Chapter 10
Same-Sex Couples in France and Belgium: The Resilient Practice of Judicial Deference

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Abstract The recognition and institutionalization of same-sex couples in France and Belgium are mainly political questions. But courts are not insignificant actors: they frame the terms of the democratic debate. In legal systems where courts have no formal law-making powers, questions of recognition are quickly transformed into institutional questions in which the responsibility of the legislator remains central. The French and Belgian cases, in that respect, fit the expectations of a civilist model of legislative supremacy. It does not mean however that fundamental rights play no role. On the contrary, the Belgian case shows that courts can be responsive to right-claims when these concern discrete, easily isolated questions of discrimination on the ground of sexual orientation or of family status. The practice of judicial deference then allows for a piecemeal recognition of same-sex couples by multiple judgments of moderate effects, and not by landmark judicial decisions.

10.1 Political and Institutional Contexts

Both French and Belgian institutional contexts are comparable in respect of the rights of same-sex couples. Both are countries of civil law in which legislative supremacy is central. Both include constitutional rights to equality that are interpreted in terms of consistency, and which provide the ground for a seemingly thin rationality review. Both consider that same-sex relationships are ultimately questions of personal status that are central to the *Code civil*, which itself is the foundation of their national legal cultures. Jean Carbonnier, an eminent figure of French legal scholarship, wrote that the Code formed the actual French constitution[1]: it embodies political principles applied in the private sphere.

[1] Carbonnier (1997).

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Politics, on the other hand, are very different. Whereas the French legal system is the mirror of a unitary and centralized Republican State, Belgium is a Federal Monarchy fragmented along linguistic and ideological lines. Whereas Belgium is pluralist and prompt to recognize cultural differences, France stands firmly on its principle of *laïcité* and its assimilating implications. That does not mean that religious conceptions are less capable of framing the public debate on same-sex couples in France than in Belgium. French Catholicism is politically conservative (or reactionary), while Belgian Catholicism is humanist and liberal. Historically, both France and Belgium have an exceptionally permissive approach to homosexuality. In the wake of the Revolution, the French criminal code of 1791 no longer incriminated homosexual relationships. The *Code pénal* of 1810 enacted by Napoleon also considered that the law did not have to regulate a behaviour that did not contravene public order. In the following sections, the key rulings on same-sex couples are analysed in the different stages of recognition: from repression to tolerance, to equal status.

10.2 France

10.2.1 Overcoming Homosexuality as a Deviant Conduct

The authoritarian and collaborationist regime of Vichy suppressed the liberal customs of the nineteenth century. A law of 6th August 1942 criminalized acts "against nature" involving minors. This text allowed the deportation of thousands of homosexuals to Germany.[2] It was maintained after the war, only to be modified by a discriminatory distinction. Homosexual lewd acts were punishable against a minor under the age of 21, while heterosexual acts were punishable under the age of 15. This distinction was kept through the many reforms of criminal law. The *Conseil constitutionnel* validated the distinction in 1980, considering that equality before the law did not bar differentiations made between "acts of different nature."[3]

At the same period nevertheless, the French legislator undertook to abolish a number of penalizing and stigmatizing measures against homosexual people. The beginning of the pandemic of HIV/AIDS also jump-started a burgeoning social movement.[4] As the virus disproportionately struck gays, claims for recognition of same-sex couples took importance, and were not well received by judges. The *Cour de cassation* refused a social advantage to the partner of an homosexual worker, considering that the term "spouse" (*conjoint*) had to be understood for persons

[2] Sibalis (2002).

[3] "Le principe d'égalité devant la loi pénale (...) ne fait pas obstacle à ce qu'une différenciation soit opérée par la loi pénale entre agissements de nature différente." Decision n° 80-125 of 19th December 1980 (*Journal Officiel*, 20 December 1980, p. 3005).

