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**More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine European countries. (Documents de travail n°125)**

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**Citation**

Waldijk, C. (2005). *More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine European countries. (Documents de travail n°125)*. Paris: Institut national d'études démographiques (INED). Retrieved from <https://hdl.handle.net/1887/12585>

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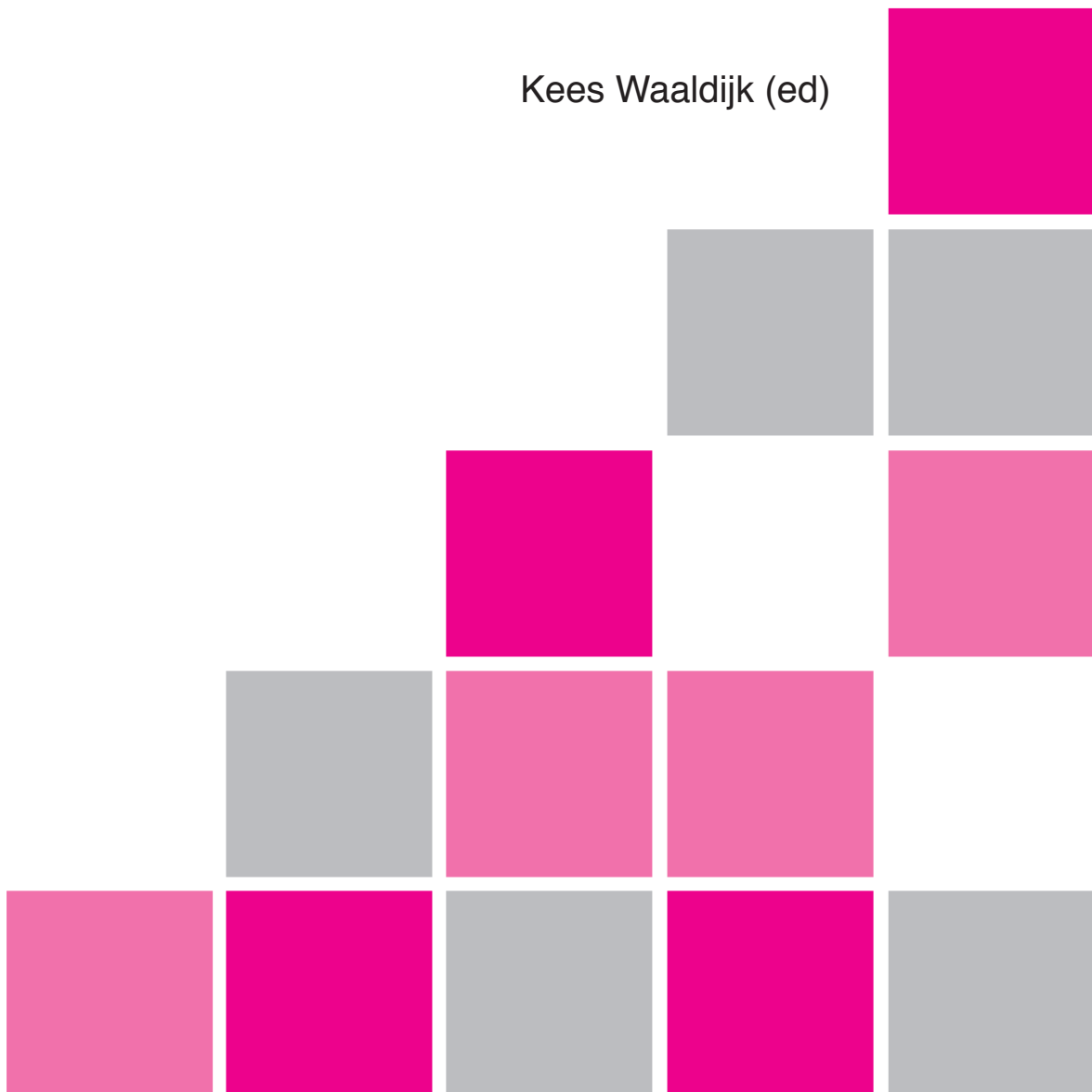
2005

# DOCUMENTS DE TRAVAIL

## MORE OR LESS TOGETHER:

Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners

*A comparative study of nine European countries*





# **More or less together:**

**Levels of legal consequences  
of marriage, cohabitation and registered partnership  
for different-sex and same-sex partners**

**A comparative study of nine European countries**

by Kees Waaldijk

in cooperation with:

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with a sociological epilogue by Eric Fassin

***Institut National d'Etudes Démographiques***

Paris

December 2004



## Table of contents

|  |     |
|--|-----|
| Introduction-----  | 3   |
| ▪ Background -----   | 3   |
| ▪ Aims -----   | 3   |
| ▪ Methodology-----   | 4   |
| ▪ Further research-----  | 5   |
| Comparative overview-----  | 7   |
| ▪ Codes used in the tables -----   | 8   |
| ▪ Parenting, material and other consequences together (Table O) -----  | 9   |
| ▪ Parenting consequences (Table A)-----  | 12  |
| ▪ Material consequences in private law (Table B - part one)-----   | 16  |
| ▪ Positive material consequences in public law (Table B - part two) -----  | 20  |
| ▪ Negative material consequences in public law (Table B - part three)-----   | 24  |
| ▪ Other legal consequences (Table C)-----  | 28  |
| ▪ Types of discrimination prohibited in anti-discrimination legislation (Table D) -----                                      | 32  |
| ▪ Types of couples that qualify (Table E)-----   | 33  |
| ▪ Authority for starting a marriage or registered partnership (Table F)-----   | 34  |
| ▪ Means of ending a marriage or registered partnership (Table G)-----  | 35  |
| Comparative analysis -----   | 37  |
| ▪ Introduction -----   | 37  |
| ▪ The legal character of civil marriage -----  | 37  |
| ▪ The legal character of registered partnership-----   | 38  |
| ▪ The legal character of informal cohabitation-----  | 40  |
| ▪ The levels of legal consequences of civil marriage -----   | 41  |
| ▪ The levels of legal consequences of informal cohabitation -----  | 41  |
| ▪ The levels of legal consequences of registered partnership-----  | 42  |
| ▪ The exclusion (and gradual inclusion) of same-sex couples -----  | 43  |
| ▪ Explaining the frequency of partnership registration-----  | 45  |
| ▪ Conclusions -----  | 47  |
| Major legal consequences of marriage, cohabitation and registered partnership for<br>different-sex and same-sex partners in: |     |
| ▪ Belgium -----  | 49  |
| ▪ Denmark -----  | 67  |
| ▪ Finland -----  | 79  |
| ▪ France -----   | 93  |
| ▪ Germany -----  | 107 |
| ▪ Iceland -----  | 121 |
| ▪ Netherlands -----  | 137 |
| ▪ Norway -----   | 155 |
| ▪ Sweden-----  | 169 |
| Sociological questions: an epilogue-----   | 171 |
| ...marriage, cohabitation and registered partnership for different-sex and same-sex partners                                 | 1   |



# Introduction

by Kees Waaldijk<sup>1</sup>

## Background

Through the institution of *civil marriage* all countries in Europe recognise regulate different-sex couples. As a legal institution marriage can be characterised as a form of partnership between two persons that is created by a formal act of registration, and that results in a number of legal consequences (rights and obligations, both between the partners, and between the partners and others including the state). Since the 1970s a growing number of European countries have made a growing number of these legal consequences available to unmarried partners in *informal cohabitation*. This legal recognition of informal cohabitation has sometimes been restricted to different-sex couples, while sometimes same-sex couples have been included. Since 1989 several European countries have introduced *registered partnership*, a legal institution that is more or less analogous to marriage, resulting in some or almost all of the legal consequences of marriage. In some countries registered partnership has only been made available to same-sex couples, while others made it also available to different-sex couples. And since 2001 a few European countries have opened up civil marriage to same-sex partners.

With all these developments,<sup>2</sup> the field of 'family law' (in the wide sense of the word) has become much more complex and varied (and 'same-sex-friendly') than it used to be. Even lawyers rarely have a comprehensive understanding of the differences between the marriage, registered partnership and cohabitation in their own country, let alone in other countries. Over the next few years these developments will become evident in more countries.<sup>3</sup> Therefore it is becoming simultaneously more interesting and less easy to analyse this field of law. The challenge is how to carry out comparisons in at least five 'dimensions': between marriage, registered partnership and cohabitation, between different-sex and same-sex partners, between different areas of private and public law, between different countries, and between now and previous years or decades.

The present study introduces a tool for such a complex comparative analysis. The tool is called 'level of legal consequences' or 'LLC'. That tool is applied here to the nine European countries that by 2003 had introduced a form of registered partnership at national level: Belgium, Denmark, Finland, France, Germany, Iceland, Netherlands, Norway and Sweden.

This study is the result of the cooperation of nine lawyers in the multi-disciplinary project of the French National Institute of Demographic Studies (INED) on the phenomenon of registered partnership. That multi-disciplinary project also comprises sociologists, historians, statisticians and demographers. The results of their work are and will be published elsewhere.<sup>4</sup>

## Aims

The aims of this study are:

- to assess more accurately the levels of legal consequences (hereafter LLC) of existing forms of registered partnership in comparison with the LLC of marriage and the LLC of cohabitation;
- to discover similarities and differences between the nine countries;
- to document the exclusion and inclusion of same-sex couples;

<sup>1</sup> Dr. C. Waaldijk is a senior lecturer at the E.M. Meijers Institute of Legal Studies, Universiteit Leiden, the Netherlands ([www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk)). I am grateful to the Institut National d'Études Démographiques in Paris, for making this study financially possible, to Marie Digoix and Patrick Festy (of INED) and Daniel Borrillo and Hans Ytterberg, for their inspiration and support in carrying out the study, to Wout Morra (law student/research-assistant) and Riekje Boumlak (secretary at the Meijers Institute) for their technical support, and to the eight lawyers who did most of the work on the national tables: Olivier De Schutter (Belgium), Dirk Siegfried (Germany), Søren Baatrup (Denmark), Rainer Hiltunen (Finland), Daniel Borrillo (France), Hrefna Fridriksdóttir (Iceland), John Asland (Norway), Hans Ytterberg (Sweden). (The Netherlands was taken care of by myself.) Any corrections and suggestions are welcome at [c.waaldijk@law.leidenuniv.nl](mailto:c.waaldijk@law.leidenuniv.nl).

<sup>2</sup> And with regional registered partnership legislation already in force in parts of Spain and Switzerland.

<sup>3</sup> In 2004 registered partnership legislation was adopted in Luxembourg (in force 1 November 2004), in Switzerland (subject to a referendum to be held in 2005), in England and Wales (expected to enter into force late 2005 or early 2006). Proposals for registered partnership legislation are being discussed in Ireland and the Czech Republic, and legislation for opening up marriage to same-sex couples is being prepared in Spain and Sweden. Countries with some legislation recognising same-sex cohabitation include Hungary, Portugal, Scotland and Croatia.

<sup>4</sup> The first results of this project were presented at a conference of Stockholm, Sweden, in September 2003. The proceedings of that conference can be found in: Digoix, Marie & Festy, Patrick (eds).- *Same-sex couples, same-sex partnerships, and homosexual marriages: A Focus on cross-national differentials*.- Documents de travail n°124, Ined, 2004, which also includes the 'Comparative overview' and 'Comparative analysis' of this study on the levels of legal consequences.



- to indicate differences in LLC between cohabitation and registered partnership (and between registered partnership or cohabitation and marriage), that might potentially explain national differences in the frequency of partnership registrations (or marriages).

Such data and insights could be useful for lawmakers (in any jurisdiction of the world) wishing to propose or consider legislation in this field, for courts and lawyers being called upon to decide whether a certain foreign marriage/partnership/cohabitation should be recognised, and for legal and non-legal researchers trying to understand the developments in this field.

## **Methodology**

The research made use of a *questionnaire* (in the form of tables) that could be filled out by a specialist lawyer from each of the nine country.

For this purpose 33 possible legal consequences of marriage/partnership/cohabitation were selected, divided over three broad fields:

- (A) 'parenting consequences',
- (B) 'material consequences' and
- (C) 'other legal consequences'.

In the selection of these consequences (from the many hundreds of legal rights and obligations that are attached to marriage in most countries), the intention was to include all legal consequences that may be most important for individuals considering the legal impact of entering a specific relationship type, and/or that have been most prominent in the legal and political debates about relationship diversity and non-discrimination. Nevertheless, some legal consequences that would fit these criteria (for example in social security) have been left out because they would be too complex, or too difficult to compare between countries. The final questionnaire was decided upon, after several lawyers and non-lawyers from various countries had made suggestions for changing the selection of legal consequences, and for phrasing them more clearly and accurately. One such suggestion led to the subdivision of the large category of 'material consequences' into three:

- (B part one) material consequences in private law,
- (B part two) positive material consequences in public law, and
- (B part three) negative material consequences in public law.

Each lawyer filling out the questionnaire was invited to suggest an additional major legal consequence of marriage, of particular relevance in his or her country, but this did not lead to any further suggestion.

To make a more complete picture of marriage, registered partnership and cohabitation, the questionnaire also contained tables with questions about:

- (D) prohibitions of civil status and sexual orientation discrimination,
- (E) types of couples qualifying for marriage or registered partnership,
- (F) authorities for starting a marriage or registered partnership, and
- (G) procedures for ending a marriage or registered partnership.

Each lawyer filling out the questionnaire was asked to indicate to what degree a certain legal consequence (or condition, procedure, etc.) applies to same-sex and/or different-sex cohabitants, to same-sex and/or different-sex registered partners, and to same-sex and/or different-sex married spouses. For each of these types of relationships, each question had to be answered with one out of six codes 'yes', 'yes, but', 'no, but', 'no', 'doubt', or 'not applicable'. The legal source for each answer had to be indicated in a note, where the answer could also be further specified or nuanced. To promote a more uniform and thus more comparable approach, the lawyers have been given a document with general and specific guidance on how to read and fill out the questionnaire. For the same reason, the answers and notes provided by the lawyers have been discussed with the coordinator of the study, which in some instances has led to corrections and clarifications of the answers and notes.

The nine filled out questionnaires have become the *nine national chapters* in this study. For the benefit of the readers, brief introductions and short lists of literature (mostly in English) have been added to these.

To calculate the level of legal consequences (LLC), each of the codes in the tables was given a numerical value ranging from 0 points for 'no', to 3 points for 'yes'. Per table these points have been added up for each of the available types of relationship. To enable a comparative analysis, these numbers of points were then translated into a percentage, with the LLC of different-sex marriage always considered as 100%. Thereby it became possible to say for any country what percentage of the (studied) legal consequences of different-sex marriage is available to same-sex cohabitants, for example, or to different-sex registered partners.

In the *Comparative overview* the 'comparative tables' (A to G) briefly indicate the answers for each country to each question, while the numbers of points and the corresponding LLC-percentages are listed in 'levels tables' (O and A to C). The percentages are also visualised in pie charts (O and A to C), in which the whole circle represents the LLC of different-sex marriage, while the green segment represents the LLC of informal cohabitation, the yellow segment the additional LLC of registered partnership, the pink segment the additional

LLC of marriage, and the red segment the percentage of legal consequences not available to any same-sex couple.

The final stage of the study consisted of making a *Comparative analysis* of the data provided in the national chapters and in the Comparative overview.

### ***Further research***

It is hoped that this study can be continued in several directions.

Firstly, the legal analysis of this study can be extended to include more jurisdictions in Europe and perhaps in other parts of the world: How typical are the levels of legal consequences found in these nine countries for other (European) countries, or for North American states or provinces?

Secondly, the data and insights provided in this lawyers' study can perhaps be combined with data and insights provided by sociologists, historians, statisticians and demographers: Do the legal data help to explain national differences in the frequency of partnership registration? Can the legal situation be explained by non-legal factors, or vice versa?

Thirdly, the data about national law could be confronted with the requirements of international human rights law and European Union law: Do the distinctions that national laws make between same-sex and different-sex partners, or for example between marriage and cohabitation, amount to unlawful discrimination?

And finally, the data about national law could be analysed from a perspective of private international law, of conflict of laws, and of freedom of movement: Where, when, as what, and for what purposes could or should informal cohabitants, registered partners and same-sex spouses be recognised outside the country in which they started to live together, registered their partnership or married each other?



# Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners:

## Comparative overview

by Kees Waaldijk <sup>1</sup>

### Introduction

This study introduces the concept of ‘levels of legal consequences’ (LLC) as a tool for a comparative analysis of civil marriage, registered partnership, and informal cohabitation (of different-sex or same-sex partners) in different countries. For nine countries (Belgium, Denmark, Finland, France, Germany, Iceland, Netherlands, Norway and Sweden) 33 possible major legal consequences of these three types of relationship status were investigated.

This comparative overview is based on nine sets of *national tables*, one set for each country.<sup>2</sup> Each national table consisted of a list of questions, to be answered for six types of relationships (as far as applicable in the country): different-sex and same-sex civil marriage, different-sex and same-sex registered partnership, and different-sex and same-sex informal cohabitation. Each set of tables consists of seven tables. All tables aim to reflect the law as it stood early in 2004, but it is still an imperfect work in progress.

This comparative overview contains two types of tables: *comparative tables*, with the same questions as the corresponding national tables; and (only for the tables O, A, B and C) *levels tables*. The latter bring together the *levels of legal consequences* (LLC) per country; these levels are based on the numbers of points calculated in the corresponding national tables. The figures in the levels tables are also visualised as *pie charts*, in which the whole circle represents the LLC of different-sex marriage (set at 100%), while the green segment represents the LLC of informal cohabitation, the yellow segment the additional LLC of registered partnership, and the pink segment the additional LLC of marriage.

In the *levels tables* the countries are listed in an order that facilitates easy comparisons: first the two countries that have opened up marriage to same-sex couples (Netherlands and Belgium), then the third country (France) that has introduced registered partnership both for same-sex and for different-sex couples, then the other countries that have introduced registered partnership, with Germany being placed between France and the five Nordic countries (because the level of legal consequences of German registered partnership lies between the French and Nordic levels). The Nordic countries are put in the order in which they have introduced registered partnership, Denmark first and Finland last.

The country codes (iso 3166) used in the comparative tables are the following:

|       |                       |
|-------|-----------------------|
| BEL   | = Belgium             |
| DEU   | = Germany             |
| DNK   | = Denmark             |
| FIN   | = Finland             |
| FRA   | = France              |
| ICE   | = Iceland             |
| NLD   | = Netherlands         |
| NOR   | = Norway              |
| SWE   | = Sweden              |
| (ALL) | = all nine countries) |

<sup>1</sup> Dr. C. Waaldijk is a senior lecturer at the E.M. Meijers Institute of Legal Studies, Universiteit Leiden, the Netherlands ([www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk)). I am grateful to Wout Morra (law student/research-assistant) and Riekje Boumlak (secretary at the Meijers Institute) for the support and patience in helping to create this overview. Any corrections and suggestions are welcome at [c.waaldijk@law.leidenuniv.nl](mailto:c.waaldijk@law.leidenuniv.nl).

<sup>2</sup> I am equally grateful to the eight lawyers who did most of the work on the national tables: Olivier De Schutter (Belgium), Dirk Siegfried (Germany), Søren Baatrup (Denmark), Rainer Hiltunen (Finland), Daniel Borrillo (France), Hrefna Fridriksdóttir (Iceland), John Asland (Norway), Hans Ytterberg (Sweden). (The Netherlands was taken care of by myself.)

## Codes used in the tables

| Applicable answer  | Answer code in national tables | Points given for calculation of level of legal consequences | Type used for country code in comparative tables |
|--|--------------------------------|---|--|
| The legal consequence applies.   | Yes                            | 3 pt  | <b>BOLD</b>                                      |
| The legal consequence applies in a limited way or not in all circumstances, or it can be contracted out of, or courts can set it aside using some general legal principle, etc.    | Yes, but                       | 2 pt  | ORDINARY   |
| The legal consequence only applies in a very limited way or in very few circumstances, or it can be established by contract, or by courts using some general legal principle, etc. | No, but                        | 1 pt  | <i>(ITALICS IN BRACKETS)</i>                     |
| The legal consequence does not apply.  | No                             | 0 pt  | Country is not mentioned                         |
| No information was available on this point, or the legal position is unclear.  | Doubt                          | 1 pt  | <i>(ITALICS WITH QUESTION MARK IN BRACKETS)</i>  |
| The column is not applicable in the country, because this type of relationship is not legally recognised (yet).  | X                              | 0 pt  | Country is not mentioned                         |

Below you will find the following tables and pie charts:

|                                  |  |
|----------------------------------|--|
| Table O (Levels)                 | Parenting, material and other consequences together ('overall levels')   |
| Pie charts O                     | Idem   |
| Table A (Comparative)            | Parenting consequences   |
| Table A (Levels)                 | Idem   |
| Pie charts A                     | Idem   |
| Table B part one (Comparative)   | Material consequences in public law  |
| Table B part one (Levels)        | Idem   |
| Pie charts B part one            | Idem   |
| Table B part two (Comparative)   | Positive material consequences in private law  |
| Table B part two (Levels)        | Idem   |
| Pie charts B part two            | Idem   |
| Table B part three (Comparative) | Negative material consequences in public law   |
| Table B part three (Levels)      | Idem   |
| Pie charts B part three          | Idem   |
| Table C (Comparative)            | Other legal consequences   |
| Table C (Levels)                 | Idem   |
| Pie charts C                     | Idem   |
| Table D (Comparative)            | Types of discrimination by employers or service providers that are prohibited in anti-discrimination legislation |
| Table E (Comparative)            | Types of couples that qualify for starting a civil marriage or registered partnership in the country itself      |
| Table F (Comparative)            | Authority for starting a civil marriage or registered partnership  |
| Table G (Comparative)            | Means of ending a civil marriage or registered partnership   |

**Table O (Levels): Parenting, material and other consequences together**

This table adds up the totals of points given in the the levels tables on legal consequences (A – parenting consequences, B – material consequences, C – other consequences). Because of their specific nature, tables D, E, F and G have not been used in the adding up in this table.

Because a total of 33 legal consequences have been considered in these three tables, the maximum number of points in each cell of this table is 99. For each country the total number of points for legal consequences of different-sex marriage is equated with 100%.

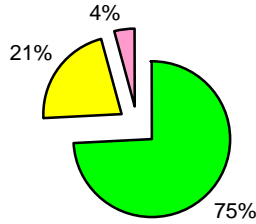
|             | Civil marriage |             | Registered partnership |             | Informal cohabitation |             |
|-------------|----------------|-------------|------------------------|-------------|-----------------------|-------------|
|             | Different-sex  | Same-sex    | Different-sex          | Same-sex    | Different-sex         | Same-sex    |
| Netherlands | 70 pt = 100%   | 67 pt = 96% | 67 pt = 96%            | 67 pt = 96% | 52 pt = 75%           | 51 pt = 73% |
| Belgium     | 76 pt = 100%   | 67 pt = 88% | 38 pt = 50%            | 36 pt = 48% | 31 pt = 41%           | 27 pt = 36% |
| France      | 76 pt = 100%   | 0 pt = 0%   | 48 pt = 63%            | 42 pt = 55% | 32 pt = 42%           | 26 pt = 34% |
| Germany     | 65 pt = 100%   | 0 pt = 0%   | 0 pt = 0%              | 44 pt = 68% | 15 pt = 23%           | 11 pt = 17% |
| Denmark     | 61 pt = 100%   | 0 pt = 0%   | 0 pt = 0%              | 51 pt = 84% | 32 pt = 52%           | 27 pt = 45% |
| Norway      | 71 pt = 100%   | 0 pt = 0%   | 0 pt = 0%              | 61 pt = 86% | 41 pt = 58%           | 34 pt = 48% |
| Sweden      | 64 pt = 100%   | 0 pt = 0%   | 0 pt = 0%              | 58 pt = 91% | 48 pt = 75%           | 43 pt = 68% |
| Iceland     | 71 pt = 100%   | 0 pt = 0%   | 0 pt = 0%              | 60 pt = 85% | 45 pt = 63%           | 16 pt = 23% |
| Finland     | 64 pt = 100%   | 0 pt = 0%   | 0 pt = 0%              | 56 pt = 87% | 36 pt = 56%           | 27 pt = 42% |

**Pie charts based on Table O: Parenting, material and other consequences together**

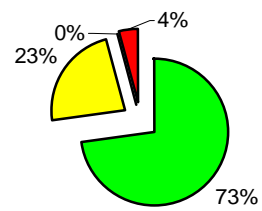
Used colour codes (LLC = level of legal consequences)

- Green = LLC of *informal cohabitation*
- Yellow = additional LLC of *registered partnership* (Green + Yellow = LLC of registered partnership)
- Pink = additional LLC of *civil marriage* (Green + Yellow + Pink = LLC of civil marriage)
- Red = LLC *not* available to same-sex partners of any status

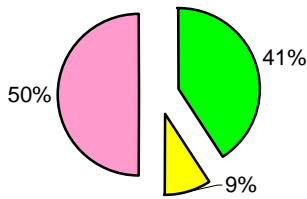
**Netherlands: different-sex**



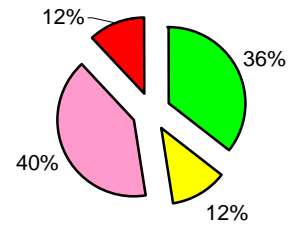
**Netherlands: same-sex**



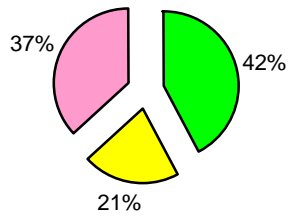
**Belgium: different-sex**



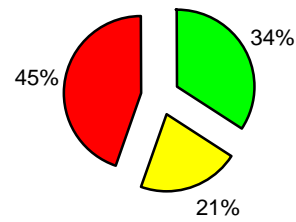
**Belgium: same-sex**



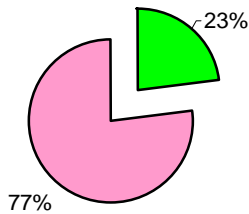
**France: different-sex**



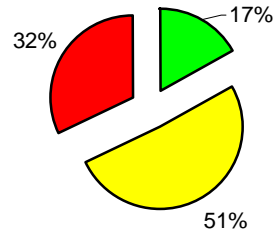
**France: same-sex**



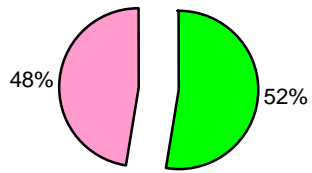
**Germany: different-sex**



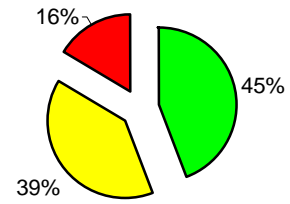
**Germany: same-sex**



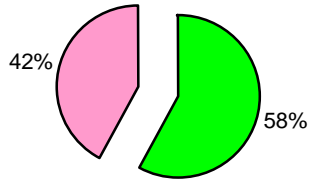
Denmark: different-sex



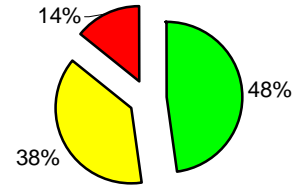
Denmark: same-sex



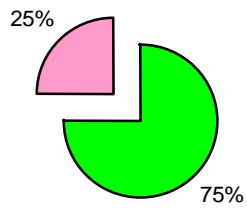
Norway: different-sex



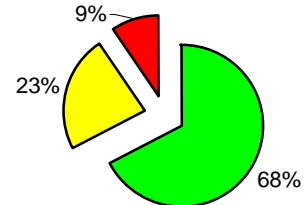
Norway: same-sex



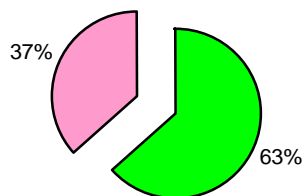
Sweden: different-sex



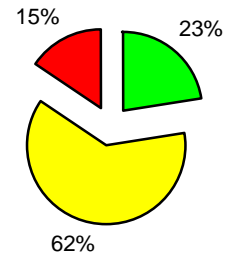
Sweden: same-sex



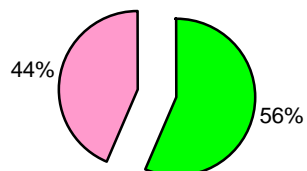
Iceland: different-sex



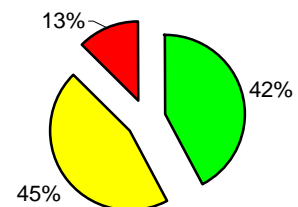
Iceland: same-sex



Finland: different-sex



Finland: same-sex





**Table A (Comparative): Parenting consequences**

|  | Civil marriage                                      |          | Registered partnership |   | Informal cohabitation  |   |
|--|---|----------|------------------------|---|--|---|
|  | Different-sex                                       | Same-sex | Different-sex          | Same-sex  | Different-sex  | Same-sex  |
| 1. When female partner gives birth, both partners automatically become legal parents   | ALL   | (NLD)    | (BEL), (FRA)<br>(NLD)  | (NLD)   | DNK<br>(BEL), (DEU)<br>(FIN), (FRA)<br>(ICE), (NLD)<br>(NOR),<br>(SWE) |   |
| 2. Medically assisted insemination is lawful for women in such a relationship  | ALL   | BEL, NLD | BEL, NLD<br>FRA        | BEL, FIN,<br>NLD<br>SWE<br>(DEU?)                             | BEL, DNK,<br>FIN, NLD,<br>SWE<br>FRA, ICE,<br>NOR<br>(DEU?)            | BEL, FIN,<br>NLD<br>SWE<br>(DEU?)                             |
| 3. When only one partner is the parent of a child, both partners can have parental authority or responsibilities during their relationship | DEU, FIN,<br>ICE, NLD<br>NOR<br>(DNK),<br>(SWE)     | NLD      | NLD                    | DEU, FIN,<br>ICE, NLD<br>NOR<br>(DNK),<br>(SWE)               | FIN, ICE,<br>NLD<br>NOR<br>(DNK),<br>(SWE)                             | FIN, NLD<br>NOR<br>(DNK),<br>(SWE)                            |
| 4. When only one partner is the parent of a child, the other partner can adopt it and thus become its second parent                        | ALL   | NLD      | NLD<br>(BEL)           | NLD, SWE<br>ICE, DNK,<br>NOR                                  | NLD<br>ICE<br>(BEL)  | NLD   |
| 5. Partners can jointly adopt a child  | ALL   | NLD      | NLD                    | SWE<br>NLD  | ICE, NLD   | NLD   |
| 6. One partner can individually adopt a child  | BEL, FRA,<br>NLD<br>(DEU), (ICE)<br>(NOR),<br>(SWE) | BEL, NLD | BEL, FRA,<br>NLD       | BEL, FIN,<br>NLD<br>DEU, FRA<br>(NOR),<br>(SWE)               | BEL, DNK,<br>FIN, FRA,<br>NLD<br>DEU, SWE<br>(ICE), (NOR)              | BEL, DNK,<br>FIN, NLD<br>DEU, FRA,<br>ICE, SWE<br>(NOR)       |
| 7. Partners can jointly foster a child   | ALL   | BEL, NLD | BEL, FRA,<br>NLD       | BEL, DNK,<br>FIN, ICE,<br>NLD, NOR,<br>SWE<br>(DEU)<br>(FRA?) | BEL, DNK,<br>FIN, FRA,<br>ICE, NLD,<br>NOR, SWE<br>(DEU)               | BEL, DNK,<br>FIN, ICE,<br>NLD, NOR,<br>SWE<br>(DEU)<br>(FRA?) |

**Table A (Levels): Parenting consequences**

The maximum number of points in each cell of this table (covering 7 legal consequences) is 21. For each country the total number of points for legal consequences of different-sex marriage is equated with 100%.

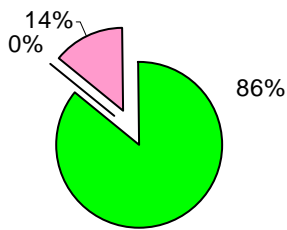
|             | Civil marriage |             | Registered partnership |             | Informal cohabitation |             |
|-------------|----------------|-------------|------------------------|-------------|-----------------------|-------------|
|             | Different-sex  | Same-sex    | Different-sex          | Same-sex    | Different-sex         | Same-sex    |
| Netherlands | 21 pt = 100%   | 18 pt = 86% | 18 pt = 86%            | 18 pt = 86% | 18 pt = 86%           | 17 pt = 81% |
| Belgium     | 18 pt = 100%   | 9 pt = 50%  | 11 pt = 61%            | 9 pt = 50%  | 11 pt = 61%           | 9 pt = 50%  |
| France      | 18 pt = 100%   | 0 pt = 0%   | 9 pt = 50%             | 3 pt = 17%  | 9 pt = 50%            | 3 pt = 17%  |
| Germany     | 19 pt = 100%   | 0 pt = 0%   | 0 pt = 0%              | 7 pt = 37%  | 5 pt = 26%            | 4 pt = 21%  |
| Denmark     | 16 pt = 100%   | 0 pt = 0%   | 0 pt = 0%              | 6 pt = 37%  | 12 pt = 75%           | 7 pt = 44%  |
| Norway      | 18 pt = 100%   | 0 pt = 0%   | 0 pt = 0%              | 8 pt = 44%  | 9 pt = 50%            | 6 pt = 33%  |
| Sweden      | 17 pt = 100%   | 0 pt = 0%   | 0 pt = 0%              | 13 pt = 76% | 10 pt = 59%           | 8 pt = 47%  |
| Iceland     | 19 pt = 100%   | 0 pt = 0%   | 0 pt = 0%              | 8 pt = 42%  | 14 pt = 74%           | 5 pt = 26%  |
| Finland     | 18 pt = 100%   | 0 pt = 0%   | 0 pt = 0%              | 12 pt = 67% | 13 pt = 72%           | 12 pt = 67% |

**Pie charts based on Table A: Parenting consequences**

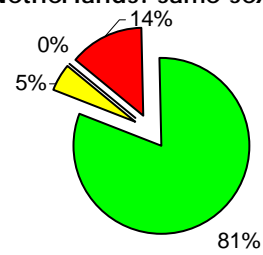
Used colour codes (LLC = level of legal consequences)

- Green = LLC of *informal cohabitation*
- Yellow = additional LLC of *registered partnership* (Green + Yellow = LLC of registered partnership)
- Pink = additional LLC of *civil marriage* (Green + Yellow + Pink = LLC of civil marriage)
- Red = LLC *not* available to same-sex partners of any status

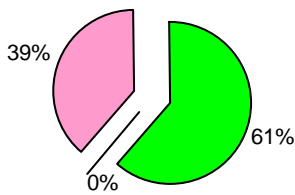
**Netherlands: different-sex**



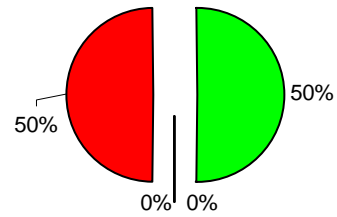
**Netherlands: same-sex**



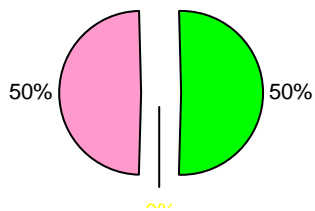
**Belgium: different-sex**



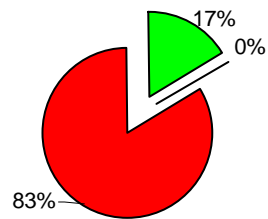
**Belgium: same-sex**



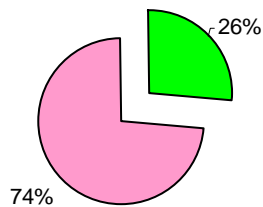
**France: different-sex**



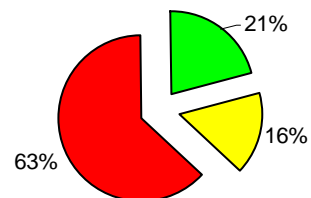
**France: same-sex**



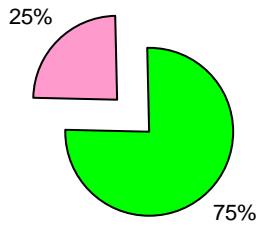
**Germany: different-sex**



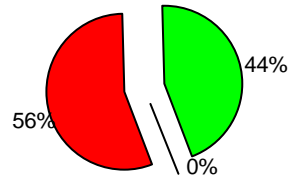
**Germany: same-sex**



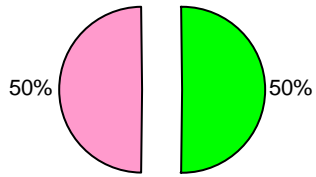
Denmark: different-sex



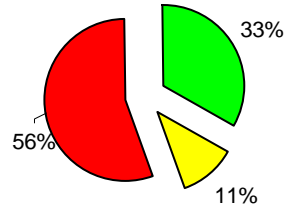
Denmark: same-sex



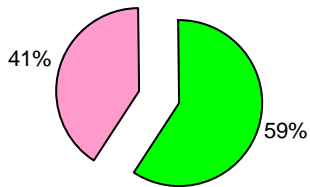
Norway: different-sex



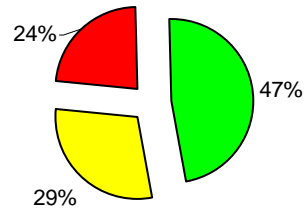
Norway: same-sex



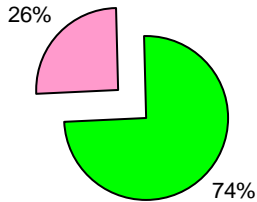
Sweden: different-sex



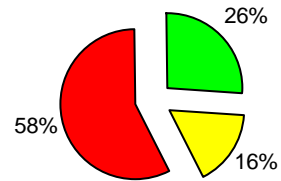
Sweden: same-sex



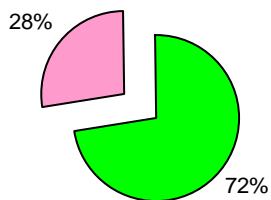
Iceland: different-sex



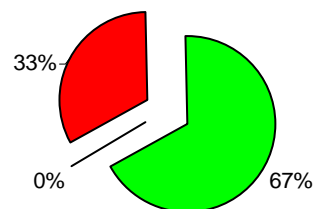
Iceland: same-sex



Finland: different-sex



Finland: same-sex



**Table B – part one (Comparative): Material consequences in private law**

|  | Civil marriage                             |          | Registered partnership |   | Informal cohabitation                 |  |
|--|--|----------|------------------------|---|---------------------------------------|--|
|  | Different-sex                              | Same-sex | Different-sex          | Same-sex                                    | Different-sex                         | Same-sex                                 |
| 1. Properties of each partner are considered joint property                        | BEL, DNK, FRA, NLD (DEU)                   | BEL, NLD | FRA, NLD (BEL)         | DNK, FRA, NLD (BEL)                         | (FRA), (NLD)                          | (FRA), (NLD)                             |
| 2. Debts of each partner are considered joint debt                                 | BEL, FRA, NLD (DEU), (FIN) (NOR), (SWE)    | BEL, NLD | FRA, NLD (BEL)         | FRA, NLD (BEL), (FIN) (NOR), (SWE)          | (FRA), (NLD), (SWE)                   | (FRA), (NLD), (SWE)                      |
| 3. In case of splitting up, statutory rules on alimony apply                       | BEL, FIN, FRA, ICE, NLD, NOR, SWE DNK, DEU | BEL, NLD | FRA, NLD (BEL)         | FIN, FRA, ICE, NLD, NOR, SWE DNK, DEU (BEL) | (BEL), (NLD)                          | (BEL), (NLD)                             |
| 4. In case of splitting up, statutory rules on redistribution of properties apply  | FIN, FRA, ICE, NOR DNK, DEU, SWE           |          | FRA                    | FIN, FRA, ICE, NOR DNK, DEU, SWE            | NOR, SWE (DEU), (FRA)                 | NOR, SWE (DEU), (FRA)                    |
| 5. In case of wrongful death of one partner, the other is entitled to compensation | BEL, DEU, FIN, FRA, ICE, NLD, SWE DNK, NOR | BEL, NLD | BEL, FRA, NLD          | BEL, DEU, FIN, FRA, ICE, NLD, SWE DNK, NOR  | BEL, FIN, FRA, NLD, SWE DNK, ICE, NOR | FIN, FRA, NLD, SWE DNK, NOR (ICE) (BEL?) |
| 6. When one partner dies without testament, the other is an inheritor              | BEL, DNK, DEU, FIN, FRA, ICE, NLD, NOR SWE | BEL, NLD | NLD                    | DNK, DEU, FIN, ICE, NLD, NOR SWE            | (SWE)                                 | (SWE)                                    |

**Table B – part one (Levels): Material consequences in private law**

The maximum number of points in each cell of this table (covering the 6 legal consequences of table B – part one) is 18. For each country the total number of points for legal consequences of different-sex marriage is equated with 100%.

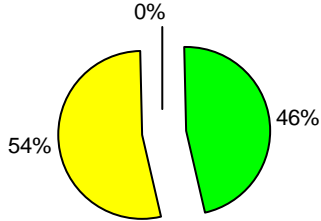
|             | Civil marriage |              | Registered partnership |              | Informal cohabitation |            |
|-------------|----------------|--------------|------------------------|--------------|-----------------------|------------|
|             | Different-sex  | Same-sex     | Different-sex          | Same-sex     | Different-sex         | Same-sex   |
| Netherlands | 13 pt = 100%   | 13 pt = 100% | 13 pt = 100%           | 13 pt = 100% | 6 pt = 46%            | 6 pt = 46% |
| Belgium     | 13 pt = 100%   | 13 pt = 100% | 6 pt = 46%             | 6 pt = 46%   | 4 pt = 31%            | 2 pt = 15% |
| France      | 16 pt = 100%   | 0 pt = 0%    | 13 pt = 81%            | 13 pt = 81%  | 6 pt = 38%            | 6 pt = 38% |
| Germany     | 12 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 10 pt = 83%  | 1 pt = 8%             | 1 pt = 8%  |
| Denmark     | 11 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 11 pt = 100% | 2 pt = 18%            | 2 pt = 18% |
| Norway      | 12 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 12 pt = 100% | 4 pt = 33%            | 4 pt = 33% |
| Sweden      | 11 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 11 pt = 100% | 7 pt = 64%            | 7 pt = 64% |
| Iceland     | 12 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 12 pt = 100% | 2 pt = 17%            | 1 pt = 8%  |
| Finland     | 13 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 13 pt = 100% | 3 pt = 23%            | 3 pt = 23% |

**Pie charts based on Table B – part one: Material consequences in private law**

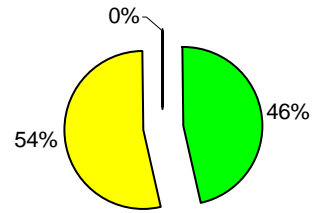
Used colour codes (LLC = level of legal consequences)

- Green = LLC of *informal cohabitation*
- Yellow = additional LLC of *registered partnership* (Green + Yellow = LLC of registered partnership)
- Pink = additional LLC of *civil marriage* (Green + Yellow + Pink = LLC of civil marriage)
- Red = LLC *not* available to same-sex partners of any status

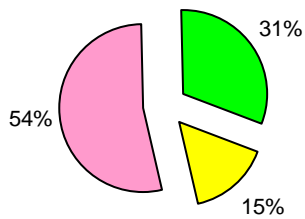
**Netherlands: different-sex**



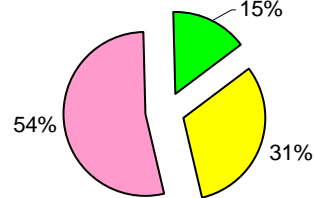
**Netherlands: same-sex**



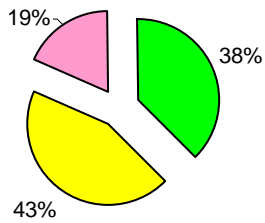
**Belgium: different-sex**



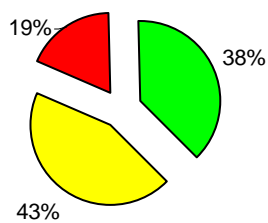
**Belgium: same-sex**



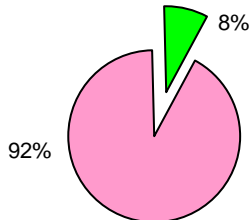
**France: different-sex**



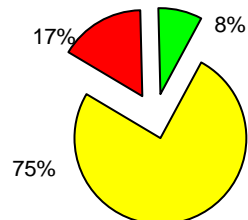
**France: same-sex**



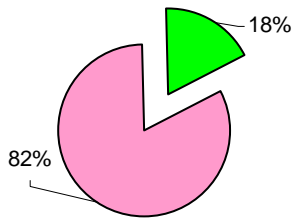
**Germany: different-sex**



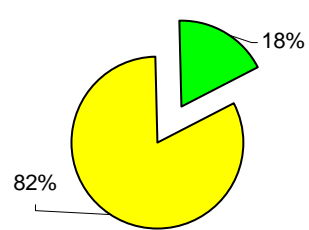
**Germany: same-sex**



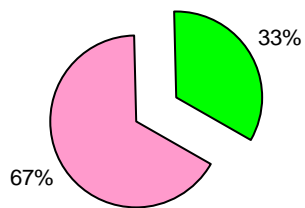
Denmark: different-sex



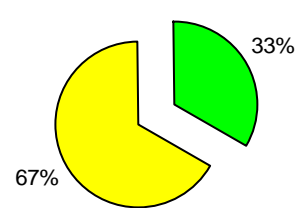
Denmark: same-sex



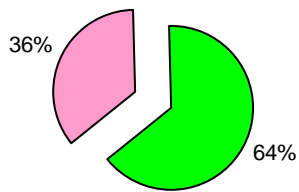
Norway: different-sex



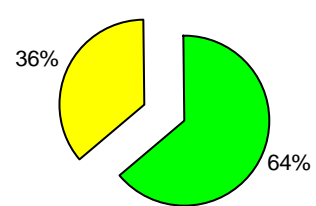
Norway: same-sex



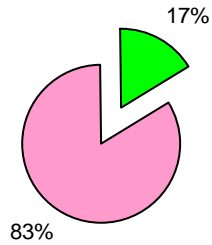
Sweden: different-sex



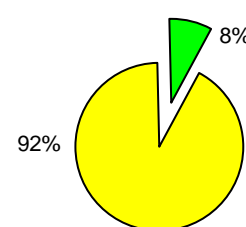
Sweden: same-sex



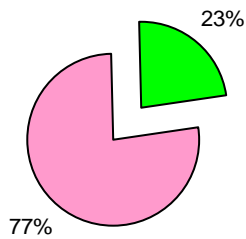
Iceland: different-sex



Iceland: same-sex



Finland: different-sex



Finland: same-sex

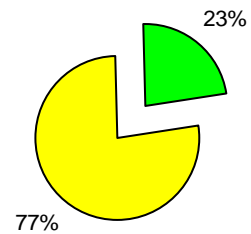




Table B – part two (Comparative): Positive material consequences in public law

|  | Civil marriage                                       |              | Registered partnership |  | Informal cohabitation                                 |   |
|--|--|--------------|------------------------|--|---|---|
|  | Different-sex  | Same-sex     | Different-sex          | Same-sex                                       | Different-sex   | Same-sex  |
| 1. Relationship can result in lower property tax   | ICE, NOR<br>(NLD)                                    | (NLD)        | (NLD)                  | ICE, NOR<br>(NLD)                              | ICE<br>(NLD)  | (NLD)   |
| 2. Relationship can result in lower income tax   | DEU, DNK,<br>FRA, ICE,<br>NOR<br>BEL<br>(FIN), (NLD) | BEL<br>(NLD) | FRA<br>(NLD)           | DNK, FRA,<br>ICE, NOR<br>DEU<br>(FIN), (NLD)   | ICE<br>(DEU),<br>(NLD)                                | (DEU),<br>(NLD)                                 |
| 3. Public health insurance of one partner covers medical costs of other partner                | DEU, FRA,<br>NOR<br>BEL, NLD<br>(ICE)                | BEL, NLD     | BEL, FRA,<br>NLD       | DEU, NOR<br>BEL, FRA,<br>NLD<br>(ICE)          | BEL, FRA,<br>NLD, NOR<br>(ICE)                        | BEL, FRA,<br>NLD<br>(NOR)                       |
| 4. Relationship can have positive impact on basic social security payment in case of no income | (NOR)  |              |                        | (NOR)  | (NOR)   | (NOR)   |
| 5. Relationship can have positive impact on statutory old age pension                          | BEL, ICE<br>(NLD)                                    | BEL<br>(NLD) | (NLD)                  | ICE<br>(NLD)                                   | (ICE), (NLD)  | (NLD)   |
| 6. When one partner dies, the other can get a statutory survivor's pension                     | DEU, FIN,<br>FRA,<br>NOR<br>BEL, SWE<br>(ICE), (NLD) | BEL<br>(NLD) | (NLD)                  | FIN, NOR<br>SWE<br>(ICE), (NLD)                | NOR, SWE<br>(ICE), (NLD)                              | SWE<br>(NLD), (NOR)                             |
| 7. Surviving partner pays no inheritance tax (or less than a mere friend would)                | ALL  | BEL, NLD     | NLD<br>BEL, FRA        | DNK, FIN,<br>ICE, NLD,<br>NOR, SWE<br>BEL, FRA | DNK, SWE<br>ICE, NLD,<br>NOR<br>(BEL), (FIN)<br>(FRA) | DNK, SWE<br>NLD<br>(BEL), (FRA)<br>(ICE), (NOR) |

**Table B – part two (Levels): Positive material consequences in public law**

The maximum number of points in each cell of this table (covering the 7 legal consequences of table B – part two) is 21. For each country the total number of points for legal consequences of different-sex marriage is equated with 100%.

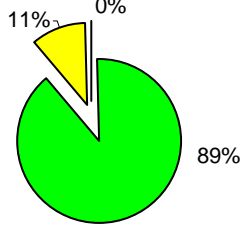
|             | Civil marriage |              | Registered partnership |              | Informal cohabitation |             |
|-------------|----------------|--------------|------------------------|--------------|-----------------------|-------------|
|             | Different-sex  | Same-sex     | Different-sex          | Same-sex     | Different-sex         | Same-sex    |
| Netherlands | 9 pt = 100%    | 9 pt = 100%  | 9 pt = 100%            | 9 pt = 100%  | 8 pt = 89%            | 8 pt = 89%  |
| Belgium     | 12 pt = 100%   | 12 pt = 100% | 4 pt = 33%             | 4 pt = 33%   | 3 pt = 25%            | 3 pt = 25%  |
| France      | 12 pt = 100%   | 0 pt = 0%    | 7 pt = 58%             | 7 pt = 58%   | 3 pt = 25%            | 3 pt = 25%  |
| Germany     | 12 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 5 pt = 41%   | 1 pt = 8%             | 1 pt = 8%   |
| Denmark     | 6 pt = 100%    | 0 pt = 0%    | 0 pt = 0%              | 6 pt = 100%  | 3 pt = 50%            | 3 pt = 50%  |
| Norway      | 16 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 16 pt = 100% | 7 pt = 44%            | 4 pt = 25%  |
| Sweden      | 5 pt = 100%    | 0 pt = 0%    | 0 pt = 0%              | 5 pt = 100%  | 5 pt = 100%           | 5 pt = 100% |
| Iceland     | 14 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 14 pt = 100% | 9 pt = 64%            | 1 pt = 7%   |
| Finland     | 7 pt = 100%    | 0 pt = 0%    | 0 pt = 0%              | 7 pt = 100%  | 1 pt = 14%            | 0 pt = 0%   |

**Pie charts based on Table B – part two: Positive material consequences in public law**

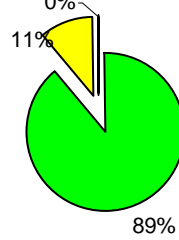
Used colour codes (LLC = level of legal consequences)

- Green = LLC of *informal cohabitation*
- Yellow = additional LLC of *registered partnership* (Green + Yellow = LLC of registered partnership)
- Pink = additional LLC of *civil marriage* (Green + Yellow + Pink = LLC of civil marriage)
- Red = LLC *not* available to same-sex partners of any status

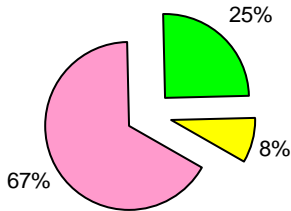
**Netherlands: different-sex**



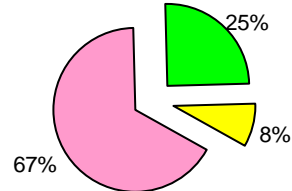
**Netherlands: same-sex**



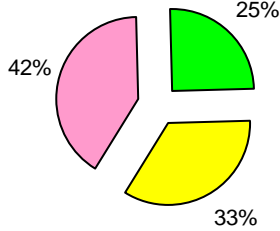
**Belgium: different-sex**



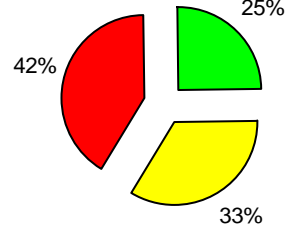
**Belgium: same-sex**



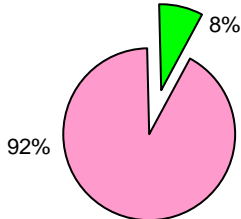
**France: different-sex**



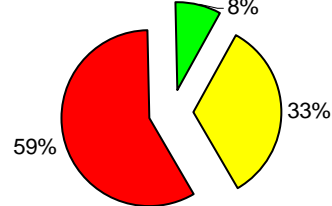
**France: same-sex**



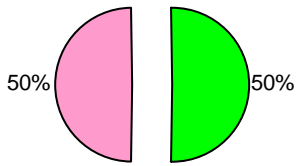
**Germany: different-sex**



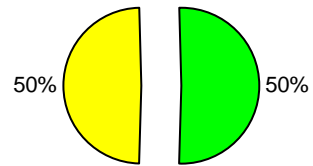
**Germany: same-sex**



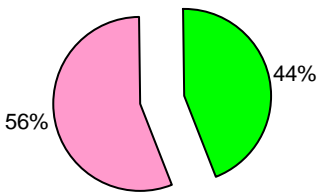
Denmark: different-sex



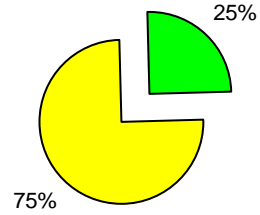
Denmark: same-sex



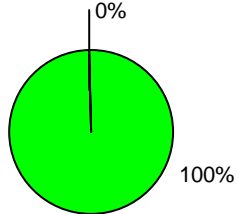
Norway: different-sex



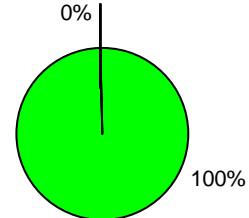
Norway: same-sex



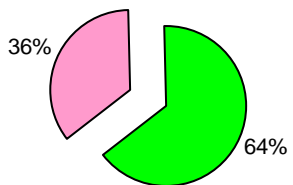
Sweden: different-sex



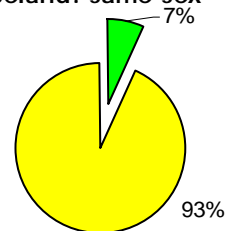
Sweden: same-sex



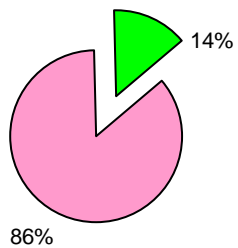
Iceland: different-sex



Iceland: same-sex



Finland: different-sex



Finland: same-sex

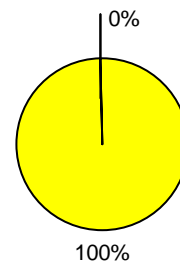


Table B – part three (Comparative): Negative material consequences in public law

|   | Civil marriage   |              | Registered partnership |  | Informal cohabitation                                      |   |
|---|--|--------------|------------------------|--|--|---|
|   | Different-sex  | Same-sex     | Different-sex          | Same-sex   | Different-sex  | Same-sex  |
| 8. Relationship can result in higher property tax   | SWE  |              |                        | SWE  | SWE  | (SWE)   |
| 9. Relationship can result in higher income tax   | BEL, FRA<br>(NLD)  | BEL<br>(NLD) | FRA<br>(NLD)           | FRA<br>(NLD)   |  |   |
| 10. Relationship can have negative impact on basic social security payment in case of no income | BEL, DEU,<br>DNK, FIN,<br>FRA, ICE,<br>NLD, SWE<br>(NOR) | BEL, NLD     | FRA, NLD<br>BEL        | DEU, DNK,<br>FIN, FRA,<br>ICE, NLD,<br>SWE<br>BEL<br>(NOR) | DEU, DNK,<br>FIN, FRA,<br>ICE, NLD,<br>SWE<br>BEL<br>(NOR) | DNK, FRA,<br>NLD, SWE<br>BEL<br>(NOR)<br>(DEU?) |
| 11. Relationship can have negative impact on statutory old age pension                          | DNK, FIN,<br>ICE, NLD,<br>NOR<br>(SWE)                   | NLD          | NLD                    | DNK, FIN,<br>ICE, NLD,<br>NOR<br>(SWE)                     | DNK, FIN,<br>ICE, NLD<br>NOR                               | DNK, NLD<br>(NOR)                               |

**Table B – part three (Levels): Negative material consequences in public law**

The maximum number of points in each cell of this table (covering the 4 legal consequences of table B – part two) is 12. For each country the total number of points for legal consequences of different-sex marriage is equated with 100%.

