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TRENDS ON (INTER-COUNTRY) ADOPTION BY GAY AND LESBIAN COUPLES IN WESTERN EUROPE

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1. INTRODUCTION

In this article I will analyze Western European developments in the field of (inter-country) adoption by homosexuals. Some countries have accepted the legal possibility of adoption by homosexual individuals and/or couples, although this does not mean that in all cases children can be adopted by lesbian and gay persons. There are several restrictions on inter-country adoption. The jurisprudence of the European Court on Human Rights with regard to adoption by homosexuals is still rather restrictive.

In this article, I will analyze the following questions: whether it is a human right to adopt or to be adopted; and, if adoption should be promoted in other countries as well. What are the positive and the negative legal and social consequences of adoption by gay and lesbian couples? I will first start with a small introduction of the legal institution of adoption. Then I will describe the form of adoption in the Netherlands, and after that, I will give an overview of homosexual adoption in Western Europe.

2. A SHORT INTRO ON ADOPTION IN EUROPE

Adoption in the western culture can be traced back to Roman Law. In the beginning of the nineteenth century, France permanently included the possibility to adopt children in its Civil Code. One of the very important consequences of this legislation on adoption has been the spread of the institution throughout the western world.

The Netherlands was one of the first countries that accepted this possibility. However, considering the small number of adoptions realized, the institution of adoption had little practical impact not only for this

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reason, but also because most lawyers in those days considered it to be "incompatible with our national character." In the Netherlands, for instance, adoption was not included in the Civil Code of 1838.

Many other countries introduced adoption in their legislation during the 19th or 20th century. In the Netherlands, adoption was first introduced in 1956. According to Marianne Meijdam-Slappendel, author of "De Adoptie in Nederland," such late timing can be explained by the existence of a comparatively well-equipped child welfare system and people's inclination to hold onto a dogmatic principle that "mother and child belong together." In most countries, adoption was seen as help for the child and, therefore, the legal ties between the child and his or her original family remained despite the adoption ("adoption simple").

According to Guus E. Schmidt, nowadays, most countries favor "full adoption" ("adoption plena") – the adoption that does not only lead to a full legal integration of the child into the new family, but also to a total break in the legal ties with the original (biological) family.

Another development was that adoption changed from a child protection measure into the last help for childless spouses to get a child of their own. Adoption has become increasingly criticized, and more and more lawyers plead for a new (but actually old) form of adoption – to keep the legal ties between the child and his or her biological parent(s). New alternatives for adoption were proposed. For example, Guus E. Schmidt proposed an "adoption" with the following characteristics:

> the child remains a member of the original family although the specific rights and duties as to custody, alimony, and inheritance, as a rule, will cease to exist; the child becomes a member of the new family and in most cases acquires the same rights and duties as if he were born to that family; it is possible that certain rights between the child and the members of the original family are maintained; it is also possible that the child retains or later re-acquires his original name; the possibility of revoking adoption are strongly extended.

3. REGULATIONS ON ADOPTION IN THE NETHERLANDS

3.1. GENERAL REMARKS

Originally, adoption was introduced in 1956 in Dutch Law as a measure of child protection. Since then, however, adoption has become more and more a special legal construction of filiations. An adoption can only be granted by providing that it is in the child's best interests, and it is clear that the child should expect nothing more from his or her parents.

The adoption is established by a decision of the district court and not by contract between the natural and the adoptive parents.

3.2. CONDITIONS FOR ADOPTION

On April 1, 1998, the rather old limitation of adoption by married couples only was set aside, and since then, adoption has been equally available for cohabiting (married or not) couples and for singles. With the introduction of the same-sex marriage, Dutch adoption legislation changed once again on April 1, 2001. As of that date, two women or two men are also able to adopt a child. However, the law applies only to children who are habitual residents of the Netherlands. Adoption of a child from another country remains to be a possibility only for married couples of different sexes. This, however, will be changed in the Dutch legislation in 2006.

