1. The changing concept of ‘family’ and challenges for family law in the Benelux countries*

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1. INTRODUCTION

Since the 1990s Belgium and the Netherlands have been international leaders in the legal accommodation of new family forms in general, and of same-sex partnering and parenting in particular. The relevant legislation was mainly passed by so-called ‘Violet Cabinets’ in 1994–2002 in the Netherlands and in 1999–2007 in Belgium, from which the Christian-Democrats were banned after decades of government participation. Yet the Netherlands had already passed a progressive divorce law reform as early as 1971 and both Low Countries have voted for progressive legislation with Christian-Democrats in government in 2014. Luxembourg has had Christian-Democrats-dominated governments from World War II up till 2013, with the exception of the period 1974–1979. This has resulted in a relative time lag in the modernisation of family law, which is however underway. A ‘Violet Cabinet’ was installed in 2013.

* Updated 5 January 2015.
The changes in family law described in this chapter disclose, in summary:

(a) a retreat of government regulation of the *formation* and *dissolution* of family relations and an advance of government intervention in the *content* thereof; and
(b) the legal recognition of *new family forms*, particularly same-sex families and blended families.

There are some major exceptions to those principles, which will be highlighted hereinafter.

Changes in family law however have not always led to coherent legislation. There seem to exist two obstacles.

On the one hand, governments should develop a policy of evidence-based legislation, and reforms of family law need to be assessed (*ex ante* or *ex post*) in the light of empirical research.\(^1\) The Netherlands seems to have developed such policy, through the work of its agencies Research and Documentation Centre\(^2\) and Statistics Netherlands\(^3\) and by government commissioning of multi-disciplinary research projects.\(^4\) In Belgium, there is a federal agency, Statistics Belgium,\(^5\) and a federated Flemish Research Division of the Flemish Government.\(^6\) Multi-disciplinary research projects have been commissioned by the Flemish government agency for Innovation by Science and Technology\(^7\) in application of a policy of strategic basic research and by the Belgian Science Policy

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\(^3\) Centraal Bureau voor de Statistiek (available 21 June 2015 at http://www.cbs.nl).

\(^4\) See www.wodc.nl (available 21 June 2015) and for example its reports on surrogacy agreements and on (pre-)marital agreements.


\(^6\) Studiedienst van de Vlaamse Regering (available 21 June 2015 at http://www4dar.vlaanderen.be/sites/svr/).

\(^7\) Instituut voor Wetenschap en Technologie (available 21 June 2015 at www.iwt.be). Two major relevant projects are www.scheidinginvlaanderen.be (Divorce in Flanders) and www.scheidingsonderzoek.be (Research into Divorce) (both accessed 21 June 2015).
A coherent approach is lacking. Luxembourg policymakers only rely on their statistics institute with a view of preparing evidence-based legislation.

On the other hand, coherence is difficult to reach in light of the traditional public law/private law divide that still characterises continental systems and that also applies to family law. This divide is increasingly questioned either through the horizontal application of human rights, or through the extension of general private law concepts such as public policy and morality. Besides, a quite complex division of competences regarding family law exists in Belgium. Only the federal government is competent regarding civil law, including private family law. The federated communities have exclusive competence regarding assistance to persons, including family policy. The federated regions (Flanders, Wallonia and Brussels-Capital) are exclusively competent regarding economy and taxes, including developing a family policy by tax incentives. It goes without saying that the partly overlapping system of multi-level governance does not facilitate coherence in family law.

2. HORIZONTAL FAMILY LAW

2.1 Marriage and Divorce

Marriage rates are declining in the Benelux countries, whereas divorce rates are increasing. The effect of the declining marriage rates seem to be balanced out slightly by increasing numbers of remarriages after divorce and of same-sex marriages.

Formation of marriage is generally characterised by a liberalisation of both substantive and procedural conditions to marriage.

