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National Report: Belgium

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NATIONAL REPORT: BELGIUM¹

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Question 1

1. The Kingdom of Belgium is a federal state comprising three communities, three regions, and four linguistic regions.² The legal form of the state is a federal parliamentary monarchy.

2. Civil law, including family law, is under federal jurisdiction.

However, responsibilities close to these matters rest with the communities (e.g. welfare assistance³) and with the regions (with the exception of certain fiscal aspects⁴). Family law thus develops indirectly on the level of the federated entities.

The legal protection of the constitution on couple relationships is apparent on three levels with different intensities: marriage, legal cohabitation, and de facto cohabitation. Some authors argue in support of the individualization of rights and obligations: the legal standard should be entirely different within the judicial framework of couple relationships⁵ and at least sexuality should not, in any case, constitute a criterion for regulation.⁶ This does not appear to be the case presently in Belgium.

1. The structure of the report is established following the questionnaire of the general reporter, Prof. Dr. Macarena Saez.

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2. Constitution, Articles 1-4.

3. Article 5, § 1, II Special Law of August 8, 1980 on institutional reforms, *Belgian Gazette (MB)*, August 15, 1980.

4. Special Law of January 16, 1989 relating to the financing of Communities and Regions, *MB* January 17, 1989.

5. See, on this opinion: F. SWENNEN, *Het huwelijk afschaffen (Abolish Marriage)?*, Antwerp, Intersentia, 2004, no. 11. On various models of inclusion: D. PATERNOTTE, "Beyond the Laws: Right to Marry, Citizenship and Inclusion Models in Belgium" in A. WEYEMBERGH and S. CARSTOCEA (ed.), *The gays' and lesbians' rights in an enlarged European Union*, Brussels, University of Brussels, 2006, (127) 131.

6. A. HEYVAERT, "De evolutie naar de seks(e)neutraliteit van het gezinsrecht (The Evolution towards Sex Neutrality in Family Law)," *New Weekly Law Gazette (NJW)*

Regarding the protection of minority groups in general, and same-sex couples in particular, some maintain that family law currently rests on the principles of equality and non-discrimination, which, in their view, are fruitless in this area, and not on the missions that it has been asked to actually fulfill.⁷ We do not share that point of view: the opening of marriage provides a precise means for undertaking this mission of joining, through the law, those couples who legitimately seek legal protection.⁸

3. Belgium is endowed with a written Constitution last coordinated on February 17, 1994.⁹ It grants in principle the separation of powers.

The legislative power is the first of the three powers of the State. Our written legislative law is developed within the framework of an imperfect bicameral system. Belgium is a nation of continental law in which the Napoleonic Code of 1804 still forms the basis of the Civil Code.

The judicial power is independent and charged with the application of the laws, royal decrees, and regulation of litigation concerning civil rights. The application of royal decrees and regulations may be only eliminated by reason of unconstitutionality;¹⁰ the judicial power cannot evaluate the conformity of the laws to the Constitution. Court decisions are not valid as precedents.¹¹

Conformity of the laws to the Constitution is performed by the Constitutional Court,¹² either by annulment or by interlocutory questions. The Constitutional Court has no jurisdiction to verify or modify the Constitution; only the legislative power exercises this jurisdiction according to the procedure established by the Constitution.

The constitutionality or unconstitutionality of royal decrees and regulations is determined by the Council of State by annulment.

The executive power is composed of the King and of a government

2005, 1190.

7. M.A. GLENDON, "Introduction: Family Law in a Time of Turbulence" in *International Encyclopedia of Comparative Law*, Tübingen, Mohr, 2006; J.-L. RENCHON, "Personal and Family Law: On Inaccessibility and Self-Determination" in D. HEIRBAUT & G. MARTYN (dir.), *A Napoleonic Heritage: Bicentennial of the Civil Code in Belgium*, Kluwer, 2005, 99 ff.

8. On the function of "companion" in contemporary family law: Y.-H. LELEU, *Personal and Family Law*, Brussels, Larcier, 2005, no. 3, pp. 16-17.

9. *MB* February 17, 1994.

10. Constitution, Article 159.

11. M. ADAMS, *De precedentwerking van gerechtelijke uitspraken: een rechtstheoretische en rechtsvergelijkende studie (The Precedent Effect of Court Decisions: A Study in Theoretical and Comparative Law)*, Doctoral thesis, Louvain, Royal University of Louvain, Faculty of Legal Studies, 1997.

12. Formerly "Arbitrage Court." In the text, the old decrees are cited as being rendered by the Constitutional Court in its present designation.

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named by him, presided over by the prime minister.

4. Belgium is a monistic system from the point of view of the relationships between international law and domestic law. This means that the provisions of international law have the direct effect of precedence over Belgian law, including the Constitution, and can be applied as such by the judiciary power.¹³ In this way the judicial power can evaluate the conformity of this category of laws to international provisions.¹⁴

5. In Belgium the separation between the Church and the State is strict, which implies for family law notably that religious marriages cannot produce legal consequences. Article 21, paragraph 2 of the Constitution in fact stipulates that, as a rule, the civil marriage must always precede the religious ceremony, with risk of a fine for the minister and even imprisonment in the case of a new infraction of the same type.¹⁵

Question 2

6. Judicial protections for couple relationships¹⁶ between persons of the same sex, on a constitutional level, and further, on the level of fundamental rights, can be understood by following the successive layers of its edification.¹⁷

7. In the first place one finds articles 10, 11, and 11*bis* of the Constitution, according to which Belgians are equal before the law, the equality of men and women is guaranteed, and the enjoyment of the rights and liberties granted to Belgians must be assured without discrimination. The Constitution of Belgium, contrary to that of South Africa, contains no prohibition of discrimination on the basis of sexual orientation.

13. Court of Cassation - Supreme Court of Appeal (Cass.), May 27, 1971, *Pasicrise (Pas.)* 1971, I, 886.

14. See M. BOSSUYT, *Op het kruispunt van recht en politiek (On the Intersection between Law and Politics)*, Antwerp, Intersentia, 2007, pp. 4-8.

15. Penal Code, Article 267.

16. By this term we refer to the "same-sex partnership," used in the questionnaire by the general reporter. It is important to note that "couple relationships" means a factual relationship without prejudice of law, and is not identical with "registered partnership" (in Belgium, "legal cohabitation").

17. A. ALEN & K. MUYLLE, *Compendium van het Belgisch staatsrecht (Compendium of Belgian Constitutional Law)*, I, edition for student use, Malines, Kluwer, 2008, no. 60 ff.; G. MAES, "Het gelijkheids- en non-discriminatiebeginsel" (The principle of equality and non-discrimination) in F. DE BOCK, G. MAES & A. WITTENS, *Een nieuw gezin. Rechtsstatuut van het gelijkslachtige gezin (A New Family. The Legal Status of the Homosexual Family)*, UGA, 2007, (107), 117-118.

Concerning (the battle against) the inequalities that affect certain groups such as homosexuals, it is appropriate to distinguish between legal inequalities on one hand and factual inequalities on the other.¹⁸

Legal inequalities are combatted as follows: against discrimination by operation of law, a petition is made with the Constitutional Court, whether by annulment (objective litigation) or on a matter of prejudice.¹⁹ As mentioned above, the judicial power does not have the jurisdiction to dismiss application of the laws by reason of a violation of the principle of equality, and still less to repeal them. On the other hand, a decree or regulation that violates the principle of equality can be eliminated in a substantial way by the judicial power;²⁰ its repeal rises into the exclusive jurisdiction of the Council of State.²¹

Factual inequalities can present themselves on various levels. In the first place, public services, decrees, or regulations can be rendered or applied in an unequal way. In the second place, in private relationships, inequalities can result from abuse of contractual autonomy (e.g. refusing to rent a house to a homosexual couple). Unequal treatments also find their source in actual behavior (e.g. hostile intentions). In the third and final place, factual inequalities can result from certain behavior of a social group (e.g. demonstrative exhibition of sexual orientation by behavior or clothing).

