

**News and information
about research and developments
in Sexual Orientation Law**

by Kees Waaldijk (www.law.leidenuniv.nl)

2001 - 2008

September 2008

Conferences

The fourth conference of the International Lesbian and Gay Law Association (ILGLaw), "The Global Arc of Justice: Sexual Orientation Law Around the World," will take place 11-14 March 2009, in West Hollywood and Los Angeles, California, U.S.A., where it will be co-sponsored by the Williams Institute on Sexual Orientation Law and Public Policy at UCLA. Please consider proposing a paper or panel presentation for this important conference on sexual orientation and gender identity law (before the deadline of 15 November 2008, see the call for papers, and do circulate it to others!). Registration information will be available soon at www.ilglaw.org. ILGLaw unites people around the world who are dedicated to the principle of equality under the law for lesbian, gay, bisexual, and transgender people. The ILGLaw Conference brings together attorneys, judges, academics, law students, policy makers and activists from around the globe to discuss developments in sexual orientation and gender law, and honors an individual with the Karl Heinrich Ulrichs award for an important contribution to the cause of legal equality for lesbian, gay, bisexual and transgender people. Earlier ILGLaw conferences took place in London (1999), Torino (2002) and Toronto (2005, see www.ilglaw.org).

The 13th World Conference of the International Society of Family Law will take place in Vienna, 16-20 September 2008. See www.univie.ac.at/isfl. The next World OutGames, again featuring sport, culture and an International conference on LGBT human rights, will be held in Copenhagen 25 July - 2 August 2009, www.copenhagen2009.org. For the call for proposals (deadline for proposals and outreach applications is 1 October 2008), see www.bdp.dk/proposals.htm.

March 2008

New Book:

Kees Waaldijk & Eric Fassin, *Droit conjugal et unions de même sexe. Mariage, partenariat en concubinage dans neuf pays européens*, préface de Marie Digoix et Patrick Festy, Paris: Presses Universitaires de France 2008 (serie "Les Notes" de la Mission de

recherche Droit et Justice; isbn 978-2-13-056249-8; 64 p.; based on the 2005 report [More or less together](#)).

March 2008

Summer School

From 8 July to 5 August 2008, in Amsterdam, once again, the Summer Program on Sexual Orientation and the Law will be held. This summer school for law students from all over the world is organised by Whittier Law School in Los Angeles. See

www.law.whittier.edu/centers/sa-netherlands.asp.

November 2007

Advisory commission recommends allowing a woman to acknowledge the child of another woman

Although marriage and adoption have been opened up to same-sex couples in the Netherlands in April 2001, there have still been a few differences between the legal position of children of different-sex couples and the legal position of those of same-sex couples:

1. Legislation is already under way to abolish one of these differences: the prohibition of intercountry adoption by (married) same-sex couples.
2. On 31 October an ad hoc advisory commission of the Dutch government has recommended the abolition of another difference: If a child only has a legal mother, the law as it stands only allows a man (wether or not he is the biological father) to acknowledge the child as his own. The commission now recommends to also allow such an acknowledgement by another woman. This would make it quite easy for the lesbian partner of a mother to become the second legal parent of her child. Acknowledgement can be done before or after the birth of the child, and has a very simple procedure at the Civil Registry. It has the same legal effect as a second-parent-adoption. Unlike adoption, it does not involve the costs, time and hassle of having to go to court. Acknowledgement is not possible in situations where the child already has two legal parents. The commission does not propose to allow children to have more than two legal parents.
3. A third difference in the law as it stands, is that a child born to a woman who is married to another woman, does not automatically get that second woman as its second parent. In such a situation the second woman automatically only gets joint parental responsibility for the child, and the couple can choose to start an adoption procedure to make her a full legal parent. In a different-sex marriage the husband automatically becomes the legal father of the newborn child. The advisory commission mentioned above suggests that this difference could be abolished as well, but it does not recommend it.

It is not yet known whether the Dutch Government and/or Dutch Parliament will follow the recommendation of the commission.