Social parents can adopt "their" child. This option turns social parents into judicial parents. In most cases of adoption by singles, the partner of the parent will adopt his or her child (so-called partner-adoption and formerly called step-parent-adoption), i.e. adoption by the partner or new partner of the child's mother or father. In case of partner-adoption, the new partner of one of the parents adopts the child. The family ties with this parent remain in existence. Only the family ties with the other parent (if that parent or that tie is present) are broken. In practice, the partner is often already living as a family with the parent and one or more children. The duration of cohabitation and caring for the child are therefore the same for the partner (step-parent) as for adoption by two persons. The step-parent must have been living with the other parent for at least three years and must have cared for the child for at least one year.

Anyone adopting a child becomes his or her legal parent and all family-law ties with the birth parent are severed. This is a radical step that can only be taken under strict conditions. The interests of the child are paramount and therefore come first. Another important condition is that the child has nothing more to expect from his or her birth parents in their capacity as parents.

The couple wanting to adopt must be able to prove that they have lived together for at least three years and have cared for the child for at least a year. Likewise, step-parents wanting to adopt their partners' children need to have lived with the partner for at least three years and cared for the child for at least a year. This last demand is not necessary in the case where the child is born into a lesbian relationship and the female partner of the mother wants to adopt the child. A single person, similarly, must have taken care of a child for at least three years.

A child of twelve years or older has the right to veto adoption, while a younger child can be heard if the judge determines that the child is aware of his or her interests. From the side of the parents, it is sufficient that they do not contest the adoption, and that they do not have custody at the time of the adoption procedure. Under certain conditions, objections by the parents can be overruled.

Adoption leads to cutting off the links from the child with his or her former parents to establishing new judicial links with the social parents. The case of adoption by the then partner of the parent is called "partner-adoption." Thanks to adoption, a new legal family tie comes into being between the child and the adoptive parent(s). The family ties with the original parent(s) cease to exist. This makes adoption a drastic measure. The starting point in the legislation is that adoption must only be possible if the original family ties cannot be maintained. For this reason, adoption may only take place if a number of conditions are met. It is already a requirement that adoption must be to the manifest benefit of the child. There may be no doubt about this at all. The condition that a child can expect nothing more from its original parent(s), however, is new. The judge decides whether a parent can still fulfill his or her role as a parent. For the sake of clarity, this is about the question of whether a parent can still mean something to the child as a parent. The answer to this question, for example, may be "no," while there is still contact in the form of an arrangement concerning parental access.

The request for an adoption must be submitted by a request to the court, and the help of a lawyer is always required for the submission of an adoption request. To obtain joint responsibility, the parent and his or her partner must jointly submit a request to the court. The help of a lawyer is necessary in this case as well.

The conditions for the adoptive child are the following: (1) he or she must be a minor (although the Court of Appeal in Amsterdam allowed an adoption of a girl, who was twenty years old at the time of the first demand for adoption); and (2) he or she must not be a legal grandchild of one of the adopting parents, i.e. in the Netherlands grandparent's adoption is not permitted.

Children of twelve years and older have to be heard by the judge about the intended adopted and have an absolute right to veto their own adoption. The judge tries to establish an opinion on whether the child has been adequately informed about his or her position as a foster child who probably will be adopted in the near future. The philosophy behind this kind of information gathering is that the child might be traumatized

severely if an outsider were to accidentally tell him or her about his or her adoptive status. It is thought much better for adoptive children to be told by their adoptive parents that they are in fact not their biological children. This information duty is not laid down in the statutes; it has, however, been developed in the legal practice.

3.3. CONSEQUENCES OF ADOPTION

With the adoption order, the child acquires the legal status of a child of the adoptive parent(s). The child loses all legal ties with his or her biological parents and family. Adoption can, however, be revoked. The only person who can revoke an adoption is the adopted child himself. This can be done at least two years, but no more than five years, after the child reaches the age of majority. The revocation has to be in the best interest of the young adult and it does not happen frequently. Adoption of the step-children of the other partner is also possible. Most Dutch adoptions nowadays concern foreign children, especially from China and South American countries. Those adoptions are not so much a matter of private law regulations than as of the policy in respect to aliens. The future adoptive parents have to deal with the ministerial circulars concerning aliens and the Act on the placement of foreign children for adoption (1988), operative from July 15, 1989. This law provides not only the conditions of adoption for the future adoptive parents, but also rules pertaining to persons or agencies that mediate these kinds of cases. It is a licensing system in this respect.