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10 See, for example, W van Gerven and S Lierman, *Algemeen Deel. Veertig jaar later in Beginselen van Belgisch Privaatrecht* (Kluwer 2010).
In regard to substantive conditions, marriage is still limited to two unrelated adult persons as a rule; neither polygamous nor polyamorous marriages are allowed. Accommodation of foreign polygamous marriages is possible to a limited extent under private international law rules, for example with a view of dividing the widow’s pension between two surviving spouses. Dispensation of the marriageable age of 18 is still possible in the Benelux counties, but a proposal has been made in the Netherlands to abolish this, with a view to preventing sham and forced marriages. The impediments to marriages between family members, particularly in case of affinity, have been eased, but according to a Dutch proposal relatives in the third (uncle/aunt–nephew/niece) and fourth degree (nephews and nieces) will have to take the oath that they are not entering into a sham or forced marriage. Most importantly, marriage has been open to two partners of the same sex in the Netherlands since 2001 and Belgium since 2003, and in Luxembourg from 2014. Marriage was traditionally conceived as protection of a mother (matri-monium) by the father-husband. The opening up of marriage to same-sex partners is a logical step from a strictly legal-positivist perspective, both if marriage and parenthood are decoupled, and if parenthood is opened to same-sex partners.

The formal conditions to marriage have also been eased, particularly in the Netherlands and Belgium, for example, with the abolition of the banns of marriage and of the possibility for family members to lodge a caveat against the issue of a marriage certificate, in 1987 and 1999 respectively. Since the Napoleonic secularisation of the state, the civil marriage must precede the religious marriage. Religious marriages also have no civil effect. It remains to be seen whether or not the former rule

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14 For example for Belgium: Court of Cassation 18 March 2013 (available 21 June 2015 at www.cass.be).
15 Tweede Kamer (available 21 June 2015 at www.tweedekamer.nl), Draft Bill No 33 488.
16 Ibid.
17 Civil Code, article 1:30(1).
18 Civil Code, article 143.
19 Civil Code, article 143.
is an infringement upon the freedom of religion, as was contended in a case before the Belgian Constitutional Court.\textsuperscript{21}

One major exception to the liberalisation of substantive and formal conditions to marriage is the legislative effort to eliminate sham and forced marriages in the context of immigration. Family reunification has become a major gateway for immigration, and has caused an increase in international marriages between Benelux citizens belonging to an ethnic minority and a partner of their country of origin. To prevent abuses of marriage undertaken with a view to obtaining residence permits or even citizenship, Belgium has recently and repeatedly enforced civil and penal mechanisms to prevent and punish sham or forced marriages.\textsuperscript{22} The Luxembourg parliament has moved in the same direction in 2014.\textsuperscript{23} The Netherlands will take its fight against such marriages even one step further – and probably too far\textsuperscript{24} – by abolishing age dispensation and by forcing relatives to take the oath before being allowed to marry.\textsuperscript{25}

The legislators intervene more actively in the field of the content of marriage. Each of the Benelux countries has included imperative marital rights and obligations in their civil codes. They concern both the person and the property of the partners and automatically apply to all marriages, with limited space for private ordering. In cases of domestic violence both civil law and criminal law measures apply. More importantly, a preventive administrative restraining measure may be taken against an alleged offender, to the benefit of any member of the household.\textsuperscript{26} Beside the mandatory rights and obligations, the matrimonial property regime regulates property relations between spouses. The Dutch default system

\textsuperscript{21} Belgium Constitutional Court (available 21 June 2015 at www.constcourt.be), Case N\textdegree 159/2004, 20 October 2004 (inadmissible with regard to the contention regarding freedom of religion).


