnerships, while no other country in the world had opened up marriage to same-sex couples. It subscribed to the warning of the minority of the Kortmann II Commission that opening up marriage would result in limping relationships. It furthermore felt that a 'relatively small jurisdiction like the Netherlands' was not to deviate from international practice.[64]

Parliament disagreed with the position taken by the government and, by a relatively small majority (81 to 60 votes), adopted a motion requesting the government to draft a bill for the opening up of marriage.[65] This time, albeit with some delay, the government acted accordingly[66] and a bill for an act opening up marriage was tabled in July 1999.[67] Just before the tabling of this bill the Advisory Department

59 *Idem*, at p. 9.

60 See also the Article by of one of the Commission-members A.W.M. Willems, 'Het homohuwelijk: een te hoge prijs?' ['Same-sex marriage: a too high a price?'], 21 *Tijdschrift voor Familie- en Jeugdrecht* (1999) p. 217.

61 F. van Vliet, 'Van achterdeur naar zij-ingang: Commissie Kortmann en gelijkgeslachtelijke leefvormen' ['From backdoor to side entrance: the Kortmann Commission and ways of living together by same-sex couples'], 14 *Nemesis* (1998) p. 13 at p. 20.

62 *Idem*.

63 *Kamerstukken II* 1997/98, 22 700, no. 23, pp. 7–8. The government was, however, prepared to introduce adoption for persons of the same sex. See 12.3.6 below. See also S.F.M. Wortmann, 'Zo zijn we niet getrouwd. De openstelling van het huwelijk voor personen van hetzelfde geslacht' ['That was not what we agreed on. The opening up of marriage for same-sex couples'], 49 *Ars Aequi* (2000) pp. 82, at p. 84.

64 See *Kamerstukken II* 1998/99, 26 672, no. 3, p. 3.

65 *Kamerstukken II* 1997/98, 22 700, no. 26 and *Handelingen II* 1997/98, 49, pp. 5642–5643.

66 See the Coalition Agreement of 1998, *Kamerstukken II* 1997/98, 26 024, no. 9. p. 68.

67 *Kamerstukken II* 1998/99, 26 672, nos. 1–2.

of the Dutch Council of State issued a negative opinion on the matter.[68] Given that no other country in the world had at the time opened up marriage to same-sex couples, the Council of State was particularly concerned about the non-recognition of marriages between same-sex spouses in other countries, which would result in limping relationships.[69] The Council felt that as long as no special rules of Private International Law were drafted on the matter, the time was not ripe for the opening up of marriage to same-sex couples.[70] The government nonetheless proceeded with the bill and postponed regulation of the Private International Law aspects to a later date (see section 12.4 below).[71] The Deputy Prime Minister even held that she wanted to try and convince other States also to open up marriage to same-sex couples.[72] The Secretary of State for Justice later explained to Parliament that this would primarily take the form of initiating consultation at the international level on registered partnerships and similar institutions, in which the opening up of marriage would be included.[73] The government first of all intended to raise awareness of and understanding for recognition issues. Subsequently it could be explored if the drafting of an international instrument was feasible, it was held.[74] The government expected it to take considerable time before these discussions would pay off.[75] The government found it difficult to predict to what extent the Dutch opening up of marriage would meet with understanding within the Council of Europe, the International Commission on Civil Status and the Hague Conference on Private International Law. From the fact that support had been expressed by these organisations for international consultation on the Private International Law aspects of new forms of unmarried cohabitation, the government concluded that in other States also views were changing. The government was therefore not afraid that the Netherlands would not be taken seriously at the international level.[76] In response to the argument made by some parties in Parliament that from an international perspective the Netherlands isolated itself by opening up marriage to same-sex couples, the government held that the legislation was drafted 'in full awareness' of the fact that for the time being, the Dutch legislation would be relatively exceptional.[77]

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68 Advisory Department of the Council of State, Opinion of 23 March 1999, no. WO3.98.0593–19I, *Kamerstukken II* 1998/99, 26 672, no. B.

69 *Idem*, at p. 2.

70 The Explanatory Memorandum had acknowledged this legal issue and had therefore proposed to ask the State Commission on Private International Law for advice, after the bill had been adopted by Parliament. The Council of State held that conflict rules had to be drafted before the bill was sent to Parliament. This advice was, however, not followed-up. See also section 12.4 below.

71 *Kamerstukken II* 27 762 no. 3, p. 5. The Senate (*Eerste Kamer*) adopted the Bill on 23 January 2001. *Handelingen I* 2000/01, 15, pp. 687–688.

72 'Homohuwelijk exporteren', *Algemeen Dagblad* 12 December 1998, p. 3. See also *Kamerstukken II* 1999/00, 26 672, no. 4, p.16.

73 *Kamerstukken II* 1999/00, 26 672, no. 4, p. 21.

74 *Kamerstukken II* 1999/00, 26 672, no. 5, pp. 14 and 20–21.

75 *Idem*, at p. 12.

76 *Idem*, at p. 24.

77 *Idem*, at pp. 23–24.

On 7 September 2000 the Act opening civil marriage to same-sex couples was adopted in the Lower House by a large majority.[78] The Preamble of the Act did not express the legislature's motivation for introducing the Act, but in an accompanying press release of the Ministry of Justice it was stated that, against the background of the principle of equal treatment, there was no objective justification for the exclusion of same-sex couples from marriage.[79] As explained by the authors of the 2006 Evaluation of the Act:

> 'The creation of registered partnership was, in the eyes of the legislature, not sufficient to satisfy the requirements imposed by the principle of equality, as laid down in the Dutch Constitution. This principle necessitated that exactly the same institution be open to same-sex and different couples.'[80]

The government showed full awareness that, by opening up marriage, it broke with a long tradition of Western civilisation. It acknowledged that the departure of what had long been an essential characteristic of marriage, namely that marriage was between man and woman only, implied an essential change of the meaning of marriage, which was no longer linked to religious views. The government also held, however, that the opening up of marriage by no means 'denatured' marriage between different-sex couples.[81]

The new Act was both endorsed and criticised in legal scholarship. Some scholars held the opening up of marriage to same-sex couples to be against the *essentiale* of marriage.[82] Others were critical of the haste with which the legislature had proceeded and the choice it had made to postpone regulation of the Private International Law aspects.[83] Various authors pointed out that, from a legal perspective, there was no need for opening up marriage, because a registered partnership had yet been introduced.[84] Some received the Act as primarily symbolic and 'a matter of ideology'.[85] Others, however, stressed the importance of the signal that the new Act gave that full equality before the law was desirable and possible.[86]

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78 The Act was adopted with 109 votes in favour and 33 votes against. *Handelingen II* 1999/00, 100, pp. 6468.

79 C. Waaldijk, 'De voorgestelde Wet openstelling huwelijk en de daarmee samenhangende wijzigingen inzake adoptie en geregistreerd partnerschap' ['The proposed Act opening up marriage and the related amendments of the law on adoption and registered partnership'], 21 *Tijdschrift voor Familie- en Jeugdrecht* (1999) p. 198 at p. 199.

80 Boele-Woelki et al. 2006, *supra* n. 2, at p. 246.

81 *Kamerstukken II* 1999/2000, 26 672, no. 5, p. 7.

82 L. Westerhof, 'Is het huwelijk tussen personen van hetzelfde geslacht een fictie en, zo ja, kan op deze fictie de wettelijke regeling van dit huwelijk worden gebaseerd?' ['Is same-sex marriage a fiction, and if so, can the legal regulation of this marriage be based on this fiction?'], 75 *Nederlands Juristenblad* (2000) p. 1021.

83 K. Boele-Woelki, 'De prijs van het homohuwelijk' ['The price of gay marriage'], *Tijdschrift voor Familie- en Jeugdrecht* (1999) p. 113.

84 *Inter alia*, Wortmann 2000, *supra* n. 63, at p. 84.

85 *Idem*.

86 Waaldijk 1999, *supra* n. 79, at p. 208.

12.3.5. The Act opening civil marriage to same-sex couples (2001)

Since the entry into force of the Act opening civil marriage to same-sex couples in 2001,[87] Article 1:30(1) Civil Code provides that '[a] marriage may be entered into by two persons of a different or of the same sex.' The conditions for the conclusion of a marriage, for instance in respect of age of the marriage candidates, are the same for both same-sex and different-sex couples and there are no differences in regard to interruption of an intended marriage or annulment of a marriage.[88] The legal effects of marriage are also generally the same. For example, both same-sex and different-sex spouses have marital community of property, unless they have provided otherwise by nuptial agreement and they can use each others' family name.[89] There are, however, two important differences in legal effects between same-sex spouses and different-sex spouses. These concern parental rights and the recognition and effects of their marriages abroad.[90] Both these issues will be discussed separately in this Chapter. The gradual awarding of parental rights to same-sex couples – either registered partners or married – is discussed in section 12.3.6 below. The development of the relevant Dutch rules of Private International Law is discussed in section 12.4.

At the time when marriage was opened up to same-sex couples in the Netherlands, there was discussion if registered partnership should be abolished.[91] After all, the primary aim of the introduction of registered partnership had been to provide legal recognition to same-sex relationships and with the opening up of marriage even more equal treatment was established. Both institutes were maintained, however, and still exist today, because there was and is a considerable group of different-sex and same-sex couples that prefer the less value-laden registered partnership over marriage.[92] Over the years the differences between the legal regimes and effects of marriage and registered partnership have been increasingly more levelled out.[93]

A thorny issue in the Dutch debate on the opening up of marriage that has been debated for many years concerns the question of civil registrars with conscientious objections. The government initially held that this was a matter for the municipalities

87 *Wet openstelling huwelijk* [Act on the Opening Up of Civil Marriage] of 21 December 2000, *Stb.* 2001, 9, entry into force on 1 April 2001.

88 Arts. 1:50–1:57 and 1:69–1:77 BW.

89 Arts. 1:9; 1:93 and 1:94 BW.

90 *Kamerstukken II* 1998/99, 26 672, no. 3, p. 4.

91 Some even suggested that civil marriage had to be abolished, leaving religious marriage and civil registered partnership as only choices. Wortmann 2000, *supra* n. 63, at pp. 84–85. Nuytinck regretted the choice not to abolish registered partnership. A.J.M. Nuytinck, 'Het geregistreerd partnerschap wordt niet afgeschaft. Jammer, een gemiste kans!' ['The registered partnership will not be abolished. Shame, a missed opportunity!'], 139 *WPNR* (2008) p. 306.

92 Boele-Woelki et al. 2006, *supra* n. 2, at p. 10. See also *Kamerstukken II* 1999/00, 26 672, no. 5, p. 15 and Waaldijk 2000, *supra* n. 12, at pp. 180–181.

93 A.J.M. Nuytinck, 'Huwelijk en geregistreerd partnerschap groeien steeds verder naar elkaar toe' ['Marriage and registered partnership are growing towards one another'], 142 *WPNR* (2011) p. 1001. As Curry-Sumner explained in 2005, '[t]he two institutions are treated exactly the same with respect to public law (e.g. taxation and social security) and are effectively treated the same for private law issues as well.' Curry-Sumner 2005A, *supra* n. 28, at p. 127.

to find practical solutions to, as long as it was guaranteed that same-sex couples could conclude a marriage in every Dutch municipality.[94] The issue remained controversial for a number of years; it was debated in Parliament on various occasions,[95] it was the subject of various court proceedings,[96] and bodies like the Equal Treatment Commission (now the Human Rights Institute)[97] and the Council of State[98] issued opinions on the question. Only in July 2014, a bill was adopted into law, marking the end of a long debate on this topic. It provided that civil servants with conscientious objections to the conclusion of marriage and/or a registered partnership between to persons of the same sex could no longer be appointed as registrars. It was left to the municipalities to decide on how to deal with already employed registrars with conscientious objections.[99]

12.3.6. Parental rights for same-sex couples

Parental rights for same-sex couples have long been, and still are, a rather debated topic in Dutch politics and society. Although the legislature has consistently tried to stay as close as possible to biological reality in its laws on parentage, it has increasingly departed from that basic principle. Parental rights have gradually been strengthened over the years, particularly for couples consisting of two women. As will be explained below, for reasons of differences in biological reality, the parental rights of gay couples are not as strong as those of lesbian couples.

Before the gradual development of parental rights for same-sex couples is set out, it is important to clarify the distinction between legal parenthood ('*juridisch*

94 *Kamerstukken II* 1998/99, 26 672, no. 12.

95 See also Boele-Woelki et al. 2006, *supra* n. 2, at pp. 15–16.

96 Rb. Leeuwarden 24 June 2003, ECLI:NL:RBLEE:2003:AH8543. In October 2013 District Court 's-Gravenhage upheld the dismissal by the Municipality of 's-Gravenhage of a registrar who refused to conclude marriages between same-sex couples. The Court dismissed the registrar's claim that his freedom of religion had been violated. Rb. 's-Gravenhage 23 October 2013, ECLI:NL:RBDHA:2013:14133.

