

EURO-LETTER

No. 72

August 1999

The Euro-Letter is published on behalf of ILGA-Europe - The European Region of the International Lesbian and Gay Association by Gay and Lesbian International Lobby in co-operation with The Danish National Association for Gays and Lesbians.

Editors: Steffen Jensen, Ken Thomassen, Peter Bryld, Lisbeth Andersen and Soeren Baatrup.

Contact to Euro-Letter:

E-mail: steff@inet.uni2.dk

URL: <http://www.steff.suite.dk>

Fax: +45 4049 5297

Tel: +45 3324 6435

Mobile: +45 2033 0840

Mail: c/o Steffen Jensen, Gl. Kongevej 31, 4.th, DK-1610 Copenhagen V, Denmark

You can receive Euro-Letter by e-mail by sending an empty message to

euroletter-subscribe@egroups.com

and from no 30 onwards the Euro-Letters are available on the Internet at

<http://www.steff.suite.dk/eurolet.htm> and at

<http://www.france.qrd.org/assocs/ilga/euroletter.html>

IN THIS ISSUE

SEXUAL OFFENCES BILL WILL RETURN TO UK PARLIAMENT

SWITZERLAND CONSIDERS COUPLES' RIGHTS

PORTUGUESE CASE ON GAY PARENTING ACCEPTED BY THE EUROPEAN COURT OF HUMAN RIGHTS

DANISH GOVERNMENT SUPPORTS GAY EU EMPLOYEE IN COURT CASE

DUTCH BILL TO OPEN MARRIAGE FOR SAME-SEX PARTNERS

DUTCH BILL ALLOWING ADOPTION FOR SAME-SEX COUPLES

Documents relating to ILGA-Europe can be found at ILGA-Europe's homepage

<http://www.steff.suite.dk/ilgaeur.htm>

An update of the Survey on the Legal Situation for Gays and Lesbians in Europe can be found at

<http://www.steff.suite.dk/survey.htm>

A description of partnership laws and other laws regarding same-sex partners can be found at

<http://www.steff.suite.dk/partner.htm>

SEXUAL OFFENCES BILL WILL RETURN TO UK PARLIAMENT

UK Home Office press statement (23/07/99):

The Sexual Offences (Amendment) Bill, aimed at equalising the age of consent for homosexuals and creating an offence of abuse of trust, will be re-introduced in the next Parliamentary session and, if necessary, the Parliament Acts will be used to secure its passage, Home Secretary Jack Straw said today.

The Sexual Offences (Amendment) Bill has two key aims:

1. Establishing equality before the law by equalising the age of consent for homosexuals with that of heterosexuals at 16 (17 in Northern Ireland). It fulfils a UK commitment to the European Commission of Human Rights in two cases, Sutherland and Morris, currently before the European Court of Human Rights.

2. Creating an offence of abuse of trust designed to protect the most vulnerable children and young people. The offence would apply where a person aged 18 or over has sexual intercourse or engages in any other sexual activity with a person under that age, if the older person is in a position of trust in circumstances specified in the Bill.

The Bill was originally introduced into the House of Commons on 16 December 1998, and was subject to a free vote. It was overwhelmingly endorsed by the House of Commons, but rejected by the House of Lords on 13 April 1999 by 222 votes to 146.

The Home Secretary has been given dispensation to announce the Government's intentions to reintroduce the Bill prior to the Queen's speech. This is because when considering the Government's application for a further extension in the cases before it, the European Court of Human Rights needs to know that the Bill will definitely be reintroduced next session.

The two cases currently at the European Court of Human Rights brought by Euan Sutherland and Chris Morris have been stayed pending parliamentary consideration of the Bill.

Home Secretary Jack Straw said:

"We have today, with the agreement of the applicants, sought a further extension from the European Court of Human Rights in the stayed cases of Sutherland and Morris versus the UK.

"We have informed the Court, in the context of this request, that the Government intends to reintroduce the Sexual Offences (Amendment) Bill next session

and if necessary the Parliament Acts will be used to secure its passage."

SWITZERLAND CONSIDERS COUPLES' RIGHTS

By Rex Wockner

The Swiss government has initiated a complex process that should result in recognition of gay/- lesbian couples next year.