\textsuperscript{25} Eerste Kamer (available 21 June 2015 at www.eerstekamer.nl), Draft Bill N\textdegree 33 488.

is community of property; the Belgian\(^{27}\) and Luxembourg default systems only encompass community of gains, with property acquired though inheritance or gift excluded. In the three countries, spouses may depart from the default legal system in (pre-)marital agreements. Even agreements of separation of property, without participation in the assets and without other compensation for one spouse, are valid.\(^{28}\) The outcome of such agreements can be unfair in some cases, however, with limited possibilities of recourse to the courts.\(^{29}\)

The dissolution of marriage has been liberalised in the Netherlands (1971) and in Belgium (2007), with Luxembourg on its way.\(^{30}\)

With regard to the grounds for divorce, the Dutch legislator has abolished fault divorce in favour of irretrievable breakdown of the marriage as the sole ground for divorce. If the parties apply for divorce together, the irretrievable breakdown is conclusively proven. If only one party applies, and the other spouse does not accept the divorce, the onus probandi applies. The Belgian legislator has created a two-track system, with divorce by mutual consent on the one hand and a right to divorce on the ground of irretrievable breakdown of the marriage on the other hand. The latter ground in reality comprises three independent grounds for divorce: hardship, separation and reflection period. The periods required to satisfy the latter two differ according to whom applies for divorce: both spouses, one spouse with the other’s assent, or one spouse only. In Luxembourg, the three-track system of divorce – mutual consent, on the ground of separation or for reason of fault – is still in force. A liberal reform may be underway,\(^{31}\) after which divorce by mutual consent and


\(^{30}\) Chambre des Députés (available 21 June 2015 at www.chd.lu), Draft Bill No 5155.

\(^{31}\) Ibid.
divorce on the ground of irretrievable breakdown will be the sole grounds. The application for divorce by even one spouse will conclusively prove the breakdown.

Regarding the consequences of divorce, a division between maintenance on the one hand and liquidation and division of joint property (if any, see above) on the other applies in the three countries. Maintenance will only be awarded in case of need. Belgian law is, however, evolving in the direction of giving a compensatory function to maintenance in view of economic inequalities that may have arisen during marriage, for example to the detriment of the homemaker-spouse.32 The Luxembourg Civil Code will be modified to this effect as part of the above-mentioned divorce reform. Belgium and the Netherlands apply the adult worker model to post-divorce solidarity by limiting the duration of maintenance: to a maximum of the duration of the marriage in Belgium, and to maximum of five or 12 years in the Netherlands (depending on the presence of children and the duration of the marriage). A proposal has been made in the Netherlands to further reduce that period.33 Only the Netherlands requires divorcing (and some separating) parents to try to negotiate a parenting plan as a condition of being allowed to apply for divorce. This condition has been criticised by some authors,34 while others propose the introduction of compulsory parenting plans for all parents.35

2.2 Registered Partnership

The Netherlands introduced registered partnership, open to both same-sex and opposite-sex couples, in 1998. The rules regarding formation, content and dissolution of such partnerships were even at that time almost the same as those relating to marriage, and have been brought further into line with marriage since. Registered partnership was considered the forerunner of the opening up of marriage to same-sex partners. Now that

this has taken place, the question has arisen whether registered partnership should be abolished; marriages cannot be abolished as an alternative, given the international human rights protection of marriage. The legislator has opted for the conservation of the two-track system, so as not to force any couple into the symbolism of marriage.\textsuperscript{36} Belgium also introduced a registered partnership (\textit{cohabitation légale}) in 1998 (in force since 2000), as a forerunner of same-sex marriage. Unlike the Dutch system, it was conceived as a mini-marriage, to which only some property rights and obligations of spouses during their marriage were extended. However, the institution is apparently evolving in the direction of equality with marriage\textsuperscript{37} – even if the Court of Cassation\textsuperscript{38} has unjustly characterised civil partnership as not relating to civil status! There is, in any case, no comparable protection to divorce law for ex-registered partners regarding maintenance and division of property. To extend marriage-like protection to registered partners would, however, be problematic, since the impediments to marriage based on kinship do not apply to registered partnership. The English \textit{Burden} sisters\textsuperscript{39} would therefore find themselves protected under Belgian (tax) law. Remarkably, the number of registered partnerships per year in Belgium exceeds the number of marriages per year.\textsuperscript{40} In Luxembourg, a registered partnership (\textit{partenariat}) conceived as a mini-marriage was created in 2004,\textsuperscript{41} and slightly modified in 2010.\textsuperscript{42}