97 In an Opinion of 2008, the Equal Treatment Commission (ETC) held that municipalities were under an obligation to enforce the law; that they had to refrain from discrimination on grounds of sexual orientation and that they had to see to it that their civil servants carried out their tasks in conformity with these obligations. Only in cases where a civil servant had more tasks than the conclusion of marriages only, there was limited room to give in to such objections. Following the Opinion of the ETC the government asked the Advisory Department of the Council of State to issue an Opinion on the matter. Equal Treatment Commission (now College voor de Rechten van de Mens), *Trouwen? Geen bezwaar!* ['To marry? No objections!'], ECT, Advisory Opinion, No. 2008/04. See also the ECT's earlier Opinions Nos. 2008/40 and 2002/25.

98 The Council of State took the view that while all municipalities were under a legal obligation to guarantee access to marriage for same-sex couples, in individual cases of conscientious objections individual arrangements could be made in order to protect the registrar's right to respect for religion. The Council saw no ground for separate, national legislation on the matter. Advisory Division of the Council of State, Opinion of 9 May 2012, *Kamerstukken II* 2011/12, 33 344, no. 5.

99 Wet van 4 juli 2014 tot wijziging van het Burgerlijk Wetboek en de Algemene wet gelijke behandeling met betrekking tot ambtenaren van de burgerlijke stand die onderscheid maken als bedoeld in de Algemene wet gelijke behandeling [Act of 4 July 2014 amending the General Equal Treatment Act as regards civil servants who make a difference in treatment in the meaning of the General Equal Treatment Act]], *Stb.* 2014, 260.

ouderschap') and parental authority ('*ouderlijk gezag*') under Dutch law. Legal parenthood forms part of the law on lineage ('*afstammingsrecht*') and has, *inter alia*, effect for the name and nationality of the child, as well as for succession.[100] Legal parenthood may be established by operation of the law (i.e., through birth), through the act of recognition or adoption of the child, or through judicial determination of legal parenthood.[101] Under Dutch law, the woman who gives birth to a child is always the legal mother of that child (*mater semper certa est*).[102] The man who is married to the woman who gives birth, is legal parent of the child by operation of the law. In 2014 this was extended to the female spouse and the (male or female) registered partner of the woman who gives birth (see section 12.3.6.4 below).[103] If an unmarried woman gives birth to a child, another person – usually her partner – may become legal parent through adoption, recognition or determination of parenthood by a court.

Parental authority creates rights and duties which are relevant for the upbringing of, and care for, the child.[104] A person who has been vested with parental authority may, for instance, hold the child's property under trust. A person endowed with parental authority is not necessarily also the legal parent of the child. For instance, a person may have parental authority over his or her partner's child, without being the child's legal parent.[105] On the other hand, although the legal parent mostly has parental authority over the child, sometimes a special act may be required to obtain such authority, as in the case of recognition of a natural child by the father.

Dutch society changed considerably in the 1960s. Next to the traditional family, consisting of husband and wife and their children, other forms of family became more common practice and were increasingly socially accepted. These new forms of family life were accorded protection by the ECtHR under Article 8 ECHR, as well as by the Dutch Supreme Court.[106] This was different, however, in respect of parental rights for same-sex couples; with regard to this sensitive issue, the Dutch courts deferred to the legislature.[107] For example, in a judgment of 1989 the Supreme

100 *Kamerstukken II* 2011/12, 33 032, no. 3, p. 1.

101 Arts. 1:198–199 BW.

102 Art. 1:198 BW.

103 As will be explained below (in section 12.3.7.4), this does not apply to same-sex couples consisting of two men.

104 Arts. 1:251–253y BW.

105 Art. 1:245 and 1:253sa BW. The notion 'authority' under Dutch law, covers both parental authority ('*ouderlijk gezag*') and guardianship ('*voogdij*'). Parental authority is exercised by one parent or two parents jointly. Guardianship is exercised by a third person.

106 As acknowledged in a Government Memorandum on 'ways of living together' ('*Notitie leefvormen*'), *Kamerstukken II* 1994/95, 22 700, no. 5, p. 8. The memorandum referred to ECtHR 13 June 1979, *Marckx* v. *Belgium*, no. 6833/74; ECtHR 18 December 1986, *Johnston a.o.* v. *Ireland*, no. 9697/82; ECtHR 26 May 1995, *Keegan* v. *Ireland*, no. 16969/90; HR 6 November 1987, *NJ* 1988 No. 829, ECLI:NL:HR:1987:AB9568; HR 10 March 1989, *NJ* 1990 No. 24, ECLI:NL:1989:AC1343 and HR 23 March 1990, *NJ* 1991 Nos. 149 and 150, ECLI:NL:HR:1990:AD1066.

107 The 1995 government Memorandum on ways of living together held that the case law of the European Court of Human Rights had not – to date – given any indications that it was plausible that the relationship of two persons who were not or who could biologically not be the parents of a child could be qualified as 'family life' within the meaning of Art. 8 ECHR. *Kamerstukken II* 1994/95, 22 700, no. 5, p. 8.

Court ruled that, other than different-sex couples, same-sex couples were not entitled to parental authority, because they could not both establish parental links with the child, mainly because same-sex couples could not conclude a marriage.[108] In 1997 the Supreme Court furthermore rejected a request by a woman who wished to adopt the children born with her female partner within their stable relationship.[109] The Supreme Court held that it was not for the Court to set aside the existing requirement in the Civil Code that only married (hence different-sex) couples could adopt a child.[110]

In the legislative debate on legal recognition of same-sex relationships during the 1990s, parental rights for same-sex couples proved to be a controversial issue.[111] It was clear from the outset that the Registered Partnership Act would not regulate parental rights.[112] The legislature acknowledged, however, that increasingly more children were raised by same-sex couples. While it expressly wished to refrain from giving 'a moral or pedagogical/psychological judgment on the general issue of whether it was in the interest of the child to be cared for by a couple of the same sex', the legislature felt that the interests of the child required that some form of legal protection was given to these forms of *de facto* family life.[113] At the same time it wished to hold on to the principle that the laws on lineage were in line with biological descent.[114] For that reason, the government at the time rejected joint adoption by two persons of the same sex. It furthermore pragmatically held that such an adoption

108 HR 24 February 1989, *NJ* 1989 No. 741, ECLI:NL:HR:1989:AD0648 (with a case note by EAA en EAAL). For an early plea for the right to acknowledge a child as hers for female partners of mothers, see F. van Vliet, 'Erkenning: mensenrecht of mannenrecht?' ['Recognition: human right or men's right?'], 63 *Nederlands Juristenblad* (1988) p. 1263.

109 The two petitioners had been in a stable and committed relationship for many years when one of them conceived a child with the use of sperm from an anonymous donor. The woman subsequently gave birth to two more children. The two women jointly cared for the children and after several years the partner of the mother wished to adopt the children.

110 Even if it were accepted that partnerships between same-sex couples and their relationships with children raised within these relationships deserved greater protection, the way in which to provide for this would still require a political choice, the Court considered. HR 5 September 1997, *NJ* 1998 No. 686, ECLI:NL:HR:1997:ZC2420.

111 For instance, the Emancipatieraad [Emancipation Council], a government-appointed advisory body, held in 1991 (as paraphrased in *Kamerstukken II* 1994/95, 22700, no. 5, p. 6) that it was time to depart from the general principle that laws on lineage had to be in line with biological descent. It advised introducing joint adoption for same-sex couples.

112 Boele-Woelki et al. hold that registered partnership was originally intended to provide for legal regulation of the relationship between partners and not of their relation to children who would be raised within that relationship. According to the authors, this was so because registered partnership was not intended for couples with children. Boele-Woelki et al. 2006, *supra* n. 2, at p. 6. It must also be noted, however, that the Kortmann Commission had yet proposed in 1997 to introduce second-parent adoption and joint adoption for same-sex couples and that, as Vlaardingerbroek pointed out, the government had not rejected this suggestion in its Memorandum on ways of living together of 1998. *Kamerstukken II* 1997/98, 22700 no. 23 and P. Vlaardingerbroek, 'Adoptie door paren van gelijk geslacht' ['Adoption by same-sex couples'], 22 *Tijdschrift voor Familie- en Jeugdrecht* (2000) p. 198.

113 *Kamerstukken II* 1992/93, 22 700, no. 3, p. 18.

114 *Kamerstukken II* 1994/95, 22 700, no. 5, pp. 9–10.

would in all probability not be recognised by foreign countries.[115] The government was considering, however, the introduction of single-parent adoption.[116]

The first actual step on the path to recognition of parental rights for same-sex couples was the granting of parental authority. In the beginning of the 1990s a bill was drafted following which (same-sex) registered partners could apply for parental authority over their partner's child.[117] The Act on joint parental authority for registered partners entered into force on 1 January 1998, the same date as the Act Introducing Registered Partnerships.[118]

12.3.6.1. Early developments; single-parent adoption

In 1998, single-parent adoption was introduced in Dutch law.[119] Because no discrimination on grounds of sexual orientation was permitted, persons with a homosexual orientation or in a same-sex relationship were also enabled adopt a child.[120] If the adoptive parent had a (same-sex) partner, he or she could subsequently apply for parental authority over the child. It was furthermore provided that unmarried different-sex couples could jointly adopt a child from the Netherlands.[121] Adoption by the same-sex partner of a child's legal parent (second-parent adoption (in Dutch: '*partneradoptie*')) and joint adoption by same-sex couples were not introduced at the time, because to establish such parental links between a child and two persons of the same sex was considered to be too big an abstraction from biological reality.[122]

In the meantime, however, support for greater legal protection of the links between children and the same-sex couples caring for them, was rapidly growing.[123] In 1996 Parliament had adopted two motions which held that joint adoption by same-sex

115 *Idem*, at p. 10.

116 *Idem*, at p. 1.

117 *Kamerstukken II* 1993/94, 23 714, nos. 1–3. Because parental authority had no effect on the laws on lineage, this approach was considered to fit in with two basic principles underlying the Dutch family laws, namely that the laws on lineage in essence reflected the biological parentage and that parental authority, safe a few exceptions, belonged to those from whom the child was descended. *Kamerstukken II* 1992/93, 22 700, no. 3, p. 17.

118 Wet van 30 oktober 1997 tot wijziging van, onder meer, Boek 1 van het Burgerlijk Wetboek in verband met invoering van gezamenlijk gezag voor een ouder en zijn partner en van gezamenlijke voogdij [Act of 30 October 1997 amending, *inter alia*, Volume 1 of the Civil Code with a view to introduction of joint authority for a parent and his partner and of joint guardianship], *Stb.* 1997, 506, entry into force per 1 January 1998.

119 Wet van 24 december 1997 tot herziening van het afstammingsrecht alsmede van de regeling van adoptie [Act of 24 December 1997 amending the law on descent as well as the adoption regulations] *Stb.* 1997, 772, entry into force per 1 April 1998. See also Vliet, van 1998, *supra* n. 61, at p. 17.

120 Vlaardingerbroek 2000, *supra* n. 112, at p. 200. Second-parent adoption had been possible for different-sex couples since 1979.

121 Art. 1:227 BW (old). For a clarification that the couple had to be of different sex, see also *Kamerstukken II* 1995/96, 24 649, no. 3, p. 14. Interstate adoption was the only possible for married couples or for individuals. Art. 1 Wet opneming buitenlandse kinderen ter adoptie (Wobka) [Act on the fostering of children from foreign countries with the purpose of adoption].

122 See also Curry-Sumner 2005A, *supra* n. 28, at pp. 120–121 and Vlaardingerbroek 2000, *supra* n. 112, at p. 202.

123 For a plea for greater protection of these links see Waaldijk 2000, *supra* n. 12, at pp. 177–179.

couples had to introduced,[124] and the subsequently appointed Kortmann II Commission (see above) had taken the same view.[125] The government also endorsed the viewpoint that any child raised and cared for by a same-sex couple in a durable relationship was entitled to legal protection of the links between this couple and the child[126] and a bill introducing adoption by same-sex couples was tabled in 1999.[127]

When the opening up of marriage to same-sex couples was debated in Parliament, however, the debate on parental issues was separated from the debate on the actual opening of marriage. Following the advice of the Kortmann Commission II, the Explanatory Memorandum to the Act opening up marriage expressly mentioned that a marriage between same-sex partners would not establish any parental links by operation of the law.[128] Measures to enforce the protection of the links between the child and the same-sex couple caring for it, were introduced separately, but simultaneously.

12.3.6.2. 2001: Joint adoption of children from the Netherlands; second-parent and successive adoption and joint parental authority

By Act of 2001, same-sex couples (either married, registered or in a stable relationship) were enabled to jointly adopt a child from the Netherlands.[129] Because annually only 50 to 100 children from the Netherlands were given up for adoption,[130] in practice only a limited number of same-sex couples could establish a family through this newly introduced institute of joint adoption. The simultaneous introduction of second-parent and successive adoption for same-sex couples,[131] following which a same-sex married, registered or stable partner was able to adopt the (genetic or adopted) child of his or her partner, was of greater practical relevance.[132]

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124 *Kamerstukken II* 1995/96, 22 700, nos. 14 and 18.

125 Rapport Commissie inzake openstelling van het burgerlijk huwelijk voor personen van hetzelfde geslacht [Report of the Commission on opening up of civil marriage to couples of the same sex] (The Hague, Ministry of Justice, October 1997) pp. 9–10. The Commission furthermore recommended providing for parental authority by operation of the law when a child was born within a registered partnership and to provide that this form of joint authority had effect for the laws on inheritance. See *Kamerstukken II* 1997/98, 22 700, nos. 23 and *Kamerstukken II* 1999/00, 22 700, no. 31.

