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The Repercussions in the European Union of the Netherlands' Same-Sex Marriage Law

Nicholas J. Patterson*

On September 12, 2000, by a lopsided 190 to 33 vote in the lower house of Parliament, the Netherlands became the first country to allow same-sex couples to marry on the same terms as heterosexual couples. The measure had the support of all of the parties in the ruling coalition and even some members of the conservative opposition.¹ On December 19, 2000, the marriage law was approved by the upper house of parliament by a vote of 49 to 26.² After approval by the upper house, the bill was signed into law by Queen Beatrix on December 21, 2000, and took effect on April 1, 2001. The Dutch law requires that at least one partner either be a Dutch citizen or be domiciled in the Netherlands.

The Netherlands has recognized registered same-sex partnerships since 1998. The country also gives same-sex couples many of the same rights as married couples, including inheritance rights and pension benefits. However, the new law removes the distinction between heterosexual and homosexual marriages. Same-sex couples can now have the same marriage ceremonies and divorce proceedings as heterosexual couples.

The two main differences between marriage for same-sex couples and heterosexual couples deal with adoption laws and lack of international recognition of same-sex marriages. The Dutch Parliament passed an adoption law concurrently with the same-sex marriage law which allows gay and lesbian couples to adopt Dutch children but not children from abroad. Commentators cite two reasons for this restriction. First, Dutch law-makers may have been concerned about conflicts with nations that ban adoptions by gays and lesbians.³ Second, some may have felt that

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1. See Keith B. Richburg, *Dutch Legalize Same-Sex Marriages; Netherlands First to Grant Equal Status to Gay Pairs*, Wash Post A28 (Sept 13, 2000).
2. See *Same-Sex Dutch Couples Gain Marriage and Adoption Rights*, NY Times A8 (Dec 20, 2000).
3. *The Dutch Say "I Do,"* The Advocate (Oct 24, 2000), available online at <http://www.advocate.com/html/stories/823/823_atissue_dutch.asp> (visited March 23, 2001).

Dutch homosexuals should be discouraged from seeking babies abroad, fearing that Dutch heterosexuals might be kept out of world adoption markets by suspicious foreigners.⁴

The conflict of laws question arises when same-sex couples marry in the Netherlands and then travel to other countries. Tension may occur because of the disparity in legal treatment of same-sex couples in the Netherlands and the other Member States of the European Union ("EU").

Although some EU countries (England, for example) do not recognize same-sex relationships, there is a recent trend towards greater acceptance and legal recognition. Germany, France, Sweden, and Finland recognize same-sex relationships as a legal matter, though they do not offer the protections available in the Netherlands. While providing same-sex couples with many of the economic rights that married heterosexual couples enjoy, they shy away from acknowledging same-sex relationships as exactly equivalent to heterosexual marriages. The other EU Member States, besides the Netherlands, that protect same-sex relationships use a registered partnership rather than a marriage model. The most significant difference between same-sex relationships and heterosexual marriages in these countries concerns the right of adoption. Few Member States recognize lesbian and gay couples as joint parents of children born to one member of the couple, and many do not allow homosexuals to adopt children at all.

For instance, Germany does not recognize same-sex couples as joint parents and restricts adoption by homosexuals, although it provides gay couples with other rights.⁵ Beginning in 2001, gay couples will be able to register their relationships and will have the same inheritance and tenant rights as heterosexual married couples. In addition, foreign-born partners will be eligible for permanent residence permits.

The question of international recognition of same-sex marriages, and in particular the recognition of Dutch same-sex marriages by other EU countries, will increasingly become an issue as the law goes into effect. While there are legal arguments that support general EU recognition of these marriages, politics and social realities dictate against this result.

