CURRENT DEVELOPMENTS

PRIVATE INTERNATIONAL LAW

Edited by Peter McEleavy

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I. NEW BELGIUM LAW ON SAME SEX MARRAGE AND ITS PIL IMPLICATIONS

Belgium has now become the second jurisdiction worldwide, after the Netherlands,[1] to allow same-sex marriages. The bill opening marriage to persons of the same-sex and modifying certain provisions of the Civil Code[2] was adopted by a large majority and without modification by the Belgian parliament on 30 January 2003. While the new law was promulgated by King Albert II on 13 February 2003 and published in the third edition of the *Moniteur belge* on 28 Febuary[3], it did not enter into force until 1 June 2003. This somewhat unusual time delay was required to ensure that all officials with competence to celebrate marriages (*officiers de l'état civil*) had sufficient time to become familiar with the scope of the new rules.[4]

The reform of the Belgian law of marriage, which takes place just a few years after the enactment of a law establishing an institution of 'statutory cohabitation,'[5] opens yet another option to same-sex partners wishing to organise their common life. Today there are in fact four forms of cohabitation arrangement available to same-sex partners.

First, gay and lesbian companions can opt for a de facto cohabitation. Although not governed by a comprehensive set of rules, free cohabitation has acquired a semi-legal status over the years.[6] However, since the effects which exist have been

[1] Since the Act of 21 Dec 2000, *Staatsblad* 2001 No 9, Art 1.30(1) of the Dutch civil code reads: '*a marriage can be entered into by two persons of different or same sex*'.

[2] « *Projet de loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil* ».

[3] *Moniteur Belge* (Official Gazette) 28 Feb 2003 ed 3, pp 9880–9883.

[4] Cf *Doc Parl* 50 2165/002, at p 24.

[5] The notion and regime of statutory cohabitation, governed by Art 1475–1479 Civil code, was introduced by the '*Loi du 23 novembre 1998 instaurant la cohabitation légale*', which entered into force on 1 Jan 2000.

[6] See the *exposé des motifs* introducing the 1995 Bill on the 'contrat of common life' (*contrat de vie commune*), Doc No 170/1–95/96, p 2.

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justified by making analogies with marriage,[7] the Belgian courts have often been reluctant to extend these to same-sex partners.[8]

The absence of a clear legal recognition of de facto same-sex cohabitations may be overcome, at least partially, by the use of contract law. However contract law, while providing more legal certainty, is unable to afford same-sex couples total security or protection. This results from the fact that contractual freedom is in many ways restricted by a number of peremptory norms, not only in the field of personal status, which is entirely governed by the principle of *indisponibilité*,[9] but also in the area of succession.

A third option, which was supposed to respond to these weaknesses, came into sight in 1995 with the proposal for a 'contract of common life'[10] (*Contrat de vie commune*).[11] The original bill sought to put in place a special legal framework for the protection of all non married cohabitees. But as has been rightly pointed out,[12] the legislation which finally emerged[13] was characterised by fragility and lacunas, being restricted to financial issues. The current status of 'statutory cohabitee' has few conse-

[7] In this, the approach of the Belgian courts mirrored the attitude of their French counterparts. Until the introduction of the *Pacte Civil de Solidarité* (PACS) in the French civil code by the law of 15 Nov 1999, the French C*our de cassation* had repeatedly refused to admit that same-sex cohabiting partners could benefit from the various advantages open to heterosexual couples. This position was sometimes motivated by textual arguments ('*conjoints' en union libre, vie 'maritale*'), see: Cass Soc 11.7.1989 (2 decisions), *Gaz Pal* 1990, 216. France's highest court eventually gave a definition of the concept of *concubinage* symmetrical to that of marriage in 1997; see: Cass Civ 3ème 17.12.1997, D.1998, 111. The legislature intervened, adding a provision in the law of 15 Nov 1999 establishing the notion of registered partnership. Since then, art 515–8 of the French civil code defines *concubinage* as the factual, stable and continuous union of two persons, whether of different or same sex, who live as a couple.

