Equal rights for same-sex couples and the rights of the child as third party

*Coby de Graaf**

I Introduction

In January 2007, the Dutch House of Representatives proposed a motion urging that same-sex couples be granted the same filiation (parentage) rights regarding children born within their relationship as opposite-sex couples.[1] This proposal should not be seen in isolation, but as a result of the process of emancipation of same-sex couples over the past fifteen years. This contribution will be touching on significant milestones in this process.

The changing outlook on same-sex couples must be seen within the context of general developments regarding the family and how this is reflected in the regulation of family law. In the Netherlands, as in most other Western European countries, ideas concerning family and family life have undergone far-reaching changes. Forms of cohabitation outside of marriage have become increasingly important. This change was first reflected in legislation in a general regulation of forms of extra-marital cohabitation. This general regulation from 1998 also had important emancipatory consequences for same-sex couples.

In a later phase of this process, the focus in the discussion on the equal treatment of heterosexual and same-sex couples moved increasingly towards legal issues concerning children born in a same-sex relationship. This development was strongly influenced by the increasing numbers of possibilities in the field of artificial insemination, a development that made it possible for same-sex couples to start a family that strongly resembles the 'classic' family, where raising children plays a significant role. The consequence of this was that the opportunity for same-sex couples to form a 'classic' family was legalised during this phase. The first evidence of this was in a change to the adoption law. This change, which was introduced in 2001, meant that adoption could have consequences regarding filiation law

* Dr. J.H. de Graaf is assistant lecturer in private law at the University of Amsterdam, and is attached to the Amsterdam Institute for Private Law.

1 *Parliamentary Papers II* 2006/07, 30 800 VI, No. 60.

for the relationship between the child and the partner of the mother. In the second place this legalisation resulted in 2001 in an expansion of the ways in which legal parental responsibility could be acquired.

The most recent phase in the legalisation of the emancipation process was formed by the bill of 2006 proposing considerable simplifications to the regulations concerning adoption for same-sex couples.[2] At the time of writing (summer 2008), this bill was due to be dealt with. This process reawakened the discussion on whether same-sex couples should be accorded the same filiation rights as heterosexual couples. It was held that establishing legal filiation between the so-called duo-mother and the child of her partner should no longer need to be arranged via adoption but through an amendment to the filiation law. One of the proposals put forward by the committee set up to investigate this was to give the partner of the mother the option of acknowledging the child.

Increasing the possibilities for same-sex couples to establish legal filiation is legitimised in the proposals by saying this is in the 'interest of the child', among other things. But how valid is this argumentation? It almost seems that in the process of creating equal rights for same-sex couples, the rights of the child have been pushed further into the background. The political debate seems to be dominated by the political champions of equal rights for same-sex couples, with no regard to the fundamental rights of the children concerned. The question also arises whether the emphasis on the formal equal status has not led to a disregard of the actual differences which exist between same-sex and opposite-sex couples, where not enough account is taken of the differential impact that the regulations concerned have on same-sex couples.[3] Is this differential impact not too often unfairly only at the child's expense? The question presented within the context of this contribution is therefore: how can the principle of equality and the rights of the child be brought into a more balanced relation? Because children have no say in (the manner of) their conception, there is a good argument for saying that their position as third party should be protected by law.

This contribution sketches the framework within which the rights of the child have gradually disappeared from view. Section II begins with a description of the rights of the child to be able to obtain information concerning his filiation (parentage). Following this,

2 *Parliamentary Papers II* 2005/06, 30 551, No. 2.

3 R. Platero, 'Love and the state: Gay marriage in Spain', *Feminist Legal Studies* 2007, pp. 329-340.

section III deals with the legislative process, including the milestones in the legislation relating to the equal treatment of same-sex couples. Here various patterns appear that would seem to explain the one-sided focus on the rights of same-sex couples in the debate. Section IV provides a sketch of the developments in the equality of rights for homosexual couples in relation to the rights of a child of a lesbian couple. Also dealt with here is the concept of parental responsibility which is so important to the discussion on children's rights, and following on from this, the international feminist discussion on the importance of 'an ethics of care'.
Section V takes a look at the situation in other countries, where the concept of procreational responsibility is also being developed further. For this comparison, countries have been chosen that match the developments currently taking place in the Netherlands. In closing, section VI contains a conclusion.

II The right of a child to know his or her parents

1 Introduction

The right of a child to know his or her parentage can be substantiated by referring on the one hand to philosophical and social-scientific sources and on the other hand to basic principles of law, including international law. The demand for the right to obtain information concerning filiation is particularly relevant in a society in which the link between biological/genetic filiation and legal parenthood is becoming looser. However, we will begin with a broader framework, examining the general principle based on natural filiation. The right to information concerning filiation is indeed closely connected to this, but only becomes an issue at the point where the link between biological and legal parenthood is let go of, and this principle is therefore abandoned. The following subsections will start by explaining the philosophical and social scientific viewpoint (subsection 2), followed in subsection 3 by a representation of the legal basis for respecting this legal right.

2 The importance of (knowing) filiation from a philosophical and social-scientific perspective

Important starting points for a clear explanation of the significance of filiation as such can be found in Pessers's work.[4] Pessers

4 D. Pessers, *Verdwaalde seksen. Over sperminators, metroseksuelen en autocopien*, [Lost Sexes: On Sperminators, Metrosexuals and Autocopies] Thijm Essay, Nijmegen: Valkhof Pers 2003.

discusses in the Thijm Essay the most important developments in recent years, during which, as she explains, the significance of the classic family has gradually declined, often to the detriment of the children involved. According to Pessers, it is of fundamental importance to a child that he or she is rooted in a tradition and has a clearly traceable ancestral lineage. As she puts it:

> "The relationship between the sexes based on individual freedom of choice completely ignores the desires of the child. What the child wants most is a legal filiative bond with his or her biological father. And more than that, what the child really wants most of all is an intensive and loving contact with his or her biological father. Where this filiative bond and this contact are absent – no matter how well they are compensated by a social father – the child still experiences a piercing sense of loss. The new human right of the child to have access to information on its biological descent – presented in the literature as a triumph for the child – is at most a poor comfort which we should be ashamed to call such."[5]

If the link between genetic filiation and legal parenthood is broken, then information about the biological origins of the child does indeed become relevant. Nowadays the importance of this is generally recognised.

Blauwhoff, among others, refers to authorities in the social sciences to show the psychological significance to the child of knowing his biological filiation as an important justification for the right to such information, in addition to the medical significance, for example in the case of hereditary diseases.[6] Following on from this, it seems logical that the determining role of genetic factors on personal development should also not be forgotten. In recent years the nature-nurture debate seems to show a distinct shift towards the significance of the nature component. As Swaab posits within the context of "Gender identity and sexual differences":

> "Genes also play a role. We don't know precisely which genes, but studies of twins show a genetic factor in homosexuality."[7]

5 Pessers 2003, p. 26 (see note 4).

6 R.J. Blauwhoff, 'Tracing down the historical development of the legal concept of the right to know one's origins. Has 'to know or not to know' ever been the question', *Utrecht Law Review* 2008, p. 102.