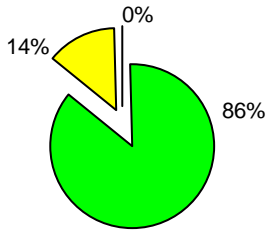
|             | Civil marriage |             | Registered partnership |             | Informal cohabitation |             |
|-------------|----------------|-------------|------------------------|-------------|-----------------------|-------------|
|             | Different-sex  | Same-sex    | Different-sex          | Same-sex    | Different-sex         | Same-sex    |
| Netherlands | 7 pt = 100%    | 7 pt = 100% | 7 pt = 100%            | 7 pt = 100% | 6 pt = 86%            | 6 pt = 86%  |
| Belgium     | 6 pt = 100%    | 6 pt = 100% | 2 pt = 33%             | 2 pt = 33%  | 2 pt = 33%            | 2 pt = 33%  |
| France      | 6 pt = 100%    | 0 pt = 0%   | 6 pt = 100%            | 6 pt = 100% | 3 pt = 50%            | 3 pt = 50%  |
| Germany     | 3 pt = 100%    | 0 pt = 0%   | 0 pt = 0%              | 3 pt = 100% | 3 pt = 100%           | 1 pt = 33%  |
| Denmark     | 6 pt = 100%    | 0 pt = 0%   | 0 pt = 0%              | 6 pt = 100% | 6 pt = 100%           | 6 pt = 100% |
| Norway      | 4 pt = 100%    | 0 pt = 0%   | 0 pt = 0%              | 4 pt = 100% | 3 pt = 75%            | 2 pt = 50%  |
| Sweden      | 7 pt = 100%    | 0 pt = 0%   | 0 pt = 0%              | 7 pt = 100% | 5 pt = 71%            | 4 pt = 57%  |
| Iceland     | 6 pt = 100%    | 0 pt = 0%   | 0 pt = 0%              | 6 pt = 100% | 6 pt = 100%           | 0 pt = 0%   |
| Finland     | 6 pt = 100%    | 0 pt = 0%   | 0 pt = 0%              | 6 pt = 100% | 6 pt = 100%           | 0 pt = 0%   |

**Pie charts based on Table B – part three: Negative material consequences in public law**

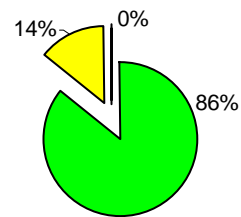
Used colour codes (LLC = level of legal consequences)

- Green = LLC of *informal cohabitation*
- Yellow = additional LLC of *registered partnership* (Green + Yellow = LLC of registered partnership)
- Pink = additional LLC of *civil marriage* (Green + Yellow + Pink = LLC of civil marriage)
- Red = LLC *not* available to same-sex partners of any status

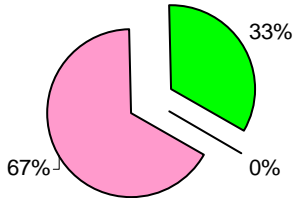
**Netherlands: different-sex**



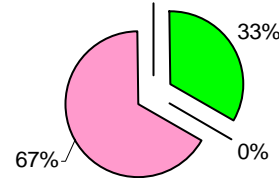
**Netherlands: same-sex**



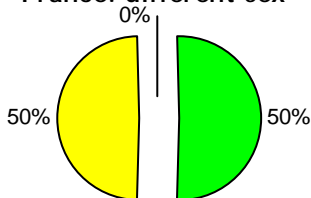
**Belgium: different-sex**



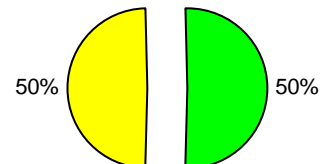
**Belgium: same-sex**



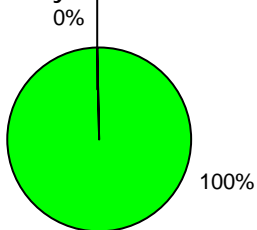
**France: different-sex**



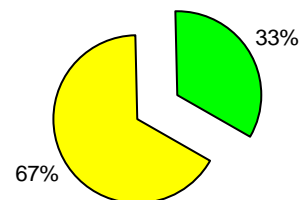
**France: same-sex**



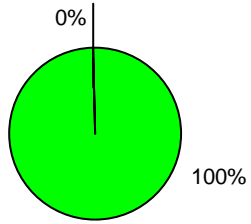
**Germany: different-sex**



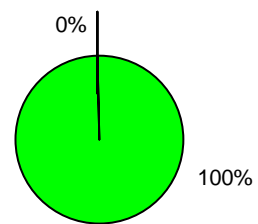
**Germany: same-sex**



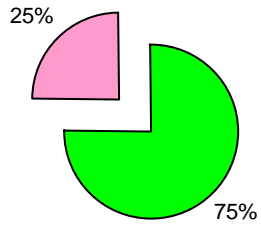
Denmark: different-sex



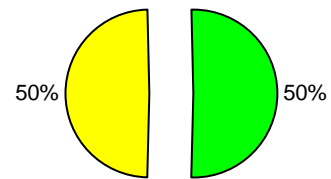
Denmark: same-sex



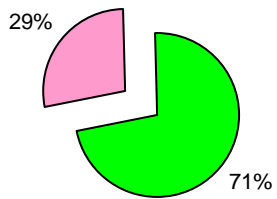
Norway: different-sex



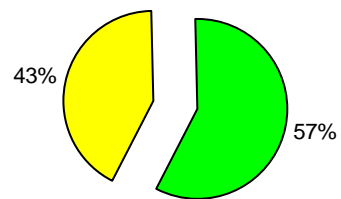
Norway: same-sex



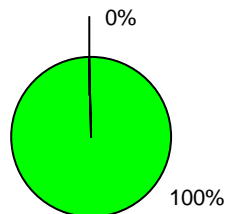
Sweden: different-sex



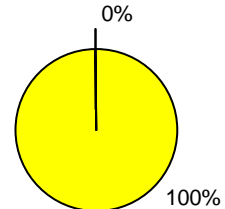
Sweden: same-sex



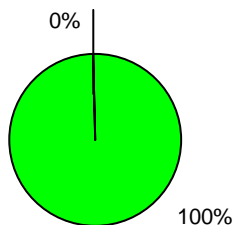
Iceland: different-sex



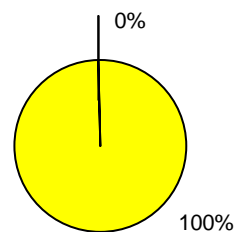
Iceland: same-sex



Finland: different-sex



Finland: same-sex





**Table C (Comparative): Other legal consequences**

|  | Civil marriage                                |          | Registered partnership |  | Informal cohabitation                       |                                       |
|--|---|----------|------------------------|--|---|---------------------------------------|
|  | Different-sex                                 | Same-sex | Different-sex          | Same-sex                                       | Different-sex                               | Same-sex                              |
| 1. One partner can have or use surname of the other  | BEL, DEU, DNK, FIN, FRA, NLD, NOR, SWE (ICE)  | BEL, NLD | NLD                    | DEU, DNK, NLD, NOR, SWE (FIN), (ICE)           | NOR (NLD)                                   | NOR (NLD)                             |
| 2. Foreign partner of resident national is entitled to a residence permit  | BEL, DEU, FRA, ICE, NOR, SWE DNK, FIN, NLD    | BEL NLD  | BEL FRA, NLD           | BEL, DEU, ICE, NOR, SWE DNK, FIN, FRA, NLD     | BEL, ICE, NOR, SWE FIN, NLD (FRA)           | BEL, NOR, SWE FIN, NLD (FRA)          |
| 3. Relationship makes it easier for foreign partner to obtain citizenship  | BEL, DEU, DNK, FIN, FRA, ICE, NLD, SWE        | BEL, NLD | NLD (FRA)              | DEU, DNK, FIN, ICE, NLD, SWE (FRA)             | SWE ICE, NLD (FRA)                          | SWE NLD (FRA)                         |
| 4. In case of criminal prosecution, one partner can refuse to testify against the other  | BEL, DEU, DNK, FIN, ICE, NLD, NOR, SWE (FRA)  | BEL, NLD | NLD                    | DEU, DNK, FIN, ICE, NLD, NOR, SWE              | DNK, SWE FIN, ICE, NOR (DEU)                | DNK, SWE FIN, ICE, NOR                |
| 5. When one partner uses violence against other partner, specific statutory protection applies   | BEL, FRA, NOR, SWE (DNK), (ICE)               | BEL      | BEL, FRA               | BEL, FRA, NOR, SWE (DNK), (ICE)                | FRA, NOR, SWE BEL (ICE)                     | FRA, NOR, SWE BEL (ICE)               |
| 6. In case of accident or illness of one partner, the other is considered as next of kin for medical purposes (even without power of attorney) | BEL, DNK, FIN, FRA, ICE, NLD, NOR, SWE (DEU?) | BEL, NLD | BEL, NLD (FRA)         | BEL, DNK, FIN, ICE, NLD, NOR, SWE (FRA) (DEU?) | BEL, FIN, NLD, NOR, SWE (FRA), (ICE) (DEU?) | BEL, FIN, NLD, NOR, SWE (FRA) (DEU?)  |
| 7. Organ donation from one living partner to the other is lawful   | BEL, DEU, DNK, FIN, ICE, NLD, NOR, SWE FRA    | BEL, NLD | BEL, NLD               | BEL, DEU, DNK, FIN, ICE, NLD, NOR (SWE?)       | BEL, DNK, FIN, ICE, NLD, NOR, SWE           | BEL, DNK, FIN, ICE, NLD, NOR (SWE?)   |
| 8. When one partner dies, the other can continue to rent the home  | ALL   | BEL, NLD | BEL, FRA, NLD          | ALL  | DEU, DNK, FIN, FRA, NLD, SWE ICE, NOR       | DEU, DNK, FRA, ICE, NLD, SWE FIN, NOR |
| 9. Partners have a duty to have sexual contact   | BEL, FRA                                      | BEL      | FRA                    | FRA  | FRA   | FRA                                   |

**Table C (Levels): Other legal consequences**

The maximum number of points in each cell of this table (covering 9 legal consequences) is 27. For each country the total number of points for legal consequences of different-sex marriage is equated with 100%.

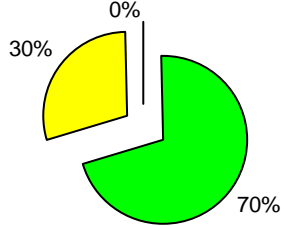
|             | Civil marriage |              | Registered partnership |              | Informal cohabitation |             |
|-------------|----------------|--------------|------------------------|--------------|-----------------------|-------------|
|             | Different-sex  | Same-sex     | Different-sex          | Same-sex     | Different-sex         | Same-sex    |
| Netherlands | 20 pt = 100%   | 20 pt = 100% | 20 pt = 100%           | 20 pt = 100% | 14 pt = 70%           | 14 pt = 70% |
| Belgium     | 27 pt = 100%   | 27 pt = 100% | 15 pt = 56%            | 15 pt = 56%  | 11 pt = 41%           | 11 pt = 41% |
| France      | 24 pt = 100%   | 0 pt = 0%    | 13 pt = 54%            | 13 pt = 54%  | 11 pt = 46%           | 11 pt = 46% |
| Germany     | 19 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 19 pt = 100% | 5 pt = 26%            | 4 pt = 21%  |
| Denmark     | 21 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 21 pt = 100% | 9 pt = 43%            | 9 pt = 43%  |
| Norway      | 21 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 21 pt = 100% | 18 pt = 86%           | 18 pt = 86% |
| Sweden      | 24 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 22 pt = 92%  | 21 pt = 87%           | 19 pt = 79% |
| Iceland     | 20 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 20 pt = 100% | 14 pt = 70%           | 9 pt = 45%  |
| Finland     | 20 pt = 100%   | 0 pt = 0%    | 0 pt = 0%              | 18 pt = 90%  | 13 pt = 65%           | 12 pt = 60% |

**Pie charts based on Table C: Other legal consequences**

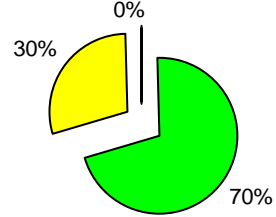
Used colour codes (LLC = level of legal consequences)

- Green = LLC of *informal cohabitation*
- Yellow = additional LLC of *registered partnership* (Green + Yellow = LLC of registered partnership)
- Pink = additional LLC of *civil marriage* (Green + Yellow + Pink = LLC of civil marriage)
- Red = LLC *not* available to same-sex partners of any status

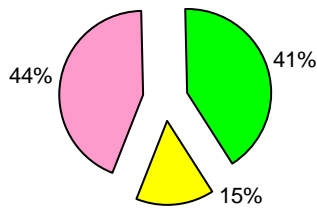
**Netherlands: different-sex**



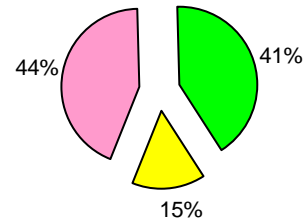
**Netherlands: same-sex**



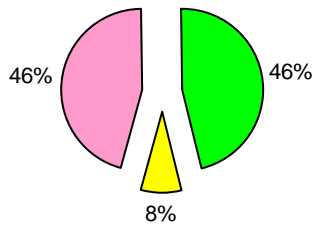
**Belgium: different-sex**



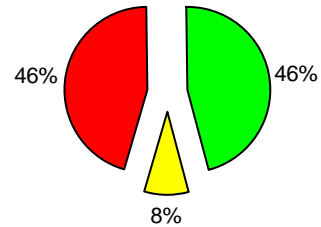
**Belgium: same-sex**



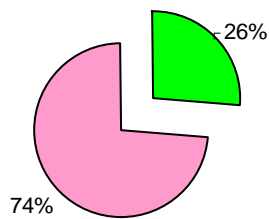
**France: different-sex**



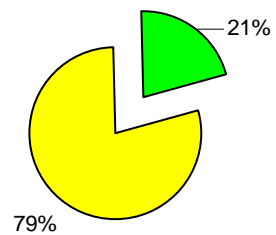
**France: same-sex**



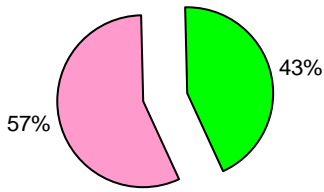
**Germany: different-sex**



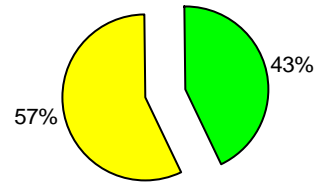
**Germany: same-sex**



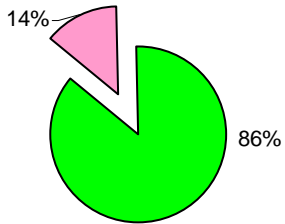
Denmark: different-sex



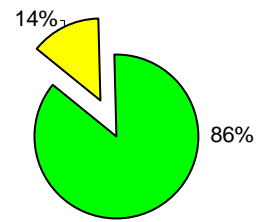
Denmark: same-sex



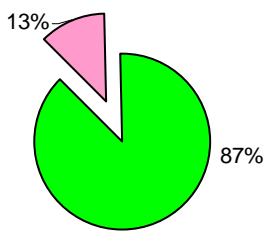
Norway: different-sex



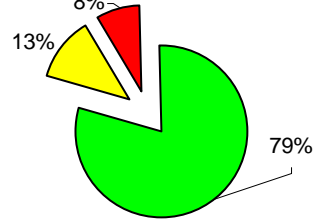
Norway: same-sex



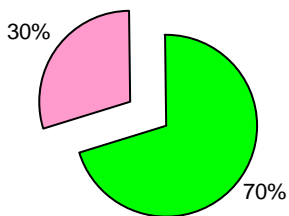
Sweden: different-sex



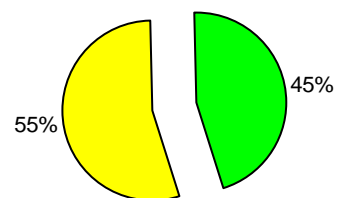
Sweden: same-sex



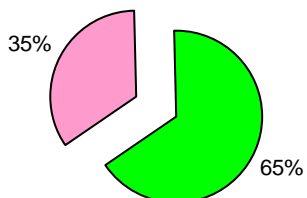
Iceland: different-sex



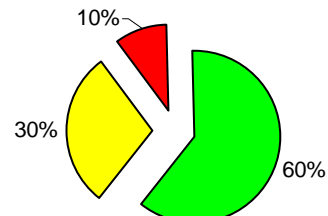
Iceland: same-sex



Finland: different-sex



Finland: same-sex



**Table D (Comparative): Types of discrimination by employers or service providers that are prohibited in anti-discrimination legislation**

|   | Between married spouses and registered partners   | Between married spouses and informal cohabitants | Between registered partners and informal cohabitants | Between same-sex and different-sex partners (with same status) |
|---|---|--|--|--|
| 1. With respect to housing                              | BEL, DNK, ICE, FIN, FRA, NLD, NOR, SWE            | BEL, FIN, FRA, NLD                               | BEL, FIN, FRA, NLD                                   | BEL, DNK, FIN, FRA, ICE, NLD, NOR, SWE                         |
| 2. With respect to life insurance                       | BEL, DNK, FIN, FRA, ICE, NLD, NOR, SWE            | BEL, FIN, FRA, NLD                               | BEL, FIN, FRA, NLD                                   | BEL, DNK, FIN, FRA, ICE, NLD, NOR, SWE                         |
| 3. With respect to health insurance                     | BEL, DNK, FIN, FRA, ICE, NLD, NOR, SWE            | BEL, FIN, FRA, NLD                               | BEL, FIN, FRA, NLD                                   | BEL, DNK, FIN, FRA, ICE, NLD, NOR, SWE                         |
| 4. With respect to medically assisted insemination      | BEL, NLD<br>FIN, FRA                              | BEL, NLD<br>FIN, FRA                             | BEL, NLD<br>FIN, FRA                                 | BEL, NLD<br>FIN  |
| 5. With respect to other services                       | BEL, DNK, FIN, FRA, ICE, NLD, NOR, SWE            | BEL, FIN, FRA, NLD                               | BEL, FIN, FRA, NLD                                   | BEL, DNK, FIN, FRA, ICE, NLD, NOR, SWE                         |
| 6. With respect to an occupational survivor's pension   | BEL, DNK, FIN, ICE, NOR, SWE<br>NLD<br>(FRA?)     | BEL<br>(SWE)<br>(FRA?)                           | BEL<br>(SWE)<br>(FRA?)                               | BEL, DNK, ICE, NLD, NOR, SWE<br>(FIN)<br>(DEU?),<br>(FRA?)     |
| 7. With respect to other spousal benefits in employment | BEL, DNK, FRA, ICE, NLD, NOR, SWE<br>FIN<br>(DEU) | BEL, FRA, NLD<br>(FIN), (SWE)                    | BEL, FRA, NLD<br>(FIN), (SWE)                        | BEL, DNK, FRA, ICE, NLD, NOR, SWE<br>FIN<br>(FRA)<br>(DEU?)    |

**Table E (Comparative): Types of couples that qualify for starting a civil marriage or registered partnership in the country itself**

|  |                            | Civil marriage   |          | Registered partnership |  |
|--|----------------------------|--|----------|------------------------|--|
|  |                            | Different-sex  | Same-sex | Different-sex          | Same-sex   |
| Resident national with:                      | 1. Resident national       | ALL  | BEL, NLD | BEL, FRA, NLD          | ALL  |
|  | 2. Non-resident national   | ALL  | BEL, NLD | NLD<br>FRA<br>(BEL?)   | DEU, DNK,<br>FIN, NLD,<br>NOR, SWE<br>FRA<br>(BEL?)          |
|  | 3. Resident foreigner      | ALL  | BEL, NLD | FRA, NLD<br>(BEL?)     | DEU, DNK,<br>FIN, FRA,<br>ICE, NLD,<br>NOR, SWE<br>(BEL?)    |
|  | 4. Non-resident foreigner  | BEL, DEU,<br>DNK, FIN,<br>FRA, NLD,<br>SWE<br>ICE, NOR | BEL, NLD | NLD<br>FRA<br>(BEL?)   | DEU, DNK,<br>FIN, NLD,<br>SWE<br>FRA, NOR<br>(BEL?)          |
| Non-resident national with:                  | 5. Non-resident national   | BEL, DEU,<br>DNK, FIN,<br>ICE, NLD,<br>NOR, SWE        | BEL, NLD | NLD<br>(BEL?)          | DEU, NLD<br>(BEL?)   |
|  | 6. Resident foreigner      | ALL  | BEL, NLD | NLD<br>FRA<br>(BEL?)   | DEU, NLD<br>FRA, NOR,<br>SWE<br>(DNK), (FIN)<br>(BEL?)       |
|  | 7. Non-resident foreigner  | BEL, DEU,<br>DNK, FIN,<br>NLD, SWE<br>ICE, NOR         | BEL, NLD | NLD<br>(BEL?)          | DEU, NLD<br>(BEL?)   |
| Resident foreigner with:                     | 8. Resident foreigner      | ALL  | BEL, NLD | FRA, NLD<br>(BEL?)     | DEU, FRA,<br>NLD<br>DNK, FIN,<br>NOR, SWE<br>(ICE)<br>(BEL?) |
|  | 9. Non-resident foreigner  | BEL, DEU,<br>DNK, FIN,<br>FRA, NLD,<br>SWE<br>ICE, NOR | BEL, NLD | NLD<br>FRA<br>(BEL?)   | DEU, NLD<br>FRA, NOR,<br>SWE<br>(FIN)<br>(BEL?)              |
| Non-resident foreigner with:                 | 10. Non-resident foreigner | BEL, DEU,<br>DNK, SWE<br>FIN, ICE,<br>NOR              | (BEL)    | (BEL?)                 | DEU<br>(BEL)   |
| 11. Sister or brother with sister or brother |                            | (SWE)  |          | BEL                    | BEL<br>(SWE)   |
| 12. Parent with child                        |                            | (SWE)  |          | BEL                    | BEL<br>(SWE)   |

**Table F (Comparative): Authority for starting a civil marriage or registered partnership**

|  | Civil marriage                |          | Registered partnership |                         |
|--|-------------------------------|----------|------------------------|-------------------------|
|  | Different-sex                 | Same-sex | Different-sex          | Same-sex                |
| 1. Registry of births, marriages and deaths      | BEL, DEU,<br>FIN, FRA,<br>NLD | BEL, NLD | BEL, NLD               | BEL, FIN,<br>NLD<br>DEU |
| 2. Local population administration               | DNK                           |          |                        | DNK<br>DEU              |
| 3. Church  | DNK, FIN,<br>ICE, NOR,<br>SWE |          |                        |                         |
| 4. Court   | FIN, SWE                      |          | FRA                    | FIN, FRA,<br>SWE        |
| 5. Private individual with special authorisation | SWE<br>(NOR)                  |          |                        | SWE<br>(NOR)            |
| 6. Public notary                                 | NOR                           |          |                        | NOR<br>DEU              |
| 7. Administrative magistrate                     | ICE                           |          |                        | ICE<br>DEU              |

**Table G (Comparative): Means of ending a civil marriage or registered partnership**

|  | Civil marriage                             |                     | Registered partnership |                                  |
|--|--|---------------------|------------------------|----------------------------------|
|  | Different-sex                              | Same-sex            | Different-sex          | Same-sex                         |
| 1. By court decision (after joint or individual petition)  | BEL, DEU, DNK, FIN, FRA, ICE, NLD, SWE NOR | BEL, NLD            | NLD                    | DEU, DNK, FIN, ICE, NLD, SWE NOR |
| 2. By mutually agreed contract (outside court)   | <i>(BEL), (NLD)</i>                        | <i>(BEL), (NLD)</i> | BEL, FRA, NLD          | BEL, FRA, NLD                    |
| 3. Unilaterally by one partner (outside court)   |  |                     | BEL, FRA               | BEL, FRA                         |
| 4. By conversion of marriage into registered partnership, or vice versa (outside court)  | NLD<br><i>(FIN)</i>                        | NLD                 | NLD                    | NLD<br><i>(FIN)</i>              |
| 5. By one registered partner marrying a third person (or by one married partner starting a registered partner with a third person) |  |                     | BEL, FRA               | BEL, FRA<br><i>(DEU?)</i>        |
| 6. By the registered partners marrying each other (or by the married partners starting a registered partnership together)          |  |                     | BEL, FRA,              | BEL, FRA                         |
| 7. By administrative decision (after joint or individual petition)   | DNK, NOR<br>ICE                            |                     |                        | DNK, NOR<br>ICE                  |





# Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners:

## Comparative analysis

by Kees Waaldijk <sup>1</sup>

### **Introduction**

This study introduces the concept of 'levels of legal consequences' (LLC) as a tool for a comparative analysis of civil marriage, registered partnership, and informal cohabitation (of different-sex or same-sex partners) in different countries.<sup>2</sup> For nine countries (Belgium, Denmark, Finland, France, Germany, Iceland, Netherlands, Norway and Sweden) 33 possible major legal consequences of these three types of relationship status were investigated.<sup>3</sup>

On the basis of the national chapters about the nine countries, and on the basis of the Comparative overview <sup>4</sup> of the national information found, this chapter aims to provide a first tentative comparative analysis of the data. First, the legal character of civil marriage, of registered partnership and of informal cohabitation will be discussed.<sup>5</sup> That discussion is largely based on the data that can be found in the *comparative tables* in the Comparative overview. Secondly, the attention will focus on the levels of legal consequences found for each type of relationship status. This will largely be based on the data as represented in the *levels tables* and *pie charts* in the Comparative overview. Thirdly the question will be addressed what this tells us about the legal exclusion (and inclusion) of same-sex couples. Finally some hypotheses will be formulated on how the different levels of legal consequences might explain differences in the frequency of partnership registration between the nine different countries.

### ***The legal character of civil marriage***

This study looks at civil marriage (and registered partnership and informal cohabitation) as a legal institution. This focus on the legal character of marriage means that other aspects (such as the social, the psychological, the religious, the economic, etc.) are left aside. As a legal institution marriage can be characterised as a form of partnership between two persons that is created by a formal act of registration, and that results in a number of legal rights and obligations (both between the partners, and between the partners and others including the state). The law sets *conditions* that must be met by the two persons who want to marry, gives rules for the *procedures* that need to be followed for starting or ending a marriage, and provides which legal *consequences* result from a marriage.

These characteristics of law and marriage can be found in each of the nine countries surveyed. In fact, the survey shows a great similarity between these nine countries, with respect to conditions and procedures as well as with respect to legal consequences of marriage.

In all countries but Belgium and the Netherlands, one of the conditions for marriage is that the partners are of different-sex. Only recently that condition has been dropped in Belgium (2003) and the Netherlands (2001). In all nine countries the condition applies that neither partner should be a sister, brother, parent or child of the other partner (see E11 and E12).<sup>6</sup> This condition also applies to same-sex marriage in Belgium and the

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<sup>2</sup> For a discussion of the different approaches in the legal literature on how to categorise and name different types of relationship status, see: Kees Waaldijk, 'Others may follow: the introduction of marriage (and quasi-marriage or semi-marriage) for same-sex couples in European countries', 38 *New England Law Review* 2004, p.569-589 (online available via [www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk)).

<sup>3</sup> See the introductory chapter in this report.

<sup>4</sup> The Comparative overview can be found on the pages before this Comparative analysis.

<sup>5</sup> It should be noted that, for the sake of clarity, the distinctions made in the national chapters and in the Comparative overview, between 'yes' and 'yes, but', and between 'no' and 'no, but' are largely ignored in this chapter in the paragraphs on the legal character of marriage, registered partnership, and cohabitation.

<sup>6</sup> All references like 'E11' here and below both refer to the corresponding items in the relevant national chapter(s), and to the corresponding items in the *comparative tables* in the Comparative overview.

Netherlands. As far as non-residents and foreigners are concerned, the nine countries are quite liberal. Only France requires that at least one of the partners is a resident (see E5, E7 and E10). In the Netherlands (and in Belgium for same-sex marriages) the requirement is that at least one of the partners is either a national or a resident (see E10). In all other countries (and in Belgium for different-sex marriages) citizenship or residency is not required.

Between the nine countries, the similarities with respect to procedures are also considerable. In each country a marriage can be started before a public authority (see F1, F2, F4, F6 and F7). However, in the five Nordic countries a different-sex civil marriage can also start in church (see F5), a possibility that is not available in Belgium, Germany, France and the Netherlands. In all nine countries a marriage can be ended in court (see G1). However, in Denmark, Iceland, the Netherlands and Norway a marriage can also end outside court (if certain conditions are met; see G4 and G7).

There are great similarities between the countries as regards the legal consequences that are attached to marriage.<sup>7</sup> Yet, of the 33 legal consequences taken into account in this survey, only twelve consequences apply to different-sex marriage in all countries,<sup>8</sup> and only one in no country at all (B10, positive impact of relationship on basic social security). One consequence applies in one country only, Sweden (B14, higher property tax); five other consequences apply in all but one of the countries.<sup>9</sup> As regards the applicability of legal consequences, the variation between the countries mostly relates to parental authority and individual adoption (A3 and A6), joint property and debts (B1, B2 and B4), tax (B7, B8 and B15), public health insurance and pensions (B9, B11, B12 and B17), protection against domestic violence (C5), and the duty to have sex (C9).

Both in Belgium and the Netherlands the consequences of same-sex marriage are almost the same as those of different-sex marriage; the main difference between the two countries is that joint and second-parent adoptions (A4 and A5) are not possible for same-sex spouses in Belgium. In neither of the two countries the female spouse of a mother automatically becomes a legal parent of the new born child (A1).

### *The legal character of registered partnership*

Forms of registered partnership have been introduced in all nine countries.<sup>10</sup> In all countries registered partnership is conceived as a legal institution *more or less analogous* to marriage.<sup>11</sup> Therefore it can also be characterised as a form of partnership between two persons that is created by a formal act of registration, and that results in a number of legal rights and obligations (both between the partners, and between the partners and others including the state).<sup>12</sup> It would be interesting to see to what degree non-legal aspects of registered partnership (such as the social, the psychological, the economic, the religious, etc.) are also analogous to marriage, but that falls outside the scope of this study.

Like marriage law, the legal rules on registered partnership focus on the *conditions* that must be met by two persons who want to register their partnership, on the *procedures* that need to be followed for starting or ending a registered partnership, and on the legal *consequences* that result from registered partnership. With respect to all three the survey shows large similarities between the nine countries, but less so than as regards marriage.

In all countries but France, Belgium and the Netherlands, one of the conditions for partnership registration is that the partners must be of the same sex. From the beginning (Denmark, 1989; Norway, 1993; Sweden, 1995; Iceland, 1996) registered partnership was aimed at couples who were not *allowed* to get married because of the different-sex requirement of marriage laws. The more recent legislation on registered partnership in the Netherlands (1998), France (1999) and Belgium (2000) was not only aimed at such same-sex couples, but also at different-sex couples who did not *want* to get married. Nevertheless, the two most recent registered partnership laws (Germany, 2001; Finland, 2002) again include the same-sex requirement. Like for marriage, in most countries also the condition applies that neither partner should be a sister, brother, parent or child of the other partner. The only exception is Belgium, where inter-generational and inter-sibling partnerships can also be registered (see E11 and E12).

As far as non-residents and foreigners are concerned, some countries are as liberal for registered partnership as for marriage (Germany and the Netherlands), but most countries (especially Iceland, Denmark, Finland and perhaps Belgium) are more restrictive (see E2 and E4 to E10). It should be noted that in several countries the conditions with respect to non-residents and/or foreigners have been made more liberal a few years after the introduction of registered partnership (Denmark, Norway, Sweden, the Netherlands, Iceland and perhaps Belgium).

<sup>7</sup> It should be remembered that for the purposes of this study it is assumed that married or registered partners are always living together, even when that is not required by law.

<sup>8</sup> The twelve items are: A1, A2, A4, A5, A7, B3, B5, B6, B13, C2, C7 and C8.

<sup>9</sup> The five items are: B16 and C3 not in Norway, C1 not in Iceland, C4 not in France, and C6 possibly not in Germany.

<sup>10</sup> That is in fact why these nine countries have been included in this study.

<sup>11</sup> More about that at the end of this paragraph.

<sup>12</sup> On the demarcation line between 'registered' partnership and 'informal' cohabitation, see also the introductions to the chapters on Belgium and Iceland.

In no country a registered partnership can be entered into in a church, not even in the five Nordic countries, where it is possible to marry in church (see F3). Registered partnerships can be started before a public authority (see F1, F2, F4, F6 and F7). In most countries partnership registration is done by the same public authorities as those competent to do marriages. However, in France partnership registration can only take place at a court (see F4), and in Germany it varies from *Land* to *Land* which authority is declared competent to do such registrations.

Similarly, in most countries the procedures for ending a marriage (see above) also apply to the ending of registered partnership. However, in Belgium and France different procedures apply (mutual contract, unilateral declaration, marriage between the registered partners, or marriage of one partner with someone else; see G2, G3, G5 and G6). In the Netherlands the ordinary procedures for a divorce in court also apply to registered partnership, but registered partners can also choose to dissolve their partnership by mutual contract (G2), or by converting it into a marriage (G4). It is interesting to note that the three countries with this wider range of non-judicial means of ending a registered partnership (Belgium, France and the Netherlands) are also the three that allow different-sex couples to register their partnership.

The legal consequences of registered partnership<sup>13</sup> are most like marriage in the Netherlands, where only the presumption of paternity (A1) does not apply, and in Sweden, where that presumption does not apply either, and where perhaps organ donation between living registered partners (C7) is not allowed. The consequences are also very similar in Finland, where only the presumption of paternity (A1), second-parent and joint adoption (A4 and A5), and the use of each other's surname (C1) are excluded,<sup>14</sup> and in Denmark, Iceland and Norway, where the presumption of paternity (A1), medically assisted insemination (A2), and joint adoption (A5) are excluded.<sup>15</sup>

The list of legal consequences of marriage that are not attached to registered partnership is a little longer in Germany: apart from paternity, insemination, and second-parent and joint adoption,<sup>16</sup> also fostering (A7) is normally not possible for registered partners; neither are they entitled to any statutory survivor's pension (B12), nor to a substantial reduction of inheritance tax (B13).

The lists in France and Belgium are even longer. Apart from most of the exceptions mentioned for the other countries,<sup>17</sup> registered partners in France are not entitled to intestate inheritance (B6), nor to citizenship (C3) and they are not automatically considered as next of kin for medical purposes (C6). In Belgium, apart from some of the above,<sup>18</sup> the list of exceptions also contains joint property, joint debt and alimony (B1, B2 and B3), positive impact on old age pension (B11), the right to refuse to testify against each other (C4), and the duty to have sex (C9); until the end of 2004, the list also comprises some positive and negative impact on income tax (B8 and B15).

The three countries that have made registered partnership also available to different-sex couples, make very few differences between same-sex and different-sex partnerships. The main differences can be found in France, where medically assisted insemination (A2) and perhaps fostering (A7) are only available to different-sex registered partners.

Above it was claimed that in all nine countries registered partnership is conceived as *more or less analogous* to marriage. We have now seen that as far as the *conditions* for getting into it, registered partnership is most analogous to marriage in Germany and the Netherlands, and least analogous in Belgium, Denmark, Finland and Iceland. As regards *procedures* for getting into it, however, registered partnership is completely analogous to marriage in Belgium and the Netherlands, and least analogous in France. As regards procedures for getting out of it, the analogy is complete in Germany and the Nordic countries, and the smallest in Belgium and France. Finally, as regards legal *consequences*, the analogy between marriage and registered partnership is largest in the Netherlands and the Nordic countries, and smallest in Belgium and France.

In most countries the analogy between marriage and registered partnership is further strengthened by the prohibition of discrimination. In all countries but Germany discrimination between married and registered partners is unlawful, both with respect to housing, insurance and most other services (D1, D2, D3 and D5), and with respect to most spousal benefits in employment (D6 and D7).<sup>19</sup> With respect to medically assisted insemination, discrimination between married and registered women is only unlawful in Finland, France, Belgium and the Netherlands (see D4).

<sup>13</sup> It should be remembered that for the purposes of this study it is assumed that registered partners are always living together, even when not legally required to do so. Therefore all the legal consequences of informal cohabitation are assumed to also apply to registered partnership.

<sup>14</sup> Please note that in Finland (and in Germany) individual adoption (A6) is available to registered partners, but not to married individuals.

<sup>15</sup> All this, without taking into account nuances such as between 'yes' and 'yes, but' (see above).

<sup>16</sup> See A1, A2, A4 and A5. See also the previous note.

<sup>17</sup> Especially A1, A4, A5, C1 and C7, and as far as only same-sex registered partners are concerned: A2 and perhaps A7.

<sup>18</sup> These are: A1, A4, A5, B6, C1 and C3.

<sup>19</sup> In all countries but Germany and France this prohibition of discrimination in employment extends to survivor's pensions (D6).

### *The legal character of informal cohabitation*

It can no longer be said that the law does not concern itself with informal cohabitants, certainly in the countries surveyed here. In all these countries the law provides that when certain *conditions* are met, a number of legal *consequences* follows from the fact that two persons are informally living together. In most countries there are no specific *procedures* that need to be followed before a cohabiting couple becomes legally recognised. The main exception is Iceland, where for the purposes of certain specific laws different-sex cohabiting partners have to register with the National Registry.<sup>20</sup> However, for the purposes of this study, such a 'registered cohabitation' is still being considered as a form of informal cohabitation. One reason for that is that the partnership is not *created* by the act of registration, but simply recognised. In the previous paragraph, the term 'registered partnership' has been reserved for forms of partnership that are 'created by a formal act of registration'. It should be noted that in several other countries, too, cohabiting couples may be under a duty to officially declare that they are in fact cohabiting, sharing a household, having a joint address, or something like that. Such a declaration does not make their partnership fall into the category of 'registered partnership'. On the other hand, the relationship status known in Belgium as *cohabitation légale* ('legal cohabitation') is created by the act of registration, and therefore (for the purposes of this study) it is not considered as a form of informal cohabitation.

The absence of specific *procedures* for getting into informal cohabitation, is also reflected in the absence of specific legislative rules on how to get out of it. For that reason, tables F and G do not deal with informal cohabitation.

Within the context of this study, it would have been impossible to give a full overview of the *conditions* that need to be fulfilled before the informal cohabitation of a couple is recognised in law. The main reason for this is, that such conditions not only vary from country to country, but also from law to law. Furthermore, quite often the extension of certain legal consequences to informal cohabitation has been realised by administrative practice or by case law; in such circumstances it is not always exactly clear what the conditions are. In the national chapters it can be seen that only rarely a written contract, or sexual contact, between the cohabitants is required, and only occasionally their having a child together. More frequent conditions are a certain length of the duration of the cohabitation, and obviously a joint address or household. For more details, see the national chapters.

The most fruitful angle under which to study the legal recognition of informal cohabitation is that of its legal consequences. In all nine countries some of the legal consequences of marriage have been attached to informal cohabitation, both of different-sex and of same-sex couples. With respect to these legal consequences, the differences between the countries are rather larger than with respect to the legal consequences of marriage or registered partnership.

The country with the least legal consequences attached to informal cohabitation, is Germany, where it can have a negative impact on basic social security (B16) and where the surviving cohabitant can continue to rent the home (C8), and where cohabitants are perhaps entitled to assisted insemination (A2) and are perhaps considered as next of kin for medical purposes (C6).<sup>21</sup> In Belgium and France the list of legal consequences of informal cohabitation is somewhat longer, and also includes, in both countries: fostering (A7), compensation for wrongful death (B5), partner cover in public health insurance (B9), and domestic violence protection (C5); and in Belgium also a residence permit for the foreign partner (C2), and in France also a duty to have sex (C9). The list is much longer in the five Nordic countries; of these Sweden, like the Netherlands, attaches the most consequences to informal cohabitation. In the latter two countries the main remaining differences between marriage and cohabitation relate to paternity (A1), alimony (B3), intestate inheritance (B6), and surname (C1); and in Sweden also to second-parent and joint adoption (A4 and A5), and in the Netherlands also to property and debts (B1 and B2) and to the right to refuse to testify against each other (C4).

In most countries informal cohabitation carries only slightly less legal consequences for same-sex cohabitants than for different-sex cohabitants, with most differences being in the parenting field. The exception is Iceland, where same-sex cohabitants are only entitled to fostering (A7), to organ donation (C7), and to continuation of the rent after the death of one partner (C8),<sup>22</sup> and different-sex cohabitants to much more.<sup>23</sup>

In general it is not unlawful for employers or service providers to distinguish between cohabitants on the one hand, and married or registered partners on the other. With respect to housing, insurance and other services, such discrimination is only prohibited in Finland, France, Belgium and the Netherlands (D1 to D5). And with respect to most spousal benefits in employment, only France, Belgium and the Netherlands prohibit such discrimination (D6 and D7).<sup>24</sup>

<sup>20</sup> See the introduction in the chapter on Iceland.

<sup>21</sup> Apart from the obvious possibility of individual adoption (A6).

<sup>22</sup> Apart from the obvious possibility of individual adoption (A6).

<sup>23</sup> See A2, A3, A4, A5, B5, B7, B8, B13, B16, B17, C2 and C3.

<sup>24</sup> Only in Belgium this prohibition of discrimination in employment extends to survivor's pensions (D6).

### *The levels of legal consequences of civil marriage*

Within the limitations of this study (only 33 of the hundreds of possible legal consequences of marriage have been taken into account; and for each only five different answer-codes were available), an effort was made to quantify the level of legal consequences of each type of relationship status. This quantification of course introduces a further limitation: all 33 legal consequences carry the same weight in the calculation, and the five answer-codes were crudely translated in zero points for the answer 'no', one point for the answer 'no, but' or 'doubt', two points for 'yes, but', and three points for 'yes'. With that in mind, some general conclusions may be drawn from the levels of legal consequences (LLC) as represented in the levels tables and pie charts in the Comparative overview.

The first striking result is that in no country the level of legal consequences of different-sex marriage comes near the possible maximum of  $3 \times 33 = 99$  points. It would seem that in Belgium and France different-sex marriage has the highest level of consequences, but in both it is only a level of 76 points (see comparative table O). In the other countries the level is even lower, with the lowest level for different-sex marriage in Denmark (61 points), Finland and Sweden (both 64 points) and Germany (65 points).<sup>25</sup> Clearly there is no European consensus as to the precise (level of) consequences that the law should attach to marriage. The differences between the countries are not so great with respect to parenting consequences and material consequences in private law (see tables A and B part one), but quite substantial with respect to material consequences in public law (table B parts two and three) and with respect to other consequences (table C).

To enable a good comparison between countries, the level of legal consequences in points have been translated into percentages, with the total number of points for different-sex marriage in each country being defined as 100%. This allows for the conclusion that in the Netherlands the level of legal consequences (hereafter: LLC) of same-sex marriage is 96%, while in Belgium it is only 88%.<sup>26</sup> In other words: 4% of the LLC of different-sex marriage in the Netherlands does not apply to same-sex marriage. This 4% is represented by a red segment in the pie chart for the Netherlands (see the *pie charts* based on table O).<sup>27</sup> For Belgium 12% of the LLC of different-sex marriage does not apply to same-sex marriage; therefore the red segment in the pie chart for Belgium is bigger.<sup>28</sup>

A look at the pie charts based on table A shows much bigger red segments, both for the Netherlands and for Belgium: this illustrates that the LLC not applicable to same-sex marriage is much larger with respect to parenting consequences, than with respect to material and other consequences. In fact, both in the Netherlands and in Belgium the LLC for same-sex marriage is 100% as far as material and other consequences are concerned (see the levels tables B and C).

Because same-sex marriage is not available in the other seven countries, there is no LLC for same-sex marriage in these countries (represented as an LLC of '0%' in the tables).

### *The levels of legal consequences of informal cohabitation*

The pie charts in the Comparative overview can best be read clockwise, that is starting with the green segment. The green segment represents the LLC of informal cohabitation.

In all pie charts there is a green segment, because in all nine countries informal cohabitation (by same-sex or different-sex partners) carries at least some legal consequences, and this not only in the field of material consequences (see the pie charts based on the three parts of table B) but also in the field of parenting (A) and in the field of 'other' consequences (C). This is an important finding. The nine countries for this study were selected because of their having introduced a form of registered partnership, not because they attach legal consequences to informal cohabitation, but they happen to do that, too. This will not be a mere coincidence: it seems reasonable to assume that countries that already recognise (same-sex) informal cohabitation are more likely to then also introduce (same-sex) registered partnership.

Nevertheless, the LLC for informal cohabitation varies very much from country to country, and from field to field (and, only in Iceland, also between same-sex and different-sex cohabitation, see above). For different-sex cohabitation the overall LLC (see the pie charts based on table O) is highest in the Netherlands and Sweden (75%),<sup>29</sup> followed by Iceland (63%), Norway, Finland and Denmark (around 55%), and then by Belgium and

<sup>25</sup> It can be observed that the number of points for marriage in these four countries is even lower than the number of points (67) for registered partnership in the Netherlands.

<sup>26</sup> This means that in Belgium the LLC of same-sex marriage is even lower than the LLC of registered partnership in the Netherlands and Sweden (see below).

<sup>27</sup> The few consequences of different-sex marriage in the Netherlands that do not or not fully apply to same-sex marriage are: paternity and joint (intercountry) adoption (see A1 and A5 in the chapter on the Netherlands).

<sup>28</sup> In Belgium the consequences that do not apply to same-sex marriage are: paternity, parental authority, second-parent adoption and joint adoption (see A1, A3, A4 and A5 in the chapter on Belgium).

<sup>29</sup> This means that in the Netherlands and Sweden the LLC of informal cohabitation is even higher than the LLC of registered partnership in Belgium, France and Germany (see below).

France (around 40%), and is lowest in Germany (23%). For same-sex cohabitation the overall LLC is generally only a little lower, except in Iceland, where the LLC for same-sex cohabitation (23%) is just over a third of the LLC for different-sex cohabitation. Only in Germany the LLC for same-sex cohabitation is even lower (17%).

As far as the LLC for informal cohabitation is concerned, the countries are especially dissimilar with respect to material consequences in public law (tax and social security): see the great variation among the pie charts based on parts two and three of table B. In some countries all, or almost all tax and social security consequences of marriage are also attached to cohabitation (the Netherlands, Denmark, Sweden), or at least to *different-sex* cohabitation (Iceland, Finland). The same is true for Germany and Norway, but only with respect to *negative* tax and social security consequences of different-sex cohabitation (see pie charts based on table B part three). In Belgium and France, in the field of tax and social security, the LLC of cohabitation is much smaller; which is also true for the LLC for same-sex cohabitation in Germany, Norway, Iceland and Finland.

All countries except Germany are quite generous in attaching parenting consequences to different-sex cohabitation (see the pie charts based on table A). In the Netherlands the LLC for this is as high as 86%, and for Belgium, France and the Nordic countries it is at least 50% (in Germany it is 26%). This reflects the development that the law of many European countries has undergone in response to the social fact that an increasing number of children is born outside marriage. With respect to parenting, the LLC for *same-sex* cohabitation is only a little lower in the Netherlands, Belgium, Sweden, Finland and Germany, while in other countries it is substantially lower (especially in France and Iceland). As far as same-sex cohabitation is concerned, the LLC for parenting is lowest in France, Germany and Iceland (around 20%), and highest in the Netherlands (81%) and Finland (67%).

In all nine countries, the level of legal consequences of informal cohabitation has been growing over time. In none of them there is one general law specifying the legal consequences of cohabitation. Even the general cohabitation laws in force in Sweden (since 2003, merging several earlier laws) and in Norway (since 1991), primarily only deal with redistribution of property after splitting up (B4) and with continuing the rent after the death of one partner (C8).

In the tables of some of the national chapters it is specified when legislation or courts have started to consider certain consequences of marriage also applicable to (different-sex and/or same-sex) cohabitation. So far it has not been possible to fully document this historical step-by-step process for all countries. The earliest given examples for same-sex cohabitation date back to the 1970s: partner immigration rights (C2) in Sweden and the Netherlands, and rent law rights (C8) in the Netherlands. Even earlier examples relate to different-sex cohabitation only: since 1965 such cohabitation could negatively impact basic social security payments in the Netherlands (B16), a disadvantage that was extended to same-sex cohabitation in 1987; and since 1970 the courts in France have started to award compensation to the surviving different-sex partner in cases of wrongful death (B5), an advantage that was extended to same-sex cohabitants in 1995. It should be noted that in France most legal consequences of cohabitation at first only applied to different-sex cohabitation. Only the law introducing registered partnership in 1999 extended most of these consequences to same-sex cohabitation. The earliest given examples from Belgium relate to compensation in case of wrongful death (B5, since 1989 for different-sex cohabitants), to partner cover in public health insurance (B9, since 1996), and to immigration (C2, since 1997). The earliest given example from Norway also relates to immigration (C2, since 1990). In Germany rent law rights (C8) were recognised for different-sex cohabitants in 1993, and for same-sex cohabitants in 2001 (simultaneously with the introduction of same-sex registered partnership).

After the first legal recognition of informal cohabitation, the LLC of cohabitation has gradually risen in most of the nine countries; it could be expected to rise further, even after the introduction of registered partnership.

### *The levels of legal consequences of registered partnership*

In the pie charts in the Comparative overview, the LLC of registered partnership is represented by the green and yellow segments together.<sup>30</sup> This LLC is highest in the Netherlands (96%) and Sweden (91%), followed by Finland, Norway, Iceland and Denmark (around 85%), and least for Germany (68%), France (around 60%) and Belgium (around 50%); see table O. The LLC of registered partnership in the Netherlands and Sweden is even higher than the LLC of same-sex marriage in Belgium (88%). And the LLC of registered partnership in Germany, France and Belgium is even lower than the LLC of informal cohabitation in the Netherlands (around 75%) and Sweden (around 70%).

The LLC of registered partnership in the Netherlands and in the five Nordic countries is so high because registered partnership results in almost all the consequences of marriage; therefore, registered partnership in these countries can be characterised as '*quasi-marriage*'.<sup>31</sup> The lower LLC of registered partnership in Germany, France and Belgium signals that in these countries registered partnership only has a limited selection

<sup>30</sup> It should be remembered that for the purposes of this study it is assumed that registered partners are always living together, even when not legally required to do so. Therefore all the legal consequences of informal cohabitation are assumed to also apply to registered partnership.

<sup>31</sup> See note 2, above.

of the consequences of marriage; therefore registered partnership in these three countries can be characterised as '*semi-marriage*'.<sup>32</sup> It should be noted however, that in Germany and France there are proposals and plans to increase the LLC of registered partnership. Similarly, in several other countries at first the LLC of registered partnership was a little lower than it is now. In these countries adoption by same-sex registered partners (A4 and/or A5) only became possible after the enactment of subsequent legislation (Denmark in 1999, Iceland in 2000, the Netherlands in 2001, Norway in 2002, Sweden in 2003); in the Netherlands further subsequent legislation in 2002 provided that registered partners automatically acquire joint authority over children born during their registered partnership (A1 and A3). Quite possibly, the LLC of registered partnership could still rise further in most countries, even after the opening up of marriage to same-sex couples.

The 'quasi-marriage' character of registered partnership in the Nordic countries and the Netherlands becomes even more apparent in the LLC of their registered partnership in the field of *material* consequences (see tables B). With respect to these material consequences the LLC of registered partnership is the same as the LLC of marriage: 100%. In Belgium, France and Germany, on the other hand, the LLC of registered partnership in the field of material consequences is lower; this is in particular the case with respect to *positive* material consequences in *public* law (see table B - part two): 33% in Belgium, 41% in Germany, and 58% in France. Only with respect to the *negative* material consequences in public law, in Germany and France, is the LLC of registered partnership the same as that of marriage (100%).

As seen above, the main differences between registered partnership and marriage tend to relate to *parenting* consequences. This can also be seen in the LLC in the field of parenting (see table A). In this field the LLC of registered partnership is a little lower in the Netherlands (86%), Sweden (76%) and Finland (67%), and much lower in Belgium (around 55%), in Norway, Iceland, Germany and Denmark (around 40%),<sup>33</sup> and in France (17% for same-sex, 50% for different-sex).

In the field of *other* legal consequences (see table C), the LLC of registered partnership is 100% in the Netherlands, Denmark, Norway, Iceland, and also in Germany (an indication that in Germany registered partnership is already almost a 'quasi-marriage'). The LLC in this field is a little lower (around 90%) in Finland, because registered partners are not allowed to use each other's surname (C1), and in Sweden, because it is not certain that organ donation between male same-sex partners is allowed (C7). In Belgium and France the LLC in this field is much lower (around 55%).

Only in Belgium, France and the Netherlands registered partnership is open to different-sex couples. Of these countries, the Netherlands has the same LLC (96%) for different-sex and same-sex registered partnership. In Belgium and France the LLC is a little higher for different-sex registered partnership than for same-sex registered partnership (see table O); this is completely due to differences in the field of parenting (see table A).

### *The exclusion (and gradual inclusion) of same-sex couples*

Traditionally, same-sex couples have been excluded from marriage, and from the rights and obligations that result from marriage. This study illustrates that as yet this exclusion has not been completely abolished in any European country, although all nine countries have attached a gradually growing number of the legal consequences of marriage to the informal cohabitation of same-sex partners, and all have introduced a form of registered partnership more or less analogous to marriage, while two countries (the Netherlands and Belgium) have also lifted the heterosexual exclusivity of marriage.

The continuing exclusion of same-sex partners from the legal consequences of marriage is represented by the red segments in the pie charts of the Comparative overview. The overall level of legal consequences from which same-sex couples are still excluded (see pie charts based on table O) is highest in France (45%), followed by Germany (32%), much lower in Denmark, Iceland, Norway, Finland and Belgium (around 15%), and lowest in Sweden (9%) and the Netherlands (4%). In the field of *parenting* (see pie charts based on table A) the ranking is similar, but the exclusion considerably higher, ranging from 83% in France and 63% in Germany, via around 55% in Iceland, Denmark, Norway and Belgium, to 33% in Finland, 24% in Sweden and 14% in the Netherlands. Even in the field of *material* consequences, same-sex partners are still excluded, but only in Germany and France (see pie charts based on table B, parts one and two). Same-sex partners are also still excluded in the field of *other legal consequences*, but only in France, and a little in Finland and Sweden (see pie charts based on table C).

What are the main rights that (married) different-sex couples have but from which same-sex couples are excluded (whether they are married, registered as partners, or just cohabiting)?

In all countries same-sex partners are excluded from automatically both becoming the legal parents of the child born to one of them (A1, a situation that only applies to lesbian couples). In France, Denmark, Iceland, Norway and perhaps Germany women in lesbian relationships are also excluded from medically assisted

<sup>32</sup> Idem.

<sup>33</sup> In Denmark the parenting LLC of registered partnership, exceptionally, is lower than that of informal cohabitation. This is so because an informal cohabitant can individually adopt a child, while a registered partner cannot (see A6).



insemination (A2). In all countries but Sweden and the Netherlands, same-sex partners are excluded from joint adoption (A5), and in all but Sweden from inter-country joint adoption (in theory one of the easiest ways for gay men to get children). In Belgium, France, Germany and Finland same-sex partners are also excluded from second-parent adoption (A4), and in Belgium and France also from any possibility of acquiring joint authority/responsibility for a child of one of them (A3 and A4). Individual adoption by a person in a same-sex relationship (at least in theory, and only when certain strict conditions are met) is not excluded in any of the nine countries (A6); the same probably applies to the possibility of same-sex couples becoming foster-parents (A7).

In France and Germany same-sex partners are excluded from statutory survivor's pensions (B12), and they have to pay a far higher inheritance tax than married different-sex partners (B13). In Finland and France same-sex partners cannot use each other's surnames (C1). In France the same-sex partner of a French citizen is not entitled to French citizenship (C3), for medical purposes same-sex partners are not considered as each other's next of kin (C6), they are not allowed to donate organs to each other (C7), and without a testament one same-sex partner cannot inherit from the other (B6).

The exclusion of same-sex couples does not only relate to the legal consequences of marriage, but also to *status*, and to procedural/ceremonial aspects of status. The status of being married is not (yet) available to same-sex couples in France, Germany and the five Nordic countries. The lower ranking of the status of being registered as partners is not only underlined by the lesser level of legal consequences attached to registered partnership, but also by the fact that in France, and in several *Länder* of Germany, the Registry of births, marriage and deaths has not been made competent to perform a partnership registration (see table F).<sup>34</sup> It could be argued that the same follows from the fact that in the Nordic countries churches have not been made competent to perform partnership registrations,<sup>35</sup> and from the fact that in France (and Belgium) a registered partnership can be dissolved unilaterally by one of the partners (G3).

Furthermore, it is not only through legislation that same-sex partners have been excluded; employers and service providers also discriminate against them. Such social discrimination between same-sex and different-sex partners of identical status, and between married and registered partners, is now prohibited in all countries with the exception of Germany (see table D). For the time being this underlines the lower ranking in the law of Germany of the status of being registered as partners, and indeed of same-sex partners in general. In the other eight countries the enactment of anti-discrimination legislation covering sexual orientation (and civil status) can be seen as one of the necessary steps in the process of abolishing the exclusion of same-sex partners. The first country to do so was Norway (1981), followed by France (1985, but explicitly only since 2002), Denmark and Sweden (both in 1987), the Netherlands (1992), Finland (1995), Iceland (1996) and Belgium (2003). Most countries have elaborated their anti-discrimination further in subsequent legislation. An earlier step in the same development in all nine countries has been the elimination of different age limits and other anti-homosexual discrimination from their criminal law. The first country to complete those changes in its Penal Code was the Netherlands (1971), followed by Norway (1972), Denmark (1976), Sweden (1978), France (1982), Belgium (1985), Iceland (1992), Germany (1994) and Finland (1998).<sup>36</sup>

This study documents the stages by which the nine European countries have taken steps to reduce the exclusion of same-sex couples in family law and in legal fields related to family law (such as social security, tax law, immigration, etc.). For three countries the first given example of a legal consequence of marriage being made available to (cohabiting) same-sex partners relates to residence permits (C2): the Netherlands (1975), Sweden (1970s) and Norway (1990), which also is among the first examples in Belgium (1997). The earliest example from Denmark (1986) relates to inheritance tax (B13), which also is among the first examples in the Netherlands (1981). The earliest examples from France (1993) and Belgium (1996) relate to health insurance (B9). The first given example from Germany (2001) concerns rent law (C8), which is also among the first examples in the Netherlands (1979), Sweden (1988) and Norway (1991). See the national chapters for more information about these first steps on the road to recognising cohabiting same-sex partners. As was pointed out above, in several countries many more steps have been taken on that road.