The most likely outcome will be a Scandinavian-style registered partnership law that grants most of the rights of matrimony.

On June 21, the Legal Commission of the National Council expressed support for registered partnership by a vote of 18-3 and rejected the notion of full gay marriage by a vote of 14-5.

A recent survey found that 68 percent of Swiss support legal recognition of gay partnerships.

Any measure passed by lawmakers could be subject to a national referendum if 100,000 Swiss sign a petition demanding a say in the matter.

PORTUGUESE CASE ON GAY PARENTING ACCEPTED BY THE EUROPEAN COURT OF HUMAN RIGHTS

Information note from the European Court of Human Rights

November - December 1998

Note: The summaries contained in this Information Note are prepared by the Registry and are not binding on the Court. They are provided for information purposes only and are not intended to replace the judgments and decisions to which they relate. Consequently, they should not be quoted or cited as authority. All judgments and decisions referred to in the Information Note are available for consultation in the Court's database, accessible via the Internet at the following address: <http://www.dhcour.coe.fr/hudoc>.

The summaries are presented under the relevant article of the Convention and are preceded by a keyword and a brief description of the subject-matter of the complaint, followed by the Court's decision.

ARTICLE 8 PRIVATE LIFE

Parent obliged to hide his homosexuality during meetings with his daughter: admissible.

SALGUEIRO DA SILVA MOUTA - Portugal (N° 33290/96)
Decision 1.12.98 [Section IV]
(See Family life, below).

FAMILY LIFE

Refusal to grant custody to a parent living in a homosexual relationship: admissible.

SALGUEIRO DA SILVA MOUTA - Portugal (N° 33290/96)
Decision 1.12.98
[Section IV]

The applicant married in 1983. A girl, M., was born to the couple in 1987. Since 1990, the applicant has been living in a homosexual relationship. In the divorce proceedings, the applicant and his spouse concluded an agreement whereby custody was granted to the mother, the applicant being awarded a right of access. However, M. s mother refused him access and the applicant filed a request for custody to be awarded to him. The court acceded to this request in a judgment delivered in 1994 and M. lived with the applicant until 1995, when she was allegedly abducted by her mother (criminal proceedings are currently pending in this connection). His former wife appealed against this decision and the appeal court set aside the judgment, holding that, as a general rule, a young child should not be separated from its mother, but it also added that a homosexual environment could not be considered to be the healthiest for a child s development, given that this was an abnormal situation. Nevertheless, the court awarded a right of access to the applicant, who maintains that it is not being honoured as the whereabouts of M. are unknown. No appeal was filed against this decision. The applicant, relying on Article 8 in conjunction with Article 14, alleges that the appeal court awarded custody to M. s mother on the basis of his homosexuality. He also claims that the appeal court s decision constitutes an unjustified interference with his right to respect for family life, and also with his right to respect for his private life in that it was specified that he must hide his homosexuality in his meetings with his daughter.

Admissible under Article 8 and Article 14 in conjunction with Article 8.

ARTICLE 14

DISCRIMINATION

Refusal to grant custody to a parent living in a homosexual relationship: admissible.

SALGUEIRO DA SILVA MOUTA - Portugal (N° 33290/96)

Decision 1.12.98
[Section IV]
(See Article 8, above).

DANISH GOVERNMENT SUPPORTS GAY EU EMPLOYEE IN COURT CASE

By Steffen Jensen

The Danish government has decided to support Sven Englund in his case at the European Court of Justice against the EU Council of Ministers.

Sven Englund, a Swedish employee of the EU Council of Ministers, married to another man under the Swedish registered partnership law had asked his employer to treat him (and his partner) like his married heterosexual colleagues (and their spouses) under the terms of the EU Staff Regulations and thus claimed household allowance. The Council refused, so he brought the case before the Court in First Instance which rejected his plaint 28 January 1999.

Sven Englund has appealed the decision of the Court in First Instance to the Court itself. The appeal has been backed by the Swedish government and now also by the Danish government.

DUTCH BILL TO OPEN MARRIAGE FOR SAME-SEX PARTNERS

By Kees Waaldijk

Below you will find a translation (plus some comments and explanations) that I have made of the bill and explanatory memorandum on the opening up of marriage to same-sex partners.