7 D. Swaab, 'Wij zijn onze hersenen' ['We are our brains'], in: C. Ex, *Opvoeden wat kun je? Over de ontwikkeling van ouders en kinderen* [Childrearing, what part can you play? On the development of parents and children], Amsterdam: Wereldbibliotheek 2007, p. 18.

3 The importance of (knowing) filiation from a legal perspective

For a legal basis for the starting point expounded by Pessers on the importance of filiation as such, we can first look to international law. Article 7 of the UN Convention on the Rights of the Child (CRC)[8] states that every child has, "as far as possible, the right to know and be cared for by his or her parents". From this provision we can infer that the starting point should be for the child to grow up with his or her biological parents.[9] This then not only assumes the link between biological and legal parenthood, but also a link between both these terms and parental responsibility. Despite the addition to the text of "as far as possible", Asser/De Boer also argue for a wide interpretation of Article 7 of the CRC. They state:

> "Article 7 of the CRC encompasses more than just the right to be informed of the parent's names: the wording and the intent, which is based in part on the psychological welfare of the child, oppose such a restricted interpretation."[10]

International adoption law also clearly reflects the great importance of maintaining a link with natural filiation. The primary starting point here is that the interests of the child should be placed explicitly above any other interests. In the explanation accompanying the Act sanctioning the Hague Adoption Convention, this is worded as follows:

> "The issue is to find a family for the child, and not to provide a child for a family."[11]

Bearing the subsidiarity principle in mind, we can then state that to begin with, the possibility of the child remaining in his or her family of origin should be looked into. In the report *Alles van waarde is weerloos* (*All things of Value are Defenceless*), published by the Kalsbeek Committee in May 2008, this subsidiarity principle is underlined once more by referring to the Hague Adoption Convention and the CRC. Among other things, the report states:

8 UN Convention on the Rights of the Child (Treaty Series 1990, 46 and 170).

9 See among other things: Court of 's-Hertogenbosch 3 May 2006, *UJN* AX1364 in which the court states that under Article 7 of the CRC "the child has the right to know and be cared for by his or her parents".

10 Asser/De Boer 2006, No. 692.

11 *Parliamentary Papers II* 1995/96, 24 810 (R 1577), No. 3, p. 4.

> "The question must always be asked whether intercountry adoption justifies the removal of a child from its own environment and culture."[12]

The principle of adhering to natural filiation as such is also expressed in filiation law. With the amendment to the Law of Filiation in 1998 this principle was explicitly brought to the fore. This is evident from the then-introduced possibility for denial of paternity within marriage on the grounds that the man is not the biological father of the child, as stated in Article 1:200 of the Dutch Civil Code, and also the new schedule of judicial determination of paternity as stated in Article 1:207 of the Dutch Civil Code. On the basis of this, it is possible to establish the paternity of a man on the ground that he fathered the child.

If the principle of adhering to natural filiation is abandoned, the right to obtain knowledge regarding filiation becomes relevant. For this we can in the first place refer to the Artificial Insemination (Donor Information) Act in which this right to obtain information concerning filiation is given legal shape.[13] According to this Act, children who are born as a result of artificial insemination not only have the right to know important details about the donor, but also information regarding his identity. In this Act, the right of the child to know about his or her origins is seen as a fundamental – although not absolute – personal right. Following a ten-year-long discussion, the right of the child to have access to this information has been accorded overriding importance in this law. If the donor refuses to supply the information, then the disclosure of such particulars

> "may only be withheld if, taking into account the consequences that non-disclosure may have for the applicant, they may involve such compelling interests on the part of the donor that disclosure should not take place" (Article 3, paragraph 2).

If the donor does not consent to the request of the child, the burden of proof lies with him and not with the child. This strict formulation was added to the original wording of the Act by the Van der Staaij Amendment.[14]

Case law shows a clear result of the right to obtain filiation information, in the Valkenhorst ruling. In this ruling, the Netherlands Supreme Court ruled that the right of the child to know the identity of the father prevails over the

12 Report on intercountry adoption *Alles van waarde is weerloos* [*All things of value are defenceless*], 29 May 2008, p. 21.

13 Artificial Insemination (Donor Information) Act (*Bulletin of Acts and Decrees* 2002, 240); Decree of 11 August 2003 containing provisions regarding data and records as referred to in Article 2 paragraph 1, respectively Article 3 paragraph 8, of the Artificial Insemination (Donor Information) Act [Governmental Decree] (*Bulletin of Acts and Decrees* 2003, 320).

14 *Parliamentary Papers II* 2000/01, 23 207, No. 24.

interests of the mother. The consideration that the mother is jointly responsible for the child's existence was an important argument here. [15]

Within the context of international case law regarding the right to obtain information concerning filiation, mention must be made of Article 8 of the ECHR. The European Court of Human Rights referred to this article when delivering a significant judgement in the Gaskin case. This case was unusual in that it was about a request for access to records from Gaskin's childhood, which he had spent largely in public care. In this situation, the Court considered the request of the individual to have access to his records, which were kept by Liverpool City Council as manager of the institution, to be justified. In its ruling, the Court stated:

> "*In the Court's opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development.*"[16]

A more recent judgement can be seen in the Jäggi case.

Remarkable in this case is Jäggi's age at the time when the complaint regarding the violation of Article 8 of the ECHR was brought. The Court ruled that despite his age – he was then 67 years old – Jäggi had the right to obtain information regarding the biological identity of his father. The Court stated:

> "*Although it is true that, as the Federal Court observed in its judgment, the applicant, now aged 67, has been able to develop his personality even in the absence of certainty as to the identity of his biological father, it must be admitted that an individual's interest in discovering his parentage does not disappear with age, quite the reverse.*"[17]

Having considered the abovementioned principles and the legal framework of the general right of the child to know and be cared for by his or her parents and the special right of the child to obtain information concerning filiation, we will examine the extent to which these principles have played a role in the establishment of legislation regarding equal rights of same-sex couples.

15 Supreme Court 15 April 1994, *Dutch Law Reports* 1994, 608, 3.4.3.

16 Gaskin v United Kingdom, ECHR 7 July 1989, publications ECHR series A vol. 160.

17 Jäggi v Switzerland, ECHR 13 July 2006, application No. 58757/00, under No. 40. For an overview of judgements of the European Court regarding the right to obtain information concerning filiation see: Blauwhoff 2008, pp. 105-112 (see note 6).