From 1989 several countries have also taken another road to reduce the exclusion of same-sex partners: the introduction of some form of registered partnership. Denmark was the first to do so in 1989, Norway followed in 1993, Sweden in 1995, Iceland in 1996, the Netherlands in 1998, France in 1999, Belgium in 2000, Germany in 2001 and Finland in 2002.

And from 2001 a third road was taken: the opening up of marriage to same-sex couples, first in the Netherlands (2001) and then in Belgium (2003). And while the introduction of registered partnership did not mean the abandonment of the instrument of attaching legal consequences to informal cohabitation, the opening up of marriage has not meant that the new institution of registered partnership was abandoned.

<sup>34</sup> See Daniel Borrillo, 'Pluralisme conjugal ou hiérarchie des sexualités: la reconnaissance juridique des couples homosexuels dans l'Union Européenne', *McGill Law Journal*, vol. 46, 2001, p. 877-922.

<sup>35</sup> In the five Nordic countries (but not in France, Belgium, the Netherlands and Germany) it is still possible to start a civil marriage in church (F3).

<sup>36</sup> See the appendix to Kees Waaldijk, 'Taking same-sex partnerships seriously: European experiences as British perspectives', *International Family Law*, 2003, p. 84-95 (online available at [www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk)).

It seems likely that other countries will follow the Netherlands and Belgium in opening up marriage (in fact, Sweden and Spain are already preparing to do so, as is Canada), that more countries will introduce registered partnership (in fact, it has already been introduced in most autonomous regions of Spain, while in Luxembourg registered partnership becomes possible in November 2004, and in Switzerland and the United Kingdom the legislation is almost ready; and more countries are preparing to legislate), and that many countries will start or continue to attach (more) legal consequences to the informal cohabitation of same-sex couples (as Portugal and Hungary have already done).

The developments in the nine countries so far have been summarised in the following table.

Overview of stages of legal recognition of same-sex partners

|   | 1970-1974             | 1975-1979             | 1980-1984 | 1985-1989                   | 1990-1994          | 1995-1999                                  | 2000-2004                     |
|---|-----------------------|-----------------------|-----------|-----------------------------|--------------------|--|-------------------------------|
| Completion of decriminalisation of homosexuality      | Netherlands<br>Norway | Denmark<br>Sweden     | France    | Belgium                     | Iceland<br>Germany | Finland                                    |                               |
| Legislation against sexual orientation discrimination |                       |                       | Norway    | France<br>Denmark<br>Sweden | Netherlands        | Finland<br>Iceland                         | Belgium                       |
| First recognition of same-sex cohabitation            |                       | Netherlands<br>Sweden |           | Denmark                     | Norway<br>France   | Belgium<br>(Finland?)<br>(Iceland?)        | Germany                       |
| Introduction of registered partnership                |                       |                       |           | Denmark                     | Norway             | Sweden<br>Iceland<br>Netherlands<br>France | Belgium<br>Germany<br>Finland |
| Opening up of marriage                                |                       |                       |           |                             |                    |  | Netherlands<br>Belgium        |

**Explaining the frequency of partnership registration**

One of the aims of this study has been to make it possible to assess whether the different frequencies of partnership registration in the different countries can be explained by the different levels of legal consequences of registered partnership. It is not (yet) the intention to make that assessment; for that purpose reliable statistical data about registration frequencies from all countries would be necessary, plus the close cooperation of statisticians, demographers, sociologists and lawyers. That will have to wait until a later stage. For now, this study tries to provide a reliable and quantified indication of the levels of legal consequences attached to marriage, cohabitation and registered partnership.

There are various problems that make it difficult to use the calculated levels of legal consequences as explanations for different frequencies of partnership registration. In the first place, it seems probable that legal consequences are at most *one* of the factors influencing people in their decisions whether or not to register their partnership. Other factors (social, psychological, religious, etc.) will also play a role, perhaps a bigger role.<sup>37</sup> It also seems probable that many people are not fully and accurately aware of the legal consequences that are attached to registered partnership (and to other relationship statuses).<sup>38</sup> Their decisions may thus be guided by misconceptions about what the legal consequences are. And apart from the legal consequences there may well be other legal factors influencing the frequency of partnership registration. For example, certain couples (foreigners, non-residents) may be excluded from partnership registration in a particular country (see table E); and the availability of easy ways to end a registered partnership (outside court as in the Netherlands, or even unilaterally as in Belgium and France, see table G) may make partnership registration more (or for some people: less) popular. It is also possible that some people choose to register as partners, not to obtain particular legal consequences, but simply to make it easier to prove that they are a couple; this could for example be the case with couples that do not (permanently) live together and therefore have difficulty in qualifying as cohabitants.

<sup>37</sup> A first, small survey of people who registered as partners in the Netherlands during the first year after the introduction of registered partnership, suggests that for most interviewees 'emotional considerations' do indeed play a role, but generally not a bigger role than 'financial/practical' considerations. See Yvonne Scherf, 'Registered partnership in the Netherlands. A quick scan', Commissioned by the Ministry of Justice, published in Amsterdam: by Van Dijk Van Soomeren en Partners BV, 1999, p. 23-24.

<sup>38</sup> The same study found that one third of the interviewed registered partners could not name any legal consequences of registered partnership (Scherf, 1999, p. 25).

Let's assume, however, that at least some people base their decision whether or not to register as partners on the legal consequences of doing so. Their decision would then not be influenced by the total LLC of registered partnership, but by the *additional LLC* of registered partnership as compared to the LLC of informal cohabitation. If people are looking rationally at the law, they would look what legal consequences they would obtain in addition to what they already enjoy as informal cohabitants. In the pie charts in the Comparative overview the *additional LLC of registered partnership* is represented as yellow segments. Their size could perhaps (partly) explain the different frequencies of partnership registration in the different countries. A complication in this context in the Netherlands and Belgium is the availability of marriage to same-sex couples. Some of the cohabitants who would be attracted by the additional LLC of registered partnership could also choose to get married.<sup>39</sup>

Another complication is that while some legal consequences are clearly advantageous to registered partners (increased parenting rights, compensation for wrongful death, inheritance, lower taxes, higher social security, pension rights, immigration and citizenship, etc.),<sup>40</sup> other consequences are clearly disadvantageous (higher taxes, lower social security).<sup>41</sup> And there are also legal consequences where it depends on the circumstances, and from whose perspective you look at it, whether they are advantageous or disadvantageous. This is true for joint property (B1), joint debts (B2), alimony (B3), redistribution of property at splitting up (B4), domestic violence protection (C5), and the duty to have sex (C9). And even if a certain legal consequence is clearly advantageous, it will depend on the circumstances whether the advantage will or could actually apply. For example, a male couple will not benefit from the possibility of medically assisted insemination (A2) nor from a presumption of 'paternity' (A1); and more generally, the parenting consequences will only be relevant for partners who have or would like to have children. Several consequences can only be advantageous for the partner who outlives the other.<sup>42</sup> And finally, for certain legal consequences it seems unlikely that they would influence more than a few people in their decisions whether or not to get registered as partners; examples are the right to refuse to testify against each other (C4), the right to donate organs to each other (C7) and the duty to have sex (C9).<sup>43</sup>

The conclusion could be that it is unlikely that the additional levels of legal consequences of registered partnership (as represented by the yellow segments in the pie charts of table O) would provide a *precise* explanation of the different frequencies of same-sex partnership registrations in the different countries. A more accurate explanation could perhaps be given, by attaching a weighing factor to each legal consequence (e.g. a weighing factor of 0 for consequences that are unlikely to influence people in their decision whether or not to register; a weighing factor of -1 for negative legal consequences; and a weighing factor of 2 for legal consequences that are most often mentioned in interviews as being decisive) and then recalculating the additional LLC of registered partnership for each country. Such an exercise, however, will have to wait until a later stage.

However, for a *rough* explanation of the different frequencies of same-sex partnership registrations, the data in the pie charts may be good enough. The additional LLC of registered partnership for same-sex couples (see the yellow segments in the pie charts of table O) is *highest* in Iceland (62%) and Germany (51%),<sup>44</sup> so in these two countries a higher frequency of partnership registrations could be expected than in the other seven countries. This would be largely due to the very limited LLC of informal cohabitation in these two countries. Same-sex cohabitants in Iceland and Germany have more to gain from partnership registration than same-sex cohabitants in the other countries. The additional LLC of registered partnership for same-sex couples is *lowest* in Belgium (12%), followed by France, Sweden and the Netherlands (around 20%). Therefore in these four countries the frequency of partnership registration could be expected to be lower than in the other four countries. In Belgium and France this would be largely due to the rather limited LLC of registered partnership, and in Sweden and the Netherlands this would be due to the rather high LLC of informal cohabitation. In these four countries same-sex cohabitants have less to gain from partnership registration than elsewhere. In Belgium and the Netherlands the frequency of partnership registration would also be lower because of the availability of marriage to same-sex couples.

In an earlier study I found that over the years up to 1999/2000 the frequency of partnership registration was lowest in Sweden, followed by Norway, then by Iceland and Denmark, and highest in the Netherlands (no

<sup>39</sup> Yet another complication relates to the passage of time. The levels of legal consequences calculated in this study reflect the legal situation as it was sometime early in 2004. By that time in several countries the level of legal consequences of registered partnership (or of marriage or of informal cohabitation) was already higher than a few years before. To really accurately correlate frequencies of partnership registration to levels of legal consequences, one would need to calculate the levels reflecting the period around (or just before?) the counted partnership registrations.

<sup>40</sup> See A1 to A7, B5 to B13, C1 to C4, C6, C7 and C8.

<sup>41</sup> See B14 to B17.

<sup>42</sup> See B5, B6, B12, B13 and C8.

<sup>43</sup> Similarly, some people could be influenced by other legal consequences than the 33 included in this study. However, because the 33 consequences were selected (among other reasons) because of their great practical importance for many people, it would be unlikely that many people would be influenced by other consequences than those 33.

<sup>44</sup> If you were to correct the figures of table O by not adding but subtracting the points given for negative material consequences in public law (table B part three), the additional LLC of registered partnership would still be highest in Iceland and Germany (and still be lowest in Belgium, France, Sweden and the Netherlands).

figures available for Belgium, France, Germany and Finland).<sup>45</sup> For Sweden that finding corresponds to the expectation I formulated above, but not for Iceland and the Netherlands. These discrepancies between expectations and findings may be attributable to non-legal factors (see above), or to other legal factors than legal consequences. In the Netherlands, for example, the popularity of partnership registration may be partly due to the possibility to end such a partnership by mutual contract (an option not available in the five Nordic countries and not in Germany, but also existing in Belgium and France).

Statistical data for more years, and for more countries, might give further indications whether or not levels of legal consequences, in general, do indeed partly explain differences in the frequency of partnership registration.

### *Conclusions*

The concept of 'levels of legal consequences' (LLC) developed and applied in this study, has helped to clarify certain aspects of marriage, cohabitation and registered partnership. There appear to be great similarities between the nine European countries that by early 2004 had introduced some form of registered partnership. Their similarities with respect to marriage are greater than with respect to registered partnership, and yet somewhat smaller with respect to informal cohabitation. And even with respect to marriage there are important differences between the countries, for example as to the precise consequences that are attached to it.

Some misconceptions have been cleared up in this study. For example the idea that registered partnership in Belgium does not carry many legal consequences: the Belgian form of registered partnership is indeed lighter than anywhere else, but because registered partners also profit from the growing number of legal consequences attached to informal cohabitation, the LLC of Belgian registered partnership is not much lower than the LLC of French registered partnership. Another misconception is that registered partnership always has a higher LLC than informal cohabitation; not so, because the LLC of informal cohabitation in Sweden and the Netherlands is actually higher than the LLC of registered partnership in Belgium, France and Germany. And as to same-sex marriage: it can be noted that in the Netherlands same-sex marriage has exactly the same LLC as registered partnership, and that a Belgian same-sex marriage happens to have a lower LLC than a Swedish or Dutch registered partnership.

The LLC concept may help to partly explain the differences between countries in the frequency of partnership registration. In as far as couples actually base their decision, whether or not to register as partners, on the amount of extra legal consequences that would be the result of their partnership registration, the levels of legal consequences calculated in this study suggest the expectation that there will be a more than average number of partnership registrations in Iceland and Germany, and a less than average number in Sweden, Belgium, France and the Netherlands. It may be necessary to adjust this expectation because of the possibility in the latter three countries to end a registered partnership by mutual contract (which may make partnership registration more popular). Perhaps a recalculation of the additional LLC of registered partnership, with a weighing factor for each legal consequence, may provide a more precise explanation of the frequency differences.

Furthermore, the concept of levels of legal consequences may also be useful in dealing with questions of private international law. Could or should a certain national form of registered partnership (or of same-sex marriage) be recognised in other countries, either in general or for the application of specific legal consequences? For this it is important to note that different-sex marriage is almost always recognised by other European countries, although, as we have seen, the actual legal consequences of different-sex marriage (and therefore also its LLC) differ from country to country. The data of this study may thus help courts and other officials to overcome their possible hesitation in recognising foreign relationship statuses. The LLC of a Belgian or Dutch same-sex marriage (or of a Dutch registered partnership) is actually higher than the LLC of a — universally recognised — different-sex marriage from Germany, Finland, Sweden or Denmark.<sup>46</sup> And the LLC of a registered partnership from one of the Nordic countries is hardly lower. Therefore, in countries with lighter forms of registered partnership (Belgium, France and German), Dutch and Nordic registered partnerships *could* mostly be treated on the same basis as marriage. A more difficult question is whether in the Netherlands and in the Nordic countries a Belgian, French or German registered partnership should be treated on the same basis as a Dutch or Nordic registered partnership.

Finally, the study has also demonstrated that in all nine countries same-sex couples do not yet have access to all of the legal consequences that are attached to different-sex marriage. However, an increasing number of these consequences has been made available to same-sex couples, through the incremental legal recognition of informal cohabitation and/or through the introduction (and subsequent extension) of registered partnership, and also, in two countries so far, through the opening up of marriage.

<sup>45</sup> Kees Waaldijk, 'Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands', in: Robert Wintemute & Mads Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart Publishing, 2001, p. 462-464. See also: Patrick Festy, 'The "Civil Solidarity Pact" (PACS) in France: an impossible evaluation', *Population & Sociétés - Bulletin Mensuel d'Information de l'Institut National d'Etudes Démographiques*, no. 369, June 2001.

<sup>46</sup> See the points (rather than the percentages) in table O.



# Major legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners in Belgium

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Symbols and words used in the national tables:

| Applicable answer  | Answer code | Color       | Points given for calculation of level of legal consequences |
|--|-------------|-------------|---|
| The legal consequence applies.   | Yes         | White       | 3 pt  |
| The legal consequence applies in a limited way or not in all circumstances, or it can be contracted out of, or courts can set it aside using some general legal principle, etc.    | Yes, but    | Light pink  | 2 pt  |
| The legal consequence only applies in a very limited way or in very few circumstances, or it can be established by contract, or by courts using some general legal principle, etc. | No, but     | Middle pink | 1 pt  |
| The legal consequence does not apply.  | No          | Dark pink   | 0 pt  |
| No information was available on this point, or the legal position is unclear.  | Doubt       | Middle pink | 1 pt  |
| The column is not applicable in the country, because this type of relationship is not legally recognised (yet).  | X           | Dark pink   | 0 pt  |

| Additional information   | Answer code |
|--|-------------|
| The legal consequence is only available after the specified number of years.   | >x years    |
| The legal consequence is only available after the specified number of months.  | >x months   |
| Year of entry into force of the legislation providing the legal consequence (or the particular relationship type), or year of supreme court decision establishing its existence.<br>(Where two years are given, the first indicates the introduction of a more limited version of the consequence; where no year is given, the legal consequence mostly applies since the introduction of the particular relationship type, or already for a long time.) | (Year)      |

<sup>1</sup> University of Louvain, [www.cpdf.ucl.ac.be/cridho/index.php?pageid=2](http://www.cpdf.ucl.ac.be/cridho/index.php?pageid=2).

<sup>2</sup> Universiteit Leiden, [www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk). The authors are grateful to Paul Borghs for his useful comments on an earlier version of this text. Any remaining errors are the sole responsibility of the authors.

## Introduction

This chapter aims to represent the law as it stood early in 2004.

### *Civil marriage*

In Belgium, the Law of 13 February 2003 had opened civil marriage to persons of the same sex (Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil). The law was published in the *Moniteur Belge* on 28 February 2003. It entered into force on 1 June 2003, according to the terms of Article 23. The differences between same-sex and different-sex marriages relate to parenting; see items A1 (paternity) and A4 and A5 (adoption), and to the possibilities for couples of non-resident foreigners to enter into a marriage in Belgium (see item E10).

### *Registered partnership*

In the comments to the tables above, the expression 'registered partnership' - strictly speaking, such a form of union does not exist in Belgian law - should be understood to refer in fact to the 'legal cohabitation' created by the Law of 23 November 1998 (Loi instaurant la cohabitation légale, *Moniteur Belge*, 12 January 1999). This legislation entered into force on 1 January 2000 after the adoption of the Royal Decree (Arrêté royal) of 14 December 1999, *Moniteur Belge*, 23 December 1999. Where reference will be made to the 'registered partner', therefore, the reader should really understand that what is meant is 'legal cohabitee' in the meaning of this legislation.

In Belgium registered partnership is open to same-sex and to different-sex couples, and even to couples of close relatives (see E11 and E12). It is not quite clear whether it is open to foreigners and/or non-residents (see E2 to E9). Another difference between marriage and registered partnership is that the latter can be dissolved by mutual agreement of the partners, and even unilaterally by one partner - for example by marrying someone else (see G2, G3 and G5).

In its consequences registered partnership is a little stronger than informal cohabitation - see for example items B1 and B2 (joint properties and joint debts), B 13 (inheritance tax) and C8 (continuation of rent). Simultaneously, the consequences of registered partnership are far less numerous than those of marriage - see for example items A1 (paternity), A4 and A5 (adoption), B3 (alimony), B6 (intestacy), B 11 and B12 (pensions), C1 (surname) and C3 (citizenship).

There is hardly any difference between same-sex and different-sex registered partnership.

### *Informal cohabitation*

There is no general law regulating informal cohabitation in Belgium. However, *de facto* couples are taken into account, explicitly or implicitly, in a growing number of legal rules. For examples where same-sex and different-sex cohabitation are treated in the same way, see the items B9 (public health insurance), B13 (inheritance tax in the Flemish region), B16 (basic social security), C2 (residence permits), C5 (domestic violence protection), C6 (next of kin rules for medical purposes). For a few differences between the position of same-sex and different-sex cohabitants, see items A1 (paternity), A4 (second parent adoption) and perhaps B5 (compensation for wrongful death).

**Table A (Belgium): Parenting consequences**

|  | Civil marriage    |                  | Registered partnership (2000) |                  | Informal cohabitation   |                  |
|--|-------------------|------------------|-------------------------------|------------------|-------------------------|------------------|
|  | Different-sex     | Same-sex (2003)  | Different-sex                 | Same-sex         | Different-sex           | Same-sex         |
| 1. When female partner gives birth, both partners automatically become legal parents   | Yes               | No               | No, but                       | No               | No, but                 | No               |
| 2. Medically assisted insemination is lawful for women in such a relationship  | Yes               | Yes              | Yes                           | Yes              | Yes                     | Yes              |
| 3. When only one partner is the parent of a child, both partners can have parental authority or responsibilities during their relationship | No                | No               | No                            | No               | No                      | No               |
| 4. When only one partner is the parent of a child, the other partner can adopt it and thus become its second parent                        | Yes               | No               | No, but                       | No               | No, but                 | No               |
| 5. Partners can jointly adopt a child  | Yes               | No               | No                            | No               | No                      | No               |
| 6. One partner can individually adopt a child  | Yes               | Yes              | Yes                           | Yes              | Yes                     | Yes              |
| 7. Partners can jointly foster a child   | Yes               | Yes              | Yes                           | Yes              | Yes                     | Yes              |
| <b>Level of legal consequences</b>   | 6x3 + 1x0<br>= 18 | 3x3 + 4x0<br>= 9 | 3x3 + 2x1 + 2x0<br>= 11       | 3x3 + 4x0<br>= 9 | 3x3 + 2x1 + 2x0<br>= 11 | 3x3 + 4x0<br>= 9 |

**Notes to table A**

A1 - The presumption of paternity established by Art. 315 Civil Code (according to which the husband is presumed to be the father of the child born within marriage or during the 300 days following its dissolution or annulment) is explicitly excluded in the case of marriage between partners of the same sex: see Art. 143 Civil Code, introduced by the Law of 13 February 2003. Moreover, although the male partner of the woman who gave birth to a child (and will be considered legally the mother) may recognize the child (reconnaissance de paternité), such a recognition will not be possible for the female partner, whether she has entered a registered partnership with the mother or whether she lives de facto with her ( see Article 313(1) Civil Code). It will be noted that in the remainder of the comments to the tables above, the expression 'registered partnership' - such a form of union does not exist in Belgian law - should be understood to refer in fact to the 'legal cohabitation' created by the Law of 23 November 1998 (Loi instituant la cohabitation légale, *Moniteur Belge* 12 January 1999). This legislation entered into force after the adoption of the Royal Decree (Arrêté royal) of 14 December 1999, *Moniteur Belge* , 23 December 1999. Where reference will be made to the 'registered partner', therefore, the reader should really understand that what is meant is 'legal cohabitee' in the meaning of this legislation.

A2 - The lawfulness of medically assisted insemination does not mean that it will always be available. The consulted physician will decide according to his/her deontology: see Tribunal de première instance de Courtrai (section jeunesse, chambre civile), 24 June 1997, *Journal des Procès*, 1997, 16, note Versluys, *Journal des tribunaux*, 1998, p. 731, note Massager.

A3 - In Belgian law parental authority continues beyond the marriage or the cohabitation of the parents (Article 372 Civil Code ): even where the spouses divorce or are separated, they have joint parental responsibility on the child (on the equality of both parents in that respect, see the Law of 1 July 1974; on the maintenance of this joint parental responsibility beyond divorce or separation, see the Law of 13 April 1995 on the joint exercise of parental authority (Loi sur l'exercice conjoint de l'autorité parentale), *Moniteur Belge* 24 May 1995



and Art. 374 and 376 Civil Code), and this authority is not shared with others (J.-L. Renchon, 'La nouvelle réforme législative de l'autorité parentale', *Revue trimestrielle de droit familial*, 1995, p. 388; J. Sosson, 'L'autorité parentale conjointe. Des vœux du législateur à la réalité', *Annales de droit de Louvain*, 1996, p. 115). Civil marriage has been opened to same-sex couples by the Law of 13 February 2003. But marriage between two persons of the same sex is to have no consequence whatsoever on filiation of parental authority. Therefore, even if married to another woman, a lesbian mother would have sole parental authority on the child, even where the child would be de facto raised within the family.

A4 - Article 13 of the Law of 13 February 2003 opening civil marriage to persons of the same sex introduces a modification in Article 345 Civil Code which confirms that, even where one of the spouses is the parent of the child, the other spouse will be authorized to adopt the child only if he/she is of the opposite sex. However, there is some case law that suggests that second parent adoption by a non-married different-sex partner should sometimes be possible. The law of 24 April 2003 (*Moniteur Belge* 16 May 2003; not yet in force) will open the possibility of second parent adoption also to registered or informally cohabiting different sex partners, who are no relatives to each other, and who have cohabited in a permanent and affective manner since a least three years (new Art. 343(1) Civil Code).

A5 - When the Law of 13 February 2003 was adopted, opening civil marriage to same-sex partners, the legislator explicitly excluded any consequences either on filiation or on the possibility to adopt jointly: Article 346 Civil Code, which provided previously that 'Nul ne peut être adopté par plusieurs si ce n'est par deux époux', has been modified to add 'de sexe différent' (Art. 14 of the Law of 13 February 2003), precisely to avoid that spouses of the same sex will seek joint adoption on the basis of this provision of the Civil Code. Neither has the regime of legal cohabitation introduced by the Law of 23 November 1998 any consequence on adoption or filiation. The law of 24 April 2003 (*Moniteur Belge* 16 May 2003; not yet in force) will open the possibility of second parent adoption also to registered or informally cohabiting different sex partners, who are no relatives to each other, and who have cohabited in a permanent and affective manner since a least three years (new Art. 346 Civil Code).

A6 - According to Art. 347 Civil Code, where a married person wishes to adopt a child (in accordance with the forms prescribed in Articles 349 ff. of the Civil Code), the spouse has to consent to the adoption, unless he/she is incapable to do so, is absent, or cannot be found to consent. See also P. Senaeve, *Compendium van het Personen- en Familierecht*, 5de uitgave, Acco, Leuven, 200, n° 907. The law of 24 April 2003 (see comments to A6 above) will apply the same condition to registered and informally cohabitation partners.

A7 - The answers given in the table refer to *de facto* fostering (see P. Borghs, 'Homoseksualiteit en ouderschap. Actuele stand van zaken', *Nieuw Juridisch Weekblad* 2004, p. 299). Aside from *de facto* taking into care of a child in need of protection ('hébergement', 'pleeggezin'), Belgian law knows an institution called 'pleegvoogdij', 'tutelle officieuse', which is regulated by Articles 475bis to 475septies of the Civil Code. Although the Civil Code refers to the 'pleegvoogd' ('tuteur officieux') only in the singular, it is generally agreed that, just like both spouses of a married couple can adopt jointly, they may jointly become the 'tuteurs officieux' of the child (see e.g. Gent (Jk.)(Jeugdrechtbank Gent), 10 December 1975, *Rechtskundig weekblad* 1977-1978, 1259, noot J. Pauwels)). It is still uncertain, however, whether non-married couples, even in legal cohabitation, can become jointly 'tuteurs officieux'. And it is even less certain that same-sex couples, even married, can do so. Generally, this institution is considered rather analogous to adoption, except that no filiation is established with the child ('tuteur officieux'). This would point towards a negative answer. There is no case-law to my knowledge; the institution is very rarely resorted to.

Table B - part one (Belgium): Material consequences in private law

|  | Civil marriage       |                      | Registered partnership (2000) |                     | Informal cohabitation |               |
|--|----------------------|----------------------|-------------------------------|---------------------|-----------------------|---------------|
|  | Different-sex        | Same-sex (2003)      | Different-sex                 | Same-sex            | Different-sex         | Same-sex      |
| 1. Properties of each partner are considered joint property                        | Yes, but             | Yes, but             | No, but                       | No, but             | No                    | No            |
| 2. Debts of each partner are considered joint debt                                 | Yes, but             | Yes, but             | No, but                       | No, but             | No                    | No            |
| 3. In case of splitting up, statutory rules on alimony apply                       | Yes                  | Yes                  | No, but                       | No, but             | No, but               | No, but       |
| 4. In case of splitting up, statutory rules on redistribution of properties apply  | No                   | No                   | No                            | No                  | No                    | No            |
| 5. In case of wrongful death of one partner, the other is entitled to compensation | Yes                  | Yes                  | Yes                           | Yes                 | Yes (1989)            | Doubt         |
| 6. When one partner dies without testament, the other is an inheritor              | Yes                  | Yes                  | No                            | No                  | No                    | No            |
| Level of legal consequences  | 3x3 + 2x2 + 1x0 = 13 | 3x3 + 2x2 + 1x0 = 13 | 1x3 + 3x1 + 2x0 = 6           | 1x3 + 3x1 + 2x0 = 6 | 1x3 + 1x1 + 4x0 = 4   | 2x1 + 4x0 = 2 |

Notes to table B - part one

B1 - With respect to this question, the situation of legal cohabitation is an intermediate situation between marriage and informal cohabitation. On the one hand, Article 1478 al. 1 Civil Code states that 'Chacun des cohabitants légaux conserve les biens dont il peut prouver qu'ils lui appartiennent, les revenus que procurent ces biens et les revenus du travail'. This contrasts the situation of legal cohabitation with that of marriage - either heterosexual or homosexual -, where the legal regime is that all revenues acquired after the date of the marriage become the joint property of the spouses ('communauté d'acquêts'): this legal regime, codified under Articles 1398-1450 Civil Code, can be modified by the matrimonial convention concluded between the spouses (see Articles 1451 ff. Civil Code); hence the 'Yes, but' which appears in the tables. On the other hand, the regime of legal cohabitation introduced by the Law of 23 November 1998 has material consequences which clearly distinguish it from 'informal cohabitation'. Indeed, according to Art. 1478 al. 2 Civil Code, which forms the major innovation of the Law of 23 November 1998 on legal cohabitation (registered partnership), 'Les biens dont aucun des cohabitants légaux ne peut prouver qu'ils lui appartiennent et les revenus que ceux-ci procurent sont réputés être en indivision'. Thus, a legal presumption of indivision applies to the property of both legal cohabitants is introduced, which distinguishes the situation of legal cohabitants from that of unmarried partners living in 'informal cohabitation' ('concubinage' or 'union libre') (see Appeals Court Bruxelles, 6 September 1996, *Revue trimestrielle de droit familial*, 1997, p. 128; Appeals Court Gent, 16 November 1993, *Revue trimestrielle de droit familial*, 1995, p. 343).

B2 - The solidarity with respect to the debts of either partner, unless these debts are excessive, is provided for in identical terms for marriage (Art. 222 Civil Code) and for legal cohabitation (Art. 1477(4) Civil Code). In both institutions, this solidarity extends however only to debts incurred by each spouse or partner for 'les besoins du ménage et l'éducation des enfants' (marriage - Art. 22 Civil Code) or for 'les besoins de la vie commune et des enfants qu'ils éduquent' (registered partnership - Art. 1477(4) Civil Code). From the year 2005 registered partners will, like married partners, be liable for each other tax debts (law of 10 August 2001, *Moniteur Belge* 20 September 2001).

B3 - Although the Civil Code stipulates no right to alimony (pension alimentaire) either in the case of a legal cohabitation or in the case of informal or *de facto* cohabitation (concubinage), there is some case-law which considers that, at least where the cohabitation has lasted for a significant period of time or has entailed certain sacrifices from the partner in need (e.g., left his/her employment to dedicate him- or herself to the home or the upbringing of the child), there is an obligation of the other partner to assist financially the partner

in need (see e.g. Justice of the Peace (Vredesrechter, Juge de Paix) Gent, 4 November 1996, *Revue trimestrielle de droit familial*, 1999, p. 176, *Rechtskundig weekblad*, 1997-1998, p. 266, note F. Aps; Justice of the Peace (Vrederechter, Juge de Paix) Gent, 6 July 1998, *Revue générale de droit civil*, 1998, p. 468; or Rechtbank van eerste aanleg (civiele afdeling) Louvain, 27 September 1996, *Journal des Procès*, 1996, p. 26 - however the case-law remains divided on this issue: see Rechtbank van eerste aanleg (civiele afdeling) Leuven, 3 June 1991, *Rechtskundig Weekblad*, 1992-1993, p. 131).

B4 - See comments to B1.

B5 - The Court of Cassation has decided, in a decision of 1989, that *de facto* cohabitants (non married partners) could be considered to have a right to compensation for the wrongful death of their partner (Cass., 2<sup>ème</sup> ch., aud. plén., 1<sup>er</sup> février 1989, *Pas.*, 1989, p. 582; confirmed later by Cass., 1<sup>ère</sup> ch., 15 février 1990, *Pas.*, 1990, I, p. 694, *Journal des tribunaux.*, 1990, p. 216, *Revue générale assurance et responsabilité*, 1990, n°11.658, note R.O. Dalcq): previously, this was considered unacceptable, as no legal consequences could be attached to a *de facto* situation, that of cohabitation outside marriage. However, this evolution only concerned *de facto* de cohabitants living together outside marriage when their relationship has the appearance of marriage ('apparence de mariage'); it may not extend to *de facto* cohabitation between two persons of the same sex.

B6 - Legal cohabitation, as organized by the Law of 23 November 1998, has no incidence on the rules of inheritance, except for one consequence which applies in the marginal situation where the surviving registered partner is already an inheritor of the deceased partner because of being a close relative (see Art. 1478 al. 3 Civil Code). One should recall that the Law of 23 November 1998 may be relied upon, to organize a form of legal cohabitation, in many situations, including between two persons of the same family who wish to institute this material solidarity between them although they would not be able to marry (a brother and sister, e.g., could register as legal cohabitants).

**Table B - part two (Belgium): Positive material consequences in public law**

|   | Civil marriage          |                         | Registered partnership (2000) |                  | Informal cohabitation  |                        |
|---|-------------------------|-------------------------|-------------------------------|------------------|------------------------|------------------------|
|   | Different-sex           | Same-sex (2003)         | Different-sex                 | Same-sex         | Different-sex          | Same-sex               |
| 7. Relationship can result in lower property tax  | No                      | No                      | No                            | No               | No                     | No                     |
| 8. Relationship can result in lower income tax  | Yes, but                | Yes, but                | No                            | No               | No                     | No                     |
| 9. Public health insurance of one partner covers medical costs of other partner                 | Yes, but                | Yes, but                | Yes, but                      | Yes, but         | Yes, but (1996)        | Yes, but (1996)        |
| 10. Relationship can have positive impact on basic social security payment in case of no income | No                      | No                      | No                            | No               | No                     | No                     |
| 11. Relationship can have positive impact on statutory old age pension                          | Yes                     | Yes                     | No                            | No               | No                     | No                     |
| 12. When one partner dies, the other can get a statutory survivor's pension                     | Yes, but                | Yes, but                | No                            | No               | No                     | No                     |
| 13. Surviving partner pays no inheritance tax (or less than a mere friend would)                | Yes                     | Yes                     | Yes, but                      | Yes, but         | No, but                | No, but                |
| <b>Level of legal consequences</b>  | 2x3 + 3x2 + 2x0<br>= 12 | 2x3 + 3x2 + 2x0<br>= 12 | 2x2 + 5x0<br>= 4              | 2x2 + 5x0<br>= 4 | 1x2 + 1x1 + 6x0<br>= 3 | 1x2 + 1x1 + 6x0<br>= 3 |

**Notes to table B - part two**

B7 - No property tax exists.

B8 - When one married partner has no income, or very little income, or is assisting in the independent business activities of the other spouse, then income tax is a little lower. From 2005 the same tax advantages will also apply to registered partners (law of 10 August 2001, *Moniteur Belge* 20 September 2001).

B9 - The public health insurance mechanism is organized by the Law of 14 July 1994 (*Loi coordonnée relative à l'assurance obligatoire soins de santé et indemnités* - Coordinating Law on the compulsory health insurance). This law is applicable to salaried workers, including public servants. A Royal Decree of 29 December 1997 has partly aligned the rules provided for in the Law of 14 July 1994 to the self-employed (Arrêté royal du 29 décembre 1997 portant les conditions dans lesquelles la loi du 14 juillet 1994 est étendue aux travailleurs indépendants et aux membres des communautés religieuses; last modified by the Arrêté royal du 15 mai 2003 modifiant l'arrêté royal du 29 décembre 1997 portant les conditions dans lesquelles l'application de la loi relative à l'assurance obligatoire soins de santé et indemnités, coordonnée le 14 juillet 1994, est étendue aux travailleurs indépendants et aux membres des communautés religieuses, *Moniteur Belge*, 26 May 2003). The Law of 14 July 1994 provides that the dependants of the workers contributing to the compulsory security scheme (assurance obligatoire soins de santé) will benefit from the same advantages as the contributor him- or herself (Art. 32, al. 1, 17°). These 'dependants' are the non-divorced spouse, even after separation, the children, and the ascendants (Art. 32, al. 1, 19° of the Law of 14 July 1994; Art. 123, 2° of the Royal Decree of 3 July 1996 (Arrêté Royal portant exécution de la loi relative à l'assurance obligatoire soins de santé et indemnités, coordonnée le 14 juillet 1994)). However, the Royal Decree of 3 July 1996 defines as 'dependants' ('personnes à charge') the spouse or the person cohabiting with the worker (Art. 123). Certain exceptions apply.

B10 - Please refer to the comments above, under B7. Where the person having a right to a basic income (revenu d'intégration) in the absence of other revenues cohabits with either a spouse or a de facto cohabitant

or a registered partner (cohabitant légal), the basic income afforded will be of a lesser amount, as it is presumed that living in a shared environment will be less expensive for each.

B11 - In the situation where the spouse effectively cohabits with his/her wife/husband, and receives no social benefit although he/she is dependent, the statutory old age pension will be augmented by 25%. This applies only where the partners are married: it does not apply where they are legal or *de facto* cohabitantes. *De facto* cohabitation has no consequence whatsoever on the amount of the statutory old age pension (see Bouille, Etienne, Meunier, Conrardy, Demet, Kreit and Petit, 'Les pensions', *Actualités du droit*, 1993/4, p. 1103).

B12 - A pension is paid to a surviving married partner, if the marriage has lasted at least since one year (or if a child was born from the marriage, or if at the time of death one partner was receiving child benefit, or if death resulted from an accident that took place after the start of the marriage) and the surviving partner has not remarried (Art. 17 Act on Pensions for Employees, and art. 54(1) General Regulation on Pensions for Employees).

B13 - Inheritance tax is regulated by the three regions of Belgium (see Art. 48 Succession Law of Flemish Region, Art. 48 Succession Law of Walloon Region, and Art. 48 Succession Law of Brussels Region). In all regions the same tariffs as for marriage apply in the case of registered partnership, but in the Walloon region only if the partners are no relative, had been registered at least since one year, and were living together at the time of death). In the Flemish region the same tariffs as for marriage also apply in the case of informal cohabitation, but only if the cohabitants at least since one year had a joined household. This does not apply in the Walloon and Brussels regions.

**Table B - part three (Belgium): Negative material consequences in public law**

|   | Civil marriage   |                  | Registered partnership (2000) |                  | Informal cohabitation |                  |
|---|------------------|------------------|-------------------------------|------------------|-----------------------|------------------|
|   | Different-sex    | Same-sex (2003)  | Different-sex                 | Same-sex         | Different-sex         | Same-sex         |
| 14. Relationship can result in higher property tax  | No               | No               | No                            | No               | No                    | No               |
| 15. Relationship can result in higher income tax  | Yes              | Yes              | No                            | No               | No                    | No               |
| 16. Relationship can have negative impact on basic social security payment in case of no income | Yes              | Yes              | Yes, but                      | Yes, but         | Yes, but              | Yes, but         |
| 17. Relationship can have negative impact on statutory old age pension                          | No               | No               | No                            | No               | No                    | No               |
| <b>Level of legal consequences</b>  | 2x3 + 2x0<br>= 6 | 2x3 + 2x0<br>= 6 | 1x2 + 3x0<br>= 2              | 1x2 + 3x0<br>= 2 | 1x2 + 3x0<br>= 2      | 1x2 + 3x0<br>= 2 |

**Notes to table B - part three**

B14 - No property tax exists.

B15 - Until 2005 the basic tax free sum is a little higher for an unmarried person than for a married person. Also, until 2005 married couples have a disadvantage with respect to any income from other sources than work: such income is taxed as part of the work income of the spouse with the highest work income (the 'breadwinner'). These disadvantages for the married will be abolished as of 2005 (law of 10 August 2001, *Moniteur Belge* 20 September 2001). See also final comment on B2.

B16 - The relevant rules are in the Law of 26 May 2002 on the right to social integration (loi concernant le droit à l'intégration sociale), *Moniteur Belge*, 31 July 2002. The right to a basic income (called 'revenu d'intégration sociale') guaranteed by this legislation is subsidiary: it is afforded when the individual does not have sufficient revenues from other sources; those revenues are calculated taking into account both the revenues of the individual concerned and the revenues of the person he/she cohabits with. Whether married or not, when a couple cohabits, the revenues of the cohabitant (whether spouse, registered partner or *de facto* cohabitant) will therefore be considered, for the allocation of any basic income to the other partner (see Art. 34(1), al. 2, of the Law of 26 May 2002). Therefore, any form of cohabitation (marriage, legal cohabitation or *de facto* cohabitation) will make it more difficult to receive basic income at the same level as for an isolated person.

Another form under which a minimum income is afforded in Belgium is through the Law of 1 April 1969 instituting a guaranteed income for elderly (Loi instituant un revenu garanti aux personnes âgées). Article 2 of this Law stipulates that married beneficiaries (even in case of separation of less than ten years, and provided a part of the revenue of the beneficiary goes to the separated spouse) will be afforded a higher income; such an advantage does not extend to cases of *de facto* cohabitation or to registered partners.

B17 - See comment on B11.

Table C (Belgium): Other legal consequences

|  | Civil marriage |                 | Registered partnership (2000) |                   | Informal cohabitation   |                         |
|--|----------------|-----------------|-------------------------------|-------------------|-------------------------|-------------------------|
|  | Different-sex  | Same-sex (2003) | Different-sex                 | Same-sex          | Different-sex           | Same-sex                |
| 1. One partner can have or use surname of the other  | Yes            | Yes             | No                            | No                | No                      | No                      |
| 2. Foreign partner of resident national is entitled to a residence permit  | Yes            | Yes             | Yes                           | Yes               | Yes (1997)              | Yes (1997)              |
| 3. Relationship makes it easier for foreign partner to obtain citizenship  | >3 years: Yes  | >3 years: Yes   | No                            | No                | No                      | No                      |
| 4. In case of criminal prosecution, one partner can refuse to testify against the other  | Yes            | Yes             | No                            | No                | No                      | No                      |
| 5. When one partner uses violence against other partner, specific statutory protection applies   | Yes            | Yes             | Yes                           | Yes               | Yes, but (1997)         | Yes, but (1997)         |
| 6. In case of accident or illness of one partner, the other is considered as next of kin for medical purposes (even without power of attorney) | Yes            | Yes             | Yes                           | Yes               | Yes                     | Yes                     |
| 7. Organ donation from one living partner to the other is lawful   | Yes            | Yes             | Yes                           | Yes               | Yes                     | Yes                     |
| 8. When one partner dies, the other can continue to rent the home  | Yes            | Yes             | Yes                           | Yes               | No                      | No                      |
| 9. Partners have a duty to have sexual contact   | Yes            | Yes             | No                            | No                | No                      | No                      |
| <b>Level of legal consequences</b>   | 9x3<br>= 27    | 9x3<br>= 27     | 5x3 + 4x0<br>= 15             | 5x3 + 4x0<br>= 15 | 3x3 + 1x2 + 5x0<br>= 11 | 3x3 + 1x2 + 5x0<br>= 11 |

**Notes to table C**

C1 - Article 216(2) of the Civil Code states that the spouse may use the surname of the other spouse in the context of professional relationships, with the agreement of the spouse whose name is used. Once such an agreement is given, it may only be withdrawn for serious reasons. Such a provision exists neither in the rules on registered partnership (legal cohabitation); nor do they apply to *de facto* cohabitation.

C2 - A circulaire adopted on 30 September 1997 by the Ministry of the Interior (Circulaire du 30 septembre 1997 relative à l'octroi d'une autorisation de séjour sur la base de la cohabitation dans le cadre d'une relation durable, *Moniteur Belge*, 14 November 1997) authorizes both Belgian nationals and aliens established in Belgium or authorized to reside in Belgium for periods of more than three months, to be joined in Belgium by the person with whom they have a 'stable relationship' ('relation durable'). This benefits all *de facto* couples, whether heterosexual or homosexual (indeed, the very purpose of the circulaire was to put an end to the discrimination against homosexuals with respect to family reunification, as they had no access to marriage).

Couples living under the regime of legal cohabitation will of course find it even easier to prove the 'longstanding character' of their relationship.

C3 - The foreign spouse of a Belgian national may obtain the Belgian nationality after the couple has resided in Belgium during at least three years, and provided the two spouses still are cohabiting at the time of the declaration of nationality (Art. 16 of the Code de la nationalité belge of 28 June 1984, *Moniteur Belge* 12 July 1984). Although these three years of residency in Belgium is also the period imposed to foreigners who are seeking to be naturalized as Belgians (Articles 18 to 21 of the Codes de la nationalité belge), the foreign spouse of a Belgian national does not have to be 'naturalized' by a formal act of the House of Representatives; rather, provided their declaration meets no opposition, it will automatically result in the obtention of the Belgian nationality.

C4 - See Art. 156 and 322 of the Code d'instruction criminelle (Code of Criminal Procedure), concerning the inadmissibility of testimonies by the spouse: spouses may not testify, neither can they be invited to testify in a criminal case concerning the other spouse. This is not extended either to legal cohabitantes or to cohabitantes de facto.

C5 - A Law of 24 November 1997 introduced a specific protection for the victim of intra-family violence in Article 410 of the Code pénal. This provision has been expanded by the Law of 28 November 2000, to include within that protection not only the spouse, but also the registered partner (legal cohabitant) and any *de facto* cohabitant with whom the author of the violent act entertains a durable affective and sexual relationship. See A. Jacobs, 'Les violences au sein du couple', in: *Formation permanente CUP*, February 2000, pp. 178-179. The protection of the spouse or registered partner (legal cohabitant) has also been recently ameliorated by a legislation attributing the common residence of the couple to the partner against whom abuse has been committed: see the Law of 28 January 2003 on the attribution of the family home to the spouse or the registered partner who is a victim of acts of physical violence from his/her partner and completing Article 410 of the Penal Code (Loi du 28 janvier 2003 visant à l'attribution du logement familial au conjoint ou au cohabitant légal victime d'actes de violence physique de son partenaire et complétant l'article 410 du Code pénal, *Moniteur Belge* 12 February 2003).

C6 - See Article 14(2) Law on the Rights of Patients.

C7 - Organ donation is regulated in Belgium by a Law of 13 June 1986 (Loi du 13 juin 1986 sur le prélèvement et la transplantation d'organes; see also Arrêté royal du 24 novembre 1997 relatif au prélèvement et à l'allocation d'organes d'origine humaine, *Moniteur Belge* du 23 December 1997). No distinction is made between organ donation between spouses or other persons, including *de facto* cohabitants or registered partners. The same rules (free and informed consent, purely altruistic purposes in particular) apply in all cases.

C8 - See Article 215(2) Civil Code, which concerns marriage, and which Article 1477(2) Civil Code makes applicable to the legal cohabitation.

C9 - The duty of spouses to live together (Art. 213 Civil Code) is deemed to imply a duty to have sexual contact.



**Table D (Belgium): Types of discrimination by employers or service providers that are prohibited in anti-discrimination legislation**

|   | Between married spouses and registered partners (2003) | Between married spouses and informal cohabitants (2003) | Between registered partners and informal cohabitants (2003) | Between same-sex and different-sex partners (with same status) (2003) |
|---|--|---|---|---|
| 1. With respect to housing                              | Yes  | Yes   | Yes   | Yes   |
| 2. With respect to life insurance                       | Yes  | Yes   | Yes   | Yes   |
| 3. With respect to health insurance                     | Yes  | Yes   | Yes   | Yes   |
| 4. With respect to medically assisted insemination      | Yes  | Yes   | Yes   | Yes   |
| 5. With respect to other services                       | Yes  | Yes   | Yes   | Yes   |
| 6. With respect to an occupational survivor's pension   | Yes  | Yes   | Yes   | Yes   |
| 7. With respect to other spousal benefits in employment | Yes  | Yes   | Yes   | Yes   |

**Notes to table D**

D1 - Under Article 2(4) the Federal Law of 25 February 2003 prohibiting discrimination and modifying the Law of 15 February 1993 creating the Centre for Equal Opportunities and Fight against Racism, which is the main legislation implementing Directive 2000/78/EC in the Belgian legal order, the prohibition of direct and indirect discrimination extends to: the provision or offering to the public of goods and services; access to employment or to self-employment, and working conditions, in both the private and the public sector; the nomination or promotion in the public service, or the assignment of a public servant to a particular service; any mention in official documents; distribution, publication or public exposition of a text or sign under any other form; access, participation in, and any exercise of an economic, social, cultural or political activity open to the public. Moreover, not only discrimination based on *sexual orientation*, but also discrimination based on *civil status* (e.g., between married couples and legal cohabitants, or *de facto* cohabitants and legal cohabitants...) is prohibited by this legislation. It should be emphasized however that - and this somewhat compensates for the broad material scope of application of the Law as well as for the long list of prohibited grounds of discrimination - direct discrimination is defined as any distinction (based on a suspect ground) which *lacks a reasonable and objective justification* (Art. 2(2)).

D2 - See comment to D1.

D3 - See comment to D1.

D4 - See comment to D1.

D5 - See comment to D1.

D6 - See comments to D1.

D7 - See comment to D1.

**Table E (Belgium): Types of couples that qualify for starting a civil marriage or registered partnership in the country itself**

|  |                            | Civil marriage |                 | Registered partnership (2000) |          |
|--|----------------------------|----------------|-----------------|-------------------------------|----------|
|  |                            | Different-sex  | Same-sex (2003) | Different-sex                 | Same-sex |
| Resident national with:                      | 1. Resident national       | Yes            | Yes             | Yes                           | Yes      |
|  | 2. Non-resident national   | Yes            | Yes             | Doubt                         | Doubt    |
|  | 3. Resident foreigner      | Yes            | Yes             | Doubt                         | Doubt    |
|  | 4. Non-resident foreigner  | Yes            | Yes             | Doubt                         | Doubt    |
| Non-resident national with:                  | 5. Non-resident national   | Yes            | Yes             | Doubt                         | Doubt    |
|  | 6. Resident foreigner      | Yes            | Yes             | Doubt                         | Doubt    |
|  | 7. Non-resident foreigner  | Yes            | Yes             | Doubt                         | Doubt    |
| Resident foreigner with:                     | 8. Resident foreigner      | Yes            | Yes             | Doubt                         | Doubt    |
|  | 9. Non-resident foreigner  | Yes            | Yes             | Doubt                         | Doubt    |
| Non-resident foreigner with:                 | 10. Non-resident foreigner | Yes            | No, but         | Doubt                         | Doubt    |
| 11. Sister or brother with sister or brother |                            | No             | No              | Yes                           | Yes      |
| 12. Parent with child                        |                            | No             | No              | Yes                           | Yes      |

**Notes to table E**

E1 - See comments to E2.

E2 - Under Article 1476 Civil Code, which is located in Title Vbis (De la cohabitation légale) of Book III (Des différentes manières dont on acquiert la propriété), the two persons wishing to declare that they intend to define their relationship as 'legal cohabitation' must declare their common domicile. The 'cohabitation légale' consists in a declaration before the 'officier de l'état civil' of the municipality in which the partners have chosen to share their common domicile (Art. 1476(1) Civil Code: 'Une déclaration de cohabitation légale est faite au moyen d'un écrit remis contre récépissé à l'officier de l'état civil du domicile commun'). Indeed, the institution is specifically set up to facilitate a form of material solidarity between two persons sharing the same roof. Therefore, the hypothesis of a 'legal cohabitation' being contracted by a non-resident, although not explicitly excluded in the Civil Code, would seem not to correspond to the purpose of the institution. It should also be noted that the Belgian diplomatic or consular agents are not explicitly given a competence to receive a declaration of registered partnership ('cohabitation légale'), although they do have such a competence with respect to celebrating marriage.

The doubt will disappear when the new Code of Private International Law ('Loi portant le Code de droit international privé' of 16 July 2004, *Moniteur Belge*, 27 July 2004), will take effect on 1 October 2004. Article 59 of the new Code provides that registration in Belgium can only take place is, at the moment of registration, both partners have their habitual residence in Belgium. Article 60 adds that Belgian law will be applicable to such a registration.

E3 - At first, same-sex marriage in Belgium was only open to Belgians or foreigners whose national law makes it possible for them to contract such a marital relationship. This was not stated explicitly in the Law of 13 February 2003 opening marriage to persons of the same sex, but was unanimously recognized in legal doctrine. This was done on the basis of an application by analogy of Article 170ter Civil Code, explicitly concerned only with the recognition of foreign marriages (concluded in foreign jurisdictions), and which subordinates the validity of marriage to the conditions imposed by the national law of the concerned persons (according to Article 170ter of the Civil Code: 'Les mariages visés à l'article 170 [these are the marriages celebrated under foreign jurisdictions] seront, quant au fond, valables en Belgique, si les parties contractantes ont satisfait aux conditions prescrites à peine de nullité par leur statut personnel pour pouvoir contracter mariage'). That solution was confirmed by the preparatory works of the Law. However, in a circular of 23 January 2004 (*Moniteur Belge*, 24 January 2004) the Minister of Justice made it clear that any foreign legal prohibition on same-sex marriage must be considered discriminatory and contrary to Belgian public order, and therefore should not be applied. The circular goes on to say that in such cases Belgian law should be applied if at least one of the future spouses is either a Belgian citizen or a habitual resident of Belgium. This means that Dutch nationals (and perhaps citizens of Canada or Massachusetts) are no longer the only foreigners who have access to same-sex marriage in Belgium.

The content of the circular has been codified into a new Code of Private International Law ('Loi portant le Code de droit international privé' of 16 July 2004, *Moniteur Belge*, 27 July 2004), that will take effect on 1 October 2004. Article 44 of the new Code provides that a marriage can be contracted in Belgium if one of the future spouses is a Belgian citizen or has his or her domicile or (since at least three months) his or her habitual residence in Belgium. Article 46 of the new Code provides that validity of marriage will be considered according to the national law of each future spouse; but it also provides that foreign legislation prohibiting same-sex marriages will not be taken into account if one of the spouses has the citizenship of a country allowing same-sex marriages, or if one of the spouses has his or her habitual residence in such a country.

With regard to the availability to foreigners, either resident or non-resident in Belgium, of the registered partnership organized in Belgium under the Law of 23 November 1998 on legal cohabitation, two opinions may be defended. Some would reason by analogy with the private international law rule governing access to marriage (see Article 170ter Civil Code mentioned in the comment to E3): whether they reside or not in Belgium, the regime of registered partnership ('cohabitation légale') would be accessible only to foreigners provided that their national law organizes a similar institution (such as the French pacte civil de solidarité, the Swedish registered partnership, etc.). This position (which appears to be defended by L. Barnich, in 'L'union libre et les unions légales en droit international privé', *L'Union libre - commentaire pratique*, 2002, V.1.6.) however underestimates the difficulty to make such comparisons between institutions of different countries - in which sense precisely can it be said that the French PACS sufficiently approximates the Belgian 'cohabitation légale' so that this institution should be accessible to French nationals in Belgium? More importantly, it assimilates the 'cohabitation légale' to a form of 'civil union' or 'registered partnership', despite the fact that the institution was deliberately crafted by the Belgian legislator to be a purely material arrangement, with no consequences on civil status or obligations which would relate to an *affectio maritalis* between the partners. Therefore, doubts remain on the availability to foreigners of the institution of 'cohabitation légale' created in Belgium by the Law of 23 November 1998.

The doubt will disappear in October 2004 (see the comments to E2).

E4 - See comments to E2 and E3.

E5 - See comments to E2 and E3.

E6 - See comments to E2 and E3.

E7 - See comments to E2 and E3.

E8 - See comments to E2 and E3.

E9 - See comments to E2 and E3.

E10 - Although foreigners may celebrate their marriage in Belgium (see Articles 63 to 75 Civil Code on the celebration of marriage and its conditions), the officier de l'état civil in charge, within the municipal administration, of celebrating the marriage, will have to verify whether each of the spouses complies with the requirements of his/her national law with respect to the conditions of marriage. The exception discussed in the comments to E3 does not apply in the case of two non-resident foreigners. Only very few same-sex couples of non-resident foreigners could marry in Belgium: for example a couple of Dutch citizens.

E11 - The Law of 23 November 1998 limitatively enumerates the conditions which the parties have to fulfill to be able to register under the regime of 'cohabitation légale', in inserting in Article 1475(2) of the Civil Code that 'Pour pouvoir faire une déclaration de cohabitation légale, les deux parties doivent satisfaire aux conditions suivantes :

1° ne pas être liées par un mariage ou par une autre cohabitation légale;

2° être capables de contracter conformément aux articles 1123 et 1124'.

The possibility for a brother and sister, two brothers, or a parent and child, to form such a registered partnership has explicitly been envisaged in the preparatory works of the Law of 23 November 1998: the purpose was to remove the institution from anything which would tend to make it similar to marriage - although, in what has been denounced by a number of authors as anomalous, the 'cohabitation légale' still remains restricted to two, unmarried individuals.

E12 - See comments to E11.

**Table F (Belgium): Authority for starting a civil marriage or registered partnership**

|  | Civil marriage |                 | Registered partnership (2000) |          |
|--|----------------|-----------------|-------------------------------|----------|
|  | Different-sex  | Same-sex (2003) | Different-sex                 | Same-sex |
| 1. Registry of births, marriages and deaths  | Yes            | Yes             | Yes                           | Yes      |
| 2. Local population administration           | No             | No              | No                            | No       |
| 3. Church                                    | No             | No              | No                            | No       |
| 4. Court                                     | No             | No              | No                            | No       |
| 5. Private person with special authorisation | No             | No              | No                            | No       |
| 6. Public notary                             | No             | No              | No                            | No       |
| 7. Administrative magistrate                 | No             | No              | No                            | No       |

**Notes to table F**

F1 - The 'cohabitation légale' instituted by the Law of 23 November 1998 was presented by the legislator as an essentially patrimonial arrangement, excluding almost any affective or sexual elements (except that the 'legal cohabitantes' must be two and no more, and that the marriage of either legal cohabitantes or of the cohabitantes together automatically ends the legal cohabitation). Therefore, the 'cohabitation légale' is registered on the local registry of the population, held in the local municipality; in contrast to what was proposed when a form of 'civil union', equivalent to a registered partnership, was proposed in Belgium (Proposition de loi instituant l'union civile, *Doc. parl.*, Ch. repr., 1995-1996, n° 372/1), there is no notification in the margin of the birth act. Nevertheless, the competent authority is the same, before which both marriage and 'cohabitation légale' are passed: this is the *officier de l'état civil* of the municipal administration where the spouses / partners have their common domicile. See Article 75 of the Civil Code with respect to the celebration of marriage by the *officier de l'état civil*. See Article 1475(1) of the Civil Code, introduced by the Law of 23 November 1998, for registered partnership (cohabitation légale).