The recognition of Dutch same-sex marriages in other EU countries will probably depend on the domestic laws of Member States. The Dutch Parliament issued a statement upon the passage of the same-sex marriage law warning that "married Dutch gays should not assume that their unions would be recognized abroad, since the notion of marriage is usually interpreted in international treaties as

4. See, for example, *When My Old Dutch Is A Man*, *Economist* 52 (Jan 24, 1998).

5. *Germany's Upper House OK's Gay Partnership Law*, *The Advocate* (Dec 2-4, 2000), available online at <<http://www.advocate.com/html/news/120200-120400/120200news02.asp>> (visited March 23, 2001).

uniting a man and a woman.”⁶ However, it may be expected that in countries with extensive registered partnership legislation, Dutch married same-sex couples may be treated as if they were in a registered partnership.⁷

A challenge could be brought in the European Court of Justice (“ECJ”) against Member States that refuse to recognize Dutch same-sex marriages. However, it is not certain that the ECJ would require Member States to recognize Dutch same-sex marriages for all purposes. Member States have accepted the jurisdiction of the ECJ and are obliged by Article 5 of the European Economic Community Treaty (“EEC Treaty”) to uphold the Community legal order.⁸ Article 48 of the EEC Treaty states that “the activities of the Community shall include . . . the abolition, as between Member States, of obstacles to freedom of movement for persons.”⁹ EU citizen workers have the right to be accompanied by their married partner when they immigrate to another EU Member State under Article 10 of Council Regulation 1612/68 on freedom of movement of workers within the Community.¹⁰ The ECJ held in the *Reed* case that the term “spouse” in Regulation 1612/68 “refers to a marital relationship only.”¹¹ The ECJ has not yet ruled on whether same-sex spouses are considered spouses under EU law. However, the ECJ recently ruled in *D v Council* that same-sex registered partnerships do not have to be treated as equivalent to heterosexual marriages by employers.¹²

The outcome of a case before the ECJ will depend greatly on the amount of change in policies concerning same-sex marriages/partnerships in other EU countries that has occurred by the time the case comes to trial. The Court will need to balance its respect for Dutch family law with its respect for the immigration law of other countries. It is possible that the ECJ would respect the validity of a Dutch same-sex marriage because “family law is still clearly the domain of the Member States.”¹³ It is also possible, and currently more likely, that the ECJ would respect the immigration

6. *Same-Sex Dutch Couples*, NY Times at A8 (cited in note 2).

7. *Id.*

8. European Economic Community (Treaty of Rome), 298 UNTS 11, Art 5 (1957).

9. Treaty of Rome, Art 48 (cited in note 8).

10. See Council Regulation 1612/68 on Freedom of Movement for Workers Within the Community, 1968 OJ SPEC ED 475, Art 10 (1968) (“1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age of 21 years or are dependants; (b) dependant relatives in the ascending line of the worker and his spouse.”).

11. *Netherlands v Ann Florence Reed* [1986] ECR 1283, para 15.

12. On February 22, 2001, the ECJ held in *D v Council*, Cases C-122/99 P, C-125/99 P, [2001] ECR, that the Council (the main EC legislative institution) could refuse to treat the Swedish same-sex registered partnership of a Council employee as equivalent to a marriage in relation to an employment benefit. The Swedish, Danish, and Dutch governments intervened on the side of D.

13. Kees Waaldijk, *Towards equality in the freedom of movement of persons*, in *ILGA Europe: After Amsterdam: Sexual Orientation and the European Union* 40, 43 (ILGA Europe 1999).

law of Member States that are opposed to same-sex marriages/partnerships and not rule that such a state had to recognize a Dutch same-sex marriage. However, the timing of such a case may be very important. The last decade has seen a large increase in the recognition of same-sex partnerships in Member States. If a case comes to the ECJ in a decade or so, the situation in Member States with respect to same-sex partners may have changed dramatically—leading to a different outcome.

Another obstacle to the ECJ forcing Member States to recognize Dutch same-sex marriages is the fact that the Treaty of Rome “does not grant individuals standing to challenge breaches of Community law before the Court.”¹⁴ This lack of standing is offset by the ECJ’s preliminary ruling procedures. Either a Member State has to bring the challenge or an individual can present their complaint to the Commission of the European Community. There is no guarantee that the Commission will open legal proceedings because this action is discretionary.¹⁵ It is quite possible that the Dutch government may choose not to bring a challenge to avoid disturbing its more conservative neighbors. However, the ECJ has penetrated the national legal systems of the EU Member States by exploiting a relatively obscure provision in the Treaty of Rome, Article 177, which “allowed all national courts, and required national courts of last resort, to refer cases involving the application of European law to the ECJ for a preliminary ruling on the European law issues.”¹⁶ The ECJ, in one of its first referrals, declared the doctrine of “direct effect,” finding that certain provisions of the Treaty of Rome are directly applicable to individuals within national legal systems.¹⁷ In this way, individuals could invoke “these provisions in national court against contrary provisions of national law; the national court was then to refer the issue to the ECJ for resolution.”¹⁸ For example, in the *Grant* employment discrimination on the basis of sexual orientation case¹⁹ and the *P v S* transsexual rights case,²⁰ the plaintiffs were litigating before national courts. The cases were sent up to the ECJ for a ruling and then returned to the national court. In the instance of the *P v S* ruling, the rights of the transsexual plaintiff were then directly enforced by the British court. Thus, preliminary rulings by the ECJ are effective substitutes for direct standing—in fact, plaintiff’s lawyers may appear and present written and oral arguments to the court in these proceedings. In this way, one or two individuals could take their case to a court in a non-recognizing country, and that court might be persuaded (if it was a lower