[4] Caballero (2010), p. 279.

engaged in a stable and continuous relationship having appearance of a marriage "therefore between a man and a woman."[5] It also prevented the transmission of a lease between homosexual tenants in case of death.[6] For the law and for French courts thus, same-sex couples did not exist. In this context, their recognition seemed impossible and requires the intervention of the Legislator. Again, this caused the Legislator to respond and enact a number of specific measures, such as the prohibition of discrimination on the ground of sexual orientation on the labour market. The process culminated at the end of the 1990s by the vote of the *Pacte civil de solidarité* (PACS),[7] a registered partnership that comported personal and patrimonial rights similar to the ones of the marriage. The PACS was the first legal recognition of same-sex couples. Yet, legal scholars, in general, harshly criticized the decision of the Legislator. The root of the opposition is to be found in the resilience of idea of homosexuality as deviance. For some, the idea itself of same-sex couple is a "negation of the familial order"[8] and the legislation is the monstrous child of a Legislator[9] dominated by demagogical considerations.[10] As a leading scholar, proponent of the law, wrote,

> all the branches of the law were mobilized to stress the imperfections and demonstrate the incongruities of a 'mediocre', 'one-sided' law that animates 'perplexity' and triggers 'doubt' and 'uncertainty'.[11]

10.2.2 Early Recognition of Same-Sex Couples

The PACS was controversial, and the debate in the French assemblies surrounding its adoption took a legal turn before the *Conseil constitutionnel*.[12] The claims before that jurisdiction adopted all the dimensions of the critique expressed by the political and academic opponents to the project. The *Conseil* validated the law by rejecting claims relating to competences, equality before the law, and a number of general principles stemming from constitutional provisions.[13] What is remarkable in this decision is that it went quite far in analysing the intention of the

[5] F. *Cour de Cassation Soc*., 11th July 1989, *X c. Air France* (*Recueil Dalloz* 1990, p. 589, note Malaurie).

[6] F. *Cour de Cassation Civ*., 17th December 1997, *Vilela c. Mme Weil* (*Recueil Dalloz* 1998, p. 111, note Auber).

[7] Loi No. 99-944 du 5 novembre 1999 relative au Pacte civil de solidarité (*Journal Officiel*, 16th November 1999, p. 16959).

[8] Malaurie (1997).

[9] Malaurie and Fulchiron (2008).

[10] Terré (1999).

[11] Borillo (2001), p. 185.

[12] Note that the *Conseil*, until recently, is called to review the constitutionality of legislation preventively: it intervenes before the law is published.

[13] Decision No. 99-419 DC, 9 November 1999 (*Journal Officiel*, 16th November 1999, p. 16962).

Legislator and operated a frank constructive interpretation of the provisions of the law. Doing so, it actually redefined the purpose itself of the PACS. Constrained by the political necessity of creating a regime substantially distinct from the marriage, the French Legislator avoided resorting to language evoking the institutional aspects of the (same-sex) relationships recognized by its legislation. It did centrally define the PACS as a "contract concluded by two major natural persons, of different sex or same sex, for organizing their common life".[14] If it's a contract, it is not a matter of affective relationship, even less a question of family. And the law gave no precision on the concept of 'common life', and thus allowing the partnership to be open to relations of friendship or convenience. The *Conseil* nevertheless 'sexualised' the contract. It saw that no contract can be concluded between members of the same family, that a common residence must be established, and that a mutual obligation of material assistance must be respected by the parties. It concluded that, under the light of the parliamentary debates, the PACS was not strictly a community of interests of two persons living under the same roof: the partnership required a life as a couple (*vie de couple*).[15]

The *Conseil* nevertheless, by referring to the terms of *vie de couple*, did not create an obligation of marital fidelity between the parties of a PACS and refused to identify in the regime created by the Legislator anything that touches upon personal status.[16] What the *Conseil* did was to strengthen the *sui generis* character of the partnership as a specific contract of family law.