December 2007

Evaluation study on Dutch same-sex marriage and registered partnership

Researchers at the University of Utrecht (Katharina Boele-Woelki, Ian Curry-Sumner, Miranda Jansen, Wendy Schrama) have completed their evaluation study, commissioned by the Dutch government, of the Act introducing registered partnership (in force in the Netherlands since 1998) and the Act opening up marriage to same-sex couples (in force since 2001). There is an [online summary in English](#) of this study (third pdf document listed on the right).

September 2006

At the International Conference on LGBT Human Rights (of the 1st World OutGames in Montreal in July 2006) the "**Declaration of Montreal**" was adopted, detailing the aims and concerns of the global fight for LGBT Human Rights. The text of the declaration can be found at www.declarationofmontreal.org. See also www.ilga-europe.org/europe/news/international_conference_on_lgbt_rights_montreal.

At the latter site you will find the text of the speeches delivered at the conference by Louise Arbour (UN High Commissioner for Human Rights), Vladimír Špidla (EU Commissioner for Employment, Social Affairs and Equal Opportunities) and Anastasia Crickley (representative of the OSCE).

April 2006

Registered Partnership Law in Czech Republic (and elsewhere)

On 15th March 2006, the Chamber of Deputies (the Lower Chamber) of the Czech Parliament outvoted the presidential veto and adopted the Registered Partnership Bill. The Bill shall be enacted by its publication in the Collection of Law and will enter into effect three months thereafter. The first couples could therefore become registered partners sometime in late June / early July. Registration will only be possible for same-sex partners.

The list of legal consequences attached to a Czech registered partnership is long, but so is the list of legal consequences that will continue to be only available to married different-sex couples. Therefore I think that the Czech registered partnership can best be characterised as a "semi-marriage" (just like the "PaCS" in France, and the "cohabitation

légale" in Belgium, for example). It does not look like a "quasi-marriage" (as can be found in the five Nordic countries, and in the Netherlands, for example). On this classification, see my article "Others may follow: the introduction of marriage, quasi-marriage, and semi-marriage for same-sex couples in European countries", in: 38 **New England Law Review** 2004, p. 569-589. Online available at: www.nesl.edu/lawrev/vol38/3/11-Waaldijk-PDF.pdf.

As far as Europe is concerned, the situation is now as follows:

National registered partnership laws are now in force in Denmark, Norway, Sweden, Iceland, Finland, Netherlands, Belgium, Luxembourg, France, Germany, Andorra, and the United Kingdom. National registered partnership laws have also been adopted in three other countries, and will soon enter into force in Slovenia (2006), Czech Republic (2006) and Switzerland (2007). Regional registered partnership laws are in force in parts of Spain and parts of Switzerland.

Same-sex couples can marry in the Netherlands, in Belgium and in Spain. Registered partnership (or even the opening up of marriage to same-sex couples) is being discussed in almost all other countries in Western and Central Europe, including Italy, Ireland, Portugal, Austria and Hungary.

Various laws in many European countries recognise the informal (non-registered) cohabitation of same-sex partners for certain purposes; this is also the case in some countries that have no laws on registered partnership (yet), such as Hungary, Austria, Portugal and Croatia.

The similarities and differences between marriage, registered partnership and/or informal cohabitation, and the levels of legal consequences attached to these forms of relationships, vary considerably from country to country (see the report [More or less together](#)).

March 2006

New books

Matteo Bonini Baraldi wrote *Le nuove convivenze - tra discipline straniere e diritto interno*, ISBN 88-217-2238-4, see <http://ipshop.ipsoa.it/scheda.asp?ID=000053597>.

Ian Curry-Sumner wrote *All's well that ends registered? The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe*, ISBN 90-5095-532-0, www.intersentia.be/zoekdetail.asp?pid=1251.

Mark Harper, Martin Downes, Katharine Landells & Gerald Wilson wrote *Civil Partnership: The New Law* (about the legislation in England and Wales), ISBN 0 85308 933 7, www.jordanpublishing.co.uk/Publications/catDetails.aspx?productID=65.

Anne Weyembergh and Sinziana Carstocea edited *The gays' and lesbians' rights in an enlarged European Union*, ISBN 2-8004-1367-0, www.editions-universite-bruxelles.be/ABWebBuilder.php?page=/catalogue.

Stefano Fabeni & Maria Gigliola Toniollo edited *La discriminazione fondata sull'orientamento sessuale*, ISBN 88-230-1029-2, www.ediesseonline.it/asp/libro.asp?id=245.