III Legislation in the Netherlands

1 Introduction

This section deals with the establishment of legislation concerning the granting of equal rights to same-sex couples as heterosexual couples. This seems to show a number of patterns that may explain the one-sided approach which has arisen. The period in which this legislation was formed will be divided into three phases in this section. The first phase is the equal treatment of married and unmarried couples in general (subsection 2). This is followed in phase 2 by a differentiation in legislation which is primarily focused on same-sex couples (subsection 3). Finally, this trend is continued in the third phase with proposals that include the introduction of the concept of acknowledgement by the duo-mother (subsection 4).

2 The first phase

This first phase covers the statutory regulations regarding heterosexual couples and those which particularly apply to same-sex couples. The focus is on protecting an actual family life. It leads among other things to the abandonment of the link between filiation and responsibility (custody). This phase is primarily concerned with the granting of equal legal status to married and unmarried couples, a development that took place simultaneously with the process of emancipation of same-sex couples which is at the centre of the second phase (see below in subsection 3). This first phase resulted in a totally new family law that came into force in 1998. Three elements codified within the framework of this law are important here, to wit: joint parental responsibility by a parent with a party other than a parent (subsection 2.1), the possibility of adoption by a single person (subsection 2.2.) and registered partnership (subsection 2.3).

2.1 Parental responsibility

With regard to the important change to the regulation of parental responsibility, a form of granting equal rights to married and unmarried couples was instituted in 1995 in advance of the general revision of family law in 1998. The statutory regulation concerning the Parental Responsibility and Access to Children Act (1995)[18] considerably broadened the possibilities for joint responsibility. Joint responsibility was

18 Act of 6 December 1995 (*Bulletin of Acts and Decrees* 1995, 592).

now not only possible during marriage, but also after *and* outside of marriage. This legislation codified that which had been taking place in practice for the last ten years, based on the case law of the Supreme Court, whose judgements were based on Article 8 of the ECHR.[19] These judgements by the Supreme Court formed the first steps in a process in which the dominant position of marriage as the only legal form of cohabitation was abandoned. The term 'spring rulings', which was used to denote these decisions, seems appropriate given the direction which was then taken. Not only were these rulings made in the spring, they also heralded a new beginning in the field of family law. The exclusive connection between marriage and responsibility was broken first in case law and then in 1995 by legislation. This development was to have far-reaching implications, particularly for same-sex couples.

In the 1998 amendment to family law, the regulation of joint parental responsibility was adapted and expanded. The new regulation introduced the concept of joint responsibility, whereby the joint responsibility could be carried out by a parent together with a person other than the other parent of the child.[20] On the basis of this regulation expressed in Article 1:253t of the Dutch Civil Code, a parent may exercise parental responsibility over his or her children, together with his or her partner. The underlying thought in this is that actual family life should be protected by law as far as possible:

> "The starting point is (...) that in the interests of the child, actual family life, even if not in the form of a traditional family unit, deserves adequate legal protection when the persons concerned are raising and taking care of the child in a lasting relationship."[21]

Persons eligible for the protection offered by these regulations are those who are not the biological parent of the child but who do have a "close personal relationship" with the child. This legal construction is not only meant for situations in which a parent embarks upon a new relationship with a partner of the opposite sex, but also for situations in which the child grows up under the responsibility of two persons of the same sex. In these cases it is also possible to establish a custodial relationship between the child and the partner of the biological parent. The new regulations signalled an important step towards equal rights for both married and unmarried couples and heterosexual and same-sex couples.

---

19 Supreme Court 4 May 1984, *Dutch Law Reports* 1985, 519 and Supreme Court 21 March 1986, *Dutch Law Reports* 1986, 585-589. See also: J.H. de Graaf, 'De modernisering van het ouderlijk gezag' ['The modernisation of parental responsibility'], *Advocatenblad* 2003, pp. 792-794.

20 *Parliamentary Papers II* 1993/94-1996/97, 23 714.

21 *Parliamentary Papers II* 1994/95, 22 700, No. 5, p. 3.

2.2 Adoption

Besides the regulations concerning joint responsibility, the revised adoption legislation also had a significant emancipatory effect on the position of married and unmarried heterosexual couples as well as same-sex couples. This change was also part of the revision of family law in 1998. A significant difference to the old regulations is that under the revised regulation it is possible for a single parent to adopt a child. In other words: single-person adoption is also possible. Although the later re-revised first paragraph of Article 1:227 of the Dutch Civil Code stipulated that adoptive parents should be of different sex, the Explanatory Memorandum to the bill in question specifically stated that the nature of the social situation of the candidate adoptive parent may not be used as a separate criterion.[22] So the fact that the potential adoptive parent is co-habiting with a person of the same sex should not be allowed to play a role here.

In a later phase of the emancipation process, where the focus is more on equal rights for same-sex couples, this regulation, as dealt with later in the following phases, is expanded further and offers the possibility for same-sex couples to adopt a child, although this regulation is not (yet) applicable to adopting children from abroad. [23]

In the discussion of the relevant proposals in the third phase, it will be clear that the proposition that the social circumstances of the adoptive parent may not play a role in the placing of a child will lead to the proposal that adoption by same-sex parents should also be possible in the case of foreign adoptive children.

2.3 Registered partnership

A third important step in the development of the recognition of same-sex couples was formed by the statutory regulation that made it possible for same-sex couples to "publicly declare their intent to take on lasting responsibility for each other".[24] This regulation came into effect simultaneously with the regulation concerning joint responsibility, on 1 January 1998.[25]

This law was significantly influenced by the 1995 Ministerial 'Memorandum on forms of cohabitation in family law'.[26] In this

22 *Parliamentary Papers II* 1995/96, 24 649, No. 3, p. 13.
23 Act of 1 April 2001 (*Bulletin of Acts and Decrees* 2001, 10).
24 *Parliamentary Papers II* 1993/94, 23 761, No. 3, p. 5.
25 *Bulletin of Acts and Decrees* 1997, 324.
26 *Parliamentary Papers II* 1994/95, 22 700, No. 5.

memorandum several areas of family law were extensively analysed. Based on the central principle of protecting 'actual family life', the memorandum notes that a considerable proportion of the Dutch population no longer lives together in a marriage relationship. The existing family law, with its emphasis on marriage, needs to be brought more in line with the actual situation in society. The proposal for registered partnership, which in a former version only applied to people unable to marry (i.e. homosexual and lesbian couples), is now open to couples who could marry but choose a legal form of cohabitation over marriage. According to the final regulation on registered partnership, a registered partner has, with some exceptions, the same rights as a married partner regarding matrimonial property, maintenance and inheritance laws. Article 1:80b of the Dutch Civil Code states that titles six, seven and eight of Book 1 of the Dutch Civil Code apply equally to registered partnerships as well. This means that registered partners enjoy the same community property regime as married couples, unless they enter into a 'prenuptial agreement' stating otherwise (just as married couples may choose to do). During the debate on the proposal in the House of Representatives, doubts arose concerning this issue: was there not a need for a less far-reaching arrangement than marriage? Where a registered partnership is involved, would it not be better to follow a system of separate assets?[27]

Registered partnership only covers the statutory regulations between the partners themselves. It contains no rules on the legal relationship regarding the partner's children. As has already been stated, couples (whether same-sex or opposite-sex) *may* be given joint responsibility (custody). The lack of a regulation laying down the relationship between the child and the partner of the mother is the main focus of the second and the final phase of the process of emancipation of same-sex couples.