Adoption within the Netherlands was made possible for same-sex couples on April 1, 2001, at which time the act of December 21, 2000, to amend Title 1 of the Civil Code (adoption by same-sex couples) has taken effect.

Under the new adoption rules, children who are raised by same-sex couples are afforded better judicial protection. For example, through adoption, they become the lawful heirs of their adoptive parents. The Netherlands was the first country to allow adoption by same-sex couples, but as seen later on, several other countries soon followed. The new rules relate to adoption of a child in the Netherlands, that is, a child with its ordinary place of residence in the Netherlands. For adoption of a child from another country, however, it is still the rule that couples wishing to adopt a child must be married and of different sexes. Furthermore, there is a new condition that is in effect for all adoptions. From now on, adoption may only take place if the child has no more expectation from his or her biological parent(s).

3.4 ADOPTION BY SAME-SEX AND DIFFERENT-SEX COUPLES

Adoption of a child in the Netherlands was already possible for different-sex couples and for single persons. Since April 1, 2001, same-sex couples became eligible to adopt as well. Therefore, children who are being raised by two people of the same sex will now have the legal protection they are entitled to in this situation. Whether partners are married or not is irrelevant. However, immediately prior to the request, they must have been living together for at least three years and they must also have spent at least one year jointly caring for and bringing up the child.

3.5 ADOPTION BY A SINGLE PERSON

A single person can also adopt a child in the Netherlands if he or she has cared for and raised the child for three years. In practice, adoption by a single person will primarily involve a step-parent, although it's not limited to those cases. The person who adopts can be male or female, heterosexual or homosexual.

3.6 PARTNER ADOPTION AND STEP-PARENT ADOPTION

In partner/step-parent adoption, the new partner of one of the parents adopts the child. The family ties with this parent remain in existence. Only the family ties with the other parent (if that parent or that tie is present) are broken. In practice, the partner/step-parent often already lives with the parent and one or more children as a family. The duration of cohabitation and caring for the child is therefore the same for the step-parent as it is for adoption by two people. The partner/step-parent must have been living with the other parent for at least three years and must have cared for the child for at least one year. Whether the couple lives together as a man and a woman, two women, or two men is irrelevant. The same goes for their status: adoption is possible for married spouses, registered partners, and de-facto-marriages.

3.7 DUO MOTHERS

In one case of partner/step-parent adoption, the period during which the child must have been cared for does not apply. This is the case of two women having a relationship and one of them has a child. The mother's partner may submit a request for adoption to the court immediately after

the child's birth. This applies irrespective of the form of their cohabitation. However, they must be living together for at least three years.

3.8 JOINT PARENTAL RESPONSIBILITY INSTEAD OF ADOPTION

Sometimes adoption is not possible or not desirable. In those cases, joint responsibility can be a solution. As of January 1, 1998, one of the parents may exercise responsibility for the child together with his or her partner (who is not the parent of the child). This may involve the mother and her girlfriend or boyfriend with whom she forms a family, or the father and his boyfriend or girlfriend with whom he forms a family. Joint responsibility gives the non-parent the same rights and duties of parental responsibility as it does the parent(s). He or she is then in all respects responsible for the care and upbringing of the child.

4. FOREIGN ADOPTION

4.1. NEW DEVELOPMENTS

The number of children who come to the Netherlands for adoption is still growing, which is largely due to an increased number of children coming from China. Accordingly, the Minister is investigating whether he can increase the number of official documents indicating consent in principle for inter-country adoption from 1500 to 1800 per year. The development provides a better balance between the number of would-be adoptive parents and the supply of adoption-eligible children. At the same time, it will be investigated whether the compulsory information course can be divided up into group informative meetings, family screening, and the preparation of adoptive parents for the actual adoption in small groups.