April 2005

New study: *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*

by Kees Waaldijk (Netherlands) in cooperation with John Asland (Norway), Søren Baatrup (Denmark), Daniel Borrillo (France), Hrefna Fridriksdóttir (Iceland), Rainer Hiltunen (Finland), Olivier De Schutter (Belgium), Dirk Siegfried (Germany) and Hans Ytterberg (Sweden), with a sociological epilogue by Eric Fassin

Published as: Documents de travail no. 125, Institut National des Etudes Démographiques (INED), Paris, 2005.

The individual chapters of the 200 page report are [online available](#) in PDF. See also http://www-same-sex.ined.fr/intro_pub.htm. A paper copy of the report can be requested from Marie Digoix (mad@ined.fr).

December 2004

Published on the website of the Commission of the European Communities:

Combating sexual orientation discrimination in employment: legislation in fifteen EU member states

Report of the European Group of Experts on Combating Sexual Orientation Discrimination, about the implementation up to April 2004 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

edited by Kees Waaldijk and Matteo Bonini-Baraldi with the cooperation of Alan Littler

The [full text in English](#) of this 660 page report is now available online. Most chapters are [also available in French](#). For each chapter there is a summary, both in English and in

French.

The report not only contains chapters on each of the fifteen countries that until 1 May 2004 formed the European Union, but also a chapter on European law (by Matteo Bonini), a detailed and critical Comparative analysis (by Kees Waaldijk), and a thematic study on Discriminatory partner benefits (by Alan Littler). The report focusses on the legislation that has been enacted or proposed in the fifteen member states to meet the European Community's requirement to prohibit sexual orientation discrimination in employment. The national, European and comparative chapters also sketch the general legal background with respect to sexual orientation discrimination in these fifteen countries, in the European Union and under the European Convention on Human Rights.

This report was prepared by an independent group of experts (EGESO) that was established and funded (2002-2004) by the European Commission under the framework of the European Community's Action Programme to Combat Discrimination (see http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm).

For more information about the report and about the group of legal experts that wrote it, see below. The [concluding chapter 20](#) can be read as a summary of the whole report; its conclusions indicate to what degree the various member states have fulfilled their obligations.

December 2004

Three countries have recently moved closer to the **nationwide introduction of same-sex marriage** (without actually introducing it, as yet):

The ruling of the **Canadian Supreme Court** about draft legislation providing for same-sex marriage throughout Canada can be found at: www.lexum.umontreal.ca/csc-scc/en/rec/html/2004scc079.wpd.html in most but not all parts of Canada marriage is already available to same-sex couples).

A judgment of the **Supreme Court of Appeal of South Africa**, of 30 November 2004 (see <http://wwwserver.law.wits.ac.za/sca/files/2322003/2322003.pdf>), paving the way for same-sex marriage, is subject to an appeal to the Constitutional court.

A draft-bill on same-sex marriage has been approved by the **Council of Ministers of Spain**. It still needs to be debated in Parliament.

April 2004

New publication by Kees Waaldijk: **'Others may follow: the introduction of marriage, quasi-marriage, and semi-marriage for same-sex couples in European countries'**, in: 38 *New England Law Review* 2004, p. 569-589. Online available at:

www.nesl.edu/lawrev/vol38/3/11-Waaldijk-PDF.pdf.

This article is based on the text of an affidavit written by the author in October 2003, at the request of the Department of Justice Canada, for the Supreme Court of Canada 'in the matter of a reference by the Governor in Council concerning the proposal for an act respecting certain aspects of legal capacity for marriage for civil purposes, as set out in Order in Council P.C. 2003-1055, dated the 16th of July 2003'. In this reference, the Canadian government is asking the Supreme Court of Canada for an advisory opinion on proposed legislation to open up the definition of civil marriage to same-sex couples (after appellate courts in two common law provinces ruled that the exclusion of same-sex partners from marriage is unconstitutional, and a superior court in civil law Quebec ruled the province's statutory bar to be similarly unconstitutional). The hearing on the reference is scheduled for October 2004.