F2 - Neither persons who wish to marry nor those wishing to register their partnership as 'cohabitation légale' have the choice to go before another authority than the *officier de l'état civil* mentioned in F1.

F3 - Article 21 of the Belgian Constitution states that the religious celebration of marriage cannot precede the civil marriage by the public officer (*officier de l'état civil*). Religious marriage is without any legal effect. It is neither a substitute for, nor a condition of, civil marriage.

F4 to F7 - Articles 75 and 1475, respectively concerning marriage and registered partnership ('cohabitation légale'), stipulate that the *officier de l'état civil* is exclusively competent to celebrate marriage or to receive a declaration that partners intend to enter into a registered partnership. No other possibility is provided by the law.

**Table G (Belgium): Means of ending a marriage or registered partnership**

|   | Civil marriage |                 | Registered partnership (2000) |          |
|---|----------------|-----------------|-------------------------------|----------|
|   | Different-sex  | Same-sex (2003) | Different-sex                 | Same-sex |
| 1. By court decision (after joint or individual petition)   | Yes            | Yes             | No                            | No       |
| 2. By mutually agreed contract (outside court)  | No, but        | No, but         | Yes                           | Yes      |
| 3. Unilaterally by one partner (outside court)  | No             | No              | Yes                           | Yes      |
| 4. By conversion of marriage into registered partnership, or vice versa (outside court)                                   | No             | No              | No                            | No       |
| 5. By one registered partner marrying a third person (or starting a registered partner with a third person)               | No             | No              | Yes                           | Yes      |
| 6. By the registered partners marrying each other (or by the married partners starting a registered partnership together) | No             | No              | Yes                           | Yes      |
| 7. By administrative decision (after joint or individual petition)  | No             | No              | No                            | No       |

**Notes to table G**

G1 - An end can be put to a registered partnership ('cohabitation légale') upon the unilateral will of any of the partners, without the need for any particular justification (Article 1476(2) of the Civil Code: 'Il peut être mis fin à la cohabitation légale, soit de commun accord par les cohabitants, soit unilatéralement par l'un des cohabitants au moyen d'une déclaration écrite qui est remise contre récépissé à l'officier de l'état civil (...)'); the officier de l'état civil simply registers this unilateral notification by one partner, who simply must declare explicitly his/her desire to end the partnership but is not even required to give a justification). Therefore, there will never be any need to resort to the judge to end the registered partnership. Of course, the consequences of a cessation of the registered partnership may be disputed, and end up in being litigated.

G2 - Divorce is always pronounced by a tribunal. However, the spouses can mutually consent to the divorce, and the convention organizing their separation can be passed before a public notary. The role of the judge is then simply to ratify this agreement.

G3 - See comment on G1.

G4 - See comment on G5

G5 - Under Article 1476(2) of the Civil Code, the marriage of either of the partners registered within a 'cohabitation légale', or the marriage of these partners with one another, automatically puts an end to the partnership.

G6 - See comment on G5.

G7 - See comments on G1, G2 and G3.

### *Some literature in English*

- Olivier De Schutter and Anne Weyembergh, ' "Statutory Cohabitation" under Belgian Law: A Step Towards Same-Sex Marriage?', in: Robert Wintemute & Mads Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart Publishing, 2001, p. 465-474.
- Yuval Merin, *Equality for Same-Sex Couples. The legal recognition of gay partnerships in Europe and the United States*, Chicago/London: The University of Chicago Press, 2002, p. 147-150.
- Kees Waaldijk, 'Others may follow: the introduction of marriage (and quasi-marriage or semi-marriage) for same-sex couples in European countries', 38 *New England Law Review* 2004, p.569-589.

### *Some literature in French*

- P. Borghs, 'Quel statut pour les parents de même sexe?', *Journal de Procès*, 4 April 2003, p. 14.
- N. Dandoy and F. Taimont, 'Contours de la loi du 23 novembre 1998 instaurant la cohabitation légale', *Revue régionale de droit*, 1995, p. 267.
- O. De Schutter and A. Weyembergh, 'La cohabitation légale: une étape dans la reconnaissance des unions entre personnes de même sexe', *Journal des tribunaux*, 2000, p. 98.
- Y.-H. Leleu, 'La loi du 23 novembre 1998 instaurant la cohabitation légale (Le régime juridique de la cohabitation légale)', in *Actualités du droit familial 1997-1999*, Formation permanente CUP, octobre 1999, p. 55.
- J.-L. Renchon, 'La régulation par la loi des relations juridiques du couple non marié', in X, *Le couple non marié à la lumière de la cohabitation légale*, Bruxelles, Bruylant, 2000, p. 33.



## Major legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners in Denmark

by Søren Baatrup <sup>1</sup>  
and Kees Waaldijk <sup>2</sup>

### Symbols and words used in the national tables:

| Applicable answer  | Answer code | Colour      | Points given for calculation of level of legal consequences |
|--|-------------|-------------|---|
| The legal consequence applies.   | Yes         | White       | 3 pt  |
| The legal consequence applies in a limited way or not in all circumstances, or it can be contracted out of, or courts can set it aside using some general legal principle, etc.    | Yes, but    | Light pink  | 2 pt  |
| The legal consequence only applies in a very limited way or in very few circumstances, or it can be established by contract, or by courts using some general legal principle, etc. | No, but     | Middle pink | 1 pt  |
| The legal consequence does not apply.  | No          | Dark pink   | 0 pt  |
| No information was available on this point, or the legal position is unclear.  | Doubt       | Middle pink | 1 pt  |
| The column is not applicable in the country, because this type of relationship is not legally recognised (yet).  | X           | Dark pink   | 0 pt  |

| Additional information   | Answer code |
|--|-------------|
| The legal consequence is only available after the specified number of years.   | >x years    |
| The legal consequence is only available after the specified number of months.  | >x months   |
| Year of entry into force of the legislation providing the legal consequence (or the particular relationship type), or year of supreme court decision establishing its existence.<br>(Where two years are given, the first indicates the introduction of a more limited version of the consequence; where no year is given, the legal consequence mostly applies since the introduction of the particular relationship type, or already for a long time.) | (Year)      |

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## Introduction

This chapter aims to represent the law as it stood early in 2004.

### *Civil marriage*

Only two persons of different sexes can enter into civil marriage and not if they are close family (e.g. children, grand-children, parents, grand-parents etc.). See for more details Act on Marriage of 9 March 1999 (*Ægteskabsloven*, Act no. 147; last changed by Act no. 365 of 6 June 2002); see [www.retsinfo.dk](http://www.retsinfo.dk).

### *Registered partnership*

This was introduced by the Act on Registered Partnership of 7 June 1989 (*Lov om registreret partnerskab*, Act no. 372, entering into force on 1 October 1989; last changed by Act no. 360 of 2 June 1999; see [www.retsinfo.dk](http://www.retsinfo.dk)). Only two persons of the same sex can register, and only if one of the partners lives in Denmark and is a Danish citizen or if both (foreign) partners have been living in Denmark in the last two years before the registration. Partners from countries with a similar law as the Danish are regarded as Danish citizens (see table E, below).

With a few exceptions the rules of the Act on Marriage also apply to registered partnership. The main differences between marriage and registered partnership concern the presumption of paternity, medically assisted insemination and joint adoption (see items A1, A2 and A5, below). Another difference is that unlike marriage a partnership registration cannot take place in a church (see item F3). And for marriage no residency or citizenship requirements apply (see items E5, E6 and E8).

An English translation of the Act on Registered Partnership can be found in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003.

Websites about registered partnership:

[www.lbl.dk/english](http://www.lbl.dk/english)

[www.civildir.dk/regler/aegteskab.htm](http://www.civildir.dk/regler/aegteskab.htm) (only partly in English and German)

[www.steff.suite.dk/gaypol.htm](http://www.steff.suite.dk/gaypol.htm)

### *Informal cohabitation*

There is no general legislation on cohabitation, but informal cohabitation is taken into account in some areas of law.

Table A (Denmark): Parenting consequences

|  | Civil marriage       |          | Registered partnership |                           | Informal cohabitation      |                     |
|--|----------------------|----------|------------------------|---------------------------|----------------------------|---------------------|
|  | Different-sex        | Same-sex | Different-sex          | Same-sex (1989)           | Different-sex              | Same-sex            |
| 1. When female partner gives birth, both partners automatically become legal parents   | Yes                  | X        | X                      | No                        | Yes, but                   | No                  |
| 2. Medically assisted insemination is lawful for women in such a relationship  | Yes                  | X        | X                      | No                        | Yes                        | No                  |
| 3. When only one partner is the parent of a child, both partners can have parental authority or responsibilities during their relationship | No, but              | X        | X                      | No, but                   | No, but                    | No, but             |
| 4. When only one partner is the parent of a child, the other partner can adopt it and thus become its second parent                        | Yes                  | X        | X                      | Yes, but (1999)           | No                         | No                  |
| 5. Partners can jointly adopt a child  | Yes                  | X        | X                      | No                        | No                         | No                  |
| 6. One partner can individually adopt a child  | No                   | X        | X                      | No                        | Yes                        | Yes                 |
| 7. Partners can jointly foster a child   | Yes                  | X        | X                      | Yes                       | Yes                        | Yes                 |
| <b>Level of legal consequences</b>   | 5x3 + 1x1 + 1x0 = 16 | 7x0 = 0  | 7x0 = 0                | 1x3 + 1x2 + 1x1 + 4x0 = 6 | 3x3 + 1x2 + 1x1 + 2x0 = 12 | 2x3 + 1x1 + 4x0 = 7 |

## Notes to table A

A1 - If a man is married he is automatically recognised as father of the child without any further investigations. See art. 1 of Act no. 460, Act of Children (*Børneloven*) of 7 June 2001. If the child is born by an unmarried woman, a man can be recognised as father if both partners declare that they will take care of the child (see art. 2 of same Act).

A2 - It is only lawful, if the woman is married or living in a similar relation with a man. See art. 3 of Act no. 460, Act on Fertilization, of 10 June 1997 as changed 8 January 1999.

A3 - A stepfather or stepmother has no authority over the child. A stepfather or stepmother has no obligation to maintain the child either, but a single bread-winner loses some public payments when entering into a new relationship.

A4 - For heterosexuals - see Act no. 1040 of 16 December 1999, Act of Adoption. For same-sex couples see art. 4(1) of Act no. 372, Act of Registered Partnership of 7 June 1989 as last changed by Act no. 360 at the 2 June 1999, which reads that one registered partner can adopt the other partner's children as long as they are not adopted from foreign countries.

A5 - This is exclusively a right for married heterosexual couples. See art. 5(2) of Act no. 1040 of 16 December 1999, Act of Adoption.

A6 - A heterosexual spouse can not adopt alone. If you are married, you can only adopt as a couple. See art. 5(2) of Act no. 1040 of 16 December 1999, Act of Adoption. Registered partners can not adopt neither as a couple nor as an individual. Singles can adopt - no matter if they are heterosexuals or not.

A7 - If they are accepted by the municipalities, everyone can foster a child.

**Table B - part one (Denmark): Material consequences in private law**

|  | Civil marriage          |            | Registered partnership |                         | Informal cohabitation |                  |
|--|-------------------------|------------|------------------------|-------------------------|-----------------------|------------------|
|  | Different-sex           | Same-sex   | Different-sex          | Same-sex (1989)         | Different-sex         | Same-sex         |
| 1. Properties of each partner are considered joint property                        | Yes, but                | X          | X                      | Yes, but                | No                    | No               |
| 2. Debts of each partner are considered joint debt                                 | No                      | X          | X                      | No                      | No                    | No               |
| 3. In case of splitting up, statutory rules on alimony apply                       | Yes, but                | X          | X                      | Yes, but                | No                    | No               |
| 4. In case of splitting up, statutory rules on redistribution of properties apply  | Yes, but,               | X          | X                      | Yes, but                | No                    | No               |
| 5. In case of wrongful death of one partner, the other is entitled to compensation | Yes, but                | X          | X                      | Yes, but                | Yes, but              | Yes, but         |
| 6. When one partner dies without testament, the other is an inheritor              | Yes                     | X          | X                      | Yes                     | No                    | No               |
| <b>Level of legal consequences</b>   | 1x3 + 4x2 + 1x0<br>= 11 | 6x0<br>= 0 | 6x0<br>= 0             | 1x3 + 4x2 + 1x0<br>= 11 | 1x2 + 5x0<br>= 2      | 1x2 + 5x0<br>= 2 |

**Notes to table B - part one**

B1 - Properties of each partner are considered joint property, see art. 15 of Act no. 37 of 5 January 1995, Act on the Economical Consequences of Marriage (*Retsvirkningsloven*). But before the marriage/partnership is started, you can decide that part of one or both of the partners/spouses property or money shall be owned exclusively by the one.

B2 - See Act no. 37 of 5 January 1995, Act on the Economical Consequences of Marriage (*Retsvirkningsloven*) art. 25.

B3 - If there is a (large) difference between the income of the spouses/partners, the right to alimony can apply (see art. 5-9 of Act no. 37 of 5 January 1995, Act on the Economical Consequences of Marriage (*Retsvirkningsloven*) and art. 49-53 of Act no. 147, Act on Marriage).

B4 - All that is defined as joint property is divided 50:50. See art. 16(2) of Act no. 37 of 5 January 1995, Act on the Economical Consequences Marriage (*Retsvirkningsloven*). See also B1.

B5 - If a spouse, registered partner or a partner in an informal cohabitation loses a breadwinner the person has a right to compensation. See art. 12-13 of Act no. 750 of 4 September 2002, Act on Compensation. In all cases the other is entitled to an amount of 14.400 euro (2003).

B6 - See chapter two of Act no.727 of 14 August 2001, Act on Inheritance (*Arveloven*).

**Table B - part two (Denmark): Positive material consequences in public law**

|   | Civil marriage   |            | Registered partnership |                  | Informal cohabitation |                      |
|---|------------------|------------|------------------------|------------------|-----------------------|----------------------|
|   | Different-sex    | Same-sex   | Different-sex          | Same-sex (1989)  | Different-sex         | Same-sex             |
| 7. Relationship can result in lower property tax  | No               | X          | X                      | No               | No                    | No                   |
| 8. Relationship can result in lower income tax  | Yes              | X          | X                      | Yes              | No                    | No                   |
| 9. Public health insurance of one partner covers medical costs of other partner                 | No               | X          | X                      | No               | No                    | No                   |
| 10. Relationship can have positive impact on basic social security payment in case of no income | No               | X          | X                      | No               | No                    | No                   |
| 11. Relationship can have positive impact on statutory old age pension                          | No               | X          | X                      | No               | No                    | No                   |
| 12. When one partner dies, the other can get a statutory survivor's pension                     | No               | X          | X                      | No               | No                    | No                   |
| 13. Surviving partner pays no inheritance tax (or less than a mere friend would)                | Yes              | X          | X                      | Yes              | >2 years: Yes         | >2 years: Yes (1986) |
| <b>Level of legal consequences</b>  | 2x3 + 5x0<br>= 6 | 7x0<br>= 0 | 7x0<br>= 0             | 2x3 + 5x0<br>= 6 | 1x3 + 6x0<br>= 3      | 1x3 + 6x0<br>= 3     |

**Notes to table B - part two**

B7 - You do not pay property tax in Denmark any longer except for a sort of house-tax on owned houses, summerhouse and flats - and that tax is the same whether you are married/registered or not.

B8 - In Denmark all citizens have a basic tax allowance (4.600 euro a year), but married/registered couples can transfer their allowance between them if e.g. one of the spouses has no income.

B9 - The Danish public health system is not based on an insurance system, but is paid through the taxes. Since the public health system is individual, it is of no importance whether you are married/registered or not.

B10 - See B16 - See chapter two of Act no. 727 of 14 August 2001, Act on Inheritance (*Arveloven*).

B11 - See B17 - The informal cohabitation partners have to have been living together for two years or more before they pay the same inheritance tax as married couples/registered partners.

B12 - There is no statutory survivor's pension in Denmark.

B13 - The informal cohabitation partners have to have been living together for two years or more before they pay the same inheritance tax as married couples/registered partners. For same-sex partners this was introduced by Act no. 339 of 4 June 1986, which remained in force until 1 October 1989 (when registered partnership was introduced).

**Table B - part three (Denmark): Negative material consequences in public law**

|   | Civil marriage |          | Registered partnership |                 | Informal cohabitation |               |
|---|----------------|----------|------------------------|-----------------|-----------------------|---------------|
|   | Different-sex  | Same-sex | Different-sex          | Same-sex (1989) | Different-sex         | Same-sex      |
| 14. Relationship can result in higher property tax  | No             | X        | X                      | No              | No                    | No            |
| 15. Relationship can result in higher income tax  | No             | X        | X                      | No              | No                    | No            |
| 16. Relationship can have negative impact on basic social security payment in case of no income | Yes            | X        | X                      | Yes             | Yes                   | Yes           |
| 17. Relationship can have negative impact on statutory old age pension                          | Yes            | X        | X                      | Yes             | Yes                   | Yes           |
| <b>Level of legal consequences</b>  | 2x3 + 2x0 = 6  | 4x0 = 0  | 4x0 = 0                | 2x3 + 2x0 = 6   | 2x3 + 2x0 = 6         | 2x3 + 2x0 = 6 |

**Notes to table B - part three**

B14 - See B7 - You do not pay property tax in Denmark any longer except for a sort of house-tax on owned houses, summerhouse and flats - and that tax is the same whether you are married/registered or not.

B15 - There are no such rules, on the contrary, see B8. In Denmark all citizens have a basic tax allowance (4.600 euro a year), but married/registered couples can transfer their allowance between them if e.g. one of the spouses has no income.

B16 - According to art. 1 of Act no. 37 of 5 January 1995, Act on the Economical Consequences of Marriage (*Retsvirkningsloven*) both partners shall do what they can to make a living for the couple, which means that the authorities will take a look at the couple as a whole, before the money from the social security system is paid out (see art. 2 of Act on Active Social Politics). Concerning informal cohabitation couples it is more or less the same - in many cases they are looked upon as a couple. Only if they prove that one of the two is only renting a room - the negative consequences will not apply.

B17 - Married spouses, registered partners, informal cohabitants and singles get the same basic amount of 7.000 euro per year. On top of that you get an additional pension which is 3.300 euro per year if you are a married spouse/registered partner/informal cohabitant and 7.100 euro if you are single.

Table C (Denmark): Other legal consequences

|  | Civil marriage             |          | Registered partnership |                            | Informal cohabitation |               |
|--|----------------------------|----------|------------------------|----------------------------|-----------------------|---------------|
|  | Different-sex              | Same-sex | Different-sex          | Same-sex (1989)            | Different-sex         | Same-sex      |
| 1. One partner can have or use surname of the other  | Yes                        | X        | X                      | Yes                        | No                    | No            |
| 2. Foreign partner of resident national is entitled to a residence permit  | Yes, but                   | X        | X                      | Yes, but                   | No                    | No            |
| 3. Relationship makes it easier for foreign partner to obtain citizenship  | Yes                        | X        | X                      | Yes                        | No                    | No            |
| 4. In case of criminal prosecution, one partner can refuse to testify against the other  | Yes                        | X        | X                      | Yes                        | Yes                   | Yes           |
| 5. When one partner uses violence against other partner, specific statutory protection applies   | No, but                    | X        | X                      | No, but                    | No                    | No            |
| 6. In case of accident or illness of one partner, the other is considered as next of kin for medical purposes (even without power of attorney) | Yes                        | X        | X                      | Yes                        | No                    | No            |
| 7. Organ donation from one living partner to the other is lawful   | Yes                        | X        | X                      | Yes                        | Yes                   | Yes           |
| 8. When one partner dies, the other can continue to rent the home  | Yes                        | X        | X                      | Yes                        | >2 years: Yes         | >2 years: Yes |
| 9. Partners have a duty to have sexual contact   | No                         | X        | X                      | No                         | No                    | No            |
| <b>Level of legal consequences</b>   | 6x3 + 1x2 + 1x1 + 1x0 = 21 | 9x0 = 0  | 9x0 = 0                | 6x3 + 1x2 + 1x1 + 1x0 = 21 | 3x3 + 6x0 = 9         | 3x3 + 6x0 = 9 |

## Notes to table C

C1 - Spouses and partners have to apply for the other partner's name, they do not get it automatically any longer. See art. 4 of Act no. 193, Act on Names, of 29 April 1981.

C2 - A foreigner, who is married/registered (and not an EU-citizen) with a Dane, can apply for a residence permit - see art. 9 of Act no. 608 of 17 July 2002, Act on Foreigners (*Udlændingeloven*). Please note, that the same paragraph states that the Dane does not have to be a native Dane: he/she can also be a citizen of the other Nordic countries or a 'convention refugee'. But the spouses have to be 24 years of age or more - and their relation to Denmark has to be stronger than the relation to the foreigner's homeland. The Minister of Integration has decided that these two rules do not necessarily apply on registered partners since they can not go to most of the countries and live as partners there.

C3 - To apply for a Danish citizenship you have to have a residence permit for more than seven years. You can get that permission in three ways - either through marriage/registered partnership, because you have an education which is attractive to Denmark (for example chemistry) or because you are recognised as a refugee.

C4 - See Act on Administration of Justice (*Retsplejeloven*) art. 171 (1)

C5 - The victim has a right to immediately get a divorce. See art. 34 of Act no. 147, Act on Marriage, (*Ægteskabsloven*) of 9 March 1999 as latest changed by Act no 365 of 6 June 2002.

C6 - See art. 105(5) of Act no. 129 of 15 April 1930, Act on Insurance Agreements (*Forsikringsaftaleloven*).

C7 - Special rules for persons under 18 years of age apply. See art. 13 of Act no. 402, Act on Organ Donation etc. of 13 June 1990.

C8 - If a spouse or a registered partner dies - the other spouse/partner can continue the rent. See art. 75(1) of Act no. 347 of 14 May .2001, Act on Renting homes and rooms, (*Lejeloven*). Informal cohabitation couples have the same right if they have been together for two years or more. See art. 75(2) of the same Act.

C9 - Not applicable.

**Table D (Denmark): Types of discrimination by employers or service providers that are prohibited in anti-discrimination legislation**

|   | Between <b>married spouses and registered partners</b> (1989) | Between <b>married spouses and informal cohabitants</b> | Between <b>registered partners and informal cohabitants</b> | Between <b>same-sex and different-sex partners</b> (with same status) (1987) |
|---|---|---|---|--|
| 1. With respect to housing                              | Yes   | No  | No  | Yes  |
| 2. With respect to life insurance                       | Yes   | No  | No  | Yes  |
| 3. With respect to health insurance                     | Yes   | No  | No  | Yes  |
| 4. With respect to medically assisted insemination      | No  | No  | No  | No   |
| 5. With respect to other services                       | Yes   | No  | No  | Yes  |
| 6. With respect to an occupational survivor's pension   | Yes (1996)  | No  | No  | Yes (1996)   |
| 7. With respect to other spousal benefits in employment | Yes (1996)  | No  | No  | Yes (1996)   |

**Notes to table D**

D1 - There is a general ban on discrimination on the grounds of race, belief, sexual orientation etc. in the Act on Race Discrimination, Act no. 626 of 29 Oktober 1987 (*Lov om forbud mod forskelsbehandling på grund af race m.v.*). This act covers all kinds of service providers including landlords. But it will not be discrimination if the landlord demands that people who rent his flats are married or registered - and therefore refuse to rent out to informal cohabitants of all kinds.

D2 - See D1.

D3 - See D1.

D4 - As mentioned in A2, only married women or women living in a similar relation with a man are allowed to get assisted fertilisation (insemination, IVF etc.) by help from a doctor. This is a direct discrimination of lesbians.

D5 - See D1.

D6 - See D7.

D7 - See Act no. 459, Act on Discrimination of 12 June 1996 (*Lov om forbud mod forskelsbehandling på arbejdsmarkedet*) which bans discrimination in employment and occupation - and giving heterosexual couples spousal benefits which homosexual couples are being refused will be a breach of the Act on Discrimination.



**Table E (Denmark): Types of couples that qualify for starting a civil marriage or registered partnership in the country itself**

|  |                            | Civil marriage |          | Registered partnership |                 |
|--|----------------------------|----------------|----------|------------------------|-----------------|
|  |                            | Different-sex  | Same-sex | Different-sex          | Same-sex (1989) |
| Resident national with:                      | 1. Resident national       | Yes            | X        | X                      | Yes             |
|  | 2. Non-resident national   | Yes            | X        | X                      | Yes             |
|  | 3. Resident foreigner      | Yes            | X        | X                      | Yes             |
|  | 4. Non-resident foreigner  | Yes            | X        | X                      | Yes             |
| Non-resident national with:                  | 5. Non-resident national   | Yes            | X        | X                      | No              |
|  | 6. Resident foreigner      | Yes            | X        | X                      | No, but         |
|  | 7. Non-resident foreigner  | Yes            | X        | X                      | No              |
| Resident foreigner with:                     | 8. Resident foreigner      | Yes            | X        | X                      | Yes, but        |
|  | 9. Non-resident foreigner  | Yes            | X        | X                      | No              |
| Non-resident foreigner with:                 | 10. Non-resident foreigner | Yes            | X        | X                      | No              |
| 11. Sister or brother with sister or brother |                            | No             | X        | X                      | No              |
| 12. Parent with child                        |                            | No             | X        | X                      | No              |

**Notes to table E**

E1 - See art 1-2 of Act no. 372, Act of Registered Partnership of 7 June 1989 as last changed by Act no. 360 of 2 June 1999, and Act no. 147, Act on Marriage (*Ægteskabsloven*) of 9 March 1999 as last changed by Act no 365 of 6 June 2002.

E2 - See E1.

E3 - See E1.

E4 - Beside the rules in the acts on Marriage and Registered Partnership mentioned above - also art. 9 of Act no. 608 of 17 July 2002, Act on Foreigners, applies. This means that you can get married or register your partnership - but you are not sure to be able to bring your partner to Denmark.

E5 - It is not possible for two Danes of the same sex living abroad to register - since it is a demand in art. 2(2) of the Act of Registered Partnership of 7 June 1989 as latest changed by Act no. 360 of 2 June 1999 that one of the partners is living in Denmark. Heterosexual couples are not met with the same demand.

E6 - If the resident foreigner is from a country with a similar legislation as the Danish Partnership Law they can register in Denmark. For the purposes of art. 2(2) of the Act of Registered Partnership, Norway, Sweden, Iceland, the Netherlands and Finland are considered to be such a country.

E7 - You still have to observe the rules of art. 9 of the Act on Foreigners, if the non-resident national wants to bring his/her spouse to Denmark.

E8 - For same sex-couples it is a demand that they have been living in Denmark for at least two years. However, if the foreigners (or just one of them) residing in Denmark are from countries with a similar legislation as the Danish Partnership Law, they are regarded as Danish citizens and can register like Danes, see art. 2 (2 and 3) of Act no. 372, Act on Registered Partnership (*Lov om registreret partnerskab*) of 7 June 1989 as last changed by Act no. 360 of 2 June 1999

E9 - For heterosexual couples see Act no. 147, Act on Marriage (*Ægteskabsloven*) of 9 March 1999 as last changed by Act no 365 of 6 June 2002 - and art. 9 of Act no. 608 of 17 July 2002, Act on Foreigners.

E10 - It has become quite popular among foreign heterosexual couples to go to Denmark just to get married. But of course they do not get any rights concerning social security, residence or working permit etc. The same possibility does not exist for homosexual couples.

E11 - Not applicable in Denmark.

E12 - See E11.

**Table F (Denmark): Authority for starting a civil marriage or registered partnership**

|  | Civil marriage |          | Registered partnership |                 |
|--|----------------|----------|------------------------|-----------------|
|  | Different-sex  | Same-sex | Different-sex          | Same-sex (1989) |
| 1. Registry of births, marriages and deaths  | No             | X        | X                      | X               |
| 2. Local population administration           | Yes            | X        | X                      | Yes             |
| 3. Church                                    | Yes            | X        | X                      | No              |
| 4. Court                                     | No             | X        | X                      | No              |
| 5. Private person with special authorisation | No             | X        | X                      | No              |
| 6. Public notary                             | No             | X        | X                      | No              |
| 7. Administrative magistrate                 | No             | X        | X                      | No              |

**Notes to table F**

F1 - See F2.

F2 - In Denmark you can start your marriage either at the City Hall or in a Church. The City Mayor (or an employee on behalf of him/her) does the investigation to find out whether the couple qualifies for marriage or partnership. The City Mayor can also delegate his authority to marry or register couples to a member of the City Council (which is rather common).

F3 - Only heterosexual couples can get legally married in a church. Homosexuals have to go to the City Hall only (but can get a blessing in a church - if they find a priest who is willing to do so).

F4 - This is not possible in Denmark.

F5 - This is not possible in Denmark.

F6 - This is not possible in Denmark.

F7 - This is not possible in Denmark.

**Table G (Denmark): Means of ending a marriage or registered partnership**

|   | Civil marriage |          | Registered partnership |                 |
|---|----------------|----------|------------------------|-----------------|
|   | Different-sex  | Same-sex | Different-sex          | Same-sex (1989) |
| 1. By court decision (after joint or individual petition)   | Yes            | X        | X                      | Yes             |
| 2. By mutually agreed contract (outside court)  | No             | X        | X                      | No              |
| 3. Unilaterally by one partner (outside court)  | No             | X        | X                      | No              |
| 4. By conversion of marriage into registered partnership, or vice versa (outside court)                                   | No             | X        | X                      | No              |
| 5. By one registered partner marrying a third person (or starting a registered partner with a third person)               | No             | X        | X                      | No              |
| 6. By the registered partners marrying each other (or by the married partners starting a registered partnership together) | No             | X        | X                      | No              |
| 7. By administrative decision (after joint or individual petition)  | Yes            | X        | X                      | Yes             |

**Notes to table G**

G1 - See art. 32-34, and art. 23-24 (annulment of a marriage), of Act no. 147, Act on Marriage, (*Ægteskabsloven*) of 9 March 1999, as most recently changed by Act no. 387 of 28 May 2003. The same Act states in art. 29 that a spouse (or registered partner) who does not feel he or she is able to continue the relation has a right to separation, which after one year gives the right to final divorce (see art.31 (1) of the above mentioned Act), or after 6 months if the spouses/partners agree (see art. 31(2) of the same Act).

G2 - This is not possible in Denmark.

G3 - See G2.

G4 - You can not convert a marriage into a partnership or the other way around, since it has to be two of opposite sex who marry - and two of the same sex who register. If somebody wants to change sex - he/she will have to end the marriage (or partnership) and register (or marry).

G5 - If by mistake or by will someone marries a third person, or registers a partnership with a third person, the latest marriage or partnership is looked upon as not existing.

G6 - Since you can not marry as a same-sex couple and can not enter into a registered partnership as a different sex couple this question is of no relevance for Denmark.

G7 - Most separations/divorces are given by permission by the public authorities (*Statsamtet*), but under the condition that the couple agrees on divorce/separation (see Act on Marriage, cited above).

**Some literature in English**

- Ingrid Lund-Andersen, 'The Danish Registered Partnership Act', in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003, p. 11-23.
- Ingrid Lund-Andersen, 'The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?', in: Robert Wintemute & Mads Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart Publishing, 2001, p. 417-426.
- Yuval Merin, *Equality for Same-Sex Couples. The legal recognition of gay partnerships in Europe and the United States*, Chicago/London: The University of Chicago Press, 2002, p. 61-80.
- Morten P. Broberg, 'The registered partnership for same-sex couples in Denmark', in: *Child and Family Law Quarterly*, vol. 8, no. 2, 1996, p. 149-155.
- E. Albæk, 'Political Ethics and Public Policy: Homosexuals between Moral Dilemmas and Political Considerations in Danish Parliamentary Debates', in: *Scandinavian Political Studies*, vol. 26, no. 3, 2003, p. 245-267.

## Major legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners in Finland

by Rainer Hiltunen <sup>1</sup>  
and Kees Waaldijk <sup>2</sup>

Symbols and words used in the national tables:

| Applicable answer  | Answer code | Colour      | Points given for calculation of level of legal consequences |
|--|-------------|-------------|---|
| The legal consequence applies.   | Yes         | White       | 3 pt  |
| The legal consequence applies in a limited way or not in all circumstances, or it can be contracted out of, or courts can set it aside using some general legal principle, etc.    | Yes, but    | Light pink  | 2 pt  |
| The legal consequence only applies in a very limited way or in very few circumstances, or it can be established by contract, or by courts using some general legal principle, etc. | No, but     | Middle pink | 1 pt  |
| The legal consequence does not apply.  | No          | Dark pink   | 0 pt  |
| No information was available on this point, or the legal position is unclear.  | Doubt       | Middle pink | 1 pt  |
| The column is not applicable in the country, because this type of relationship is not legally recognised (yet).  | X           | Dark pink   | 0 pt  |

| Additional information   | Answer code |
|--|-------------|
| The legal consequence is only available after the specified number of years.   | >x years    |
| The legal consequence is only available after the specified number of months.  | >x months   |
| Year of entry into force of the legislation providing the legal consequence (or the particular relationship type), or year of supreme court decision establishing its existence.<br>(Where two years are given, the first indicates the introduction of a more limited version of the consequence; where no year is given, the legal consequence mostly applies since the introduction of the particular relationship type, or already for a long time.) | (Year)      |

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## Introduction

This chapter aims to represent the law as it stood early in 2004.

### *Civil marriage*

Civil marriage is only open for different-sex partners. See the Marriage Act (*Avoliittolaki*) 234/1929 of 13 June 1929. For an unofficial English translation by the Ministry of Justice of the Marriage Act, see [www.finlex.fi/pdf/saadkaan/E9290234.PDF](http://www.finlex.fi/pdf/saadkaan/E9290234.PDF).

### *Registered partnership*

Registered partnership is only open for same-sex partners. See the Act on Registered Partnerships (*Laki rekisteröidystä parisuhteesta*) 950/2001 of 9 November 2001, which entered into force on 1 March 2002. See [www.finlex.fi/pdf/saadkaan/E0010950.PDF](http://www.finlex.fi/pdf/saadkaan/E0010950.PDF) for an unofficial English translation by the Ministry of Justice of the partnership law

The main differences between marriage and registered partnership concern the presumption of paternity (see item A1, below), adoption (items A4 and A5) and the use of each other's surname (C1). Another difference is that unlike marriage a partnership registration cannot take place in a church (see item F3). And for marriage no residency or citizenship requirements apply (see items E5 to E10).

### *Informal cohabitation*

There is no single definition of cohabitation in Finnish legislation. The description varies from one piece of legislation to the next. Usually cohabitation is defined as 'persons living in a marriage-like relationship', sometimes 'a man and a woman who live in a marriage-like relationship'. The government has decided to further define the legal position of same-sex cohabitants, but nothing has been done on that since 2001.

The definitions do not automatically rule out same-sex cohabitants, but there is no clear legislative rule or case law on this. Same-sex couples have been treated as common-law couples when the wording of the law allows it. Examples include joint parental authority (see item A3, below), fostering (A7), compensation in case of wrongful death (B5), next of kin rules (C6 and C7) and probably rent law (C8). See also items B13, B16 and B17.

### *Names, numbers and websites of laws cited in the notes*

- Act on the Medical Use of Human Organs and Tissues (*Laki ihmisen elimien ja kudoksien lääketieteellisestä käytöstä*) 101/2001 [www.finlex.fi/linkit/ajansd/20010101](http://www.finlex.fi/linkit/ajansd/20010101)
- Act on Compensation for Crime Damage (*Rikosvahinkolaki*) 935/1973 [www.finlex.fi/linkit/ajansd/19730935](http://www.finlex.fi/linkit/ajansd/19730935)
- Act on confirming the sex of a transsexual (*Laki transseksuaalin sukupuolen vahvistamisesta*) 563/2002 [http://finlex1.edita.fi/dynaweb/stp/stp/2002sd/@ebt-link?showtoc=false;target=IDMATCH\(id,20020563.sd](http://finlex1.edita.fi/dynaweb/stp/stp/2002sd/@ebt-link?showtoc=false;target=IDMATCH(id,20020563.sd)
- Act on Inheritance and Gift Tax (*Perintö- ja lahjaverolaki*) 378/1940 [www.finlex.fi/linkit/ajansd/19400378](http://www.finlex.fi/linkit/ajansd/19400378)
- Act on Registered Partnerships (*Laki rekisteröidystä parisuhteesta*) 950/2001 [www.finlex.fi/linkit/ajansd/20010950](http://www.finlex.fi/linkit/ajansd/20010950)
- Act on Residential Leases (*Laki asuinhuoneiston vuokrauksesta*) 481/1995 [www.finlex.fi/linkit/ajansd/19950481](http://www.finlex.fi/linkit/ajansd/19950481)
- Act on Social Assistance (*Laki toimeentulotuesta*) 1412/1997 [www.finlex.fi/linkit/ajansd/19971412](http://www.finlex.fi/linkit/ajansd/19971412)
- Act on the Status and Rights of Patients (*Laki potilaan asemasta ja oikeuksista*) 785/1992 [www.finlex.fi/linkit/ajansd/19920785](http://www.finlex.fi/linkit/ajansd/19920785)
- Adoption Act (*Laki lapseksiottamisesta*) 153/1985 [www.finlex.fi/linkit/ajansd/19850153](http://www.finlex.fi/linkit/ajansd/19850153)
- Child Custody and Right of Access Act (*Laki lapsen huollosta ja tapaamisoikeudesta*) 361/1983 [www.finlex.fi/linkit/ajansd/19830361](http://www.finlex.fi/linkit/ajansd/19830361)
- Code of Inheritance (*Perintökaari*) 40/1965 [www.finlex.fi/linkit/ajansd/19650040](http://www.finlex.fi/linkit/ajansd/19650040)
- Code of Judicial Procedure (*Oikeudenkäymiskaari*) 4/1734 [www.finlex.fi/linkit/ajansd/17340004](http://www.finlex.fi/linkit/ajansd/17340004)
- Criminal Investigations Act (*Esitutkintalaki*) 449/1987 [www.finlex.fi/linkit/ajansd/19870449](http://www.finlex.fi/linkit/ajansd/19870449)
- Employment Accidents Act (*Tapaturmavakuutuslaki*) 608/1948 [www.finlex.fi/linkit/ajansd/19480608](http://www.finlex.fi/linkit/ajansd/19480608)
- Marriage Act (*Avoliittolaki*) 234/1929 [www.finlex.fi/linkit/ajansd/19290234](http://www.finlex.fi/linkit/ajansd/19290234)

- Names Act (*Nimilaki*) 694/1985  
[www.finlex.fi/linkit/ajansd/19850694](http://www.finlex.fi/linkit/ajansd/19850694)
- National Pension Act (*Kansaneläkelaki*) 347/1956  
[www.finlex.fi/linkit/ajansd/19560347](http://www.finlex.fi/linkit/ajansd/19560347)
- Paternity Act (*Isyyslaki*) 700/1975  
[www.finlex.fi/linkit/ajansd/19750700](http://www.finlex.fi/linkit/ajansd/19750700)
- Penal Code (*Rikoslaki*) 39/1889 as amended by law 578/1995 [www.finlex.fi/linkit/ajansd/18890039](http://www.finlex.fi/linkit/ajansd/18890039)
- Survivors Pension Act (*Perhe-eläkelaki*) 38/1969  
[www.finlex.fi/linkit/ajansd/19690038](http://www.finlex.fi/linkit/ajansd/19690038)
- The Aliens Act (*Ulkomaalaislaki*) 378/1991  
[www.finlex.fi/linkit/ajansd/19910378](http://www.finlex.fi/linkit/ajansd/19910378)
- The Nationality Act (*Kansalaisuuslaki*) 359/2003  
[www.finlex.fi/linkit/ajansd/20030359](http://www.finlex.fi/linkit/ajansd/20030359)
- Workers Pension Act (*Työntekijäin eläkelaki*) 395/1961  
[www.finlex.fi/linkit/ajansd/19610395](http://www.finlex.fi/linkit/ajansd/19610395)

**Table A (Finland): Parenting consequences**

|  | Civil marriage    |            | Registered partnership |                   | Informal cohabitation   |                   |
|--|-------------------|------------|------------------------|-------------------|-------------------------|-------------------|
|  | Different-sex     | Same-sex   | Different-sex          | Same-sex (2002)   | Different-sex           | Same-sex          |
| 1. When female partner gives birth, both partners automatically become legal parents   | Yes               | X          | X                      | No                | No, but                 | No                |
| 2. Medically assisted insemination is lawful for women in such a relationship  | Yes               | X          | X                      | Yes               | Yes                     | Yes               |
| 3. When only one partner is the parent of a child, both partners can have parental authority or responsibilities during their relationship | Yes               | X          | X                      | Yes               | Yes                     | Yes               |
| 4. When only one partner is the parent of a child, the other partner can adopt it and thus become its second parent                        | Yes               | X          | X                      | No                | No                      | No                |
| 5. Partners can jointly adopt a child  | Yes               | X          | X                      | No                | No                      | No                |
| 6. One partner can individually adopt a child  | No                | X          | X                      | Yes               | Yes                     | Yes               |
| 7. Partners can jointly foster a child   | Yes               | X          | X                      | Yes               | Yes                     | Yes               |
| <b>Level of legal consequences</b>   | 6x3 + 1x0<br>= 18 | 7x0<br>= 0 | 7x0<br>= 0             | 4x3 + 3x0<br>= 12 | 4x3 + 1x1 + 2x0<br>= 13 | 4x3 + 3x0<br>= 12 |

**Notes to table A**

A1 - Marriage: art. 2 Paternity Act; partnership: art. 9(1) Act on Registered Partnerships. For different-sex cohabitation paternity is not automatic, but male partner can easily register paternity by announcement (art 3 Paternity Act).

A2 - No legislation on assisted insemination; in fact many lesbian couples are assisted every year.

A3 - Marriage: art. 6 Child Custody and Right of Access Act; partnership and cohabitation: art. 9(1)(i) of the same Act. Many same-sex registered couples and same-sex informal cohabiting couples have been granted joint parental authority during the last years.

A4 - Marriage: art. 6(2) Adoption Act; partnership: art. 9(2) Act on Registered Partnerships; cohabitation: art. 7 Adoption Act.

A5 - Marriage: art. 6(1) Adoption Act; partnership: art. 9(2) Act on Registered Partnerships, cohabitation: art. 7 Adoption Act.

A6 - Marriage: art. 6(1) Adoption Act; partnership and cohabitation: art. 1(1) Adoption Act.

A7 - No legislation on child fostering. No information available on the number of same-sex foster parents.

**Table B - part one (Finland): Material consequences in private law**

|  | Civil marriage       |          | Registered partnership |                      | Informal cohabitation |               |
|--|----------------------|----------|------------------------|----------------------|-----------------------|---------------|
|  | Different-sex        | Same-sex | Different-sex          | Same-sex (2002)      | Different-sex         | Same-sex      |
| 1. Properties of each partner are considered joint property                        | No                   | X        | X                      | No                   | No                    | No            |
| 2. Debts of each partner are considered joint debt                                 | No, but              | X        | X                      | No, but              | No                    | No            |
| 3. In case of splitting up, statutory rules on alimony apply                       | Yes                  | X        | X                      | Yes                  | No                    | No            |
| 4. In case of splitting up, statutory rules on redistribution of properties apply  | Yes                  | X        | X                      | Yes                  | No                    | No            |
| 5. In case of wrongful death of one partner, the other is entitled to compensation | Yes                  | X        | X                      | Yes                  | Yes                   | Yes           |
| 6. When one partner dies without testament, the other is an inheritor              | Yes                  | X        | X                      | Yes                  | No                    | No            |
| <b>Level of legal consequences</b>   | 4x3 + 1x1 + 1x0 = 13 | 6x0 = 0  | 6x0 = 0                | 4x3 + 1x1 + 1x0 = 13 | 1x3 + 5x0 = 3         | 1x3 + 5x0 = 3 |

**Notes to table B - part one**

B1 - Marriage and partnership: art. 34 Marriage Act.

B2 - Marriage and partnership: art. 52 Marriage Act; only debts which are made for the subsistence of spouses/partners or children living in the household, are joint debts.

B3 - Marriage and partnership: art. 48 Marriage Act.

B4 - Marriage and partnership: art. 35 Marriage Act.

B5 - Marriage, partnership and cohabitation: art. 6a Act on Compensation for Crime Damage. The term used can be translated as 'person closely connected' (*läheinen*).

B6 - Marriage and partnership: art. 1 of chapter 3 of the Code of Inheritance.



**Table B - part two (Finland): Positive material consequences in public law**

|   | Civil marriage      |          | Registered partnership |                     | Informal cohabitation |          |
|---|---------------------|----------|------------------------|---------------------|-----------------------|----------|
|   | Different-sex       | Same-sex | Different-sex          | Same-sex (2002)     | Different-sex         | Same-sex |
| 7. Relationship can result in lower property tax  | No                  | X        | X                      | No                  | No                    | No       |
| 8. Relationship can result in lower income tax  | No, but             | X        | X                      | No, but             | No                    | No       |
| 9. Public health insurance of one partner covers medical costs of other partner                 | No                  | X        | X                      | No                  | No                    | No       |
| 10. Relationship can have positive impact on basic social security payment in case of no income | No                  | X        | X                      | No                  | No                    | No       |
| 11. Relationship can have positive impact on statutory old age pension                          | No                  | X        | X                      | No                  | No                    | No       |
| 12. When one partner dies, the other can get a statutory survivor's pension                     | Yes                 | X        | X                      | Yes                 | No                    | No       |
| 13. Surviving partner pays no inheritance tax (or less than a mere friend would)                | Yes                 | X        | X                      | Yes                 | No, but               | No       |
| <b>Level of legal consequences</b>  | 2x3 + 1x1 + 4x0 = 7 | 7x0 = 0  | 7x0 = 0                | 2x3 + 1x1 + 4x0 = 7 | 1x1 + 6x0 = 1         | 7x0 = 0  |

**Notes to table B - part two**

B7 - Relationships do not affect property tax.

B8 - Income taxation is as a rule individually based. Only in a few cases marriage or registered partnership can result in lower income tax, one example of this is that alimony payments after divorce are tax free (art. 91 Act on Income Tax).

B9 - Public health insurance is individually based.

B10 - No such impact.

B11 - No such impact.

B12 - Marriage and partnership: art. 19(1) Survivors Pension Act.

B13 - Married and registered surviving partners pay less tax (art. 11(3) Act on Inheritance and Gift Tax). The same applies to different-sex cohabitants, but only if the surviving partner has (had) a joint child with the deceased partner.

**Table B - part three (Finland): Negative material consequences in public law**

|   | Civil marriage   |            | Registered partnership |                  | Informal cohabitation |            |
|---|------------------|------------|------------------------|------------------|-----------------------|------------|
|   | Different-sex    | Same-sex   | Different-sex          | Same-sex (2002)  | Different-sex         | Same-sex   |
| 14. Relationship can result in higher property tax  | No               | X          | X                      | No               | No                    | No         |
| 15. Relationship can result in higher income tax  | No               | X          | X                      | No               | No                    | No         |
| 16. Relationship can have negative impact on basic social security payment in case of no income | Yes              | X          | X                      | Yes              | Yes                   | No         |
| 17. Relationship can have negative impact on statutory old age pension                          | Yes              | X          | X                      | Yes              | Yes                   | No         |
| <b>Level of legal consequences</b>  | 2x3 + 2x0<br>= 6 | 4x0<br>= 0 | 4x0<br>= 0             | 2x3 + 2x0<br>= 6 | 2x3 + 2x0<br>= 6      | 4x0<br>= 0 |

**Notes to table B - part three**

B14 - Relationships do not affect property tax.

B15 - No such impact.

B16 - Marriage, partnership and different-sex cohabitation: art. 3(1) Act on Social Security.

B17 - Marriage, partnership and different-sex cohabitation: art. 28(2) National Pension Act.

Table C (Finland): Other legal consequences

|  | Civil marriage       |          | Registered partnership |                            | Informal cohabitation |                      |
|--|----------------------|----------|------------------------|----------------------------|-----------------------|----------------------|
|  | Different-sex        | Same-sex | Different-sex          | Same-sex (2002)            | Different-sex         | Same-sex             |
| 1. One partner can have or use surname of the other  | Yes                  | X        | X                      | No, but                    | No                    | No                   |
| 2. Foreign partner of a resident national is entitled to a residence permit  | Yes, but             | X        | X                      | Yes, but                   | >2 years: Yes, but    | >2 years: Yes, but   |
| 3. Relationship makes it easier for foreign partner to obtain citizenship  | Yes                  | X        | X                      | Yes                        | No                    | No                   |
| 4. In case of criminal prosecution, one partner can refuse to testify against the other  | Yes                  | X        | X                      | Yes                        | Yes, but              | Yes, but             |
| 5. When one partner uses violence against other partner, specific statutory protection applies   | No                   | X        | X                      | No                         | No                    | No                   |
| 6. In case of accident or illness of one partner, the other is considered as next of kin for medical purposes (even without power of attorney) | Yes                  | X        | X                      | Yes                        | Yes                   | Yes                  |
| 7. Organ donation from one living partner to the other is lawful   | Yes                  | X        | X                      | Yes                        | Yes                   | Yes                  |
| 8. When one partner dies, the other can continue to rent the home  | Yes                  | X        | X                      | Yes                        | Yes                   | Yes, but             |
| 9. Partners have a duty to have sexual contact   | No                   | X        | X                      | No                         | No                    | No                   |
| Level of legal consequences  | 6x3 + 1x2 + 2x0 = 20 | 9x0 = 0  | 9x0 = 0                | 5x3 + 1x2 + 1x1 + 2x0 = 18 | 3x3 + 2x2 + 4x0 = 13  | 2x3 + 3x2 + 4x0 = 12 |

**Notes to table C**

C1 - Marriage: art. 7(1) Names Act; partnership: art. 10(1)(iii) Names Act. The only way for a registered partner to get the name of his or her partner, is through the administrative procedure for changing a surname (see M. Savolainen, 'The Finnish and Swedish Partnership Acts - Similarities and Divergencies' in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003, p. 32-33). In that context registered partnership has been considered as a special reason needed when making an application to take a name that is already in use.

C2 - Marriage or partnership as a rule qualifies as a reason for a residence permit (art. 18(1)(i) Aliens Act). Both same-sex and different-sex cohabitation have usually been accepted as a reason for a residence permit after two years of cohabitation (art. 18(1)(i) Aliens Act).

C3 - Marriage and partnership: art. 22 Finnish Nationality Act.

C4 - Marriage, partnership and cohabitation: art. 20(1)(i) of chapter 17 Code of Procedure. This Code is from 1948 and the words used, 'married or engaged', would likely be interpreted so as to include same-sex and different-sex cohabitation.

C5 - No such provisions.

C6 - Marriage, partnership and cohabitation: art. 9(1) Act on the Status and Rights of Patients.

C7 - Art. 4(1) Act of the Medical Use of Human Organs and Tissues. The terms used 'next of kin' (*lähiomainen*) and 'person closely connected' (*läheinen henkilö*) are most likely to include informal cohabitation.

C8 - Marriage, partnership and cohabitation: art. 46(2) Act on Residential Leases. According to art. 11 of this Act, the term 'spouse' (*puoliso*) includes both married and cohabiting couples. It would be most likely to be interpreted to include also same-sex couples.

C9 - No such provisions.

**Table D (Finland): Types of discrimination by employers or service providers that are prohibited in anti-discrimination legislation**

|   | Between married spouses and registered partners (2002) | Between married spouses and informal cohabitants (1995) | Between registered partners and informal cohabitants (2002) | Between same-sex and different-sex partners (with same status) (1995) |
|---|--|---|---|---|
| 1. With respect to housing                              | Yes  | Yes   | Yes   | Yes   |
| 2. With respect to life insurance                       | Yes  | Yes   | Yes   | Yes   |
| 3. With respect to health insurance                     | Yes  | Yes   | Yes   | Yes   |
| 4. With respect to medically assisted insemination      | Yes, but   | Yes, but  | Yes, but  | Yes, but  |
| 5. With respect to other services                       | Yes  | Yes   | Yes   | Yes   |
| 6. With respect to an occupational survivor's pension   | Yes  | No  | No  | No  |
| 7. With respect to other spousal benefits in employment | Yes, but   | No, but   | No, but   | Yes, but  |

**Notes to table D**

D1 - Provisions on discrimination in the Penal Code (art. 9 of chapter 11, as amended by law 578/1995) make it a criminal offence for anyone, exercising their trade or profession, to refuse service or place someone in an unequal or an essentially inferior position, without an acceptable reason, because of [...] sexual orientation, family ties [...] or another comparable circumstance.

D2 - Idem.

D3 - Idem.

D4 - Idem. There is no law on medically assisted insemination; however, several committee reports have suggested to restrict insemination services to married couples. This might be seen by the courts as an 'acceptable reason' needed for justified differential treatment according to the Penal Code.

D5 - See note to D1.

D6 - Idem. According to art. 4a Workers Pension Act, informal cohabitants are not eligible for survivors' pensions.

D7 - See note to D1. There are differences between registered partners and married couples in spousal benefits based on collective agreements. The issue has never been brought to court as a Penal Code discrimination issue. Differential treatment would more likely be considered as prohibited discrimination when between married and registered partners or between same-sex and different-sex partners, than when between married partners and informal cohabitants or between registered partners and informal cohabitants.

**Table E (Finland): Types of couples that qualify for starting a civil marriage or registered partnership in the country itself**

|  |                            | Civil marriage       |          | Registered partnership |                            |
|--|----------------------------|----------------------|----------|------------------------|----------------------------|
|  |                            | Different-sex        | Same-sex | Different-sex          | Same-sex (2002)            |
| Resident national with:                      | 1. Resident national       | Yes                  | X        | X                      | Yes                        |
|  | 2. Non-resident national   | Yes                  | X        | X                      | Yes                        |
|  | 3. Resident foreigner      | Yes                  | X        | X                      | Yes                        |
|  | 4. Non-resident foreigner  | Yes                  | X        | X                      | Yes                        |
| Non-resident national with:                  | 5. Non-resident national   | Yes                  | X        | X                      | No                         |
|  | 6. Resident foreigner      | Yes                  | X        | X                      | No, but                    |
|  | 7. Non-resident foreigner  | Yes                  | X        | X                      | No                         |
| Resident foreigner with:                     | 8. Resident foreigner      | Yes                  | X        | X                      | >2 years: Yes, but         |
|  | 9. Non-resident foreigner  | Yes                  | X        | X                      | No, but                    |
| Non-resident foreigner with:                 | 10. Non-resident foreigner | Yes, but             | X        | X                      | No                         |
| 11. Sister or brother with sister or brother |                            | No                   | X        | X                      | No                         |
| 12. Parent with child                        |                            | No                   | X        | X                      | No                         |
| Level of access                              |                            | 9x3 + 1x2 + 2x0 = 29 | 12x0 = 0 | 12x0 = 0               | 4x3 + 1x2 + 2x1 + 5x0 = 16 |

**Notes to table E**

E1 - For partnership, see art. 10(1)(1) Act on Registered Partnerships. No such restrictions apply to marriage. The text of art. 10 of the Act on Registered Partnerships reads as follows:

‘(1) Partnership may be registered in Finland only if: (1) at least one of the partners is a Finnish citizen and habitually resident in Finland; or (2) both parties have been habitually resident in Finland for two years immediately before the registration.

(2) In the application of subsection (1), citizenship of a foreign state whose legislation allows for the registration of partnership with mainly the same legal effects as provided in this Act, shall correspond to Finnish citizenship.’

Governmental Decree 141/2002 currently designates corresponding citizenships to be Dutch, Icelandic, Swedish, Norwegian, German and Danish citizenships.

E2 - Idem.

E3 - Idem.

E4 - Idem.

E5 - Idem.

E6 - Art. 10(2) Act on Registered Partnerships allows registration if the resident foreigner has a citizenship of a country mentioned in the Governmental Decree 141/2002 (quoted in note to E1). No such restrictions apply to marriage.

E7 - See note to E1.

E8 - Art. 10(1)(2) Act on Registered Partnerships allows registration after two years of residence immediately before the registration for both parties, but according to 10(2) Act on Registered Partnerships two years residency is not required if one of the two resident foreigners has a citizenship of a country mentioned in Governmental Decree 141/2002 (quoted in note to E1). No such restrictions apply to marriage.

E9 - Art. 10(2) Act on Registered Partnerships allows registration if the resident foreigner has a citizenship of a country mentioned in Governmental Decree 141/2002 (quoted in note to E1). No such restrictions apply to marriage.

E10 - Art. 108(2) Marriage Act: ‘If neither the woman nor the man is a Finnish citizen and if neither is habitually resident in Finland, they have the right to marry before a Finnish authority only if the marriage is permissible under the law of Finland and if each of them has the right to marry in accordance with the law of the state whose citizen he or she is or where he or she is habitually resident, or in accordance with the law

applicable in one of these states on the examination of impediments to marriage.’ For partnership, see art. 10(1) Act on Registered Partnerships (quoted in note to E1).

E11 – Art. 7(2) Marriage Act; art. 2(1)(2) Act on Registered Partnerships.

E12 – *Idem*.