Soon the text will be available on <http://www.coc.nl/index.html?file=marriage>

Text of Dutch bill and explanatory memorandum on the opening up of marriage for same-sex partners introduced in Parliament on 8 July 1999 printed as parliamentary paper nr. 26672

Summary-translation by Kees Waaldijk LL.M.
Universiteit Leiden, The Netherlands,
waaldijk@euronet.nl

Draft-version 23 July 1999

All explanations and comments between square brackets have been added by me. Square brackets are also used to indicate omitted or summarised passages.

For further background information on the lengthy process leading up to this bill, and for future updates

on its passage through parliament and possible amendments to it, see:
<http://www.coc.nl/index.html?file=marriage>

This is an unofficial translation and I am not a professional translator. Please inform me when putting this text on any internet-site. Please consult me before publishing it on paper. All copyrights are mine (W).

Parliamentary paper 26672

Amendment of Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening up of Marriage)

NR. 2: LEGISLATIVE PROPOSAL

We Beatrix [...];
[preamble:]

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

Article I
A and B
[amendments to articles 20 and 20a, concerning administrative duties of the registrar]

C
[amendment of article 28, concerning the change of sex in the birth certificates of transsexuals: Being not-married shall no longer be a condition for such change.]

D
Article 30 shall read as follows:

Article 30
1. A marriage can be contracted by two persons of different sex or of the same sex.
2. The law only considers marriage in its civil relations.

[Until now, article 30 only consists of the text of the second paragraph.]

E
Article 33 shall read as follows:

Article 33
A person can at the same time only be linked through marriage with one person.

[Until now, the text of article 33 only outlaws heterosexual polygamy.]

F

In article 49a, paragraph 1, the words "with a person of the opposite sex" shall be inserted after the word "marriage".

[This article deals with declaration of non-impediment, to be given to Dutch nationals who want to contract a marriage in another country. Such declarations shall now only be given to Dutch nationals wishing to contract a marriage with a person of the opposite sex.]

G

A new article 77a shall be inserted:

Article 77a

1. When two persons intend to convert their marriage into a registered partnership, the registrar of the domicile of one of them shall make a certificate of conversion. If the spouses are domiciled outside the Netherlands and want to convert their marriage into a registered partnership in the Netherlands, and at least one of them has Dutch nationality, conversion will take place with the registrar in The Hague.

2. A conversion terminates the marriage and starts the registered partnership on the moment the certificate of conversion is recorded in the register of registered partnerships. The conversion does not affect the paternity over children born before the conversion. Neither does it affect the consequences of the marriage.

H

[amendments to article 80a, concerning registered partnership:
The minimum age for marriage and registered partnership is 18, but for marriage it is reduced to 16, if the woman is pregnant or has given birth; this exception shall now also apply to registered partnership.

Furthermore, annulment of an underage marriage is not possible after the female spouse has become pregnant; the same shall now apply to an underage registered partnership.]

I

A new article 88f shall be inserted:

Article 88f

1. When two persons intend to convert their registered partnership into a marriage, the registrar of the domicile of one of them shall make a certificate of conversion. If the spouses are domiciled outside the Netherlands and want to convert their registered partnership into a marriage in the Netherlands, and at least one of them has Dutch nationality, conversion will take place with the registrar in The Hague.

2. A conversion terminates the registered partnership and starts the marriage on the moment the certificate of conversion is recorded in the register of marriages.

The conversion does not affect the paternity over children born before the conversion. Neither does it affect the consequences of the registered partnership.

J

Article 395 shall read as follows:

Article 395

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

[Until now this article only applies to marriage, not to registered partnership.]

K

Article 395a, second paragraph, shall read as follows:

2. A stepparent is obliged to provide [the costs of living and of studying] for the adult children of his spouse or registered partner, but only during his marriage or registered partnership and only if they belong to his nuclear family and are under the age of 21.

[Until now this article only applies to marriage, not to registered partnership.]

Article II

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

Article III

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

Article IV

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

Parliamentary paper 26672

Amendment of Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening up of Marriage)

NR. 3: EXPLANATORY MEMORANDUM

[The explanatory memorandum is signed by Mr. Job Cohen, State-Secretary for Justice.

It is a lengthy text. Therefore I have only translated some brief passages.]

[...]

Amendments - where necessary - in other books of the Civil Code and in other legislation will be proposed in a separate bill. [...]