[8] Some first instance courts have adopted a liberal approach, considering that de facto cohabitation ('*ménage de fait*') possibly included same-sex couples; eg: decision of the tribunal du travail de Charleroi, section de Haine-Saint-Pierre, of 26 June 1990 (No JS45035_1). Other courts, taking account of sectoral legislative definitions of the notion of de facto cohabitation as 'cohabitation of a man and a woman living as a married couple' ('*cohabitation d'un homme et d'une femme qui vivent ensemble maritalement*' as in the decree of 21.6.1990), have refused to extend the status of de facto cohabitation to any form of cohabitation but heterosexual; see: Cour du Travail de Liège, section de Liège (8è chambre), 24 June 1998, N° JS51253_1.

[9] According to this principle, any contract by which a person would want to change any element of his/her personal status (whether individual, familial or social) is deemed to be void.

[10] *Proposition de loi concernant le contrat de vie commune* (*Doc Parl* No 170/1–95/96).

[11] In the same vein, another bill had been introduced with the aim to update Belgian law and to adapt it to post-modern realities. This Bill (*Doc Parl* No 372/1–95/96), which was to create a new institution of civil union (*union civile*), did not cover a number of issues included in the proposal for the creation of the *contrat de vie commune*.

[12] O De Schutter and A Weyembergh, ''Statutory Cohabitation' Under Belgian Law', *Legal Recognition of same-Sex Partnerships–A Study of National, European and International Law*, in R Wintemute & M Andenæs (eds), Hart, Oxford, 2001, at p 467, 471.

[13] The Chamber of Representatives considered three bills jointly: the Bill establishing the 'contract of common life' (cited above), as well as two proposals to outlaw all forms of discrimination based on sexual orientation (*proposition de loi relative à la protection, contre les discriminations fondées sur le sexe et les tendances sexuelles ou relationnelles* (*Doc Parl* No 600/1–95/96) and *proposition de loi modifiant le code pénal, abrogeant la loi du 30 juillet 1981 tendant à réprimer certains actes inspires par le racisme ou la xénophobie et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme* (*Doc Parl* No 1089/1–95/96)).

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quences.[14] It does not entail any personal effects: there is no obligation of mutual aid and assistance, and no effects with respect to natural or adopted children. Likewise, there are very limited patrimonial consequences. In the case of separation there is no form of financial support (unless provisional) in favour of the weaker partner, who has no right to remain in the common residence of the couple (if it was owned or rented by the other). In the event of the death of one of the partners no inheritance rights, and no automatic right to compensation (in case of the death of partner caused by a third party) is afforded to the other.[15]

Against this background it is perhaps not surprising that there was yet further legislative intervention to respond to the needs of long-term cohabiting couples. Indeed the bill organising a 'registered partnership'[16] (*partenariat enregistré*) which was aimed at creating a new framework, exclusively open to same-sex couples and paralleling marriage as far as possible, was introduced before the adoption of the law on statutory cohabitation. The proposed new status was not to be equated with marriage and the bill attempted to avoid any confusion between both institutions.[17] The differentiation was to be formal and substantive: both would be performed by *officiers de l'état civil*, but a new distinct registry book would have to be used.[18] Furthermore marriage was only to be open to different sex couples, while registered partnerships would only be accessible to same-sex partners.[19] In addition the assimilation of registered partners with spouses did not extend to the field of filiation. Not only would the rules based on biological bond be made inapplicable to registered partners,[20] but homosexual partners would also be barred from adopting children. This exclusion was justified by the fact that the 'large political and social consensus'[21] which existed with regard to the establishment of a status for gay and lesbian couples did not stretch as far as recognising their right to adopt children. All other legal consequences of marriage were nonetheless extended by analogy to registered partnerships.

The strong parallelism between the proposed registered partnership and the existing institution of marriage led to the question as to whether it was necessary to create this new institution, which would be viewed as a second class marriage.[22] Given the apparent political commitment to ending discrimination, was it not just simpler to open civil marriage to same-sex couples? This is precisely the idea which led to the adoption of the 2003 legislation.

[14] Because the main aim of the original proposal was to provide non-married couples with a 'minimal material security' it was not restricted to patrimonial aspects until the initial bill was amended in early 1998. The *Proposition de loi concernant le contrat de vie commune*, Amendment No 1 (*Doc Parl* No 170/2–95/96) constituted the basis of the parliamentary discussions which resulted in the adoption of the institution of 'statutory cohabitation'.