Why did the Court proceed to such an interpretive operation? The legislation voted by the French Parliament is short and leaves open many questions concerning the nature and extent of the obligations of mutual assistance between the parties, the effect of the contract on parental rights, its mode of termination. The allegation of the claimants concerned the lawful exercise by the Legislator of its constitutional competence in matters of private law (Art. 34 of the French Constitution). For them, the absence of precise and clear rules on the questions mentioned amounted to a violation of the constitutional competence to the extent that it left discretion to other institutions (the executive and the judiciary) for determining the content of the regime itself. The *Conseil* rejected the argument by imposing reserves of interpretation.[17] What mattered to the *Conseil* was clearly not a question of substance or recognition: the formal characters of the law, legal certainty and institutional balance are the reasons which lead the Court to affirm the specific nature of the contract, and the personal and affective relationships it is expected to protect. Nevertheless, as narrow as the grounds of the judgment are, the decision remains a form of acceptation of same-sex relationships and sexuality at the apex of the French judicial hierarchy.[18]

[14] Art. 515-1 of the *Code civil*.

[15] See para. 26 of the Decision.

[16] It seems however that the decision of the *Conseil* and the traditional contractual principles of the *Code civil* provide the basis for an obligation of loyalty that implies the sanction of infidelity.

[17] Drago (1999).

[18] Caballero (2010), p. 285.

10.2.3 Same-Sex Marriage

The vote of the PACS had a considerable chilling effect on the politics of same-sex couples in France. The bill, as progressive as it was, double-edged: it constituted a form of recognition of same-sex couples forced by the legal formalism of the *Conseil constitutionnel*, but was also a confirmation a political attachment to a traditional order of family and sexuality. The debate remained blocked amid the wave of acceptation of same-sex marriage taking place in Europe and beyond. It did not dissuade gay rights lobbying and activism however. Some of these actions were deployed at local level, and mainly consisted in celebrating the same ceremony of marriage for the conclusion of registered partnerships.

The most emblematic case concerned the celebration of a marriage of two male partners by the mayor of Bègles, a commune of Bordeaux. The mayor, a strong proponent of same-sex marriage and a green member of the French assembly named Noël Mamère, responded to a call of the jurist Daniel Borrillo and philosopher Didier Eribon.[19] The celebration and consequent litigation had, it seems, no other purpose than kindling the political debate on the question of same-sex marriage. Yet, it gave the opportunity to the *Cour de cassation* to affirm that the definition of marriage in French law, as it stood, can only be understood as the union of a man and a woman.[20] This conclusion, it declared, was not contradicted by the European Convention of Human Rights (further referred to as ECHR), nor by the EU Charter of fundamental rights, which was, at that time, not a binding instrument.

Doctrinal commentators welcomed the decision of the Court. They considered, in the greatest majority, that judicially opening the marriage to same-sex partners cannot be solved by a traditional operation of interpretation: this entails a redefinition of the concept of marriage. For Hugues Fulchiron, the obstacle is the procreative "function" expected from a married couple.[21]

The *Conseil constitutionnel* in a decision delivered a few years later adopted the same position in the case of *Corinne C*.[22] Invited by the *Cour de cassation* to rule on the constitutionality of the provisions of the *Code civil* that incidentally refer to a man and a woman as the parties to a marriage, the *Conseil* espoused the views expressed by the *Cour de cassation*: the ordinary meaning of marriage is heterosexual. The court was also required to determine whether this definition was in breach of the constitutional right to lead a normal family life, as protected by the preamble of the French constitution of 1946. It considered that this right did not include the right to marry for homosexual couples, which could already benefit from the PACS or from the provisions applicable to *de facto* relationships (*concubinage*). It also rejected claims based on equality: the legislator could validly

[19] Paternotte (2008).

[20] Fr. *Cour de cassation*, 13th March 2007 (*Recueil Dalloz*, 2007, p. 935, note Gallmeister).

[21] Fulchiron (2007).

[22] Decision No. 2010-92 QPC, 28 January 2011 (*Journal Officiel*, 29th January 2011, p. 1894).

considered that same-sex couples are not in the same situation than heterosexual couples. The *Conseil* nevertheless emphasised that the competence of the legislator was not restrained by the constitutional principle of freedom to marry. Doing so, the *Conseil* considered that a judgement of opportunity must be made, and that it could not make a decision in this respect in place of the legislator.