The first two factual inequalities are combatted in Belgium by the Act of May 10, 2007 to fight against certain forms of discrimination.²² This law forbids discrimination based on sexual orientation (Article 3).²³ The law applies to all persons, in the public as well as in the private sector, including the public agencies that deal with (Article 5, § 1):

1st—access to goods and services and the provision of goods and services provided to the public;

18. P.-J. DEFOORT, “De taak van de wetgever inzake ongelijke behandeling op grond van seksuele geaardheid” (The Task of the Legislature on Unequal Treatment on the Basis of Sexual Orientation), *Weekly Legal Gazette (RW)* 1997-98, 625, nos. 3-4 and 15 ff.; M.-Cl. FOGLETS, “Gelijke kansen en racismebestrijding. Beperkingen en mogelijkheden van het recht” (Equal Opportunities and the Fight Against Racism. Limitations and Possibilities of the Law), *Panopticon* 1994, 513; G. MAES, “The Principle of Equality and Non-Discrimination” in F. DE BOCK, G. MAES & A. WITTENS, *A New Family. The Legal Status of the Homosexual Family*, UGA, 2007, (107), 110-111.

19. Constitution Article 142.

20. Constitution Article 159.

21. Article 14 of the Coordinated Laws of January 12, 1973 from the Council of State, *MB* March 21, 1973.

22. *MB* May 30, 2007. See in general C. BAYART, S. SOTTIAUX and S. VAN DROOGHENBROECK (ed.), *The New Laws Battling Discrimination*, Brussels, La Chartre, 2008.

23. Under the (first) Act of February 25, 2003 to fight against discrimination: D. DE PRINS, S. SOTTIAUX and J. VRIELINK, *Handboek discriminatierecht (Handbook of Discrimination Law)*, Malines, Kluwer, 2005, 1148-1152 and 1437-1439.

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2nd—social protection, including social security and health care;

3rd—social benefits;

4th—supplementary aspects of social security;

5th—work relationships;

6th—reference in an official document or report;

7th—affiliation with, and involvement in, a workers' or employers' organization, or any other organization in which the members practice a given profession, including the benefits procured by this type of organization;

8th—access to, participation in, and any other exercise of an economic, social, cultural, or political activity open to the public.

Jurisprudential casuistry relative to the equality principle is treated further on (*below*, VIII).

8. The Constitutional Court is qualified to evaluate the conformity of laws to:

- ❖ all of the rights that the Belgians derive from Title II of the Constitution, notably the prohibition of any discrimination and the right to respect private and family life;
- ❖ the constitutional principle of equality and legality in taxation matters;
- ❖ equality in the treatment of foreigners.

However, the Constitutional Court does not have jurisdiction to evaluate the conformity of laws, as well as that of the Constitution, with the provisions of international law invested or not with direct effects.²⁴ The Court can nevertheless accomplish an indirect control of the constitutionality of these standards because if a provision of international law offers legal protection comparable to that offered by a provision of the Constitution, it can evaluate, on the basis of this latter provision, however indirectly, the conformity of Belgian law with the provision of international law. That is also the case where this provision of international law has no direct effect on Belgian law.²⁵

In the application of the monistic theory mentioned above, the judicial power must give priority to any provision of international law having direct effects on a provision of domestic law that was contrary to it. From this point of view, the judicial power is granted a jurisdiction greater than that of the Constitutional Court in evaluating the conformity of domestic laws.

24. Constitutional Court, December 14, 2005, no. 189/2005, www.const-court.be.

25. Constitutional Court, July 22, 2004, no. 136/2004, www.const-court.be, *Public Law Chronicle (CPDK)* 2004, 403, footnote M. NIHOUL and footnote J. GHYSELS.

But a compromise had been made between jurisprudence and doctrine.²⁶ If a provision of international law offers protection similar to that offered by a constitutional provision on the basis of which the Constitutional Court could evaluate the constitutionality of the law, then the Court has exclusive jurisdiction for this verification of constitutionality. In this case, the judicial power can no longer assess the constitutionality of the law, but can pose an interlocutory question to the Constitutional Court. If, on the other hand, a provision of international law having direct effects offers protection *greater* than the Constitution, then the Constitutional Court loses its jurisdiction to evaluate the constitutionality of the law. Under this assumption, the judicial power stays jurisdiction to give preference to the provision of international law.²⁷

9. The result of the preceding is that international law is granted a particular importance in the Belgian judicial order.

Of especially primary importance are, on one hand, provisions of European Union law having direct effects, both those designated primary (the Treaty) as well as secondary (regulations and directives), all interpreted by the European Community Court of Justice in Luxembourg. It particularly results in provisions granting certain, but limited protection in couple relationships between persons of the same sex.²⁸

To this is added the European Convention on Human Rights, which is interpreted by the European Court of Human Rights in Strasbourg. The right to marry and establish a family (Article 12 of the Convention) does not, however, grant this right to couples of the same sex. Furthermore, couple relationships between persons of the same sex are not protected by Article 8 of the Convention pursuant to the law with respect to family life, but rather pursuant to that on private life.²⁹

The two European judicial orders mutually influence each other.³⁰ Thus,

26. See for this problem in general A. ARTS *et al.* (ed.), *Relationships among the Court of Arbitrage, the Judicial Power, and the Council of State*, Brussels, La Chartre, 2006.

27. Cass., November 16, 2004 (2 decrees), www.cass.be, *Critical Review of Belgian Jurisprudence (RCJB)* 2007, 42, footnote J. VAN MEERBEECK and M. MAHIEU, "International Treaty and National Constitution."

28. See, in general F. SWENNEN, "Atypical families in EU (private international) family law" in J. MEEUSEN, M. PERTEGÁS, G. STRAETMANS and F. SWENNEN (ed.), *International Family Law for the European Union*, Antwerp—Oxford, Intersentia, 2007, 389 ff.

29. See in general D. VAN GRUNDERBEECK, *Beginselen van personen- en familierecht. Een mensenrechtelijke benadering (Fundamentals of personal and family law. A human rights approach)*, Antwerp, Intersentia, 2003. In particular, European Court of Human Rights, July 24, 2003, Karner / Austria, www.echr.coe.int, *Journal of Management Science and Public Law (TBP)* 2004, 222, footnote G. MAES.

30. C. VAN DE HEYNING, "De nationale gerechtshoven tussen het Hof

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this raises the question of whether the distinction effected by Article 9 of the Charter of Fundamental Rights of the European Union regarding the right of marriage on one hand, and the right to establish a family on the other, would influence the interpretation of Article 12 of the European Convention on Human Rights.

By reason of the opening of civil marriages to couples of the same sex in Belgium (*below*, III), the permeability of the domestic order to international law lost its relevance for this problem. However, it is preserved for all judicial systems deprived of protections for relationships between couples of the same sex, or accord them limited protection.

Question 3

10. Since June 1, 2002, two persons of the same sex can contract marriage in Belgium.³¹

11. Since the 1990s, doctrine has defended the thesis according to which the lack of any legal protection for the relationships of couples between persons of the same sex could constitute a violation of the principle of equality. Homosexual couples being not only denied the right to marriage as such, but also legal effects of marriage. Now they were, regarding these effects, or at least some of them, in a situation comparable to that of heterosexual couples.

In order to remedy this alleged discrimination, two solutions were possible: open marriage or extend all or part of these legal effects to homosexual couples. No author has recommended the opening of marriage as the sole legitimate solution.³²

Mensenrechten en het Hof van Justitie: de onmogelijke keuze?" (The National Courts between the Human Rights Court and the Justice Court; the Impossible Choice?), *RW* 2007-08, 1058.

31. Civil Code Article 143, paragraph 1, restored by Article 3, Act of February 13, 2003 opening marriage to persons of the same sex and modifying certain Civil Code provisions, *MB* February 28, 2003.

32. P.-J. DEFOORT, "De taak van de wetgever inzake ongelijke behandeling op grond van seksuele geaardheid," *RW* 1997-98, 625, nos. 7 ff.; O. DE SCHUTTER & A. WEYEMBERGH, "Legal cohabitation. A step in the recognition of unions of the same sex?", *Journal of the Courts (JT)* 2000, 93, 104, *idem est*: O. DE SCHUTTER & A. WEYEMBERGH, "Statutory Cohabitation in Belgian Law: A Step Towards Same-Sex Marriage?" in R. WINTEMUTE & M. ANDENAES (ed.), *Legal Recognition of Same-Sex Partnerships. A Study of National, European, and International Law*, Oxford, Hart, 2001, 465; P. SENAËVE, "De wettelijke samenwoning en het geregistreerd partnerschap in het Belgisch recht" (Legal Cohabitation and Registered Partnership under Belgian Law), *Family and Youth Law Journal (FJR)* 1998, 254, no. 23; S. SOTTIAUX, "Discrimination on the Basis of Sexual Orientation" (Constitutional Court note, June 21, 2000, no. 80/2000), *RW* 2000-01, 768, no. 11.