Government efforts to prevent the abuse of marriage for migration purposes have been extended to registered partnerships.\textsuperscript{43}

\begin{itemize}
  \item \textsuperscript{36} See the report by K Boele-Woelki et al, \textit{Huwelijk of Geregistreerd Partnerschap}? (Kluwer 2007).
  \item \textsuperscript{37} Hereto already H Casman, ‘Wettelijke samenwoning. Hoe gaat dat nu verder?’ [2004] \textit{NJW} 182.
  \item \textsuperscript{38} Court of Cassation, 17 January 2013, including the legal opinion of the Advocate-General (available 21 June 2015 at www.cass.be).
  \item \textsuperscript{39} \textit{Burden} v UK (2008) 47 EHRR 38.
  \item \textsuperscript{40} Statistics Belgium (available 21 June 2015 at http://statbel.fgov.be/en/statistics/figures/).
  \item \textsuperscript{42} Act of 3 August 2010, \textit{Memorial A – N} ° 134 of 12 August 2010, 2190.
  \item \textsuperscript{43} For example, for Belgium: Act of 2 June 2013, \textit{Moniteur belge} 23 September 2013 (available 21 June 2015 at http://www.ejustice.just.fgov.be/cgi/welcome.pl).
\end{itemize}
2.3 Cohabitation

As yet, there are no reliable statistics on the number of cohabiting partners, but qualitative research suggests that this number is fairly high. Yet there is no family law protection for cohabiting partners in any of the Benelux counties, and cohabitants may only rely on the general principles of the law of obligations, contract law and property law. There is much scholarly attention to this field of law, in the light also of increasing reported case law. The law of obligations is used to provide for both family law consequences of cohabitation (particularly post-separation maintenance) and family property consequences (with a view to fair compensation for capital losses or investments). Cohabitation is taken into account in scattered provisions in family law (for example as a ground for termination of post-divorce maintenance) and in other fields of law (for example, social security benefits, tax benefits and domestic violence).

3. VERTICAL FAMILY LAW

3.1 Parenthood and Adoption

In the parenthood law of all Benelux countries, the default position is that every child has one (legally) male father and one (legally) female mother. As of 1 April 2014, dual motherhood has been introduced in Dutch law; as of 1 January 2015, co-motherhood has been introduced in Belgium.

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44 For example, for the Netherlands: WM Schrama, *De niet-huwelijkse samenleving in het Nederlandse en Duitse recht* (Kluwer 2004).
48 Act of 5 May 2014, Moniteur belge of 7 July 2014.
As a rule, the (first) mother is the woman who gave birth to the child, regardless of any genetic tie. The maxim *mater semper certa est* still applies in Belgium and the Netherlands, which do not (yet) provide for anonymous or discreet childbirth. Luxembourg has provided for anonymous birth (*accouchement sous x*) since 1975 in order to avoid abortions.\(^{49}\) In all three countries, the genetic father is also the legal father of the child as a rule. The mother’s husband is presumed to be the genetic father (*pater est quem nuptiae demonstrant*), with varying possibilities of rebuttal. In Belgium and Luxembourg the alleged genetic father may dispute the paternity of the husband; in the Netherlands he may not. Recent judgments of the ECtHR suggest that alleged genetic fathers should not necessarily have the right to contest the legal paternity of the mother’s husband and that their rights are sufficiently protected through information and contact rights, to be exercised only in the child’s best interest.\(^{50}\) Not only genetic fathers can become legal father of a child: to some extent social paternity or even mere intentional paternity – for example when the partner of the mother assents to artificial insemination – may be given priority as a basis for legal paternity over genetic ties. In this regard, it is alarming that the Belgian Constitutional Court has *de facto* reformed the Parenthood Act of 2006 in a number of judgments, with a view to allowing courts to strike a ‘fair balance’ between the interests of the child, its legal parents and the alleged parents when determining parentage, instead of referring only to the statutory bases for parenthood.\(^{51}\) As aforementioned, in the Netherlands and in Belgium a child may have a second mother (*the mother who has not given birth to the child*), that is, a co-mother instead of (and not beside; multi-parenthood is not yet possible but is currently discussed in the Netherlands\(^{52}\)) a father. The statutory provisions regarding fatherhood apply