On the 23rd of April 2013, the French national assembly and senate voted the law No. 2013-404 granting the right to marry to same-sex couples.[23] The project of "*Mariage pour tous*" was initiated in autumn 2012 by the then-newly elected president François Hollande. The piece of legislation, which allows both marriage and adoption, was debated in a heated political context, with multiple popular demonstrations organised by Catholic and right wing groups. The *Conseil constitutionnel* was called to verify the validity of the act and rendered a considerably longer decision on 17th of May, which permitted the law to be finally promulgated.[24] The bill was attacked on many procedural and substantive grounds, but the jurisdiction was particularly careful in rejecting claims relating to the definition of marriage. For the applicants (all elected members of the houses of the French parliament), the socialist majority misrecognised the "natural roots" of civil law, which posit sexual otherness as the foundation of marriage. For the *Conseil*, tradition and "nature" do not constitute fundamental principles of the law of the French republic. This position is in line with the decision of 2011: the legislator has the sole competence to legally define the law of marriage as long as constitutional provisions are respected. The *Conseil* is compelled to adopt a more substantive stance in matters of filiation and adoption. As in the Belgian case, the presumption of paternity does not apply to married same-sex couples, which means that the female partner of a mother is not presumed to be the co-parent of her child. The French bill leaves the presumption untouched and causes the spouses who are not the biological authors of the child to establish filiation by mechanisms of adoption. The court validates this situation, as it accepts that in matters of procreation, same-sex couples are not in a similar situation to heterosexual families. For the applicants, the possibility to establish filiation for same-sex couples contravened the right of the child to lead a normal family life. The position of the *Conseil* is here twofold. First, the legislator is simply institutionally competent in these matters and is allowed to imposed its views. Secondly, adoption and filiation correspond to the best interests of the child, which are constitutionally protected (para. 53). The Court here neutralises the concept of "normal family life" brought up by the applicants: this "normality" does not entail the secret of family origins or the heterosexuality of parents.

[23] Loi No. 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe (*Journal Officiel*, 18th May 2013, p. 8253).

[24] Decision No. 2013-669 DC, 17 May 2013 (*Journal Officiel*, 18th May 2013, p. 8281).

10.3 Belgium

The Belgian case is in many respects similar to the French case. To the extent that it shares with France the same civilist legal culture, Belgian law nourishes a similar anxiety towards the power of judges.

Formally, the judiciary does not enjoy law-making powers. If they embraced rights-based judicial review recently, courts hesitate to contemplate the transformative potential of fundamental rights. An advocate general to the *Cour de cassation*, recently considered that the application of the law often required a purposive interpretation that entails law-making and creative dimensions. Yet, novel interpretations and constructions in case law are explained and justified by the pursuit of a secular value: the reparation of damage.[25] This is approach and the model of restorative justice it implies[26] is inadequate to questions of recognition, and the question of recognition of same-sex couples in particular.

Nevertheless courts are participants in a democratic culture shared by all public institutions and social actors. They thus contribute to its evolution, in collaboration or opposition with the legislator. Like in the previous chapter, the role of courts can be analysed during the historical stages of the law of same-sex couples: repression, recognition, and marriage.

10.3.1 Overcoming the Conception of Homosexuality as Deviant Conduct

Belgium is also similar to France in the stages of the politics of homosexuality. The historical background is filled with events expressing outright prejudice against sexualities that are consistently described as behaviors "against nature". Like in France, Belgian criminal law included between 1965 and 1985 a discriminatory provision on age of consent. The *Cour de cassation* saw no issue of validity on this differentiated treatment, considering that if the law constituted indeed an interference in the right to private life guaranteed by Art. 8 ECHR, this interference was justified by the public interest in order and morals.[27] The judgment was delivered in a context of revision of the law on the question of homosexuality.

[25] Opinion of Advocate General Henkes before B. *Cour de Cassation*, 7th December 2007, Pas., para 40: "En fin de compte, par le recours à des constructions juridiques inédites, la Cour, à chaque fois fait le choix d'étendre à de nouvelles applications une valeur séculaire – la réparation d'un dommage par celui qui l'a causé ou qui doit l'assumer – traduite dans des textes de droit parfaitement muet sur ces applications voire longtemps considéré comme étrangers à ces nouvelles applications."

[26] For example, see Suk (2006).