12. In the 1990s some legal propositions were introduced with the goal of either opening marriage to homosexual couples,³³ or, on the contrary, to write into the law the difference of sex, which was never done in the Civil Code.³⁴

At the very least, these proposals made it clearly apparent that the difference in sex between spouses was an implicit condition of validity of the marriage.

These legal proposals were never discussed in Parliament.

13. The federal elections of 1999 had as a consequence that, for the first time since 1958, the Christian Democratic parties were not the parliamentary majority. The government coalition, composed of liberals and socialists, showed itself more open to discussions in areas touching on ethics and values, and purposely undertook to make progress on several projects with an ethical dimension until then blocked by the Christian Democrats.

Upon the occasion of the adjustment of domestic law to the Hague Convention regarding adoptions, a political compromise was reached consisting, on that occasion, of not opening adoption to same-sex adoption applicants (see below IV and VIII) but to open marriage to couples of the same sex. It was also convened to prepare an anti-discrimination law³⁵ (above II).³⁶

14. A small controversy persists on the question of knowing which solution was finally retained in 2003, that of the opening of marriage, or of the creation of an equivalent institution for homosexual couples (see above, no. 11).

A doctrinal minority believes that alongside marriage there had been

33. Legal proposal (VERSNICK) modifying Articles 144, 162, and 163 of the Civil Code, *Parliamentary Document (Doc. parl.)* Chamber 1998-99, no. 49-2208/001, repeated in *Doc. parl.* Chamber 1999-2000, no. 50-692/001; Legal proposal (GRAUWELS) modifying the Civil Code concerning homosexual marriages, *Doc. parl.* Chamber 1999-2000, no. 50-861/001; Legal proposal (VANVELTHOVEN) completing Article 144 of the Civil Code concerning marriage of persons of the same sex, *Doc. parl.* Chamber 2000-01, no. 50-1011/001.

34. Legal proposal (VAN DEN EYNDE ET AL.) completing the Civil Code with a view to making membership in different sexes a condition for marriage, *Doc. parl.* Chamber 1996-97, no. 49-932/001 repeated in *Doc. parl.* 1999-2000, no. 50-485/001.

35. D. PATERNOTTE, "Beyond the Laws: Right to Marry, Citizenship and Inclusion Models in Belgium" in A. WEYEMBERGH et S. CARSTOCEA (ed.), *The Gays' and Lesbians' Rights in an Enlarged European Union*, Brussels, University of Brussels, 2006, (127) 131.

36. On the political genesis of the law: J.-L. RENCHON, "The advent of homosexual marriage in the Belgian Civil Code," *Review of Comparative International Law (Rev. dr. int. comp.)* 2004, 169, nos. 5 ff.

created a new legal institution, marriage between couples of the same sex. They argue by considering that homosexual marriage is not subject to the same regimen, particularly on the level of consanguinity and of private international law (*below*, IV).³⁷ Homosexual marriage is said to be “amputated,” or “castrated,” or comparable to Canada Dry, which, according to the advertising slogan well known to the Belgians and the French, “has the color of alcohol, but it isn’t alcohol.”

Another doctrinal tendency regards that marriage was incontestably opened to couples of the same sex, as it particularly ensues from the title of the Act of February 13, 2003 opening marriage to persons of the same sex (our underline). In addition to this, in marriage law no distinction is made between “homosexual marriages” and “heterosexual marriages.” And the fact that this distinction had been made and still is in other legal provisions is without relevance in marriage law.

As a consequence, there exists only one kind of marriage in Belgium,³⁸ and when we resort to the expression “homosexual marriage” we are simply indicating a marriage contracted between two people of the same sex.

15. The opening of marriage, preferred to the creation of a new statute that some preferred,³⁹ is not a neutral choice. The access to marriage as such, with its special status, has an undeniably symbolic value.⁴⁰ It notably

37. N. GALLUS, “Marriage of Homosexuals and Private international law” in A.-C. VAN GYSEL (ed.), *Family Law: Current Legislative and Jurisprudential Issues*, Brussels, Bruylant, 2004, 9, no. 3; J.-L. RENCHON, “The advent of homosexual marriage in the Belgian Civil Code,” *Review of Comparative International Law (Rev. dr. int. comp.)* 2004, 169 no. 1; P. SENAËVE, “De wet van 13 februari 2003 tot invoering van het homohuwelijk in het Belgische recht” (The Law of February 13, 2003, for Introduction of Homosexual Marriage into Belgian Law), *Journal of Decisions (EJ)* 2003, 50, nos. 7-8, cf. G. VERSCHULDEN, “Homohuwelijk heeft praktische gevolgen” (Homosexual Marriage has Practical Consequences), *Juristenkrant* 2003, no. 65, 10, which evokes traditional marriage on the one hand, and the homosexual marriage on the other.

38. J.-Y. CARLIER, “Same-Sex Couples in Belgian Law, in Particular from the Angle of Private International Law” in E. DIRIX and Y.-H. LELEU (ed.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, (301) 303; D. STERCKX, “On the Law Opening Marriage to Persons of the Same Sex,” *JT* 2003, 434; F. SWENNEN, “Het ‘homohuwelijk’ bestaat niet anno 2005” (Homosexual marriage does not exist in the year 2005), *EJ* 2005, 66; F. SWENNEN, “*O tempora, o mores!* The Evolving Marriage Concept and the Impediments to Marriage” in M. ANTOKOLSKAIA (ed.), *Convergence and Divergence of Family Law in Europe*, Antwerp, Intersentia, 2007, (121) 139.

39. P. ex.: P. SENAËVE, “De wettelijke samenwoning en het geregistreerd partnerschap in het Belgisch recht” (Legal Cohabitation and the Registered Partnership in Belgian Law), *FJR* 1998, 254 ff.

40. J.-L. RENCHON, “The Advent of Homosexual Marriage in the Belgian Civil Code,” *Rev. dr. int. comp.* 2004, 169, nos. 2-3; G. VERSCHULDEN, “De openstelling van het huwelijk voor personen van hetzelfde geslacht” (The Opening of Marriage to Persons of the Same Sex), *Lawmakers’ Journal (TvW)* 2003, (148) 151.

avoids relegating same-sex couples to another institution, even having equivalent legal effects, setting up separatism in fact (“*separate but equal*”). The opening of marriage has the merit of facilitating the social integration of couples of the same sex.⁴¹ The fact that the vocabulary has not introduced the discrimination into law⁴² is thus not a pertinent argument.

16. The opening of marriage was not accomplished without difficulties, and several arguments with a contrary view had been advanced.⁴³

In the first place, it was maintained that marriage was traditionally reserved for a man and a woman. The purportedly “fundamental heterosexuality” of marriage was reasoned in legal provisions containing the terms *man* and *woman*, or similar words. Now, as evidence, neither tradition nor existing legal provisions can be invoked against a modified legislation.

In the second place, it had been argued in the sense that the opening of marriage would entail complications in private international law, and would create “lame marriages” valid according to one legal order and not according to another. This argument changes the policy, in the larger sense of the term.

In the third and last place, it was maintained that the idea of marriage in international treaties was that of “heterosexual marriage.” That in no way prevents domestic law from offering more extensive protection.

17. The most serious argument presented against the opening of marriage concerned the purported “nature of things” in the name of which

41. J. GERLO, “Het gelijkheidsbeginsel en het familierecht” (The Principle of Equality in Family Law) in *Gandaius Actueel IV*, Brussels, Story, 1999, pp. 52 ff., no. 95; D. PATERNOTTE, “Beyond the Laws: Right to Marry, Citizenship, and Inclusion Models in Belgium” in A. WEYEMBERGH and S. CARSTOCEA (ed.), *The Gays’ and Lesbians’ Rights in an Enlarged European Union*, Brussels, University of Brussels, 2006, (127) 132 ss.

42. J. GERLO, “Het gelijkheidsbeginsel en het familierecht” (The Principle of Equality in Family Law) in *Gandaius Actueel IV*, Brussels, Story, 1999, pp. 52 ff., no. 97.