The costs for screening families, carried out by the Child Protection Board, are borne in their entirety by the adoptive parents because adoption is a personal and voluntary choice made by the would-be adoptive parents to adopt a child from another country. A legislative proposal on this issue is in preparation, according to a letter submitted to the Lower House by Justice Minister Piet Hein Donner.

The Minister also writes that he plans to improve the efficiency of the adoption procedure up to the granting of the official document indicating consent in principle and to extend the period of validity for this document from three to four years. Furthermore, the Minister wants to make it possible for parents to adopt two children at the same time.

Despite plans to improve procedural efficiency and to increase the number of consents in principle, some regulation of the influx of would-be adoptive parents will be required because the number of adoptive children that come to the Netherlands fluctuates.

4.2. PARTIAL INTERMEDIARY SERVICES

Under the Hague Adoption Convention, it is not possible in principle to adopt children from non-member states through partial intermediary services. The reason for this is that the procedure cannot be sufficiently checked. The Minister, therefore, proposes that the Dutch Central Authority provides a declaration of consent for each adoption in relation to matching adoption and parents. A questionnaire will also be drafted that applies for each partial intermediary service, which is to be filled out by the would-be adoptive parents and includes all the required documentation.

The maximum age difference between the adoptive child and the parent is forty years. Children entering the Netherlands must be six years of age or younger. This means that an adoptive parent must be no older than forty-six years. The Minister sees no reason to change this maximum age, but he is considering raising it to forty-eight years for cases in which parents want to take a second adopted child into the family.

For the time being, the law will not be amended to allow for inter-country adoption by same-sex parents. A survey held in twenty-five countries showed that inter-country adoption by parents of the same sex is yet impossible. The Minister indicates in his letter that he is willing to amend the law, should the attitudes of the countries of origin change. Only some states in the USA agree to inter-country adoption for homosexual adoptive single parents living in other countries.

4.3. SINGLE-PARENT ADOPTION

In single-parent adoptions, the child must be cared for by the adoptive parent for at least three years before the adoption becomes official. The Minister is of the opinion that this time frame is too long. He therefore proposes to reduce the time period to one year, which is the same requirement as for married couples. In many cases, this will also reduce the time period required for the partner of an adoptive parent to obtain legal guardianship over the child ("step-parent adoption").

4.4. SOME FIGURES

The following are statistics relating to adoptions in the Netherlands in 2004. Dutch families adopted 1,368 children in 2004; compared to the year of 2003, the increase in adoptions was nearly 20 percent (over 200 more than in 2003). China led all other countries with the number of children adopted by Dutch families (60 percent from the number of foreign children; 87 percent of them are girls). Out of 1,368 adoption cases, 1,116 were non-step-parent adoptions and 252 were step-parent adoptions. Non-step-parent adoptions are usually international adoptions. Only 7 percent of non-step-parent adoptions involve Dutch children. Half of step-parent adoptions take place by the same-gender couples.

In 2004, nearly 300 Dutch children were adopted. Three-quarters (252 children) were step-parent adoptions. In 130 cases, the female partner of the mother was the adoptive parent.

5. ARRANGEMENTS FOR INTER-COUNTRY ADOPTION BY SAME-SEX COUPLES

In the fall of 2005, Dutch Justice Minister Piet Hein Donner will submit a bill to the Lower House of Parliament that will allow inter-country adoption for same-sex couples, according to a letter that the Minister sent to the Lower House in response to meetings previously held with Members of Parliament on the issue. In those meetings he announced that he would open the Placement of Foreign Foster Children Act ("Wobka") to same-sex couples.

Under the arrangement, the care period for one-parent adoption will be reduced from three years to one year. In practice, this means that the completion of the adoption of a foreign-born child by one man or one woman may take place two years earlier than is presently the case. Under current legislation, the person who cares for a child becomes an adoptive parent after three years.