[15] O De Schutter & A Weyembergh (see above, note 11), p 466 & 468 *et seq.*

[16] *Proposition de loi organisant le partenariat enregistré* (*Doc Parl* No 1417/1–97/98).

[17] The preoccupation with the elimination of all confusion between marriage and registered partnership is reflected throughout the bill; see the comments of the proposed provisions (*Doc Parl* No 1417/1-–97/98, p 2 *et seq.*).

[18] Art 2 of the bill.

[19] Art 4 of the bill.

[20] The traditional principle '*pater est quem nuptiae demonstrant'* (art 315–318 Code civil) was made inapplicable as well as all claims resulting from the application of this principle (art 322 Code civil).

[21] *Proposition de loi organisant le partenariat enregistré* (*Doc Parl* No 1417/1–97/98), p 1.

[22] The Dutch experience has since shown that equality is not really achieved through the alignment of the legal effects of a new legal construct on those of marriage. That the importance of

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I. THE GENESIS OF THE ACT OPENING MARRIAGE TO SAME-SEX COUPLES

In April 1999 a bill modifying articles 144, 162 and 163 of the Belgian civil code[23] was first submitted to this effect.[24] It was not however until the 50th parliamentary session that the Act opening marriage to single sex couples was finalised.

The opponents of same-sex marriage expressed three major arguments: the principle of equal treatment did not impose the adoption of this draft legislation; marriage could not by definition be open to homosexual companions, and finally, the adoption of the bill would lead to complications and legal uncertainty in the field of private international law. These arguments were considered in turn by the *Conseil d'Etat* in its advisory opinion of 12 November 2001.[25]

A. Equal treatment

The starting point of the bill was the necessity for the equality of treatment between homosexual and heterosexual couples as regards marriage. According to the drafters, the principle of non-discrimination[26] implied that, considering the evolution in public opinion in recent years, no objective ground remained that could possibly justify the prohibition of marriage between same-sex partners.[27]

To the advisory body this reasoning appeared 'erroneous'. Recalling article 10 and 11 of the Constitution, the *Conseil d'Etat* indicated that a difference of treatment could be validly imposed to different categories of persons, provided the criterion of distinction was reasonably and objectively justifiable. Moreover there was an intrinsic and

labels is not merely symbolic is exemplified by the decision in Case C-122/99P and 125/99P *D and Sweden v Council* [2001] ECR 1–4319. In this case the Court of Justice refused to expand the term 'married' or spouse' to include registered partners and denied benefits available to 'married officials' to a Swedish employee of the Council who was in a registered partnership (which, under Swedish law, provides most of the rights attached to marriage—except those relating to filiation).

[23] *Proposition de loi modifiant les articles 144, 162 et 163 du Code civil, Doc Parl* No 2208/1–98/99.

[24] This was followed by a number of other bills which led to the adoption of the Act opening marriage to persons of the same-sex and modifying certain provisions of the civil code of 13 Feb 2003. The bills considered by the Parliament include the following: *Projet de loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil* (*Doc Parl* 50 2165/ (2002/2003), *Proposition de loi complétant le Code civil en vue de faire de l'appartenance à des sexes différents une condition du mariage* (*Doc Parl* 50 0485/ (1999/2000), *Proposition de loi modifiant les articles 144, 162 et 163 du Code civil* (*Doc Parl* 50 0692/ (1999/2000), *Proposition de loi modifiant le Code civil en ce qui concerne les mariages homosexuels* (*Doc Parl* 50 0861/ (1999/2000), *Proposition de loi complétant l'article 144 du Code civil en ce qui concerne le mariage de personnes du même sexe* (*Doc Parl* 50 1011/ (2000/2001), *Proposition de loi modifiant le Code civil en vue d'autoriser l'adoption par les cohabitants légaux* (*Doc Parl* 50 1419/ (2000/2001), *Proposition de loi modifiant le Code civil en ce qui concerne la reconnaissance de filiation* (*Doc Parl* 50 1433/ (2000/2001).

[25] The Justice Minister had asked the *Conseil d'Etat* in July 2001 to give an advisory opinion on the draft bill opening marriage to same-sex persons and modifying certain provisions of the Civil code. In its *Avis* 31.008/2 the *Conseil d'Etat* concluded that the draft bill should be abandoned.