43. In general J. DELVA, “Homohuwelijk en homo-ouderschap onder het kijkglas van de wetgever. Toetsing aan het gelijkheidsbeginsel en aan het Kinderrechtenverdrag” (Homosexual Marriage and Homo-parenthood Through the Lawmakers’ Magnifying Glass. Test of the Principle of Equality and the Convention on the Rights of the Child), *TBP* 1998, (463) 465; J. GERLO, “Het gelijkheidsbeginsel en het familierecht” (The Principle of Equality in Family Law) in *Gandaius Actueel IV*, Brussels, Story, 1999, pp. 52 ff., no. 93; P. SENAËVE, “De wettelijke samenwoning en het geregistreerd partnerschap in het Belgisch recht” (Legal Cohabitation and Registered Partnership in Belgian Law), *FJR* 1998, 254 ff.; P. SENAËVE, “De wet van 13 februari 2003 tot invoering van het homohuwelijk in het Belgische recht” (The Law of February 13, 2003 for Introduction of the Homosexual Marriage into Belgian Law), *EJ* 2003, 50, nos. 8 ff.

there would exist objective differences between heterosexual and homosexual couples.

The truism of the existence of homosexual couples distinct from heterosexual couples, and the inference that, in fact, it would make sense to institute homosexual marriage alongside heterosexual marriage, with the same legal effects, is an argument devoid of any relevance.⁴⁴

According to the Council of State, in a notice treating the legal history,⁴⁵

only heterosexual unions are of a nature to give birth to infants. They have further need for stability and have a social position different from that of homosexual unions. [There would have been] a close link of causality between the institution of marriage, with its essential characteristics, and the necessity of ensuring the stability of the union between a man and a woman in order to permit the education of the children who can result therefrom.⁴⁶

A proof in support of this thesis had been investigated in the bill itself, where it was shown that the homosexual marriage is devoid of any material consequence of parentage.

As noted, the exclusively heterosexual organization of family relationships has, in our view, no relation to the right of marriage. In fact, one cannot consider that the presumption of paternity may be one of the legal fundamentals of marriage law.⁴⁷ That is going to be the same for the possibility given to couples for adoption, which, in addition, was opened in 2003 to (heterosexual) couples other than married couples.⁴⁸ The exclusion

44. N. GALLUS, "Marriage of Homosexuals and Private International Law" in A.-C. VAN GYSEL (ed.), *Family Law: Current Legislative and Jurisprudential Issues*, Brussels, Bruylant, 2004, 9, no. 2; J. GERLO, "Het gelijkheidsbeginsel en het familierecht" (The Principle of Equality in Family Law) in *Gandavus Actueel IV*, Brussels, Story, 1999, pp. 52 ff., no. 97.

45. Notice of the Council of State on the bill opening marriage to persons of the same sex and modifying certain provisions of the Civil Code, *Doc. parl.* Chamber 2001-02, no. 50-1692/001, pp. 18 ff. (www.lachambre.be). To this notice: D. PIRE, "Long Live Homosexual Marriage!," *Law Journal (Journ. jur.)* 2002, no. 8, 7 and P. LEVERT, "Toward an Extension of the Jurisdiction of the Council of State?," *Journ. jur.* 2002, no. 9, 7 and the reaction of N. GALLUS, "Further Reflection on the Reforms in Family Law," *Journ. jur.* 2002, no. 11, 7; J.-L. RENCHON, "Marriage and Homosexuality," *JT* 2002, 505 and the reaction of F. SANT'ANGELO, "Homosexuals and Marriage: A Response to the Article by Jean-Louis Renchon (. . .)," *Journal of Youth Law (J. dr. jeun.)* 2002, no. 218, 3; S. SOTTIAUX, "De Raad van State en de aard der dingen" (The Council of State and the Nature of Things), *Juristenkrant* 2002, no. 41, 4; A.-C. VAN GYSEL, "Marriage, Life as a Couple, and Divorce: Theme and Variation," (*Div. Act.*) 2002, 49.

46. On the historical roots of this thesis: K. DEKELVER, "Homofiel huwelijk en homofiel gezin: juridische, filosofische en beleidsmatige kanttekeningen" (Homosexual Marriage and Homosexual Family: Legal, Philosophical, and Marginal Views), *RGDC* 1996, 82, nos. 24 ff.

47. In this sense P. SENAËVE, "De wet van 13 februari 2003 tot invoering van het homohuwelijk in het Belgische recht" (The Act of February 13, 2003, for Introduction of Homosexual Marriage into Belgian Law," *EJ* 2003, 50, no. 8,

48. F. SWENNEN, "Het 'homohuwelijk' bestaat niet anno 2005" (Homosexual

of any effect of homosexual marriage in matters of parentage is not, however, in our view, in any way contradictory to the opening of marriage to couples of the same sex.

Above all, the main argument against the opening of marriage has been moot since 1995. In fact, marriage and parentage have been separated since the Act of March 31, 1987, reformed family relationships, and since the Act of April 13, 1995, marriage and parental authority have been organized in a totally independent way. Marriage between a man and a woman had, from then on, no legal impact on the education of the children that they conceive together. More and more, children are educated within a domestic framework distinct from the marriage of their parents or in newly reconstituted families. Family law is thus less and less organized on the model of a conjugal couple, and more and more on that of a parental couple.

Conversely, there are serious reasons to accord an obligatory type of legal protection, through marriage, to the affective relationship between a man and a woman independent of the existence of children, common or not. These reasons are equally valid for homosexual couples.

18. A major argument in favor of opening marriage has therefore been that,

in our contemporary society, marriage is lived and felt as a (formal) relationship between two persons having as principal goal the creation of a community of durable life Today, marriage serves essentially to externalize and to affirm the intimate relationship of the two people and loses its procreative character—there is no longer any reason not to open marriage to persons of the same sex.⁴⁹

The preceding considerations do not negate in any way that marriage can have a stabilizing role in the relationship of couples who are raising children. But this function observes the social or psycho-affective order, thus the private life of couples,⁵⁰ and marriage does not have this power from a legal point of view.⁵¹

Marriage Does Not Exist in the Year 2005”, *EJ* 2005, 66, no. 3.

49. Report on the motifs for the bill opening marriage to persons of the same sex and modifying certain provisions of the Civil Code, *Doc. parl.* Chamber 2001-02, no. 50-1692/001, pp. 4 ff., (www.lachambre.be) resumed in the Developments on the law proposal opening marriage to persons of the same sex and modifying certain provisions of the Civil Code, *Doc. parl.* Senate 2001-02, no. 2-1173/001.

50. Y.-H. LELEU, *Personal and Family Law*, Brussels, Larcier, 2005, no. 6, p. 21.

51. F. SWENNEN, “*O tempora, o mores!* The Evolving Marriage Concept and the Impediments to Marriage” in M. ANTOKOLSKAIA (ed.), *Convergence and Divergence of Family Law in Europe*, Antwerp, Intersentia, 2007, (121) 140-41.

19. The law opening marriage to same-sex couples had been met with an appeal for annulment before the Constitutional Court. One of the means claimed that the opening of marriage would bring equal treatment in objectively different situations.⁵² The categories to be compared, according to the appellants, was, on one hand, persons who wished to establish a family with a person of the opposite sex and, on the other hand, persons who wished to constitute a community of life with a person of the same sex (our underlining).

The Constitutional Court responded that, with regard to the conception of marriage as the source of creation of a durable community of life, the difference between, on the one hand, persons who wished to form a community of life with a person of the other sex and, on the other hand, the persons who wished to form such a community with a person of the same sex is not such that it would necessarily exclude the possibility for the latter to marry (our underlining). Consequently it did not judge the opening of marriage discriminatory toward homosexual couples.⁵³

In fact, and as shown above, the category, “persons who wish to establish a family” was not relevant.⁵⁴

In Table 1, we show the number of marriages between persons of the same sex in relation to the total number of marriages, and in Table 2 in relation to the number of declarations of legal cohabitation between persons of the same sex.

Question 4

20. Marriage law makes no distinction between marriages between persons of the same sex and of different sex.

Some have considered the impediments to marriage between people of the same sex, related by blood or marriage in homosexual marriages illogical for the reason that they would have no eugenic counter-indication

52. T. GOFFIN, “Zette het Arbitragehof de deur open voor adoptie door homoseksuele koppels?” (Holding the Door of the Arbitrage Court Open for Adoption by Homosexual Couples?), *Jura Falc.* 2005-06, (107) 116 and P. SENAËVE, “Wet op het homohuwelijk niet strijdig bevonden met de grondwet” (Law on the Homosexual Marriage Found Not Conflicting with the Constitution), *EJ* 2005, 25, no. 8 indicating that there can be no question of equal treatment by reason of the “amputation” of homosexual marriage as to its effects on matters of parentage.

53. Constitutional Court, October 20, 2004, no. 159/2004, B.4.7., www.const-court.be, *EJ* 2004, 22, footnote P. SENAËVE, *Jura Falconis (Jura Falc.)* 2005-06, 107, footnote T. GOFFIN.