The amended care period is also favorable for the adoptive parent's partner who decides to adopt the foreign child at a later point in life. In these cases, a care period of one year should, however, be taken into account before he or she can also become an adoptive parent, but the total length of the procedure for both parents can, as a result of the change, be shortened from a total of four to two years.

The requirement of having to live together for at least three years in relation to step-parent adoption will also be cancelled by the Minister and, as a result, the adoption of a child born into a lesbian relationship can

already be completed at the child's birth. It will then be possible to start the adoption procedure before the child is born and adopt him or her at birth. In the event that a decision to adopt a child is made only after the child's birth, it can be arranged that adoption will have retroactive effect from birth. In this regard, the legal position of children in a lesbian relationship will be equal to children born from a marriage between a husband and wife.

In his letter to the Lower House, the Minister further informs the readers that he is planning a second legislative proposal on adoption that will specifically concern the working process and the procedure of the cross-border adoption. This relates to matters such as the extension of the adoption consent in principle from three to four years, the possibility of granting this consent for two children at the same time if the adoptive parents have proven their suitability, and to raise the maximum age to forty-eight years for cases where a family wants to adopt a little brother or sister of the already adopted child.

6. ADOPTION BY HOMOSEXUAL COUPLES IN EUROPE

6.1. HOMOSEXUAL ADOPTION IN OTHER EUROPEAN COUNTRIES

On November 1, 2005, gay adoption became legal in Sweden, the Netherlands, Spain, England, and Wales. Other countries, for example, Iceland, Norway, Germany, and Denmark allow "stepchild-adoption" so that the partner in a civil union can adopt the natural (or sometimes even adopted) child of his partner. In the Republic of Ireland and some other countries, individual persons, whether heterosexual or homosexual, cohabiting or single, may apply for adoption as well.

In France, the same-sex adoption case is currently being reviewed by the Court of Cassation. In that case, a lesbian had given birth to children who were then adopted by her partner under a legal framework that allows one to create legal adoptive parenthood without extinguishing the original legal parent-child relationship(s) ("adoption simple"). As this automatically gives exclusive custody to the adopter, however, a second court application was then made.

6.2. FRETTÉ (A FRENCH HOMOSEXUAL) V. FRANCE

On February 26, 2002, the European court decided *Fretté v. France* (no. 36515/97, ECHR 2002), which has been very important in this field. In October of 1991, the applicant made an application for prior

authorization to adopt a child. A social inquiry was opened by the Paris Social Services, Child Welfare, and Health Department. On December 18, 1991, the applicant had the first interview with a psychologist from the Department, during which he revealed that he was in fact a homosexual. He submits that during the interview he was strongly urged not to continue with the adoption process.

In a decision of May 3, 1993, the Paris Social Services Department rejected the applicant's application for authorization to adopt. The reasons given for that decision were that the applicant had "no stable maternal role model" to offer and had "difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child." The decision was made on the basis of various inquiries leading, among other things, to a social services report of March 2, 1993, which included the following statements:

> [M]r. Fretté seems to us to be a sensitive, thoughtful man who shows consideration for others. He discusses his emotional life and his homosexuality with a great deal of honesty and simplicity. He spoke to us of a number of relationships which have had a major impact on his life, particularly one with a male friend who has now died. It should be added that he is now the auxiliary guardian of this friend's child.

His humanistic, altruistic cast of mind prompts him to take an interest in the problems of the Third World. He sponsors two Tibetan children, one of whom is a baby. He is able to talk sensibly and intelligently about the boy over whom he has guardianship. He is not personally responsible for the boy, who is in the care of his grandmother, but he plays a highly active part in his upbringing. His ideas about bringing up children are well-thought out and imbued with a spirit of tolerance.

Mr. Fretté has been thinking about adopting since 1985. He is aware that his homosexuality may be an obstacle to being granted authorization to adopt because of the prevailing views of society. In his opinion, his choice of emotional and sexual lifestyle has no bearing on his desire to bring up a child. His application is a personal undertaking, not a militant gesture.