\(^{49}\) On this see Avis 22 of the Luxembourg National Ethics Commission (2009) (available 21 June 2015 at www.cne.lu);

\(^{50}\) *Schneider v Germany* (2011) 54 EHHR 407; *Kautzor v Germany* (2012); *Ahrens v Germany* (2012).


accordingly. The core question of course is to what extent legal parenthood should be based on biological ties.\textsuperscript{53}

The rules on parenthood apply to intended parents in cases of medically assisted reproduction, for which legislation exists in the Netherlands (2003) and Belgium (2007), both in the Civil Code and in specific Acts. Medically assisted reproduction is open to single mothers and for female same-sex couples. The legislators have not regulated the legal consequences of surrogacy agreements, out of which many (private international law) issues have arisen in the last few years.\textsuperscript{54} Whereas the Dutch legislator safeguards a child’s access to the identity of the donor through the intervention of a commission, the Belgian legislator ensures the donor’s anonymity, which is apparently contrary to the human rights protection of the child.\textsuperscript{55} The Luxembourg National Ethics Commission advised against statutory intervention on medically assisted reproduction in 2011.\textsuperscript{56}

The Belgian and Luxembourg Civil Codes provide for weak adoption (adoption simple) and strong adoption (adoption plénière). The former does not completely disrupt the family ties with the family of origin, whereas the latter does (unilaterally, in the case of step-parent adoption). The former does not constitute full family ties in the adoptive family, whereas the latter does. Weak adoption is not available in the Netherlands. In Belgium and the Netherlands, (both weak and strong) adoption is open to single persons and for couples, whether same-sex, married, registered partners or cohabiting partners. In Luxembourg, weak adoption is possible for single persons and for married couples, and strong adoption only for married couples. There are many more international adoptions than internal adoptions (excluding step-parent or second-parent adoptions) in the Benelux.

\textsuperscript{53} In general, see I Schwenzer, Tensions Between Legal, Biological and Social Conceptions of Parentage (Intersentia 2007), with Belgian and Dutch country reports by G Verschelden and M Vonk respectively.


\textsuperscript{55} See Odièvre v France (2003) 38 EHHR 43.

In the light of government efforts to prevent sham and forced marriages, there is some evidence that ‘sham parentage’ or ‘sham adoptions’ are used for migration purposes.\footnote{For example, for Belgium, see P Senaeve, ‘Papieren kinderen’ [2013] \textit{TFam} 22.}

3.2 Parental Responsibility

In continental systems, parental responsibility is traditionally awarded solely to the legal or adoptive parents. Only the Dutch legislator has provided for parental responsibility to be assigned or attributed to a parent with sole custody, together with his or her partner. This happens automatically where the child is born during a marriage or registered partnership and has no father. The Dutch system is (too) complex, with more than 120 hypothetical situations of parental responsibility organised in the law.\footnote{JE Doek, ‘Gezag over minderjarigen. Iets over een doolhof en het zoeken van (rode?) draden’ [2000] \textit{FJR} 217.} The Belgian Constitutional Court urged the legislator to provide for joint parental responsibility by a parent and non-parent, in the case of \textit{de facto} ‘dual motherhood’, in 2003.\footnote{Constitutional Court No 134/2003 of 8 October 2003.} The issue was partly resolved in 2006, by the opening up of adoption to same-sex partners. The Constitutional Court has stated in two new judgments that the opening up of adoption, however, does not solve all possible situations of \textit{de facto} ‘dual motherhood’, for example, in a case where the ‘mothers’ have separated before the adoption.\footnote{Constitutional Court No’s 93 and 94 of 12 July 2012.} Dual motherhood is further accommodated by the aforementioned introduction of co-motherhood, but not all remaining issues are resolved by that.