54. T. GOFFIN, “Zette het Arbitragehof de deur open voor adoptie door homoseksuele koppels?” (Holding the Door of the Arbitrage Court Open for Adoption by Homosexual Couples?), *Jura Falc.* 2005-06, (107) 115.

under these assumptions.⁵⁵ It loses sight of the fact that the impediments to marriage are, in the tradition of the Civil Code, inspired as much by biomedical reasons as by moral or social considerations.⁵⁶

The obligation of fidelity between spouses and the legal limitations on the right of divorce had also been supported as indirectly serving the interests of the children and that, in consequence, it should be required to make them flexible for homosexual marriages.⁵⁷

Thus it is to be noted, as we have already mentioned, that homosexual marriage had been considered as an “amputated” marriage, and, even as a separate institution nevertheless carried the term “marriage” for the reason that, in other areas of law and family law, it had been subjected to different rules. But this impeded nothing since, as also mentioned, there exists under Belgian law only one institution of marriage (above No, 14).

21. In the first place, homosexual marriage produces no effects on the matter of parentage.

Belgian parentage law (paternal) is governed for married couples by the rule *pater is est quem nuptiae demonstrant* (Civil Code Article 315). This rule, also called “presumption of paternity,” is of probative nature and rests on the *quod plerumque fit*. In Belgium, paternal parentage is, in principle, based on the bio-genetic bond between a man and an infant. Given that the spouses are, as a rule, obliged to maintain sexual relations (Civil Code Article 213), it can be reasonably assumed that the mother’s husband, in a stable couple, is the parent of her child.

Proceeding from this biological presupposition of a parenting right, it seems evident that the presumption of paternity can only be applied to the male spouse of the mother. Nevertheless, lawmakers deemed it necessary to define it specifically. And it seems to us that they committed an error by not having done so in the law on parenting (Civil Code Article 315). It is in Article 143, second paragraph, of the Civil Code, under title of marriage, where it is stipulated that if the marriage had been contracted between persons of the same sex, Article 315 is not applicable.

The presumption of paternity can be applied to a man who is not the parent of the child. And it protects, in addition, paternity not conforming to the biology of the husband who consents to (artificial) insemination of his

55. D. STERCKX, “On the Law Opening Marriage to Persons of the Same Sex,” *JT* 2003, 434.

56. F. SWENNEN, “*O tempora, o mores!* The Evolving Marriage Concept and the Impediments to Marriage” in M. ANTOKOLSKAIA (ed.), *Convergence and Divergence of Family Law in Europe*, Antwerp, Intersentia, 2007, (121) 127-28.

57. J.L. RENCHON, “The Advent of Homosexual Marriage in the Belgian Civil Code,” *Rev. dr. int. comp.* 2004, 169, no. 26.

wife with the sperm of a donor (Civil Code Article 318, § 5). But, in theory, the masculine spouse could, under these presumptions, perfectly well be the parent. And this certainly cannot be the case for a woman who is married to the mother. Designating her as “father” would require, according to the lawmakers, “to make far too much of an abstraction from reality. Then it is no longer about refutable ‘presumptions,’ but of fiction. The distance between reality and the law would become too great.”⁵⁸

In our opinion, Civil Code Article 143, second paragraph is a superfluous provision by reason of the biological presupposition of the parenting law⁵⁹ (see, however, above VIII).

Furthermore, adoption was not opened to homosexual couples until the law of 2003 took effect. The prevailing opinion at that time concerning adoptions by or within a couple was that the adopted child, “enters an environment that guarantees a relationship resembling that of a biological relationship.”⁶⁰ As already mentioned above (no. 13), the opening of marriage to couples of the same sex served as political counterpart for maintaining this position in the matter of adoption, which has also been opened to same-sex couples (*below*, VIII).

22. In the second place, homosexual marriage is subject to a particular conflicting rule of laws in private international law.

The spirit of the private international law code in this matter is that the standard of foreign law that forbids homosexual marriage would be *ipso facto* contrary to Belgian international public order. The current rule is that the basic conditions of marriage are governed by the national law of each of the spouses, but the application of a provision of this law is nevertheless ruled out if it prohibits marriage of persons of the same sex under the condition that one of them has citizenship in a State, or has habitual residence in a State where the law permits a marriage, or a communal life relationship creating between the cohabitants an affiliation equivalent to marriage, by persons of the same sex.⁶¹ In order that the marriage would be able to be celebrated in Belgium, it suffices that one of the future spouses is

58. Report on the motifs for the bill opening marriage to persons of the same sex and modifying certain provisions of the Civil Code, *Doc. parl.* Chamber 2001-02, no. 50-1692/001, p. 6, (www.lachambre.be) resumed in the Developments on the bill opening marriage to persons of the same sex and modifying certain provisions of the Civil Code, *Doc. parl.* Senate 2001-02, no. 2-1173/001.

59. T. ROBERT, “Het opengestelde huwelijk” (The Opened Marriage), *RW* 2003-04, 1210, nr. 6; F. SWENNEN, “Het ‘homohuwelijk’ bestaat niet anno 2005” (Homosexual Marriage Does Not Exist in the Year 2005), *EJ* 2005, 66, no. 2.

60. Report (DELUELLE-GHOBERT) made in the name of the justice commission on the bill modifying various legal provisions relative to . . . adoption, *Doc. parl.* Senate 1985-86, no. 256/2, p. 65.

61. Code of Private International Law (Codip.), Articles 46 and 58.

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either Belgian, or domiciled in Belgium, or maintained residence in Belgium for more than three months at the time of the celebration.⁶²

These provisions had been preceded by a ministerial circular *para legem* in the same sense, and much disputed.

The status of homosexual couples in private international law has already been the subject of a general report of the International Academy of Comparative Law, and will not be developed here.⁶³

Questions 5 & 6

23. Although Belgium opens marriage to persons of the same sex, it is not without value to set out briefly the status of legal cohabitation.

The Act of November 23, 1998, establishing legal cohabitation⁶⁴ came into effect January 1, 2000. This institution had been classified in *Book III* of the Civil Code, *Ways in Which One Acquires Property*, and not in *Book I. Persons*. It had been deduced in doctrine that legal cohabitation did not modify the state of persons.⁶⁵ This position is debatable and all seems to point to the thought that legal cohabitation, like marriage, concerns the state of the person within the family.⁶⁶ It is even more the case now, as from then on, legal cohabitation has produced more and more legal consequences.

24. A declaration of legal cohabitation can be made before a vital records officer (Civil Code Article 1475) by:

- ❖ two persons;

62. Codip. Article 44.

63. Belgian report: J.-Y. CARLIER, "Couples of Persons of the Same Sex in Belgian Law, in Particular from the Angle of Private International Law" in E. DIRIX and Y.-H. LELEU (ed.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 301; General report: G.-R. DE GROOT, "Private International Law Aspects Relating to Homosexual Couples," downloadable from the website of the Netherlands Association of Comparative Law, www.ejcl.org.

64. *MB* January 1999.

65. J.-Y. CARLIER, "Couples of Persons of the Same Sex in Belgian Law, in Particular from the Angle of Private International Law" in E. DIRIX and Y.-H. LELEU (ed.), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, (301) 302; P. SENAËVE, "De wettelijke samenwoning en het geregistreerd partnerschap in het Belgisch recht" (Legal Cohabitation and Registered Partnership in Belgian Law), *FJR* 1998, 254, no. 6.

66. F. SWENNEN, "Bedenkingen bij het rechtsbegrip staat van de persoon" (Considerations on the Legal Concept of Status of the Person) in W. DEBEUCKELAERE, J. MEEUSEN and H. WILLEKENS (ed.), *Met rede ontleed, de rede ontkleed. Opstellen aangeboden aan Fons Heyvaert ter gelegenheid van zijn vijftenzestigste verjaardag (Dissected by Talk, Stripped by Talk. Exhibits Offered to Fons Heyvaert on the Occasion of his Sixty-Fifth Birthday)*, Ghent, Mys & Breesch, 2002, 59 ff.

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- ❖ in a communal living situation;
- ❖ who are not connected by a marriage or by another legal cohabitation; and
- ❖ who are capable of contracting.

The nature of the relationship between the two legal cohabitants is not relevant; they can be of different sexes or the same sex, or they can be related or not.