14. Renaud Dehousse, *The European Court of Justice, The Politics of Judicial Integration* 21 (St Martins 1998).

15. *Id.*

16. Laurence Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *Yale L J* 273, 291 (1993). See Treaty of Rome, Art 177 (cited in note 8).

17. See Helfer and Slaughter, 107 *Yale L J* at 291 (cited in note 16). See also, *N.V. Algemene Transp & Expeditie Onderneming Van Gend & Loos v Nederlandse administratie der belastingen* [1963] ECR 1, 12.

18. See Helfer and Slaughter, 107 *Yale L J* at 291 (cited in note 16).

19. See *Grant v South West Trains*, [1998] ECR I-621, para 48.

20. See *P v S and Cornwall County Council* [1996] ECR I-2143.

court) or required (if it was a court of last resort) to ask for a preliminary ruling by the ECJ. The Commission would probably not play a role in any such case, although it might have to deal with complaints by its own employees who have entered into a Dutch same-sex marriage.

If the ECJ held that same-sex spouses were spouses under EU law, Member States almost surely would follow this holding. European Union law, as interpreted by the ECJ, supersedes national law.²¹ Once the ECJ rules on a particular point, Member States must comply. Private litigation before national courts and referral to the ECJ is one way to ensure enforcement.²² In this way, to the extent that decisions of national courts are binding, the elements of Community law are also binding. As a consequence, many commentators say that EC Treaty Law (as interpreted by the court) is self-executing or given direct effect.²³ In addition, the track record of voluntary compliance is very high.²⁴ Thus, if the ECJ required that Member States recognize Dutch same-sex marriages, it is likely that this judgment would be followed.

In theory, the Dutch same-sex marriage law might also encourage similar laws in other European Union countries via a ruling by the European Court of Human Rights ("ECHR"). However, it is extremely unlikely that the European Court of Human Rights would consider the non-recognition of a Dutch same-sex marriage in another country to be in violation of the European Convention for the Protection of Human Rights.

The object of the Convention was to take "the first steps for the collective enforcement of certain of the rights stated in the United Nations Universal Declaration of Human Rights of 1948."²⁵ Any Contracting State (State application)

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21. Helfer and Slaughter, 107 Yale L J at 291 (cited in note 16). See Treaty of Rome, Art 177 (cited in note 8).
 22. Id at 291–292 for a discussion of the ECJ's development of domestic enforcement mechanisms for its judgments. These mechanisms include direct effect and supremacy of European Community law. Other ECJ innovations include implied powers for Community lawmaking, preemption of conflicting national legislation, and the development of a human rights jurisprudence to check potential excesses of Community law and actors. See also J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L J 2403, 2413–19 (1991) for a discussion of these mechanisms and citations to major authorities analyzing them.
 23. See, Helfer and Slaughter, 107 Yale L J at 292 (cited in note 8); Weiler, *Transformation of Europe*, 100 Yale L J at 2413–19 (cited in note 22).
 24. See Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, 46 Intl Org 533, 555 (1992); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 Nw J Intl L & Bus 398, 443 (1996–97). It should be noted that the ECJ's effectiveness has mainly been measured in regard to its adjudication of Treaty of Rome, Article 177 cases. However, the ECJ's record in cases brought by states against one another and by the Commission of the Community against Member States has been spotty. See Helfer and Slaughter, *Toward a Theory*, 107 Yale L J at 292 (cited in note 16).
 25. The Registrar of the European Court of Human Rights, *The European Court of Human Rights—Historical background, organization and procedure*, available online at <<http://www.echr.coe.int/Eng/EDOCS/InfodocRevised2.htm>> (visited Apr 2, 2001).

or individual claiming to be a victim of a violation of the Convention (individual application) may sue directly in the ECHR. The Convention currently consists of 41 Contracting States, including all EU members. Final judgments of the Court are binding on the respondent States.