The Belgian legislator offers the strongest safeguards for the equal attribution of parental responsibility to both parents, with the Luxembourg legislation at the other end of the spectrum and the Dutch legislation somewhere in between. In Belgium, parents exercise parental responsibility jointly as a rule, regardless of their marital status. The unmarried second parent is attributed parental responsibility automatically, and joint parental responsibility is not terminated upon divorce or separation. Moreover, the courts must first consider equally shared residence of the child if one of the parents so requests. Where parents cohabit, the court may vest one of the parents with the power to decide on specific issues; the court may vest one of the parents with exclusive parental responsibility (with specific exceptions) only where the parents

\footnotesize{\begin{itemize}
\item 57 For example, for Belgium, see P Senaeve, ‘Papieren kinderen’ [2013] \textit{TFam} 22.
\item 58 JE Doek, ‘Gezag over minderjarigen. Iets over een doolhof en het zoeken van (rode?) draden’ [2000] \textit{FJR} 217.
\item 59 Constitutional Court No 134/2003 of 8 October 2003.
\item 60 Constitutional Court No’s 93 and 94 of 12 July 2012.
\end{itemize}}
do not cohabit. In the Netherlands, parents jointly exercise parental responsibility during marriage or registered partnership, and joint responsibility is continued as a rule upon divorce or separation. The law does not explicitly favour equally shared residence. Unmarried or unregistered parents do not automatically jointly exercise parental responsibility. The second parent will only be vested with parental responsibility with the consent of the mother or of the court. The compatibility of this rule with international human rights instruments has been questioned.61 In Luxembourg, parental responsibility is exercised jointly only during marriage. Upon divorce, the custody of the child will be awarded exclusively to one parent or to a third party. The Constitutional Court has however found this provision to be unconstitutional,62 thus awarding discretion to the courts. Only the mother exercises parental responsibility over ‘natural’ children, except by her consent or with an order of the court in favour of joint parental responsibility. The Constitutional Court has also found this provision to be unconstitutional.63 In cases of exclusive parental responsibility, the three Benelux countries provide for visitation and supervision rights by the other parent.

3.3 Blood, Milk and Water

As mentioned above, the Benelux countries only provide for parental responsibility by legal or adoptive parents as a rule, with one exception for the Netherlands. Questions have therefore arisen regarding the legal position of parents by blood, milk or water only. ‘Milk kinship’ refers to persons who de facto exercise parental responsibility and ‘water kinship’ to godparents, broadly speaking. All three countries allow the courts to award rights vis-à-vis a child to persons other than the parents, but only regarding visitation, contact or information. In Belgium and Luxembourg, the law explicitly protects grandparents.64 Even if such favouritism is open to question, it has also proponents in the Netherlands. The three counties more generally provide for persons with, in summary, family life vis-à-vis the child. In the last few years, that protection has been extended to encompass intended family life, for example in relation to a duo-mother who had co-signed a consent form for medically assisted

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reproduction, but whose relationship with the birth-mother had ended before the child was born. Belgian and Dutch courts have also extended this protection to the biological parent – often the genetic father – even where he has no effective family life with the child. Such protection is in line with recent case law of the ECtHR. Remarkably, family law protection is thus awarded not on the basis of family life, but on the basis of the protection of private life only.65

4. INDIVIDUAL FAMILY LAW

4.1 Change of Legal Gender

Change of legal gender with full civil effect is possible in all three Benelux countries. Specific legislation was enacted to that end in the Netherlands (1985 and 2013) and Belgium (2007). In Luxembourg, the general procedure for correction of acts of civil status is applicable, as was formerly the case in the Netherlands and Belgium. The Ombudsman has, however, urged the legislator to provide for a specific procedure.66

The Belgian legislator provides for a change of legal gender and of given names on the threefold condition of (a) proof of the conviction of belonging to the opposite gender to that mentioned in the birth certificate; (b) proof of having undergone gender reassignment surgery insofar as medically and psychologically possible and justified; and (c) proof of the definitive impossibility to father or give birth to a child according to the original gender. The compatibility of the latter two conditions with international human rights instruments is, however, questioned.67 The Dutch legislator abandoned comparable conditions in 2013.68 The Belgian legislator accommodates transsexuals during their ‘real life experience’, as the right to change given names prior to the change of legal gender was introduced in 2007. The Dutch and Belgian legislators have organised the impact of the change of legal gender on vertical family