126 *Kamerstukken II* 1998/99, 26673, no. 3, p. 2.

127 *Kamerstukken II* 1998/99, 26 673, nos. 1–3. See also *Kamerstukken II* 1997/98, 22 700, no. 23, p. 3 and F. van Vliet, 'Door de zij-ingang naar niemandsland?' ['Through the side entrance into no man's land?'], 16 *Nemesis* (2000) p. 41. The coalition agreement of 1997 yet provided that a bill to this effect was to be tabled by the end of 1998 and this was done accordingly. *Kamerstukken II* 1997/98, 26 024, no. 9, p. 68. See also *Kamerstukken II* 1997/98, 22 700, no. 23.

128 *Kamerstukken II* 2001/02, 27 762 no. 3, p. 4. See also *Kamerstukken II* 1997/98, 22 700, no. 23, p. 2.

129 Wet adoptie door personen van hetzelfde geslacht [Act on adoption by persons of the same sex] Act of 21 December 2000, *Stb.* 2001, 10. The Act entered into force 1 April 2001, the same date on which the Act Opening up Marriage entered into force. See also Vlaardingerbroek 2000, *supra* n. 112 and A.W.M. Willems, 'Adoptie door homo-ouders en de positie van de spermadonor' ['Adoption by gay parents and the position of the sperm donor'], 22 *Tijdschrift voor Familie- en Jeugdrecht* (2000) p. 226.

130 *Kamerstukken II* 1994/95, 22 700, no. 5, p. 13. See also Vlaardingerbroek 2000, *supra* n. 112, at p. 200.

131 Act on adoption by persons of the same-sex (Wet adoptie door personen van hetzelfde geslacht), Act of 21 December 2000, *Stb.* 2001, 10. Entry into force 1 April 2001.

132 Vlaardingerbroek 2000, *supra* n. 112, at pp. 200–201.

Following the new adoption laws, any couple or any partner of a legal parent could petition to the Court for a joint adoption, a second-parent adoption or a successive adoption, if the partners had lived together uninterruptedly for a period of at least three years and had jointly cared for the child for a period of at least one uninterrupted year immediately preceding the adoption request.[133] Next to the yet existing requirement that any adoption had to be in the best interests of the child,[134] a new requirement was introduced that an adoption could only be approved if the child could not expect anything from its 'original parent(s)' ('*oorspronkelijke ouder(s)*').[135] This could concern both a legal and a genetic parent.[136]

International (interstate) adoption was not (yet) introduced for same-sex couples, as the legislature considered that 'not appropriate' given existing international relations.[137] In fact, the Act on interstate adoption was explicitly amended to clarify that the term 'spouses' in this context referred to different-sex spouses only.[138] According to the government, this was 'no principled position', but concerned a practical measure which was required not to imperil the relations with countries of origin of adoptees and not to create false expectations with adoptive parents.[139] The State Commission for Private International Law criticised the discriminating character of this rule in its report on the Act opening civil marriage to same-sex couples.[140]

In addition to the adoption laws, the laws on parental authority were amended in 2001. Same-sex spouses and registered partners were vested with joint parental authority, by operation of law, over a child born during their marriage or registered

133 Art. 1:227(3) and Art. 1:228(1)(f) BW.

134 Art. 1:227(2) BW.

135 Art. 1:227(3) BW. See also *Kamerstukken II* 1998/99, 26 673, no. 3, p. 1. For an example of a judgment in which this condition was applied see Hof Amsterdam 4 May 2010, ECLI:NL:GHAMS:2010:BM3903.

136 See also M.J. Vonk, *Commentaar op Burgerlijk Wetboek Boek 1 art. 227 (en 228) (artikeltekst geldig vanaf 01-01-2009)* [Commentary on the Civil Code, Book 1 (art. 227 (and 228) (version valid as of 01-01-2009)] (Sdu Opmaat (online) 2011) para. C.3.1.

137 Reference was made to a survey by the Ministry of Justice into six countries of origin and six countries of destination in the adoption context of 1997, which had shown a strong preference for married couples for interstate adoption. *Kamerstukken II* 1998/99, 26 673, no. 3, p. 3 and *Kamerstukken II* 1996/97, 22 700, no. 22. Critical on this point: Waaldijk 1999, *supra* n. 79, at pp. 202–203. The author considered it 'unnecessary' to codify other countries' policies in the Dutch law.

138 Art. II Wet van 8 maart 2001 tot aanpassing van wetgeving in verband met de openstelling van het huwelijk en de invoering van adoptie door personen van hetzelfde geslacht [Act of 8 March 2001 amending legislation with a view to the opening up of marriage and the introduction of adoption by couples of the same sex], *Stb.* 2001, 128.

139 *Kamerstukken II* 1999/00, 27 256, no. 4, pp. 10–11.

140 Staatscommissie voor het Internationaal Privaatrecht, *Advies inzake het internationaal privaatrecht in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht* [Advice concerning Private International Law in relation to the opening up of marriage for persons of the same sex], December 2001, pp. 26–27, online available at www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2001/12/01/internationaal-privaatrecht-in-verband-met-de-openstelling-van-het-huwelijk-voor-personen-van-hetzelfde-geslacht/internationaalprivaatrechtinverbandmetdeopenstellingvanhethuwelijkvoorpersonenvanhetzelfdegeslacht.pdf, visited May 2010, as well as at www.justitie.nl/themas/wetgeving/rapporten_en_notas/privaatrecht/Staatscommissie_IPR.asp, visited May 2010.

partnership, provided the child had no other legal parent.[141] Because of the latter restriction, the new provision was primarily relevant for couples consisting of two women, who could now exercise joint parental authority in situations where there was no father, for instance because the child had been conceived with the use of anonymously donated sperm.[142] The newly introduced Article 1:253 (sa) Civil Code did and does not apply to couples consisting of two men (whether married or registered) because in that situation there is in principle always another legal parent, namely the mother of the child.[143]

The 2001 amendments did not end the debate on parental rights for same-sex couples. Various parties insisted on a further equalisation of the parental rights of same-sex couples – in particular couples consisting of two women – with those of different-sex couples. During the deliberations on the opening up of marriage, Parliament had adopted a motion requesting the government to explore the legal options, including recognition, which could achieve the greatest (as reasonably) possible equalisation of the legal position of children born within a relationship of two women with that of children born within a different-sex relationship.[144] In response, the government maintained that full equalisation of the position of same-sex couples with that of different-sex couples in respect of parental links and the laws on lineage, would be too far removed from the basic principle underpinning Dutch family laws that legal parenthood in principle corresponded with genetic parenthood.[145] The government furthermore felt that such equalisation paid too little attention to the fact that a third party could be involved and that it fell out of pace with international standards.[146]

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141 Art. 1: 253 BW, introduced by Wet tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het gezamenlijk gezag van rechtswege bij geboorte tijdens een geregistreerd partnerschap [Act Amending Volume 1 of the Civil Code with a view to joint authority by operation of the law after birth in a registered partnership], Act of 4 October 2001, *Stb.* 2001, 468 entry into force on 1 January 2002, *Stb.* 2001, 544.

142 As Curry-Sumner and Vonk point out, lesbian couples were the primary addressees of the new Act. I. Curry-Sumner and M.J. Vonk, 'Adoptie door paren van hetzelfde geslacht: wie probeert de wet te beschermen?', 28 *Tijdschrift voor Familie- en Jeugdrecht* (2006) p. 39 at p. 39. The authors refer to *Kamerstukken II* 1998/99, 26 673, no. 3, p. 3.

143 This follows from the above discussed *mater semper certa est* rule. In those situations Art. 1:253 (t) BW applies, which provides that the partner of a parent endowed with parental authority may apply for parental authority, even in situations where another person has established parental links with the child. For such a request for joint parental authority to be granted, the couple must have jointly taken care of the child for a period of at least one year immediately preceding the request for parental authority by the partner and the parent must have exercised parental authority for a period of at least three years immediately preceding his/her partner's request for parental authority. The granting of joint parental authority is refused if, in the light of the interests of the other parent, there is a reasonable fear that the awarding of such joint parental authority would neglect the child's interests (Art. 253t (2) and (3) BW).

144 *Kamerstukken II* 1999/00, 26 672 and 26 673, no. 9.

145 Boele-Woelki et al. 2006, *supra* n. 2, at p. 21, referring (in footnote 140) to: *Kamerstukken II* 2003/04, 26 672 and 26 673, no. 14, pp. 3–5 and *Kamerstukken II* 2004/05, 26 672 and 26 673, no. 15. The Explanatory Memorandum to the Act Opening up marriage had also yet held that to assume that a child born within the relationship of two women descended from both women, would unacceptably stretch reality and would create too big a distance between biological truth and law. *Kamerstukken II* 1998/99, 26 672, no. 3, pp. 4–5.

146 *Idem*.

Because of these considerations the improvement of the legal position of children born within lesbian relationships was initially established through further amendment of the adoption laws. While the first legislative initiatives to this effect were taken in 2005, it took until 2009 before a new Act entered into force.[147]

12.3.6.3. 2009: Interstate adoption by same-sex spouses and simplification of second-parent adoption

An important change brought about by the 2009 Act was that interstate adoption was made possible for same-sex spouses.[148] In 2012, the Netherlands furthermore ratified the Revised CoE Adoption Convention[149] which provides for the possibility of joint adoption by same-sex couples.[150] In practice, however, the practical effect of this change so far has been limited. Not many same-sex spouses are able to jointly adopt a child from abroad, as many foreign countries do not want to collaborate in such an interstate adoption.

Moreover, the 2009 amendments simplified the procedures for second-parent adoption, especially for couples consisting of two women.[151] The three year cohabitation condition (see above),[152] was lifted for situations where the child was born 'within the relationship' of the parent and the adoptive parent.[153] For the situation where a child was born within the relationship of two female life partners, the condition was lifted that they had to have jointly taken care of the child for a

147 Wijziging van Boek 1 van het Burgerlijk Wetboek in verband met verkorting van de adoptieprocedure en wijziging van de Wet opneming buitenlandse kinderen ter adoptie (Wobka) in verband met adoptie door echtgenoten van gelijk geslacht tezamen. Act of 24 October 2008 [Act amending Volume 1 of the Civil Code with a view to shortening of the adoption procedure and amendment of the Act on the fostering of children from foreign countries with the purpose of adoption, in relation to joint adoption by same-sex spouses], *Stb.* 2008, 425, entry into force per 1 January 2009. See also L. van Hoppe, 'Wijziging van Boek 1 van het Burgerlijk Wetboek in verband met verkorting van de adoptieprocedure en wijziging van de Wet opneming buitenlandse pleegkinderen ter adoptie in verband met adoptie door echtgenoten van gelijk geslacht tezamen' ['Amendment of Book 1 of the Civil Code in relation to the adoption procedure and amendment of the Act placement of foreign foster children for adoption in relation to joint adoption by same-sex spouses'], 48 *Ars Aequi* (2009) p. 191.

148 Art. III Wet van 24 oktober 2008 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met verkorting van de adoptie-procedure en wijziging van de Wet opneming buitenlandse kinderen ter adoptie in verband met adoptie door echtgenoten van gelijk geslacht tezamen [Act amending Chapter 1 of the Civil Code concerning the shortening of the adoption procedure and amendment of the Act on the fostering of children from foreign countries with the purpose of adoption as regards joint adoption by couples of the same sex], Act of 24 October 2008, *Stb.* 2008, 425, entry into force per 1 January 2009.

149 European Convention on the Adoption of Children (Revised) CETS No.202 (Strasbourg 2008).

150 Art. 7(2) European Convention on the Adoption of Children (Revised).

151 Wet van 24 oktober 2008 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met verkorting van de adoptie-procedure en wijziging van de Wet opneming buitenlandse kinderen ter adoptie in verband met adoptie door echtgenoten van gelijk geslacht tezamen [Act amending Chapter 1 of the Civil Code concerning the shortening of the adoption procedure and amendment of the Act on the fostering of children from foreign countries with the purpose of adoption as regards joint adoption by couples of the same sex], Act of 24 October 2008, *Stb.* 2008, 425, entry into force per 1 January 2009.

152 The cohabitation condition set the rule that the legal parent and his or her partner had to have lived together for a period of at least three uninterrupted years, immediately preceding the adoption request.

153 The new Art. 1:227(2) BW.

period of at least a year.[154] Further, it was provided that a request for second-parent adoption was as a rule granted, where the child was born in a relationship of two women and was conceived with the use of donated gametes in correspondence with the Act Donor Information Artificial Reproduction.[155] Lastly, the 2009 Act stipulated that the procedure for second-parent adoption could be initiated before the child's birth and would have effect from the date of birth, provided no existing parental links were severed by the adoption.[156] Because of the latter condition, this rule did and does not apply to couples consisting of two men, as in that situation the parental links between the mother and the child stand in the way of an immediately effective second-parent adoption.