3 The second phase

The second phase of the process of emancipation for same-sex couples saw measures taken specifically aimed at giving equal rights to same-sex couples. Here the argument for the right to equality before the law for same-sex couples was applied for the first time. In the measures argued for and later applied in this phase we can see an approach in which traditional marriage as a regulated institute once again assumed an important position. This signalled a withdrawal from the principle of equal rights for non-marital forms of cohabitation which

27 *Parliamentary Papers II* 1996/97, 23 761, No. 6, p. 18.

were the focus of attention in the 'Memorandum of forms of cohabitation in family law' from 1995. The link between filiation and responsibility (custody) was in effect reinstated. The recommendations by the Kortmann Committee formed the basis for developments in the second phase of this process of emancipation.[28] This Committee was set up on 25 June 1996 following two motions from the House of Representatives of April 1996 urging more-comprehensive regulations regarding equal rights for same-sex and heterosexual couples. [29] Here the House of Representatives expressed its desire to revoke the legal impediment to marriage between two people of the same sex, as well as, in the apparent interest of the child, to make it possible for same-sex couples to adopt a child. The Committee published its recommendations in October 1997.

The Committee voted in favour (by five votes to three) of opening up marriage to same-sex couples, thereby sharing the opinion of the House of Representatives on this issue. However, the Committee was unwilling to confer parental rights to such couples in a specific regulation. The Committee felt that this would create too great a breach between the reality (there is no question of filiation) and law (there is a legal family relationship). The Committee suggested introducing a new form of marriage which would have the same rights as registered partnership but which would bear the name 'marriage'. This would make the regulations on registered partnerships redundant, so they would cease to apply.

These recommendations by the Kortmann Committee had far-reaching consequences, considering that after the initial negative response from the ruling government, they were all transformed into statutory provisions under the following government. As a result of these recommendations, the following three statutory provisions were introduced (see subsections 3.1, 3.2 and 3.3).

The Committee also recommended that – in the interests of the child that is born and/or raised within a relationship between persons of the same sex – the legitimate desire to grant the child legal protection should be met. On the basis of this, joint parental responsibility should be introduced by operation of law and the possibility for adoption should also be introduced for these cases, albeit with the greatest caution.

28 Report of the Committee on opening civil marriage to same-sex couples, under the chairmanship of S.C.J.J. Kortmann (Kortmann Committee Report), The Hague October 1997.

29 *Parliamentary Papers II* 1996/97, 22 700, Nos. 14 and 18.

3.1 Same-Sex Marriage Act

The report of the Kortmann Committee led in the first place to the Same-Sex Marriage Act which came into force on 1 April 2001.[30] The considerations underlying the opening up of marriage to persons of the same sex can be found in the Kortmann Report, along with the arguments against such a regulation.[31] In order to justify opening up same-sex marriage, the government referred to Article 1 of the Constitution of the Netherlands, the principle of non-discrimination. The Explanatory Memorandum states:

> "The requirement that marriage partners should be of the opposite sex can be seen as a form of discrimination regarding gender and homosexual proclivity, for which no objective and reasonable justification exists."[32]

The question can be raised as to why it was felt necessary, after the introduction of the registered partnership on 1 January 1998, to move to introducing this form of marriage. The added value of the same-sex marriage seems slight, given that this regulation only differs from registered partnership in a few very minor points.

Neither the registered partnership nor this Act contain any regulation providing for the creation of legal filiation between the child and the partner of the parent. If one considers the possibility that registered partnership does not render this same-sex marriage superfluous, one could ask oneself if, in reverse, the regulation of same-sex marriage should not lead to a withdrawal of the option for registered partnership, whether same-sex or heterosexual. In the Explanatory Memorandum to the bill it is clear that, unlike the Kortmann Committee, the government was unwilling to draw the conclusion that the registered partnership is superfluous.[33] According to the government there is a need for an institution similar to marriage that is free from the symbolism associated with marriage, and we see that opposite-sex couples in particular use this facility.[34] For 2001, Boele-Woelki reported a percentage of 88% of the

30 *Bulletin of Acts and Decrees* 2001, 9.

31 Kortmann Committee Report, p. 35. For an overview of the viewpoints for and against same-sex marriage see also: Asser/De Boer 2006, pp. 121 and 122. In opposition of the proposition, the point is made that these are not equal cases. Purely from a biological viewpoint, one can state that a same-sex couple cannot beget children, so same-sex marriage cannot be placed on one line with heterosexual marriage, which by definition involves filiation rights.

32 *Parliamentary Papers II* 1998/99, 26 672, No. 3, p. 2.

33 *Parliamentary Papers II* 1998/99, 26 672, No. 3.

34 *Parliamentary Papers II* 1998/99, 26 672, No. 3, p. 6.

registered partnerships as being entered into by persons of the opposite sex. However she also notes that it is likely that most of these couples were people converting their marriage into a registered partnership in order to be able to get a flash divorce.[35]

3.2 Adoption by Persons of the Same Sex Act

The second piece of legislation that resulted from the proposals by the Kortmann Committee was the Adoption by Persons of the Same Sex Act. This also came into force on 1 April 2001.[36] Adoption was seen to be desirable as, in the case of same-sex married couples, the children have no legal familial ties to the couple. For this reason, the Act on Adoption by Persons of the Same Sex is a necessary supplement to the Same-Sex Marriage Act. Adoption is the appropriate legal concept here because as a result of the legal familial ties created by adoption, the child likewise becomes a member of the family of the co-parent. This is not the case with parental responsibility. Another difference is that, unlike parental responsibility, legal familial ties have permanent consequences.
The central criterion for adoption, namely the best interests of the child, is supplemented by a new criterion for these specific situations. For this a new paragraph (3) has been added to Article 1:227 of the Dutch Civil Code, stating:

> "that in the reasonably foreseeable future, the child may expect nothing of his parent or parents to the point of parenthood."