1. History

[...]

From the government's manifesto of 1998 (Parliamentary Papers II, 1997/98, 26024-9, p. 68) it appears that the principle of equal treatment of homosexual and heterosexual couples has been decisive in the debate about the opening up of marriage for persons of the same sex.

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

[...]

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

[For example, only one of the persons wishing to marry needs to have either his or her domicile in the Netherlands or Dutch nationality. Also, two brothers or two sisters will not be allowed to marry each other, although the bill forgets to amend article 41 accordingly; an oversight which no doubt will get corrected.]

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

[According to article 199 the husband of the woman who gives birth during marriage is presumed to be the father of the child.] It would be pushing things too far to assume that a child born in a marriage of two women would legally descend from both women. That would be stretching partnership was introduced in the Netherlands on 1 January 1998. In 1998 4556 couples (including 1550 different-sex couples) have used the possibility of contracting a registered partnership [...]. Compared to other countries with registered partnership legislation the interest in registered partnership in the Netherlands is relatively high [...].

The relatively high number of different-sex couples that contracted a registered partnership in 1998 and the results of a quick scan evaluation research [Yvonne Scherf, Registered Partnership in the Netherlands. A quick scan, The Hague: Ministry of Justice 1999; that is the English translation of the original report] make it plausible that there is a need for a marriage-like institution devoid of the symbolism attached to marriage.

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

4. International aspects

[...]

As the Kortmann-committee has stated (p. 18) the question relating to the completely new legal phenomenon of marriage between persons of the same sex concerns the interpretation of the notion of public order to be expected in other countries. Such interpretation relates to social opinion about homosexuality. The outcome of a survey by the said committee among member-states of the Council of Europe was that recognition can only be expected in very few countries. This is not surprising. [...]

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

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

5. Conversion of marriage into registered partnership and of registered partnership into marriage

[...]

6. Adaptation of computerised systems

[...]

7. Explanation per article

[...]

Article I - D

[...] The principle of gender-neutrality of marriage is expressed by [the new article 30, paragraph 1].

[...]

Article III

[...] The aim is to let this Act enter into force on 1 January 2001.

[Given the clear commitment of the three coalition parties to this bill, expressed in the government manifesto of August 1998, the passage through the Lower House of Parliament should be politically unproblematic. The bill would probably also get a majority in the Upper House. All this would easily take more than one year, hence the foreseen date in 2001. The greatest risk for the passage of this bill is a possible breakdown of the current coalition of social democrats, liberals, and social-liberal democrats. That could happen over a number of completely unrelated issues. Such a breakdown would normally lead to new elections, and thus at least to delay in the passage of the bill. Furthermore, if then a new coalition would be formed including the christian democrats, the new government might withdraw the bill. But that is mere speculation.]

DUTCH BILL ALLOWING ADOPTION FOR SAME-SEX COUPLES

By Kees Waaldijk

Below you will find a translation (plus some comments and explanations) that I have made of the bill and explanatory memorandum on allowing adoption by same-sex couples, introduced in Parliament on the same day as the bill on the opening up of marriage.

Soon the text will be available on www.coc.nl/index.html?file=marriage

Text of Dutch bill and explanatory memorandum on adoption by persons of the same sex introduced in Parliament on 8 July 1999 printed as parliamentary paper nr. 26673

Summary-translation by Kees Waaldijk LL.M.
Universiteit Leiden, The Netherlands,
waaldijk@euronet.nl

Draft-version 28 July 1999

All explanations and comments between square brackets have been added by me. Square brackets are also used to indicate omitted or summarised passages.

For further background information on the lengthy process leading up to this bill, and for future updates on its passage through parliament and possible amendments to it, see:
www.coc.nl/index.html?file=marriage .

This is an unofficial translation and I am not a professional translator. Please inform me when putting this text on any internet-site. Please consult me before publishing it on paper. All copyrights are mine (W).

Parliamentary paper 26673

Amendment of Book 1 of the Civil Code
(adoption by persons of the same sex)

NR. 2: LEGISLATIVE PROPOSAL

We Beatrix [...];
[preamble:]

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

Article I

Book 1 of the Civil Code shall be amended as follows:

A, B and C
[consequential amendments to articles 5, 204 and 207]

D
Article 227 shall be amended as follows:

a. The first paragraph shall read as follows:

1. Adoption is effected by a decision of the district court at the joint request of two persons or at the request of one person alone.