Some Dutch scholars have concluded that, as a result of these amendments to the adoption laws, the legal position of a child born in a relationship between two women was as much as possible equalised with that of a child born within a different-sex relationship.[157] Others felt that full equalisation required something more than amendments to the adoption laws only. In their view, after all, adoption procedures were time consuming and the law as it stood provided no solution to the deadlock situation where a mother and the genetic father of a child disagreed on who should be the second legal parent of the child, the female partner of the mother or the genetic father of the child.[158]

12.3.6.4. 2014: Legal parenthood by operation of the law for female couples

In 2007, when the bill on interstate and second-parent adoption for same-sex couples was under debate, Parliament adopted a motion which called for the introduction of recognition and legal parenthood by operation of the law for situations where a child was born within the relationship of two women.[159] The government subsequently appointed an advisory expert commission, the Kalsbeek Commission, which was

154 The new Art. 1:228(3) BW. See *Kamerstukken II* 1999/00, 26 673, no. 15.

155 The new Art. 1:227(4) BW. This would only be different if such adoption would be evidently not in the child's interests or if the conditions of Art. 1:228 BW were not met. For a case where a Court granted an adoption request to the same-sex former spouse of the mother (the original 'co-mother') instead of the new same-sex partner of the mother (as desired by the mother), see Rb. Breda 27 July 2011, ECLI:NL:RBBRE:2011:BR2383.

156 New Art. 1:230(2) BW. See also M.J.C. Koens, *Groene Serie Personen- en Familierecht, 2.4 Adoptie door personen van gelijk geslacht bij: Burgerlijk Wetboek Boek 1, Artikel 227 [Verzoek tot adoptie]* [Green Series Family Law, 2.4 Adoption by persons of the same sex: Civil Code Book 1, Article 227 [Adoption reguest]] (Kluwer, update 12 December 2011) and P. Vlaardingerbroek, *Groene Serie Personen- en Familierecht, 1 Geregistreerd partnerschap; algemeen bij: Burgerlijk Wetboek Boek 1, Titel 5A Het geregistreerd partnerschap* [Green Series Family Law, 1 Registered Partnership, general: Civil Code Book 1, Title 5A, The registered partnership] (Kluwer, update 1 April 2011). In 2011 the Central Appeals Tibunal ruled in a case originating from 2006 (hence before the possibility of prenatal adoption was introduced for same-sex couples) that there were no particularly serious reasons which could justify a difference in treatment between a child born within a same-sex marriage and a child born within a different-sex marriage with respect to half orphan's benefits. CRvB 24 June 2011 (dec.), ECLI:NL:CRVB:2011:BQ9855.

157 Vlaardingerbroek 2011, *supra* n. 156.

158 *Kamerstukken II* 2011/12, 33 032, no. 3.

159 *Kamerstukken II* 2006/07, 30 800 VI, no. 60.

asked to explore the legal options, other than adoption, to establish legal parenthood for a so-called 'co-mother'.[160] Taking the interests of the child and the principle of equal treatment as a point of departure, the Kalsbeek Commission was of the opinion that legal protection of social parenthood had to prevail over holding on to (the presumption of) biological parenthood.[161] It recommended enabling co-mothers to establish parental links with their partner's child through recognition and advised making judicial determination of parenthood possible for co-mothers under the same conditions as applied to male partners of mothers. The Commission held it a matter for the legislature, however, to decide upon legal parenthood for the co-mother by operation of the law in situations where a child was born within a marriage between two women.[162]

The legislature followed the advice of the Kalsbeek Commission in a bill tabled in 2011.[163] Taking the interests of the child as primary consideration, the bill provided for legal parenthood for the co-mother by operation of the law, where a child was born within marriage between two women and where it was established that the genetic father of the child would play no role in the child's upbringing. This would be the case where the child was conceived with the use of sperm from a sperm bank, situation in which the donor was not known to the two women. In all other situations, so it was proposed, the co-mother could recognise the child as her child. Further, the legal parenthood of a co-mother could be judicially established if, as life partner of a mother, she had agreed with an act which could have resulted in the begetting of the child.[164] At the same time, some improvement of the legal position of the sperm donor who maintained close ties with the child, was proposed. In situations where the mother refused to give permission to this donor to recognise the child as his, the donor could petition to the court for substitute permission.[165]

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160 *Kamerstukken II* 2006/07, 30 551, no. 8. The term 'co-mother' (in Dutch 'duomoeder' or 'meemoeder') refers to the woman in a lesbian relationship who is not the birth mother but cares for the child that was born in or grows up in their relationship.

161 Commissie lesbisch ouderschap en interlandelijke adoptie (Commissie Kalsbeek) [Commission on lesbian parenthood and interstate adoption (Kalsbeek Commission)], *Lesbisch ouderschap* [Lesbian parenthood], Report of October 2007, online available at www.aoo.nl/downloads/2007-10-31-MvJ.pdf, visited March 2010.

162 *Kamerstukken II* 2011/12, 33 032, no. 3.

163 *Kamerstukken II* 2011/12, 33 032, no. 2. The bill was generally positively received by interest groups during the internet consultation by the Ministry of Justice, as well as in academia. See M.J. Vonk, 'Het conceptwetsvoorstel lesbisch ouderschap onder de loep' ['A closer look at the bill on lesbian parenthood'], 141 *WPNR* (2010) p. 348 and www.internetconsultatie.nl/ouderschapduomoeder, visited January 2011. See also A.J.M. Nuytinck, 'Concept-wetsvoorstel lesbisch ouderschap: meemoeder wordt juridisch moeder van rechtswege of door erkenning' [Draft bill lesbian parenthood: co-mother becomes legal mother by operation of the law or by recognition'], 141 *WPNR* (2010) p. 343. Forder and Bakker argued that the Bill paid too little attention to the rights of the child. C.J. Forder and R. Bakker, 'Kroniek van personen- en familierecht' ['Chronicle of family law legislation'], 85 *Nederlands Juristenblad* (2010) p. 1796.

164 This entailed, *inter alia*, that the co-mother could be subjected to a maintenance order on the basis of Arts. 11:394 and 11:395(b) BW.

165 *Kamerstukken II* 2011/12, 33 032, no. 3, p. 5.

This bill meant a change in the existing family laws because – next to genetic parenthood – social parenthood was firmly introduced as ground for the establishment of legal parenthood.[166] It was particularly in respect of this 'fundamental' change that the Council of State was very critical in its Advisory Opinion on the bill.[167] The Council failed to see a justification for the proposed departure of the basic principle underpinning Dutch family laws that legal parenthood in principle corresponded with genetic parenthood.

The Council of State furthermore warned that the forms of legal parenthood for co-mothers as proposed in the bill would not be recognised in other countries. The Kalsbeek Commission had been of the opinion that such risks should not prevent the Dutch legislature from once again taking the role of a 'model country', as it also had done by the opening up of marriage and the introduction of joint adoption for same-sex couples.[168] During the debate in Parliament on the bill possible legal problems that co-mothers could encounter abroad were also a point of discussion, but this risk was generally accepted and it was hoped that this could be remedied as much as possible through informing the public and other countries on this point.[169]

Parliament ('*Tweede Kamer*') adopted the bill on lesbian parenthood in October 2012.[170] It was adopted by the Senate ('*Eerste Kamer*') on 12 November 2013.[171] On that same date the Senate adopted another bill that had been tabled by the government in the meantime. This bill provided for rules extending the co-mothers regime to female registered partners.[172] The government regarded this as the tailpiece of the existing (or soon to be introduced) legislation, which provided for legal parenthood for the male spouse, the female spouse and the male registered partner of a woman who gives birth to a child.[173] The bill did not focus on legal parenthood by operation of the law in respect of relationships between two men, as it was held that a child 'cannot be born in a relationship of two men'.[174]

Both Acts entered into force on 1 April 2014.[175] Since that time Article 1:198 of the Civil Code provides that the mother of a child is the woman (a) who gave birth to the

166 *Idem*, p. 4.

167 Advisory Division of the Council of State, Opinion of 15 April 2011, W03.11.0034/II, *Kamerstukken II* 2011/12, 33 032, no. 4.

168 A.J.M. Nuytinck, 'Lesbisch ouderschap. Bespreking van het rapport van de Commissie lesbisch ouderschap en interlandelijke adoptie (commissie-Kalsbeek)' ['Lesbian parenthood. Review of the Report lesbian parenthood and interstate adoption (Kalsbeek Commission)'] 139 *WPNR* (2008) p. 44.

169 The Secretary of State for Justice acknowledged that if a lesbian couple moved to another State, the best solution could be that the co-mother could adopt the child, as that form of legal parenthood was most likely to be recognised by the other State. *Handelingen II* 2011/12, 13, pp. 13, 18 and 68.

170 *Kamerstukken II* 2012/13, 33 032, no. 16.

171 *Handelingen I* 2013/14, pp. 9–7.

172 *Kamerstukken II* 2012/13, 33 526, no. 2.

173 *Kamerstukken II* 2012/13, 33 526, no. 3, p. 2.

174 *Kamerstukken II* 2011/12, 33 032, no. 3, p. 2 and *Kamerstukken II* 2012/13, 33 526, nos. 2–3.

175 Wet van 25 november 2013 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met het juridisch ouderschap van de vrouwelijke partner van de moeder anders dan door adoptie [Act of 25 November amending Volume 1 of the Civil Code, with a view to legal parenthood of the female partner of the mother other than by means of adoption], *Stb*. 2013, 480 and Wet van 27 november 2013

child; or (b) who is at the moment of birth the spouse or the registered partner of the woman who gives birth to the child, if this child was conceived as a result of IVF with the use of a donor not known to the woman and in accordance with the Donor Information Act; (c) who has recognised the child; (d) whose parenthood has been judicially established; or (e) who has adopted the child.

During the parliamentary debates on the bills on lesbian parenthood the question was raised if the law was also to provide for parental authority for multiple parents. The Secretary of State for Justice promised to have a research conducted on this issue.[176] In February 2014 the '*Wetenschappelijk Onderzoek- en Documentatiecentrum*' (WODC), the Research and Documentation Centre of the Ministry of Security and Justice, published a report,[177] that, *inter alia*, addressed the situation where a child is born in a relationship between two women with the use of a sperm donor who is known to the women. The authors of the report held that any action undertaken by the legislature had to put the best interests of the child first. However, as these interests required different approaches, they could not recommend one particular approach. Also, the report questioned whether any legislative action in respect of parental authority was at all necessary in these situations, as only few problems had been reported by the families concerned in a survey conducted by the researchers. The relations between these parties were generally good. The researchers considered a more inclusive approach, addressing both parental authority and legal parenthood for multiple parents, fruitful, and they therefore welcomed the appointment of the State Commission on Legal Parenthood ('*Staatscommissie Herijking Ouderschap*'). This Commission has the mandate to advise on possible amendments of the Civil Code in respect of: (a) legal parenthood, (b) multiple parenthood and parental authority by multiple parents, and (c) surrogate motherhood.[178]

12.3.6.5. Access to AHR treatment

As explained in Chapter 6, section 6.3.2, the standard applied in decision-making around reproduction in the Netherlands is the reasonable well-being of the child. While IVF clinics have a considerable discretion when it comes to access to treatment,[179] the categorical exclusion of certain groups in society is not allowed.[180] This certainly entails that exclusion of all same-sex couples or individuals with

tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering mede in verband met de evaluatie van de Wet openstelling huwelijk en de Wet geregistreerd partnerschap [Act of 27 November 2013 amending the Civil Code and the Civil Proceedings Act, *inter alia*, with a view to the evaluation of the Act opening up marriage and the Registered Partnership Act], *Stb.* 2013, 486.

176 *Handelingen II* 2012/13, pp.13–18.

177 M.V. Antokolskaia et al., *Meeroudergezag: een oplossing voor kinderen met meer dan twee ouders? Een empirisch en rechtsvergelijkend onderzoek* [Parental authority by multiple parents: a solution for children who have more than two parents? An empirical and comparative legal study] (Den Haag, Boom Juridische uitgevers 2014).

178 As discussed more extensively in Ch. 6, section 6.3.8.

179 See Ch. 6., section 6.3.2. See also Rb. 's-Gravenhage (pres.) 17 July 1990, ECLI:NL:RBSGR:1990:AD1197.

180 NVOG, *Modelprotocol Mogelijke morele contra-indicaties bij vruchtbaarheidsbehandelingen* [Model Protocol concerning possible moral counter-indications for fertility treatment], p. 3, online

a homosexual orientation is prohibited and the present author is not aware of any cases where access was nonetheless refused to same-sex couples. Still, in practice their access to AHR treatment may be more limited when compared to different-sex couples. This may, for instance, be so because not all clinics cooperate with a sperm bank.[181]

12.4. Same-sex relationships and cross-border movement

12.4.1. Cross-border movement: some statistics

Statistics Netherlands keeps statistics on the number of registered partnerships and marriages concluded by same-sex couples on an annual basis in the Netherlands. On average two per cent of the total number of marriages annually concluded concerns same-sex spouses.[182] In respect of registered partnerships this percentage was much higher in the first years after registered partnerships were introduced (65 per cent in 1998; 53 per cent in 1999 and 55 per cent in 2000), but after the opening up of marriage in 2001, this number decreased to a steady 5 to 6 per cent of the total number of partnerships annually registered in the Netherlands.[183] For marriages a (detailed) breakdown in country of birth of the spouses is available.[184] For example, in 2001, 437 same-sex marriages were concluded whereby at least one partner was born outside the Netherlands. In 2013, this number had dropped to 305. The numbers do not make clear whether these partners have Dutch nationality and/or how long they had been resident in the Netherlands by the time they got married. There are no statistics available in respect of the country of birth, nationality or country of residence of persons entering into a registered partnership under Dutch law. On the basis of statistics of the Civil Registry of the Municipality of Amsterdam, Jessurun d'Oliveira estimated in 1999 that approximately 5 per cent of the total number of

available at www.nvog.nl/Sites/Files/0000000935_NVOG%20Modelprotocol%20Mogelijke%20Morele%20Contraindicaties%20Vruchtbaarheidsbehandelingen%202010.pdf, visited June 2014.