The question is however how this should be assessed. The Code refers to situations in which the child is born within a relationship between two women. In situations in which the donor is a friend or acquaintance of the woman and on the basis of Article 8 of the ECHR claims the right to family life, this cannot be ignored out of hand. An indication of the implications of this can be clearly seen in case law. For example, a judgement by the Netherlands Supreme Court of 21 April 2006 concluded that the court had correctly ruled:

> "that both of these circumstances taken together – biological paternity and family life of the man with the daughter – mean that in effect the man is a parent as meant in

35 K. Boele-Woelki, 'Registered partnership and same-sex marriage in the Netherlands', in: K. Boele-Woelki & A. Fuchs (eds.), *Legal recognition of same-sex couples in Europe*, Antwerp: Intersentia 2003, p. 51.
36 *Bulletin of Acts and Decrees* 2001, 10.

> Article 1:227 paragraph 3 of the Dutch Civil Code and that he thus has a direct interest in his resistance to adoption as demanded by Article 798 of the Code of Civil Procedure."[37]

A recent judgement by the Netherlands Supreme Court even ruled that the protection of a potential relationship falls under Article 8 of the ECHR. In this case the conclusion was drawn that the contact which the (known) donor had with the mother led to the existence of a close personal relationship as required by Article 8 of the ECHR. [38]

3.3 Joint Parental Responsibility within the Registered Partnership Act

A third proposal directly resulting from the Kortmann Committee's report was the Act of 4 October 2001 in which legal joint parental responsibility was granted over children born within a registered partnership.[39] On the basis of Article 1:253sa of the Dutch Civil Code, a parent and his or her partner – whether of the same or the opposite sex – are granted by law joint parental responsibility for a child born during the registered partnership. Partners who are both a parent and who have entered into a registered partnership fall under Article 1:253aa of the Dutch Civil Code. It is assumed that this is in the best interests of the child. What is to be avoided is the child ending up in a sort of responsibility vacuum.[40] Whether this argument is actually based on the best interests of the child is, in my opinion, doubtful.

4 The third phase

The final phase of the process of equal rights continues the trend of abandoning the link between biological filiation and legal parentage. The present proposals (summer 2008) are prompted by the desire to establish as completely as possible equal rights between same-sex and opposite-sex couples.[41] Same-sex couples should also be able to adopt children from abroad, and the female partner of the

37 Supreme Court 21 April 2007, *Dutch Law Reports* 2006, 584 notes JdB.

38 Supreme Court 30 November 2007, *LJN* BB9094. See also the consideration by A.J.M. Nuytinck, 'Het omgangsrecht van de spermadonor' ['The sperm donor's rights of access'], *Ars Aequi* 2008, p. 132 et seq.

39 *Bulletin of Acts and Decrees* 2001, 468.

40 A bill is currently (Summer 2008) being read in which the text of Articles 1:253aa and 1:253sa is being clarified: the parent and the registered partner must be one and the same person. *Parliamentary Papers II* 2003/04, 29 353, No. 3.

41 *Parliamentary Papers II* 2005/06, 30 551. The proposed amendments are a consequence of the discussion between the Minister of Justice and the House of Representatives which took place as a result of the bill on Adoption (Conflict of Laws) (*Parliamentary Papers II* 2002/03, 28 457).

mother should be able to become the legal parent of the child of her partner – the mother of the child – in a far less legally complicated way than at present. An amendment to adoption law is proposed for both situations. But the proposals go further, perhaps not on the part of the government directly, but certainly in the report on lesbian parentage by the Kalsbeek Committee which was set up by the government.[42] This Committee proposes, among other things, that the classic instrument of acknowledgement be used for granting legal parenthood to the duo-mother.[43] This means that filiation law rather than adoption law is called upon for establishing legal parenthood. With this the leading principle of filiation law, namely the link to biological filiation, is abandoned. All three proposals, which are discussed under the following three headings, are currently still being handled. The two bills were debated in the Senate at the time of writing (summer 2008).

4.1 Proposal for amendments to the Placement of Foreign Children for Adoption Act

Regarding the adoption of a child from abroad by same-sex couples, it was proposed that Article 1 of the Placement of Foreign Children for Adoption Act (Wobka) be amended. With an appeal to the principle of equal rights that is deemed desirable, the Minister decided in favour of this, despite the negative response of a survey carried out to assess potential international cooperation. In 25 countries – of which 14 responded – inquiries were made into the willingness to cooperate in international adoption by same-sex couples. The response was, by and large, negative.[44] On the other hand, creating the possibility for adoption by same-sex couples was not shown to have a negative effect on cooperation in general.[45]

The deciding factor in the Minister's viewpoint seems however to have been the part played in the De Pater-Van der Meer debate. She raises the point that "the present inequality before the law no longer serves any demonstrable function". Adoption by same-sex couples is already possible after all, using the construction of single-person adoption followed by step-parent adoption, the so-called U-bend construction.[46] This construction is rooted in the possibility for single-person adoption, which – as was discussed earlier – was explicitly separated from the social situation of the adoptant.

42 Report on lesbian parenthood, 31 October 2007.

43 In Dutch law acknowledgement is an act of law rather than an act of truth.

44 *Parliamentary Papers II* 2004/05, 28 457, No. 20, p. 8.

45 *Parliamentary Papers II* 2004/05, 28 457, No. 20, p. 8.

46 *Parliamentary Papers II* 2004/05, 28 457 and 26 672, No. 22, p. 4.

4.2 Proposal for simplifying the adoption procedure

Regarding the establishment of legal parenthood of the female partner of the mother, the Minister proposes that the adoption procedure be simplified. This will create a "situation equivalent to acknowledgement for the duo-mother", according to the Minister.[47] The Minister is not in favour of creating actual acknowledgement by the duo-mother. In this type of situation there is always a third party involved, and the Minister feels this third party may not be sidelined without some form of judicial scrutiny. [48]

To begin with, the proposed amendments concern the reduction of the period of care in a single-person adoption from three years to one year (Article 1:228, first paragraph. section f of the Dutch Civil Code). This makes the length of the period of care the same as for an adoption by two people. In the second place it was proposed to scrap the period of living together in Article 1:227, second paragraph, second sentence of the Dutch Civil Code. This means that adoption by the female partner of the mother can take place at the moment of birth.[49]
Both in the preparation phase of the bill and during its debate in the House of Representatives, the proposal for simplifying the adoption procedure came in for a great deal of fundamental criticism. During the preparation phase this could be seen in the very critical advice given by the Council of State. The Council stated that it is not in favour of the growth of the concept of adoption. Adoption is a measure for the protection of the child and not meant to create parenthood opportunities for the lesbian duo-mother. Here the Council is in favour of a legal concept that is equal to acknowledgement.[50] In the debate of this bill in the House of Representatives, this fundamental criticism was expressed in the acceptance of a motion proposed by Pechtold et al for strengthening the legal position of the duo-mother.[51] This motion proposed granting the duo-mother legal parenthood, and in the event of there not being a marriage relationship, opening the possibility of acknowledgement.
The arguments for rejecting the concept of acknowledgement by the duo-mother show just how sensitive the principle of equal rights is in this discussion. It is claimed that the manner of obtaining parenthood proposed in the motion is not the only way of doing justice to the principle of equal rights. The bill in its present form also does justice to this principle, according to the Minister. The question as to whether there is any