[27] B. *Cour de Cassation*, 7th December 1982 (in Pasicrisie 1983, p. 437).

Before 1965, the law knew no specific rules on homosexual conduct. Homosexuality was punishable only if it constituted a lewd act committed with violence or an affront to public decency. Then, the Belgian Legislator adopted measures for the protection of minors,[28] and the basis for the distinction was openly scientific, not moral. As a measure of protection, the Legislator considered that adolescents are psychologically vulnerable to "seduction" that ultimately leads to a "conversion" to homosexuality. Protection was needed since, in the view of medicine and psychology, homosexuality was considered a pathology. This view, shared by the Legislator and medical professionals for long, was later rejected. In the early 1980s, the scientific foundation of the incrimination of same-sex activities of minors was dismissed and the Legislator admitted the negative effects of the repression on young homosexual adults. The Legislator abolished this provision of the criminal code, and broadly considered that consensual same-sex activities were not harmful and should thus not be condemned.

The abolition did however not amount to the public acceptation of same-sex relationships. The debates in the Assembly made clear that some amalgamated homosexuality with paedophilia, sadism or exhibitionism, and that the vote could not amount to a form of recognition. Homophobia is culturally ingrained, and criminal courts are not alien to its promotion, even in a context of depenalization. Françoise Tulkens exposed that courts used the crime of debauchery (as an open-ended notion) to repress gay gatherings and venues.[29] Debauchery was then given the meaning of any dysfunction of sexuality, which included homosexuality.[30] Was then condemned on that ground Michel Vincineau, a Law professor from the Université Libre de Bruxelles. As in France, the 1980s are a transition period that included a growing toleration or acceptance of homosexuality as a conduct and the beginnings of a social movement carrying the claim of gay rights. Like anywhere else, the context of AIDS pushed the agenda for legal protection of same-sex relationships, which came in the form of a registered partnership[31] (with substantially less content than the French PACS) adopted by the Belgian Legislator in 1998. Courts are thus not the authors of the first legal recognition of same-sex couples.

[28] *Loi du 8 avril 1965 relative à la protection de la jeunesse*, Moniteur Belge, 15th April 1965.

[29] Tulkens (1986).

[30] "Si l'homosexualité n'est pas en elle-même constitutive d'infraction, il n'en demeure pas moins qu'elle constitue une forme de dérèglement de la sexualité par cela même qu'elle méconnait la finalité de l'existence de deux sexes différents, finalité dont l'abandon généralisé mènerait à l'extinction de l'espèce humaine (...) que celle seule considération suffirait déjà à permettre se supposer que le législateur a voulu (...) empêcher la propagation de l'homosexualité précisément en ne lui Assurant pas la sécurité ailleurs qu'au domicile des particuliers." *Tribunal correctionnel de Bruxelles*, 29 mai 1985, *Journal des procès*, 27th December 1987.

[31] *Loi du 23 novembre 1998 instaurant la cohabitation légale* (Moniteur Belge, 12th January 1999).

10.3.2 Early Recognition of Same-Sex Relationships

It does not mean however that Belgian courts were not confronted to cases involving same-sex relationships over the same period. But decisions were diverse. Two kinds of approaches can be identified. The first is the case law of civil jurisdictions, which have worked to preserve a heterosexual definition of couples in matters of family law. The second case law concern labour courts, which were ready to redefine the notion of household and to protect same-sex couples for the purposes of social security legislation.

The cases of family law on the question of same-sex relationships may seem absurd to many. Adultery is a legal cause of divorce, and a line of case law considered that adultery was not constituted if it was committed with a person of the same sex.[32] The *Cour de cassation* decided in 1998 that the law did not require a condition of heterosexuality in the legal definition of adultery.[33] The judgment is remarkable in declaring, "Everyone is entitled to the respect of their private life, without distinction, such as sex".

Against this affirmation of a fundamental right, the decision is striking in placing on an equal footing hetero- and homosexuality. These cases do not concern the protection of same-sex relationships, and the judgment of the *Cour de cassation* will not be the foundational recognition of homosexual couples. As it adapts the definition of adultery to more accurate circumstances, the decision nevertheless constitutes the acknowledgement of the diversity of sexualities, and simply proceeds to draw the appropriate conclusions from it.