181 As explained in Ch. 6, section 6.3.2, the Dutch government has held this to be acceptable. *Kamerstukken II* 32 500 XVI, no. 112, p. 3. See also Dutch Equal Treatment Commission, Decision 2009-31.

182 Data of *Centraal Bureau voor de Statistiek* [*Statistics Netherlands*] of 28 October 2011 give the following numbers per year. The number between brackets is the total number of marriages concluded in the Netherlands in the relevant year: 2001: 2,414 (73,190); 2002: 1,838 (76,393); 2003: 1,499 (72243); 2004: 1,210 (66,847); 2005: 1,150 (65,859); 2006: 1,212 (60,102); 2007: 1,341 (67,152); 2008: 1,408 (69,971); 2009: 1,385 (67,663); 2010: 1,354 (67,051). Online available at www.statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=60036NED&D1=1-2,4-16,74,128&D2=a&HDR=G1&STB=T&VW=T, visited February 2013. Hence, only in the year 2001, when marriage was opened up, was the percentage of same-sex marriages slightly higher, namely 3 per cent.

183 Data of *Statistics Netherlands* of 27 June 2012 give the following numbers per year. The number between brackets is the total number of partnerships registered in the Netherlands in the relevant year: 1998: 3,010 (4,626); 1999: 1,757 (3,257); 2000: 1,600 (2,922); 2001: 530 (3,377); 2002: 547 (8,321); 2003: 542 (10,119); 2004: 583 (11,156); 2005: 608 (11,307); 2006: 619 (10,801); 2007: 605 (10,550); 2008: 611 (10,842); 2009: 495 (9,497); 2010: 487 (9,571); 2011: 481 (9,945). Online available at www.statline.cbs.nl/StatWeb/publication/?VW=T&DM=SLNL&PA=37772ned&D1=35-47&D2=48-l&HD=120104-1452&HDR=G1&STB=T, visited 21 February 2013.

184 See www.statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=60036NED&D1=107-127,161-181,213&D2=5-17&HDR=G1&STB=T&VW=T, visited September 2014.

partnerships that were annually registered in the Netherlands involved non-Dutch nationals.[185]

In respect of (im)migration there are only very few relevant statistics available. The present author is not aware of any Dutch statistics on the number of Dutch same-sex married and registered couples that migrate to other (EU Member) States. There are furthermore no detailed statistics available on the number of same-sex couples or partners from other (EU) countries that are annually granted (or refused) residence rights in the Netherlands. On the basis of the data available it may be very tentatively estimated that annually approximately 50 same-sex partners are admitted to the Netherlands under Directive 2004/38/EC,[186] while approximately 2 per cent of the requests for family reunification under Directive 2003/86/EC concern same-sex partners.[187]

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185 H.U. Jessurun d'Oliveira, 'Het geregistreerd partnerschap, het 'homohuwelijk' en het IPR' ['Registered partnership, 'gay marriage' and Private International Law'], 74 *Nederlands Juristenblad* (1999) p. 305 at p. 305.

186 These estimations are based on K. Waaldijk et al., *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity, Comparative legal analysis, Thematic study Netherlands, 2010 Update*, European Union Agency for Fundamental Rights 2010, online available at www.fra.europa.eu/sites/default/files/fra_uploads/1363-LGBT-2010_thematic-study_NL.pdf, visited February 2013. The authors hold on p. 25: '[…] for a recent study a sample of 336 cases were examined involving successful applications of non-EU citizens claiming residence in the Netherlands on the basis of EU law, because their spouse/partner was a EU (or EEA or Swiss) citizen. It was found that 15 of these cases involved a same-sex partner. The sample of 336 represented around 10 per cent of all such cases having been decided in the years 2005–2008. It should be noted however that only for two thirds of all honoured applications of that period the study could establish both the citizenship of the sponsor and the type of (family) relationship between applicant and sponsor. Furthermore, the number of successful applications increased from around 900 in 2005 to around 2,500 in 2008, while the annual number of rejected applications increased similarly from around 100 to around 300 during that period. Taking all that into account, it could be estimated – very tentatively – that in these four years perhaps over 200 same-sex partners were admitted to the Netherlands under Directive 2004/38/EC.' The report refers in (in footnote 96) to: A. Schreijenberg et al*., Gemeenschapsrecht en gezinsmigratie. Het gebruik van het gemeenschapsrecht door gezinsmigranten uit derde landen* [Community law and family migration. The use of Community law by third-country migrants for family migration] (The Hague Ministry of Justice 2009), pp. 11, 16, 29, 31 and 83, online available at www.wodc.nl/onderzoeksdatabase/neveneffecten-van-toepassing-van-het-europese-gemeenschaps-recht-bij-gezinsmigratie.aspx?cp=44&cs=6796, visited June 2014.

187 Waaldijk et al. 2010, *supra* n. 187, have noted (at p. 30): 'Not many figures are available on the number of same-sex partners that have successfully applied for family reunification/formation. However, a recent study of the period July 2003 to February 2006 yielded some figures. Over that period of 32 months there were 23,407 successful applications for a provisional residence permit for a spouse or partner. The study found that 461 of these cases involved same-sex partners, i.e. two per cent. Same-sex partners were much more often involved in the 8,296 cases where the sponsor was a Dutch citizen (3.4 per cent or 282 permits) than in the 15,111 cases where the sponsor was a foreigner (1.2 per cent or 179 permits). It should be noted however that the total number of successful applications between 01.07.2003 and 01.11.2004 was more than 50 per cent higher than that between 01.11.2004 and 01.03.2006. This is probably due to the increased income and age requirements for family formation that took effect on 1.11.2004. Since then the sponsor needs to be at least 21 years of age, and needs to have an income equal to at least 120 per cent of the minimum wage.' In footnote 119 this report refers to: H. Muermans and J. Liu, 'Gezinsvorming in cijfers' [Family formation in numbers'], in: *Internationale gezinsvorming begrensd? Een evaluatie van de verhoging van de inkomens- en leeftijdseis bij migratie van buitenlandse partners naar Nederland* [International family formation restricted? An evaluation of the raised income and age requirements with regard to the migration of foreign partners to the

12.4.2. (Development of) the relevant Dutch conflict-of-laws rules

Dutch Private International Law is firmly rooted in international Treaty law. In respect of marriage, for instance, the applicable law was, for 70 years, the Hague Convention relating to the settlement of the conflict of the laws concerning marriage of 1902.[188] When this Treaty was annulled in the late 1970s,[189] the Netherlands subsequently ratified the Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages.[190] The latter Convention entered into force in the Netherlands in 1991.[191] However, because it was for a long time uncertain whether there would be enough ratifications for this Convention to enter into force,[192] the Dutch legislature soon after ratification drafted national conflict-of-laws rules in respect of marriage.[193] This Private International Law (Marriages) Act (*Wet conflictenrecht huwelijk*) implemented and supplemented the Hague Convention.[194] Other relevant instruments of the Hague Conference on Private International Law, to which the Netherlands is a Contracting Party, are the 1970 Convention on the Recognition of Divorces and Legal Separations[195] and the 1978 Convention on the Law Applicable to Matrimonial Property Regimes.[196] The Netherlands neither signed nor ratified the – not (yet) in force – Convention on the recognition of registered partnerships of the International Commission on Civil Status (ICCS).[197]

Netherlands] (The Hague: Ministry of Justice 2009), pp. 25, 29, 31 and 175, online available at www.wodc.nl/onderzoeksdatabase/de-gevolgen-van-de-aanscherping-van-het-gezinsvormingsbeleid.aspx?cp=44&cs=6799, visited June 2014.

188 Convention of 12 June 1902 relating to the settlement of the conflict of the laws concerning marriage, *Stb.* 1904, 121.

189 Wet van 10 februari 1977, houdende goedkeuring van het voornemen tot opzegging van het Verdrag van 's-Gravenhage van 12 juni 1902 [Act of 10 February 1977 approving of the intention to revoke the Hague Concention of 12 June 1902], *Stb.* 1977, 61. The Treaty was revoked as of 1 June 1979 (*Trb.* 1977, 57), because it was considered to no longer conform to modern standards. A.P.M.J. Vonken, *GS Personen- en Familierecht, regeling WCH, aant. 1*, Kluwer (last update 01-05-2004).

190 Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages, no. 26, entry into force 1 May 1991.

191 *Stb.* 1989, 391.

192 A.P.M.J. Vonken, *GS Personen- en Familierecht, regeling WCH, aant. 1*, Kluwer (last update 1 May 2004). In the end only two other States, Luxembourg and Australia, ratified the Convention. Three other States (Egypt, Finland and Portugal) have signed the Convention but not (yet) ratified it.

193 *Kamerstukken II* 1987/88, 20 507 and *Kamerstukken I* 1988/89, 20 507.

194 Private International Law (Marriages) Act) of 7 September 1989 (Wet conflictenrecht huwelijk) *Stb.* 1989, 392, entry into force 1 January 1990.

195 Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, entry into force on 24 August 1975. In the Netherlands the Convention entered into force on 22 August 1981. Next to the Netherlands, 18 other States are Contracting Parties to this Convention.

196 Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes (entry into force 1 September 1992). In the Netherlands the Convention also entered into force on 1 September 1992. Only the Netherlands, France and Luxembourg are Contracting Parties to this Convention.

197 Convention on the recognition of registered partnership, ICCS Convention no. 32, opened for signature at Munich on 5 September 2007. Following its Art. 19, the Convention will enter into force after two member States of the ICCS have ratified, accepted or approved it. Following the chart of signatures and ratifications as published on the website of the ICCS (update 15 June 2014) only Spain ratified this Convention, while Portugal signed the Convention.

When registered partnerships were introduced in the Netherlands, and later when marriage was opened up to same-sex couples, a recurring theme in the debate was the applicability of these International Treaties – and the Dutch laws implementing them – to these 'new' institutions. This will therefore also be a recurring theme in the subsections below, which set out the relevant Dutch conflict-of-laws rules. First a brief introduction to the development of these rules is given.

The 'international aspects' of the introduction of the registered partnership and the opening up of marriage to same-sex couples have been much debated. In both cases, although heavily criticised by some, the legislature postponed the drafting and adoption of conflict-of-laws rules until well after the entry into force of the new legal regime.[198] Neither the Act Introducing Registered Partnerships nor the Act Opening Up Marriage contained any provisions on recognition or the applicable law in international cases. When the Registered Partnerships Bill was under debate in Parliament in the mid-1990s, the Secretary of State for Justice felt that as long as the (details of the) substantive law had not yet been decided upon, there was little use in endeavouring to draft conflict-of-laws rules, or in asking the State Commission on Private International Law for advice on the matter.[199] Just before the entry into force of the Act Introducing Registered Partnerships, the latter Commission was indeed asked to give an advice on the Private International Law aspects of the Act and to make a proposal for conflict-of-laws rules, which could then for the time being function as 'policy measures' ('*beleidsregels*').[200] Actual implementation of the advice and the accompanying proposal for legislation was, however, postponed. On the one hand, the government wanted to wait to see if the rapid legislative developments in respect of registered partnerships in other countries would perhaps result in the drafting of a Treaty instrument. On the other hand, legislation for the opening up of marriage was already in preparation at the time and the government wished to capture all Private International Law issues in one piece of legislation.[201] By 2001, the year when the Act Opening Up Marriage entered into force, the government – acknowledging that it was not very likely that an international treaty on the matter would be drafted and adopted in the foreseeable future – felt that it was time to draft legislation.[202]

198 Very critical of this choice for postponement was H.U. Jessurun d'Oliveira, 'Het raadselachtige buitenland, de partnerregistratie en het burgerlijk huwelijk voor homo's en lesbo's' ['The mysterious other countries, partner registration and civil marriage for gays and lesbians'], 71 *Nederlands Juristenblad* (1996) p. 755.

199 *Kamerstukken II* 1995/96, 22700 no. 7, p. 1.

200 The advice of the State Commission on Private International Law (Staatscommissie voor het Internationaal Privaatrecht) of 8 May 1998 was published in 20 *Tijdschrift voor Familie- en Jeugdrecht* (1998), pp. 146–159 and in 131 *WPNR* (2000) p. 375. See also I.S. Joppe, 'Het geregistreerd partnerschap in het Nederlands IPR (I)' ['Registered partnership in Dutch Private International Law (I)'], 131 *WPNR* (2000) p. 371 and I.S. Joppe, 'Het geregistreerd partnerschap in het Nederlands IPR (II)' ['Registered partnership in Dutch Private International Law (II)', 131 *WPNR* (2000) p. 391. Critical of the fact that the advice was published in legal journals only was H.U. Jessurun d'Oliveira 1999, *supra* n. 186, at p. 306.