47 *Parliamentary Papers II* 2004/05 28 457 and 26 672, No. 22, p. 8.
48 This was explained in a letter in the context of the debate on the bill for opening marriage and adoption to persons of the same sex (*Parliamentary Papers II* 1999/00, 26 672 and 26 673).
49 *Parliamentary Papers II* 2004/05 28 457 and 26 672, No. 23, p. 2.
50 Council of State Advisory Report, 25 September 2006, p. 4.
51 *Parliamentary Papers II* 2006/07 VI, 30 800, No. 60.

conflict with the principle of equal rights is not addressed. And that would have seemed obvious, considering the actual inequality between single-sex and opposite-sex couples. In an evaluation of the Same-Sex Marriage Act and the Registered Partnership Act, the question of whether a different regulation for lesbian couples constitutes a conflict with the principle of equality is for the time being answered in the negative. The involvement of a third party means that this situation is in any case different to that of an opposite-sex couple the reasoning goes.[52]

4.3 Proposals of the Kalsbeek Committee

De Minister did not want to implement the motion and decided to set up the Kalsbeek Committee, whose task included:

> "...investigating which options other than adoption – as in the starting point in the bill for adoption by same-sex couples (30551) – can be used to provide the possibility for a female partner of the mother to, in a simple manner, become parent of the child born within the relationship of this woman and the mother, taking into consideration the interests of the persons involved, including the child, as well as the time and costs of the procedure."[53]

The Committee used two starting points to work out this question: the interests of the child and the principle of equal rights. The Committee considered that it is in the best interest of the child that he/she be raised within the context of a stable and caring relationship. As far as this is concerned, this interest will often coincide with the interests of those caring for and raising the child, the Committee feels. With this the Committee opted for social parenthood and abandoned the approach based on biological parenthood.
Against this background one may have expected that the issue of the right of the child to know the identity of the biological father would have been thoroughly covered,
but unfortunately this is not the case. Although the Committee did raise the question of the relationship between the possibility of acknowledgement by the co-mother and the right to obtain information concerning filiation, it only touched on it briefly. According to the Committee, in principle every child has this right. For this the Committee referred to the Artificial Insemination (Donor Information) Act, which gives children aged 16 and over the right to find out the identity of the donor. With a view to this, the law obliges the institution or person carrying out treatment to register donor information. This means that only a child whose mother was inseminated

52 K. Boele-Woelki et al, *Huwelijk of Geregistreerd Partnerschap? Een Evaluatie van de Wet openstelling huwelijk en de Wet geregistreerd Partnerschap, [Marriage or Registered Partnership? An evaluation of the Same-Sex Marriage Act and the Registered Partnership Act],* Utrecht: Utrecht University, Molengraaff Instituut Rechtsgeleerdheid/WODC 2006, p. 226.

53 Report on lesbian parenthood, 31 October 2007, pp. 13-14.

in an institution has the right to obtain information concerning filiation. The Committee felt that under the principle of equal rights, the introduction of an obligation to register the identity of the biological father only applying to lesbian relationships cannot be justified. After all, this obligation does not apply to heterosexual couples. The Committee was unwilling to discuss the question whether a similar obligation should be instituted for all legal parents who are not at the same time the biological parents of their child, as this is beyond the remit of its task.[54] A reference to the Valkenhorst ruling, which provides for cases such as this, is sadly lacking here.[55] In this ruling, the interests of the mother and the child were weighed against each other and it was decided that the right of the child to know the identity of his or her biological father prevailed over the right of the mother to withhold this information from her child.

Like the Kortmann Committee in its day, this Committee also made recommendations which are completely in line with the motion by Pechtold et al. The Committee issued the advice that it should in any case be possible for the female partner of the mother to acknowledge the child. For married lesbian couples there could even be two options available: either acknowledgement or legal parenthood, although this latter possibility is a choice regarding the law, and as such cannot be made by the Committee but only by the legislator.[56] If this choice should at some point be made on a political level, [57] then the Committee felt that a record should be kept of which partner is the birth mother and which is the co-mother.

The Committee was not in favour of a system such as that in Sweden, where a special form of acknowledgement was introduced. The introduction of a new legal concept which differs from the traditional acknowledgement "bears the risk that lesbian couples may experience this regulation as a second-rate option". In this context the Committee referred to the opening up of marriage to persons of the same sex, in addition to the existing possibility for registered partnership:

54 Report on lesbian parenthood, 31 October 2007, pp. 29-30.

55 Supreme Court 15 April 1994, *Dutch Law Reports* 1994, 608.

56 Report on lesbian parenthood, 31 October 2007, p. 9.

57 During the concluding phase of this contribution, the Minister of Justice communicated to the House of Representatives in a letter dated 12 August 2008 (ref. 555523 9/08/6) that the government has decided to broadly implement the advice given by the Kalsbeek Committee. Given the time it takes to draw up a new proposal, the Minister feels it is desirable that the bill for liberalising the adoption procedure (*Parliamentary Papers II* 2005/06-2006/07, 30 551) should be dealt with without delay.

> "Some people were offended by the fact that marriage was not opened to same-sex couples at the same time as the introduction of the registered partnership."[58]

Wortmann feels that the Committee missed a chance here. She states:

> "The committee also had the opportunity to make proposals in which all interests, those of the child foremost, could have been taken into account. Besides those of the child, these interests include those of the mother, the woman looking to acknowledge the child, and the biological father."

The Committee could have learned from regulations in other countries regarding acknowledgement by the duo-mother. Like the Council of State, Wortmann feels that a legal concept closely resembling acknowledgement is to be preferred over relaxing the conditions for adoption. In this concept the donor could be given a position in which justice could be done to the rights of the child to obtain information concerning his or her parentage. Wortmann refers to countries such as Sweden and Canada, where a similar system is already working.[59] In section V the developments within a number of national legal systems are set out in brief.

IV Losing sight of the rights of the child: emancipation of same-sex couples prevailing over the right to (information concerning) filiation?

In the first phase we saw that the granting of equal legal rights to married and unmarried couples– whether heterosexual or same-sex couples – broke the link between filiation and parental responsibility. Marriage as an instrument of order faded into the background under the influence of this.[60] It also became possible to legally acknowledge new forms of family outside the traditional husband-wife relationship.