The role of labour courts is more proactive. A diverse number of pieces of social security legislation referred to the notion of household for the calculation of benefits. Royal decrees adopted in execution of these legislations have repeatedly defined this notion as the cohabitation of persons of different sexes. Labour courts have overwhelmingly considered this definition to be illegal because that it constituted a discrimination on the ground of sexual orientation or of family status.[34] The Constitutional court (then called *Cour d'arbitrage*) confirmed this case law in 2000. The case[35] concerned a mode of calculation of family benefits which applied in an equal manner to cohabitants of different sexes and to same-sex cohabitants of the same family, but not to same-sex cohabitants *simpliciter*. The Court saw less a discrimination on the ground of sexual orientation than a lack of consistency in the determination of the personal scope of the royal decree. The decision is short but

[32] For example, *Cour d'appel de Mons*, 29th March 1989 (*Revue Trimestrielle de Droit Familial*, p. 385).

[33] *B. Cour de Cassation*, 17th December 1998 (Pasicrisie 1998, p. 527).

[34] See *Cour du travail de Bruxelles*, 22nd January 1996 (*Journal des Tribunaux* 1996, p. 263); Arbeidsrechtbank Gent, 4th April 1996 (Sociaalrechtelijke Kronieken 1996, p. 407). See also, in a case of social aid, Arbeidsrechtbank Brugge, 8th March 1999 (Rechtskundig Weekblad 1999–2000, p. 565).

[35] *Cour d'arbitrage*, Case n° 80/2000, 21 June 2000 (Moniteur Belge 2000, p. 30028).

notable, to the extent that it protects homosexual households with children on equal terms with traditional families. Note that if same-sex couples benefit directly from the decisions of labour (and constitutional) courts, these cases go beyond the question of homosexuality as they include both relations of affection and relations of care.

Should we thus consider that courts contributed to the recognition of same-sex couples? We know already that the main mode of recognition was and remained political and that the Legislator played the leading role. But the answer must certainly be positive. There was however, no frontal case. Courts resolved a series of discrete or isolated questions of inequality. They were not summoned to affirm generally and solemnly the equal moral standing of same-sex couples. The technique of these courts also remains usual for the Belgian legal-formalist culture. Questions of equality become tractable once they are framed in terms of rationality and consistency, not in terms of the fundamental right to equal dignity. Plainly, cases of discrimination are easier to deal with so long as they do not tackle directly the questions of *status* organized by the Code civil, which are not only symbolically more potent, but which have comprehensive legal consequences with respect to personal rights and obligations, contractual liability, parental authority and fiscal treatment.

10.3.3 Same-Sex Marriage

The question of marriage is, again, political. In 1999, the federal elections resulted in a governmental coalition that did not comprise Christian-democrats parties supported by relatively conservative electorate. More progressive policies took shape. Against the background of the bill on the *cohabitation légale*, whose weaknesses were already apparent at the time of its adoption, the coalition agreement of the new liberal-socialist-green majority announced a general law on discrimination and a "véritable régime légal de vie commune".[36] The legislative project defended by the government included the following motivation:

> In our contemporary society, the marriage is experienced as a (formal) relationship, the principal purpose of which is the creation of a durable life together (communauté de vie). The marriage offers to both partners the possibility of affirming publicly their relationship and their mutual feelings. Attitudes and mindsets have evolved – today, the marriage is used to affirm the intimate relationship of two persons and loses is procreative character. There are no more reasons not to open the marriage to persons of the same sex. This opening will signify that same-sex couples will exercise the fundamental right to marry. The foundation of the present draft bill is the equal right to marry for homosexual and heterosexual couples.[37]

[36] Arend-Chevron (2002).

[37] *Projet de loi ouvrant le marriage aux personnes de même sexe et modifiant certaines dispositions du Code civil*, Doc. Parl., Chambre, 2001–2002, n° 1692/001.

The very definition of marriage as *communauté de vie* turned out to be extremely problematic for lawyers, and for a jurisdiction in particular.