201 *Kamerstukken II* 2002/03, 28 924, no. 3, p. 2. See also Joppe 2000A, *supra* n. 200.

202 *Idem*. Earlier intentions to draft legislation on this matter had been expressed in *Kamerstukken I* 1996/97, 23 761, no. 157b, p. 4 and *Kamerstukken II* 1999/00, 26 672, no. 5, p. 18.

A much debated issue was (and is) whether any of the existing Private International Law Treaty instruments – in particular the Hague Convention on the Celebration and Recognition of the Validity of Marriages of 1978[203] – and the Dutch laws implementing them, applied to (same-sex) registered partnership and to same-sex marriage. The government took the view that none of the international Treaties did, as they were drafted at a time when the institutes of registered partnerships and same-sex marriage did not yet exist.[204] It therefore concluded that the Netherlands was free to adjust its national legislation to changed views in society and to draft its own conflict-of-laws rules on the issue.[205]

This approach has been criticised. Boele-Woelki, for example, held that from a Private International Law perspective, the price for the introduction of same-sex marriage was too high.[206] The opening up of marriage would imply that the Netherlands would unilaterally breach the silent consensus on the definition of marriage that underpinned the relevant international Treaties, she held.[207] Boele-Woelki warned that Dutch family law was 'no isolated practice ground' but had to operate in the wider European context. Following this publication, concerns were expressed in Parliament that the Netherlands no longer would be taken seriously internationally.[208]

Because the government was of the opinion that the Hague Treaties did not apply to same-sex marriages, however, it saw no need – as suggested by some members in Dutch Parliament following Boele-Woelki's critique – to revoke these Treaties, nor to ask other States for permission to employ a different interpretation of 'marriage'. For the sake of clarity and to increase the chances of recognition by other States, the government nonetheless wished to bring the Dutch rules of Private International Law as much as possible in line with the Treaties to which it was a party.[209] The government held that the responsibility of the Netherlands *vis-à-vis* other States did

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203 Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages, The Hague, entry into force per 1 May 1991.

204 In respect of registered partnerships: *Kamerstukken II* 2002/03, 28 924, no. 3, p. 3, in respect of same-sex marriage: *Kamerstukken II* 1998/99, 27 762 no. 3, p. 5 and *Kamerstukken II* 1999/00, 26 672 no. 5, p. 19.

205 *Kamerstukken II* 1998/99, 27 762 no. 3, p. 5 and *Kamerstukken II* 1999/00, 26 672, no. 5, p. 23.

206 Boele-Woelki 1999, *supra* n. 83, at p. 113.

207 *Idem*. See also Bogdan who held in respect of the 1970 Convention on the Recognition of Divorces and Legal Separations and the 1978 Convention on the Law Applicable to Matrimonial Property Regimes: 'At the time of the conclusion of […] [these] legal instruments, the concept of same-sex marriages was unheard of and it was certainly not taken into consideration by the parties. The introduction, by one contracting state, of a new dimension to a traditional legal term cannot reasonably obligate the other contracting states. It is therefore submitted that it would be contrary to the principle of good faith to consider the contracting states bound by the rules of the said conventions as far as Dutch same-sex marriages are concerned.' M. Bogdan, 'Some Reflections on the Treatment of Dutch Same-sex Marriages in European and Private International Law', in: T. Einhorn and K. Siehr (eds.), *Intercontinental cooperation through private international law: essays in memory of Peter E. Nygh* (The Hague, T.M.C. Asser Press 2004) p. 25 at p. 29.

208 *Kamerstukken II* 1998/99, 26 672, no. 4, pp. 14–18. For the government response to this concern, see section 12.3.6 below.

209 *Kamerstukken II* 1999/2000, 26 672, no. 5, pp. 19–20.

not go any further than to provide for clear information.[210] It had no intentions to assist same-sex couples in individual cases in explaining the status of their marriage to foreign authorities, but planned to issue a brochure which briefly explained the main features of the new Dutch legislation in various languages.[211] This brochure could also be used by official representations of the Netherlands in other States.[212] The government held it to be impossible to predict what legal effects would be given to the Dutch same-sex marriage by other States, but it expressed the hope that foreign legal practice would be 'innovative' in finding solutions.[213]

The State Commission on Private International Law held in December 2001 that there was no use (then) in drafting rules on the recognition of foreign same-sex marriages, because no other country had (then) introduced legislation to that effect.[214] It furthermore noted that such recognition would most probably not be problematic in the Dutch legal order.[215] The Commission did not consider the question of the recognition of Dutch same-sex marriages by other States, as that matter did not come within the competences of the Dutch legislature anyway.[216]

The State Commission was divided on the question of whether the Dutch 'opened up marriage' fell within the scope of the Hague Convention on the Celebration and Recognition of the Validity of Marriages of 1978.[217] As the report explained, if the Convention indeed applied to same-sex marriages, the other Contracting States to this Convention were, in principle, under the obligation to recognise a Dutch same-sex marriage,[218] as well as to celebrate a same-sex marriage if its choice of law rules designated Dutch law as the applicable law.[219] In both situations, however, so it was explained, the States could invoke a public policy exception.[220] One part of the Commission agreed with the government that the Convention did not apply

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210 *Idem*, at p. 23.

211 *Idem*, at p. 18.

212 *Idem*, at p. 23.

213 *Idem*, at p. 17.

214 Staatscommissie voor het Internationaal Privaatrecht 2001, *supra* n. 140, at p. 4. The Commission had examined to what extent the relevant existing Private International Law Treaties relating to family law left room for the Dutch legislature to provide for specific conflict-of-laws rules concerning the Dutch opened up marriage and concerning adoption by same-sex couples. Joppe 2000A, *supra* n. 200, at p. 371.

215 Staatscommissie voor het Internationaal Privaatrecht 2001, *supra* n. 140, at p. 6.

216 *Idem*, at p. 4. The government was also well aware that any Dutch Private International Law legislation could not guarantee that a same-sex marriage concluded under Dutch law would be recognised abroad, as this was wholly dependent upon the rules of Private International Law of the State where recognition was sought. *Kamerstukken II* 1999/2000, 26 672, no. 5, p. 22.

217 Staatscommissie voor het Internationaal Privaatrecht 2001, *supra* n. 140, at p. 7.

218 Art. 9 (first sentence) of the 1978 Hague Convention on the Celebration and Recognition of the Validity of Marriages reads: 'A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter.' It must be noted that in fact the only other Contracting States to this Convention next to the Netherlands are Luxembourg and Australia.

219 Art. 3(2) of the 1978 Hague Convention on the Celebration and Recognition of the Validity of Marriages. See also Staatscommissie voor het Internationaal Privaatrecht 2001, *supra* n. 140, at p. 6.

220 Arts. 5 and 14 of the 1978 Hague Convention on the Celebration and Recognition of the Validity of Marriages.

and that therefore the Dutch government was free to draft its own conflict-of-laws rules.[221] On the basis of a historic interpretation, other members of the Commission came to a different conclusion. These members pointed out that same-sex marriage was indeed discussed during the drafting of the Convention and that – partly for that reason – the drafters had deliberately not provided for a definition of 'marriage' in the Convention.[222] In any case, so the full Commission concluded, the Dutch Private International Law (marriages) Act, which implemented the Convention, also applied to same-sex marriages and no amendment to this Act was required.[223]

The Commission also held that the 1978 Convention on the Law Applicable to Matrimonial Property Regimes[224] adopted the same definition of marriage as the Hague Convention on the Celebration and Recognition of the Validity of Marriages and that it could therefore possibly be held to be applicable to same-sex marriage.[225] The Commission was furthermore of the opinion that the *Brussels II* Regulation also applied to the Dutch (opened up) marriage, and that there was therefore only limited room for the Dutch legislature to make use of its residual competence to draft rules on jurisdiction.[226] Further, the Commission held that there were strong (historic) arguments that the Hague Adoption Convention of 1993[227] excluded adoption by same-sex couples.[228] The Commission therefore recommended that the government conclude bilateral or multilateral agreements with (Contracting) States that had no principled objections to adoption by same-sex couples.[229]

Following the advice of the Commission, the government continued the drafting of conflict-of-laws rules for registered partnerships. It acknowledged that the existing rules of Private International Law concerning marriage could not be fully analogously applied to registered partnerships as they were distinct institutes after all.[230] However, because the underlying principle of the Act Introducing Registered

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221 These members of the Commission referred to the Explanatory Report to the Convention according to which marriage was to be defined 'in its broadest, international sense'.

222 These members of the Commission referred to the *Actes et Documents de la Treizième Session Tome III, Mariage* (1978). Support for this vision can be found in L. Pellis, 'Het homohuwelijk: een bijzonder nationaal product' ['Same-sex marriage: a special national product'] 24 *Tijdschrift voor Familie- en Jeugdrecht* (2002) p. 162 and A.P.M.J. Vonken, *Asser/Vonken, Asser 10-II Het internationale personen-, familie- en erfrecht, 69 Huwelijk personen gelijk geslacht*, update of 23 July 2012.

223 In one necessary amendment was yet foreseen in the Act of 8 March 2001 amending legislation with a view to the opening up of marriage and the introduction of adoption by couples of the same sex (Wet van 8 maart 2001 tot aanpassing wetgeving in verband met openstelling van het huwelijk en de invoering van personen van hetzelfde geslacht, *Stb.* 2001,128. This concerned the prohibition on polygamy in Art. 3(1)(d), which provided that one man could be married to one woman only and one woman to one man only. This wording was changed to the more neutral 'person'.

224 Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, entry into force 1 September 1992.

225 Staatscommissie voor het Internationaal Privaatrecht 2001, *supra* n. 140, at p. 13.

226 *Idem*, at p. 34.

227 Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, The Hague, entry into force 1 May 1995.

228 Staatscommissie voor het Internationaal Privaatrecht 2001, *supra* n. 140, at p. 24.

229 *Idem*, at, p. 34.

230 As Frohn explained, analogous application of the conflict-of-laws rules in relation to marriage to registered partnership, could have resulted in a reference to the laws of a country which did not provide

Partnerships had been to equalise registered partnerships as much as possible with marriage, the legislature also applied the conflict-of-laws rules for marriage as analogously as possible.[231] For partnerships registered in the Netherlands, unilateral conflict-of-laws rules were adopted, which determined in what situations Dutch law applied to these registered partnerships entered into under Dutch law.[232] For foreign partnerships, the *lex loci celebrationis* was applied (see below).[233]

After the Private International Law (registered partnership) Act (*Wet conflictenrecht geregistreerd partnerschap*) had entered into force in 2004,[234] in 2012 all Dutch Private International Law rules, including those relating to marriage and registered partnership, were brought together in a new tenth chapter in the Dutch Civil Code.[235] This was mainly a 'cosmetic' operation; substantively very little changed.[236] The following subsections set out the relevant substantive rules of Dutch Private International Law for various situations involving same-sex registered partnerships and marriages, starting with the situation where foreign same-sex couples wish to enter into a marriage or partnership in the Netherlands.

12.4.3. Access to marriage and registered partnerships for foreign same-sex couples

Since the Netherlands was of the first countries in the world which provided for a form of legal recognition of same-sex relationships, there was, when the registered partnership was introduced, a certain fear of 'registration tourism' and sham registrations.[237] Until 2001, when marriage was opened up, the rules concerning access to registered partnerships were more stringent when compared to the rules on

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for registered partnership. E.N. Frohn, 'Geregistreerd Partnerschap' ['Registered Partnership'], in: Th. M. de Boer and F. Ibili (eds.), *Nederlands internationaal personen- en familierecht: wegwijzer voor de rechtspraktijk* [Dutch international family law: guidance for legal practice] (Deventer, Kluwer 2012) p. 281 at p. 281.

231 *Kamerstukken II* 2002/03, 28 924, no. 3, p. 3.

232 As Bell explained: '[…] the Dutch legislation governing registered partnership sought to depart from normal rules of private international law in order to ensure that Dutch law would remain the applicable jurisdiction in most disputes surrounding Dutch registered partners.' M. Bell, 'Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union', 12 *European Review of Private Law* (2004) p. 613 at p. 627. At the time of drafting of the Act, the legislature accepted that it could prove desirable in the future to amend the law on this point. See *Kamerstukken II* 2002/03, 28 924, no. 3, p. 3.

233 Art. 10:61(5)(a) and (b) BW. See also *Kamerstukken II* 2002/03, 28 924, no. 3, p. 3 and Frohn 2012, *supra* n. 231, at p. 281.

234 Wet conflictenrecht geregistreerd partnerschap [Act conflict-of-laws rules registered partnership], Act of 6 July 2004, *Stb.* 2004, 334. This Act was revoked per 1 January 2012 by Art. IV of *Vaststellings- en Invoeringswet Boek 10 BW* [Implementation Act Volume 10 of the Civil Code].

235 *Stb.* 2011, 272.

236 As Heijning explains, the new Arts. 10:60 to 10:90 BW were an 'almost literal copy' of the Private Internatinal Law (Registered Partnership) Act. S.H. Heijning, 'Boek 10 BW: IPR-regels geregistreerd partnerschap (art. 10:60 t/m 10:91 BW)' ['Book 10 BW: PIL-rules registered partnership (Art. 10:60 to 10:91 BW)'], 141 *WPNR* (2010) p. 311.