June 2003

Marriage open for same-sex couples in Belgium

Belgium has become the second country in the world where legislation has been passed to open up the existing institution of marriage to same-sex couples. As in the Netherlands, the Belgian law does not provide for presumed paternity for the female spouse of a married woman who gives birth during their marriage. In the Netherlands the two women in such a situation would automatically get joint parental responsibility over the child, and the non-biological mother could then ask in court to be allowed to adopt her spouse's child (see details below). In Belgium, on the other hand, there is no provision for joint parental responsibility, nor for adoption by a same-sex partner or a same-sex couple. Another difference with the Netherlands lies in the Belgian rules as to which international couples can marry, and which cannot. Belgian International Private law requires that the marriage is allowed by the national law of each partner. At this time this means that Belgians can only marry other Belgians or a partner from the Netherlands.

Law of 13 February 2003 opening up marriage to persons of the same sex and modifying certain provisions of the Civil Code, published in French and Dutch on 28 February 2003 in the Moniteur belge, Edition 3, entering into force on 1 June 2003. See www.moniteur.be.

June 2002

How Holland did it

Discussion And Visibility Is Key In Ending Marriage Discrimination

[Interview](#) by Kevin Bourassa and Joe Varnell (of Equal Marriage for Same-Sex Couples, Canada)

November 2001

**And after nine months ...
lesbian partners in the Netherlands get full responsibility for children**

When marriage was opened up for same-sex couples on 1 April 2001, one important distinction remained between lesbian and heterosexual marriages. If a child is born in a heterosexual marriage, the child automatically has the husband of the mother as its legal father, and that father and mother automatically share all legal and financial responsibilities over the child. Such joint parental authority plus joint parental maintenance duties do not arise automatically where a child is born in a lesbian marriage (nor where a child is born in a lesbian or heterosexual registered partnership). These responsibilities could only be obtained by petitioning the court. But this is now going to change on 1 January 2002. Any child born from that date into a lesbian marriage (or into a registered partnership of two women or of a man and a woman) will automatically, from the moment of birth, have two fully responsible adults: its mother and her spouse or registered partner. That spouse or partner will still not be deemed to be the "father" (nor "parent" or "second mother") of the child, but will have an equal share in the *parental authority* over the child and in the *maintenance duties* towards the child.

This is the result of the law of 4 October 2001 (amending various articles of Book 1 of the Civil Code) which was published in Staatsblad 2001, nr. 468). By virtue of a Royal Decree of 7 November 2001 (Staatsblad 2001, nr. 544) that law will enter into force on 1 January 2002.

Because children are only born into marriages and registered partnership that include at least one woman, a male co-parent who wants to share the legal and financial responsibilities with the father of the child will still need to go to court to ask for joint parental authority and maintenance duties.

A gay or lesbian co-parent who wants to have full parental *status* to complement these responsibilities, will have to go through the adoption procedure. Adoption by same-sex partners became possible in the Netherlands on 1 April 2001 (see below). The first such adoptions are expected to be decided by Dutch courts around January 2002.

For some background to the new piece of legislation, see my chapter 'Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands', in: Robert Wintemute and Mads Andenæs (eds.), *Legal Recognition of Same-Sex Partnership. A Study of National, European and International Law*, Oxford: [Hart Publishing](#) 2001, p. 437-464.

October 2001

Big book published:

Robert Wintemute and Mads Andenæs (eds.), *Legal Recognition of Same-Sex Partnership. A Study of National, European and International Law*, Oxford: [Hart Publishing](#) 2001.

March 2001

At midnight on 1 April 2001, four laws are coming into force in the Netherlands (as a result of the royal decree of 20 March 2001, published in the official journal: *Staatsblad* 2001, nr. 145):

The law of 21 December 2000 on the opening up of marriage for same-sex partners (*Staatsblad* 2001, nr. 9). See [summary-translation](#) in PDF at the bottom of this page.

The law of 21 December 2000 on adoption by same-sex partners (*Staatsblad* 2001, nr. 10). See [summary-translation](#) in PDF at the bottom of this page.

The law of 13 December 2000 on various matters including the further equality between marriage and partnership registration (*Staatsblad* 2001, nr. 11; other parts of this law took effect earlier or later this year).