The *Conseil d'Etat* is the court entrusted with the review of the acts of the Belgian administration. Its *Section législation* functions as an advisory body for the legislative and executive branches of the State. It delivered an opinion on the draft bill of the government, which considered that objective differences remain between heterosexual and homosexual couples.[38] These differences concern "the nature of things". Only heterosexual couples are able to give birth to children, and as such, they have a different social utility than homosexual unions. The *Conseil d'Etat* concluded that, contrary to the view adopted by the government, there is no (legal) discrimination between hetero- and homosexual couples in the access to marriage. It nevertheless considered that if there were no obligation for the Legislator to give the right to marry to same-sex couples, it can be viewed as a question of opportunity. But for the *Conseil d'Etat*, the project remains incoherent on that level too. The single concept of marriage cannot be reduced to a question of *communauté de vie* since it is legally organized for filiation, parentage and descent.

The opinion of the *Conseil d'Etat* was very badly received, both in the political and public spheres. Many considered that the jurisdiction overstepped its mandate and expressed unacceptable moral views the draft bill was meant to combat. It was nevertheless well received and defended by prominent academic figures who contended, like the *Conseil d'Etat*, that the governmental project was incoherent.[39]

The draft bill of the government is indeed founded on equality, but the regimes proposed therein are not equal since they maintain rules of filiation for heterosexual couples and excludes their application in cases of homosexual couples. For Jean-Louis Renchon, the only way to guarantee legal coherence was to reshape completely the institution of marriage and discard all its rules on filiation for different sex couples first. It would indeed be

> fictitious to assimilate an homosexual union that cannot generate a double filiation of a child to a heterosexual marriage is not (yet) reduced to a simple partnership and which is and remains a social organization allowing to structure the parentage of children.[40]

Despite the typically legal criticism of incoherence, a large majority in the two Houses of Parliament promptly voted the law as proposed by the government.[41] The equalization (or assimilation) then concerned the modes of conclusion and dissolution of marriage, the effects on alliance, mutual rights and obligations between spouses, and social and fiscal rights and obligations between spouses and the state. Filiation finds no application here.

The idea of difference in the "nature of things" between heterosexual and same-sex couples persisted legally. Still today, the spouse of the mother of a child is not

[38] B. *Conseil d'Etat*, Opinion n° 32.008/2, 12th November 2001.

[39] Renchon (2002, 2004).

[40] Renchon (2004), pp. 184–185.

[41] *Loi du 13 février 2003 ouvrant le mariage à des personnes de même sexe*, Moniteur Belge, 28th February 2003.

the child's second mother: there is no legal parentage established between the two. And *a fortiori*, the husband of the father of a child is not the father of that child, regardless of the identity of the child's mother.

The Constitutional court validated the law opening marriage to same-sex couples against that background. In a judgment[42] delivered on a direct action in annulment, the *Cour d'arbitrage* considered that the difference between heterosexual and same-sex couples was "not such" that the latter should be excluded from the right to marry.[43] The argument of the claimants was founded on the constitutional guarantee of equality: as the law treated identically two allegedly objectively different situations without reasonable justification, it contradicted the Constitution. It is difficult to understand which is the objective difference between couples that the Court perceived but deemed irrelevant. It nevertheless is reminiscent of the views of the *Conseil d'Etat* for which same-sex couples are not in a comparable situation with heterosexual couples that there is the acknowledgement of a difference, again, in the "nature of things" between the two categories. But the Constitutional court remains deferent to the choices of the Legislator: if it wishes to universalize the right to marry despite objective differences, it is free to do so as long as these differences, "natural" or "socially constructed", are not important.

10.3.4 Same-Sex Parenthood

In 2006, the Belgian legislator extended the law of adoption to same-sex couples.[44] The same logic of equality is thus applied in matters of adoption. To a certain extent, the Legislation is an attempt to solve the issue raised by the problem of filiation in the context of a same-sex marriage.

The Constitutional court had to review certain of its provisions that disadvantaged same-sex parents, especially in respect of the transmission of surnames.[45] But the judgments of the *Cour constitutionnelle* in these cases are hardly addressed same-sex couples as such. Judges were more concerned with the interest of the child, not the claim of equality associated with homosexual parenthood.[46]

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[42] *Cour d'arbitrage*, Case No. 154/2004, 16 June 2004 (Moniteur Belge, 2nd August 2004).