237 *Kamerstukken II* 1996/97, 23 761, no. 3, p. 5; no. 7, p. 15; no. 11, pp. 7–8. See also Curry-Sumner 2005A, *supra* n. 28, at pp. 123–124 and Boele-Woelki et al. 2006, *supra* n. 2, at pp. 13–14.

access to marriage.[238] While a marriage could also be celebrated in the Netherlands if one of the future spouses had neither Dutch nationality, nor a valid residence title,[239] for registered partnerships *both* partners had to be either Dutch nationals or nationals of an EU/EEA country or legal residents in the Netherlands.[240] Following the advice by the Kortmann II Commission (see section 12.3.4 above) this difference was lifted in 2001,[241] when the laws on marriages of convenience and registered partnerships of convenience were equated.[242] Another amendment concerned the repeal of a provision in the conflict-of-laws marriages Act according to which a marriage involving one or two non-Dutch nationals, on public order grounds, could not be celebrated in the Netherlands if the future spouses were of the same sex.[243]

Under the present legislation, two partners – whether of the same or different sex – can celebrate a marriage or enter into a registered partnership in the Netherlands if at least one of the partners is legally resident in the Netherlands *or* has Dutch nationality.[244] In this regard it is irrelevant whether the law of the country of which the non-Dutch partner(s) is or are (a) national(s), recognises same-sex marriage.[245]

One remaining difference between the registered partnership and marriage relates particularly to cross-border situations and concerns choice of law. Non-Dutch nationals residing in the Netherlands, who meet the conditions of Dutch law for concluding a marriage, may also decide to celebrate the marriage under the law of their country of nationality.[246] For partners who wish to enter into a registered partnership, this option is not open. Article 10:60(2) Civil Code provides that the

238 See also Waaldijk 1999, *supra* n. 79, at p. 207.

239 Art. 1:43(1) BW (*old*).

240 Art. 1:80a (1) and (2) BW (*old*). See also *Kamerstukken II* 1992/93, 22 700, no. 3, p. 6 and *Kamerstukken II* 1993/94, 23 761, no. 3, p. 4, as well as H.U. Jessurun d'Oliveira, 'Geregistreerd partnerschap en de Europese Unie, kanttekeningen over de internationale reikwijdte van het wetsvoorstel' ['Registered partnership and the European Union: comments on the international scope of the bill'], 70 *Nederlands Juristenblad* (1995), p. 1569 and Jessurun d'Oliveira 1996, *supra* n. 199.

241 *Kamerstukken II* 1999/00, 26 0862, no. 3, p. 5. Wet van 13 december 2000 tot wijziging van de regeling in Boek 1 van het Burgerlijk Wetboek met betrekking tot het naamrecht, de voorkoming van schijnhuwelijken en het tijdstip van de totstandkoming van de scheiding van tafel en bed alsmede van enige andere wetten [Act of 13 December 2000 amending Book One of the Civil Code concerning the right of the name, the prevention of marriages of convenience and legal separation as well as several others Acts], *Stb.* 2001, 11.

242 Following Arts. 1:50 and 1:80a (5) BW an intended marriage or registered partnership may be interrupted when the objective of the prospective spouses or registered partners of one of them is not the fulfillment of the duties which the law connects to a marriage or registered partnership, but to obtain access to the Netherlands.

243 Art. 3(1)(d) Wet Conflictenrecht Huwelijk (*old*). See *Kamerstukken II* 1998/99, 26 672, no. 3, p. 7.

244 Arts. 1:43(1) and 1:80a (4) BW. As explained by the Ministry of Foreign Affairs, if neither partner is a Dutch national while they both live abroad, they may not marry in the Netherlands. If neither partner is a Dutch national, they may marry in the Netherlands provided one of them is resident there. If both partners live outside the Netherlands, they may marry in the Netherlands provided one of them is a Dutch national. Partners who both live in the Netherlands may marry even if neither of them is a Dutch national. Netherlands Ministry of Foreign Affairs, *FAQ Same-sex marriage 2010*, p. 7, online available at www.minbuza.nl/binaries/content/assets/minbuza/en/import/en/you_and_the_netherlands/about_the_netherlands/ethical_issues/qa-homohuwelijk-2011-en---def.pdf, visited June 2012.

245 *Idem*, at p. 6.

246 Art. 10:28 BW.

question of whether the partners qualify for entering into a registered partnership with each other in the Netherlands, is governed by Dutch law.[247] Application of foreign law may be rejected for being manifestly incompatible with Dutch public order.[248] The wording 'manifestly incompatible' makes clear that this exception must be applied restrictively.[249] For marriages, the public order notion is given further interpretation in Article 10:29 Civil Code. Issues such as too young in age, too close in kinship, and disturbed mental capacity of the future spouses, as well as non-exclusiveness of the marriage, may justify a refusal to apply foreign law.[250] On the other hand, the celebration of a marriage cannot be refused on the ground that there is an impediment to this marriage under the law of the State of nationality of the future spouses, if that impediment itself is contrary to Dutch public order.[251] Hence, the fact that the future spouses are of the same sex cannot be accepted as impediment to the celebration of a marriage in the Netherlands, for to accept such unequal treatment would be against Dutch public order.

12.4.4. Implementation of Directives 2004/38 and 2003/86 in Dutch Law

Unmarried different-sex and same-sex partners have been recognised for purposes of immigration to the Netherlands since 1975.[252] Under Dutch law both same-sex and different-sex spouses or registered partners of EU citizens are considered 'family members' within the meaning of Directive 2004/38.[253] A right to residence is also provided for the partner with whom the EU citizen is in a duly attested, stable, long-term relationship, as well as for the minor children of this partner.[254]

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247 Art. 10:60(2) BW. See also M. Gordijn, 'Geregistreerd Partnerschap' ['Registered partnership'], in: A. Baptiste and E.W.M. Gubbels, *Burgerzaken & Boek 10 BW* [Civil matters and Book 10 BW] (Zoetermeer, NVVB 2012) p. 92 at pp. 94–95. The Minister for Justice held that it constituted no unacceptable restriction if non-Dutch national partners who did not meet the conditions of Dutch law, were not allowed to enter into a registered partnership under Dutch law. *Kamerstukken II* 2002/03, 28 924, no. 3, p. 9.

248 Art. 10:6 BW.

249 A.P.M.J. Vonken, *Asser/Vonken 10-II 2012/114* (update 23 July 2012).

250 Following Article 10:29(1) BW the celebration of a marriage in the Netherlands is against public policy, if (a) the future spouses have not reached the age of 15 years; (b) if the future spouses are siblings or related to each other in the direct line by blood or by adoption; (c) if the free consent of one of the future spouses is missing or the mental capacity of one of them is so disturbed that he is unable to determine his own will or to understand the significance of his declarations; (d) if the marriage would be in conflict with the rule that a person may only be united in marriage with one other person at the same time and (e) if the marriage would be in conflict with the rule that a person who wishes to conclude a marriage may not simultaneously be registered as a partner in a registered partnership.

251 Art. 10:29(2) BW.

252 Waaldijk et al. 2010, supra n. 188, at p. 24. The report refers (in footnote 91) to K. Waaldijk, *More or less together: levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine European countries* (Paris, Institut National d'Études Démographiques 2005) p. 147, online available at www.hdl.handle.net/1887/12585, visited June 2010.

253 Art. 8.7 Vreemdelingenbesluit [Aliens Decree], implementing Directive 2004/38/EC.

254 Art. 8.7(4) Vreemdelingenbesluit [Aliens Decree]. Until 2009 the relationship could be attested by the partners signing a *relatieverklaring* ['declaration of relationship']. *Vreemdelingencirculaire* [Aliens Circular] B10/5.2.2. As of 31 January 2009 the partners should normally also produce evidence either

Also in respect of family reunification[255] Dutch law makes no distinction between same-sex and different-sex partners or between their family members.[256] In 2012 family reunification was limited to – what was called – the 'core family' ('*kerngezin*'), i.e. spouses, registered partners and minor children only.[257] In other words, unmarried stable partners no longer qualified for family reunification. Provision was made for same-sex couples who had no access to marriage in their home countries. They could apply for a 'marriage visa' for the duration of six months, enabling them to enter the Netherlands to conclude a marriage or a registered partnership. These amendments were repealed in 2013.[258]

12.4.5. Recognition of foreign registered partnerships and marriages under Dutch law

Because a foreign same-sex marriage will always be of later date than the entry into force of the Dutch opening up of marriage Act, it has never been an issue whether foreign same-sex marriages would be recognised as such under Dutch law.[259] They are indeed recognised as marriage under Dutch law.[260] In the words of Vonken, the principle of equal treatment as provided for in Article 1 of the Dutch Constitution and Article 26 ICCPR also has effect in Dutch Private International Law.[261]

With respect to registered partnerships the situation is somewhat different. At the time when the Dutch legislature drafted conflict-of-laws rules, registered partnership legislation was introduced in a limited number of countries only and the various regimes varied significantly. Therefore, the Dutch legislature set certain standards which foreign registered partnerships have to meet in order to be recognised as registered partnership under Dutch law.[262]

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that they have or recently had a joint household for at least six months, or that they have a child together. Aliens Circular A2/6.2.2.2.

255 Under Dutch law the term 'family reunification' includes family formation.

256 Arts. 3.13 to 3.15 Vreemdelingenbesluit [Aliens Decree]. Family members are: (a) the adult who is, according to Dutch Private International Law, legitimately married to the foreigner or who is, according to Dutch law, the registered partner of the foreigner; (b) the adult who has a lasting and exclusive relationship with the foreigner, provided that certain requirements are met; and (c) the minor natural or legitimate child of the foreigner who, in the Minister's opinion, is actually a family member of that foreigner and already was so in the country of origin and who comes under the legitimate authority of the foreigner. For each of the three categories a requirement is that the partners actually live together and have a joint household (Art. 3.17, Aliens Decree).

257 Decree of 27th March 2012 amending the Aliens Decree 2000, *Stb.* 2012, 148.

258 *Stb.* 2013, 184.

259 Compare Staatscommissie voor het Internationaal Privaatrecht 2001, *supra* n. 140, at p. 6.

260 Following Art. 10:31(1) BW '[a] marriage that is contracted outside the Netherlands and that is valid under the law of the State where it took place or that has become valid afterwards according to the law of that State, is recognised in the Netherlands as a valid marriage.' Translation taken from www.dutchcivillaw.com/civilcodebook01010.htm, visited June 2014.

261 A.P.M.J. Vonken, *Asser/Vonken, Asser 10-II Het internationale personen-, familie- en erfrecht, 69 Huwelijk personen gelijk geslacht*, update of 23 July 2012.

262 *Kamerstukken II* 2002/03, 28 924, no. 3, pp. 2–3. These requirements were included in the bill, following advice of the Council of State. *Kamerstukken II* 28 924, no. B, pp. 2–3.

As a rule a registered partnership that is entered into outside the Netherlands and that is valid under the (Private International) law of the State where it is entered into or that has become valid afterwards according to the law of that State, is recognised in the Netherlands as a valid registered partnership.[263] However, only partnerships that have '*Standesfolge*' (i.e., excluding purely contractual partnerships) and which are open to two persons in a close personal and effective relationship only, qualify for recognition as registered partnership under Dutch law.[264] The partnership must be registered with a competent public authority and the partnership must be exclusive in the sense that the partners cannot at the same time be in a marriage or any comparable institution.[265] Furthermore, the rights and obligations of the registered partners to each other must be equal to or in essence corresponding to those of spouses.[266] This includes the obligation to support one another and to provide each other with 'what is needed' ('*het nodige*').[267] Other relevant indications that the partnership corresponds to marriage, are an obligation to have a reasonable share in the costs of the household and several liability for the debts of the common household.[268]

The Civil Code also provides for two corresponding public policy exceptions for registered partnerships and marriage in recognition cases.[269] However, these exceptions can (again) only be successfully invoked in cases of a manifest conflict with Dutch public order and must be applied (very) restrictively.[270] In a situation where mere recognition is requested of a marriage or registered partnership that has been celebrated or registered in another State, the connection with the Dutch legal order will be looser, than in a situation where a request is made to have marriage or partnership celebrated in the Netherlands. This is even more so, if considerable time has elapsed since the celebration of the marriage or registration of the partnership in the other State. These factors render invocation and application of the public order exception in recognition cases even less appropriate.[271] In any case, it is obvious that the mere fact that the future spouses or registered partners are of the same sex can

263 Art. 10:61(1) and (2) BW. Following the fourth paragraph of this Article, '[…] a registered partnership is presumed to be valid if a certificate of registered partnership has been issued by a competent authority'. See also Heijning 2010, *supra* n. 237.

264 *Kamerstukken II* 2002/03, 28 924, no. 3, p. 10 and *Kamerstukken II* 2002/03, 28 924, no. 3, pp. 2–3.

265 Art. 10:61(5)(a) and (b) BW.

266 Art. 10:61(5)(c) BW.

267 *Kamerstukken II* 2002/03, 28 924, no. 3, pp. 2–3.

268 *Idem*. In the Explanatory Memorandum to the Private International Law (registered partnership) Act, the Dutch legislature held that the Belgian legal cohabitation ('wettelijke samenwoning'), the French 'pacte civil de solidarité' and the legally recognised forms of cohabitation in the laws of Catalonia and Aragon met these criteria.