Since 1985, he has met many homosexual men with children. He even once considered having a child with a female friend, but the plan came to nothing because of a lack of maturity on both sides. This friend is nonetheless still very interested in Mr. Fretté's plan to adopt and has even promised to act as a female role model for the child.

Mr. Fretté's application to adopt a child is motivated by a desire to provide a child with affection and a proper upbringing. In his view, the essential thing is to love and care for a child; adoption for him is no more

than a social and legal procedure. Mr. Fretté has the support of the friends around him. It seems, however, that his family members either do not know of his plans or have misgivings about them.

His desire for a child is genuine, but he has difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child. For example, it was only when we visited his home that he realized how unsuitable his flat is for a child to live in. As a result, he began considering the possibility of moving.

When questioned as to how he regarded his role in a society as a single father, he said he did not have an answer. He considers himself capable of managing the day-to-day life of a child and thinks that he will in due course find the answers to the questions about his homosexuality and the absence of an adoptive mother that will occur to the child as he or she grows up.

Mr. Fretté is perfectly aware of the importance of telling the child about his parentage. He shows understanding towards women who are impelled to abandon their children. He refuses to have any fixed ideas about the characteristics of the child he would like to adopt. Nonetheless, he has been thinking that he would prefer as young a baby as possible and that he may begin searching in Korea or Vietnam. Mr. Fretté has undoubted personal qualities and an aptitude for bringing up children. A child would probably be happy with him. The question is whether his particular circumstances as a single homosexual man allow him to be entrusted with a child.

The applicant alleged that the rejection of his application for authorization to adopt had been implicitly based on his sexual orientation alone. He argued that that decision, taken in a legal system which authorized the adoption of a child by a single, unmarried adoptive parent, effectively ruled out any possibility of adoption for a category of persons defined according to their sexual orientation, namely homosexuals and bisexuals, without taking into account any of their individual personal qualities or aptitudes for raising children.

Referring to the procedure adopted by the European Court of Human Rights ("ECHR") in *Salgueiro da Silva Mouta v. Portugal* (no. 33290/96, ECHR 1999-IX), the applicant considered it appropriate to place the issue in the context of Article 14 of the ECHR Convention. He alleged that he was the victim of discrimination on the ground of his sexual orientation, in breach of Article 14 taken in conjunction with Article 8. In view of the inevitability of the conclusion on that point, he did not deem it necessary for the Court to determine whether there had been a breach of Article 8

taken alone. The relevant parts of the Articles 14 and 8 of the ECHR provide:

> Article 14:
>
> The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex.
>
> Article 8:
>
> 1. Everyone has the right to respect for his private and family life[.]
>
> 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 . . . for the protection of health or morals, or for the protection of the rights and freedoms of others.

To quote the Court's opinion:

> 37. The Court observes that it has found that the decision contested by the applicant was based decisively on the latter's avowed homosexuality. Although the relevant authorities also had regard to other circumstances, these appeared to be secondary grounds.
>
> 38. In the Court's opinion there is no doubt that the decisions to reject the applicant's application for authorisation pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure, for which the granting of authorisation was, in principle, a prerequisite. It remains to be ascertained whether the second condition, namely the existence of a justification for the difference of treatment, was also satisfied.
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> 39. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different (see Thlimmenos, cited above, § 44).
>
> 40. However, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, among other authorities, Petrovic, cited above, pp. 587-88, § 38, and Rasmussen v. Denmark, judgment of 28 November 1984, Series A no. 87, p. 15, § 40).
>
> 41. It is indisputable that there is no common ground on the question. Although most of the Contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt, it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues on which opinions within a

> democratic society may reasonably differ widely. The Court considers it quite natural that the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters. By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. Since the delicate issues raised in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State (see, mutatis mutandis, Manoussakis and Others v. Greece, judgment of 26 September 1996, Reports 1996-IV, p. 1364, § 44, and Cha'are Shalom Ve Tsedek v. France [GC], no. 27417/95, § 84, ECHR 2000-VII). This margin of appreciation should not, however, be interpreted as granting the State arbitrary power, and the authorities' decision remains subject to review by the Court for conformity with the requirements of Article 14 of the Convention.