The law of 8 March 2001 adjusting various other laws to the opening up of marriage and adoption (*Staatsblad* 2001, nr. 128).

Still in Parliament is a bill to provide for automatic joint parental authority over children born during a lesbian marriage or a lesbian or heterosexual registered partnership [*this bill has now become the law of 4 October 2001, and enters into force on 1 January 2002*]. Until this bill has become law, married and registered lesbian couples who get a child, will need to petition the court if they want to have joint authority over that child. After the bill has become law and entered into force, such joint authority will automatically exist from the moment of birth.

From then on, the differences between registered partnership and marriage, and between same-sex marriage and different-sex marriage will be negligible. The position of same-sex and different-sex foreign partners with respect to marriage, partnership registration and immigration will be identical from 1 April 2001.

The only differences between a marriage of two men or two women and a marriage of a man and a woman are concerned with things that are largely beyond the sovereignty of the Dutch legislature, i.e. biology and foreign law. These differences are threefold:

- The rule that presumes the (male) husband to be the biological father of any child their wife might get during their marriage, will not apply to lesbian marriages (and naturally not to male-male marriage either). However, the same-sex partner of a mother or father can petition the court to be made the adoptive parent of the

child. For children born to lesbian partners, there is no minimum period of joint care before which such adoption can be requested.

- Intercountry adoption (i.e. adoption of a child whose ordinary place of residence is not in the Netherlands) will only be possible by a different-sex married couple or by one individual. Opening up intercountry adoption to same-sex couples would not be very useful, because the authorities in the original country of the child would most probably not allow it to be adopted by Dutch same-sex partners.
- Only children born in a heterosexual marriage approved by Parliament can succeed as King or Queen. However, contrary to wishful speculation by certain authorities, there is nothing in the Constitution or the Civil Code which would prevent a King, Queen, Prince or Princess from marrying someone of the same sex. It would be unthinkable that parliamentary approval of such a marriage would be denied because of the gender of the royal partner. Therefore, a same-sex marriage would not stop anyone from being King or Queen.

It should be noted that there is no Dutch law restricting access to medically assisted procreation. It is up to the hospitals to decide. Their discretion is of course limited by general rules of health law and anti-discrimination law. Most hospitals do not refuse their services to unmarried or lesbian couples.

Partnership registration of two men or two women (or between a man and a woman) has been possible in the Netherlands since 1 January 1998 (see [summary-translation of that legislation](#) in PDF at the bottom of this page). The (provisional) statistics of Dutch partnership registrations in 2000 have now become available (source www.cbs.nl). In three years time well over 6000 same-sex couples registered their partnership. An earlier survey suggested that more than 60% of these couples would hope to convert their partnership into a marriage. This could mean that within a year or so some 10.000 gays and lesbians might be married - to someone of the same sex.

From 1 April 2001 same-sex partners can marry each other (normally after a waiting period of at least two weeks). From the first moment of that day it is possible to convert an existing registered partnership into marriage (without waiting period). The procedure for an adoption takes a long time, so it will be several months before the first adoptions by same-sex partners will take place. The first same-sex marriage ceremony took place in the night of 31 March to 1 April. At midnight the registered partnerships of several same-sex couples were converted into full civil marriages.

As to foreigners marrying in the Netherlands: in each couple that wants to marry in the Netherlands, at least ONE of the partners should either have Dutch citizenship or have his or her 'domicile' and 'habitual residence' in the Netherlands. This rule has been applicable to different-sex marriages, and will be applicable to same-sex marriages. Another law has been adopted which will make the same rule applicable to partnership registrations (Law of 21 December 2000, *Staatsblad* 2001, nr. 11, replacing the existing requirement that EACH registering partner should be either a Dutch citizen or a lawful resident). This law is also entering into force on 1 April 2001.

In the case of TWO foreigners who wish to marry in the Netherlands, Dutch private international law does not require that they fulfil the conditions for marriage in the country of their citizenship (which would be impossible if they are of the same sex), provided that at least one of them has indeed 'domicile' and 'habitual residence' in the Netherlands. The latter requirement does not apply when ONE foreigner wants to marry a Dutch citizen.