In Table 3 are shown the number of persons connected with a declaration of legal cohabitation. One cannot deduce from the official statistics the distribution according to sex of the legal cohabitations by same-sex couples. Nor can one conclude if the legal cohabitation by two persons of the same sex are couples, or related by blood or marriage. The fact is that the declarations of legal cohabitation by persons of the same sex only amount to 5% of the total number of declarations.⁶⁷

25. The judicial regime of legal cohabitation initially borrowed a small portion of the provisions applicable to the primary (mandatory) regime of married couples. It is a matter of provisions concerning the cohabitation situation, as such:

- ❖ protection of the residence where the declarants cohabit;
- ❖ obligation to contribute to the costs of the cohabitation;
- ❖ joint and several liability with regard to third parties for debts related to the household;
- ❖ possibility of intervention by the judge to order emergency and provisional measures.

Conversely to spouses, legal cohabitants are not responsible for any personal obligation (e.g. duty of fidelity) or economic liability during the cohabitation. No common patrimony with the cohabitant is created; however, the presumption of undivided possession of assets can be arranged contractually.

Contrary to marriage, legal cohabitation can be very easily dissolved, even by a unilateral decision. It carries no support obligation.

These statements induced the Constitutional Court to consider that legal cohabitation “does not create an institution that would put the cohabitants in a ‘situation almost identical’ to those of married persons, but creates

67. S. EGGERMONT, “Jan en Jan Modaal: homohuwelijk of wettelijke samenwoning?” (Jan and Jan Modaal: Homosexual Marriage or Legal Cohabitation?), *RW* 2008-09, 124; W. PINTENS & C. DECLERCK, “Statistieken over wettelijke samenwoning en opengesteld huwelijk” (Statistics on Legal Cohabitation and Opened Marriage), *RW* 2003-04, 1556; P. SENAËVE, “De wettelijke samenwoning, een vooral Vlaamse, heteroseksuele en tijdelijke aangelegenheid” (Legal Cohabitation, a Flemish Specialty, Heterosexual and Temporary Matter), *EJ* 2004, 87.

only a limited patrimonial protection inspired partially by provisions applicable to spouses.⁶⁸

Since 2007, legal cohabitation has provided inheritance provisions, not as legal successor, for the benefit of the surviving cohabitant.⁶⁹ This reform is symptomatic of the evolution of the judicial term of legal cohabitation since 2000. In an increasing number of areas, legal cohabitation is treated as an equivalent of marriage and distinguished from de facto cohabitation. This is what led us to think that it establishes a true legal control over the relationship between the parties.

26. Legal cohabitation results from provisions of law that, at the start and principally, intended to offer a more or less extended protection to the growing phenomenon of unmarried (heterosexual) couples. By analogy with the legislative solutions found previously in Scandinavian countries, and with some provisions of French law, the proposals had been introduced to Parliament to introduce into Belgian legislation a kind of registered partnership for which all or some of the consequences of marriage would be declared applicable.⁷⁰

The creation of specific legal protection for homosexual cohabiting couples appears originally to have only been a side issue.⁷¹

A political compromise finally permitted the realization of a minimal status open to two persons, whatever their sex and the nature of their relationship.⁷² Legal cohabitation had been deliberately extended to homosexual couples and, in this measure, presented as a “mini-marriage” for them.⁷³

An appeal for annulment of the law, inspired by a conservative ethic, had been declared inadmissible by the Constitutional Court.

68. Constitutional Court, February 23, 2000, no. 23/2000, www.const-court.be and the footnote of J. KIRKPATRICK, *Journal of trials (Journ. Proc.)* 2000, no. 393, 30.

69. R. BARBAIX, “Het erfrecht van de langstlevende wettelijk samenwonende partner” (The Law of Succession for the Surviving Legally Cohabiting Partner), *Estate Planning Journal (TEP)* 2007, 442; F. TAINMONT, “The Act of March 28, 2007, on the Inheritance Rights of the Legal Cohabitant. Civil Aspects,” *RTDF* 2008, 7.

70. P. SENAËVE, “De wettelijke samenwoning en het geregistreerd partnerschap in het Belgisch recht” (Legal Cohabitation and Registered Partnership in Belgian Law), *FJR* 1998, 254, no. 3.

71. O. DE SCHUTTER and A. WEYEMBERGH, “Legal Cohabitation. A Step in the Recognition of Same-Sex Unions?,” *JT* 2000, (93) 95-96 and 103.

72. P. SENAËVE, “Het erfrecht van de langstlevende wettelijk samenwonende partner” (The Law of Succession for the Surviving Legally Cohabiting Partner), *FJR* 1998, 254, no. 4.

73. P. ex. A. HEYVAERT, “De evolutie naar de seks(e)neutraliteit van het gezinsrecht” (The Evolution Toward Sex Neutrality of Family Law), *NJW* 2005, 1190, no. 15; A.-C. VAN GYSEL, “A Final Bouquet to the Colors of the Rainbow,” *Div. Act.* 2003, (65) 67.

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Question 7

27. The legislation on legal cohabitation makes no distinction regarding the sex of the declarants.

But earlier, distinctions had existed regarding effects that legal cohabitation produced in other areas of the law; in particular, adoption, where legal cohabitants of the same sex, contrary to legal cohabitants of different sexes, were deprived of access (*below*, VIII).

Questions 8 and 9

28. Neither marriage law nor legal cohabitation law makes a formal distinction according to the sex of the partners. Nevertheless, distinctions persist in certain other sections of the law.

29. Before the introduction of legal cohabitation and the opening of marriage, certain legal provisions made distinctions between unmarried couples depending on whether they were homo- or heterosexual.⁷⁴ Wherever this distinction was irrelevant or produced disproportionate consequences, it could be fought with an appeal to the Constitutional Court on the basis of the constitutional principle of equality (*above*, II).

The Constitutional Court has thus decided in this sense regarding the determination of the position of the child as a function of which the amount of family allowances is determined.⁷⁵ For the determination of position, one would have to take into account the number of all the children not common to de facto cohabitants of different sexes, and thus qualify for the granting of increased allocations. This was not the case for children not common to de facto cohabitants of the same sex. But the objective of the legislature in this matter was “to take account of the different forms of household that existed in the modified social context and that proposed as a principle that the burden that the household had to support increases as a function of its size,” and it would have been necessary (unconstitutionally) to count as well these children for homosexual couples because “the cohabitation of several recipients with children leads to the formation of a larger

74. S. SOTTIAUX, “Discriminatie op grond van seksuele geaardheid” (Discrimination on the Basis of Sexual Orientation), (footnote to the Constitutional Court, June 21, 2000, no. 80/2000), *RW* 2000-01, 768, no. 11, and more detailed O. DE SCHUTTER and A. WEYEMBERGH, “Legal Cohabitation. A Step in the Recognition of Same-Sex Unions?,” *JT* 2000, 93-95 and 101-102.

75. Constitutional Court, June 21, 2000, no. 80/2000, www.const-court.be, *RW* 2000-01, 768 with footnote by S. SOTTIAUX.

household, as much for cohabitants of the same sex as for cohabitants of different sexes or spouses, and the partners have to assume the maintenance of the children in the same way.”

In another matter, the Constitutional Court did not find any discrimination in an inconclusive legal assumption on the basis of which cohabitants of the same sex, in contrast to cohabitants of different sex, are not presumed to live “in a household” for application of the regulations relative to family allowances.⁷⁶

30. On the basis of Article 159 of the Constitution (*above*, No. 3), the Ghent Labor Court set aside the application of a provision of a Royal Decree on employment and unemployment whereby it followed that the community of life between persons of the same sex had not been considered a “de facto household,” contrary to that between persons of different sexes.⁷⁷

In more recent legislation, the different forms of families is taken into account. Thus, in criminal law, since 1989 rape has been considered as any act of sexual penetration (Penal Code Article 375), and not only vaginal penetration.⁷⁸

In addition, in the area of inheritance taxation (rights of succession) cohabiting partners of the same sex are treated in an identical manner as those of different sexes.⁷⁹

Thus, during the parliamentary discussion of the law project aimed at combating domestic violence, the expression “cohabit as if married,” which implied they were as husband and wife, had been modified to “cohabit and maintain a durable emotional and sexual relationship.”⁸⁰

31. Since 2003, the anti-discrimination law expressly withholds sexual orientation as a forbidden basis for differential treatment.

This law has proven to be difficult to apply to contractual relationships, for example in case of refusal to lease an apartment for the benefit of a

76. Constitutional Court, June 24, 1998, no. 77/98, www.const-court.be, *Belgian Social Security Review (Rev. b. séc. soc.)* 1999, 311, observation by J. DE MEYER, *J. dr. jeun.* 1998, no. 178, 39, footnote J. JACQMAIN.