**Table F (Finland): Authority for starting a civil marriage or registered partnership**

|  | Civil marriage |          | Registered partnership |                 |
|--|----------------|----------|------------------------|-----------------|
|  | Different-sex  | Same-sex | Different-sex          | Same-sex (2002) |
| 1. Registry of births, marriages and deaths  | Yes            | X        | X                      | Yes             |
| 2. Local population administration           | No             | X        | X                      | No              |
| 3. Church                                    | Yes            | X        | X                      | No              |
| 4. Court                                     | Yes            | X        | X                      | Yes             |
| 5. Private person with special authorisation | No             | X        | X                      | No              |
| 6. Public notary                             | No             | X        | X                      | No              |
| 7. Administrative magistrate                 | No             | X        | X                      | No              |

**Notes to table F**

F1 – Art. 17(2)(ii) Marriage Act; art. 4(1) Act on Registered Partnerships, which reads as follows: ‘Partnership shall be registered by an authority entitled to perform *civil* marriage ceremonies’ (emphasis added). This means that partnership registrations can be done either by a judge of the local court of first instance, or by a registrar of the population register, which is comparable to what the French call ‘*l’état civil*’ and the English call ‘*the registry of births, marriages and deaths*’ (see M. Savolainen, ‘The Finnish and Swedish Partnership Acts – Similarities and Divergencies’ in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003, p. 30).

F2 – Marriages and partnerships can be registered by the registrar of the population register, which resembles most the Registry of births, marriages and deaths. See note to F1.

F3 – Art. 17(1) Marriage Act; art. 4(1) Act on Registered Partnerships (quoted in note to F1).

F4 – Art. 17(2)(i) Marriage Act; art. 4(1) Act on Registered Partnerships (quoted in note to F1).

F5 – No such provisions.

F6 – No such provisions.

F7 – No such provisions.

**Table G (Finland): Means of ending a marriage or registered partnership**

|   | Civil marriage |          | Registered partnership |                 |
|---|----------------|----------|------------------------|-----------------|
|   | Different-sex  | Same-sex | Different-sex          | Same-sex (2002) |
| 1. By court decision (after joint or individual petition)   | Yes            | X        | X                      | Yes             |
| 2. By mutually agreed contract (outside court)  | No             | X        | X                      | No              |
| 3. Unilaterally by one partner (outside court)  | No             | X        | X                      | No              |
| 4. By conversion of marriage into registered partnership, or vice versa (outside court)                                   | No, but        | X        | X                      | No, but         |
| 5. By one registered partner marrying a third person (or starting a registered partner with a third person)               | No             | X        | X                      | No              |
| 6. By the registered partners marrying each other (or by the married partners starting a registered partnership together) | No             | X        | X                      | No              |
| 7. By administrative decision (after joint or individual petition)  | No             | X        | X                      | No              |

**Notes to table G**

G1 - Art. 25 Marriage Act; art. 7(2) Act on Registered Partnerships.

G2 - No such provisions.

G3 - No such provisions.

G4 - Marriage and partnership: art. 2(2) Act on confirming the sex of a transsexual. When the sex of a transsexual is notarised in compliance with the procedures stated in the Act, the persons marriage is a automatically converted to registered partnership and vice versa.

G5 - No such provisions.

G6 - No such provisions.

G7 - No such provisions.

***Some literature in English***

- Matti Savolainen, 'The Finnish and Swedish Partnership Acts - Similarities and Divergencies', in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003, p. 24-40.
- Yuval Merin, *Equality for Same-Sex Couples. The legal recognition of gay partnerships in Europe and the United States*, Chicago/London: The University of Chicago Press, 2002, p. 107-110.





## Major legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners in France

by Daniel Borrillo <sup>1</sup>  
and Kees Waaldijk <sup>2</sup>

Symbols and words used in the national tables:

| Applicable answer  | Answer code | Colour      | Points given for calculation of level of legal consequences |
|--|-------------|-------------|---|
| The legal consequence applies.   | Yes         | White       | 3 pt  |
| The legal consequence applies in a limited way or not in all circumstances, or it can be contracted out of, or courts can set it aside using some general legal principle, etc.    | Yes, but    | Light pink  | 2 pt  |
| The legal consequence only applies in a very limited way or in very few circumstances, or it can be established by contract, or by courts using some general legal principle, etc. | No, but     | Middle pink | 1 pt  |
| The legal consequence does not apply.  | No          | Dark pink   | 0 pt  |
| No information was available on this point, or the legal position is unclear.  | Doubt       | Middle pink | 1 pt  |
| The column is not applicable in the country, because this type of relationship is not legally recognised (yet).  | X           | Dark pink   | 0 pt  |

| Additional information   | Answer code |
|--|-------------|
| The legal consequence is only available after the specified number of years.   | >x years    |
| The legal consequence is only available after the specified number of months.  | >x months   |
| Year of entry into force of the legislation providing the legal consequence (or the particular relationship type), or year of supreme court decision establishing its existence.<br>(Where two years are given, the first indicates the introduction of a more limited version of the consequence; where no year is given, the legal consequence mostly applies since the introduction of the particular relationship type, or already for a long time.) | (Year)      |

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<sup>2</sup> Universiteit Leiden, [www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk).

## Introduction

This chapter aims to represent the law as it stood early in 2004.

In France there are three ways in which relationships are legally organized: civil marriage, registered partnership (civil pact of solidarity, PaCS) and informal cohabitation ('concubinage').

The Civil Code does not define marriage. Article 144 simply establishes the age limit of the partners: "A male, until the completion of eighteen years, a female until the completion of fifteen years, may not contract marriage." Only civil marriage produces legal consequences. Moreover, it is prohibited to celebrate a church wedding before the civil wedding.

Before Act n° 99-944 of 15 November 1999 on registered partnerships came into effect, same-sex couples were not legally recognized. The said law has since introduced into the Civil Code a new Article 515-1 which defines a registered partnership as a "contract entered into by two natural persons of age, of different sexes or of the same sex, to organize their common life".

Until 1999, homosexual couples were barred from the status of cohabitants. It was the same Act of 1999 that also amended the Civil Code by introducing cohabitation, defined by Article 515-8 of the Civil Code as follows: "Cohabitation is a de facto union, characterized by a life in common offering a character of stability and continuity, between two persons, of different sexes or of the same sex, who live as a couple".

These three conjugal formats occupy a different hierarchical position in the legal system. The rights and obligations entailed by each of these formats are in proportion to the formality of the act. Civil marriage, at the top of the conjugal hierarchy, is not open to same-sex couples.

Informal cohabitation produces very limited legal consequences, essentially connected with social law: health insurance, reductions for certain forms of transport, etc.

Although registered partnerships offer more rights than informal cohabitation, it does not offer nearly as many prerogatives as civil marriage. Unlike marriage, a registered partnership gives no right to filiation whatsoever (no shared parental authority, no adoption, no access to medically assisted procreation). Furthermore, it does not allow foreigners who entered into a registered partnership to instantly obtain a residence permit or to apply for French nationality after one year. Partners in registered partnerships are not entitled to survivor's pension, and where they were entitled to such a pension (by virtue of a previous marriage) they lose it once they enter into a registered partnership. A registered partnership does not change the rules of devolution of estate and, in the absence of a will, there can be no inheritance. For donations between partners, besides the fact that the tax allowance is far smaller, registered partners must wait for two years.

Where married partners can file a joint tax return immediately after marriage, registered partners must wait until the third year after the date of conclusion of the registered partnership.

Registered partners are only entitled to parental or compassionate leave in case of disease of the partner, whereas married couples are entitled to such leave in case of birth, adoption, marriage or death of a child, as well as in case of disease of the parents-in-law. Since a registered partnership does not alter the marital status of the partners, they cannot choose to bear the partner's name. Furthermore, there is no legal representation between the partners (Articles 218 and 219 of the Civil Code).

Paradoxically, joint and several liability for household debts is much greater in registered partnerships than in marriage (the concept of "manifestly excessive expenditures" in Article 220 of the Civil Code does not apply to registered partnerships; see Article 515-4 CC).

To put an end to a marriage, legal divorce proceedings must be instituted. The freedom to sever the relationship is in the very nature of informal cohabitation. As far as registered partnerships are concerned, a joint declaration or three months' notice from one of the partners suffices to put an end to the relationship.

The *Loi no 99-944 du 15 novembre 1999 relative au pacte civil de solidarité* (law on the civil pact of solidarity) was published in *Le Journal officiel de la République Française* of November 16, 1999, p. 16959, which can be found at [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).

On that website the consolidated text of the whole Civil Code, including the provisions on marriage, registered partnerships and informal cohabitation can also be found (with translations); the English translation of the Civil Code is at [www.legifrance.gouv.fr/html/codes\\_traduits/code\\_civil\\_textA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm).

For more information about the Pacs, see also: [www.chez.com/obspacs/](http://www.chez.com/obspacs/) and <http://vosdroits.service-public.fr/particuliers/ARBO/NXFAM260.html?&n=Couples&l=NX23>.

### Abbreviations

CC: *Civil Code*

CE: *Council of State*

Pacs: *Registered partnership*

**Table A (France): Parenting consequences**

|  | Civil marriage    |            | Registered partnership (1999) |                        | Informal cohabitation        |                        |
|--|-------------------|------------|-------------------------------|------------------------|------------------------------|------------------------|
|  | Different-sex     | Same-sex   | Different-sex                 | Same-sex               | Different-sex                | Same-sex (1999)        |
| 1. When female partner gives birth, both partners automatically become legal parents   | Yes               | X          | No, but                       | No                     | No, but                      | No                     |
| 2. Medically assisted insemination is lawful for women in such a relationship  | Yes               | X          | >2 years: Yes, but            | No                     | >2 years: Yes, but           | No                     |
| 3. When only one partner is the parent of a child, both partners can have parental authority or responsibilities during their relationship | No                | X          | No                            | No                     | No                           | No                     |
| 4. When only one partner is the parent of a child, the other partner can adopt it and thus become a second parent                          | Yes               | X          | No                            | No                     | No                           | No                     |
| 5. Partners can jointly adopt a child  | >2 years: Yes     | X          | No                            | No                     | No                           | No                     |
| 6. One partner can individually adopt a child  | Yes               | X          | Yes                           | Yes, but               | Yes                          | Yes, but               |
| 7. Partners can jointly foster a child   | Yes               | X          | Yes                           | Doubt                  | Yes                          | Doubt                  |
| <b>Level of legal consequences</b>   | 6x3 + 1x0<br>= 18 | 7x0<br>= 0 | 2x3 + 1x2 + 1x1 + 3x0<br>= 9  | 1x2 + 1x1 + 5x0<br>= 3 | 2x3 + 1x2 + 1x1 + 3x0<br>= 9 | 1x2 + 1x1 + 5x0<br>= 3 |

**Notes to table A**

A1 - The establishment of parental authority for the two parents springs from the principle of the presumption of paternity that is solely applicable in marriage. In accordance with Article 312 CC, a child is related to the husband of the mother if he was conceived in wedlock, from the 180<sup>th</sup> day after the wedding. This presumption is also extended to a child who was conceived before the marriage and was born during the marriage as a "child of the engaged couple", Art. 314 par. 1 CC: "A child born before the one hundred and eightieth day of marriage is legitimate and shall be deemed to have been so as from his conception". Presumption of paternity does not exist in the context of registered partnerships or informal cohabitation. The Act of 8 January 1993 instituted equality between married parents and unmarried parents in terms of the exercise of parental authority. Unlike in marriage, children born to a different-sex cohabiting couple (or registered partners) must be acknowledged by the two partners before the age of one year.

A2 - Art. L152-2, Public Health Code: "Medically assisted procreation is intended to respond to the parental wishes of a couple. The aim is to remedy infertility, the pathological nature of which has been medically diagnosed. It may also be intended to prevent a serious illness from being transmitted to the child. The man and woman forming the couple must be alive, of childbearing age, married or able to furnish proof of at least two years of conjugal life, and must have given prior consent to the transfer of embryos or to insemination".

A3 - The partner of the parent has no rights over the latter's child.

A4 - Art. 345-1 CC: "Plenary adoption of the spouse's child is allowed:

1° Where the child has a lawfully established parentage only with regard to that spouse;

2° Where the parent other than the spouse has been totally deprived of parental authority;

3° Where the parent other than the spouse is dead and has left no ascendant of the first degree or where the latter obviously took no further interest in the child."

A5 - Art. 343 CC: "Adoption may be petitioned by two spouses not judicially separated, married for more than two years or who are both older than twenty-eight years".

A6 - Art. 343-1: "Adoption may also be petitioned by a person over twenty-eight years of age. Where the adopter is married and not judicially separated, his or her spouse's consent is required unless this spouse is unable to express his or her intention." Homosexual individuals have far less chance of securing administrative approval prior to adoption. This practice was ratified on several occasions by the Council of State (Ph. Fretté case, Council of State, Sections 1 and 4 jointly, 9 October 1996; Parodi and Bettan cases, Council of State, 12 February 1997; Ms B. case, Council of State, 5 June 2002) and upheld by the European Court of Human Rights: *Fretté v. France*, 26 February 2002.

A7 - Although the law remains silent on this point, the case law may follow the example of adoption by considering that it is contrary to the interest of the child to be brought up by a homosexual couple or individual.

**Table B - Part One (France): Material consequences in private law**

|  | Civil marriage    |            | Registered partnership (1999) |                         | Informal cohabitation  |                        |
|--|-------------------|------------|-------------------------------|-------------------------|------------------------|------------------------|
|  | Different-sex     | Same-sex   | Different-sex                 | Same-sex                | Different-sex          | Same-sex (1999)        |
| 1. Properties of each partner are considered joint property                        | Yes, but          | X          | Yes, but                      | Yes, but                | No, but                | No, but                |
| 2. Debts of each partner are considered joint debt                                 | Yes, but          | X          | Yes, but                      | Yes, but                | No, but                | No, but                |
| 3. In case of splitting up, statutory rules on alimony apply                       | Yes               | X          | Yes                           | Yes                     | No                     | No                     |
| 4. In case of splitting up, statutory rules on redistribution of properties apply  | Yes               | X          | Yes                           | Yes                     | No, but                | No, but                |
| 5. In case of wrongful death of one partner, the other is entitled to compensation | Yes               | X          | Yes                           | Yes                     | Yes (1970)             | Yes (1995)             |
| 6. When one partner dies without testament, the other is an inheritor              | Yes               | X          | No                            | No                      | No                     | No                     |
| <b>Level of legal consequences</b>   | 4x3 + 2x2<br>= 16 | 6x0<br>= 0 | 3x3 + 2x2 + 1x0<br>= 13       | 3x3 + 2x2 + 1x0<br>= 13 | 1x3 + 3x1 + 2x0<br>= 6 | 1x3 + 3x1 + 2x0<br>= 6 |

**Notes to table B - Part One**

B1 - Married couples or partners having entered into a registered partnership may provide otherwise. In the absence of a contract, half of the property acquired after the marriage or registration of the partnership shall be considered joint property. In the case of informal cohabitation, the court may consider that there is a division of property if it is demonstrated that there was a de facto partnership between the cohabitants or joint ownership, or that there was unjust enrichment.

B2 - Joint and several liability for household debts is far greater for registered partners (Art. 515-4 par. 2, CC) than for married couples (Art. 220 CC). In the case of informal cohabitation, the case law has established a passive joint and several liability towards creditors by citing the theory of appearance or de facto partnership between cohabitants.

B3 - Articles 212 and 214 of the Civil Code provide for the benefit of alimony between spouses. For registered partnership couples there also exists an obligation of alimony, the terms and conditions of which are established by the partners. No obligation of alimony exists in informal cohabitation, and the court cannot impose such an obligation.

B4 - For married couples, the rules governing the liquidation of marriage settlements apply (Articles 1467 et seq., CC). For registered partnerships, the Civil Code also establishes rules for the distribution of the property after the dissolution (Art. 515-7, CC). No rules exist for informal cohabitation. The court may distribute the joint property after dissolution if the existence of a joint ownership agreement or a de facto partnership is established, or it may even apply the theory of unjust enrichment.

B5 - The law provides for compensation for married couples as well as for registered partners. For cohabitants, a judgment of the mixed chamber of the Court of Cassation of 27 February 1970 awards compensation for the prejudice suffered by a cohabitant as a result of the death of her partner. It was not until a judgment of the Belfort Court of First Instance on 25 July 1995 that the same rights were granted to homosexual cohabitants.

B6 - In the absence of a will, only married couples are entitled to inherit. Article 731 CC: "Succession devolves by law to the relatives and spouse entitled to inherit on the following terms".

Table B - Part Two (France): Positive material consequences in public law

|   | Civil marriage    |            | Registered partnership (1999) |                        | Informal cohabitation  |                        |
|---|-------------------|------------|-------------------------------|------------------------|------------------------|------------------------|
|   | Different-sex     | Same-sex   | Different-sex                 | Same-sex               | Different-sex          | Same-sex (1999)        |
| 7. Relationship can result in lower property tax  | No                | X          | No                            | No                     | No                     | No                     |
| 8. Relationship can result in lower income tax  | Yes               | X          | >3 years: Yes                 | >3 years: Yes          | No                     | No                     |
| 9. Public health insurance of one partner covers medical costs of other partner                 | Yes               | X          | Yes, but                      | Yes, but               | Yes, but               | Yes, but (1993)        |
| 10. Relationship can have positive impact on basic social security payment in case of no income | No                | X          | No                            | No                     | No                     | No                     |
| 11. Relationship can have positive impact on statutory old age pension                          | No                | X          | No                            | No                     | No                     | No                     |
| 12. When one partner dies, the other can get a statutory survivor's pension                     | Yes               | X          | No                            | No                     | No                     | No                     |
| 13. Surviving partner pays no inheritance tax (or less than a mere friend would)                | Yes               | X          | Yes, but                      | Yes, but               | No, but                | No, but                |
| Level of legal consequences   | 4x3 + 3x0<br>= 12 | 7x0<br>= 0 | 1x3 + 2x2 + 4x0<br>= 7        | 1x3 + 2x2 + 4x0<br>= 7 | 1x2 + 1x1 + 5x0<br>= 3 | 1x2 + 1x1 + 5x0<br>= 3 |

## Notes to table B - Part Two

B7 - Only the owner spouse is liable for tax (naturally, the spouses are both liable if the property belongs to them in joint ownership).

B8 - A joint tax return is compulsory for married couples. The amount of the tax may be higher or lower, depending on the income of the partners.

B9 - Sickness insurance is open to spouses who are not divorced or legally or de facto separated, if the spouse in question has no sickness insurance of his own, as well as to cohabitants or persons in a registered partnership who are effectively, totally and permanently dependent on the insured partner.

B10 - Relationship does not have a positive impact, since the benefits are individual. These benefits may be reduced or withdrawn from one of the partners if the income of the couple exceeds the amount laid down by law.

B11 - See B17 - Entitlement to old-age pension is an individual right and does not depend on the family situation.

B12 - In France, a special benefit called "widow's pension" is granted to surviving spouses on a means-tested basis. It is added to the reversion pension on condition that the surviving spouse does not marry or enter into a registered partnership. In order to be entitled to a reversion pension, the claimant must be at least 55 years of age and have been married for at least 2 years. This period does not apply if the couple has a child.

B13 - The tax reduction is not the same for married couples as for registered partnerships or informal cohabitation. There is a less expensive way for married couples to pass on their estate *mortis causa*. No inheritance tax is due between spouses on amounts up to 76,000 euros. For registered partnerships the nil-rate band is 57,000 euros and for cohabitants 1,525 euros (Articles 777b and 779 III of the General Tax Code).

**Table B - Part Three (France): Negative material consequences in public law**

|   | Civil marriage   |            | Registered partnership (1999) |                  | Informal cohabitation |                  |
|---|------------------|------------|-------------------------------|------------------|-----------------------|------------------|
|   | Different-sex    | Same-sex   | Different-sex                 | Same-sex         | Different-sex         | Same-sex (1999)  |
| 14. Relationship can result in higher property tax  | No               | X          | No                            | No               | No                    | No               |
| 15. Relationship can result in higher income tax  | Yes              | X          | >3 years:<br>Yes              | >3 years:<br>Yes | No                    | No               |
| 16. Relationship can have negative impact on basic social security payment in case of no income | Yes              | X          | Yes                           | Yes              | Yes                   | Yes              |
| 17. Relationship can have negative impact on statutory old age pension                          | No               | X          | No                            | No               | No                    | No               |
| <b>Level of legal consequences</b>  | 2x3 + 2x0<br>= 6 | 4x0<br>= 0 | 2x3 + 2x0<br>= 6              | 2x3 + 2x0<br>= 6 | 1x3 + 3x0<br>= 3      | 1x3 + 3x0<br>= 3 |

**Notes to table B - Part Three**

B14 - Individuals are liable for tax, irrespective of their family situation.

B15 - It all depends on the income of the partners. For married couples, a joint tax return is compulsory immediately after marriage, for registered partners from the third year following the registration of the registered partnership. Cohabitants do not file a joint tax return for their income (Art. 6 of the General Tax Code).

B16 - The partners in a registered partnership, like cohabitants, are considered as a couple with respect to the rules concerning the upper limits of certain social security benefits (minimum social security benefit, housing benefit, etc), according to the income of the couple. Entitlement to income support or widow's pension ceases as soon as a registered partnership is entered into or a marriage is concluded, irrespective of the partner's means.

B17 - Entitlement to old-age pension is an individual right and is independent of the family situation.



Table C (France): Other legal consequences

|  | Civil marriage       |          | Registered partnership (1999) |                            | Informal cohabitation      |                            |
|--|----------------------|----------|-------------------------------|----------------------------|----------------------------|----------------------------|
|  | Different-sex        | Same-sex | Different-sex                 | Same-sex                   | Different-sex              | Same-sex (1999)            |
| 1. One partner can have or use surname of the other  | Yes                  | X        | No                            | No                         | No                         | No                         |
| 2. Foreign partner of resident national is entitled to a residence permit  | Yes                  | X        | >1 year: Yes, but             | >1 year: Yes, but          | No, but                    | No, but                    |
| 3. Relationship makes it easier for foreign partner to obtain citizenship  | >1 year: Yes         | X        | No, but                       | No, but                    | No, but                    | No, but                    |
| 4. In case of criminal prosecution, one partner can refuse to testify against the other  | No, but              | X        | No                            | No                         | No                         | No                         |
| 5. When one partner uses violence against other partner, specific statutory protection applies   | Yes                  | X        | Yes                           | Yes                        | Yes                        | Yes                        |
| 6. In case of accident or illness of one partner, the other is considered as next of kin for medical purposes (even without power of attorney) | Yes                  | X        | No, but                       | No, but                    | No, but                    | No, but                    |
| 7. Organ donation from one living partner to the other is lawful   | Yes, but             | X        | No                            | No                         | No                         | No                         |
| 8. When one partner dies, the other can continue to rent the home  | Yes                  | X        | Yes                           | Yes                        | Yes                        | Yes                        |
| 9. Partners have a duty to have sexual contact   | Yes                  | X        | Yes                           | Yes                        | Yes, but                   | Yes, but                   |
| <b>Level of legal consequences</b>   | 7x3 + 1x2 + 1x1 = 24 | 9x0 = 0  | 3x3 + 1x2 + 2x1 + 3x0 = 13    | 3x3 + 1x2 + 2x1 + 3x0 = 13 | 2x3 + 1x2 + 3x1 + 3x0 = 11 | 2x3 + 1x2 + 3x1 + 3x0 = 11 |

## Notes to table C

C1 - Only married persons can use the name of their spouse (Art. 264 CC).

C2 - Foreign spouses immediately and automatically receive a temporary residence permit. The conclusion of a registered partnership is one of the elements that indicate the existence of personal ties in France, within the meaning of Art. 12b, par. 7, of Decree n° 45-2658 of 2 November 1945 establishing the conditions of entry and residence of foreigners in France, with a view to obtaining a residence permit. Foreign cohabitants must prove a certain period of cohabitation (exceptionally less than 5 years). Foreign partners having entered into a registered partnership must prove at least one year of conjugal life on French territory, irrespective of the nationality of the partner and the date of signature of the registered partnership (telegram of 4 April 2002 and Council of State, 29/7/02, n°231158). The issuing of a temporary residence permit to registered partners or cohabitants is left to the discretion of the public authorities.

C3 - Art. 21-2, par. 1, of the Civil Code provides that a foreigner or stateless person contracting marriage with a spouse having French nationality may, after one year of matrimony, obtain French nationality on the basis of

a declaration, provided that on the date of this declaration he or she is still living with his French spouse. This one-year period does not apply if a child is born of the two spouses. This provision does not apply to partners in a registered partnership or to cohabitants. Informal cohabitation or registered partnerships do not entitle foreign partners to French nationality. They simply constitute an element indicating the existence of personal ties in France with a view to obtaining French nationality.

C4 - According to Article 335 of the Code of Criminal Procedure, married partners are obliged to testify, but they are exempt from taking an oath, which is not the case for partners in a registered partnership or in informal cohabitation. In other words, married partners can tell lies in court without any penal consequences.

C5 - Several provisions of the Penal Code impose stiffer penalties for crimes or offences that are committed by the spouse or a close relation (e.g. Art. 222-8 of the Penal Code).

C6 - In principle, a spouse can legally represent the other spouse for certain acts in social life (Articles 217 and 219, Civil Code). In registered partnerships and informal cohabitation, an express power of attorney of the partner is required. In case of hospitalization, a homosexual person can always designate his partner as "confidant" to take decisions in his place.

C7 - According to Article L 671-3 of the Code of Public Health, a married partner can only donate organs in cases of emergency.

C8 - The Registered Partnerships Act amended Articles 14 and 15 of Act 89-462 of 6 July 1989 on tenancy relations by henceforth allowing the lease to be transferred to the partner in case of abandonment or death of the holder of the tenancy agreement with whom a registered partnership had been entered into. The same provisions apply to same-sex cohabitants.

C9 - The obligations of faithfulness and cohabitation that ensue from Article 212 of the Civil Code oblige married partners to have sexual relations. As far as registered partnerships are concerned, the Constitutional Council established that conjugal life implies "life as a couple", in other words, the obligation to have sexual relations. In case of informal cohabitation, although there is no formal obligation to have sexual relations, these relations are implicit in the very nature of the relationship, since the French word "concubinage" derives from the Latin *cum cubare*, which means "sleeping with". It does not suffice to live under the same roof to be considered cohabitants: the partners must actually sleep together.

**Table D (France): Types of discrimination by employers or service providers that are prohibited in anti-discrimination legislation**

|   | Between married spouses and registered partners (1999) | Between married spouses and informal cohabitants | Between registered partners and informal cohabitants (1999) | Between same-sex and different-sex partners (with same status) |
|---|--|--|---|--|
| 1. With respect to housing                              | Yes  | Yes  | Yes   | Yes (1989)   |
| 2. With respect to life insurance                       | Yes  | Yes  | Yes   | Yes (1985)   |
| 3. With respect to health insurance                     | Yes  | Yes  | Yes   | Yes (1993)   |
| 4. With respect to medically assisted insemination      | Yes, but   | Yes, but   | Yes, but  | No (1994)  |
| 5. With respect to other services                       | Yes  | Yes  | Yes   | Yes (1985)   |
| 6. With respect to an occupational survivor's pension   | Doubt  | Doubt  | Doubt   | Doubt  |
| 7. With respect to other spousal benefits in employment | Yes  | Yes  | Yes   | Yes  |

**Notes to table D**

D1 - Since the 1999 Act on registered partnerships, public authorities or private individuals must no longer make a distinction between married couples, registered partners or informal cohabitants, whether heterosexual or homosexual, with respect to access to housing. Moreover, Article 158 of Act 2002-73 of 17 January 2002 on "social modernization" amended Article 1 of the Act of 6 July 1989 as follows: "No person shall be refused rented accommodation on grounds of his or her origin, patronymic, physical appearance, sex, family situation, state of health, disability, morals, sexual orientation, political opinions, trade union activities, membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion." For the first three cases, direct protection is afforded on the basis of "family situation", for the fourth case "sexual orientation".

D2 - Life insurance is a means to protect the partner, whether he be married, living in a registered partnership or in informal cohabitation. Discrimination in this area is a statutory offence under Articles 225-1 and 225-2 of the Penal Code (refusal to supply a product or service on grounds of sexual orientation or morals).

D3 - Same as above, but health insurance is generally part of the social security system, see note B9.

D4 - Only heterosexual couples who have been married or living together for at least two years, who are of childbearing age and have proved that they are infertile have access to medically assisted insemination (Art. L152-2, Public Health Code; see note A2).

D5 - Articles 225-1 and 225-2 of the Penal Code prohibit the refusal of a product or service on grounds of sexual orientation or morals.

D6 - Only the surviving partner of a married couple is entitled to a widow's pension. This depends on the general public social security system, which has the monopoly in this area (Article L356-1 of the Social Security Code).

D7 - In the area of employment, Articles L122-35 (company rules) and L122-45 (compensation) of the Employment Code prohibit discrimination on grounds of sexual orientation or morals.

**Table E (France): Types of couples that qualify for starting a civil marriage or registered partnership in the country itself**

|  |                            | Civil marriage |          | Registered partnership (1999) |          |
|--|----------------------------|----------------|----------|-------------------------------|----------|
|  |                            | Different-sex  | Same-sex | Different-sex                 | Same-sex |
| Resident national with:                      | 1. Resident national       | Yes            | X        | Yes                           | Yes      |
|  | 2. Non-resident national   | Yes            | X        | Yes, but                      | Yes, but |
|  | 3. Resident foreigner      | Yes            | X        | Yes                           | Yes      |
|  | 4. Non-resident foreigner  | Yes            | X        | Yes, but                      | Yes, but |
| Non-resident national with:                  | 5. Non-resident national   | No             | X        | No                            | No       |
|  | 6. Resident foreigner      | Yes            | X        | Yes, but                      | Yes, but |
|  | 7. Non-resident foreigner  | No             | X        | No                            | No       |
| Resident foreigner with:                     | 8. Resident foreigner      | Yes            | X        | Yes                           | Yes      |
|  | 9. Non-resident foreigner  | Yes            | X        | Yes, but                      | Yes, but |
| Non-resident foreigner with:                 | 10. Non-resident foreigner | No             | X        | No                            | No       |
| 11. Sister or brother with sister or brother |                            | No             | X        | No                            | No       |
| 12. Parent with child                        |                            | No             | X        | No                            | No       |

**Notes to table E**

E1 - Two French nationals aged 18 may enter into a registered partnership. Women can marry from the age of 16.

E2 - A couple can marry in France on condition that one of the future spouses has been domiciled in France for at least one month (Art. 74, Civil Code). As regards registered partnerships, Article 515-3 of the Civil Code requires the partners to choose a shared residence (see note E4).

E3 - A French national can marry or enter into a registered partnership with a resident foreigner.

E4 - A French resident can marry a non-resident foreigner. A French resident, however, cannot enter into a registered partnership with a foreigner with whom he does not have a shared residence in France. This provision, however, does not imply that the foreigner must be a resident before the registered partnership is celebrated: it simply suffices for him to establish his residence with the partner at the moment of entering into the registered partnership.

E5 - Article 165 of the Civil Code provides that the marriage shall be solemnized by the Registrar of the town where one of the spouses has his domicile or residence, while Article 74 stipulates that at least one of the spouses must have had his residence there for at least one month before the wedding.

E6 - A resident foreigner may marry a non-resident French national. He may also enter into a registered partnership on condition that he shares residence with the resident foreigner.

E7 - See E2. Article 170 of the Civil Code provides, "A marriage contracted in a foreign country between French persons and between a French person and an alien is valid". A French national residing abroad may enter into a registered partnership with a foreigner at the French embassy.

E8 - See E2.

E9 - A resident foreigner holding a residence permit (including residence permit for studying) may enter into a registered partnership with a non-resident foreigner in France on condition that the latter shares residence with the former.

E10 - Two non-resident foreigners can neither marry nor enter into a registered partnership.

E11 - As with marriage, registered partnerships or informal cohabitation are not allowed between direct ascendants and descendants (father and daughter, etc.), between direct relatives by marriage (parents-in-law and sons-in-law, etc.) and between collateral relatives up to the third degree (brother and sister, uncle and niece, uncle and nephew, etc.) (Art. 515-2, Civil Code).

E12 - Same as above

**Table F (France): Authority for starting a civil marriage or registered partnership**

|  | Civil marriage |          | Registered partnership (1999) |          |
|--|----------------|----------|-------------------------------|----------|
|  | Different-sex  | Same-sex | Different-sex                 | Same-sex |
| 1. Registry of births, marriages and deaths  | Yes            | X        | No                            | No       |
| 2. Local population administration           | No             | X        | No                            | No       |
| 3. Church                                    | No             | X        | No                            | No       |
| 4. Court                                     | No             | X        | Yes                           | Yes      |
| 5. Private person with special authorisation | No             | X        | No                            | No       |
| 6. Public notary                             | No             | X        | No                            | No       |
| 7. Administrative magistrate                 | No             | X        | No                            | No       |

**Notes to table F**

F1 - For marriages, the registry is kept at the town hall by the Registrar. Registered partnerships are registered at the office of the Magistrates' Court. No formal instrument exists for informal cohabitation.

F2 - The prefectorial authorities have no authority in this matter.

F3 - In France, civil marriage must take precedence, on pain of penal sanctions.

F4 - Registered partnerships must be registered at the office of the Magistrates' Court.

F5 - See F1 and F4.

F6 - Same as above

F7 - Same as above

**Table G (France): Means of ending a marriage or registered partnership**

|   | Civil marriage |          | Registered partnership (1999) |          |
|---|----------------|----------|-------------------------------|----------|
|   | Different-sex  | Same-sex | Different-sex                 | Same-sex |
| 1. By court decision (after joint or individual petition)   | Yes            | X        | No                            | No       |
| 2. By mutually agreed contract (outside court)  | No             | X        | Yes                           | Yes      |
| 3. Unilaterally by one partner (outside court)  | No             | X        | Yes                           | Yes      |
| 4. By conversion of marriage into registered partnership, or vice versa (outside court)                                   | No             | X        | No                            | No       |
| 5. By one registered partner marrying a third person (or starting a registered partnership with a third person)           | No             | X        | Yes                           | Yes      |
| 6. By the registered partners marrying each other (or by the married partners starting a registered partnership together) | No             | X        | Yes                           | Yes      |
| 7. By administrative decision (after joint or individual petition)  | No             | X        | No                            | No       |

**Notes to table G**

G1 - Only a court of law can end a marriage.

G2 - A registered partnership ends by a joint decision of the parties or by a unilateral notification by one of the parties (Art. 515-7, Civil Code).

G3 - Same as above

G4 - A marriage or registered partnership cannot be converted in France.

G5 - Marriage results in the immediate dissolution of the registered partnership (Art. 515-7, Civil Code).

G6 - Marriage results in the immediate dissolution of the registered partnership (Art. 515-7, Civil Code).

G7 - This facility does not exist in France.

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## Major legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners in Germany

by Dirk Siegfried <sup>1</sup>  
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Symbols and words used in the national tables:

| Applicable answer  | Answer code | Colour      | Points given for calculation of level of legal consequences |
|--|-------------|-------------|---|
| The legal consequence applies.   | Yes         | White       | 3 pt  |
| The legal consequence applies in a limited way or not in all circumstances, or it can be contracted out of, or courts can set it aside using some general legal principle, etc.    | Yes, but    | Light pink  | 2 pt  |
| The legal consequence only applies in a very limited way or in very few circumstances, or it can be established by contract, or by courts using some general legal principle, etc. | No, but     | Middle pink | 1 pt  |
| The legal consequence does not apply.  | No          | Dark pink   | 0 pt  |
| No information was available on this point, or the legal position is unclear.  | Doubt       | Middle pink | 1 pt  |
| The column is not applicable in the country, because this type of relationship is not legally recognised (yet).  | X           | Dark pink   | 0 pt  |

| Additional information   | Answer code |
|--|-------------|
| The legal consequence is only available after the specified number of years.   | >x years    |
| The legal consequence is only available after the specified number of months.  | >x months   |
| Year of entry into force of the legislation providing the legal consequence (or the particular relationship type), or year of supreme court decision establishing its existence.<br>(Where two years are given, the first indicates the introduction of a more limited version of the consequence; where no year is given, the legal consequence mostly applies since the introduction of the particular relationship type, or already for a long time.) | (Year)      |

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## Introduction

This chapter aims to represent the law as in stood early in 2004.

In Germany marriage is regulated in the Civil Code (*Bürgerliches Gesetzbuch*). Marriage is only available to different-sex couples.

On 1 August 2001 the Registered partnership law (*Lebenspartnerschaftsgesetz*) of 16 February 2001 entered into force. Registered partnership (or 'life partnership') is only available to same-sex couples. To such a partnership the law only attaches a limited selection of the rights and obligations of marriage. Excluded are, among other things: presumption of paternity (see item A1, below), adoption (A4 and A5), statutory survivor's pension (B12), and certain tax reductions (e.g. with respect to income tax and inheritance tax, see items B8 and B13).

At the time of the enactment of the Registered partnership law, a proposal for a *Lebenspartnerschaftsgesetz-ergänzungsgesetz* (Life Partnership Extension Bill), aiming to also attach to 'life partnership' some of the now excluded rights, failed to get a majority in the German Senate (*Bundesrat*). The main bill that became the Registered partnership law did not require approval in the Senate.

It is expected that by the end of 2004 further legislation would raise the level of legal consequences of registered partnership.

Informal cohabitation of different-sex partners, and less often of same-sex partners, has only been recognized in German law for certain specific purposes (including some aspects of social security and of rent law; see items B8, B16 and C8, below).

The text of the Registered partnership law of 16 February 2001, plus a French and English translation of it, can be found at: [www.lsvd.de/lpartg/index.html](http://www.lsvd.de/lpartg/index.html), a website that also contains a guide (*Ratgeber*) in German to the law. An English translation of the Registered partnership law can also be found in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003.

### Abbreviations

BGB *Bürgerliches Gesetzbuch*- Civil Code

LPartG *Lebenspartnerschaftsgesetz* - Registered partnership law of 16 February 2001

**Table A (Germany): Parenting consequences**

|  | Civil marriage    |            | Registered partnership |                              | Informal cohabitation  |                        |
|--|-------------------|------------|------------------------|------------------------------|------------------------|------------------------|
|  | Different-sex     | Same-sex   | Different-sex          | Same-sex (2001)              | Different-sex          | Same-sex               |
| 1. When female partner gives birth, both partners automatically become legal parents   | Yes               | X          | X                      | No                           | No, but                | No                     |
| 2. Medically assisted insemination is lawful for women in such a relationship  | Yes               | X          | X                      | Doubt                        | Doubt                  | Doubt                  |
| 3. When only one partner is the parent of a child, both partners can have parental authority or responsibilities during their relationship | Yes (2001)        | X          | X                      | Yes                          | No                     | No                     |
| 4. When only one partner is the parent of a child, the other partner can adopt it and thus become its second parent                        | Yes               | X          | X                      | No                           | No                     | No                     |
| 5. Partners can jointly adopt a child  | Yes               | X          | X                      | No                           | No                     | No                     |
| 6. One partner can individually adopt a child  | No, but           | X          | X                      | Yes, but                     | Yes, but               | Yes, but               |
| 7. Partners can jointly foster a child   | Yes               | X          | X                      | No, but                      | No, but                | No, but                |
| <b>Level of legal consequences</b>   | 6x3 + 1x1<br>= 19 | 7x0<br>= 0 | 7x0<br>= 0             | 1x3 + 1x2 + 2x1 + 3x0<br>= 7 | 1x2 + 3x1 + 3x0<br>= 5 | 1x2 + 2x1 + 4x0<br>= 4 |

**Notes to table A**

A1 - Civil marriage: art. 1592(1) BGB. Non-married different-sex partner becomes legal father if both partners agree; art. 1592(2) BGB.

A2 - There is no codification; in regard to non-married women there are different opinions in different states.

A3 - Civil marriage: art. 1687b BGB, introduced by art. 2(13) LPartG; registered partnership: art. 9 LPartG.

A4 - Art. 1741(2) BGB.

A5 - Art. 1741(2) BGB.

A6 - Art. 1741(2) BGB. Civil marriage: single adoption is only possible if the other partner has no legal capacity or is under 21. Non-married people can only adopt singly, but in practice children go to married couples almost exclusively.

A7 - Non-married people can jointly foster a child only if there are specific reasons in the particular case; art. 1775 BGB.

Table B - part one (Germany): Material consequences in private law

|  | Civil marriage       |          | Registered partnership |                      | Informal cohabitation |               |
|--|----------------------|----------|------------------------|----------------------|-----------------------|---------------|
|  | Different-sex        | Same-sex | Different-sex          | Same-sex (2001)      | Different-sex         | Same-sex      |
| 1. Properties of each partner are considered joint property                        | No, but              | X        | X                      | No                   | No                    | No            |
| 2. Debts of each partner are considered joint debt                                 | No, but              | X        | X                      | No                   | No                    | No            |
| 3. In case of splitting up, statutory rules on alimony apply                       | Yes, but             | X        | X                      | Yes, but             | No                    | No            |
| 4. In case of splitting up, statutory rules on redistribution of properties apply  | Yes, but             | X        | X                      | Yes, but             | No, but               | No, but       |
| 5. In case of wrongful death of one partner, the other is entitled to compensation | Yes                  | X        | X                      | Yes                  | No                    | No            |
| 6. When one partner dies without testament, the other is an inheritor              | Yes                  | X        | X                      | Yes                  | No                    | No            |
| <b>Level of legal consequences</b>   | 2x3 + 2x2 + 2x1 = 12 | 6x0 = 0  | 6x0 = 0                | 2x3 + 2x2 + 2x0 = 10 | 1x1 + 5x0 = 1         | 1x1 + 5x0 = 1 |

**Notes to table B - part one**

B1 - Married spouses can establish community of property by contract, but it's outmoded; art. 1415 BGB.

B2 - See B1

B3 - Civil marriage: art. 1361, 1569, 1585 c BGB, spouses can exclude the statutory rules, but the contracts are only valid after divorce and not during separation. Registered partnership: art. 12, 16 LPartG, partners can exclude the statutory rules, but the contracts are only valid after formal ending of the partnership, not during separation.

B4 - Civil marriage: art. 1363 BGB, deviating contracts are possible. Registered partnership: art. 6 LPartG, deviating contracts are possible. Informal cohabitation: only in very specific cases courts grant (re)distribution (mostly based on the company law notion of a commercial partnership).

B5 - Art. 844 BGB.

B6 - Civil marriage: art. 1931 BGB; registered partnership: art. 10 LPartG. The content of the rules is the same.

**Table B - part two (Germany): Positive material consequences in public law**

|   | Civil marriage    |            | Registered partnership |                        | Informal cohabitation |                  |
|---|-------------------|------------|------------------------|------------------------|-----------------------|------------------|
|   | Different-sex     | Same-sex   | Different-sex          | Same-sex (2001)        | Different-sex         | Same-sex         |
| 7. Relationship can result in lower property tax  | No                | X          | X                      | No                     | No                    | No               |
| 8. Relationship can result in lower income tax  | Yes               | X          | X                      | Yes, but               | No, but               | No, but          |
| 9. Public health insurance of one partner covers medical costs of other partner                 | Yes               | X          | X                      | Yes                    | No                    | No               |
| 10. Relationship can have positive impact on basic social security payment in case of no income | No                | X          | X                      | No                     | No                    | No               |
| 11. Relationship can have positive impact on statutory old age pension                          | No                | X          | X                      | No                     | No                    | No               |
| 12. When one partner dies, the other can get a statutory survivor's pension                     | Yes               | X          | X                      | No                     | No                    | No               |
| 13. Surviving partner pays no inheritance tax (or less than a mere friend would)                | Yes               | X          | X                      | No                     | No                    | No               |
| <b>Level of legal consequences</b>  | 4x3 + 3x0<br>= 12 | 7x0<br>= 0 | 7x0<br>= 0             | 1x3 + 1x2 + 5x0<br>= 5 | 1x1 + 6x0<br>= 1      | 1x1 + 6x0<br>= 1 |

**Notes to table B - part two**

B7 - There is no general property tax in Germany.

B8 - Civil marriage: art. 26 EStG (*Einkommensteuergesetz* - Income tax law).

Registered partnership: art. 33a EStG: payments to the partner of up to circa EUR 7000 per year reduces the income tax of the paying partner, but it is much less than the reduction granted to married couples (the so-called *Splitting*).

Informal cohabitation: art. 33a EStG, see explanation of registered partnership, but only if the partners social benefits have been reduced or cut or refused due to the cohabitation.

B9 - Civil marriage: art. 10(1) SGB V (*Sozialgesetzbuch V* - Social Code V of 20 December 1988); registered partnership: art. 10(1) SGB V amended by art. 3 § 52 LPartG; in both cases the public health insurance has to pay only if the other partner has no appreciable income.

B10 - No form of partnership results in higher social security payment.

B11 - There is no positive impact of any partnership on statutory old age pension.

B12 - Art. 46 SGB VI (*Sozialgesetzbuch VI* - Social Code VI of 18 December 1989). Normally the other spouse will get a statutory survivor's pension.

B13 - Art. 15, 16, 17 ErbStG (*Erbschaftsteuer- und Schenkungsteuergesetz* - Inheritance and gift tax law of 27 February 1997) - A surviving married partner can get up to 563.000 € tax free. A surviving registered partner or informal cohabitant or a mere friend can get only 5.200 € tax free.

**Table B - part three (Germany): Negative material consequences in public law**

|   | Civil marriage   |            | Registered partnership |                  | Informal cohabitation |                  |
|---|------------------|------------|------------------------|------------------|-----------------------|------------------|
|   | Different-sex    | Same-sex   | Different-sex          | Same-sex (2001)  | Different-sex         | Same-sex         |
| 14. Relationship can result in higher property tax  | No               | X          | X                      | No               | No                    | No               |
| 15. Relationship can result in higher income tax  | No               | X          | X                      | No               | No                    | No               |
| 16. Relationship can have negative impact on basic social security payment in case of no income | Yes              | X          | X                      | Yes              | Yes                   | Doubt            |
| 17. Relationship can have negative impact on statutory old age pension                          | No               | X          | X                      | No               | No                    | No               |
| <b>Level of legal consequences</b>  | 1x3 + 3x0<br>= 3 | 4x0<br>= 0 | 4x0<br>= 0             | 1x3 + 3x0<br>= 3 | 1x3 + 3x0<br>= 3      | 1x1 + 3x0<br>= 1 |

**Notes to table B - part three**

B14 - See B7 - There is no general property tax in Germany.

B15 - No form of partnership results in higher income tax compared to single individuals.

B16 - Civil marriage: art. 11(1) BSHG (*Bundessozialhilfegesetz* - Federal social welfare law of 23 March 1994; registered partnership: art. 2 BSHG; informal different-sex cohabitation: art.122 BSHG.

Informal same-sex cohabitation: there are different opinions about the question whether art. 122 BSHG refers to them.

B17 - No form of partnership can have negative impact on statutory old age pension.

Table C (Germany): Other legal consequences

|  | Civil marriage       |          | Registered partnership |                      | Informal cohabitation |                     |
|--|----------------------|----------|------------------------|----------------------|-----------------------|---------------------|
|  | Different-sex        | Same-sex | Different-sex          | Same-sex (2001)      | Different-sex         | Same-sex            |
| 1. One partner can have or use surname of the other  | Yes                  | X        | X                      | Yes                  | No                    | No                  |
| 2. Foreign partner of a resident national is entitled to a residence permit  | Yes                  | X        | X                      | Yes                  | No                    | No                  |
| 3. Relationship makes it easier for foreign partner to obtain citizenship  | Yes                  | X        | X                      | Yes                  | No                    | No                  |
| 4. In case of criminal prosecution, one partner can refuse to testify against the other  | Yes                  | X        | X                      | Yes                  | No, but               | No                  |
| 5. When one partner uses violence against other partner, specific statutory protection applies   | No                   | X        | X                      | No                   | No                    | No                  |
| 6. In case of accident or illness of one partner, the other is considered as next of kin for medical purposes (even without power of attorney) | Doubt                | X        | X                      | Doubt                | Doubt                 | Doubt               |
| 7. Organ donation from one living partner to the other is lawful   | Yes                  | X        | X                      | Yes                  | No                    | No                  |
| 8. When one partner dies, the other can continue to rent the home  | Yes                  | X        | X                      | Yes                  | Yes (1993) (2001)     | Yes (2001)          |
| 9. Partners have a duty to have sexual contact   | No                   | X        | X                      | No                   | No                    | No                  |
| Level of legal consequences  | 6x3 + 1x1 + 2x0 = 19 | 9x0 = 0  | 9x0 = 0                | 6x3 + 1x1 + 2x0 = 19 | 1x3 + 2x1 + 6x0 = 5   | 1x3 + 1x1 + 7x0 = 4 |

Notes to table C

C1 - Civil marriage: art. 1355 BGB; registered partnership: art. 3 LPartG.

C2 - Civil marriage: art. 17, 18, 23 AusIG (*Ausländergesetz* - Immigration law of 09 July 1990); registered partnership: art. 27 a AusIG, introduced by art. 3 § 11 LPartG.

Informal same-sex cohabitants could according to a decision of the Federal administrative court (*Bundesverwaltungsgericht* - BVerwG 1 C 41./93) of 27 February 1996 get a residence permit if there was enough income. The court used a general legal norm (art. 7, 15 AusIG) because of the lack of a registered partnership. It seems that authorities and courts do not grant a residence permit to an informal cohabitant after having the possibility of registration.

C3 - Civil marriage: art. 9 StAG (*Staatsangehörigkeitsgesetz* - Citizenship law); registered partnership: art. 9 StAG, amended by art. 3 § 1 LPartG.

C4 - Civil marriage: art. 52 StPO (*Strafprozeßordnung* - Criminal procedure law); registered partnership: art. 52 StPO, amended by art. 3 § 18 LPartG.

Informal cohabitation: different-sex partners engaged to be married can refuse to testify against each other (art. 52(1) StPO), however, in terms of same-sex partners there is no recognized engagement period.

C5 - There is no specific protection in any partnership.

C6 - There is no federal codification regarding this question, even married couples are advised to establish this through power of attorney.

C7 - Married spouses: art. 8(1) TPG (*Transplantationsgesetz* - Organ donation law of 05 November 1997); registered partners: art. 8 (1) TPG amended by art. 3 § 7 LPartG.

C8 - Married spouses can continue to rent the home if they lived together with the dead spouse. They are ranking above children of the dead spouse; art. 563(1,2) BGB. Registered partners who had lived together with the dead partner are ranking at the same level with children of the dead partner, if the children had lived together with the dead partner; art. 563(2) BGB amended by art. 2 LPartG. If the children did not live together with the dead partner, they are ranking above the surviving registered partner. Informal cohabitants are ranking below spouses, children and registered partners if someone from the latter three categories lived together with the dead partner; if not, spouses, children and registered partners are ranking below the informal cohabitant who had lived together with the dead partner; art. 563(2) BGB amended by art. 2 LPartG.

Before the amendment of the law there were differing decisions to this question, until the Federal civil court (*Bundesgerichtshof*) in its judgement of 13 January 1993 VIII (ARZ 6/92) affirmed this right for different-sex partners, denying it for same-sex partners, which was remarkable, because it was no case of same-sex partners. Because of this fact lower courts were not bound to this decision in same-sex cases.

C9 - There is no duty to have sexual contact in Germany.

**Table D (Germany): Types of discrimination by employers or service providers that are prohibited in anti-discrimination legislation**

|   | Between married spouses and registered partners | Between married spouses and informal cohabitants | Between registered partners and informal cohabitants | Between same-sex and different-sex partners (with same status) |
|---|---|--|--|--|
| 1. With respect to housing                              | No  | No   | No   | No   |
| 2. With respect to life insurance                       | No  | No   | No   | No   |
| 3. With respect to health insurance                     | No  | No   | No   | No   |
| 4. With respect to medically assisted insemination      | No  | No   | No   | No   |
| 5. With respect to other services                       | No  | No   | No   | No   |
| 6. With respect to an occupational survivor's pension   | No  | No   | No   | Doubt  |
| 7. With respect to other spousal benefits in employment | No, but   | No   | No   | Doubt  |

**Notes to table D**

D1 - There is no relevant federal or state anti-discrimination legislation in Germany.

D2 - See D1.

D3 - See D1.

D4 - See D1.

D5 - See D1.

D6 - There may be some protection against discrimination on the basis of sexual orientation because of art. 75 of the *Betriebsverfassungsgesetz* (Act on the Constitution of Companies).

D7 - A decision of the *Bundesarbeitsgericht* (Federal Labour Court) of 29 April 2004, based on the 'Federal collective wage agreement', has outlawed certain discriminations between married spouses and registered partners. See also D1 and D6.



**Table E (Germany): Types of couples that qualify for starting a civil marriage or registered partnership in the country itself**

|  |                            | Civil marriage |          | Registered partnership |                 |
|--|----------------------------|----------------|----------|------------------------|-----------------|
|  |                            | Different-sex  | Same-sex | Different-sex          | Same-sex (2001) |
| Resident national with:                      | 1. Resident national       | Yes            | X        | X                      | Yes             |
|  | 2. Non-resident national   | Yes            | X        | X                      | Yes             |
|  | 3. Resident foreigner      | Yes            | X        | X                      | Yes             |
|  | 4. Non-resident foreigner  | Yes            | X        | X                      | Yes             |
| Non-resident national with:                  | 5. Non-resident national   | Yes            | X        | X                      | Yes             |
|  | 6. Resident foreigner      | Yes            | X        | X                      | Yes             |
|  | 7. Non-resident foreigner  | Yes            | X        | X                      | Yes             |
| Resident foreigner with:                     | 8. Resident foreigner      | Yes            | X        | X                      | Yes             |
|  | 9. Non-resident foreigner  | Yes            | X        | X                      | Yes             |
| Non-resident foreigner with:                 | 10. Non-resident foreigner | Yes            | X        | X                      | Yes             |
| 11. Sister or brother with sister or brother |                            | No             | X        | X                      | No              |
| 12. Parent with child                        |                            | No             | X        | X                      | No              |

**Notes to table E**

E1 - There is no limitation concerning citizenship, residency or duration of residency.

E2 - See E1.

E3 - See E1.

E4 - See E1.

E5 - See E1.

E6 - See E1.

E7 - See E1.

E8 - See E1.

E9 - See E1.

E10 - See E1.

E11 - Civil marriage: art. 1307 BGB; registered partnership: art. 1(2) LPartG.

E12 - See E11.

**Table F (Germany): Authority for starting a civil marriage or registered partnership**

|  | Civil marriage |          | Registered partnership |                 |
|--|----------------|----------|------------------------|-----------------|
|  | Different-sex  | Same-sex | Different-sex          | Same-sex (2001) |
| 1. Registry of births, marriages and deaths  | Yes            | X        | X                      | Yes, but        |
| 2. Local population administration           | No             | X        | X                      | Yes, but        |
| 3. Church                                    | No             | X        | X                      | No              |
| 4. Court                                     | No             | X        | X                      | No              |
| 5. Private person with special authorisation | No             | X        | X                      | No              |
| 6. Public notary                             | No             | X        | X                      | Yes, but        |
| 7. Administrative magistrate                 | No             | X        | X                      | Yes, but        |

**Notes to table F**

F1 - Art. 1 LPartG: The registering authority varies from state to state and in some states from town to town. In 8 of 16 states the registry of births, marriages and deaths was installed as the authority of starting a registered partnership.

F2 - See F1.

F3 - The federal law gives no opportunity to install the church as registering authority for registered partnerships. Church weddings do not have any legal status. They are even forbidden if the couple has not first married at the registry of births, marriages and deaths; art. 67 PStG (*Personenstandsgesetz* - Personal status law of 08 August 1957).

F4 - The federal law gives no opportunity to install courts as registering authorities.

F5 - The federal law gives no opportunity to install private persons as registering authority.

F6 - See F1. In Bavaria the public notary was installed by state law as registering authority.

F7 - See F1.

**Table G (Germany): Means of ending a marriage or registered partnership**

|   | Civil marriage |          | Registered partnership |                 |
|---|----------------|----------|------------------------|-----------------|
|   | Different-sex  | Same-sex | Different-sex          | Same-sex (2001) |
| 1. By court decision (after joint or individual petition)   | Yes            | X        | X                      | Yes             |
| 2. By mutually agreed contract (outside court)  | No             | X        | X                      | No              |
| 3. Unilaterally by one partner (outside court)  | No             | X        | X                      | No              |
| 4. By conversion of marriage into registered partnership, or vice versa (outside court)                                   | No             | X        | X                      | No              |
| 5. By one registered partner marrying a third person (or starting a registered partnership with a third person)           | No             | X        | X                      | Doubt           |
| 6. By the registered partners marrying each other (or by the married partners starting a registered partnership together) | No             | X        | X                      | No              |
| 7. By administrative decision (after joint or individual petition)  | No             | X        | X                      | No              |

**Notes to table G**

G1 - Civil marriage: art. 1313 BGB; registered partnership: art. 17 LPartG.

G2 - See G1.

G3 - See G1.

G4 - There is no same-sex marriage and no different-sex registered partnership.

G5 - Registered partnership: there is no reference to this case in LPartG, but the Federal constitutional court (*Bundesverfassungsgericht*) has requested a solution to this question by legislation or jurisdiction in its decision of 17 July 2002 (1 BvF 1/01, 1 BvF 2/01- two source numbers because of two applications, but one decision).

G6 - See G4.

G7 - See G1.

### *Some literature in English*

- Yuval Merin, *Equality for Same-Sex Couples. The legal recognition of gay partnerships in Europe and the United States*, Chicago/London: The University of Chicago Press, 2002, p. 142-147.
- Roland Schimmel and Stefanie Heun, 'The Legal Situation of Same-Sex Partnerships in Germany: An Overview', in: Robert Wintemute & Mads Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart Publishing, 2001, p. 575-590.
- Karsten Thorn, 'The German Law on Same-Sex Partnerships', in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003, p. 84-98.

### *Some literature in German*

#### *Civil marriage:*

- Kurt H. Johannsen / Dieter Henrich: *Eherecht*, 3rd edition, München, 1998.
- Otto Palandt (Hrsg.): *Bürgerliches Gesetzbuch*, 62nd edition, München: Beck, 2003.
- Dieter Schwab: *Das neue Familienrecht*, Bielefeld, 1998.