In the second phase of this process, an approach can be seen in which marriage returned as an instrument of order. In this phase the link between filiation and parental responsibility was in effect reinstated. In order also to be applicable to same-sex couples, where of course filiation as such is out of the question, the link between biological filiation

58 Report on lesbian parenthood, 31 October 2007, p. 38.

59 S.F.M. Wortmann, 'Ontwikkelingen in het familierecht' ['Developments in Family Law'], *WPNR* 2008-6753, pp. 355-356.

60 For a general view of marriage and its changing character under the influence of social developments, see: Asser/De Boer 2006, Nos. 103-110.

and legal parenthood was abandoned. This was achieved by changing the law regarding adoption. During this phase it was explicitly decided to not change the law of filiation. Both the Kortmann Committee and the legislator share the viewpoint that the principle that parenthood should be linked to natural filiation should not be abandoned.

However, it can be seen that the implementation of the recommendations made by the Kortmann Committee set a process in motion in which the principle of equal rights clearly began to prevail over the rights of the child. This was the seed for the developments which led to the proposals which are now at hand.

The proposals put forward in the final phase of this process are at heart a logical consequence of the changes set in motion by the Kortmann Committee. By calling upon the principle of equal rights as a justification for breaking the link between filiation and legal parenthood, a mechanism was set up which has turned out to have a life of its own. The proposal is now being put forward to also abandon the principle of natural filiation and to establish the parenthood of the duo-mother within filiation law.

It would seem that more or less 'separate circuits' are or have been created here. In the parliamentary history of the creation of the law concerning equal rights for same-sex couples in the different phases discussed here, there are few, if any, references to the discourse on children's rights. This can be seen particularly clearly in the debate on the bill on adoption by same-sex parents. There is almost no reference at all to the bill on Artificial Insemination (Donor Information), which was being debated almost simultaneously in the House of Representatives and where the right to obtain information concerning filiation was playing an increasingly significant role. [61]

Freeman makes a similar observation:

> "*Given the attention we now give to the paramountcy of a child's welfare and to the importance of the wishes and feelings of the children in so many matters, though ironically not in adoption, it is of concern that the interests of children should count for so little where decisions about artificial reproduction are being taken. The role of responsible parenthood, so little explored elsewhere, is deftly ignored.*"[62]

---

61 *Parliamentary Papers II* 1997/04, 23 207.

62 M.D.A. Freeman, 'The new birth right? Identity and the child of the reproduction revolution', *The International Journal of Children's Rights* 1996, p. 282.

Following on from this quote by Freeman, we can state that the importance of parental responsibility in the realisation of children's rights can hardly be overestimated.

Freeman speaks in this context of the right to responsible parents. This concept is further elaborated upon and placed in context regarding young children and health care by Bridgeman. She states:

> "*The concept of responsibility can be understood as providing nothing more than the "moral correlative" of rights, that is, that the possession of a right by one person imposes responsibilities upon others to respect or enable fulfilment of that right.*"[63]

This notion of parental responsibility taken up by both Freeman and Bridgeman correlates somewhat with the criticism, particularly by feminist researchers, on the emphasis of the role played by the law in processes of social change. Their criticism is that accepting the use of legal language also brings an automatic acceptance of the social structure which is mainly male-oriented.[64] Platero addresses this point with regard to the struggle of same-sex couples for equal rights. Accepting marriage as a regulatory instrument implies acceptance of the suppositions upon which it is founded, and the question arises whether these should not be critically examined,

> "*especially in the Spanish context, where so much emphasis is put on the family as a source of reciprocal care and economic support that underlines not only the welfare system but the whole organisation of the State.*"[65]

In other words, is the formal legal system satisfactory here? Is this not in part a case of issues which go beyond the legal framework?
This same question can be asked regarding the present debate. Would it not be better to have a moral duty of care – an ethics of care – above a legal duty of care – an ethics of rights? In the literature, the concept of 'procreational responsibility' has been developed within the context of artificial insemination of lesbian women. Could it not be possible for this concept to form a bridge between the moral duty of care of the parents and the rights of the child?[66] This concept developed by Vonk is explained further in the next section.

---

63 J. Bridgeman, *Parental Responsibility, Young Children and Healthcare Law*, New York: Cambridge 2007, p. 25.

64 L. Hilary & J. Roche, 'Feminism and Children's Rights: The politics of voice', in: D. Fottrell, *Revisiting Children 's Rights*, The Hague: Kluwer Law International 2000, pp. 51-72, q.v. p. 60.

65 Platero 2007, p. 337 (see note 3).

66 M. Vonk, *Children and their parents*, Antwerp: Intersentia 2007, p. 252.

V A quick look at the situation in other countries

Similar developments to those presently taking place in the Netherlands can be seen in a number of legal systems in other countries. Do these systems offer anything that could be of use when considering the proposals made in the Netherlands?

Several countries have taken steps similar to those taken in the Netherlands for providing equal rights to heterosexual and same-sex couples.[67] Countries which have joined the Netherlands in legalising same-sex marriage include Belgium and Spain. Belgium introduced same-sex marriage in 2003. This made Belgium the second country, following the Netherlands, to grant same-sex couples the right to get married. Just as in the Netherlands, this had no consequences regarding legal filiation. In Belgium also, changes were made to the adoption law for this.[68]
Spain has experienced turbulent developments since the socialist party took over from the conservative *Partido Popular*.[69] On 2 July 2005, the country passed a law allowing marriage for same-sex couples. By 2 March 2006, more than 1,000 same-sex marriages had taken place. Just as in Belgium and the Netherlands, this has no consequences regarding legal filiation. Spain also allows adoption by same-sex couples. [70]
However, since March 2007, Spain also has a legal concept similar to acknowledgement for the duo-mother. Article 7 paragraph 3 of the Spanish act covering artificial insemination techniques, states that the partner of the mother can swear before the Registrar of Births, Deaths and Marriages that she assents to the establishment of a filiation relationship between the child and herself.[71] In this way the partner of the mother is legally filiated to the child from the moment of birth.[72]
Sweden does not recognise same-sex marriage, but since 1 July 2005 it offers the duo-mother who either lives with the mother, or has entered into some form of registered partnership, the option of becoming the

67 Boele-Woelki et al. 2006 (see note 52).

68 Boele-Woelki et al. 2006 p. 94 (see note 52). This refers to the act of 18 May 2006 which amended a number of provisions of the Belgian Civil Code in order to make adoption by same-sex couples possible.

69 M. Martin Casals, 'Same-sex partnerships in the legislation of Spanish autonomous communities', in: K. Boele-Woelki & A. Fuchs (eds.), *Legal recognition of same-sex couples in Europe*, Antwerp: Intersentia 2003, pp. 55-67.