77. Labor Journal (Trib. trav.) Ghent, April 4, 1996, *General Judicial Gazette (AJT)* 1995-96, 593, footnote B. LIETAERT, *Journ. proc.* 1996, no. 308, 22, footnote L. VERSLUYS, *Social Law Chronicles (Chron. D. S.)* 1996, 407, footnote H. FUNCK.

78. L. STEVENS, *Strafrecht en seksualiteit (Criminal Law and Sexuality)*, Antwerp, Intersentia, 2002, no. 407.

79. Decree of the Region of Flanders of July 15, 1997; in regard to annulling this decree: Constitutional Court, July 15, 1999, no. 82/99, www.const-court.be.

80. Report (LAEREMANS) made in the name of the Justice Commission on the bill to combat domestic violence, *Doc. parl.* Chamber 1996-97, no. 949/005, p. 12.

same-sex couple.⁸¹

Regarding assaults, one author notes that it appears difficult to sanction a judge for motives associated with his/her impartiality if, in court, he/she expresses a (negative) opinion on the legitimacy of a homosexual relationship.⁸²

32. A major development in the law for Belgian families of the last ten years is the reform of the adoption law.

Previously, adoption had been reserved to single persons or married couples, and in the latter case it must have been done by the couple or between them (adoption of a spouse's child), being understood that the couple could only be heterosexual. Within the framework of the first fundamental reform of the subject in 1987, it was proposed to open adoption to unmarried couples as well as to those of the same sex, again whether as adoptive parents or adoption of one partner's child. These proposals had been rejected on the grounds that adoption had as its purpose the integration of the adoptee into a stable family that could offer a structure close to that of a biological relationship.

33. Adoption law underwent a second broadening reform in 2003 upon the occurrence of a change in the Hague Convention regarding adoption. The preference given to marriage was abandoned to open adoption to legal cohabitants or de facto cohabitants maintaining a stable relationship. But same-sex couples had been expressly excluded from this opening⁸³ in "counterpart" to the opening of marriage (*above*, No. 13). At least the principle of opening adoption to same-sex couples had been fully enough discussed. The principle of precaution had been advanced as sufficient justification to refuse the opening of adoption to same-sex couples, in the name of which it was forbidden and could involve prejudicial consequences, so it should remain so as long as no proof that it is not prejudicial had been produced.⁸⁴ And this justification had been accepted

81. D. DE PRINS, "Gediscrimineerd homopaar krijgt geen rechtsherstel" (Discriminated Homosexual Pair Gets No Rehabilitation), *Juristenkrant* 2004, no. 84, pp. 1 and 12.

82. P. BORGHS, "Homorelatie strijdig met openbare orde en goede zeden?" (Homosexual relationships contrary to public order and good morals?), *Juristenkrant* 2005, no. 116, p. 7.

83. See, for a plea in favor of opening adoption S. SOTTIAUX, "Beter twee mama's dan één? Het Arbitragehof en de adoptie door wettelijk samenwonenden" (Are Two Mothers Better than One? The Arbitrage Court and Adoption by Legal Cohabitants), *RW* 2001-02, 971.

84. See in general on the precautionary principle: S. LIERMAN, *Voorzorg, preventie en aansprakelijkheid (Precaution, Prevention, and Responsibility)*, Antwerp, Intersentia, 2004; B. JADOT & F. TULKENS, "The Principle of Precaution in Belgian Public Law" in E. DIRIX and Y.-H. LELEU (ed.), *The Belgian Reports at the Congress*

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taking into consideration the insufficient social and legal acceptance for adoption by or within couples of the same sex at that time.⁸⁵

Finally, adoption was opened by the Act of May 18, 2006 modifying, certain provisions of the Civil Code with a view to permitting adoption by persons of the same sex.⁸⁶

On one hand, the Constitutional Court had clearly insisted in a decree on the necessity of introducing into the legislation a possibility to anchor legally in family law the relationship between a child having only one legal parent and the homosexual partner of that parent, without further inferring discrimination.⁸⁷

On the other hand, it had clearly specified, in the social and legal discussion, that there exists no right to adoption, but that the right to adoption must be reserved to all, with no discrimination. The argument of the principle of precaution, as well, has lost its relevance since scientific proof had been rendered that the education of a child by a homosexual couple is *not* harmful to it. This argument can consequently no longer justify the exclusion of same-sex couples with regard to the equality principle, and the European Court of Human Rights has decided in this sense with regard to adoption by a single homosexual person.⁸⁸

In doctrine, always on the basis of this principle of precaution, the reactions against the opening of adoption had been very intense.⁸⁹ Analogous to the debate for the opening of marriage, the arguments are connected with the essentially heterosexual nature of the (adoptive) relationship and oriented toward the creation of a distinct institution for “homoparenthood.”⁹⁰

of *Utrecht of the International Academy of Comparative Law*, Brussels, Bruylant, 2006, 683.

85. F. SWENNEN, “Het nieuwe interne adoptierecht: *horresco referens*” (The New Domestic Adoption Law: *horresco referens*), *RW* 2003-04, 441, no. 11.

86. *MB* June 20, 2006. A. HUYGENS, “Voorwaarden en gevolgen van de adoptie door paren van hetzelfde geslacht” (Conditions and Results from Adoption by Same-Sex Couples) in P. SENAËVE, F. SWENNEN & G. VERSCHULDEN (ed.), *Verblijfscoouderschap (Co-habitant Parenting)*, Antwerp, Intersentia, 2007, 199 ff.; T. WUYTS, “De wet van 18 mei 2006: adoptie toegankelijk voor personen van hetzelfde geslacht” (The Act of May 16, 2006: Adoption Available to Persons of the Same Sex), *EJ* 2006, 87.

87. Constitutional Court, October 8, 2003, no. 134/2003, www.const-court.be, *RTDF* 2004, 185 footnote J.-L. RENCHON, *RW* 2003-04, 1016, footnotes T. ROBERT and V. VERLINDEN, *EJ* 2003, 134, footnote P. SENAËVE, *TJK* 2004, 39, footnote T. ROBERT.

88. European Court of Human Rights, January 22, 2008, E.B./France, www.echr.coe.int, *RTDF* 2008, 916, footnote G. RUFFIEUX, *JLMB* 2008, 540, footnote P. MARTENS, *JT* 2009, 157, footnote M. DEMARET.

89. J.-L. RENCHON, “Social Relationship and Homosexual Adoption. What a Political Choice,” *JT* 2005, 130.

90. P. ex. G. VERSCHULDEN, “Homohuwelijk heeft praktische gevolgen” (Homosexual Marriage Has Practical Consequences), *Juristenkrant* 2003, no. 65, 10.

The opening of adoption has not yet enabled a de facto equality among adopting couples or persons according to their sex. Most of the adoptions within homosexual couples are requested by the lesbian partner of the mother who had benefited from artificial insemination by a donor. In Belgium, lesbian women and couples have access to medically assisted procreation and the relationship regarding the donor cannot be legally established.⁹¹ On the other hand, few children are available for internal adoption in Belgium, and, as far as international adoption is concerned, the partner countries generally give preference to adoptions by heterosexual couples.

34. As far as decisions relative to parental authority are concerned, in particular the accommodations for the child, the European Court of Human Rights considered that the homosexuality of one of the parents, in itself, could have no effect.⁹²

Before and after this decision, Belgian jurisprudence furnished examples of decisions penalizing the homosexual parent, for example, in the name of a “seduction theory,” evoking a possible transmission of sexual orientation by education.⁹³

Questions 9 and 10

35. The law opening adoption to same-sex couples (*above*, no. 31) had been passed under the condition that a legislative proposal for the opening of the rules relating to biological relationships would be withdrawn.

As we mentioned above, currently the presumption of paternity under Article 315 of the Civil Code looks only to the male spouse of the mother that she designates as father. And it protected in a definitive way (Civil Code, Article 318 § 4) the affective paternity of the husband who consents to the insemination of his wife with the gametes of a donor.

Where it appears that the paternity of the male spouse can also be based on a falsehood, this makes it theoretically possible that such falsehood could also benefit the female spouse of the mother. This is already the case in South Africa: the lesbian partner of the mother who had given consent to the artificial insemination of her partner was deemed under law to be the

91. Act of July 6, 2007 on medically assisted procreation . . . , *MB* July 17, 2007.

92. European Court of Human Rights, December 21, 1999, *Salgueiro da Silva Mouta/Portugal*, *EJ* 2000, 106 note D. VAN GRUNDERBEECK, *Journal of Justices of the Peace (and Police) (JJP)* 2002, 252 footnote D. VAN GRUNDERBEECK, *AJT* 1999-00, 681 footnote S. VAN GARSSE.