#### *Registered partnership:*

- Manfred Bruns / Rainer Kemper (Hrsg.): *Handkommentar zum Lebenspartnerschaftsgesetz*, Baden-Baden: Nomos, 2002.
- Herbert Grziwotz: *Beratungshandbuch Lebenspartnerschaft*, München, 2003.
- Stephan Ladnar / Manfred Bruns: *Eingetragene Lebenspartnerschaft*, LSVD-Rechtsratgeber, Berlin: Lesben- und Schwulenverband in Deutschland e.V., 2001.
- Karl-Heinz Muscheler: *Das Recht der Eingetragenen Lebenspartnerschaft. Begründung - Rechtsfolgen - Aufhebung - Faktische Partnerschaft*, Berlin: Erich Schmidt Verlag, 2001.
- Dieter Schwab: *Die Eingetragene Lebenspartnerschaft - Text, amtliche Materialien, Abhandlungen*, Bielefeld, 2002.

#### *Informal cohabitation:*

- Herbert Grziwotz: *Rechtsfragen des nichtehelichen Zusammenlebens*, 2nd edition, München: dtv, 2002.
- Herbert Grziwotz: Rechtsprechung zur nichtehelichen Lebensgemeinschaft, *Zeitschrift für das gesamte Familienrecht*, 1994, S. 1217 ff und 1999, S. 413 ff.
- Ida Schillen / Elisa Rodé: *Familienbuch*, Berlin: Lesben- und Schwulenverband in Deutschland e.V., 2002.



## Major legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners in Iceland

by Hrefna Fridriksdóttir <sup>1</sup>  
and Kees Waaldijk <sup>2</sup>

### Symbols and words used in the national tables:

| Applicable answer  | Answer code | Colour      | Points given for calculation of level of legal consequences |
|--|-------------|-------------|---|
| The legal consequence applies.   | Yes         | White       | 3 pt  |
| The legal consequence applies in a limited way or not in all circumstances, or it can be contracted out of, or courts can set it aside using some general legal principle, etc.    | Yes, but    | Light pink  | 2 pt  |
| The legal consequence only applies in a very limited way or in very few circumstances, or it can be established by contract, or by courts using some general legal principle, etc. | No, but     | Middle pink | 1 pt  |
| The legal consequence does not apply.  | No          | Dark pink   | 0 pt  |
| No information was available on this point, or the legal position is unclear.  | Doubt       | Middle pink | 1 pt  |
| The column is not applicable in the country, because this type of relationship is not legally recognised (yet).  | X           | Dark pink   | 0 pt  |

| Additional information   | Answer code |
|--|-------------|
| The legal consequence is only available after the specified number of years.   | >x years    |
| The legal consequence is only available after the specified number of months.  | >x months   |
| Year of entry into force of the legislation providing the legal consequence (or the particular relationship type), or year of supreme court decision establishing its existence.<br>(Where two years are given, the first indicates the introduction of a more limited version of the consequence; where no year is given, the legal consequence mostly applies since the introduction of the particular relationship type, or already for a long time.) | (Year)      |

<sup>1</sup> Government Agency for Child Protection, [hrefna@bvs.is](mailto:hrefna@bvs.is).

<sup>2</sup> Universiteit Leiden, [www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk).

## Introduction

This chapter aims to represent the law as it stood early in 2004.

### *Civil marriage*

Different-sex partners can get married in church or have a civil ceremony with a magistrate. The current Marriage Act no. 31/1933 deals with issues such as impediments to marriage, solemnization of marriage, annulment of marriage, separation and divorce, responsibility of spouses for the maintenance of the family, property and proprietary rights of spouses, financial obligations of spouses, agreements between spouses, marriage settlements and legal procedure in matrimonial action.

A translation of the Marriage Act no. 31/1993 can be found at <http://eng.domsmalaraduneyti.is/laws-and-regulations/nr/112>.

### *Registered partnership*

The Icelandic term for registered same-sex partnership is *staðfest samvist* (literally 'confirmed partnership'). The Icelandic Parliament passed a resolution in 1992 commanding the government to appoint a committee to explore the legal, cultural and social situation of homosexuals and to propose measures to abolish discrimination against homosexuals in Iceland. The committee was appointed in 1993 and issued a report in 1994. The majority of the committee recommended the adoption of laws similar to those already adopted in Denmark, Norway and Sweden. In February 1996 the government proposed a bill that was passed and the Registered Partnership Act no. 87/1996 (the RPAct) came into effect on June 27th 1996. The RPAct was amended by Act no. 52/2000 (allowing for second-parent adoption, and extending the possibilities for registering a partnership with a foreigner).

The Icelandic Parliament passed a new resolution in 2003 commanding the government to appoint a committee to explore the legal situation of homosexuals. Same-sex informal cohabitation will be looked at in particular together with the issue of homosexuals and (JOINT ?) adoption and medically assisted insemination. The committee is expected to issue a report and proposals before January 15th 2004.

Same-sex partners can register their partnership under the RPAct with a magistrate and this is the same ceremony as a civil marriage. Such registration generally affords the partners the same rights as a married couple (with a few defined exceptions). Different-sex partners cannot register their partnership under the RPAct.

See <http://eng.domsmalaraduneyti.is/laws-and-regulations/nr/117> for an English translation of the RPAct. Such a translation can also be found in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003.

### *Informal cohabitation*

There are basically two types of cohabitation that can be defined as informal.

a) The Icelandic term *óvígð sambúð* (literally 'non-marital cohabitation') is generally used for different-sex partners that share a household and have a relationship similar to a married couple. This is a theoretical definition that evolved hand in hand with the process of attaching legal rights and obligations to non-marital cohabitation, starting before and around the middle of the 20th century in Iceland. There is no general law on such cohabitation and therefore the term does not have a single legal definition. There are only specific provisions in different laws that are controlled by different requirements. Some of these provisions mention a man and a woman and are as such clearly meant only to apply to different-sex partners. Other provisions that use the term non-marital cohabitation are generally interpreted as only to apply to different-sex partners based on the theoretical definition. As mentioned before a committee is currently working on a new report on the legal status of homosexuals in Iceland and is expected to propose changes in this area.

As a general principle of family law in Iceland *óvígð sambúð* does not automatically afford the partners the same rights as a married couple. On the whole Icelandic legislation in practice affords such different-sex partners many of the same rights and obligations as married couples and registered same-sex partners. (Some are mentioned in Tables A, B and C.)

As mentioned above specific provisions in different laws affording rights and obligations to different-sex partners are controlled by different requirements. One of such requirements is a special registration of the cohabitation with the National Registry and there has been an increasing emphasis on this formal requirement in recent years. There are no special provisions that cover this kind of registration in the National Registry Act, but a procedure had to be developed to make a distinction between this registration and a simple registration of two persons at the same address. The registration of different-sex cohabitation with the National Registry is fundamentally different from registration of same-sex partnership under the RPAct. Different-sex partners sign a special form stating their wish to be registered as partners, submit the form to the National Registry and there is no ceremony involved. In practice the cohabitation is considered to have terminated if the partners marry and one of the partners can effectively terminate the cohabitation by registering his address elsewhere.

The director of the National Registry has confirmed that this kind of registration is only available to different-sex partners. He has also confirmed that it is impossible to register different-sex cohabitation of close relatives (those that are not permitted to marry). This is based on general principles of family law.

Other general requirements of provisions affording rights and obligations to different-sex partners are a minimum length of cohabitation and/or a child in the family.

b) Two different-sex partners can choose to live together and register their joint address without registering their cohabitation with the National Registry. This option is also open to same-sex partners. Icelandic law does not generally attach any specific legal consequences to such informal cohabitation save for a few limited exceptions. Such partners are therefore generally treated as two individuals.

*Websites with legal information in English:*

<http://eng.domsmalaraduneyti.is/laws-and-regulations/> (contains English translations of various Icelandic laws);

<http://eng.felagsmalaraduneyti.is/information/immigrants/nr/732> (information for foreigners who move to Iceland including info on marriage and cohabitation; published by the Ministry of Social Affairs in 1998);



Table A (Iceland): Parenting consequences

|  | Civil marriage    |            | Registered partnership |                           | Informal cohabitation     |                        |
|--|-------------------|------------|------------------------|---------------------------|---------------------------|------------------------|
|  | Different-sex     | Same-sex   | Different-sex          | Same-sex (1996)           | Different-sex             | Same-sex               |
| 1. When female partner gives birth, both partners automatically become legal parents   | Yes               | X          | X                      | No                        | No, but (1981)            | No                     |
| 2. Medically assisted insemination is lawful for women in such a relationship  | >3 years: Yes     | X          | X                      | No                        | >3 years: Yes, but        | No                     |
| 3. When only one partner is the parent of a child, both partners can have parental authority or responsibilities during their relationship | Yes               | X          | X                      | Yes                       | >1 year: Yes              | No                     |
| 4. When only one partner is the parent of a child, the other partner can adopt it and thus become its second parent                        | >3 years: Yes     | X          | X                      | >3 years: Yes, but (2000) | >5 years: Yes, but (2000) | No                     |
| 5. Partners can jointly adopt a child  | >3 years: Yes     | X          | X                      | No                        | >5 years: Yes, but (2000) | No                     |
| 6. One partner can individually adopt a child  | No, but           | X          | X                      | No                        | No, but                   | Yes, but               |
| 7. Partners can jointly foster a child   | Yes               | X          | X                      | Yes                       | Yes                       | Yes                    |
| Level of legal consequences  | 6x3 + 1x1<br>= 19 | 7x0<br>= 0 | 7x0<br>= 0             | 2x3 + 1x2 + 4x0<br>= 8    | 2x3 + 3x2 + 2x1<br>= 14   | 1x3 + 1x2 + 5x0<br>= 5 |

## Notes to table A

A1 - Paternity in marriage and different-sex cohabitation is dealt with in art. 2 of the Child Act no. 76/2003: This is new Child Act that came into effect on 1 November 2003. If the mother of a child and a man she alleges to be its father are in a different-sex cohabitation, that is registered in the National Registry, at the time of the birth of the child, that man shall be presumed to be the father. Outside marriage and different-sex cohabitation paternity may be established through formal recognition by the man alleged by the mother to be the father, or by court decision.

A2 - Art. 3 of the Act on Artificial Insemination no. 55/1996, for marriage and different-sex cohabitation that is registered in the National Registry. Art. 6 of the RPAAct, for same-sex registered partnership.

A3 - Art. 29 of the Child Act no. 76/2003: If an unmarried parent who has *sole* custody (i.e. not joint custody with the other birth-parent) marries or enters into a same-sex registered partnership (RPAAct) the stepparent shall also have custody of the child. The same rule applies when a child is born during a registered partnership of two women: in that case the stepparent shall also have custody. If an unmarried parent who has sole custody enters into different-sex cohabitation that is registered in the National Registry, the partner shall also have custody of the child after one year of registration.

A4 - Art. 2 of the Adoption Act no. 130/1999: A married couple (*in practice* the marriage shall have lasted for at least three years) or a man and a woman cohabiting for a period of at least 5 years, may be granted permission to adopt the child or the adopted child of the other. Cohabitation in the Adoption Act means the cohabitation of a man and a woman which is registered in the National Registry or which can be ascertained by other unequivocal evidence. The provisions of the Adoption Act relating to marriage and step-parent adoption apply to registered same-sex partnership, provided the child has not been adopted from another country, according to art. 6 of RPAAct, as amended with Act. nr. 52/2000.

A5 - Art. 2 of the Adoption Act no. 130/1999: A married couple (*in practice* the marriage shall have lasted for at least three years) or a man and a woman cohabiting for a period of at least 5 years can be granted permission to adopt a child. For definition of cohabitation see note to A4.

A6 - Art. 2 of the Adoption Act no. 130/1999: As a general rule partners who can adopt can only engage in adoption together. Either spouse or either partner in different-sex cohabitation may only be granted individual permission for adoption if the other one has disappeared or is in such a mental state as not to understand the meaning of adoption. A single person may be granted permission for adoption under special circumstances (if the person is considered particularly fit to care for a child) and if the adoption is clearly beneficial for the child. In this respect different-sex cohabitants that have not registered their cohabitation in the National Registry could be defined as single persons and the same applies to same-sex informal cohabitants.

A7 - Art. 66 of the Child Protection Act no. 80/2002: The Governmental Agency for Child Protection grants licenses to provide foster care for children based on an individual evaluation of each applicant.

Table B - part one (Iceland): Material consequences in private law

|  | Civil marriage    |            | Registered partnership |                   | Informal cohabitation |                  |
|--|-------------------|------------|------------------------|-------------------|-----------------------|------------------|
|  | Different-sex     | Same-sex   | Different-sex          | Same-sex (1996)   | Different-sex         | Same-sex         |
| 1. Properties of each partner are considered joint property                        | No                | X          | X                      | No                | No                    | No               |
| 2. Debts of each partner are considered joint debt                                 | No                | X          | X                      | No                | No                    | No               |
| 3. In case of splitting up, statutory rules on alimony apply                       | Yes               | X          | X                      | Yes               | No                    | No               |
| 4. In case of splitting up, statutory rules on redistribution of properties apply  | Yes               | X          | X                      | Yes               | No                    | No               |
| 5. In case of wrongful death of one partner, the other is entitled to compensation | Yes               | X          | X                      | Yes               | Yes, but              | No, but          |
| 6. When one partner dies without testament, the other is an inheritor              | Yes               | X          | X                      | Yes               | No                    | No               |
| <b>Level of legal consequences</b>   | 4x3 + 2x0<br>= 12 | 6x0<br>= 0 | 6x0<br>= 0             | 4x3 + 2x0<br>= 12 | 1x2 + 5x0<br>= 2      | 1x1 + 5x0<br>= 1 |

## Notes to table B - part one

B1 - Art. 4 of the Marriage Act no. 31/1993: Each married person shall have control of his or her assets and be responsible for his or her liabilities. According to art. 53, the property of spouses can be either matrimonial property or separate property (the latter may be created by contract or by statute), and spouses may be joint owners of property. There are some limitations as to the spouses' proprietary rights during marriage (art. 60-63). The main difference between matrimonial property and separate property is that net matrimonial property of each is divided upon legal separation or divorce of spouses. Art. 5 of the RPAct: The provisions relating to marriage and spouses apply to registered same-sex partnership. All others are generally considered as individuals. Properties of each partner *can* in certain cases be considered joint property if that is proven to be the case. Courts have recognized that a partner in a different-sex cohabitation can have a part in properties accumulated during the cohabitation (leading principle in the Supreme Court judgment of 4 February 1981, H. 1981:128).

B2 - See note to B1, same principles apply to properties and debts.

B3 - Art. 50 of the Marriage Act no. 31/1993: The mutual obligation of spouses to maintain each other shall not be affected by legal separation. When legal separation takes place a decision shall be taken as to whether one spouse shall pay alimony to the other, and as to the amount of such alimony. After divorce has been granted one spouse shall not be ordered to pay alimony to the other, save in very exceptional circumstances. According to art. 5 of the RPAct, these provisions relating to spouses apply directly to registered same-sex partners.

B4 - Art. 6 of the Marriage Act no. 31/1993: Upon legal separation or divorce of spouses, or upon the death of either spouse, the net matrimonial property of each shall be divided into two equal parts. According art. 5 of the RPAct, these provisions relating to spouses apply directly to registered same-sex partners.

B5 - Art. 12 and 26 of the Tort Act no. 50/1993: In cases of wrongful death of a spouse the wrongdoer shall pay funeral costs, pay the other spouse for loss of a supporter and pay damages for non-material damage to the surviving spouse. According to art. 13 the provision also covers payments to cohabiting partners where the cohabitation is considered comparable to marriage. It is safe to assume that different-sex cohabitation registered in the National Registry is covered in this respect but the legal standard is otherwise uncertain. Courts can also under special circumstances order wrongdoer to pay damages to others who were close to the deceased. Art. 5 of the RPAct: Provisions relating to spouses apply directly to registered same-sex partners.

B6 - Art. 2 of the Inheritance Act no. 8/1962. Art. 5 of the RPAct: Provisions relating to spouses apply directly to registered same-sex partners.

**Table B - part two (Iceland): Positive material consequences in public law**

|   | Civil marriage       |          | Registered partnership |                      | Informal cohabitation |               |
|---|----------------------|----------|------------------------|----------------------|-----------------------|---------------|
|   | Different-sex        | Same-sex | Different-sex          | Same-sex (1996)      | Different-sex         | Same-sex      |
| 7. Relationship can result in lower property tax  | Yes                  | X        | X                      | Yes                  | Yes, but              | No            |
| 8. Relationship can result in lower income tax  | Yes                  | X        | X                      | Yes                  | Yes, but              | No            |
| 9. Public health insurance of one partner covers medical costs of other partner                 | No, but              | X        | X                      | No, but              | No, but               | No            |
| 10. Relationship can have positive impact on basic social security payment in case of no income | No                   | X        | X                      | No                   | No                    | No            |
| 11. Relationship can have positive impact on statutory old age pension                          | Yes                  | X        | X                      | Yes                  | No, but               | No            |
| 12. When one partner dies, the other can get a statutory survivor's pension                     | No, but              | X        | X                      | No, but              | No, but               | No            |
| 13. Surviving partner pays no inheritance tax (or less than a mere friend would)                | Yes                  | X        | X                      | Yes                  | Yes, but              | No, but       |
| <b>Level of legal consequences</b>  | 4x3 + 2x1 + 1x0 = 14 | 7x0 = 0  | 7x0 = 0                | 4x3 + 2x1 + 1x0 = 14 | 3x2 + 3x1 + 1x0 = 9   | 6x0 + 1x1 = 1 |

**Notes to table B - part two**

B7 - Art. 79 of the Act on Personal Income tax and Net Wealth tax no. 90/2003: The taxable base for net wealth (property and other assets) tax purposes is the aggregate value of an individual's assets at the end of the tax year, less his liabilities. According to art. 80 the taxable base of married couples consists of added assets less added liabilities. According to art. 116 of the Act, spouses have a joint responsibility for the payment of all their taxes. If one of the spouses has liabilities in excess of wealth such liabilities can lower net wealth taxes for the married couple. According to art. 62, different-sex cohabiting partners have a right to be taxed as a married couple if the woman is expecting their child, they have a child together or if the cohabitation has been registered in the National Registry for the period of at least one year. Art. 5 of the RPA: Provisions in tax law relating to marriage and spouses apply directly to registered same-sex partnership.

B8 - Art. 62 of the Act on Personal Income tax and Net Wealth tax no. 90/2003: Capital income of married couples is taxed in the hands of the spouse whose total employment income is the higher. According to art. 116 of the Act, spouses have a joint responsibility for the payment of all their taxes. Iceland's personal income tax structure is such that there is a basic tax-free income. The tax free income allowance has been made transferable between spouses and partners who are treated as married couples for tax purposes, see note to B12 (Art. 62 of the Act). Once that income has been earned in any given month, a specific tax rate is applied to all subsequent income. Incomes in excess of fixed amounts (approx. EUR 47.000 for a single individual and EUR 94.000 for a couple in 2003) are subject to a specific surtax. Certain expenses are deductible from total employment income of each individual. If total deductions for one spouse are higher than the spouse's income, the excess is added to the deductions of the other spouse (Art. 62 of the Act). According to art. 62 of the Act and art. 5 of the RPA, provisions in tax law relating to marriage and spouses apply directly to registered same-sex partnership.

B9 - Art. 9a of the Social Security Act no. 117/1993: A person who is resident in Iceland is considered insured, which means that public health insurance is based on personal individual status. The State Social Security

Institute may decide, on application, that a person insured under the Act will continue to be insured even if he is working abroad for a party who fulfills specific requirements. The same applies to the person's spouse and this seems to be the only instance where a spouse can be said to be covered by the other partners public medical insurance. Art. 44 of the Social Security Act: The same rules apply to different-sex cohabiting partners if the woman is expecting their child, they have a child together or if the cohabitation has been registered in the National Registry for the period of at least one year. Art. 5 of the RPAAct: Provisions in social security law relating to marriage and spouses apply directly to registered same-sex partnership.

B10 - See note to B16 - Local Authorities Social Services Act no. 40/1991 deals with basic social security. Each local authority is responsible for social services within its boundaries and shall ensure that persons are able to provide for themselves and their families (art. 4,12 and 21 of the Act). Each local authority lays down rules on the implementation of financial assistance so the rules are not uniform throughout Iceland. It may be assumed that assistance is generally higher for two individuals than for a married couple or different-sex cohabiting partners.

B11 - Art. 11 of the Social Security Act no. 117/1993: Persons 67 years of age or older who have been resident in Iceland for at least 3 calendar years between the ages of 16 and 67 are entitled to an old age pension. Full annual old age pension shall be paid to individuals who have been resident in Iceland for at least 40 calendar years between the ages of 16 and 67. In the case of married couples where both partners are pensioners, the income of both may be based on the time of residence of the partner possessing the longer entitlement period. The same applies to same-sex registered partners, and to different-sex cohabiting partners as defined in note B9.

B12 - Art. 6 of the Social Assistance Act no. 118/1993 deals with grants payable for six months following a spouse's death. The same applies to same-sex registered partners and different-sex cohabiting partners as defined in note B9.

B13 - Art. 4 of the Inheritance Tax Act no. 83/1984: Spouses pay no inheritance tax. Art. 5 of the RPAAct: Provisions relating to spouses apply directly to registered same-sex partners. Art. 2 and 4 of the Inheritance Tax Act: A different-sex partner pays no inheritance tax if the deceased partner leaves a testament clearly naming the other as a cohabiting partner. According to art. 4 the Minister for Social Affairs can decide to exempt others cohabiting from inheritance tax under very special circumstances, such as people that have lived together for a very long time.

Table B - part three (Iceland): Negative material consequences in public law

|   | Civil marriage   |            | Registered partnership |                  | Informal cohabitation |            |
|---|------------------|------------|------------------------|------------------|-----------------------|------------|
|   | Different-sex    | Same-sex   | Different-sex          | Same-sex (1996)  | Different-sex         | Same-sex   |
| 14. Relationship can result in higher property tax  | No               | X          | X                      | No               | No                    | No         |
| 15. Relationship can result in higher income tax  | No               | X          | X                      | No               | No                    | No         |
| 16. Relationship can have negative impact on basic social security payment in case of no income | Yes              | X          | X                      | Yes              | Yes                   | No         |
| 17. Relationship can have negative impact on statutory old age pension                          | Yes              | X          | X                      | Yes              | Yes                   | No         |
| <b>Level of legal consequences</b>  | 2x3 + 2x0<br>= 6 | 4x0<br>= 0 | 4x0<br>= 0             | 2x3 = 2x0<br>= 6 | 2x3 + 2x0<br>= 6      | 4x0<br>= 0 |

**Notes to table B - part three**

B14 - See note to B7. There is a tax-free net wealth base (approx. EUR 54.000 for the income year 2003) that is the same for all individuals without consideration of marital/cohabitation status.

B15 - See note to B8. It may be added that some specific income-related benefits under the tax law (not directly related to income tax, such as child benefits) are higher for two individuals than for a married couple or for cohabiting partners treated as married couples for tax purposes.

B16 - Local Authorities Social Services Act no. 40/1991 deals with basic social security. Each local authority is responsible for social services within its boundaries and shall ensure that persons are able to provide for themselves and their families (art. 4,12 and 21 of the Act). Each local authority lays down rules on the implementation of financial assistance so the rules are not uniform throughout Iceland. It may be assumed that assistance is generally higher for two individuals than for a married or registered different-sex cohabiting couple.

B17 - Art. 11 of the Social Security Act no. 117/1993 deals with old age pension. The old age pension of a married person shall be reduced if the combined annual income of both spouses is higher than a fixed amount. If the income is above the fixed maximum the old age pension shall be reduced by 30% of the surplus income up to the point where it lapses entirely. The same applies to same-sex registered partners, and to different-sex cohabiting partners as defined in note B9.

Table C (Iceland): Other legal consequences

|  | Civil marriage       |          | Registered partnership |                      | Informal cohabitation      |                           |
|--|----------------------|----------|------------------------|----------------------|----------------------------|---------------------------|
|  | Different-sex        | Same-sex | Different-sex          | Same-sex (1996)      | Different-sex              | Same-sex                  |
| 1. One partner can have or use surname of the other  | No, but              | X        | X                      | No, but              | No                         | No                        |
| 2. Foreign partner of resident national is entitled to a residence permit  | Yes                  | X        | X                      | Yes                  | Yes                        | No                        |
| 3. Relationship makes it easier for foreign partner to obtain citizenship  | >3 years: Yes        | X        | X                      | >3 years: Yes        | >5 years: Yes, but         | No                        |
| 4. In case of criminal prosecution, one partner can refuse to testify against the other  | Yes                  | X        | X                      | Yes                  | Yes, but                   | Yes, but                  |
| 5. When one partner uses violence against other partner, specific statutory protection applies   | No, but (2000)       | X        | X                      | No, but (2000)       | No, but (2000)             | No, but (2000)            |
| 6. In case of accident or illness of one partner, the other is considered as next of kin for medical purposes (even without power of attorney) | Yes                  | X        | X                      | Yes                  | No, but                    | No                        |
| 7. Organ donation from one living partner to the other is lawful   | Yes                  | X        | X                      | Yes                  | Yes                        | Yes                       |
| 8. When one partner dies, the other can continue to rent the home  | Yes                  | X        | X                      | Yes                  | Yes, but                   | >1 year: Yes              |
| 9. Partners have a duty to have sexual contact   | No                   | X        | X                      | No                   | No                         | No                        |
| Level of legal consequences  | 6x3 + 2x1 + 1x0 = 20 | 9x0 = 0  | 9x0 = 0                | 6x3 + 2x1 + 1x0 = 20 | 2x3 + 3x2 + 2x1 + 2x0 = 14 | 2x3 + 1x2 + 1x1 + 5x0 = 9 |

## Notes to table C

C1 - Art. 8 of the Personal Names Act no. 45/1996: The traditional rule on surnames in Iceland is that every person calls him/herself by a patronymic or matronymic so that one of the identification (first) names of his/her father or/and his/her mother is used as a surname, with the suffix "son" in the case of a man or "dóttir" in the case of a woman. Some people also have a family name; in special circumstances (art. 7) a spouse can take the family name of his or her partner as a middle name. Art. 5 of the RPAct: Provisions relating to spouses apply directly to registered same-sex partnership.

C2 - Art. 13 of the Act on Foreigners no. 96/2002: The closest family members of an Icelandic national or a national of another Nordic country residing in Iceland, or those of a foreigner allowed to stay in Iceland under a permit to stay which is not subject to limitations, or under a residence permit, shall be entitled to a permit to stay in Iceland, subject to a few conditions. According to art. 13 the closest family members are considered to be the foreigner's spouse, registered same-sex partner or different-sex cohabiting partner (see also art. 5 of the RPAct).

C3 - Art. 5a of the Icelandic Citizenship Act no. 100/1952, as amended with Act no. 62/1998 and no. 96/2002. A person can apply for citizenship if he/she has been resident in Iceland for three years from the date of marriage or same-sex partnership registration with an Icelandic citizen (who has been so for at least five years). A person can also apply for citizenship if he/she has been resident in Iceland for five years from the date of different-sex cohabitation according to the National registry with an Icelandic citizen (who has been so for at least five years). A single person can apply for citizenship if he/she has been resident in Iceland for seven years; in the case of a national of one of the other Nordic countries, the requirement is only four years.

C4 - Art. 50 of the Code of Criminal Procedure no. 19/1991: Spouses can refuse to testify against their married partners. Art. 5 of the RPAAct: Provisions relating to spouses apply directly to registered same-sex partners. A judge can exempt others from the duty to testify if they are closely connected to the defendant, such as a cohabiting partner.

C5 - In the year 2000 a new chapter was added to the Code of Criminal Procedure no. 19/1991 (amendment no. 94/2000): Chapter XIII A, on restraining orders. One of the main purposes of the legislation is to protect victims of domestic violence and abuse but such victims are not specifically mentioned or defined in the provisions of the Code.

C6 - Art. 7 of the Act on the Rights of Patients: Provisions of the Legal Majority Act no. 71/1997 apply to the consent to treatment of patients who, on account of lack of intelligence or for other reasons provided for by that Act, are incapable of making a decision regarding treatment. According to the Legal Majority Act the plaintiff in a case involving a request for deprivation of legal competence or for involuntary commitment can be the respondent's spouse by marriage. Art. 6 of the Act on the Rights of Patients no. 74/1997: If a patient is unable to master information on his health and treatment the information shall be given to a close relative or, if the patient has been deprived of legal majority, to his legal guardian. There is no definition of a close relative but it is safe to presume that a spouse, a registered same-sex partner and a different-sex cohabiting partner would generally be considered close relatives in this respect.

C7 - Art. 1 of the Act on Organ Donation no. 16/1998: Anyone over the age of 18 can donate their organs to another person of choice.

C8 - Art. 45 of the Rent Act no. 36/1994. If a tenant dies before the end of the rental period, the tenant's surviving spouse or family members of the tenant's household at the time of his death, shall be permitted to take over the lease unless the landlord presents valid reasons why they should not do this. According to art. 3, provisions of the Act regarding married couples or spouses shall also apply to cohabiting couples, the term 'cohabiting couple' referring to a man and woman who live together, both of them being unmarried, if they have had a child together, or if the woman is pregnant or if their cohabitation has lasted for at least one continuous year, or to another form of cohabitation between two individuals if it has lasted for at least one continuous year. Art. 5 of the RPAAct: Provisions relating to spouses apply directly to registered same-sex partners.

C9 - No such duty exists.



**Table D (Iceland): Types of discrimination by employers or service providers that are prohibited in anti-discrimination legislation**

|   | Between married spouses and registered partners (1996) | Between married spouses and informal cohabitants | Between registered partners and informal cohabitants | Between same-sex and different-sex partners (with same status) (1996) |
|---|--|--|--|---|
| 1. With respect to housing                              | Yes  | No   | No   | Yes   |
| 2. With respect to life insurance                       | Yes  | No   | No   | Yes   |
| 3. With respect to health insurance                     | Yes  | No   | No   | Yes   |
| 4. With respect to medically assisted insemination      | No   | No   | No   | No  |
| 5. With respect to other services                       | Yes  | No   | No   | Yes   |
| 6. With respect to an occupational survivor's pension   | Yes  | No   | No   | Yes   |
| 7. With respect to other spousal benefits in employment | Yes  | No   | No   | Yes   |

**Notes to table D**

D1 - Art. 65 of the Constitution of the Republic of Iceland no. 33/1944, as amended with Act no. 97/1995: Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, color, property, birth or other status. Art. 180 of the General Penal Code no. 19/1940, as amended with Act. no. 135/1996: It is prohibited to an employer or a service provider to deny anyone goods, services or access to public places or forums, on the basis of race, color, national origin, religion or sexual orientation. It is therefore widely prohibited to discriminate against anyone on the basis of sexual orientation. It is not generally prohibited to discriminate between people on the basis of their marital status or form of cohabitation.

Same-sex partners can register their partnership under the RPAct and such registration generally affords the partners the same rights as a married couple (with a few defined exceptions). It is generally prohibited to discriminate between married couples and registered same-sex partners. On the other hand it is accepted to afford married couples and registered same-sex partners more rights and obligations than informal cohabiting partners. Different-sex cohabitation does *not* generally afford the partners the same rights as a married couple (see general notes). Discrimination between married partners and registered same-sex partners is therefore generally prohibited but discrimination between married partners/same-sex registered partners on the one hand and different-sex cohabiting partners on the other, is not prohibited. As stated in the general notes different-sex cohabitation can be registered in the National Registry but not same-sex cohabitation and it is therefore not considered prohibited to discriminate between that type of different-sex and same-sex informal cohabitation. The status of informal same-sex cohabitants and different-sex cohabitants that choose not to register their cohabitation in the National Registry is the same with a few exceptions; discrimination between them is generally prohibited by art. 180 of the General Penal Code.

D2 - See note to D1.

D3 - See note to D1.

D4 - See note to D1 but also note to A2. The Act on Artificial Insemination no. 55/1996 applies the same rule to married spouses and different-sex cohabiting partners that meet certain requirements but the Act does discriminate between married spouses and registered same-sex partners.

D5 - See note to D1.

D6 - See note to D1.

**Table E (Iceland): Types of couples that qualify for starting a civil marriage or registered partnership in the country itself**

|  |                            | Civil marriage |          | Registered partnership |                   |
|--|----------------------------|----------------|----------|------------------------|-------------------|
|  |                            | Different-sex  | Same-sex | Different-sex          | Same-sex (1996)   |
| Resident national with:                      | 1. Resident national       | Yes            | X        | X                      | >2 years: Yes     |
|  | 2. Non-resident national   | Yes            | X        | X                      | No                |
|  | 3. Resident foreigner      | Yes            | X        | X                      | >2 years: Yes     |
|  | 4. Non-resident foreigner  | Yes, but       | X        | X                      | No                |
| Non-resident national with:                  | 5. Non-resident national   | Yes            | X        | X                      | No                |
|  | 6. Resident foreigner      | Yes            | X        | X                      | No                |
|  | 7. Non-resident foreigner  | Yes, but       | X        | X                      | No                |
| Resident foreigner with:                     | 8. Resident foreigner      | Yes            | X        | X                      | >2 years: No, but |
|  | 9. Non-resident foreigner  | Yes, but       | X        | X                      | No                |
| Non-resident foreigner with:                 | 10. Non-resident foreigner | Yes, but       | X        | X                      | No                |
| 11. Sister or brother with sister or brother |                            | No             | X        | X                      | No                |
| 12. Parent with child                        |                            | No             | X        | X                      | No                |

**Notes to table E**

E1 - Art. 13 of the Marriage Act no. 31/1993 and Regulation no. 326/1996 as amended with Regulation no. 87/2001. Art. 2 of the RPAct, as amended with Act no. 52/2000: Same-sex partnership can only be registered in Iceland if two conditions are cumulatively fulfilled: a) at least one of the individuals concerned is an Icelandic national; and b) both individuals concerned have resided in Iceland for the two years preceding the registration. For the purposes of the Registered Partnership Act persons of Danish, Norwegian or Swedish nationality shall enjoy the same rights as Icelandic nationals. The Minister of Justice may decide by administrative provisions that nationals of other countries, where similar legislation on registered partnership is in effect, shall also enjoy the same rights as Icelandic nationals. This has not been done yet.

E2 - See note to E1.

E3 - See note to E1.

E4 - For source see note to E1. Icelandic nationals can always marry non-resident citizens from Norway, Denmark, Finland or Sweden. Icelandic nationals can marry other non-resident foreigners provided they have a permit to stay in Iceland. Art. 8, 15 and 35 of the Act on Foreigners no. 96/2002: Danish, Finnish, Norwegian and Swedish nationals may stay in Iceland without the issue of a permit. EEA nationals may enter Iceland without a particular permit and stay in Iceland for up to three months, or for up to six months if arriving for the purpose of seeking employment. Other foreigners may stay in Iceland for up to three months unless their entry is dependent upon a visa. A foreigner who has been staying in Iceland for a continuous period of three years under a permit to stay and has attended a course in the Icelandic language for foreigners may be granted a residence permit. A residence permit grants a right to stay in Iceland indefinitely

E5 - See note to E1 and E2.

E6 - See note to E1 and E2.

E7 - See note to E1, E2 and E4.

E8 - See note to E1.

E9 - See note to E1, E2 and E4.

E10 - For source see note to E1 and E4. Non-resident foreigners from Norway, Denmark, Finland or Sweden can marry in Iceland. Other non-resident foreigners can marry provided they have a permit to stay in Iceland.

E11 - Art. 9 of the Marriage Act no. 31/1993 and art. 2 of the RPAct.

E12 - See note to E11.

**Table F (Iceland): Authority for starting a civil marriage or registered partnership**

|  | Civil marriage |          | Registered partnership |                 |
|--|----------------|----------|------------------------|-----------------|
|  | Different-sex  | Same-sex | Different-sex          | Same-sex (1996) |
| 1. Registry of births, marriages and deaths  | No             | X        | X                      | No              |
| 2. Local population administration           | No             | X        | X                      | No              |
| 3. Church                                    | Yes            | X        | X                      | No              |
| 4. Court                                     | No             | X        | X                      | No              |
| 5. Private person with special authorisation | No             | X        | X                      | No              |
| 6. Public notary                             | No             | X        | X                      | No              |
| 7. Administrative magistrate                 | Yes            | X        | X                      | Yes             |

**Notes to table F**

F1 -Registration in the National Registry is not an authority for starting a marriage or registered partnership.

F2 - The National Registry (see F1) is also similar to a local population administration.

F3 - Art. 17 of the Marriage Act no. 31/1993: Religious solemnization of marriage is performed by the ministers of the National Church, and priests or other representatives of registered religious organizations in Iceland who have been empowered to perform such ceremonies by the Ministry of Justice and Ecclesiastical Affairs.

F4 - Not applicable.

F5 - Not applicable.

F6 - Not applicable.

F7 - Art. 17 of the Marriage Act no. 31/1993 and art. 4 of the RPAAct. The Act on Executive Power in Government no. 92/1989 outlines the role of Magistrates in Iceland. Magistrates are the representatives of executive authority in administrative areas and they have no judicial powers. The magistrates have many functions, including acting as commissioners of police and directors of customs, collecting revenues for the Treasury, performing civil marriages and granting licences for judicial separations and divorces, delivering rulings on rights of access to children and maintenance payments following divorce, ruling on the legal competence of individuals, registering official documents, taking various measures in connection with estates following death, seizing property and carrying out other measures of compulsory possession and distraint and holding auctions in execution of judgement.

**Table G (Iceland): Means of ending a marriage or registered partnership**

|   | Civil marriage |          | Registered partnership |                 |
|---|----------------|----------|------------------------|-----------------|
|   | Different-sex  | Same-sex | Different-sex          | Same-sex (1996) |
| 1. By court decision (after joint or individual petition)   | Yes            | X        | X                      | Yes             |
| 2. By mutually agreed contract (outside court)  | No             | X        | X                      | No              |
| 3. Unilaterally by one partner (outside court)  | No             | X        | X                      | No              |
| 4. By conversion of marriage into registered partnership, or vice versa (outside court)                                   | No             | X        | X                      | No              |
| 5. By one registered partner marrying a third person (or starting a registered partner with a third person)               | No             | X        | X                      | No              |
| 6. By the registered partners marrying each other (or by the married partners starting a registered partnership together) | No             | X        | X                      | No              |
| 7. By administrative decision (after joint or individual petition)  | Yes, but       | X        | X                      | Yes, but        |

**Notes to table G**

G1 - Art. 41 of the Marriage Act no. 31/1993: Permits for legal separation and divorce are granted by administrative magistrates (see note to F7) if both parties agree. An individual petition for separation or divorce can be submitted in court. Art. 5 of the RPAAct: Provisions relating to spouses apply directly to registered same-sex partnership.

G2 - See note to G7.

G3 - Art. 34, 36, 38, 39 and 40 of the Marriage Act no. 31/1993: One spouse can claim legal separation and divorce but has to seek resolution in court. See note to G1 on registered same-sex partnership.

G4 - Not applicable, see note to G6.

G5 - The RPAAct (referring to art. 11 of the Marriage Act no. 31/1993) requires a permit for divorce before a person can marry, or register partnership, with a third person.

G6 - Different-sex registered partnership would be considered to have ended without any formal resolution if the partners marry each other.

G7 - Art. 41 of the Marriage Act no. 31/1993: Permits for legal separation and divorce are granted by administrative magistrates (see note to F7) only if both parties agree. See note to G1 on registered same-sex partnership.

***Some literature in English***

- Yuval Merin, *Equality for Same-Sex Couples. The legal recognition of gay partnerships in Europe and the United States*, Chicago/London: The University of Chicago Press, 2002, p. 103-107.



## Major legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners in the Netherlands

by Kees Waaldijk <sup>1</sup>

Symbols and words used in the national tables:

| Applicable answer  | Answer code | Colour      | Points given for calculation of level of legal consequences |
|--|-------------|-------------|---|
| The legal consequence applies.   | Yes         | White       | 3 pt  |
| The legal consequence applies in a limited way or not in all circumstances, or it can be contracted out of, or courts can set it aside using some general legal principle, etc.    | Yes, but    | Light pink  | 2 pt  |
| The legal consequence only applies in a very limited way or in very few circumstances, or it can be established by contract, or by courts using some general legal principle, etc. | No, but     | Middle pink | 1 pt  |
| The legal consequence does not apply.  | No          | Dark pink   | 0 pt  |
| No information was available on this point, or the legal position is unclear.  | Doubt       | Middle pink | 1 pt  |
| The column is not applicable in the country, because this type of relationship is not legally recognised (yet).  | X           | Dark pink   | 0 pt  |

| Additional information   | Answer code |
|--|-------------|
| The legal consequence is only available after the specified number of years.   | >x years    |
| The legal consequence is only available after the specified number of months.  | >x months   |
| Year of entry into force of the legislation providing the legal consequence (or the particular relationship type), or year of supreme court decision establishing its existence.<br>(Where two years are given, the first indicates the introduction of a more limited version of the consequence; where no year is given, the legal consequence mostly applies since the introduction of the particular relationship type, or already for a long time.) | (Year)      |

<sup>1</sup> Universiteit Leiden, [www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk).

## Introduction

This chapter aims to represent the law as it stood early in 2004.

Dutch laws have no numbers. Each new or amending law is published in a numbered issue of the '*Staatsblad*' (official journal). The full text of the updated version of legislation in force in the Netherlands can be found at <http://wetten.overheid.nl>. There are no official translations available in other languages than Dutch, but see: Ian Sumner & Hans Warendorf, *Family Law Legislation of the Netherlands. A translation including Book 1 of the Dutch Civil Code, procedural and transitional provisions and private international law legislation*, Antwerp/Oxford/New York: Intersentia, 2003.

For governmental information in English see [www.overheid.nl/guest/sites/](http://www.overheid.nl/guest/sites/) and [www.postbus51.nl](http://www.postbus51.nl); for family law see [www.ministerievanjustitie.nl:8080/a\\_BELEID/fact/fact.htm](http://www.ministerievanjustitie.nl:8080/a_BELEID/fact/fact.htm); for social security see [www.socialezekerheid.nl/english/index.html](http://www.socialezekerheid.nl/english/index.html); for taxation see [www.minfin.nl](http://www.minfin.nl); and for immigration and citizenship see [www.immigratiedienst.nl/Home.asp?LangID=1](http://www.immigratiedienst.nl/Home.asp?LangID=1).

### *Civil marriage*

Civil marriage ('*huwelijk*') is regulated by Book 1 of the Civil Code (*Burgerlijk Wetboek* = CC). Since 1 April 2001 art. 30(1) of Book 1 states that a 'marriage can be contracted by two persons of different sex or of the same sex'. On that date civil marriage was opened up to same-sex couples by the amendment of this article (and some others) by the law of 21 December 2000 (*Staatsblad 2001, nr. 9*). Also on 1 April 2001 the possibility of adoption was opened up to same-sex partners, whether married, registered as partners or only cohabiting (law of 21 December 2000, *Staatsblad 2001, nr. 10*). Summary-translations into English of parts of these laws can be found at [www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk). See also the translation of Book 1 of the Civil Code, by Sumner & Warendorf, cited above.

There are only two legal differences between a marriage of two people of the same sex and a marriage of two people of different sexes. One exception concerns intercountry adoption, which is only available to married different-sex couples (see item A5, below). The other exception is the presumption of paternity: when a child is born to a woman married to a man, the man is deemed to be the father of the child. That rule does not apply when a child is born to a woman married to another woman (see item A1, below). However, since 2002 a new rule provides that when a child is born in a marriage of two women, both women automatically get joint parental authority over the child, unless a man has acknowledged the child as his own before its birth (see items A1 and A3).

### *Registered partnership*

Registered partnership ('*geregistreerd partnerschap*') is also regulated by Book 1 of the Civil Code. It was introduced, both for same-sex couples and of different-sex couples, on 1 January 1998 by the insertion of art. 80a to 80e into Book 1, by the law of 5 July 1997 (*Staatsblad 1997, nr. 324*). Almost all procedures and consequences of marriage also apply to registered partnership. This follows from art. 80b of Book 1 CC, from the many amendments of more than one hundred other laws that were made by the law of 17 December 1997 (*Staatsblad 1997, nr. 660*) that also came into force on 1 January 1998, and from various later amendments, including those contained in the law of 21 December 2000 to open up marriage to same-sex couples (*Staatsblad 2001, nr. 9*) and the law 13 December 2000 (*Staatsblad 2001, nr. 10*). See the summary-translations into English of some provisions at [www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk). See also the translation of Book 1 of the Civil Code, by Sumner & Warendorf, cited above.

There are very few difference between registered partnership and marriage. In a very simple procedure any registered partnership can be converted into a marriage, and vice versa. A difference exists with respect to the ways to split up: unlike a marriage a registered partnership can also be ended by way of mutual contract (see item G2, below). The legal consequences of registered partnership are the same as those of marriage, with two main exceptions: Registered partners are excluded from intercountry adoption (see item A5, below). And when a child is born to a woman in a registered partnership, her (male or female) partner does not automatically become a legal parent (see item A1). However, since 2002 a new rule provides that when a child is born in a registered partnership, both partners automatically get joint parental authority over the child, unless a man has acknowledged the child as his own before its birth (see items A1 and A3).

### *Informal cohabitation*

There is no general law on informal cohabitation. Informal cohabitation of different-sex and same-sex partners has been recognised since the 1970s in an ever growing number of laws and policies. The first example can be found in the policy guidelines for immigration, which since 1975 recognised cohabitation. In legislation cohabitation was recognised for the first time in 1979, for the purposes of rent law (see item C8, below), and in 1981 for the purposes of inheritance tax (see item B13, below). By 2004 almost all legal consequences of marriage are also available to cohabitants. The exceptions include the presumption of paternity (item A1), intercountry adoption (item A5), joint property (B1), joint debt (B2), alimony (B3), inheritance (B6 and B13)

and use of each other's surname (C1). The only difference between the legal position of same-sex cohabitants and that of different-sex cohabitants is that only an unmarried male can simply acknowledge the child of his female partner. Others need to go through an adoption procedure (see items A1, A3 and A4).

Most laws that now do recognise informal cohabitation, refer to the fact of two persons having a lasting joint household (*duurzaam gemeenschappelijke huishouding*). Some legal provisions in the Civil Code, however, use the undefined notion of '*levensgezel*' (life companion).

Cohabitants may choose to make a cohabitation contract (for example with the help of a public notary), but in general such a contract will only bind themselves, not third parties. Cohabitation contracts are subject to general contract law and legally enforceable. However, there are no specific legislative provisions regulating cohabitation contracts. Some legal provisions, and some pension funds, require a cohabitation contract from cohabitants who want to be recognised for a specific purpose.

#### **Abbreviation**

CC = Civil Code (*Burgerlijk Wetboek*) as amended by numerous laws, including those mentioned above.



**Table A (Netherlands): Parenting consequences**

|  | Civil marriage       |                          | Registered partnership (1998) |                           | Informal cohabitation     |                           |
|--|----------------------|--------------------------|-------------------------------|---------------------------|---------------------------|---------------------------|
|  | Different-sex        | Same-sex (2001)          | Different-sex                 | Same-sex                  | Different-sex             | Same-sex                  |
| 1. When female partner gives birth, both partners automatically become legal parents   | Yes                  | No, but (2002)           | No, but                       | No, but (2002)            | No, but                   | No                        |
| 2. Medically assisted insemination is lawful for women in such a relationship  | Yes                  | Yes                      | Yes                           | Yes                       | Yes                       | Yes                       |
| 3. When only one partner is the parent of a child, both partners can have parental authority or responsibilities during their relationship | Yes                  | Yes (2001/2002)          | Yes (1998/2002)               | Yes (1998/2002)           | Yes (1986)                | Yes (1998)                |
| 4. When only one partner is the parent of a child, the other partner can adopt it and thus become its second parent                        | >3 years: Yes (1979) | >3 years: Yes (2001)     | >3 years: Yes (1998)          | >3 years: Yes (2001)      | >3 years: Yes (1998)      | >3 years: Yes (2001)      |
| 5. Partners can jointly adopt a child  | >3 years: Yes (1956) | >3years: Yes, but (2001) | >3 years: Yes, but (1998)     | >3 years: Yes, but (2001) | >3 years: Yes, but (1998) | >3 years: Yes, but (2001) |
| 6. One partner can individually adopt a child  | Yes (1998)           | Yes                      | Yes                           | Yes                       | Yes (1998)                | Yes (1998)                |
| 7. Partners can jointly foster a child   | Yes                  | Yes                      | Yes                           | Yes                       | Yes (1980s)               | Yes (1980s)               |
| <b>Level of legal consequences</b>   | 7x3<br>= 21          | 5x3 + 1x2 + 1x1<br>= 18  | 5x3 + 1x2 + 1x1<br>= 18       | 5x3 + 1x2 + 1x1<br>= 18   | 5x3 + 1x2 + 1x1<br>= 18   | 5x3 + 1x2 + 1x0<br>= 17   |

**Notes to table A**

A1 - The man married to the woman giving birth is deemed to be the father of the child (art. 199(a) Book 1 CC). An unmarried man can become the legal father of a child by acknowledging it, before or after its birth, (*erkenning*; art. 199(c) Book 1 CC), whether or not he is the registered partner or informal cohabitant of the child's mother. Both rules do not apply to women: in a lesbian relationship the mother's partner can only become the legal parent of the child through second-parent adoption (see A4). However, when a child is born in a lesbian marriage or in a lesbian or different-sex registered partnership, both partners automatically get joint parental authority (including financial responsibility), unless a man (normally with consent of the mother) has acknowledged the child as his own before its birth. This is possible since 1 January 2002 (art. 253aa and 253sa, introduced by the law of 4 October 2001, *Staatsblad 2001, nr. 468*).

A2 - There is no legislation limiting the categories of women that can receive medically assisted insemination. The *Wet donorgegevens kunstmatige inseminatie* (Act on donor data in case of artificial insemination, of 25 April 2002, *Staatsblad 2002, nr. 240*) only regulates the keeping of records of data about donors.

A3 - Married partners automatically have joint parental authority over their common children (art. 251 Book 1 CC). From January 2002 registered partners, too, can *automatically* have joint parental authority (including financial responsibility), but only over children born to a female partner after the partnership registration (art. 253aa and 253sa, introduced by the law of 4 October 2001, *Staatsblad 2001, nr. 468*), and unless a man (normally with consent of the mother) has acknowledged the child as his own before its birth. This also applies to children born into a lesbian marriage (art. 253sa). In other situations joint parental authority can be requested (art. 252 and 253t).

A4 - See art. 227 Book 1 CC, as amended by the law of 24 December 1997 (*Staatsblad 1997, nr. 772*, in force from April 1998) so as to allow adoptions by unmarried different-sex partners, and by the law of 21 December

2000 (*Staatsblad 2001, nr. 10*, in force from April 2001) so as to allow adoptions by same-sex partners (whether married, registered as partners, or neither). Whatever their civil status or gender-combination, the partners must have lived together for three years (art. 227(2)).

A5 - Idem. However, intercountry adoption is only possible for married different-sex couples (art. 1 and 2 of the *Wet opnemng buitenlandse kinderen ter adoptie* (Act on reception of foreign children for adoption) of 8 December 1988, *Staatsblad 1988, nr. 566*), as amended by the the law of 8 March 2001, *Staatsblad, 2001, nr. 128*). Each year only very few Dutch children are available for joint adoption by a couple; the number of foreign children available for joint adoption is much larger. Unmarried couples, and married same-sex couples, are excluded from the possibility of intercountry adoption.

A6 - Art. 227 Book 1 CC, as amended by the law of 24 December 1997 (*Staatsblad 1997, nr. 772*, in force from April 1998), allows adoptions by 'one person alone', whether or not that person has a partner of any gender. Intercountry adoption by any person alone is not excluded.

A7 - There is no legislation limiting the categories of persons that can become foster parents. (From January 1998, foster parents can have joint authority over their foster children; art. 282 Book 1 CC, as amended by the law of 30 October 1997, *Staatsblad 1997, nr. 506*.)

Table B - part one (Netherlands): Material consequences in private law

|  | Civil marriage       |                      | Registered partnership (1998) |                      | Informal cohabitation |                     |
|--|----------------------|----------------------|-------------------------------|----------------------|-----------------------|---------------------|
|  | Different-sex        | Same-sex (2001)      | Different-sex                 | Same-sex             | Different-sex         | Same-sex            |
| 1. Properties of each partner are considered joint property                        | Yes, but             | Yes, but             | Yes, but                      | Yes, but             | No, but               | No, but             |
| 2. Debts of each partner are considered joint debt                                 | Yes, but             | Yes, but             | Yes, but                      | Yes, but             | No, but               | No, but             |
| 3. In case of splitting up, statutory rules on alimony apply                       | Yes                  | Yes                  | Yes                           | Yes                  | No, but               | No, but             |
| 4. In case of splitting up, statutory rules on redistribution of properties apply  | No                   | No                   | No                            | No                   | No                    | No                  |
| 5. In case of wrongful death of one partner, the other is entitled to compensation | Yes                  | Yes                  | Yes                           | Yes                  | Yes (1992)            | Yes (1992)          |
| 6. When one partner dies without testament, the other is an inheritor              | Yes                  | Yes                  | Yes                           | Yes                  | No                    | No                  |
| Level of legal consequences  | 3x3 + 2x2 + 1x0 = 13 | 3x3 + 2x2 + 1x0 = 13 | 3x3 + 2x2 + 1x0 = 13          | 3x3 + 2x2 + 1x0 = 13 | 1x3 + 2x0 + 3x1 = 6   | 1x3 + 3x1 + 2x0 = 6 |

## Notes to table B - part one

B1 - Art. 93 and 94 Book 1 CC provide that, in the absence of a prenuptial contract, spouses have community of property: from the moment of marriage almost all present and future goods and debts of each spouse are considered joint property. According to art. 80b this also applies to registered partners. There are exceptions for some gifts and inherited goods (art. 94(1), for some very personal goods and debts (art. 94(3)), and for some pension rights (art. 94(4)). The (future) spouses and (future) registered partners can prevent some or all of their goods and/or debts from becoming joint property, by agreeing a prenuptial contract (*'huwelijks voorwaarden'*; art. 114-148 Book 1 CC). For informal cohabitants, the sole fact of cohabitation does not result in joint property. However, the cohabitants can become the joint owners of a specific good if they if they acquire the property jointly.

B2 - Idem, but household debts are always joint (art. 85 Book 1 CC).

B3 - When a marriage ends in court, the court may stipulate alimony for one partner (art. 157 Book 1 CC). The same applies when a registered partnership ends in court (art. 80e). When a registered partnership is ended by mutual contract, the contract must contain a provision on alimony (art. 80d). Cohabiting partners may make a cohabitation contract in which alimony is stipulated. In theory this can be an implicit, unwritten contract or stipulation (see W.M. Schrama, *Vermogensrecht voor ongehuwde samenlevers*, Kluwer, Deventer, 2000, p. 31-33).

B4 - The law makes no provision for a re-distribution of properties, so they will be distributed according to existing ownership; joint properties are divided (see B1).

B5 - According to art. 108 Book 6 CC the married, registered or cohabiting partner is entitled to compensation for loss of financial or other support. For registered partners this is so since the law of 17 December 1997, *Staatsblad 1997, nr. 660*; for cohabiting partners since the revision of the Civil Code in 1992.

B6 - In the absence of a testament the married or registered partner inherits in the same way as a child (art. 10 Book 4 CC). This does not apply to cohabitants.

**Table B - part two (Netherlands): Positive material consequences in public law**

|   | Civil marriage               |                              | Registered partnership (1998) |                              | Informal cohabitation                |                                      |
|---|------------------------------|------------------------------|-------------------------------|------------------------------|--------------------------------------|--------------------------------------|
|   | Different-sex                | Same-sex (2001)              | Different-sex                 | Same-sex                     | Different-sex                        | Same-sex                             |
| 7. Relationship can result in lower property tax  | No, but                      | No, but                      | No, but                       | No, but                      | No, but                              | No, but                              |
| 8. Relationship can result in lower income tax  | No, but                      | No, but                      | No, but                       | No, but                      | No, but                              | No, but                              |
| 9. Public health insurance of one partner covers medical costs of other partner                 | Yes, but                     | Yes, but                     | Yes, but                      | Yes, but                     | Yes, but (1989)                      | Yes, but (1989)                      |
| 10. Relationship can have positive impact on basic social security payment in case of no income | No                           | No                           | No                            | No                           | No                                   | No                                   |
| 11. Relationship can have positive impact on statutory old age pension                          | No, but                      | No, but                      | No, but                       | No, but                      | No, but (1987)                       | No, but (1987)                       |
| 12. When one partner dies, the other can get a statutory survivor's pension                     | No, but                      | No, but                      | No, but                       | No, but                      | No, but (1996)                       | No, but (1996)                       |
| 13. Surviving partner pays no inheritance tax (or less than a mere friend would)                | Yes                          | Yes                          | Yes                           | Yes                          | >6 months: Yes, but (1981/1985/2002) | >6 months: Yes, but (1981/1985/2002) |
| <b>Level of legal consequences</b>  | 1x3 + 1x2 + 4x1 + 1x0<br>= 9 | 1x3 + 1x2 + 4x1 + 1x0<br>= 9 | 1x3 + 1x2 + 4x1 + 1x0<br>= 9  | 1x3 + 1x2 + 4x1 + 1x0<br>= 9 | 2x2 + 4x1 + 1x0<br>= 8               | 2x2 + 4x1 + 1x0<br>= 8               |

**Notes to table B - part two**

B7 - In general it must be said that (since 2001) there is no property tax in the Netherlands. However, the phenomenon that is usually known as property tax can be said to be incorporated in the Dutch income tax : taxes are not imposed on the basis of property itself, but on what is supposed to be gained from it. Accordingly, a hypothetical rent value of the owned home is added to the owner's tax able income (art. 3.112 of the *Wet Inkomstenbelasting 2001*, Income Tax Act 2001, *Staatsblad 2000, nr. 215*). The income tax legislation also assumes a 4% profit on savings and investments, whatever the actual level of interest or dividend; a 30% tax is imposed on this 4% profit. The fact that a relationship can result in a lower 'property' tax follows from art. 5.1, 5.2, 5.5 and 1.2 of the *Wet Inkomstenbelasting 2001*. No tax is imposed over the first circa EUR 19.000 owned (for most people over 65 a higher threshold applies). In case of marriage, registered partnership or informal cohabitation, this amount can be doubled for one of the partners if the other partner is willing to forgo that tax-free threshold. If the latter owns less than circa EUR 19.000, this will result in a lower tax for the couple as a whole.