70 Boele-Woelki et al. 2006 p. 120 (see note 52).

71 Art. 7 *Filiacion de los hijos nacidos mediante tecnicas de reproduccion asistida*; see also: N.M. de Boer, 'Gelijkgeslachtelijk huwelijk in Spanje' ['Same-sex marriage in Spain'], *FJR* 2008, pp. 315-321.

72 Report on lesbian parenthood, 31 October 2007, p. 38.

legal parent of the child via a form of acknowledgement. The way in which this concept has been formulated in Sweden offers the best perspective for a Dutch regulation. Just how has this concept been arranged in the Swedish legal system?

The Swedish Parenthood Act states that the duo-mother who has agreed to the conception shall be regarded as a parent of the child. However, achieving this status as a parent comes with certain conditions. The permission for the insemination treatment must have been given in writing and the treatment must have taken place in a hospital designated for this.[73] This means that a lesbian couple only come under this regulation if it is possible to establish the identity of the donor.[74] Furthermore, the acknowledgement by the duo-mother must be approved by an authorised body and by the birth-mother.[75] If the duo-mother gives permission for the treatment, she must also agree to the establishment of filiation rights.

Shortly after the introduction of this regulation, the Swedish government commissioned a study into the possibility of removing altogether the last remaining differences between heterosexual and same-sex couples.[76] This study was completed in 2007. It was proposed to also introduce legal parenthood for the female partner of the mother. In addition, the possibilities for acknowledgement should also be expanded. This should also be possible for treatments that did not take place in a hospital.

These proposals also pay a great deal of attention to strengthening the rights of the child to obtain information about his or her biological background. Various measures are put forward for this. To start with, these include informing the public by issuing general information and organising courses for people working in institutions for artificial insemination. It is also proposed to include a clause in the family law stating that the child has the right to obtain information about his or her background and that it is the responsibility of the parents to inform the child of this.[77] As far as we can ascertain, the government has not yet taken a position regarding this study.

---

73 K.J. Saarloos, 'Duo-moederschap: op de grens van afstamming en adoptie'['Duo-motherhood: on the boundary of filiation and adoption'], *FJR* 2007, pp. 142-148.

74 Report on lesbian parenthood, 31 October 2007, p. 37.

75 M. Jäntera-Järeborg, 'Lesbian couples are entitled to assisted fertilization and to equal rights to parenthood', *Zeitschrift für das gesamte Familienrecht (FamRZ)* 2006, pp. 1329-1330. See p. 1330: Despite the criticism that not enough research was carried out into the effects of the regulation on children, the proposal was carried because within the framework of the present regulation women do not use 'private insemination', in which cases it is often impossible to trace the identity of the donor. In the interests of the child this is thought to be undesirable.

76 Jäntera-Järeborg 2006, p. 1330 (see note 75).

77 *Föräldraskap vid assisterad befrucktning*, Stockholm 2007, p. 13.

The form of acknowledgement under conditions as used in Swedish law has certain similarities to the proposal made by Vonk in her thesis published in 2007.[78] In this she develops the concept of procreational responsibility. This concept has two-fold consequences. It plays a role both before and after the conception of the child.

Before conception, the notion of "the personal integrity of the child to be conceived" is relevant. This means that parents will have to take into account that a time will come when the child will want to obtain information about his or her genetic/biological background. It also means that some thought will have to go into the possible role of the known donor in the child's life.

After birth this responsibility extends to, on the one hand, those responsible for the child's conception – whether the biological parent or the one who has used artificial insemination – carrying that responsibility for the child throughout his or her life, while on the other hand it means that parenthood should also be able to be invested upon the non-biological parent.[79] Here Vonk advocates drawing up a declaration of intent in which the intentions of all parties are set down. This has the important side effect of forcing the parties involved to seriously consider the consequences of the arrangements they are contemplating putting in place.[80]

VI Conclusion

What common points does the foregoing treatise contain which may assist in finding a better balance between equal rights for same-sex couples and the rights of the child who is involved as a third party in this relationship? In my opinion, the discussion of developments thus far clearly shows that the debate has developed with a bias favouring the rights of same-sex couples.

In the second phase of the process of providing equal rights for same-sex couples, the link between filiation and parenthood, which is of fundamental importance to the child, is broken. During this phase this (still) takes place within the basis of changes to the adoption law. In the following phase the principle of equal rights is used to propose abandoning this link by amending filiation law. This further increases the distance to the general principle of connection to the natural filiation.

78 Vonk 2007 (see note 66).

79 Vonk 2007, p. 270 (see note 66).

80 M. Vonk, 'The role of formalised and non-formalised intentions in legal parent-child relationships in Dutch law', *Utrecht Law Review* 2008, p. 133.

The concept of ‘an ethics of care’ that is so relevant to family law, and its closely allied concept of parental responsibility, could form the basis for a restoration of the balance between the two starting points. More than in any other part of family law, it seems these concepts in filiation law could fill an important role. This emphasises the fact that prospective parents already have a duty of care to the child-to-be. Because the child is not (yet) in a position to demand his or her rights, he or she is dependent on how the intending parents carry out their moral duty. Even in this early phase, the concept of procreational responsibility is raised. Expressed in terms of children’s rights, this means that children have a right to responsible parents even before they are born. This responsibility is not just important before birth, but also afterwards.

Before birth, this responsibility means that intending parents carry the moral duty to stop and consider whether this form of conception is the most desirable in the given circumstances. The right of the child to, as far as possible, not only know but also be cared for and raised by his or her biological parents as stated in Article 7 of the CRC should at least play a role in parents’ considerations when contemplating artificial insemination. This responsibility can also have an important effect after birth. Parents are obliged on the basis of this responsibility to provide the child with adequate information concerning his or her biological filiation.

Only after the birth of the child is the ethics of care clearly replaced by an ethics of rights. The right to obtain information concerning filiation should be protected by law and should not be limited to children who have the right to this information under the Artificial Insemination (Donor Information) Act, but should be one all children conceived via artificial insemination have. The position of the child as the third party in filiation arrangements should be expressly protected.

In order to give structure to this right to obtain knowledge concerning biological filiation, this right must however be explicitly named as a condition in the legal constructions intended to make legal parenthood by the duo-mother possible. The concept of procreational responsibility can provide an important basis for this. The Swedish system can also serve as an example here. This system links a number of conditions to the acknowledgement of the duo-mother. Acknowledgement can only take place if it is possible to trace the identity of the donor.

If these conditions are fulfilled and the right of the child to obtain information concerning his or her filiation is specifically recognised, then the balance between equal rights for the same-sex couple and the rights of the child will have been significantly restored.