269 Arts. 10:21 and 10:62 BW. See also *Kamerstukken II* 2009/10, 32137, no. 3, p. 47.

270 Gordijn 2012, *supra* n. 248, at pp. 100–101 and Frohn 2012, *supra* n. 231, at, pp. 286–287. Possible examples the authors mention are if one of the partners or both partners was yet in a registered partnership or marriage at the time of entering into the partnership; if one of the partners or both partners were younger than 15 years of age at the time of the registration; if one of the partners or both partners were at the time of entering into the partnership incapable of his or her free will, or of understanding the meaning of his or her declaration to enter into the partnership. As Frohn has pointed out, application of the public order exception must be in line with the principle of proportionality: the lesser close the partnership is related to Dutch law, the lesser reasonable it is to apply the exception.

271 A.P.M.J. Vonken, *Asser/Vonken 10-II 2012*/92, update of 23 July 2012.

never constitute ground for application of the public order exception under Dutch law.

12.4.6. Parental issues

Under the present state of Dutch law,[272] the recognition of parental links established in another country is not to be expected problematic on the mere ground that the couple is of the same sex.[273] This may possibly only be different in the – as yet hypothetical – case that a foreign State allows for the establishment of parental links for couples consisting of two men through operation of the law.

Same-sex couples from the Netherlands may, however, experience problems if they wish to have their parental links recognised in another country. Very few other States provide for as far-reaching parental rights for same-sex couples as the Netherlands. It is generally accepted that parental links of same-sex couples or partners have a higher chance of being recognised abroad if they are established through adoption, than if they are established through recognition or by operation of the law, because adoption involves an examination by a court.[274]

12.4.7. Recognition of Dutch partnerships and marriages in other Member States

From the first moment registered partnership was considered in the Netherlands, and later when the opening up of marriage to same-sex couples was under debate, concerns have been expressed that recognition abroad could be (very) problematic.[275] After all, the new Dutch regimes represented 'a challenge to the Private International Law of other countries.'[276]

The Kortmann II Commission conducted a questionnaire amongst the Council of Europe Member States, which showed that only very few countries would recognise a Dutch same-sex marriage.[277] The government acknowledged that same-sex spouses

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272 It is recalled that this research was concluded on 31 July 2014.

273 In the past this was, however, different. For instance in 2003 – before joint interstate adoption was introduced for same-sex couples – a District Court refused to recognise a joint adoption by a same-sex couple under American law. Rb. Zwolle 30 June 2003, ECLI:NL:RBZWO:2003:AI0668. See also Curry-Sumner and Vonk 2006, *supra* n. 142. The authors hold that a week earlier in a similar case another District Court, however, recognised the adoption.

274 The Commission on lesbian parenthood and interstate adoption (also referred to as Kalsbeek Commission) had therefore proposed to issue a declaratory decision in situations where a co-mother had established parental links with a child through recognition or by operation of the law. So far, this has not been followed up, but the adoption option for co-mothers was deliberately upheld. Commissie lesbisch ouderschap en interlandelijke adoptie 2007, *supra* n. 161, at p. 44. See Nuytinck 2010, *supra* n. 169, at pp. 343–348.

275 E.g. *Kamerstukken II* 1998/99, 26 672, no. 4, pp. 14–18.

276 Bogdan 2004, *supra* n. 208, at p. 25.

277 *Kamerstukken II* 1998/99, 26 672, no. 3, pp. 7–8.

could encounter 'several practical and legal problems' abroad, but also held that this was 'one aspect' the future same-sex spouses had to be aware of.[278] The fact that same-sex spouses may possibly not be awarded any rights as 'family members' of migrating EU citizens was acknowledged by the government to be 'a practical problem which should not be underestimated'. The government also held, however, that this did not constitute a decisive argument against opening up marriage. It was for the individuals concerned to consider the pros and cons, the government held.[279] It stressed that the legislation was initiated with the express consideration that the risk of limping relationships was no reason to refrain from opening up marriage to same-sex couples. The government intended to inform the public through a brochure (see above).[280] The State Commission on Private International Law agreed with the government that it was important to inform same-sex couples who wished to enter into a marriage, about the risk that their marriage would not be recognised as such in other countries, even though it also considered it very well possible that certain legal effects would be given to it.[281]

It indeed proved to be the case that same-sex couples experience 'substantial problems' in other countries.[282] Obviously the (level of) recognition depends on the national regime of the host Member State. As Boele-Woelki et al. explain:

> 'In those countries to have opened civil marriage to same-sex couples, the recognition of Dutch same-sex marriages is generally not problematic. In those countries where a domestic form of registered partnership has been created, same-sex marriages celebrated abroad are often afforded recognition as this domestic form of registered partnership. In those jurisdictions were no substantive law regime is available for same-sex couples to formalise their relationship, the chances are great that a Dutch same-sex marriage will not be recognised.'[283]

Hence, even if some form of recognition is afforded, this may entail the downgrading of a civil status as spouses to registered partners with considerably more limited legal

278 *Kamerstukken II* 1998/99, 26 672, no. 3, p. 8. Waaldijk has translated the relevant paragraph in the Explanatory Memorandum as follows: '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. As a result of this, spouses of the same sex may encounter various practical and legal problems abroad. This is something for future spouses of the same sex to take into account.' C. Waaldijk, 'Others may follow: the introduction of marriage, quasi-marriage, and semi-marriage for same-sex couples in European countries', 38 *New England Law Review* (2004) p. 569 at p. 577.

279 *Kamerstukken II* 1999/00, 26 672, no. 5, p. 11. On this question see also H.U. Jessurun d'Oliveira, 'Vrijheid van verkeer voor geregistreerde partners in de Europese Unie. Hoog tijd!' ['Free movement for registered partners in the European Union. High time!'], 76 *Nederlands Juristenblad* (2001) p. 205.

280 *Kamerstukken II* 1999/00, 26 672, no. 5, p. 6.

281 Staatscommissie voor het Internationaal Privaatrecht 2001, *supra* n. 140, at p. 11. Pellis held that the State Commission should have urged the government more to raise the issue of 'limping relationships' at European and international level. Pellis 2002, *supra* n. 223, at p. 167.

282 Boele-Woelki et al. 2006, *supra* n. 2, at p. 246.

283 *Idem*, at p. 247.

effects,[284] as many States do not recognise the Dutch distinction between marriage and registered partnership.[285] Other States do not recognise the Dutch registered partnership as registered partnership under their national laws because it is open to both same-sex and different-sex couples. Yet other States refuse to give Dutch same-sex marriages and partnerships any recognition on public order grounds.[286] Further, the fact that same-sex spouses and registered partners cannot obtain an international (marriage) certificate under the ICCS Convention on the issue of multilingual extracts from civil status records,[287] may cause practical problems when these couples go abroad.[288]

12.5. Conclusions

When it comes to legal recognition of same-sex relationships, the Netherlands is, and always has been, in the vanguard. Firmly based on the principle of equal treatment, the legal recognition of same-sex relationships has gradually increased since the 1990s towards a strong level of protection nowadays. Same-sex couples now have access to the institutions of marriage and registered partnerships on the same footing as different-sex couples. After various amendments to the law over the past decades, these institutions now generally have the same legal effects and there are almost no differences between same-sex couples and different-sex couples in this regard. Parentage has proven to be the most controversial issue, however, and it is in this area that same-sex marriages and registered partnerships are still not entirely equal to different-sex marriages and registered partnerships. On grounds of biological differences, this holds especially for couples consisting of two men. This difference has so far been upheld on the ground that from a biological perspective, couples of two men are not in the same position as couples of two women. Nonetheless, it is

284 For example, it was reported that in Germany, the United Kingdom, the Czech Republic, Denmark, Finland, Luxembourg, Slovenia and Switzerland, Dutch same-sex marriages were not recognised as a marriage, but as registered or civil partnerships. It was unclear if Dutch same-sex marriage and registered partnerships would be recognised at all in France and Italy. Boele-Woelki et al. 2006, *supra* n. 2, at pp. 190 and 247 and K. Boele-Woelki et al., 'The evaluation of same-sex marriages and registered partnerships in the Netherlands', 8 *Yearbook of Private International Law* (2007) p. 27 at p. 31. See also Bell 2004, *supra* n. 233, at p. 629.

285 Boele-Woelki et al. 2006, *supra* n. 2, at p. 224.

286 See Waaldijk 2004, *supra* n. 279, at p. 577, referring (in footnote 41) to K. McKnorrie, 'Would Scots Law Recognise a Dutch Same-Sex Marriage?', 7 *Edinburgh L. Rev* (2003) p. 147.

287 ICCS Convention on the issue of multilingual extracts from civil status records, Vienna 8 September 1976, ICCS Convention no. 16.

288 Boele-Woelki et al. 2006, *supra* n. 2, at p. 80. In response to Parliamentary Questions on this issue, the Minister for Justice informed Parliament in 2010 that the ICCS was in the progress of adapting its model certificate accordingly. He furthermore held that in the meantime there were various other means through which the Civil Registry could issue a translated civil status record to same-sex spouses. *Aanhangsel Handelingen II* 2010/11, 95. As to date (i.e. 31 July 2014) the ICCS certificate as available on the website of the ICCS (www.ciec1.org/Conventions/Conv16.pdf, visited 31 July 2014) has not been amended on this point. In this regard it is furthermore interesting to note that the original bill for the Act Opening Up Marriage provided that an official declaration of no impediment to marriage would only be issued to a Dutch national who wished to conclude a marriage abroad under (then) Art. 1:49a BW, if the person intended to conclude a marriage with a person of different sex. This provision was not included in the final Act.

not inconceivable that gay couples will challenge this difference in treatment in the future.[289]

Legal recognition of same-sex relationships has primarily been introduced in the form of legislation and on the initiative of the Dutch Parliament and government, although court judgments sometimes functioned as a trigger. In general the courts have, however, shown strong deference towards the legislature, both in respect of legal recognition of same-sex relationships and in respect of parental rights for same-sex couples. In this respect, Waaldijk has described the Dutch process as 'an extremely gradual and almost perversely nuanced (but highly successful) process of legislative recognition of same-sex partnership'. The author finds this a 'prime example' of the operation of what he calls the 'law of small change'.[290] It is indeed true that the Dutch process is an incremental one, with every step taken raising the question why another step should not be taken as well. In the words of Waaldijk, '[…] 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*.'[291] At the same time, it cannot go unnoticed that certain steps were taken rather quickly. For instance, as Boele-Woelki et al. hold:

> 'At the start of the 1990s it was almost impossible to foresee that within ten years it would have been possible to open civil marriage to same-sex couples. Changes in the political composition of the government and unremitting social change both contributed to the rapid legal developments in this field.'[292]

The 'foreign countries' argument has played an ambiguous role in the whole process. On the one hand the clear wish to be a pioneer in Europe, or even in the world, prompted the Dutch legislature to (rapidly) introduce legislation.[293] At the same time, fear that other countries would not accept or recognise the Dutch legislative choices, was presented as an argument against legislative change. In this way, the 'foreign countries' argument functioned almost as an 'excuse'.[294] This was the main reason why the Dutch government initially did not want to risk opening up marriage, and

289 See Nuytinck 2010, *supra* n. 275. Earlier see Hoevenaars 1997, *supra* n. 28, at p. 232.

290 Waaldijk describes the 'law of the small change' 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'. Waaldijk 2001A, *supra* n. 13, at pp. 440–441.

291 *Idem*, at p. 453.

292 Boele-Woelki et al. 2006, *supra* n. 2, at p. 249.

293 The Deputy Prime Minister of the Netherlands held in 1998 that in ethical issues, the Netherlands was often the first, while often other States followed after some time. 'Homohuwelijk exporteren', *Algemeen Dagblad* 12 December 1998, p. 3.

294 See for example C. Waaldijk, 'Naar een gelijkgeslachtelijk huwelijk. Waarom het buitenland, het afstammingsrecht en de invoering van geregistreerde partnerschap geen argumenten zijn voor handhaving van de heteroseksuele exclusiviteit van het huwelijk' ['Towards a same-sex marriage. Why other countries, the law on descent and the introduction of registered partnership are no arguments for maintaining the heterosexual exclusivity of marriage'], 17 *Tijdschrift voor Familie- en Jeugdrecht* (1995) p. 223.

the argument also played an important role in the debates about parental rights for same-sex couples. In the end, although heavily criticised for it, the legislature was prepared to put up with the risk of 'limping relationships' as it – once again – felt that the principle of equal treatment had to prevail.

The development of Private International Law rules has been a considerably less smooth process than the introduction of registered partnership and same-sex marriage in the first place. While there remains, today, debate about the applicability of International Treaties, the application of the Dutch conflict-of-laws rules to foreign same-sex relationships, has not proven very problematic (see section 12.4.5), and Dutch law makes no distinction between same-sex couples and different-sex couples in respect of free movement of EU citizens and family reunification (section 12.4.4). This is different for the recognition of Dutch same-sex marriages and same-sex registered partnerships, as well as parental links established by same-sex couples under Dutch law, by other States (section 12.4.7). Although limited statistical data is available in this respect (see section 12.4.1), it is clear that migrating same-sex couples have encountered various legal and practical problems when seeking recognition of their civil status in other countries.