ECHR precedent makes it highly improbable that the Court would rule that another state's failure to recognize a Dutch same-sex marriage was a violation of the Convention. Although the right to marry is guaranteed in the European Convention for the Protection of Human Rights,²⁶ the Court reached the conclusion in two previous cases that "this fundamental right of 'men and women'" only covers heterosexual marriage.²⁷ In the *Rees* and *Cossey* cases, the Court ruled against British transsexuals who claimed the right to marry someone of his/her 'first' sex.²⁸

Two rulings that might support ECHR-imposed recognition are *Lustig-Prean and Beckett v the United Kingdom* and *Smith and Grady v the United Kingdom*. These cases held that four British homosexuals were wrongly dismissed from the armed forces after admitting their sexual orientation to investigators.²⁹ The Court's rulings ultimately pressured the British government to lift its ban on gays in the military. The Court found in each case that the investigation conducted into the service members' sexual orientation and their discharge on the grounds of homosexuality violated Article 8 of the Convention.³⁰ The Court was influenced by the fact that the European countries that completely ban homosexuals in their armed forces are now in a small minority: "Even if relatively recent, the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue."³¹ These cases suggest that the Court would be encouraged not to overrule its previous decisions on the right to marriage by the fact that the vast

26. See European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECPHRFF"), 213 UNTS 221, Art 12 (1950).

27. Kees Waaldijk, *The Legal Situation in the Member States*, in Kees Waaldijk and Andrew Clapham, eds, *Homosexuality: A European Community Issue, Essays on Lesbian and Gay Rights in European Law and Policy* 91 (Martinus Nijhoff 1993).

28. See *Rees v UK*, 9 Eur HR Rep 56 (1987); *Cossey v UK*, 13 Eur HR Rep 622 (1991).

29. *World in Brief: Britain to Permit Gays in Military*, Wash Post A39 (Dec 15, 1999). See *Lustig-Prean and Beckett v UK* (1999), available online at <<http://www.dhcour.coe.fr/hudoc>> (visited March 24, 2001), and *Smith and Grady v UK*, available online at <<http://www.dhcour.coe.fr/hudoc>> (visited March 24, 2001).

30. See *Lustig-Prean* at para 104–05 (cited in note 29); *Smith* at para 112 (cited in note 29); see also ECPHRFF, Art 8 (cited in note 26) (Right to respect for private and family life states: "1. Everyone has the right to respect for his private and family life, his home and correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.").

31. *Lustig-Prean* at para 97 (cited in note 29); *Smith* at para 104 (cited in note 29). The exact same language is used in both opinions.

majority of Contracting States do not support same-sex marriages and many do not support same-sex partnerships.

Although it is hypothetically possible that the Court could overrule itself, there is probably not enough support among the Contracting States to move the Court to make such an about-face. The fact that the Netherlands is the only country so far to establish same-sex marriage indicates that despite the trend towards establishing legally recognized same-sex partnerships, the other Contracting States are not ready to accept same-sex marriages.

Under the letter of the law, the Netherlands' same-sex marriage law could lead to major changes in the laws of other Member States. An ECJ ruling under the freedom of movement clause could allow same-sex couples married in the Netherlands to enjoy marriage rights in all other Member States. A ruling by the European Court of Human Rights could encourage Member States to bring their laws into line with the Dutch law. However, political, legal, and social realities render these results unlikely. The ECJ may not address the issue of Dutch same-sex marriages and if it does so, it may still make Member States recognize them in only limited instances. The Court of Human Rights' case-law supports the heterosexual exclusivity of the right of marriage. Both the ECJ and the Court of Human Rights tend to follow trends in the internal law of the Member States. While that habit might indicate support for legal recognition of same-sex unions, it is not likely that either body would buck the will of the majority of Member States by importing the Dutch same-sex marriage law.