[26] The principle of non discrimination is enshrined in art 11 of the Belgian Constitution, which provides: '*La jouissance des droits et libertés reconnus aux Belges doit être assurée sans discrimination. A cette fin, la loi et le décret garantissent notamment les droits et libertés des minorités idéologiques et philosophiques*'.

[27] *Doc Parl* 50 1692/001, pp 4–6. *Doc Parl* 50 2165/002, pp 5–6.

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natural difference between heterosexual and homosexual unions. Since children could only be generated by different-sex unions, both the needs and social utility of heterosexual and homosexual unions were objectively different according to the *Conseil*. Furthermore, as homosexual couples had been afforded the possibility to declare that they were statutory cohabitees under the law of 23 November 1998, the refusal to allow them to marry could not be seen as unreasonable and discriminatory.[28]

This argument is however imperfect insofar as the status of 'statutory cohabitee' is not aligned on the status of spouse.[29] Many differences persist, some rights and obligations being still associated with marriage only to the exclusion of non-married couples. There is no equality in the field of taxation, and if discrepancies in the area of social security and social assistance have been reduced in recent years, some differences still exist.[30]

In the view of the government these differences had to be eliminated. The decision had been made to choose not to create a quasi-marriage under another name (registered partnership), but to open the institution of marriage to homosexuals thus giving a clear signal that the same rules ought to be applied to all.[31]

It was therefore necessary for the opponents of this project to discuss the question of whether it was acceptable that the legislature use an existing legal institution while, in so doing, modifying the essence of it. The definition of marriage had to be debated.

B. Definition of Marriage

Despite the fact that no provision of the Belgian Civil code expressly mentioned that marriage was restricted to different sex couples,[32] both Belgian case-law and legal doctrine had always considered that same-sex partners could not contract a civil marriage. As the *Conseil d'Etat* noted, it always seemed self-evident that marriage could only be the union of a man and a woman. This resulted from the strong link between the institution of marriage and the necessity of ensuring a stable union in order to enable the education of the children who would be conceived by the spouses. The *Conseil d'Etat* insisted that the etymology of the term itself indicated that marriage was historically created to ensure that the mother would benefit from the protection of the father and have his support in the raising of the children. [33] This rationale, according to the *Conseil*, was further mirrored in certain provisions of the civil code, which provided that nubility[34] was a positive condition of marriage and established a list of impediments based on familial links.[35] The *Conseil d'Etat* also referred to the preparatory works of the *Code civil*, which plainly mentioned that the principal consequence of any matrimonial union was to give life to children.

[28] *Doc Parl* 50 1692/001, pp 18–19.

[29] See above, p 1041.

[30] Differences between married and non-married couples persist both in terms of the exclusion of the latter from the benefit of certain advantages (eg as regards the *pension de survie*) or of the imposition of additional administrative burden to achieve what is automatically afforded to married couples (as in the field of succession).

[31] Response of the Minister of Justice, in *Doc Parl* 50 2165/002, p 19.

[32] Taking account of the absence of express restriction of marriage to persons of the opposite gender, a bill was proposed on 19 Feb 1997 to the effect of making gender difference a condition of marriage. See *Doc Parl*. 932/1–96/97.

[33] *Matrimonium* means 'regime of maternity'.

[34] Article 144 *Code civil*.

[35] Article 161-164 *Code civil*.

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Citing global as well as regional human rights instruments, the advisory body remarked that international law did not provide for a wider definition of marriage. If the human rights provisions referred to by the *Conseil d'Etat* did not expressly limit the right to marry to heterosexual couples, this understanding was nevertheless traditionally inferred from the use of the term 'men and women' rather than 'every human being', 'everyone', or 'all persons'.