B8 - For most purposes income tax is the same for individuals and for persons in any relationship. However, in some cases a relationship can result in lower income tax, e.g. when all mortgage payments on the home owned by the couple can be tax-deducted by the partner with the highest income (art. 2.17 of the *Wet Inkomstenbelasting 2001*, Income Tax Act 2001, *Staatsblad, 2000, 215*), or when one partner works without salary in the company of the other partner (art. 3.78 of the *Wet Inkomstenbelasting 2001*). See also note B7.

B9 - Public health insurance (which takes the form of a statutory, compulsory insurance for mainly employees) is only available for people with an income below a certain level. If the partner of the person with such a low income earns even less or nothing, that partner is mostly also covered by the insurance (art. 4 *Ziekenfondswet*, Public Health Insurance Funds Act, *Staatsblad, 1964, nr. 392*). Art. 1(2) includes the insured person's registered partner (since the law of 17 December 1997, *Staatsblad 1997, nr. 660*, in force since 1998) in the

definition of spouse, and (since the law of 15 December 1988, *Staatsblad 1988, nr. 610*, in force since 1989) art. 1(3) does this for the unmarried/unregistered partner with whom the insured person has a joint household.

B10 - A relationship cannot have a positive impact with respect to basic social security.

B11 - In some cases, where the person entitled to the old age pension has a (married, registered or cohabiting) partner younger than 65 years whose income is below what he or she would receive at 65, the relationship may have a positive impact on the total income of the couple. See art. 8 and 11 of the *Algemene Ouderdomswet*.

B12 - Art. 14 and 3 *Algemene nabestaandenwet* (General Survivors Act, of 21 December 1995, *Staatsblad 1995, nr. 690*) only provides a statutory survivor's pension to the surviving (married or cohabiting, or since 1998 registered) partner who either was born before 1950, or who has an unmarried child under 18 which is not being raised in someone else's household, or who is medically unfit to have paid employment at the moment his or her partner dies, or who is pregnant.

B13 - The married or registered surviving partner does not pay inheritance tax over the first EUR 485,000 (art. 32 *Successiewet 1956* (Inheritance Tax Act 1956), as amended from time to time), and a lesser percentage than other inheritors over any amount above that sum (art. 24(1)). The same applies (since 1981/1985) to informal cohabitants who have had a joint household for at least five years. Since the law of 14 December 2001 (*Staatsblad 2001, nr. 643*) the same also applies to informal cohabitants who have had a joint household for less than five years but more than six months, but only if at least six months ago they have gone to a public notary to make a cohabitation contract containing a mutual obligation of support, and if they have also chosen to be treated as a couple for the purposes of income tax (art. 24(2)). Informal cohabitants were first recognised in an amendment to the *Successiewet 1956* by the law of 17 December 1980 (*Staatsblad 1980, nr. 686*), and first on an equal footing to married partners in an amendment by the law of 8 November 1984 (*Staatsblad 1984, nr. 545*).

Table B - part three (Netherlands): Negative material consequences in public law

|   | Civil marriage         |                        | Registered partnership (1998) |                        | Informal cohabitation |                  |
|---|------------------------|------------------------|-------------------------------|------------------------|-----------------------|------------------|
|   | Different-sex          | Same-sex (2001)        | Different-sex                 | Same-sex               | Different-sex         | Same-sex         |
| 14. Relationship can result in higher property tax  | No                     | No                     | No                            | No                     | No                    | No               |
| 15. Relationship can result in higher income tax  | No, but                | No, but                | No, but                       | No, but                | No                    | No               |
| 16. Relationship can have negative impact on basic social security payment in case of no income | Yes                    | Yes                    | Yes                           | Yes                    | Yes (1965)            | Yes (1987)       |
| 17. Relationship can have negative impact on statutory old age pension                          | Yes                    | Yes                    | Yes                           | Yes                    | Yes (1987)            | Yes (1987)       |
| Level of legal consequences   | 2x3 + 1x1 + 1x0<br>= 7 | 2x3 + 1x1 + 1x0<br>= 7 | 2x3 + 1x1 + 1x0<br>= 7        | 2x3 + 1x1 + 1x0<br>= 7 | 2x3 + 2x0<br>= 6      | 2x3 + 2x0<br>= 6 |

## Notes to table B - part three

B14 - A relationship cannot result in a higher 'property' tax ; see note B7.

B15 - Only in very exceptional cases (e.g. small profit from a company) a marriage or registered partnership can result in a higher income tax . Informal cohabitants can always choose to be tax ed as individuals.

B16 - In principle a single person entitled to basic social security ('*bijstand*') will receive a payment which is 50% of the payment provided to a couple entitled to basic social security (see art. 30 *Algemene bijstandswet* (General Social Security Act, *Staatsblad*, 1995, nr. 199). However, for two reasons a relationship can have a negative impact on basic social security payments. Firstly, there is no entitlement to basic social security, if the (married, registered or cohabiting) partner earns enough to support both partners. And secondly, the local authorities have a discretionary power to pay out more than 50% to a single person, if he or she cannot share with someone else the basic costs of living (art. 33 *Algemene bijstandswet*); this supplement will stop as soon as the single beneficiary enters into cohabitation, marriage or registered partnership. Already under the predecessor of this Act (the *Algemene Bijstandswet* of 1965) different-sex cohabiting partners were treated in the same way as married partners. The law of 6 November 1986 (*Staatsblad* 1986, nr. 564) codified this equal treatment of different-sex cohabiting and married partners, and introduced the equal treatment of same-sex and different-sex cohabitants (see J.L.M. Schell, *De Algemene bijstandswet*, Tilburg University Press, 1995, p. 142-143). The equal treatment of married, registered and informal cohabitants can now be found in art. 3 of the *Algemene bijstandswet* (as amended by the law of 17 December 1997, *Staatsblad* 1997, nr. 660).

B17 - The statutory old age pension provided to a single living person constitutes 70% of the minimum wage, whereas (married, registered or cohabiting) partners will only receive 50% each. See art. 1 and 9 of the *Algemene Ouderdomswet*, General Old Age Act, of 31 May 1956, *Staatsblad*, 1956, nr. 287; art. 1 of the Act was amended by the law of 6 November 1986, *Staatsblad* 1986, nr. 563 to include informal cohabitants per 1987, and by the law of 17 December 1997, *Staatsblad* 1997, nr. 660 to include registered partners per 1998).

**Table C (Netherlands): Other legal consequences**

|  | Civil marriage       |                      | Registered partnership (1998) |                      | Informal cohabitation      |                            |
|--|----------------------|----------------------|-------------------------------|----------------------|----------------------------|----------------------------|
|  | Different-sex        | Same-sex (2001)      | Different-sex                 | Same-sex             | Different-sex              | Same-sex                   |
| 1. One partner can have or use surname of the other  | Yes                  | Yes                  | Yes                           | Yes                  | No, but                    | No, but                    |
| 2. Foreign partner of resident national is entitled to a residence permit  | Yes, but             | Yes, but             | Yes, but                      | Yes, but             | Yes, but (1975)            | Yes, but (1975)            |
| 3. Relationship makes it easier for foreign partner to obtain citizenship  | >3 years: Yes        | >3 years: Yes        | >3 years: Yes (2003)          | >3 years: Yes (2003) | > 3 years: Yes, but (1985) | >3 years: Yes, but (1985)  |
| 4. In case of criminal prosecution, one partner can refuse to testify against the other  | Yes                  | Yes                  | Yes                           | Yes                  | No                         | No                         |
| 5. When one partner uses violence against other partner, specific statutory protection applies   | No                   | No                   | No                            | No                   | No                         | No                         |
| 6. In case of accident or illness of one partner, the other is considered as next of kin for medical purposes (even without power of attorney) | Yes                  | Yes                  | Yes                           | Yes                  | Yes (1995)                 | Yes (1995)                 |
| 7. Organ donation from one living partner to the other is lawful   | Yes                  | Yes                  | Yes                           | Yes                  | Yes                        | Yes                        |
| 8. When one partner dies, the other can continue to rent the home  | Yes                  | Yes                  | Yes                           | Yes                  | >2 years: Yes (1979)       | >2 years: Yes (1979)       |
| 9. Partners have a duty to have sexual contact   | No                   | No                   | No                            | No                   | No                         | No                         |
| <b>Level of legal consequences</b>   | 6x3 + 1x2 + 2x0 = 20 | 6x3 + 1x2 + 2x0 = 20 | 6x3 + 1x2 + 2x0 = 20          | 6x3 + 1x2 + 2x0 = 20 | 3x3 + 2x2 + 1x1 + 3x0 = 14 | 3x3 + 2x2 + 1x1 + 3x0 = 14 |

**Notes to table C**

C1 - No one gets a different name through marriage or partnership registration: in Dutch law each partner keeps his or her own name. However, according to art. 9 Book 1 CC, a married or registered woman or (since 1998) man is entitled *to use* the name of his or her partner, or *to use* a combination of his or her own name and that of the partner (even without permission by that partner). In theory unmarried/unregistered partners may give each other permission *to use* each other's name, but this is not specified in the Civil Code.

C2 - Art. 3.13 to 3.17 of the Aliens Decree 2000 (*Vreemdelingenbesluit 2000, Staatsblad 497*, in force since 1 April 2001) allow for the immigration of married, registered and unmarried/unregistered partners, provided that they live together and have a joint household. One of the conditions is that the 'receiving' partner has a sufficient income, i.e. 100% of the official minimum wage (art. 3.22 and 3.74; until 1 April 2004, 70% of the official minimum wage was considered sufficient for most married or registered partners; but not for informal

cohabitants). See [www.immigratiedienst.nl/Home.asp?LangID=1](http://www.immigratiedienst.nl/Home.asp?LangID=1). Until 1 April 2001 the right to immigration of partners was contained in policy guidelines (*Vreemdelingencirculaire*), which since 1975 recognized informally cohabiting different-sex and same-sex partners of Dutch citizens (see A.H.J. Swart, *De toelating en uitzetting van vreemdelingen*, Deventer, Kluwer, 1978, p. 165-166).

C3 - To acquire Dutch citizenship, a foreigner normally must have resided in the Netherlands for at least five years (art. 8(1) of the *Rijkswet op het Nederlanderschap*, Act on Dutch Nationality, *Staatsblad*, 1984, nr. 628). This condition does not apply to a foreigner who has been married to a Dutch citizen for at least three years (art. 8(2)). From 1 April 2003 the five year condition no longer applies to a foreigner who has been the registered partner of a Dutch citizen for at least three years (this follows from art. 1(2) as amended by the law of 21 December 2000, *Staatsblad* 2000, nr. 618). With respect to a foreigner who has been living together for at least three years in a permanent relationship with an unmarried/unregistered Dutch citizen, the requirement of five years of residence is reduced to one of three years of residence (Art 8(4), in force since 1985). See <[www.immigratiedienst.nl/Home.asp?LangID=1](http://www.immigratiedienst.nl/Home.asp?LangID=1)>.

C4 - Art. 217 of the Code of Criminal Procedure (*Wetboek van Strafvordering*, as amended in by the law of 17 December 1997, *Staatsblad* 1997, nr. 660) exempts current and former married or registered partners, but not cohabitants.

C5 - Legislation is being prepared to increase the limited protection now provided under criminal law (art. 300 and 304 Penal Code, *Wetboek van Strafrecht*) and in divorce law (art. 821 and 822 Code of Civil Procedure, *Wetboek van Burgerlijke Rechtsvordering*).

C6 - Art. 450 and 465 Book 7 CC provides that for the purposes of a 'medical treatment contract' a patient who is incapable of considering his or her own interests, may be represented (in the absence of anyone mandated in writing by the patient) by his or her married or registered partner or by his or her 'life companion' (*levensgezel*). (This and the other articles on the 'medical treatment contract' were inserted into the Civil Code in 1995, by law of 17 November 1994, *Staatsblad* 1994, nr. 837; the reference to 'registered partner' has been inserted by the law of 17 December 1997, *Staatsblad* 1997, nr. 660.)

C7 - The Law on Organ Donation (*Wet op de orgaandonatie*, *Staatsblad* 1997, nr. 580) makes no restrictions as to those who can benefit from an organ donation by a living person over 18 years of age (see art. 3).

C8 - According to art. 268 Book 7 CC the rent contract is continued on the death of the tenant by the co-tenant. According to art. 266 the tenant's married partner is automatically the co-tenant; since 1998 this rule also applies to the tenant's registered partner, as amended by the law of 17 December 1997, *Staatsblad* 1997, nr. 660). According to art. 267 (as amended by the law of 21 June 1979, *Staatsblad* 1979, nr. 330) the tenant's partner in a 'lasting joint household' is entitled to become co-tenant after two years of cohabitation. Art. 268 (as amended by the said law of 1979) provides that the sub-district court may allow the continuation of the rent also to a tenant's cohabiting partner who on the death of the tenant has not yet become a co-tenant. Until 1 August 2003, the articles 266 to 268 could be found (as articles 1623g to 1623i) in Book 7A CC; on that day the law of 21 November 2002 (*Staatsblad* 2002, nr. 587) recodifying rent law came into force (see *Staatsblad* 2003, nr. 230).



**Table D (Netherlands): Types of discrimination by employers or service providers that are prohibited in anti-discrimination legislation**

|   | Between married spouses and registered partners (1998) | Between married spouses and informal cohabitants (1994) | Between registered partners and informal cohabitants (1998) | Between same-sex and different-sex partners (with same status) (1992/1994) |
|---|--|---|---|--|
| 1. With respect to housing                              | Yes  | Yes   | Yes   | Yes  |
| 2. With respect to life insurance                       | Yes  | Yes   | Yes   | Yes  |
| 3. With respect to health insurance                     | Yes  | Yes   | Yes   | Yes  |
| 4. With respect to medically assisted insemination      | Yes  | Yes   | Yes   | Yes  |
| 5. With respect to other services                       | Yes  | Yes   | Yes   | Yes  |
| 6. With respect to an occupational survivor's pension   | Yes, but (1998/2000)                                   | No  | No  | Yes  |
| 7. With respect to other spousal benefits in employment | Yes  | Yes   | Yes   | Yes  |

**Notes to table D**

D1 - With respect to provision of goods and services, and to contracts relating to such provision, art. 7 General Equal Treatment Act (*Algemene wet gelijke behandeling, Staatsblad, 1994, nr. 230*) prohibits discrimination on many grounds, including sexual orientation and civil status. According to the text of art. 7, almost all forms of commercial, professional or public provision of services are covered, including services provided by institutions in the field of housing, welfare, health care, culture and education. From the *travaux préparatoires* of the law introducing registered partnership it appears that anyone can have one of three possible civil statuses: married, registered as partner, or unmarried/unregistered (see the Parliamentary Papers of the Second Chamber: *Kamerstukken II 1996/1997, 23761, nr. 11, p. 3*; and the Parliamentary Debates of the Second Chamber: *Handelingen II 1996/1997, p. 3285*). Since 1992, most sexual orientation discrimination in the performance of a 'profession, business, or official capacity' was already prohibited by art. 429quarter Penal Code (as amended by the law by the law of 14 November 1991, *Staatsblad 1991, nr. 623*); that provision does not cover civil status discrimination.

D2 - Idem.

D3 - Idem.

D4 - Idem. That this service is not excluded from the anti-discrimination rules governing other services, was confirmed by the Equal Treatment Commission (*Commissie Gelijke Behandeling*) in its opinion of 7 February 2000 nr. 2000-4. See <[www.cgb.nl](http://www.cgb.nl)>.

D5 - See D1.

D6 - In the Netherlands most employees automatically are covered by the pension fund of their employer. Pensions therefore are part of the conditions of employment. With respect to employment, sexual orientation discrimination is prohibited by art. 5 of the General Equal Treatment Act of 1994, and since 1992 also by art. 429quarter Penal Code (see D1). Civil status discrimination in the field of employment is also prohibited by art. 5 of the General Equal Treatment Act (see D1), but art. 5(6) exempts survivor's pensions from that prohibition of civil status discrimination. Nevertheless, the Equal Treatment Commission has given a narrow interpretation to the exception of art. 5(6). According to several opinions of the Equal Treatment Commission only discrimination between cohabitants on the one hand, and married or registered partners on the other, is exempted; distinctions between married and registered survivors are not generally exempted from the prohibition (opinions of 13 August 2002, nrs. 2002-111 and 2002-113, see <[www.cgb.nl](http://www.cgb.nl)>). However, art. 2c of the *Pensioen- en spaarfondsenwet* (Pension Funds Act), inserted by the law of 17 December 1997 (*Staatsblad 1997, nr. 660*) and amended by the law of 25 May 2000 (*Staatsblad 2000, nr. 256*), provides that surviving registered partners whose partner died, retired or changed to another pension scheme between January 1998 and June 2000 may receive a substantially smaller pension than surviving married partners (this probably affects less than 100 persons).

A limited number of pension funds in the Netherlands continue to exclude unmarried/unregistered partners from their schemes for survivor's pensions. However, art. 2b of the *Pensioen- en spaarfondsenwet* (inserted by the law of 21 December 2000, *Staatsblad 2000, nr. 625*) demands that employees covered by such a fund may opt-out from the provision for a (hypothetical) surviving partner; in stead they would then get a higher (or sooner) old age pension for themselves. This opt-out system only mitigates the discriminatory effects of any remaining exclusion of unmarried/unregistered partners.

D7 - With respect to other spousal employment benefits all civil status and sexual orientation discrimination is prohibited (see D6)

**Table E (Netherlands): Types of couples that qualify for starting a civil marriage or registered partnership in the country itself**

|  |                            | Civil marriage |                 | Registered partnership (1998) |            |
|--|----------------------------|----------------|-----------------|-------------------------------|------------|
|  |                            | Different-sex  | Same-sex (2001) | Different-sex                 | Same-sex   |
| Resident national with:                      | 1. Resident national       | Yes            | Yes             | Yes                           | Yes        |
|  | 2. Non-resident national   | Yes            | Yes             | Yes                           | Yes        |
|  | 3. Resident foreigner      | Yes            | Yes             | Yes                           | Yes        |
|  | 4. Non-resident foreigner  | Yes            | Yes             | Yes (2001)                    | Yes (2001) |
| Non-resident national with:                  | 5. Non-resident national   | Yes            | Yes             | Yes                           | Yes        |
|  | 6. Resident foreigner      | Yes            | Yes             | Yes                           | Yes        |
|  | 7. Non-resident foreigner  | Yes            | Yes             | Yes (2001)                    | Yes (2001) |
| Resident foreigner with:                     | 8. Resident foreigner      | Yes            | Yes             | Yes                           | Yes        |
|  | 9. Non-resident foreigner  | Yes            | Yes             | Yes (2001)                    | Yes (2001) |
| Non-resident foreigner with:                 | 10. Non-resident foreigner | No             | No              | No                            | No         |
| 11. Sister or brother with sister or brother |                            | No             | No              | No                            | No         |
| 12. Parent with child                        |                            | No             | No              | No                            | No         |

**Notes to table E**

E1 - Both art. 43(1) Book 1 CC, and art. 2 of the Act on Conflicts of Law with Respect to Marriage (*Wet Conflictenrecht Huwelijk, Staatsblad 1989, nr. 392*), require for marriage that one partner either has residency in the Netherlands or has Dutch citizenship. Since April 2001 the same applies to partnership registration (art. 80a(4) Book 1 CC, as amended by the law of 13 December 2000, *Staatsblad 2001, nr. 11*). Whether or not the law of the country of origin of a foreigner permits or recognises registered partnership or same-sex marriage is not relevant in the Netherlands (see Katharina Boele-Woelki, 'Registered Partnership and Same-Sex Marriage in the Netherlands', in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003, p. 43).

E2 - Idem

E3 - Idem

E4 - Idem. From January 1998 to 1 April 2001 a foreigner without lawful residency in the Netherlands could not enter a registered partnership.

E5 - Idem

E6 - Idem

E7 - See E4.

E8 - See E1.

E9 - See E4.

E10 - See E1. Two non-resident foreigners cannot come to the Netherlands to get married or to register their partnership.

E11 - This follows from art. 41(1) Book 1 CC, declared applicable to partnership registrations by art. 80a(6). However, the Minister of Justice may allow a marriage or partnership registration between those who are brother(s) / sister(s) through adoption (art. 41(2)).

E12 - This, too, follows from art. 41(1) and 80a(6) Book 1 CC.

**Table F (Netherlands): Authority for starting a civil marriage or registered partnership**

|  | Civil marriage |                 | Registered partnership (1998) |          |
|--|----------------|-----------------|-------------------------------|----------|
|  | Different-sex  | Same-sex (2001) | Different-sex                 | Same-sex |
| 1. Registry of births, marriages and deaths  | Yes            | Yes             | Yes                           | Yes      |
| 2. Local population administration           | No             | No              | No                            | No       |
| 3. Church                                    | No             | No              | No                            | No       |
| 4. Court                                     | No             | No              | No                            | No       |
| 5. Private person with special authorisation | No             | No              | No                            | No       |
| 6. Public notary                             | No             | No              | No                            | No       |
| 7. Administrative magistrate                 | No             | No              | No                            | No       |

**Notes to table F**

F1 - Art. 63 of Book 1 CC, declared applicable to partnership registrations by art. 80a(6). Normally, the Registry is in the town hall.

F2 - Not applicable.

F3 - Church weddings have no legal effect in the Netherlands. Art. 68 Book 1 CC even prohibits church weddings of couples who have not first married each other at the Registry (see F1).

F4 - Not applicable.

F5 - Not applicable.

F6 - Not applicable.

F7 - Not applicable.

**Table G (Netherlands): Means of ending a marriage or registered partnership**

|   | Civil marriage |                 | Registered partnership (1998) |            |
|---|----------------|-----------------|-------------------------------|------------|
|   | Different-sex  | Same-sex (2001) | Different-sex                 | Same-sex   |
| 1. By court decision (after joint or individual petition)   | Yes            | Yes             | Yes                           | Yes        |
| 2. By mutually agreed contract (outside court)  | No, but (2001) | No, but         | Yes                           | Yes        |
| 3. Unilaterally by one partner (outside court)  | No             | No              | No                            | No         |
| 4. By conversion of marriage into registered partnership, or vice versa (outside court)                                   | Yes (2001)     | Yes             | Yes (2001)                    | Yes (2001) |
| 5. By one registered partner marrying a third person (or starting a registered partner with a third person)               | No             | No              | No                            | No         |
| 6. By the registered partners marrying each other (or by the married partners starting a registered partnership together) | No             | No              | No                            | No         |
| 7. By administrative decision (after joint or individual petition)  | No             | No              | No                            | No         |

**Notes to table G**

G1 - For marriage this follows from art. 149 Book 1 CC, for registered partnerships from art. 80c and 80e. The Registry is at the town hall.

G2 - For registered partnership this follows from art. 80c Book 1 CC. Both partners and at least one advocate or notary has to sign a declaration that the partners have agreed a contract to end the registered partnership. To sort effect, the declaration has to be registered in the same way as the divorce judgment of a court. Art. 80d specifies which points need to be covered in the contract. Indirectly, the possibility of a contractual divorce is also available for mutually agreeing married couples: they can first convert their marriage into a registered partnership (see G4), and then dissolve that by contract as provided by art. 80c.

G3 - Not applicable.

G4 - For marriage this follows from art. 77a Book 1 CC and for registered partnerships from art. 80g. Conversion only requires the consent of the two partners, and takes place at the Registry of births, marriages and deaths.

G5 - For a marriage or partnership registration both partners need to be unmarried and not registered as anyone's partner (art. 33, 42, 80a(1) and 80a(2) Book 1 CC).

G6 - Idem.

G7 - Not applicable.

*Some literature in English*

- M. Antokolskaia, 'Recent developments in Dutch filiation, adoption, and joint custody law', *Familia* 2002, p. 781-804.
- Katharina Boele-Woelki, 'Registered Partnership and Same-Sex Marriage in the Netherlands', in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003, p. 41-53.
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- Nancy Maxwell, 'Opening civil marriage to same-gender couples: A Netherlands-United States comparison', 18 *Arizona Journal of International and Comparative Law* 2001 p. 141-207. See also in the *Electronic Journal of Comparative Law* 2000, <http://law.kub.nl/ejcl/43/abs43-1.html>
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- Barbara Reinhartz, 'The Netherlands', in: C. Hamilton & A. Perry (eds.), *Family Law in Europe*, second ed., London/Edinburgh, Butterworth Lexis Nexis, 2002, p. 437-467.
- Wendy M. Schrama, 'Registered partnership in the Netherlands', *International Journal of Law, Policy and the Family* 1999-13, p. 315-327.
- Ian Sumner, 'Comparative analysis and assessment of the gradual recognition of homosexuality with respect to the Netherlands and England' 9 *Maastricht Journal* 2002, p. 29-56.
- Ian Sumner & Hans Warendorf, *Family Law Legislation of the Netherlands. A translation including book 1 of the Dutch Civil Code, procedural and transitional provisions and private international law legislation*, Antwerp/Oxford/New York: Intersentia 2003.
- Kees Waaldijk, 'Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands', in: Robert Wintemute & Mads Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart Publishing, 2001, p. 437-464.
- Kees Waaldijk, 'Others may follow: the introduction of marriage (and quasi-marriage or semi-marriage) for same-sex couples in European countries', 38 *New England Law Review* 2004, p.569-589.



## Major legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners in Norway

by John Asland <sup>1</sup>  
and Kees Waaldijk <sup>2</sup>

### Symbols and words used in the national tables:

| Applicable answer  | Answer code | Colour      | Points given for calculation of level of legal consequences |
|--|-------------|-------------|---|
| The legal consequence applies.   | Yes         | White       | 3 pt  |
| The legal consequence applies in a limited way or not in all circumstances, or it can be contracted out of, or courts can set it aside using some general legal principle, etc.    | Yes, but    | Light pink  | 2 pt  |
| The legal consequence only applies in a very limited way or in very few circumstances, or it can be established by contract, or by courts using some general legal principle, etc. | No, but     | Middle pink | 1 pt  |
| The legal consequence does not apply.  | No          | Dark pink   | 0 pt  |
| No information was available on this point, or the legal position is unclear.  | Doubt       | Middle pink | 1 pt  |
| The column is not applicable in the country, because this type of relationship is not legally recognised (yet).  | X           | Dark pink   | 0 pt  |

| Additional information   | Answer code |
|--|-------------|
| The legal consequence is only available after the specified number of years.   | >x years    |
| The legal consequence is only available after the specified number of months.  | >x months   |
| Year of entry into force of the legislation providing the legal consequence (or the particular relationship type), or year of supreme court decision establishing its existence.<br>(Where two years are given, the first indicates the introduction of a more limited version of the consequence; where no year is given, the legal consequence mostly applies since the introduction of the particular relationship type, or already for a long time.) | (Year)      |

<sup>1</sup> University of Oslo, [www.ius.uio.no/ifp/ansattesider/ansatte/asland.html](http://www.ius.uio.no/ifp/ansattesider/ansatte/asland.html).

<sup>2</sup> Universiteit Leiden, [www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk).



## Introduction

This chapter aims to represent the law as it stood early in 2004.

Translations of many Norwegian laws can be found at [www.ub.uio.no/ujur/ulov/](http://www.ub.uio.no/ujur/ulov/). This site also links to the current Norwegian text of these laws.

### *Civil marriage*

The Marriage Act (lov om ekteskap) of 4 July 1991 No. 47, which entered into force 1 January 1993, contains the main provisions of civil marriage according to Norwegian law. The act contains procedural provisions regarding marriage and divorce (part I). The Act also regulates the property relationship between spouses both during marriage and by divorce; in fact most of the provisions in the Norwegian Marriage Act are provisions regarding the economic relationship between the spouses (part II), such as the right of disposal of property, liability of spouses for debts and agreements regarding property. Part II of the Marriage Act does also contain regulations on the division of assets in case of separation. Part III contains provisions of maintenance and spouse's pension.

The provisions in the Marriage Act of 1991, or similar provisions were earlier found in three different acts; the Act on Contraction and Dissolution of Marriage of 31 May 1931 No. 2, the Act on Spouses Property Relationships of 20 May 1927 No. 1, and finally the Probate Act of 21. February 1930. However, the main principles in Norwegian family law are the same in the present Marriage Act as it was under the previous regulations.

The Marriage Act is not exhaustive regarding legal consequences of marriage. E.g. the National Insurance Act of 28 February 1997 No. 19, regulates the question of statutory survivor's pension, and the right to take the other spouse's name is regulated in the Act Relating to Names of Natural Persons of 6 July 2002 No. 19. Other consequences of marriage are regulated in a broad spectre of acts and regulations in various fields of law.

The wording of the law is of course the main source of law in Norwegian law in fields of statutory law, as it is in most other countries. In Norway, the preparatory works of the acts are also of great importance as sources of law. There are also quite a few Supreme Court decisions on family law. Preparatory works and Court decisions can be found at [www.lovdatab.no/](http://www.lovdatab.no/). There is not much literature in English on Norwegian family law. The only reference I can give is P. Lødrup, 'Norway', in: C. Hamilton & A. Perry (eds.) *Family Law in Europe*, London/Edinburgh, 2002.

### *Registered partnership*

The Act on Registered Partnerships for Homosexual Couples (partnerskapsloven) of 30 April 1993 No. 40, which entered into force 1 august 1993, was the first legislation in Norway that gave homosexual partners the possibility of having a formalized relationship with almost the same rights and liabilities as married couples have. Even though the relationship is not called a marriage, most of the provisions in the Marriage Act do apply also to registered partners.

The equal status of registered partnerships and marriages is emphasized in the Partnerships Act section 3. In the first paragraph of section 3, it says that 'registration of partnerships has the same legal consequences as entering into marriage, with the exceptions mentioned in section 4'. (Section 4 says that the Adoptions Act does not apply to registered partnerships). The main principle in the first paragraph is followed up in the second paragraph which says that 'the provisions in Norwegian legislation dealing with marriage and spouses shall be applied correspondingly to registered partnerships and registered partners'.

The Partnerships Act has been amended several times, for example by the Act of 21 December 2000 No. 104 (citizenship and residence requirement) and by the Act of 15 June 2001 No. 36 (adoption). The right of registered partners to adopt is an issue that is discussed at high level in the Norwegian parliament, where more amendments are likely to come. An English translation of the Act up to the amendments of 2001 can be found in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp, Intersentia, 2003, p. 218-219.

### *Informal cohabitation*

There is no act that regulates the major consequences of informal cohabitation, such as the Marriage Act does for civil marriages and the Act on Registered Partnerships for Homosexual Couples does for registered partnerships. However, different-sex and same-sex informal cohabitation has been recognised in several laws. The regulations are very fragmentary, and you have to look up several acts and regulations to get an overview of the consequences of informal cohabitation. The Act Relating to the Joint Residence and Household when a Household Community Ceases to Exist, of 4 July 1991 No. 45, seems to be the only act that specifically regulates informal cohabitation.

The Norwegian government has set up an expert commission in connection to the legal aspects of informal cohabitation. Such commissions or expert panels are often set up when important acts are going to be revised, or when legislation is needed in a new area. The committee gives a draft bill or several draft bills and a

detailed report on the needs for legislation and the present state of the law in that specific field of law. These preparatory works are the first step of the legislation process in Norway. The preparatory works are printed in *Norges offentlige utredninger* (Public Reports of Norway) and published by the government. NOU 1999:25 *Samboerne og samfunnet* (The Cohabitants and the Community) contains all drafts to amendments to the present legislation. The draft can be found at [www.lovdatab.no](http://www.lovdatab.no) (only Norwegian text).

In this first step of the legislation process the committee has, among other things, proposed a legal definition of informal cohabitants. Today there are several definitions of informal cohabitants. Some definitions refer to a marriage-like relationship; other definitions emphasize the permanence of the relationship (they have a time limit, e.g. two years) or whether the parties have common children. The committee emphasizes that a definition must include relationships that are marriage-like and stable. The criteria presented by the committee are that the parties must be over 18 years of age, they are not married (to somebody else), they are not close relatives, they have a common household, and that there are only two of them. If they have common children, there is no requirement for permanence, but if they do not have any children together, the relationship must have lasted for more than two years. The two year limit is not randomly picked. Statistics show that informal cohabitants break up 14 times more often than married couples do in the first two years of the relationship, but only four times more often after four years of cohabitation. For the proposed criteria for a legal definition of informal cohabitants and the statistics, see NOU 1999:25, chapter 12.1. The two year limit is also the most frequent requirement in legislation that gives informal cohabitants and married couples equal rights.

The next step in the legislation process is a hearing based on the NOU and a report from the ministry in charge of the specific field of law containing draft bills to the Parliament (*Stortinget*). This second step is not yet reached for legislation on informal cohabitation. However, the preparatory works will probably lead to more legislation on informal cohabitants, and give them a more equal status to married couples (and registered partners).

#### Abbreviations

AA = Act on Adoption of 28 February 1986 No. 8.

PA = Act on Registered Partnerships for Homosexual Couples of 30 April 1993 No. 40.

MA = Marriage Act of 4 July 1991 No. 47.

NIA = National Insurance Act of 28 February 1997 No. 19.

Table A (Norway): Parenting consequences

|  | Civil marriage       |          | Registered partnership |                           | Informal cohabitation     |                           |
|--|----------------------|----------|------------------------|---------------------------|---------------------------|---------------------------|
|  | Different-sex        | Same-sex | Different-sex          | Same-sex (1993)           | Different-sex             | Same-sex                  |
| 1. When female partner gives birth, both partners automatically become legal parents   | Yes                  | X        | X                      | No                        | No, but                   | No                        |
| 2. Medically assisted insemination is lawful for women in such a relationship  | Yes                  | X        | X                      | No                        | Yes, but                  | No                        |
| 3. When only one partner is the parent of a child, both partners can have parental authority or responsibilities during their relationship | Yes, but             | X        | X                      | Yes, but                  | Yes, but                  | Yes, but                  |
| 4. When only one partner is the parent of a child, the other partner can adopt it and thus become its second parent                        | Yes                  | X        | X                      | Yes, but (2002)           | No                        | No                        |
| 5. Partners can jointly adopt a child  | Yes                  | X        | X                      | No                        | No                        | No                        |
| 6. One partner can individually adopt a child  | No, but              | X        | X                      | No, but                   | No, but                   | No, but                   |
| 7. Partners can jointly foster a child   | Yes                  | X        | X                      | Yes                       | Yes                       | Yes                       |
| <b>Level of legal consequences</b>   | 5x3 + 1x2 + 1x1 = 18 | 7x0 = 0  | 7x0 = 0                | 1x3 + 2x2 + 1x1 + 3x0 = 8 | 1x3 + 2x2 + 2x1 + 2x0 = 9 | 1x3 + 1x2 + 1x1 + 4x0 = 6 |

## Notes to table A

A1 - In marriage, the mother's husband is automatically recognized as legal parent due to the *pater est* provision in art. 3 of the Children's Act of 8 April 1981 No. 6. In different sex informal cohabitation, the male partner has to admit to public authorities that he is the biological father to the child in order to be recognized as legal parent (art. 4). The partner in a lesbian relationship will never become legal parent when her partner gives birth.

A2 - The cohabitation has to be 'marriage-like', i.e. the couple must have lived together for some period of time or having children together (art. 2-2 of the Act on Biotechnology of 5 August 1994 No. 56). The act excludes same-sex couples because it is required that the inseminated female shall be married to or in a 'marriage-like' relationship with a man.

A3 - Both partners can have parental authority only if the other parent of the child is dead. Then the court can decide to give the authority to the remaining parent and his/her partner.

A4 - Registered partners cannot adopt the child if the child is originally adopted from a country that does not permit such adoption (art. 5a AA). Registered partners were given the right to adopt the other partner's children, with the exception mentioned above, by amendment of 2001, which is in force from 1 January 2002.

A5 - Art. 5 AA.

A6 - Married spouses can only adopt individually if the other spouse is mentally incapacitated or has disappeared (art. 5 AA). The AA does not exclude registered partners from adopting individually if the general provisions in art. 2 and 3 AA are fulfilled, neither does the Act exclude informal cohabitants from adopting individually. However, it must be said that individual adoptions are rather rare, and that it requires a special binding between the child and the adoptive parent, e.g. biological relationship or a previous foster parent relationship.

A7 - Persons selected as foster parents shall have a special aptitude for giving children a secure and good home (art. 4-22 (2) of the Act Relating to Child Welfare Services of 17 July 1992 No. 100). The act does not by its wording exclude same-sex couples but the practise from the children welfare authorities show that they are quite reluctant to let homosexual parents foster children that are not one of the partners' own children.

**Table B - part one (Norway): Material consequences in private law**

|  | Civil marriage             |          | Registered partnership |                            | Informal cohabitation |                 |
|--|----------------------------|----------|------------------------|----------------------------|-----------------------|-----------------|
|  | Different-sex              | Same-sex | Different-sex          | Same-sex (1993)            | Different-sex         | Same-sex        |
| 1. Properties of each partner are considered joint property                        | No                         | X        | X                      | No                         | No                    | No              |
| 2. Debts of each partner are considered joint debt                                 | No, but                    | X        | X                      | No, but                    | No                    | No              |
| 3. In case of splitting up, statutory rules on alimony apply                       | Yes                        | X        | X                      | Yes                        | No                    | No              |
| 4. In case of splitting up, statutory rules on redistribution of properties apply  | Yes                        | X        | X                      | Yes                        | Yes, but (1991)       | Yes, but (1991) |
| 5. In case of wrongful death of one partner, the other is entitled to compensation | Yes, but                   | X        | X                      | Yes, but                   | Yes, but              | Yes, but        |
| 6. When one partner dies without testament, the other is an inheritor              | Yes                        | X        | X                      | Yes                        | No                    | No              |
| <b>Level of legal consequences</b>   | 3x3 + 1x2 + 1x1 + 1x0 = 12 | 6x0 = 0  | 6x0 = 0                | 3x3 + 1x2 + 1x1 + 1x0 = 12 | 2x2 + 4x0 = 4         | 2x2 + 4x0 = 4   |

**Notes to table B - part one**

B1 - Marriage entails no joining of properties and no limitation of the right of a spouse to dispose of what he or she owns when the marriage is contracted or later acquires (art. 31 MA). The same applies to registered partners (art. 3 PA). The same of course also applies to informal cohabitants.

B2 - The general rule regarding the liability of debts is that a spouse may not contract a debt which affects the other spouse unless this is specially authorized (art. 40 MA and art. 3 PA). However married couples and registered partners may on the liability of both spouses enter into ordinary agreements regarding the daily housekeeping and the upbringing of the children and ordinary agreements to cover the necessary requirements of individual spouse (art. 41 MA).

B3 - Chapter 16 MA.

B4 - Art. 62, 67 and 74 MA. There are special provisions regulating the common house, apartment, and movables. For informal cohabitants similar provisions are found in art. 2 of the Act Relating to the Right to the Joint Residence and Household when a Household Community Ceases to Exist of 4 July 1991 No. 45. This act does only apply to cohabitants who have lived together for more than two years or who have children together or are expecting children together (art.1).

B5 - It depends on whether the partner or spouse actually was supported economically by the deceased, regardless of any statutory obligation to support (see P. Lødrup, *Lærebok i erstatningsrett* (Law on torts), Oslo, 1995, p. 396 et seq.).

B6 - Art. 6 etc. of the Inheritance Act of 3 March 1972 No. 5.

**Table B - part two (Norway): Positive material consequences in public law**

|   | Civil marriage       |          | Registered partnership |                      | Informal cohabitation |                |
|---|----------------------|----------|------------------------|----------------------|-----------------------|----------------|
|   | Different-sex        | Same-sex | Different-sex          | Same-sex (1993)      | Different-sex         | Same-sex       |
| 7. Relationship can result in lower property tax  | Yes                  | X        | X                      | Yes                  | No                    | No             |
| 8. Relationship can result in lower income tax  | Yes                  | X        | X                      | Yes                  | No                    | No             |
| 9. Public health insurance of one partner covers medical costs of other partner                 | Yes                  | X        | X                      | Yes                  | Yes, but              | No, but        |
| 10. Relationship can have positive impact on basic social security payment in case of no income | No, but              | X        | X                      | No, but              | No, but               | No, but        |
| 11. Relationship can have positive impact on statutory old age pension                          | No                   | X        | X                      | No                   | No                    | No             |
| 12. When one partner dies, the other can get a statutory survivor's pension                     | Yes                  | X        | X                      | Yes                  | Yes, but              | No, but        |
| 13. Surviving partner pays no inheritance tax (or less than a mere friend would)                | Yes                  | X        | X                      | Yes                  | Yes, but (2002)       | No, but (2002) |
| <b>Level of legal consequences</b>  | 5x3 + 1x1 + 1x0 = 16 | 7x0 = 0  | 7x0 = 0                | 5x3 + 1x1 + 1x0 = 16 | 3x2 + 1x1 + 3x0 = 7   | 4x1 + 3x0 = 4  |

**Notes to table B - part two**

B7 - There are two classes of tax payers: class 1 and class 2. Class 2 does only apply to married (and registered) couples. Married and registered partners can decide for themselves whether to be taxed as class 1 or class 2 tax payers. The major difference between tax payers of class 1 and class 2, is that when a couple are taxed as class 2 tax payers, their joint income and joint allowances are summed up and subject to common assessment. The class 2 tax may be lower than class 1, but the total effect depends on the total economy of the family, and on which allowances can be made. See the Parliament's tax decisions for the year 2003 (tax decisions are taken annually by the Parliament (Stortinget); according to the Norwegian Constitution (Grunnloven of 17 May 1814) and constitutional doctrine, tax decisions are not considered as legislation but as plenary decisions).

B8 - A married or registered couple can choose whether to have separate or common assessment. It will depend on their income whether separate or common assessment gives the highest income tax (art. 2-10 to 2-12 of the Tax Act of 26 March 1999 No. 14).

B9 - Public health insurance covers medical costs for married spouses and registered partners. Public health insurance covers medical costs of the other cohabitant only if the couple have children together, previously have had children together or previously have been married (or registered partners) (art.1-5 NIA). (Only the last alternative will apply to same-sex cohabitants.)

B10 - See note B8 old / B16 new - It depends on the municipality social welfare office's discretionary power.

B11 - See note to B10 old / B17 new - Married spouses, registered partners, and cohabitants if the couple have children together, previously have had children together or previously have been married (or registered partners), get less pension than singles (art. 3-2, 3-3, 19-5 and 1-5 NIA).

B12 - Married and registered partners may have survivor's pension pursuant to chapter 17 of the NIA. The same applies to cohabitants if the couple have children together, previously have had children together or previously

have been married (or registered partners) (art. 1-5 NIA). (Only the last alternative will apply to same-sex cohabitants.)

B13 - Surviving married partners are exempted from paying any inheritance tax (art. 4(3) of the Act Relating to Inheritance Duty and Duty on Certain Gifts of 19 June 1964 No. 14). The same applies to surviving registered partners (art. 3(2) PA). By Act of 28 June 2002 No. 49, art. art 4(3) of the Act Relating to Inheritance Duty and Duty on Certain Gifts was amended, and the present provision applies to informal cohabitants (same-sex and different-sex). Informal cohabitation is defined in art. 47a, which refers to art. 1-5 NIA, i.e. informal cohabitants who have children together, who previously have had children together, or who previously have been married (or registered partners). Only the last alternative will apply to same-sex cohabitants.

**Table B - part three (Norway): Negative material consequences in public law**

|   | Civil marriage         |            | Registered partnership |                        | Informal cohabitation  |                  |
|---|------------------------|------------|------------------------|------------------------|------------------------|------------------|
|   | Different-sex          | Same-sex   | Different-sex          | Same-sex (1993)        | Different-sex          | Same-sex         |
| 14. Relationship can result in higher property tax  | No                     | X          | X                      | No                     | No                     | No               |
| 15. Relationship can result in higher income tax  | No                     | X          | X                      | No                     | No                     | No               |
| 16. Relationship can have negative impact on basic social security payment in case of no income | No, but                | X          | X                      | No, but                | No, but                | No, but          |
| 17. Relationship can have negative impact on statutory old age pension                          | Yes                    | X          | X                      | Yes                    | Yes, but               | No, but          |
| <b>Level of legal consequences</b>  | 1x3 + 1x1 + 2x0<br>= 4 | 4x0<br>= 0 | 4x0<br>= 0             | 1x3 + 1x1 + 2x0<br>= 4 | 1x2 + 1x1 + 2x0<br>= 3 | 2x1 + 2x0<br>= 2 |

**Notes to table B - part three**

B14 - The Parliament's tax decisions for the year 2003.

B15 - See note B8 - A married or registered couple can choose whether to have separate or common assessment. It will depend on their income whether separate or common assessment gives the highest income tax (art. 2-10 to 2-12 of the Tax Act of 26 March 1999 No. 14).

B16 - It depends on the municipality social welfare office's discretionary power.

B17 - Married spouses, registered partners, and cohabitants if the couple have children together, previously have had children together or previously have been married (or registered partners), get less pension than singles (art. 3-2, 3-3, 19-5 and 1-5 NIA).

**Table C (Norway): Other legal consequences**

|  | Civil marriage    |            | Registered partnership |                   | Informal cohabitation   |                         |
|--|-------------------|------------|------------------------|-------------------|-------------------------|-------------------------|
|  | Different-sex     | Same-sex   | Different-sex          | Same-sex (1993)   | Different-sex           | Same-sex                |
| 1. One partner can have or use surname of the other  | Yes               | X          | X                      | Yes               | Yes, but                | Yes, but                |
| 2. Foreign partner of resident national is entitled to a residence permit  | Yes               | X          | X                      | Yes               | >2 years: Yes (1990)    | >2 years: Yes (1990)    |
| 3. Relationship makes it easier for foreign partner to obtain citizenship  | No                | X          | X                      | No                | No                      | No                      |
| 4. In case of criminal prosecution, one partner can refuse to testify against the other  | Yes               | X          | X                      | Yes               | Yes, but                | Yes, but                |
| 5. When one partner uses violence against other partner, specific statutory protection applies   | Yes               | X          | X                      | Yes               | Yes                     | Yes                     |
| 6. In case of accident or illness of one partner, the other is considered as next of kin for medical purposes (even without power of attorney) | Yes               | X          | X                      | Yes               | Yes                     | Yes                     |
| 7. Organ donation from one living partner to the other is lawful   | Yes               | X          | X                      | Yes               | Yes                     | Yes                     |
| 8. When one partner dies, the other can continue to rent the home  | Yes               | X          | X                      | Yes               | Yes, but (1991)         | Yes, but (1991)         |
| 9. Partners have a duty to have sexual contact   | No                | X          | X                      | No                | No                      | No                      |
| <b>Level of legal consequences</b>   | 7x3 + 2x0<br>= 21 | 9x0<br>= 0 | 9x0<br>= 0             | 7x3 + 2x0<br>= 21 | 4x3 + 3x2 + 2x0<br>= 18 | 4x3 + 3x2 + 2x0<br>= 18 |

**Notes to table C**

C1 - Married spouses and registered partners may use the surname of the other; art. 4 (1)(1) of the Act Relating to Names of Natural Persons of 6 July 2002 No. 19. The same applies to informal cohabitants who have children together or have been living together for more than two years (art. 4(2)).

C2 - Art. 9 of the Immigration Act of 24 June 1988 No. 64. This article uses the concept of 'closest members of the family', which is defined by art. 23(b) of an administrative regulation of 21 December 1990 (No. 1028); this definition includes informal cohabitants who have been living together for more than two years and who intend to keep on living together.

C3 - The provisions on citizenship do not say anything about this question.

C4 - Married spouses and registered partners can refuse to testify against the other (art. 122 of the Criminal Procedure Act of 22 May 1981 No. 25). The same applies to persons living together in a marriage like relationship; i.e. informal cohabitants who have for some period of time lived together or have children (or are expecting children) have the same status as married couples and registered partners.

C5 - Art. 228 of the General Civil Penal Code art. 228. ('Civil' is in contrast to military; there also is a military criminal code.)

C6 - Art. 3-3 of the Act of 2 July 1999 No. 63. The legal situation on this point was the same prior to 1999.

C7 - Art. 1 of the Transplantation Act of 9 February 1973 No 6. The act does not say anything about couples or partners.

C8 - Widows, widowers and widowed registered partners may continue to rent the home (art. 8-2 of the Tenancy Act of 26 March 1999 No 17). The same applies to informal cohabitants who have lived together for more than two years or who have children together or are expecting children together (art. 1 of the Act Relating to the Right to the Joint Residence and Household when a Household Community Ceases to Exist of 4 July 1991 No. 45).

C9 - Neither married couples, registered partners nor informal cohabitants have a duty to have sexual contact. However, in order to be registered partner it is provided that you are homosexual (PA art 1), but this does off course not imply that you are obliged to be sexually active. If a spouse, registered partner or informal cohabitant, by force compels his or her partner to perform sexual activities, this may constitute a rape under Norwegian law.



**Table D (Norway): Types of discrimination by employers or service providers that are prohibited in anti-discrimination legislation**

|   | Between married spouses and registered partners | Between married spouses and informal cohabitants | Between registered partners and informal cohabitants | Between same-sex and different-sex partners (with same status) |
|---|---|--|--|--|
| 1. With respect to housing                              | Yes (1993)                                      | No   | No   | Yes (1981)   |
| 2. With respect to life insurance                       | Yes (1993)                                      | No   | No   | Yes (1981)   |
| 3. With respect to health insurance                     | Yes (1993)                                      | No   | No   | Yes (1981)   |
| 4. With respect to medically assisted insemination      | No  | No   | No   | No   |
| 5. With respect to other services                       | Yes (1993)                                      | No   | No   | Yes (1981)   |
| 6. With respect to an occupational survivor's pension   | Yes (1998)                                      | No   | No   | Yes (1998)   |
| 7. With respect to other spousal benefits in employment | Yes (1998)                                      | No   | No   | Yes (1998)   |

**Notes to table D**

D1 - Discrimination because of homosexual lifestyle is a punishable offence (art. 349a of the General Civil Penal Code, as amended by the Act of 8 May 1981 No. 14)

D2 - See note D1.

D3 - See note D1.

D4 - Art. 2-2 of the Act on Biotechnology of 5 August 1994 No. 56.

D5 - See note D1.

D6 - Employment discrimination because of homosexual lifestyle is forbidden by Art. 55a of the Worker Protection and Working Environment Act (Lov om arbeidsmiljø) of 4 February 1977, as amended by the Act of 30 April 1998 No. 24.

D7 - See note D6.

**Table E (Norway): Types of couples that qualify for starting a civil marriage or registered partnership in the country itself**

|  |                            | Civil marriage |          | Registered partnership |                 |
|--|----------------------------|----------------|----------|------------------------|-----------------|
|  |                            | Different-sex  | Same-sex | Different-sex          | Same-sex (1993) |
| Resident national with:                      | 1. Resident national       | Yes            | X        | X                      | Yes             |
|  | 2. Non-resident national   | Yes            | X        | X                      | Yes             |
|  | 3. Resident foreigner      | Yes            | X        | X                      | Yes             |
|  | 4. Non-resident foreigner  | Yes, but       | X        | X                      | Yes, but        |
| Non-resident national with:                  | 5. Non-resident national   | Yes            | X        | X                      | No              |
|  | 6. Resident foreigner      | Yes            | X        | X                      | Yes, but        |
|  | 7. Non-resident foreigner  | Yes, but       | X        | X                      | No              |
| Resident foreigner with:                     | 8. Resident foreigner      | Yes            | X        | X                      | Yes, but (2001) |
|  | 9. Non-resident foreigner  | Yes, but       | X        | X                      | Yes, but (2001) |
| Non-resident foreigner with:                 | 10. Non-resident foreigner | Yes, but       | X        | X                      | No              |
| 11. Sister or brother with sister or brother |                            | No             | X        | X                      | No              |
| 12. Parent with child                        |                            | No             | X        | X                      | No              |

**Notes to table E**

E1 - Chapter 1 MA and art. 2 PA regulate these questions. People are qualified for starting a civil marriage or registered partnership if the general requirements (age 18, not close relatives, not mentally incapacitated, not already married, not already registered as partner) are fulfilled. For civil marriage there are no restrictions concerning the residence or citizenship of the parties involved; however non-resident foreigners who wish to marry or register as partners in Norway, must be there on a legal basis (art. 5a MA; see P. Lødrup, 'Norway', in: C. Hamilton & A. Perry (eds.) *Family Law in Europe*, London/Edinburgh, 2002, p. 497). For partnership registration at least one of the partners must be a habitual resident in Norway; this residency must have lasted for at least two years prior to the registration, unless the resident partner has Norwegian, Swedish, Danish, Icelandic, Finnish or Dutch citizenship (art. 2(3) PA).

E2 - See note E1.

E3 - See note E1.

E4 - See note E1.

E5 - See note E1.

E6 - See note E1.

E7 - See note E1.

E8 - See note E1.

E9 - See note E1.

E10 - See note E1.

E11 - Art. 3 MA prohibits marriage between sisters and brothers. According to art. 2(1) PA this also applies to partnership registration.

E12 - Art. 3 MA prohibit marriage between parent and child. According to art. 2(1) PA this also applies to partnership registration.

**Table F (Norway): Authority for starting a civil marriage or registered partnership**

|  | Civil marriage |          | Registered partnership |                 |
|--|----------------|----------|------------------------|-----------------|
|  | Different-sex  | Same-sex | Different-sex          | Same-sex (1993) |
| 1. Registry of births, marriages and deaths  | No             | X        | X                      | No              |
| 2. Local population administration           | No             | X        | X                      | No              |
| 3. Church                                    | Yes            | X        | X                      | No              |
| 4. Court                                     | No             | X        | X                      | No              |
| 5. Private person with special authorisation | No, but        | X        | X                      | No, but         |
| 6. Public notary                             | Yes            | X        | X                      | Yes             |
| 7. Administrative magistrate                 | No             | X        | X                      | No              |

**Notes to table F**

F1 - The Registry of births, marriages and deaths has no authority to start a marriage or registered partnership in Norway. They are merely a register, and a branch of the local tax authorities.

F2 - See note F1.

F3 - Civil marriages may be started in a church (art. 12 MA). The churches are not available for entering a registered partnership (art. 2(2) PA). It was a part of the compromise in the Norwegian parliament when the PA was passed, that the church should not have anything to do with the ceremony, and that the word marriage was reserved for the regular civil marriage.

F4 - The courts have the authority to end marriages and registered partnerships, but not to start them.

F5 - In areas where there are a very long distance to the nearest church or public notary, the government may give private persons a special assignment for starting marriages.

F6 - Art. 12 MA. The *notarius publicus* is an ordinary judge who also is competent to do marriages and partnership registrations.

F7 - Not applicable.

**Table G (Norway): Means of ending a marriage or registered partnership**

|   | Civil marriage |          | Registered partnership |                 |
|---|----------------|----------|------------------------|-----------------|
|   | Different-sex  | Same-sex | Different-sex          | Same-sex (1993) |
| 1. By court decision (after joint or individual petition)   | Yes, but       | X        | X                      | Yes, but        |
| 2. By mutually agreed contract (outside court)  | No             | X        | X                      | No              |
| 3. Unilaterally by one partner (outside court)  | No             | X        | X                      | No              |
| 4. By conversion of marriage into registered partnership, or vice versa (outside court)                                   | No             | X        | X                      | No              |
| 5. By one registered partner marrying a third person (or starting a registered partner with a third person)               | No             | X        | X                      | No              |
| 6. By the registered partners marrying each other (or by the married partners starting a registered partnership together) | No             | X        | X                      | No              |
| 7. By administrative decision (after joint or individual petition)  | Yes            | X        | X                      | Yes             |

**Notes to table G**

G1 - In Norwegian divorce law, the courts rarely have a role to play (for example in cases of domestic violence, or where the marriage or partnership is void; see art. 23 and 24 MA and art. 3(2) PA). See P. Lødrup, 'Norway', in: C. Hamilton & A. Perry (eds.) *Family Law in Europe*, London/Edinburgh, 2002, p. 504-506.

G2 - See G7.

G3 - See G7.

G4 - Marriage must be with partners of different sex and registered partnership must be with partners of same sex.

G5 - Idem.

G6 - Idem.

G7 - After one year of separation (or after two years of cessation of cohabitation), either spouse or registered partner (or both spouses/partners jointly) can ask the County authorities (*Fylkesmannen*) for a divorce by administrative decision (art. 21 and 22 MA and art. 3(2) PA).

**Some literature in English**

- Maarit Jänterä-Jareborg, 'Registered partnerships in private international law: the Scandinavian approach' in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003, p. 137-158.
- Peter Lødrup, 'Norway', in: Carolyn Hamilton & Alison Perry (eds.) *Family Law in Europe* (second edition), London/Edinburgh: Butterworths, 2002, p. 493-519.
- Yuval Merin, *Equality for Same-Sex Couples. The legal recognition of gay partnerships in Europe and the United States*, Chicago/London: The University of Chicago Press, 2002, p. 80-94.
- Tone Sverdrup, 'Norway', in: K. Boele-Woelki, B. Braat & I. Sumner (eds.), *European Family Law in Action, Volume I - Grounds for Divorce*, Antwerp: Intersentia, 2003.
- Tone Sverdrup, 'Norway', in: K. Boele-Woelki, B. Braat & I. Sumner (eds.), *European Family Law in Action, Volume II - Maintenance between Former Spouses*, Antwerp: Intersentia, 2003.