It is not quite clear when living in the Netherlands amounts to having one's 'domicile' and 'habitual residence' there. The term 'domicile' seems to require being formally and lawfully registered as a resident of the Netherlands, whereas the requirement of 'habitual residence' seems to exclude people who continue to have their main home in another country while they work or study in the Netherlands for a year or less. A certain continuity of residence is required. Therefore foreign couples who would want to come to the Netherlands to marry here, should first take legal advice.

In Dutch immigration law the position of married, registered and unmarried cohabiting couples is almost identical. Therefore it will normally not be necessary to marry, or to register a partnership, in order to obtain a residence permit for one of the partners. Nevertheless, if a foreigner wants to immigrate to the Netherlands to join his or her partner there, it is advisable to first take legal advice about the other conditions (e.g. minimum income, housing, proof of relationship, formalities). Such advice can be given by Dutch consulates, Dutch lawyers, or the Dutch immigration service: <http://www.ind.nl/EN/index.asp>.

March 2001

Now it is certain: The laws on the opening up of marriage and adoption for same-sex partners will indeed enter into force on 1 April 2001. The royal decree fixing that date has been signed on 20 March, and will be published in *Staatsblad* 2001, nr. 145.

On 21 December, Queen Beatrix of the Netherlands, and her then State-Secretary for Justice, Mr. M.J. Cohen, have signed into law the two bills to open up both marriage and adoption to same-sex partners. On 11 January 2001 the two Laws of 21 December 2000 were formally published in the *Staatsblad* (2001, nrs. 9 and 10). Both laws will enter into force on 1 April 2001.

Both bills (introduced by the Government on 8 July 1999) had been approved by the Upper House (Senate) of the Dutch Parliament on 19 December 2000. Here the bills were supported by the liberal and labour parties (VVD, D66 and PvdA) of the governing coalition, with additional support of the left-wing opposition parties. The opposition christian-democrat party, and the small strict Protestant parties voted against the bills. Two members of the governing liberal party (VVD) also voted against the adoption bill.

The debate centered around questions about the level of recognition Dutch same-sex marriages and adoptions would receive in other countries, and whether or not adoption by

different-sex parents would be preferable. Intriguing questions were raised about the position of royal princ(ess)es marrying someone of the same sex, and about registrars with conscientious objections against same-sex marriages. Both questions received typically Dutch fuzzy answers.

The Lower House of Parliament already approved both bills on 12 September 2000. There the marriage bill obtained a majority of 109 against 33 votes. The adoption bill obtained a similar, but uncounted, majority. Together with the governing and left-wing parties, a few members of the christian-democrat party voted in favour of both bills.

A separate Adjustment Law of 8 March 2001 (*Staatsblad* nr. 128) provides for various adjustments in other legislation that have become necessary as result of the opening up of marriage and adoption. This Law will also come into effect on 1 April 2001. It introduces gender-neutral formulations into those laws that still use gender-specific words for parents and spouses (e.g. in definitions of polygamy, half-orphans, etc.). It specifies that an intercountry adoption will only be possible by a different-sex married couple or by one individual (opening up intercountry adoption to same-sex couples would not be useful, because the authorities in the original country of the child would not allow it to be adopted by Dutch same-sex partners). It also replaces the old rule, that child benefit will be paid to the mother in case of disagreement between father and mother, by a gender-neutral rule: now the benefit office will decide to whom to pay the benefit in such circumstances. Finally it arranges the price for the new possibility of converting an existing registered partnership into a marriage (or vice versa).

Some other websites with news about sexual orientation law

[European Commission on Sexual Orientation Law](#) (ECSOL, a non-governmental, non-political network of legal experts from more than 40 European countries; its origins lie in EGESO, the European Group of Experts on Combating Sexual Orientation Discrimination that operated from 2002 to 2004)

[International Lesbian, Gay, Bisexual, Transr and Intersex Association](#) (ILGA, a federation of some 700 organisations from more than 100 countries)

[ILGA-Europe](#) (the European region of ILGA is an umbrella organisation with more than 300 member-organisations throughout Europe)

[Internationaal homo/lesbisch informatiecentrum en archief](#) (IHLIA, the international gay/lesbian library, archive, information and documentation centre about homosexuality and sexual diversity in Amsterdam (Homodok) and Leeuwarden (Anna Blaman Huis))