Article 16 paragraph 1 of the Universal Declaration of Human Rights provides that 'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.' Article 23 paragraph 2 of the International Covenant on Civil and Political Rights, according to which: 'The right of men and women of marriageable age to marry and to found a family shall be recognized' has been interpreted by the Human Rights Committee in a recent decision[36] as 'indicating that the treaty obligation of State parties stemming from article 23, paragraph 2, of the Covenant is to recognise as marriage only the union between a man and a woman wishing to marry each other.' In the same vein, article 12 of the European Convention for the protection of Human rights and fundamental freedoms, which states that 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right' has been interpreted (albeit in the context of transsexualism) as protecting marriage as the basis of the family and as referring to traditional marriage between persons of the opposite biological sex.[37]

Nevertheless it must be borne in mind that the international instruments referred to in the advisory opinion by no means limit *a maxima* the discretion of State parties in these matters. The refusal to consider that a State which does not confer the capacity to marry upon homosexual couples is in breach of its obligations under article 23 ICCPR does not of course imply that this provision restricts the liberty of States to recognise the companionship between two men or between two women in the form of marriage or in any other comparable form.[38] This results from article 5 paragraph 2 of the Covenant.[39] The express reference in article 12 ECHR to 'the national laws' equally emphasises the wide discretion accorded to States to regulate the institution of marriage in their own domestic legal and social environments. The impact of social changes on the interpretation of this provision has also been considered in the recent case of *Goodwin v The United Kingdom* (again in the context of transsexualism),[40] where the European Court decided that though 'Article 12 secures the fundamental right of a man

[36] Decision of 30 July 2002, *Joslin v New Zealand*, CCPR/C/75/D/902/1999. However the Human Rights Committee's decisions are only recommendations or views, which are not binding on the State parties.

[37] *Rees v The United Kingdom* (1986) 9 E.H.R.R. 56, at §49.

[38] See, in favour of this interpretation, the concurring individual opinion expressed by Mr Rajsoomer Lallah and Mr Martin Scheinin (both members of the Human Rights Committee) which is attached to the view of the Committee in the case of *Joslin v New Zealand* (above note 36). The authors went on to admit that a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26 ICCPR, unless otherwise justified on reasonable and objective criteria.

[39] Art 5 § 2 provides: 'There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent'.

[40] *Goodwin v UK*, application No 28957/95, ECHR decision of 11.7.2002, § 98 et seq.

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and woman to marry and to found a family, the second aspect is not a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision'. Interestingly Article 9 of the more recently adopted Charter of Fundamental Rights of the European Union voluntarily departs from the wording of Article 12 of the Convention in removing the reference to men and women.[41]

The Belgian government, though admitting that the current interpretation of art 12 ECHR by the Strasbourg court did not necessarily support the acceptance of single-sex unions, considered that, like in the Netherlands, the evolution of Belgian society could lead to a wider interpretation of the concept of marriage in domestic law. It rejected the *Conseil*'s 'very classical' acceptation of the notion of marriage as having a procreative nature. It was noted that not only were many children conceived and raised out of wedlock, but Belgian law did not consider a marriage to be void or terminated if the spouses could not have children or decided not to.[42]

The Executive insisted that marriage was nowadays regarded as a formal status between two persons aiming at the creation of a long-term community and enabling them to affirm the feeling they had for one another openly. Public opinion having progressed, the law had to progress accordingly.

The governmental objective seeking to align legislation on contemporary realities and modes of thought is reflected in the refusal of letting the proposed same-gender marriage bear any legal consequences on child related matters. Two reasons were given to justify this restriction. First, child law was based on situations that are biologically possible, therefore maintaining the link between a marriage open to same-sex unions and filiation would deny reality. This position, which could give credit to the argument of the opposition according to which the government was attempting to denature the legal figure of marriage, was not further justified.

Secondly, the Minister of Justice, Marc Verwilghen, introducing the bill, explained that the refusal to let same-gender spouses adopt a child was also preferable as the contrary would create difficulties in private international law.[43] The executive could have defended this limitation on the basis that the Belgian society did not yet accept this particular effect of same-sex marriages.[44] The governmental explanation in this respect was obviously framed as a response to the last argument put forward by the *Conseil d'Etat*.

[41] Article 9 of the Charter of Fundamental Rights of the European Union, signed on 7 Dec 2000, provides: 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.' As mentioned in the explanations relating to the complete text of the Charter, 'the wording or art 9 [which is] based on art 12 ECHR . . . has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This instrument neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR but its scope may be wider when national legislation so provides.'

[42] The grounds of invalidity of a marriage are exhaustively listed in articles 180 et seq *Code civil*.

[43] *Doc Parl* 50 2165/002, p. 6. Responding to some questions raised during the discussion of the bill, Mr Verwilghen also mentioned that the government majority did not consider the question of adoption by same-sex couples ripe for debate, cf *Doc Parl* 50 2165/002, p 19. It was however noted that this could be reopened at a later stage.