[i.e. the words 'of different sex' after 'two persons' are deleted]

b. A second sentence shall be added to the second paragraph

['2. The joint request by two persons can only be done, if they have been living together during at least three continuous years immediately before the submission of the request.']

reading as follows:

The request by an adopter who is the spouse or life partner of the parent, can only be done, if he has been living together with that parent during at least three

continuous years immediately before the submission of the request.

c. The third paragraph shall read as follows:

3. The request can only be granted, if the adoption is in the evident interest of the child, if it is also certain that the child has nothing to expect anymore from its parent or parents, and if the conditions specified in article 228 are fulfilled as well.

[i.e. the words 'it is certain that the child has nothing to expect anymore from its parent or parents' are inserted]

E

Article 228, first paragraph, shall be amended as follows:

a. Sub-paragraph (f) shall read as follows:

f. [the condition] that for at least three continuous years the adopter has been caring for the child and bringing it up, or, in the case of joint adoption by two persons, that for at least one year they have been caring for the child and bringing it up; if the spouse or life partner of the parent of the child is adopting, the condition is that the adopter and that parent have been caring for the child and bringing it up for at least one year;

b. [consequential amendments in sub-paragraph (g)]

F, G and H

[consequential amendments in article 229, 253b and 327]

Article II

[transitional provision]

Article III

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

Parliamentary paper 26673

Amendment of Book 1 of the Civil Code
(adoption by persons of the same sex)

NR. 3: EXPLANATORY MEMORANDUM

[The explanatory memorandum is signed by Mr. Job Cohen, State-Secretary for Justice. It is a lengthy text. Therefore I have only translated some brief passages.]

General

1. Introduction

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

In stead of through changing the law of descent, such protection shall be offered in the form of the adoption possibilities provided for in this bill, in accordance with the advice of the Kortmann-Committee [advising the government about the opening up of marriage and adoption in 1997], as well as in the forms of joint authority for a parent and his partner and of joint custody (both introduced by legislation taking effect on 1 January 1998). An important difference between descent and adoption is that adoption always is an abstraction from descent. [...] Because parenting by two persons of the same sex always involves a form of non-biological parenting, we have opted for a change of the law of adoption and not of the law of descent. [...]

2. Scope of the legislative proposal

The bill relates to adoption of children in the Netherlands. The last years not more than 60 to 100 Dutch children have been adopted under the Dutch law of adoption [not counting stepparent adoptions], for in the Netherlands only rarely a mother does not bring up her own child.

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

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

3. The new condition for adoption

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

The words 'parent or parents' refer to legal parents as well as to biological parents. [...]

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

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

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

4. The relation to the existing conditions for adoption

[...]

5. The relation to joint authority

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

6. Strong and weak adoption

[a brief discussion of why no weak form of adoption is proposed to exist alongside the existing, strong form]

7. Consequences for private international law

The bill, intending to allow adoption by persons of the same sex, only relates to adoptions of children with their ordinary residence in the Netherlands. To these, as to adoptions in the Netherlands by persons of

different sexes, Dutch law is applicable. So problems relating to the applicability of foreign substantive laws that do not know adoption by same-sex partners, will hardly arise. [...]

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

Explanation per article

[...]

Article III

[...] This article will make it possible to let the Act enter into force on the same day as the separate Act [still to be introduced] that will adjust other Acts to the possibility of adoption by persons of the same sex. The aim is [...] to let this Act enter into force on 1 January 2001.

[Given the clear commitment of the three coalition parties to this bill, expressed in the government manifesto of August 1998, the passage through the Lower House of Parliament should be politically unproblematic. The bill would probably also get a majority in the Upper House. All this would easily take more than one year, hence the foreseen date in 2001. The greatest risk for the passage of this bill is a possible breakdown of the current coalition of social democrats, liberals, and social-liberal democrats. That could happen over a number of completely unrelated issues. Such a breakdown would normally lead to new elections, and thus at least to delay in the passage of the bill. Furthermore, if then a new coalition would be formed including the christian democrats, the new government might withdraw the bill. But that is mere speculation.]