65 See F Swennen, ‘Omgangsrecht voor niet-ouders in het Belgische recht’ in Actuele ontwikkelingen in het familierecht (Ars Aequi Libri 2013) 27, with a comparison between Belgian and the Netherlands, and drawing on ECtHR case law.
relations as follows. In Belgium the original gender remains relevant for prior children; the current gender will apply to future children. ‘Transitory’ issues regarding children are not always resolved.69 The same applies to the Netherlands, except that the (legal) man (former legal woman) who gives birth to a child is considered to be the mother of the child. Change of legal gender has no direct consequences in regard to horizontal family relations, as both marriage and registered partnership are open for same-sex partners.

4.2 Change of Names

Change of surnames is possible in the Benelux countries through an administrative procedure, although in the Netherlands it is only possible on limited grounds. The Netherlands moreover provides for a change of a child’s surname pursuant to a parental responsibility order, particularly in the case of attribution of parental responsibility to a stepparent. The administrative procedure is conceived of as a privilege rather than as a right. Some authors justly contend that the change of surnames should be a competence of the judiciary, since the right to a surname (which reflects one’s nationality, ethnicity or other identity attribution) is a civil right that should not depend on government favour.70 Both the ECtHR and the ECJ have called for accommodation in this regard.71 The change of given names is already the courts’ competence in the Netherlands, but not yet in Belgium and Luxembourg.

5. FUTURE CHALLENGES

The legislators in the Benelux countries face major challenges. This is particularly the case for the Luxembourg legislator, with many reforms still underway, whereas the Belgian and Dutch legislators have already liberalised family law during the last decades.

First, the question arises whether migration towards the Benelux countries should or can be constrained through private family law. I think

this is not the case and that human rights standards are not always satisfied in legislation aimed at limiting immigration.

In horizontal family law, there is a shift from marriage towards registered partnerships and *de facto* cohabitation. The legislators should seek a way to abolish marriage and replace it with a symbolically neutral and solely patrimonial protection.\(^{72}\) Article 12 of the ECHR is of course an important obstacle. The question whether such protection should be awarded in an *opt-in, opt-out* or imperative scheme is an open one. This protection should fulfil both maintenance and compensation functions, and a merger between maintenance law and division and distribution of property upon divorce – as is the case in France and Germany – must be considered. It would permit a *clean break* between divorcing and separating partners.

In vertical family law, equal custody of both parents – and particularly the unmarried father – is not yet achieved in Luxembourg or the Netherlands, and this should be a priority. Dual motherhood for female partners must be considered in Luxembourg. Furthermore, *multi-parenthood* and *group-parenthood* should be further researched, with a view to providing for kinship based on law, blood, milk and water, without undermining the necessary stability for the child. The Netherlands has taken the lead by installing a State Commission that is expected to submit a recommendation by 1 May 2016.\(^{73}\)

It seems that family law is concerned more and more with accommodation of minorities and individuals, on the basis of private life rather than of family life. The legislators must, however, not lose sight of the fact that liberty and equality cannot be achieved without fraternity and solidarity. Demographic evolutions and the rising costs of the welfare state will probably revive interest in family solidarity.\(^{74}\) It is therefore questionable whether the reduction of family solidarity, for example upon divorce, is the better option. Private family law should not be abandoned as an instrument of family policy. Authorities should not only focus on legislation, but also on the empowerment of families, and particularly of (young) parents (to be), for example through parenting plans or courses.


RECOMMENDATIONS FOR FURTHER READING

Belgium


Luxembourg

D Hiez (ed.), *Le droit luxembourgeois du divorce* (Larcier 2008).
G Vogel (ed.), *Le divorce en droit luxembourgeois* (3rd edn, Larcier, 2010).

The Netherlands