[44] This argument had been used in the context of the proposed registered partnership. See above, p 1041.

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C. Legal certainty in private international law

The opposition of the *Conseil d'Etat* to the original bill was indeed not motivated by purely domestic legal considerations. The *Conseil* also referred to complications which were likely to surface in private international law, potentially leading to considerable legal uncertainty.

Of course the creation of a new legal construct with no equivalent abroad will not inevitably lead to limping situations, but this depends on the innovative legal framework being acceptable to other jurisdictions. The fear that there would not be international acceptance had already led the *Raad van Staat* (which is the Dutch counterpart of the Belgian *Conseil d'Etat*) to give a negative advisory opinion[45] on the equivalent Dutch bill.[46]

For the Belgian government, the absence of any effect of same-sex marriages in the domain of filiation was sufficient to guarantee that no difficulty would arise in private international child law. It also remarked that the opening of marriage to same-sex couples would not modify or infringe existing conflict of laws principles. Nevertheless the Executive did point out that homosexual spouses should be specifically advised if they planned to relocate abroad or to acquire interests outside of Belgium.[47]

II. POTENTIAL IMPACT IN PRIVATE INTERNATIONAL LAW

The Belgian Act of 13 February 2003 will certainly lead to less controversy than the Dutch laws of 21 December 2000, not least because of the different stance of the two pieces of legislation in the field of child and adoption law.[48] The more reserved attitude of the Belgian law is further reflected in the way it has dealt with the extraterritorial aspects of the act. Private international law issues relating to marriage are traditionally enshrined in articles 170–171 of the Belgian civil code which contains the key elements of the recognition in Belgium of foreign marriages.[49]

While article 170 *Code civil*, relating to the formal validity, has been modified by the new law in order to remove the reference to 'marriages between male foreigners and Belgian female citizens' or 'marriages between Belgian male citizens and female foreigners' in favour of a gender neutral formulation, the classic choice of law rules have not been materially amended. In particular, article 170ter remains untouched. Pursuant to this provision, marriages celebrated abroad (whether homosexual or heterosexual) are considered materially valid in Belgium if the contracting parties have satisfied the requirements imposed under the law applicable to their personal status (law of nationality). Despite its unilateral wording, this rule does not only imply that a marriage celebrated in the Netherlands between, say, two Englishmen would not be

[45] *Kamerstukken* II 1998/99, 26672 B.

[46] Act of 21 Dec 2000, *Staatsblad* 2001 No 9. By another act of 21 Dec 2000, *Staatsblad* 2001 No 10, the Netherlands permitted same sex spouses to adopt as a couple.

[47] *Doc Parl* 50 2165/002, p 7.

[48] See above, p 1046. On the impact of the Acts of 21 Dec 2000 on Dutch child law, see: W Schrama, 'Reforms in Dutch Family Law During the Course of 2001: Increased Pluriformity and Complexity', in *The International Survey of Family Law 2002*, A Bainham ed, Jordan, Bristol 2002, pp 277–303.

[49] This position would not be changed under the Draft Belgian Code on Private International Law, Article 46.

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afforded recognition in Belgium. Article 170ter has long been subject to bilateralisation by the Belgian courts.[50] Therefore this provision also means that Belgian authorities would not celebrate a homosexual marriage between two persons if the personal law of one (or both) did not allow same-sex marriage,[51] thus limiting the number of marriages valid under Belgian law which would not be recognised abroad. In this the Act of 13 February 2003 is essentially different to its Dutch equivalent. In the Netherlands the legislature had chosen to open the gates of homosexual marriage to foreigners, by admitting that a single sex marriage may be validly celebrated there even if the personal law of one or both partners prohibits homosexual marriage, provided one of the spouses be Dutch or habitually resident in the Netherlands. Unlike the Dutch Act, the Belgian Law of 12 February 2003 does not really encourage marriages which might be considered fraudulous abroad.[52]

That Belgian same-sex marriages are not likely to be declared invalid abroad on the basis of fraud does by no means imply that they will easily be recognised by other countries. In this respect, several situations will have to be distinguished.