So, the ECHR decided that "the justification given by the Government appears objective and reasonable and the difference in treatment complained of is not discriminatory within the meaning of Article 14 of the Convention." According to the Court's opinions in *Karlheinz Schmidt v. Germany* and *Van Raalte v. The Netherlands*, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification," that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized." This means that according to European law, a homosexual in a European state is only allowed to adopt a child if that state allows that sort of adoption. The European Convention does not guarantee the right to adopt. According to Article 8 of the ECHR, the decision to dismiss the applicant's (Mr. Fretté's) application could not be considered to infringe his right of free expression and development of his personality or the manner in which he led his life, in particular, his sexual life.

7. CONCLUSION AND NEW QUESTIONS

In the Netherlands, like in many other European countries, the adoption by homosexual singles and couples has become more and more accepted. The trend is that adoption by homosexuals will be more permissible in Western Europe. It seems that there is no evidence that children who are adopted by homosexual couples are in more danger of

becoming victims of sexual abuse than children of heterosexual parents. In the Netherlands, there are many cases of homosexual foster parents, and yet there is no evidence of more abuse than by other parents. On the contrary, it is a well-known fact that these homosexual couples take care of the children (who have been abandoned, abused, neglected, and mistreated) in a very careful and loving way. It is this general experience that, among other reasons (no discrimination laws, pressure groups, etc.), has led to the enactment of homosexual adoption in the statutes of several European countries.

However, the question arises whether the right to adopt should come with the far-going consequence of breaking up the legal ties. Aren't there other, probably better solutions for social parents?

In my opinion, it is better to allow the full adoption only in cases where the child has no legal parents (foundlings) and not to break the legal ties with the (known) biological and legal parents of the child, but to create stronger rights for those who educate and raise the children of other parents. This is possible by introducing (or re-introducing) the "adoption-minus-plena." By this simple adoption, the child remains a member of the original family, although the specific rights and duties as to custody, alimony, inheritance etc., will as a rule cease to exist. The child becomes a member of the new family and in most cases acquires the same rights and duties as if he were born to that family. The new social parents must educate the child and the child cannot be taken away from them unless it was because of a child protective measure.

In the case of a heterosexual or homosexual partner of the parent, the caregivers have the possibility of shared parental responsibility, i.e. shared parental authority. This will lead to child support obligations for the partner of the parent of the child. So, this means the social parent is entitled to become jointly responsible. Although this does not give this parent exactly the same status as the legal parent, it certainly strengthens his or her legal position vis-à-vis the child.

According to Dutch Law, one of the parents may exercise responsibility for the child together with his or her partner (who is not the parent of the child). This may involve the mother and her male or female partner with whom she forms a family, or the father with his male or female partner with whom he forms a family. Joint responsibility gives the non-parent the same rights and duties of parental responsibility as it does the parent(s). He or she is then in all respects responsible for the care and upbringing of the child. To obtain joint responsibility, the parent and his or

her partner must jointly submit a request to the court and go through the adoption procedure. The help of a lawyer in this case is necessary.

On April 1, 2001, when marriage became available for same-sex couples in the Netherlands, one important distinction remained between the 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 both automatically share all legal and financial responsibilities over the child. Such joint parental authority plus joint parental maintenance duties do not arise automatically in the case where a child is born into a lesbian marriage (or where a child is born in a lesbian or heterosexual registered partnership). These responsibilities could only be obtained by petitioning the court. This, however, was changed on January 1, 2002, when the law of October 4, 2001, (amending various articles of Book 1 of the Civil Code; which was published in Staatsblad 2001, nr. 468) took effect. Any child born from that date on 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: his or her 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 toward the child.

Such a solution would, in my opinion, be more beneficial to the child. The child's legal ties with his or her biological parents (if they are known) will remain intact and the parents who educate the child will bear the responsibility to do so. The biological parent does not have the right to withdraw the child from its social family.