93. K. DEKELVER, “Homofiel huwelijk en homofiel gezin: juridische, filosofische en beleidsmatige kanttekeningen” (Homosexual Marriage and Homosexual Family: Legal, Philosophical, and Marginal Views), *RGDC* 1996, 82, no. 2.

father of the child.⁹⁴

Such a system, of course, is not in force in Belgium.

As concerns paternity outside of marriage, Civil Code Article 329 specifies that when a child is acknowledged by several persons of the same sex, only the first acknowledgment is effective, as long as it has not been cancelled.

By reason of biological presuppositions under the law on family relationships, a child can have only two legal parents who, moreover, must be of different sexes.⁹⁵ This principle is questioned more and more.⁹⁶ In Belgian private international law, the application of foreign law legally authorizing homosexual kinship manifests no conflict with Belgian provisions of public order (Codip. Article 62, § 2).

A legal proposal to introduce into our legislation a “dual acknowledgment” by a same-sex partner like that of the parent was withdrawn in “counterpart” to the opening of adoption.⁹⁷

36. Except in the case where the homosexual partner adopted the partner’s child, it exercises no right of parental authority over the child. Some legal proposals presently introduced into Parliament to introduce a “social relationship” permitting, notably for homosexual partners, a right of oversight or of more or less extensive co-decision to be obtained, and at least while they form a family with the child.⁹⁸

94. J. and another vs. Minister of Home Affairs, March 28, 2003, Case CCT 46/02 (Constitutional Court of South Africa), www.constitutionalcourt.org.za.

95. Approval: J. DELVA, “Homohuwelijk en homo-ouderschap onder het kijkglas van de wetgever. Toetsing aan het gelijkheidsbeginsel en aan het Kinderrechtenverdrag” (Homosexual Marriage and Homoparenthood through the Lawmakers’ Magnifying Glass. Test of the Principle of Equality and the Convention on the Rights of the Child), *TBP* 1998, (463) 466, which describes homosexual kinship as a reckless novelty and inversely proportional to the interest of the child.

96. P. ex. K. DEKELVER, “Homofiel huwelijk en homofiel gezin: juridische, filosofische en beleidsmatige kanttekeningen” (Homosexual Marriage and Homosexual Family: Legal, Philosophical, and Marginal Views), *RGDC* 1996, 82, nos. 49 ff.; A. HEYVAERT, “De evolutie naar de seks(e)neutraliteit van het gezinsrecht” (The evolution of sex neutrality in family law), *New Weekly Law Gazette, NJW* 2005, 1190, nos. 33-34.

97. Bill (GENOT) modifying the Civil Code regarding the recognition of family relationships, *Doc. parl.* Chamber 2003-04, no. 51-520/001. See as well the legal proposal (GUILBERT) modifying the Civil Code regarding the recognition of family relationships, *Doc. parl.* 2003-04, no. 3-303/001.

98. Bill (COLLIGNON *et al.*) regarding social kinship, *Doc. parl.* Senate 2007, no. 4-34/001; Bill (SWENNEN) establishing basic provisions in matters of social kinship, *Doc. parl.* Senate 2007-08, no. 4-359/001; Bill (SWENNEN) establishing the legal act of social kinship, *Doc. parl.* Senate 2007-08, no. 4-360/001; Bill (PROCUREUR *et al.*) introducing social parenthood into the Civil Code, *Doc. parl.* Senate 2007-08, no. 4-381/001; Bill (DE BÉTHUNE *et al.*) supplementing the Civil Code with provisions on social kinship, *Doc. parl.* Senate 2007-08, no. 4-670/001; Bill (TAELEMAN) establishing the right of joint decision for the in-laws, *Doc. parl.* Senate 2008-09, no. 4-1120/001;

The same-sex partner married to the parent, or who legally cohabits with same, is, on the other hand, indirectly obligated to contribute to the maintenance of the partner's child by way of the duty of contribution to the expenses of the marriage or of the household (Civil Code, Articles 221 and 1477 § 3).

After separation of the couple, the homosexual partner can presently only call upon Civil Code Article 375*bis*, according to which every person having a relationship of affection with the child has the right to maintain personal relations with it. This provision had been used, wrongfully, to organize a "co-relationship" with a lesbian "co-mother".⁹⁹ Legislation regulating family relationships would offer a solution for such situations.

After the death of the parent, the surviving spouse or legal cohabitant is held to a limited obligation regarding the amount of his/her contribution to the maintenance of the children based on Civil Code Articles 203, § 2 and 1477, § 5.

Question 11

37. We return the reader to our responses under II and VIII: under current legislation, couples of the same sex have the same rights as couples of different sexes. The legislation is neutral regarding the sexual orientation of the relationship. Thus, the Act of August 22, 2002 on patient rights¹⁰⁰ gives a right of representation for a patient incapable of expressing their will to the cohabiting spouse, then to the legal cohabitant or de facto cohabitant (Article 14, § 2), without distinction as to sex.

Question 12

Bill (NYSSENS *et al.*) introducing social kinship into the Civil Cod, *Doc. parl.* Chamber 2007, no. 52-116/001; Bill (VERHERSTRAETEN *et al.*) modifying legislation on child protection as concerns the establishment of social parenthood, *Doc. parl.* Chamber 2007-08, no. 52-1303/001; Bill (LAHAYE-BATTHEU *et al.*) modifying the Civil Code and the Judicial Code with a view to establishing a right of joint decision for the in-laws with regard to their partner, *Doc. parl.* Chamber 2008-09, no. 52-1728/001.

99. Juvenile Court of Courtrai, March 18, 1997, *JT* 1998, 731 footnote N. MASSAGER, *Health Law Review (Rev. dr. santé)* 1998-99, 245 footnote N. COLETTE-BASECQZ; Juvenile Court of Courtrai, June 24, 1997, *Journ. proc.* 1997, no. 334, 16, footnote L. VERSLUYS; Juvenile Court of Dendermonde, March 1, 2001, *Jurisdiction Antwerp Brussels Ghent (RABG)* 2003, 948, footnote F. DE BOCK; Juvenile Cort of Malines, April 28, 2004, *NJW* 2004, 1172; Juvenile Court of Louvain, November 29, 2005, *J.dr.jeun.* 2006, no. 260, 43 footnote J. JACQMAIN, *RW* 2006-07, 483, footnote A. HUYGENS. Very restrictive: Ghent, October 28, 2002, *Juristenkrant* 2003, no. 64, 13, reflection P. BORGHS, "Meemoeder zo goed als rechteloos" (My mother as good as without rights); Antwerp, April 21, 2005, *RW* 2005-06, 745, footnote F. SWENNEN.

100. *MB* September 26, 2002.

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38. Relevant jurisprudence, in particular that of the Constitutional Court, is integrated into the preceding developments.

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TABLES

Table 1. Number of marriages contracted between people of the same sex

Year	2003	2004	2005	2006	2007	2008
Total number of marriages	41,777	43,296	43,141	44,813	45,561	45,613
Total number of marriages between persons of the same sex	854	1,069	1,027	1,124	1,150	1,092
M/M	509	622	580	596	595	574
F/F	345	447	447	529	556	518
% of marriages between persons of the same sex/total marriages	2.00 %	2.40 %	2.32 %	2.44 %	2.46 %	2.33 %

Table 2. Number of marriages contracted between persons of the same sex / number of legal cohabitations declared between persons of the same sex

Year	2003	2004	2005	2006	2007	2008
Total number of legal cohabitations between persons of the same sex	397	477	585	618	860	?
Total number of marriages between persons of the same sex	854	1,069	1,027	1,124	1,150	1,092

Source: SPF Economie - General Directorate of Statistics & Economic Information according to the National Register.

Table 3. Number of persons involved in declarations of legal cohabitation (2000-2007)

Total	2000	2001	2002	2003	2004	2005	2006	2007
	5,144	21,427	8,958	11,263	18,595	30,749	34,293	49,189
Persons of different sex	2000	2001	2002	2003	2004	2005	2006	2007
	4,397	20,380	8,239	10,470	17,641	29,579	33,055	47,470
Persons of same sex	2000	2001	2002	2003	2004	2005	2006	2007
	747	1,047	719	793	954	1,170	1,238	1,719

Source: SPF Economie - General Directorate of Statistics & Economic Information according to the National Register.