Obviously recourse will in some cases be made to domestic choice of law rules. The first difficulties will arise at the stage of characterisation: it will be necessary to examine whether homosexual marriage can fall within the category of marriage or if it is in essence of a different nature. Even if the choice of law rule in respect to marriage is applied, reasons of *ordre public* might prevent the recognition of the validity of foreign same-sex marriages. Admitting that the validity test could be sustained, there is no certainty that all effects of this marriage would be recognised.[53]

The question whether multilateral instruments dealing with the subject of marriage will integrate this new form of marriage will of course have to be considered. In particular, could the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages be applied to same sex marriages?[54] Moreover since same-sex marriages potentially lead to same-sex divorces, would the 1970 Hague Convention on the recognition of divorces and legal separations be applicable?

The issue of the potential impact of this new and alternative conception of marriage on European rules will equally have to be addressed.

It seems that the European Union, as an employer at least, is inclined to consider that the homosexual marriage of a (Belgian or Dutch) official should be treated in the

[50] See F Rigaux & M Fallon, *Droit international privé, droit positif*, Larcier, Brussels 1993, pp 308-311, para No 9 et seq.

[51] One could wonder whether the Belgian authorities would also refuse to celebrate the marriage of two same-sex partners whose personal law entails an institutional framework analogous to marriage but open to homosexuals under another name. A restrictive interpretation of art 170ter does not allow a marriage to proceed in these conditions.

[52] Whilst it is not entirely impossible that one partner pretends that he/she has become habitually resident in the Netherlands in order to be able to get married there, it is even less likely (considering the requirements of a change of citizenship) that two homosexual companions would be prepared to acquire Belgian nationality under false pretences for the sole purpose of getting married. But in both cases the attraction of getting married in Belgium or the Netherlands for homosexuals living abroad does not seem to be more than symbolic, considering the expected absence of recognition of such union abroad.

[53] Though one has to take into account that the application of the doctrines of *effet atténué de l'ordre public* or *Inlandsbeziehung* could potentially lead to different outcomes.

[54] Another possible question would relate to a possible interpretation of this Convention as preventing contracting states to refuse to recognise a foreign single-sex marriage on the basis that the difference of gender is not one of the listed requirements justifying non recognition.

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same way as any other marriage recognised in a Member state for the purpose of the application of EC Staff regulations.[55]

As regards notions appearing in legislative instruments *which are intended to have consequences throughout the Community*, the view of the EC institutions is that given the absence of provisions in Community Law which define the notion of 'spouse' or 'marriage', the interpretation must take account of the situation *in all Member States.* This means that instruments such as EC Regulation 1347/2000 *on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses*[56] might but does not have to be applied to procedures concerning the divorce of a same-sex couple.[57] The regulation does not 'translate into an obligation on the courts neither to pronounce or recognise the divorce nor to recognise the marriage'.[58]

As individuals take advantage of the principle of free movement, it is likely that, within Europe, States will soon have to address the issue of the recognition of same-sex marriages. This in turn could impact on the international treatment of other forms of same sex cohabitation.[59]

Unlike marriage, foreign forms of registered/statutory cohabitation can largely be ignored by other States. A surviving German 'life partner'[60] could easily be refused any rights of succession under French law on the mere basis that the latter does not allow 'partners' to inherit. Since spouses do inherit, it would be somewhat more difficult to arrive at a similar outcome with regard to a widowed Belgian homosexual; the existence of an increasing number of foreign, single sex couples legally cohabiting in a form (marriage) which is established all over the world will thus probably compel other States to reassess the understanding of important notions of their domestic material or private international law, notably the meaning of such terms as 'spouse' and 'marriage'.

[55] See: 2002/C115E/015 Reply to written question E1830/01 to the Council. The situation of non married homosexuals has yet to be examined at an interinstitutional level as part of the coming reform to the staff regulations.

[56] OJ 2000 L160

[57] The same applies to the European regulation on free movement: while homosexuals are, as individuals, beneficiaries of the principle of free movement, there is no right of family reunion for the homosexual spouse of a worker who has exercised his right of free movement in another member state.

[58] 2003/C28E/002 Answer to written question E3261/01.