[43] See para. B.4.7.: "Au regard d'une telle conception du mariage (la création d'une communauté de vie durable), la différence entre, d'une part, les personnes qui souhaitent former une communauté de vie avec une personne de l'autre sexe et, d'autre part, les personnes qui souhaitent former une telle communauté avec une personne de même sexe n'est pas telle qu'il faille exclure pour ces dernières la possibilité de se marier."

[44] *Loi du 18 mai 2006 Loi modifiant certaines dispositions du Code civil en vue de permettre l'adoption par des personnes de même sexe*, Moniteur Belge, 20th May 2006.

[45] *Cour constitutionnelle*, Case No. 104/2010, 16th September 2010 (Moniteur Belge, 17 November 2010); Case No. 26/2012, 1st March 2012 (Moniteur Belge, 11 June 2012).

[46] Art. 22*bis* of the Belgian Constitution provides that in all decision that concerns her or him, the interest of the child is taken into account and is of primordial importance.

In an important decision delivered in the context of the debate on same-sex marriage, the Court considered discriminatory the impossibility to dissociate the exercise of parental authority and parentage in the case of a same-sex household.[47] It declared that the interest of the child in maintaining a bond with the same-sex partner of their mother or father must prevail against the legal impossibility to grant parental authority to a person who is not a parent. The discrimination established by the Court concerns distinctions made between children with and without a parentage with the persons who have a particular relationship of care with them.[48] It is not a question of sexual orientation, although the two categories obviously overlap in facts, and the case is of major instance of the recognition of same-sex household and "homoparentalité".

The case knew a follow-up in the context of same-sex marriage. As we saw, the rules of same-sex marriage do not automatically create the filiation between a child and the same-sex partner of their parent. The law of 2006 allows the establishment of this filiation by adoption. But the law requires the consent of both partners, except in specific situation of abandonment. In a case where the refusal to consent to the adoption by one spouse was claimed to be abusive, the *Cour constitutionnelle* ruled that there is a prevailing interest of the child to obtain a double bond of filiation (both with her parent and with their same-sex partner) despite the absence of consent of both partners to the adoption.[49] The decision of 2012 deserves to be read in the light of the judgment of 2003: the best interest of the child ultimately enhances the *status* of same-sex couples even if the latter are not the object of concern for the Court. Quite remarkably, the same-sex nature of the household seems to be of the least importance in the treatment of the case.

Perhaps a benign indifference to homosexual relationships has become prevalent for the Belgian constitutional court. It remains that differences of regimes subsist even if they are explained, for the Legislator and for the doctrine, by *la nature des choses*. The *Cour constitutionnelle* will have to address them in the future. The absence of filiation, the need for adoption and the inapplicability, for instance, of the presumption of paternity/maternity/parenthood in the case of same-sex couples will remain problematic. It is possible that Belgian courts, and probably the *Cour constitutionnelle*, will prompt the Legislator to reform the law of filiation radically and to equalize and unify the regimes completely.

[47] *Cour constitutionnelle*, Case No. 134/2003, 8th October 2003 (Moniteur Belge, 19th January 2004).

[48] The judgment mentions the "relations personnelles entre un enfant et la personne qui justifie d'un lien d'affection particulier avec celui-ci" and the necessity to legally enable the effects of that bond for the person who would offer to guarantee care and protection for the child. See para. B.6.

[49] *Cour constitutionnelle*, Case No. 93/2012, 12th July 2012 (Moniteur Belge, 18th October 2012).

10.4 Conclusion

In many respects, the topic of the roles of courts in the recognition of an equal status to same-sex couples in France and Belgium cannot be adequately treated by focusing on a small number of decisions of the higher courts, even of these landmark rulings establish the main lines of fault. Both systems fit the expectations of a civilist institutional arrangement, where the final word is actively given to a political authority. There is no grand narrative of emancipation and human dignity here: only the resilient practice of judicial deference is to be found.

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