[59] On the question of the international law treatment of same-sex partnerships, see: HU Jessurun d'Oliveira, 'Registered Partnerships, Pacses and Private International Law, Some Reflexions' *Rivista di diritto Internationale privato e processuale* 36 (2000), 293–322; H Fulchiron 'Réflexions sur les unions hors mariage en droit international privé', *Journal du Droit International* 2000, 889–913; G Khairallah, 'Les 'partenariats organisés' en droit international privé (propos autour de la loi du 15.11.1999 sur le PACS)', *Revue Critique de Droit International Privé* 2000, 317–330; M Mignot, 'Le partenariat enregistré en droit international privé', *Revue Internationale de Droit Comparé* 2001, pp. 601 et seq. Also dealing with same-sex marriages, J Murphy, 'The Recognition of Same-sex Families in Britain: the Role of Private International Law', *International Journal of Law, Policy and the Family* 16 (2002), 181–201.

[60] A life partnership Act entered into force in Germany on 1st Aug 2001: *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften, Bundesgesetzblat* (official gazette) I at p 266. This form of registered partnership is exclusively open to partners of the same gender and has many of the effects of a marriage. In its decision *1/BvF 0/01* of 17th July 2002, the German federal constitutional court (*Bundesverfassungsgericht*) rejected a claim that the 2001 Act was unconstitutional.

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If homosexual marriages are accepted as falling within the private international law category of marriage, the question will then arise as to whether marriage like institutions should also be so characterised for the purpose of the application of choice of law and jurisdiction rules, even though they do not carry the same label in domestic law. Whilst it is traditionally admitted that categories of private international law can be extended to encompass foreign institutions which are not exactly identical but not fundamentally different, the assimilation of marriage and marriage like institutions is not always well received by commentators.[61] In Belgium however it is proposed that Article 46 of the Draft code of private international law, according to which the law of nationality of each of the spouses shall govern the substantive validity of the marriage, will apply to any legal status equivalent to marriage, whatever name it has.[62] Consequently not only would article 46 be applicable to a Dutch same-sex marriage, but it would equally be relevant for a Scandinavian registered partnership.[63]

The opening of marriage to same-sex couples could well hasten, if not facilitate, the reflection on, and the finding of, an appropriate regime of all forms of cohabitation in private international law.

AUDE FIORINI*

II. DEFAMATION ON THE INTERNET—NICE DECISION, SHAME ABOUT THE REASONING: *DOW JONES & CO INC v GUTNICK*

A. Introduction

The decision by the High Court of Australia in *Dow Jones & Co Inc v Gutnick*,[1] one of the first decisions by a final court of appeal on transnational online defamation, handed down on 10 Dec 2002, deals with the contentious issue of whether and, if so, when online publishers have to comply with the defamation laws of foreign States. The decision has been labelled a 'dangerous precedent' and an 'extraordinary judgment'[2] by the British press. But is it indeed either?

In *Gutnick* the plaintiff, Joseph Gutnick, a prominent business figure with a reputation in philanthropic, sporting, and religious circles, who lives in Victoria with his busi-

[61] Rejecting the idea of a total assimilation, H Fulchiron, above note 57. See also P Mayer & V Heuzé, *Droit International Privé*, Montchrestien, Paris, 7th ed 2001, No 547, at p 364.

[62] To determine whether a foreign legal construct can be seen as equivalent to a (Belgian) marriage, the function (as opposed to the name) of the foreign institutional framework is, according to the commentary of art 58 of the Draft code of private international law, decisive. In particular, the fact that an obligation of fidelity or an impediment to contract a subsequent marriage are attached to the unfamiliar juridical entity would prompt the characterisation as marriage.

[63] It is to be noted however that other forms of cohabiting status, whose effects do not parallel those of a marriage, would fall within a separate category of 'shared life relationship' (*relation de vie commune*), governed by art 58 et seq of the Draft code of private international law, unless their effects would not exceed those of a contract—in which case the private international law rules governing contract would have to be applied.

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[1] [2002] HCA 56, at <http://www.austilli.edu.au> [hereinafter: Gutnick]. For the transcript of the arguments brought before the court see *Dow Jones & Co Inc v Gutnick* M3/2002 (28 May 2002) at <http://www.austlii.edu.au>.

[2] 'Sue You—Internet publishers face a dangerous precedent', *The Times* (UK), 11 Dec 2002, 21.

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