# Major legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners in Sweden

by Hans Ytterberg <sup>1</sup>  
and Kees Waaldijk <sup>2</sup>

## Symbols and words used in the national tables:

| Applicable answer  | Answer code | Colour      | Points given for calculation of level of legal consequences |
|--|-------------|-------------|---|
| The legal consequence applies.   | Yes         | White       | 3 pt  |
| The legal consequence applies in a limited way or not in all circumstances, or it can be contracted out of, or courts can set it aside using some general legal principle, etc.    | Yes, but    | Light pink  | 2 pt  |
| The legal consequence only applies in a very limited way or in very few circumstances, or it can be established by contract, or by courts using some general legal principle, etc. | No, but     | Middle pink | 1 pt  |
| The legal consequence does not apply.  | No          | Dark pink   | 0 pt  |
| No information was available on this point, or the legal position is unclear.  | Doubt       | Middle pink | 1 pt  |
| The column is not applicable in the country, because this type of relationship is not legally recognised (yet).  | X           | Dark pink   | 0 pt  |

| Additional information   | Answer code |
|--|-------------|
| The legal consequence is only available after the specified number of years.   | >x years    |
| The legal consequence is only available after the specified number of months.  | >x months   |
| Year of entry into force of the legislation providing the legal consequence (or the particular relationship type), or year of supreme court decision establishing its existence.<br>(Where two years are given, the first indicates the introduction of a more limited version of the consequence; where no year is given, the legal consequence mostly applies since the introduction of the particular relationship type, or already for a long time.) | (Year)      |

## Introduction

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<sup>2</sup> Universiteit Leiden, [www.emmeijers.nl/waaldijk](http://www.emmeijers.nl/waaldijk).

The tables refer to the legal situation as of 5 April 2004.

The term '*resident*' in the tables and notes shall be taken as meaning the same as what is often called 'having habitual residence' in private international law.

A reference between brackets containing a year, ':' and a number, refers to the year and number of publication in SFS (Svensk författningssamling), i.e. the official bulletin for the publication of all Acts of Parliament and Government decrees. Example: Registered Partnership Act (1994:1117). A searchable free of charge data base - albeit in Swedish language only - of all Acts of Parliament and Government Decrees presently in force, as well as some of the travaux préparatoires can be found at the web site of the Swedish Parliament at [www.riksdagen.se/debatt/Index.asp](http://www.riksdagen.se/debatt/Index.asp). For Acts of Parliament and Government Decrees, you then click on '*Författningar i fulltext*' (full text) or '*Författningsregister*' (references to amendments and dates of entry into force and reference data to search for texts of travaux préparatoires). Then you either type the number of the Act (or Government Decree) in the box titled '*SFS-nummer*' or you type any word you expect to be found in the text of the document in the box titled '*Fritext*'. For access to the full text of the travaux préparatoires of Acts of Parliament from 1993 and onwards, you instead click on '*Propositioner och skrivelser*'.

The Registered Partnership Act (also in English) and the Cohabitation Act can also be found at the web site of the Ombudsman against Discrimination on grounds of Sexual Orientation at [www.homo.se](http://www.homo.se). An English translation of the Registered Partnership Act can also be found in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003. For translations into English of (other) Swedish Acts of Parliament or Government Decrees, please write to: Regeringskansliet, SE-103 33 STOCKHOLM, Sweden.

### *Civil marriage*

According to older Swedish law, a marriage brought with it several important legal consequences on a personal level. Thus, in older times a woman's public rank and status would follow that of her husband. Domestically her husband would also have the right to take decisions with respect to the children and servants of the common household. He would also be the legal guardian of his wife in all matters except where she was the defendant in a criminal investigation or in matters of legal conflict between the spouses themselves.

With the introduction of the Matrimonial Code [Giftermålsbalken] of 1920, the position of the husband as legal representative of his wife disappeared altogether. From then on, under Swedish law, spouses are considered equal with respect to both economical and personal status matters. The purely personal rights and obligations between spouses were considered to be more of an ethical nature and were only reflected in legal terms in a catalogue (chapter 11 of the Code) of acts committed by one spouse, which gave the other spouse an immediate right to divorce. This list of reasons for immediate divorce was abolished in the reform of 1973 (Prop. [Government Bill] 1973:32, bet. [Parliament Standing Committee Report] LU 1973:20). Since then, marriage and divorce law in principle ignores how spouses treat each other from a purely personal perspective.

Under older Swedish marriage law, there was an obligation for the spouses to live together. To obtain dissolution of a marriage, a court order regarding physical separation was therefore necessary. Present day marriage legislation contains no corresponding obligations.

Today's Marriage Code [Äktenskapsbalken (1987:230)] entered into force 1 January 1988. Under this Code the spouses are equal. The general principle is that each spouse is the owner of her or his property and is solely responsible for her or his debts. However, there are some legal restrictions on what a spouse can do with important parts of her or his property, notably e.g. the common home, without the formal consent of the other spouse. Upon divorce, there is also a right to redistribution of property between the former spouses in the absence of a pre-nuptial agreement. Scattered provisions throughout Swedish legislation make reference to the marital status of a person. In general, however, spouses are treated as individuals rather than as couples. Exceptions from this general approach are found primarily in rules on property (fortune) taxes and parts of social security and pension law.

There is at present no possibility for same-sex couples to marry under Swedish law. Different-sex partners can, on the other hand, not register their partnership; see below regarding this latter legal instrument. The Swedish Parliament, however, on 29 April 2004 requested that the Government set up a special commission to look into the possibility of amending the Marriage Code in order to make it gender neutral.

For a comprehensive guide to the Swedish Marriage Code, albeit in Swedish, see Tottie, Lars, *Äktenskapsbalken* [a commentary to the Marriage Code], Norstedts Förlag, Stockholm 1990.

### *Registered partnership*

The Registered Partnership Act [*Lag (1994:1117) om registrerat partnerskap*] entered into force 1 January 1995 (Bet. [Parliament Standing Committee Report] 1993/94:LU28). The Act was adopted explicitly to create a possibility for same-sex couples to legalise their relationship in order to have most of the legal rights and obligations of a heterosexual marriage applied to their relationship. At the same time, to simply open up access to marriage under the Marriage Code itself for same-sex couples was not considered politically possible.

According to the general equal treatment rule of the Registered Partnership Act (art. 1 of chapter 3), the legal consequences of a registered partnership are the same as that of a marriage and all provisions in Swedish law regarding married spouses apply *mutatis mutandis* to registered partners, unless specifically exempted.

Originally the possibility of adopting children, jointly or in the form of second-parent adoption, as well as the possibility to exercise joint custody over children, was exempt from this rule. Through an amendment of the Registered Partnership Act, which entered into force on 1 February 2003 (Förordning (2002:769) om ikraftträdande av lagen (2002:603) om ändring av lagen (1994:1117) om registrerat partnerskap [Government Decree (2002:769)] on the entering into force of the Act (2002:603) amending the Registered Partnership Act [1994:1117]), registered partners and married spouses are now treated equally also in these respects. Still exempted from the material rule of equality between married spouses and registered partners are provisions regarding presumption of paternity of children and access to assisted procreation within the public health service.

#### *Informal cohabitation*

Some statutory minimum protection for the financially more vulnerable party in a cohabiting different-sex couple has been in existence under Swedish law since 1974. With legal effect from 1 January 1988, similar legislation was introduced for same-sex couples. As of 1 July 2003 these earlier existing separate pieces of legislation that have applied to informal cohabitation depending on whether the cohabitees are of the same sex or different sexes respectively, are now merged into one single Cohabitation Act (2003:376) (Prop. [Government Bill] 2002/03:80, bet. [Parliament Standing Committee Report] 2002/03:LU19). The merger brings about only few material legal changes.

For the Cohabitation Act to apply to couples (irrespective of sexes), there is no need for any registration or similar formalities. After a certain time (no statutory time limit exists) of cohabitation, the rules of the Act simply begin to apply, provided that both persons are unmarried and not in a registered partnership, that they share a common household and that their relationship is of the kind, in which sexual relations is generally an integral part. In the individual case, however, a sexual relation between the parties concerned is no requirement for the rules to apply. The provisions concern only the joint home and household goods. Such property is subject to redistribution rules in the event of a breakdown of the relationship. There are also restrictions regarding the right of a cohabitant to dispose of her or his property, which is used as common home or household goods to the couple, without the formal consent of the other cohabitant.

#### **Abbreviations**

**FB** = the Parents and Children Code [*Föräldrabalken* (1949:381)].

**ÄktB** = the Marriage Code [*Äktenskapsbalken* (1987:230)]

**PL** = the Registered Partnership Act [*Lag* (1994:1117) *om registrerat partnerskap*]

**Cohabitation Act** = *Sambolag* (2003:376); in force 1 July 2003, replacing *Lag* (1987:232) *om sambors gemensamma hem*, i.e. the Cohabitees (Joint Home) Act and *Lag* (1987:813) *om homosexuella sambor*, i.e. the Homosexual Cohabitees Act, both in force 1 January 1988

**1999 Sexual Orientation Discrimination Act** = *Lag* (1999:133) *om förbud mot diskriminering i arbetslivet på grund av sexuell läggning*



Table A (Sweden): Parenting consequences

|  | Civil marriage    |            | Registered partnership |                               | Informal cohabitation         |                              |
|--|-------------------|------------|------------------------|-------------------------------|-------------------------------|------------------------------|
|  | Different-sex     | Same-sex   | Different-sex          | Same-sex (1995)               | Different-sex                 | Same-sex                     |
| 1. When female partner gives birth, both partners automatically become legal parents   | Yes               | X          | X                      | No                            | No, but                       | No                           |
| 2. Medically assisted insemination is lawful for women in such a relationship  | Yes               | X          | X                      | Yes, but                      | Yes                           | Yes, but                     |
| 3. When only one partner is the parent of a child, both partners can have parental authority or responsibilities during their relationship | No, but           | X          | X                      | No, but                       | No, but                       | No, but                      |
| 4. When only one partner is the parent of a child, the other partner can adopt it and thus become its second parent                        | Yes               | X          | X                      | Yes (2003)                    | No                            | No                           |
| 5. Partners can jointly adopt a child  | Yes               | X          | X                      | Yes (2003)                    | No                            | No                           |
| 6. One partner can individually adopt a child  | No, but           | X          | X                      | No, but                       | Yes, but                      | Yes, but                     |
| 7. Partners can jointly foster a child   | Yes               | X          | X                      | Yes                           | Yes                           | Yes                          |
| <b>Level of legal consequences</b>   | 5x3 + 2x1<br>= 17 | 7x0<br>= 0 | 7x0<br>= 0             | 3x3 + 1x2 + 2x1 + 1x0<br>= 13 | 2x3 + 1x2 + 2x1 + 2x0<br>= 10 | 1x3 + 2x2 + 1x1 + 3x0<br>= 8 |

## Notes to table A

A1 - Art. 1 of Chapter 1 FB. This provision on statutory legal parenthood for the husband, over a child born by a married mother was already from the start exempt from the general rule in art. 1 of chapter 3 PL that all legal consequences of a marriage apply in the same way for a registered partnership and registered partners. The exception is still found in art. 3 of chapter 3 PL. When a child is born by an *unmarried* woman, her male partner (informal cohabitation) can become the legal parent of the child by signing a confirmation that he is indeed the father. For such a confirmation to become legally valid and binding, it must however also be approved both by the mother and by the local social security board (art. 3-4 of chapter 1 FB). As the law now stands, a female partner of the mother can only become a legal parent of the child through a step child (second-parent) adoption.

A2 - The key words here are 'lawful for women'. Medically assisted insemination is yet another area which was exempt (art. 2 of chapter 3 PL) from the equal treatment clause of the Registered Partnership Act. This means that access to assisted procreation through the public health system is denied to lesbian couples. It is even a punishable offence (art. 7 of the Insemination Act [*Lag* (1984:1140) om insemination]) to perform insemination on a woman who is neither married nor living in a long-term relation with a man, if it is done 'habitually' or for money. For a woman living in a lesbian relationship it is however perfectly lawful to have the insemination carried out in private with the non-commercial assistance of e.g. a male friend or to go to a clinic abroad. At the time when the possibilities of being considered for joint and second-parent adoption were opened up for registered same-sex partners, the government announced that it would come back to Parliament with a bill making also assisted procreation available on equal terms for lesbian couples as soon as possible. However, no such bill has been presented yet.

A3 - A partner - of whatever sex and civil status - can never have parental authority over his or her partner's child, together with the parent. Nevertheless, some *responsibilities* can fall upon such a partner in relation to the child. The partner is obliged to support the child financially together with his or her partner who is a

parent of the child, to the extent that the child can not obtain sufficient child support from the other legal parent who is not living with the child. This special obligation can occur only if the partner is the married or registered partner of the parent of the child, or if they, apart from the child in question, also have other children who are the children of both partners (art. 5 of chapter 7 FB). With respect to the former condition, the obligation could occur in the case of same-sex couples only from the entry into force of the Registered Partnership Act on 1 January 1995. With respect to the latter, the situation can clearly occur from 1 February 2003 when the amendment opening up the possibility for registered partners to adopt children together entered into force. However, also for same-sex informal cohabittees, at least theoretically, the situation could occur. This could be the case if they were joint adoptive parents after legally having adopted a child together (or after a second-parent adoption) abroad, where according to the law of that country such adoptions are possible. Under Swedish private international law, such an adoption is then valid also in Sweden automatically, albeit only under certain conditions (see art. 3 of the Act on International Legal Relations concerning Adoption [*Lag (1971:796) om internationella rättsförhållanden rörande adoption*]).

A4 - Married spouses as a general rule can only adopt jointly (art. 3 of chapter 4 FB). An exception from that general principle is given for the situation where one spouse wants to adopt a child of the other spouse, in order for them both to become the legal parents of that child (art. 3 last sentence of chapter 4 FB). In accordance with the general equal treatment rule of the Registered Partnership Act (art. 1 of chapter 3), the same applies to registered partners. Only married spouses and registered partners are allowed to adopt each other's children (a contrario art. 1 of chapter 4 FB). Therefore these possibilities do not exist for informal cohabittees of whatever sexes.

A5 - Art. 3 of chapter 4 FB and art. 1 of chapter 3 PL. Through the amendment of the Registered Partnership Act that entered into force 1 February 2003 (see also the general note above), registered partners can now adopt children jointly (including all forms of international adoptions) on the same conditions as married spouses. Only married spouses and registered partners are allowed to adopt jointly (art. 4 of chapter 4 FB).

A6 - According to art. 3, first sentence, of chapter 4 FB and art. 1 of chapter 3 PL, married spouses and registered partners are only allowed to adopt jointly or to adopt the child of the spouse/registered partner in order for both spouses/registered partners to become legal parents of that child. This general rule has one exception. According to the provision in art. 3, second sentence, of chapter 4 FB and art. 1 of chapter 3 PL, a spouse or registered partner may adopt individually if the other spouse or registered partner has disappeared or is suffering from a serious mental disorder. When it comes to informal cohabittees (of whatever sex), there is no legal provision stopping them from adopting individually. Since they will need the consent of the local social security board (subject to legal appeal) to obtain a court ruling granting the adoption, this may however be difficult in practice. During the home investigation, which is carried out to assess whether an adoption would be in the best interest of the child, questions would probably be raised as to why the cohabittees do not opt to marry or register their partnership in order to be able to adopt the child jointly. An unwillingness to do so may perhaps be interpreted as a sign of instability of the relationship or inability to put the best interest of the child first. I do not know of any such applications being turned down for this reason, however.

A7 - Without the permission of the local social security board (*'socialnämnden'*), a child must not be received for the purpose of care or fostering in the home of anyone who is not a legal parent of the child or who does not have parental authority over it (art. 6 of chapter 6 of the Social Services Act [*Socialtjänstlagen (2001:453)*]). There are no provisions with respect to sexual orientation or civil status in the Act, defining who can obtain such a permission. Sometimes when a child is placed in foster care also the parental authority over the child is transferred to the foster 'parents'. Such a transfer is possible under art. 10a of chapter 6 FB. This provision together with art. 1 of chapter 3 PL and art. 1 of the Cohabitation Act (*Sambolag [2003:000]*) respectively makes no difference between same-sex and different-sex couples.

**Table B - part one (Sweden): Material consequences in private law**

|  | Civil marriage             |          | Registered partnership |                            | Informal cohabitation     |                           |
|--|----------------------------|----------|------------------------|----------------------------|---------------------------|---------------------------|
|  | Different-sex              | Same-sex | Different-sex          | Same-sex (1995)            | Different-sex             | Same-sex                  |
| 1. Properties of each partner are considered joint property                        | No                         | X        | X                      | No                         | No                        | No                        |
| 2. Debts of each partner are considered joint debt                                 | No, but                    | X        | X                      | No, but                    | No, but                   | No, but                   |
| 3. In case of splitting up, statutory rules on alimony apply                       | Yes                        | X        | X                      | Yes                        | No                        | No                        |
| 4. In case of splitting up, statutory rules on redistribution of properties apply  | Yes, but                   | X        | X                      | Yes, but                   | Yes, but                  | Yes, but (1988)           |
| 5. In case of wrongful death of one partner, the other is entitled to compensation | Yes (2002)                 | X        | X                      | Yes (2002)                 | Yes (2002)                | Yes (2002)                |
| 6. When one partner dies without testament, the other is an inheritor              | Yes, but                   | X        | X                      | Yes, but                   | No, but                   | No, but                   |
| <b>Level of legal consequences</b>   | 2x3 + 2x2 + 1x1 + 1x0 = 11 | 6x0 = 0  | 6x0 = 0                | 2x3 + 2x2 + 1x1 + 1x0 = 11 | 1x3 + 1x2 + 2x1 + 2x0 = 7 | 1x3 + 1x2 + 2x1 + 2x0 = 7 |

**Notes to table B - part one**

B1 - Chapter 7 ÄktB deals with property of spouses. There are no provisions that would make property of any of the spouses joint property of them both. The fact that distribution rules apply after the split-up of a marriage is a different matter, see B14 below. The same property regime applies to registered partners (art. 1 of chapter 3 PL). The Cohabitation Act also does not contain any joint property rules. Also for these relationships, there are distribution rules if the relationship breaks down.

B2 - There are no such provisions for any of the categories. A different matter is that if one spouse, partner, or cohabitant has a lot of debts, this will affect what the other will be able to get in accordance with the distribution rules after a split-up. This is so because the debts of one party have to be covered by property belonging to that party before any distribution can take place (art. 2 of chapter 11 ÄktB, art. 1 of chapter 3 PL and art. 13-14 of the Cohabitation Act). Also bankruptcy rules and some rules of procedure applicable for the purposes of securing the payment of debts of one spouse, partner or cohabitant can make it difficult to prove that certain property in joint *possession* (normally in the joint home) does not belong to the indebted partner but to the other and should therefore not be liquidated to cover the debts in question.

B3 - Art. 7 of chapter 6 ÄktB stipulates that after a divorce, each spouse is responsible for herself or himself, but also that under certain conditions an obligation to pay alimony can be imposed on one of the spouses, for a limited or longer period of time. These provisions apply also to registered partners (art. 1 of chapter 3 PL). There are no provisions on alimony in the Cohabitation Act.

B4 - Chapters 9-13 ÄktB deal extensively with the issue of distribution of properties after divorce. These provisions apply also to registered partners (art. 1 of chapter 3 PL). The possibility of opting out of the distribution rules exists through (pre-)nuptial agreements. Informal cohabitants are also subject to distribution of property rules in case of a breakdown of their relationship. These rules are found primarily in sections 8-22 of the Cohabitation Act, but only apply to the joint home and household goods (as a difference from the rules for married couples and registered partners which include all their properties as a general principle). Also for informal cohabitation, regardless of sexes, there is a possibility to opt out of most of the statutory distribution rules (art. 9 of the Cohabitation Act).

B5 - In the absence of statutory rules on this subject, case law from the Supreme Court (*Högsta domstolen*) had gradually developed. Entering into force 1 January 2002, this case law has now been codified and somewhat extended through art. 2 of chapter 5 of the Tort Act [*Skadeståndslag* (1972:207)] as amended by the Act (2001:732) amending the Tort Act. Compensation can now be claimed by anyone who was 'particularly close to

the deceased'. There is no doubt that married spouses, registered partners and informal cohabitants of whatever sex would all qualify for such compensation under this provision.

B6 - Art. 1 of chapter 3 of the Inheritance Code [*Ärvdabalken* (1958:637)] stipulates that a surviving spouse inherits from her or his deceased spouse. There are however some limitations to this right if the deceased also leaves children that are not the children also of the surviving spouse. On the other hand there is a special minimum protection rule (art. 1(2) of chapter 3 of the Inheritance Code), which even in such cases always gives the surviving spouse the right to enough property from the estate as to cover the equivalent of a certain minimum sum of money (approximately EUR 16000 for the year 2003), even if what the spouse would have a right to under the distribution rules is not enough to reach that sum. All these rules apply also to registered partners (art. 1 of chapter 3 PL). Informal cohabitants do not inherit from each other in lack of a testament. There are, nevertheless, rules applicable regardless of the sexes of the cohabitantes, that give the surviving cohabitee a certain minimum level of protection, unless the cohabitantes have opted out of the distribution rules (see B14 above). The surviving cohabitee thus always has the right to enough property from the estate as to cover the equivalent of a certain minimum sum of money (approximately 8 000 Euros for the year 2003), even if what the surviving cohabitee would have a right to under the distribution of joint home and household goods rules is not enough to reach that sum (art. 18 of the Cohabitation Act).

**Table B - part two (Sweden): Positive material consequences in public law**

|   | Civil marriage      |          | Registered partnership |                     | Informal cohabitation |                     |
|---|---------------------|----------|------------------------|---------------------|-----------------------|---------------------|
|   | Different-sex       | Same-sex | Different-sex          | Same-sex (1995)     | Different-sex         | Same-sex            |
| 7. Relationship can result in lower property tax  | No                  | X        | X                      | No                  | No                    | No                  |
| 8. Relationship can result in lower income tax  | No                  | X        | X                      | No                  | No                    | No                  |
| 9. Public health insurance of one partner covers medical costs of other partner                 | No                  | X        | X                      | No                  | No                    | No                  |
| 10. Relationship can have positive impact on basic social security payment in case of no income | No                  | X        | X                      | No                  | No                    | No                  |
| 11. Relationship can have positive impact on statutory old age pension                          | No                  | X        | X                      | No                  | No                    | No                  |
| 12. When one partner dies, the other can get a statutory survivor's pension                     | Yes, but            | X        | X                      | Yes, but            | Yes, but              | Yes, but            |
| 13. Surviving partner pays no inheritance tax (or less than a mere friend would)                | Yes                 | X        | X                      | Yes                 | Yes                   | Yes                 |
| <b>Level of legal consequences</b>  | 1x3 + 1x2 + 5x0 = 5 | 7x0 = 0  | 7x0 = 0                | 1x3 + 1x2 + 5x0 = 5 | 1x3 + 1x2 + 5x0 = 5   | 1x3 + 1x2 + 5x0 = 5 |

**Notes to table B - part two**

B7 - There are no such rules for any of the categories, see further under B15 below.

B8 - For the purposes of income tax everyone is taxed individually.

B9 - The public health insurance is individualized.

B10 - There are no such rules for any of the categories, see also B16 below.

B11 - There are no such rules for any of the categories, see also B17 below.

B12 - In accordance with chapter 4 of the Act on Survivor's Pension and Pension for Surviving Children [*Lag (2000:461) om efterlevandepension och efterlevandestöd till barn*], the conditions for getting a statutory survivor's pension are that, at the time of death, you have not reached the age of 65 and that you and the deceased partner were living together. Furthermore, one of the two following criteria must be fulfilled: 1. You had been living together for at least five years at the time of death, or 2. at the time of death, you were living together with a child under the age of 18 over whom you, or you and the deceased together, had parental authority. This provision is applied also to registered partners (art. 1 of chapter 3 PL). For informal cohabitants, this applies if earlier they have been married to each other or have lived together in a registered partnership or if, at the time of death, they had, or had had or were awaiting children together. The latter could apply to same-sex informal cohabitation with respect to adoptive children.

B13 - According to Section 28 (as amended by the Act amending the Inheritance and Gifts Taxation Act [*Lag (2003:1198) om ändring i lagen (1941:416) om arvsskatt och gåvoskatt*]), married spouses, registered partners (by virtue of the general equality provision in art. 1 of chapter 3 PL) and informal cohabitants (with respect to same-sex cohabitants by virtue of the general equality provision in art. 1 of the Cohabitation Act) pay no inheritance tax at all.

**Table B - part three (Sweden): Negative material consequences in public law**

|   | Civil marriage      |          | Registered partnership |                     | Informal cohabitation |                     |
|---|---------------------|----------|------------------------|---------------------|-----------------------|---------------------|
|   | Different-sex       | Same-sex | Different-sex          | Same-sex (1995)     | Different-sex         | Same-sex            |
| 14. Relationship can result in higher property tax  | Yes                 | X        | X                      | Yes                 | Yes, but              | No, but             |
| 15. Relationship can result in higher income tax  | No                  | X        | X                      | No                  | No                    | No                  |
| 16. Relationship can have negative impact on basic social security payment in case of no income | Yes                 | X        | X                      | Yes                 | Yes                   | Yes                 |
| 17. Relationship can have negative impact on statutory old age pension                          | No, but             | X        | X                      | No, but             | No                    | No                  |
| <b>Level of legal consequences</b>  | 2x3 + 1x1 + 1x0 = 7 | 4x0 = 0  | 4x0 = 0                | 2x3 + 1x1 + 1x0 = 7 | 1x3 + 1x2 + 2x0 = 5   | 1x3 + 1x1 + 2x0 = 4 |

**Notes to table B - part three**

B14 - According to art. 19 and 21 of the Act on State Tax on Property [*Lag (1997:323) om statlig förmögenhetsskatt*], married spouses are taxed together for the purposes of property tax (or 'fortune tax'), as a difference from the ordinary income tax. This results in the couple reaching the limit for how much property you can own without having to pay property tax, quicker than if they had been taxed separately. The same rules apply to registered partners (art. 1 of chapter 3 PL). For informal cohabitants these 'negative' rules apply only if they have been married to each other or have been living in a registered partnership with each other before (to avoid sham divorces) or if they have, or have had, children together (art. 21 of the Act on State Tax on Property).

B15 - For the purposes of income tax everyone is taxed individually. See also under B7 above.

B16 - Rules on social security payment are found in art. 1-3 of chapter 4 of the Social Services Act [*Socialtjänstlag (2001:453)*], supplemented by art. 1 of chapter 2 of the Social Services Decree [*Socialtjänstförordning (2001:937)*]. Persons who share a common household always get a lower basic social security payment each than they would have got if they had been living alone. This is the case regardless of whether they have an intimate relation of one kind or another with any of the other members of the same household. See also under B10 above.

B17 - The pension system is extremely complicated and can not be described here in any comprehensive manner. The information is therefore limited to what is in general relevant for the majority of the population and only to strictly statutory payments. There are no such rules in the *general* statutory old age pension schemes for any of the categories. For persons born before 1954, there are some special rules due to the total reform of the Swedish pension system. For such persons being married or in a registered partnership may result in a lower old age pension than if they are single or living in informal cohabitation. The relevant legislation is primarily the Act regarding Income-based Old-age Pension [*Lag (1998:674) om inkomstgrundad ålderspension*] and the Act on Pension Guarantees [*Lag (1998:702) om garantipension*]. See also under B11 above.

**Table C (Sweden): Other legal consequences**

|  | Civil marriage    |            | Registered partnership |                         | Informal cohabitation |                         |
|--|-------------------|------------|------------------------|-------------------------|-----------------------|-------------------------|
|  | Different-sex     | Same-sex   | Different-sex          | Same-sex (1995)         | Different-sex         | Same-sex                |
| 1. One partner can have or use surname of the other  | Yes               | X          | X                      | Yes                     | No                    | No                      |
| 2. Foreign partner of resident national is entitled to a residence permit  | Yes               | X          | X                      | Yes                     | Yes (1970s)           | Yes (1970s)             |
| 3. Relationship makes it easier for foreign partner to obtain citizenship  | Yes               | X          | X                      | Yes                     | Yes (2001)            | Yes (2001)              |
| 4. In case of criminal prosecution, one partner can refuse to testify against the other  | Yes               | X          | X                      | Yes                     | Yes                   | Yes                     |
| 5. When one partner uses violence against other partner, specific statutory protection applies   | Yes (1998)        | X          | X                      | Yes (1998)              | Yes (1998)            | Yes (1998)              |
| 6. In case of accident or illness of one partner, the other is considered as next of kin for medical purposes (even without power of attorney) | Yes               | X          | X                      | Yes                     | Yes                   | Yes                     |
| 7. Organ donation from one living partner to the other is lawful   | Yes               | X          | X                      | Doubt                   | Yes                   | Doubt                   |
| 8. When one partner dies, the other can continue to rent the home  | Yes               | X          | X                      | Yes                     | Yes                   | Yes                     |
| 9. Partners have a duty to have sexual contact   | No                | X          | X                      | No                      | No                    | No                      |
| <b>Level of legal consequences</b>   | 8x3 + 1x0<br>= 24 | 9x0<br>= 0 | 9x0<br>= 0             | 7x3 + 1x1 + 1x0<br>= 22 | 7x3 + 2x0<br>= 21     | 6x3 + 1x1 + 2x0<br>= 19 |

**Notes to table C**

C1 - Art. 9-10 and 24 of the Names Act [*Namlagen* (1982:670)] and art. 1 of chapter 3 PL. When contracting a marriage, the spouses have some options. They can each of them keep their own surname or they can decide to take the surname of one of them as their common surname. One spouse who has taken the surname of the other as her or his surname may opt to also keep her or his own former surname as a 'middle name'. If they have chosen to keep each one their own surname, one of them may still take the surname of the other and use it as a 'middle name'. Both spouses can not use the surname of the other as a 'middle name'. These options are open to the spouses also later on during the marriage. All these options are open also to registered partners. Informal cohabitantes of whatever sex do not have these possibilities.

C2 - It has been a very long tradition (at least since the 1970s) not to tie the right to obtain a residence permit to civil status. Instead the immigration authorities have evaluated every application on its own merits, trying to determine if an intimate relationship between a legal resident and her or his non-resident foreign partner (regardless of sexual orientation) is a genuine one or not. This practice is now codified in art. 4 of chapter 2 of the Aliens Act [*Utlänningslag* (1989:529)], art. 1 of chapter 3 PL and art. 1 of the Cohabitation Act.

C3 - According to art. 12(2) of the Swedish Citizenship Act [*Lag (2001:82) om svenskt medborgarskap*], an applicant who is married to or cohabiting with a Swedish citizen can obtain citizenship after a shorter time of residence in the country than the statutory terms otherwise prescribe. It is not specified in the provision how much shorter the term can be. The rule also applies to registered partners and cohabitants of the same sex (art. 1 of chapter 3 PL and art. 1 of the Cohabitation Act). Before the entering into force in 2001 of this new Act on Swedish Citizenship, these shorter time requirements only applied to married couples and, with the entering into force in 1995 of the Registered Partnership Act, to registered partners.

C4 - Art. 3 of chapter 36 of the Code of Judicial Procedure [*Rättegångsbalk (1942:740)*] states that any person who is married to or in any similar way closely related to a party in the proceedings may refuse to testify against that party. After the entering into force of the Registered Partnership Act in 1995, the marriage exemption applies also to registered partners (art. 1 of chapter 3 PL) and informal cohabitants of whatever sex have for a long time been considered to be 'in a similar way related to a party...', for the purposes of this provision.

C5 - In 1998 the Penal Code [*Brottsbalk (1962:700)*] was amended through the Act (1998:393) amending the Penal Code, which introduced two new provisions (art. 4a(1-2)) into chapter 4 of the Penal Code, making it an specially aggravated offence to commit certain violent or threatening crimes against e.g. a partner or an ex-partner, making no distinction between married spouses, registered partners and informal cohabitants of whatever sex.

C6 - Art. 2b of the Health and Medical Services Act [*Hälso- och sjukvårdslag (1982:763)*] states that a patient shall be given individualised information about her or his state of health and about the existing methods for examination, care and treatment. If the information can not be given to the patient, it shall instead be given to 'someone who is close to the patient' (*'närstående'*). In an authoritative commentary on the Act, the term '*nära anhörig*' - which appeared in earlier versions of the Act and which must be interpreted as a more narrow concept - is described. Examples given include the person that the patient herself or himself has indicated as the next of kin upon admittance to e.g. a hospital. In the absence of such information, the term would include a spouse or informal cohabitee of whatever sex (the Registered Partnership Act did not exist at the time of release of the Commentary), children (including adopted children), parents and sisters and brothers (see Jan Sahlin, Jan, *Hälso- och sjukvårdslagen med kommentarer* ['The Health and Medical Services Act with Commentary'], 3 ed., Stockholm, Norstedts Tryckeri, 1990, p. 82).

C7 - According to Art. 7 of the Act on Transplantation [*Lag (1995:831) om transplantation m.m.*], biological material that does not reproduce itself (e.g. a kidney) may only be taken from a living human being if the donor is a relative of the receiver or otherwise is 'close to' the receiver. The purpose of this statutory limitation, according to the travaux préparatoires (*Prop. [Government Bill] 1994/95:148*), is to avoid commercial trade in organs. Spouses, registered partners and informal cohabitants of whatever sex are considered to be 'close to' the receiver. There is however one specific complication for registered partners and cohabitants of the same sex. The National Board for Health and Welfare [*Socialstyrelsen*] has issued administrative instructions and guidelines [*Föreskrifter och allmänna råd*] to avoid transmission of disease in relation to transplantations (SOSFS 1994:4 M - see [www.sos.se/sosfs/1994\\_4/1994\\_4.htm](http://www.sos.se/sosfs/1994_4/1994_4.htm)). The instructions (binding upon health and medical services staff) forbid the use of a donor who 'can be suspected of having been exposed to hiv infection'. In the guidelines (not binding upon health and medical services staff) to this instruction, examples are given of such persons. The examples include men who have or have had sexual relations with other men. I know of no case where the issue has been raised.

C8 - Chapter 12 of the Real Estate Code [*Jordabalk (1970:994)*] deals, among other things, with the renting of houses or apartments for the purpose of using them as homes. Art. 34(2) of that chapter states that a person 'close to' (*'närstående'*) a deceased tenant who has lived in the home with the tenant, has a right to take over the contract of the apartment, unless the landlord has good reasons to object. Married spouses, registered partners and informal cohabitants are all considered 'close to' a deceased tenant for the purposes of this provision. Furthermore, they all have an even stronger right, than other persons, visavis the landlord to continue renting the home. This is a consequence of the distribution of properties rules (art. 8 of chapter 7 ÄktB, art. 1 of chapter 3 PL and art. 16, 18 and 22 of the Cohabitation Act, respectively; see B4 above).

C9 - No such obligation exists in the individual case for any of the categories. However, for an informal cohabitation to come under the provisions of the Cohabitation Act the relationship must be of such a nature, that sexual relations are usually considered an integral part of it.



**Table D (Sweden): Types of discrimination by employers or service providers that are prohibited in anti-discrimination legislation**

|   | Between married spouses and registered partners (1995) | Between married spouses and informal cohabitants | Between registered partners and informal cohabitants (1995) | Between same-sex and different-sex partners (with same status) |
|---|--|--|---|--|
| 1. With respect to housing                              | Yes  | No   | No  | Yes (1987)   |
| 2. With respect to life insurance                       | Yes  | No   | No  | Yes (1987)   |
| 3. With respect to health insurance                     | Yes  | No   | No  | Yes (1987)   |
| 4. With respect to medically assisted insemination      | No   | No   | No  | No   |
| 5. With respect to other services                       | Yes  | No   | No  | Yes (1987)   |
| 6. With respect to an occupational survivor's pension   | Yes (1999)   | No, but (1999)                                   | No, but (1999)  | Yes (1999)   |
| 7. With respect to other spousal benefits in employment | Yes (1999)   | No, but (1999)                                   | No, but (1999)  | Yes (1999)   |

**Notes to table D**

D1 - There are no anti-discrimination provisions in Swedish law that specifically target discrimination on grounds of civil status, i.e. a non-justified difference in treatment between persons that are married and those that live in a registered partnership, in informal cohabitation or are single. Nevertheless, such differences in treatment can be construed as directly or indirectly discriminatory on grounds of (homo-)sexual orientation, which indeed is a protected category under both criminal law anti-discrimination provisions regarding goods and services and civil law provisions prohibiting such discrimination in employment. With respect to housing, art. 9 of chapter 16 of the Penal Code is applicable. This provision forbids private businesses as well as all public officials (employees as well as persons holding public office) to treat a person less favourably than they would treat another on grounds of his or her homosexual (NB not 'sexual') orientation. The provision is not applicable to the relationship between an employer on the one hand and employees or employment seekers on the other. The amendment to this provision, extending its protection from ethnic and religious discrimination only to also homosexual orientation discrimination, entered into force on 1 July 1987. However, at that point in time there was no registered partnership legislation in Sweden. Therefore, demanding that a person be married to be allowed to rent or buy an apartment or a house, would have amounted 'only' to discrimination of all unmarried persons on grounds of civil status, which is not covered by this prohibition. It also does not cover indirect discrimination, since there has to be a direct - albeit not malicious - link between the difference in treatment and the homosexual orientation. With the entering into force of the Registered Partnership Act in 1995, the issue must be judged differently. The Registered Partnership Act was adopted explicitly to create a possibility for same-sex couples to legalise their relationship in order to have access to a legal institution corresponding to that of civil marriage for heterosexual couples. Under Swedish law only different-sex couples can marry and only same-sex couples can register partnership in spite of the fact that the two systems result in virtually the same legal consequences. As a result, treating persons who are registered partners less favourably than how persons who are married would be treated most probably would amount to direct discrimination on grounds of homosexual orientation and therefore be unlawful under this penal code provision. The issue has never been tested in the courts as far as I know. However, according to an authoritative commentary on the provision, different treatment of cohabitants (who also come under two 'different but equal' sets of rules) depending on whether they are of the same sex or different sexes, amounts to unlawful discrimination under this provision of the Penal Code (see Lena Holmqvist, '16 kap. Om brott mot allmän ordning' ['Chapter 16 On Crimes against Public Order'], in: L. Holmqvist, M. Leijonhufvud, P.O. Träskman & S. Wennberg, 'Brottsbalken - En kommentar' ['The Penal Code - a Commentary'], Stockholm, Norstedts Juridik AB, 2002, p. 16:43-53). It is therefore most likely that the same would apply to registered partners compared to married spouses.

D2 - See D1.

D3 - See D1.

D4 - The anti-discrimination provision in art. 9 of chapter 16 of the Penal Code requires that a comparison is made between how a homosexual person is treated compared to how a heterosexual person would be treated.

This indicates that the persons compared must be, if not in an identical, at least in a similar (comparable) situation. In the case of medically assisted procreation, there are specific provisions excluding women in registered partnerships from access to such services. It is even a punishable offence (art. 7 of the Insemination Act) to perform insemination on a woman who is neither married nor living in a long-term relation with a man, if it is done 'habitually' or for money. Therefore, the situations of a married woman and a woman living in a registered partnership would probably not be considered 'comparable' for the purposes of this penal code anti-discrimination provision.

D5 - See D1.

D6 - Being married as well as being a registered partner (or living in a registered partnership) are different but equal civil statuses under Swedish law. Same-sex couples are not allowed to marry and different-sex couples are not allowed to register as partners. Instead, the Registered Partnership Act was meant precisely to create the same rights and obligations for same-sex couples as a marriage gives to different-sex couples. Therefore, if an occupational survivor's pension is included in the employment benefits for persons who work for a certain employer - private or public - it would amount to direct sexual orientation discrimination to treat married employees differently from how employees living in a registered partnership would be treated. Thus, such a difference in treatment would be unlawful under the 1999 Sexual Orientation Discrimination Act; see art. 3 and 5. The Act makes no exception from the discrimination prohibition for differential treatment on grounds of marital status. Discrimination between *married spouses* and *same-sex informal cohabittees* could be construed as indirect sexual orientation discrimination, since same-sex couples can not marry under Swedish law, and would therefore also be unlawful under the 1999 Sexual Orientation Discrimination Act; see art. 4 and 5. Such a difference in treatment visavis *different-sex informal cohabittees* would however not violate the discrimination prohibition since there is no general prohibition in Swedish law against discrimination on grounds of marital status alone. Discrimination between *registered partners* and *informal different-sex cohabittees* could likewise be construed as indirect (hetero-)sexual orientation discrimination, since different-sex couples can not register partnership under Swedish law, and would be unlawful under the 1999 Sexual Orientation Discrimination Act; see art. 4 and 5. Such a difference in treatment visavis *same-sex couples* would however not violate the law since there is no general prohibition against discrimination on grounds of civil status alone in Swedish law. Discrimination between *same-sex* and *different-sex informal cohabittees* would be direct sexual orientation discrimination and therefore also unlawful under the 1999 Sexual Orientation Discrimination Act; see art. 3 and 5.

D7 - Any employer who treats employees differently with respect to any form of spousal benefits on grounds of sexual orientation violates the discrimination prohibitions in art. 3-5 of the 1999 Sexual Orientation Discrimination Act; see D6 above.

**Table E (Sweden): Types of couples that qualify for starting a civil marriage or registered partnership in the country itself**

|  |                            | Civil marriage |          | Registered partnership |                 |
|--|----------------------------|----------------|----------|------------------------|-----------------|
|  |                            | Different-sex  | Same-sex | Different-sex          | Same-sex (1995) |
| Resident national with:                      | 1. Resident national       | Yes            | X        | X                      | Yes             |
|  | 2. Non-resident national   | Yes            | X        | X                      | Yes             |
|  | 3. Resident foreigner      | Yes            | X        | X                      | Yes             |
|  | 4. Non-resident foreigner  | Yes            | X        | X                      | Yes             |
| Non-resident national with:                  | 5. Non-resident national   | Yes            | X        | X                      | No              |
|  | 6. Resident foreigner      | Yes            | X        | X                      | Yes, but (2000) |
|  | 7. Non-resident foreigner  | Yes            | X        | X                      | No              |
| Resident foreigner with:                     | 8. Resident foreigner      | Yes            | X        | X                      | Yes, but (2000) |
|  | 9. Non-resident foreigner  | Yes            | X        | X                      | Yes, but (2000) |
| Non-resident foreigner with:                 | 10. Non-resident foreigner | Yes            | X        | X                      | No              |
| 11. Sister or brother with sister or brother |                            | No, but        | X        | X                      | No, but         |
| 12. Parent with child                        |                            | No, but        | X        | X                      | No, but         |

**Notes to table E**

E1 - The general principle in Swedish Private international law with respect to the possibility of entering into marriage before a Swedish authority is that the right to marry is tried for each of the future spouses individually, applying the law of the state of which he or she is a citizen; see art. 1 of chapter 1 of the Act on certain International Legal Conditions regarding Marriage and Guardianship [*Lag (1904:26 s. 1) om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap*]. Therefore when a Swedish national wants to marry another Swedish national, regardless of residence, internal Swedish law will apply. According to art. 3 of chapter 1 PL, the right to register partnership is always considered applying Swedish law. Originally the PL stipulated that a partnership could only be registered if at least one of the partners was a resident Swedish national (art. 2 of chapter 1 PL of 1 January 1995). This provision has since been amended by the Act (2000:374) amending the Act (1994:1117) on Registered Partnership, which entered into force 1 July 2000. The purpose of the amendment was to broaden the possibilities of partnership registration in Sweden to a wider category of same-sex couples. The provision as it stands now says that at least one of the parties must *either* be a resident Swedish national (Art. 2(2) of chapter 1 PL) *or* have been residing in Sweden for at least 2 years (Art. 2(1) of chapter 1 PL). For the purposes of the Registered Partnership Act, Danish, Dutch, Icelandic and Norwegian citizens are treated as if they were Swedish citizens (last sentence of art. 2 of chapter 1 PL). To conclude, a resident national (or of equivalent nationality) can always register partnership with another resident national (or of equivalent nationality).

E2 - Since both parties are Swedish nationals, they can always marry in Sweden; see E1. Since one of the partners is a resident Swedish national they can register their partnership; see E1.

E3 - *Marriage*: So long as the law of the state of which a resident foreigner is a citizen does not prevent him or her from marrying, neither does Swedish law; see E1. If a foreigner has been resident since at least two years he or she can also have the right to marry considered exclusively under Swedish law (art. 2 of chapter 1 of the Act on certain International Legal Conditions regarding Marriage and Guardianship). Foreigners who are not resident or who have not been resident that long can still obtain this possibility by applying specially to the Government (last sentence of art. 2 of chapter 1 of the same Act). *Registered partnership*: Since one of the partners also in this example is a resident Swedish national, the couple can register their partnership; see E1.

E4 - See E3

E5 - *Marriage*: See E1. *Registered partnership*: Since there is always a residence requirement for at least one of the parties wanting to enter into a registered partnership before a Swedish authority and according to Swedish law, partnership registration is not possible in this situation; see E1.

E6 - *Marriage*: See E3. *Registered partnership*: Since only the foreigner is a resident, he or she must *either* be a Danish, Dutch, Icelandic or Norwegian citizen (i.e. equivalent to Swedish citizenship) *or* have been residing in Sweden for at least two years for the partnership registration to be allowed; see also E1.

E7 - *Marriage*: See E3. *Registered partnership*: See E5.

E8 - *Marriage*: See E3. *Registered partnership*: As long as at least one of the parties *either* has Danish, Dutch, Icelandic or Norwegian citizenship (i.e. equivalent to Swedish citizenship) *or* has been resident for at least two years in Sweden, they can register their partnership; see E1.

E9 - *Marriage*: See E3. *Registered partnership*: As long as the resident foreigner *either* has Danish, Dutch, Icelandic or Norwegian citizenship (i.e. equivalent to Swedish citizenship) *or* has been resident for at least two years in Sweden, they can register their partnership; see E1.

E10 - *Marriage*: See E3. *Registered partnership*: See E5.

E11 - It is not allowed for sisters and brothers (biological or by adoption) to marry each other (Art. 3(1) of chapter 2 ÄktB). Half-brothers and half-sisters may not marry each other without a special permission from the state (Art. 3(2) of chapter 2 ÄktB). The same rules apply to partnership registration (Art. 3(1-2) of chapter 1 PL).

E12 - Parents and biological children are neither allowed to marry each other (Art. 3(1) of chapter 2 ÄktB), nor are they allowed to register as partners (Art. 3(1) of chapter 1 PL). However, if an adoptive parent marries the adopted child, the adoption automatically ceases to have any legal effects. The same goes for registered partnerships between adoptive parents and children (Art. 7(2) of chapter 4 FB and art. 1 of chapter 3 PL). From this you can conclude that such marriages and registered partnerships are possible. This has been widely criticised and the Government has on several occasions announced that this possibility will be abolished.

**Table F (Sweden): Authority for starting a civil marriage or registered partnership**

|  | Civil marriage |          | Registered partnership |                 |
|--|----------------|----------|------------------------|-----------------|
|  | Different-sex  | Same-sex | Different-sex          | Same-sex (1995) |
| 1. Registry of births, marriages and deaths  | No             | X        | X                      | No              |
| 2. Local population administration           | No             | X        | X                      | No              |
| 3. Church                                    | Yes            | X        | X                      | No              |
| 4. Court                                     | Yes            | X        | X                      | Yes             |
| 5. Private person with special authorisation | Yes            | X        | X                      | Yes             |
| 6. Public notary                             | No             | X        | X                      | No              |
| 7. Administrative magistrate                 | No             | X        | X                      | No              |

**Notes to table F**

F1 - No such possibility is provided for; see F3-F5 below.

F2 - Idem.

F3 - A legally valid marriage can be performed either by a priest belonging to the Church of Sweden (art. 3(1) of chapter 4 ÄktB) or a priest or other official of certain other churches or religious organisations (art. 3(2) of chapter 4 ÄktB). No such possibilities exist for legally valid celebrations of registered partnerships.

F4 - A legally valid marriage can also be performed by a district court judge (Art. 3(3) of chapter 4 ÄktB). The same goes for a legally valid celebration of a registered partnership (art. 8 of chapter 1 PL). The ceremonies are almost identical.

F5 - A legally valid marriage can also be performed by any individual who has received special authorisation from the County administration to do so (Art. 3(4) of chapter 4 ÄktB). The same goes for a legally valid celebration of a registered partnership (art. 8 of chapter 1 PL). The ceremonies are almost identical. The use of this alternative is less common than the one mentioned in F4 above, both for marriages and registered partners.

F6 - No such possibility is provided for; see F3-F5 above.

F7 - Idem.

**Table G (Sweden): Means of ending a marriage or registered partnership**

|   | Civil marriage |          | Registered partnership |                 |
|---|----------------|----------|------------------------|-----------------|
|   | Different-sex  | Same-sex | Different-sex          | Same-sex (1995) |
| 1. By court decision (after joint or individual petition)   | Yes            | X        | X                      | Yes             |
| 2. By mutually agreed contract (outside court)  | No             | X        | X                      | No              |
| 3. Unilaterally by one partner (outside court)  | No             | X        | X                      | No              |
| 4. By conversion of marriage into registered partnership, or vice versa (outside court)                                   | No             | X        | X                      | No              |
| 5. By one registered partner marrying a third person (or starting a registered partnership with a third person)           | No             | X        | X                      | No              |
| 6. By the registered partners marrying each other (or by the married partners starting a registered partnership together) | No             | X        | X                      | No              |
| 7. By administrative decision (after joint or individual petition)  | No             | X        | X                      | No              |

**Notes to table G**

G1 - Art. 2 of chapter 2 PL stipulates that chapter 5 ÄktB applies *mutatis mutandis* also to the dissolution of a registered partnership. Chapter 5 ÄktB provides that dissolution can be obtained by a court decision, immediately if the spouses agree and neither one of them is living with a child under the age of 16 over which that spouse has parental authority, and otherwise after a 6 months period of reconsideration (art. 1-2 of chapter 5 ÄktB).

G2 - No such possibility is provided for.

G3 - Idem.

G4 - Idem.

G5 - Idem. In fact, marrying a third person would be a criminal offence for any person who is already married or a registered partner (art. 1-1a of chapter 7 of the Penal Code).

G6 - No such possibility is provided for.

G7 - Idem.

**Some literature in English**

- Yuval Merin, *Equality for Same-Sex Couples. The legal recognition of gay partnerships in Europe and the United States*, Chicago/London: The University of Chicago Press, 2002, p. 94-103.
- Åke Saldeen, 'Sweden', in: C. Hamilton & A. Perry (eds.), *Family Law in Europe*, second ed., London/Edinburgh, Butterworth Lexis Nexis, 2002, p. 619-660.
- Matti Savolainen, 'The Finnish and Swedish Partnership Acts - Similarities and Divergencies', in: K. Boele-Woelki & A. Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, Antwerp: Intersentia, 2003, p. 24-40.
- Lars Tottie, *Äktenskapsbalken* [a commentary to the Marriage Code], Norstedts Förlag, Stockholm 1990.
- Hans Ytterberg, 'From Society's Point of View, Cohabitation Between Two Persons of the Same Sex is a Perfectly Acceptable Form or Family Life". A Swedish Story of Love and Legislation', in: Robert Wintemute & Mads Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships*, Oxford: Hart Publishing, 2001, p. 427-436.

For more literature references, see the database of the CERSGOSIG project at [www.cersgosig.informagay.it/](http://www.cersgosig.informagay.it/).



## Sociological Questions

### An epilogue to « More or Less Together »

by Eric Fassin<sup>1</sup>

Legal discourse most often presents itself as a statement of facts, a declaration of values, or the unfolding of an argument - and sometimes, alternately or simultaneously, all of the above. For a social scientist, the comparative project put together by nine European lawyers under the direction of Kees Waaldijk is particularly fascinating because of its somewhat different presentation. It is more than facts, values, and more than an argument. Its specific interest resides in its taking the form of an artefact. The neatly-ordered tables and colorful pie-charts, as well as the near-perfect quantification (thirty-three questions, each worth up to three points, totalling a maximum of ninety-nine, thus allowing an easy calculation of percentages), keep reminding us that this comparison is indeed a methodological construct. Thus, "levels of legal consequences" (of marriage, cohabitation, and registered partnerships) should be apprehended as a *research tool*. There lies perhaps its greatest originality.

#### *Three arguments*

Not that the facts, in themselves, are of minor value: on the contrary, they provide a most useful resource. The rapid changes in the legal landscape revealed by the politicization of "same-sex unions" have been almost impossible to keep track of. Therefore, if putting together the information in this volume clearly required considerable effort, the result is definitely worthwhile, despite the constant updating it will surely require. But this accumulation of information is much more than a mere compendium of facts. The first, major argument that underlies the empirical data collected here is that, if legal consequences are to be taken into account, there is no universal definition of marriage (let alone registered partnership or even more clearly informal cohabitation): what marriage means depends on the meanings it is invested with by different societies at different points in time.

For example, in terms of legal consequences, for same-sex couples, marriage means less in Belgium than registered partnership does in Sweden and the Netherlands; and in these last two countries, informal cohabitation means more legally than registered partnership does, not only in Belgium, but also in France and Germany. The political implications of this point are obviously important. So are the practical ones: private international law could take these variations into account, and consider marriage (as well as alternative forms of legal recognition), not as a universal standard, but as currency for which rates of exchange need to be determined. But the methodological insights are no less interesting. This is a comparative project that takes into account the difficulty of comparing pears and apples - or rather different realities under the same name, as well as equivalent realities under different names.

The second argument is equally interesting: in all nine countries surveyed here, informal cohabitation entails legal consequences. One could say it is a modern form of "common law marriage". This is an important point. Otherwise, one might be tempted to characterize the rise of informal personal arrangements throughout Europe as a "privatization of private life" - individuals organizing their intimate relationships without the interference of the State. Actually, in the same way that informal cohabitation cannot be described by contrast to marriage as an absence, but rather as a different degree of commitment, it cannot be defined by an absence, but rather a lesser degree of State involvement. The battle for same-sex marriage thus reveals a broader issue in contemporary "liberal" societies that feminism had already established as its central tenet: the "two spheres"- public and private - cannot and should not be separated. "Privacy" is no absolute, even in a context of lesser institutional definition of private life.

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The third argument presented in this volume is that the registered partnerships that had appeared by 2003 in these nine European countries are to be apprehended not only in relation to marriage, but also to informal cohabitation. It is true that in some ways such partnerships can be described, in terms of their legal consequences, either as “semi-marriages” (in Belgium, France, and Germany) or as “quasi-marriages” (in the Netherlands as well as in the five Nordic countries examined here: Denmark, Iceland, Finland, Norway, and Sweden). But at the same time, these partnerships are to be understood in the context of preexisting legal definitions of informal cohabitation: the two lists would be the same - partnerships are closer to marriage in countries where cohabitation entails more legal consequences. This justifies fully studying not only partnerships and marriage, which are at the center of public debate as same-sex unions reached European political agendas, but also informal cohabitation, although it does not raise the same issues of legitimation, regardless of sexual orientation.

### ***Process and progress***

This methodological construct thus contributes much more than facts: it elaborates an argument - even a panoply of arguments. But it also implies, along with its narrative, a set of values. This is not to say that the legal experts who have contributed to this volume are “biased”: to start with, their data are not. However, their ideological commitment to the recognition of same-sex unions informs their approach: this is whiggish history, based on the assumption of the progress of sexual democracy. Of course, history supports this optimistic narrative: informal cohabitation, and its legal consequences, started gaining in importance in the 1970s, partnerships followed in the 1990s, for same-sex only and then also for different-sex couples, and since the early 2000s marriage itself has started opening to same-sex couples (in the Netherlands and Belgium), and soon in other European countries (in particular Sweden, and Spain - not included in this survey).

But at the same time, the methodological construct is organized around such premises: the standard of one hundred corresponds to different-sex marriage, and the rights (and obligations) attached to other statuses (or to same-sex couples) are measured by this standard. On this scale, the Netherlands is closest to perfect equality, not only because marriage now includes same-sex unions, but also because its legal consequences are almost equivalent to those for different-sex couples. At the other end of the scale, countries like France and Germany appear to be lagging behind. This process of modernization organizes the narrative: more rights attached to informal cohabitation seem to prepare the ground for the opening of marriage to same-sex couples. The question of sexual discrimination thus takes its place in a much broader narrative about the legal status of couples, regardless of sexuality.

Of course, some might criticize the ideological underpinnings of such a history: what is here analyzed as the progress of legal modernization could also be criticized as a process of social normalization - thus emphasizing the darker side of whiggish history. Such a perspective is present in the debates on same-sex marriage in particular: what some present as the emancipation of gays and lesbians, others will denounce as the imposition of heterosexual norms upon queer practices. But this is precisely where the methodological construct helps go beyond such an opposition: this narrative is worthwhile because it helps make sense of an evolution. It provides a perspective that illuminates reality differently. Replacing the specific issue of same-sex marriage in the context of the evolution of marriage and couples more generally sheds new light on the recent history.

The nine countries studied here may all be defined by the introduction of registered partnerships. But there is a major difference: what was early on reserved to same-sex couples in Nordic countries (Denmark, Norway, and Sweden, as well as Iceland) was then opened equally for different-sex couples (in the Netherlands, France, and Belgium). This changes the meaning of registered partnerships: what was presented as an alternative to marriage, in the early 1990s, later appeared as an intermediate form (and in social practice as a transitional stage) between informal cohabitation and marriage - and possibly as stepping-stone towards the opening of marriage to same-sex couples, as in the Netherlands and Belgium. French legislators may not have followed this path, but their anxieties reveal that this shift from alternative to transition is very much present in everyone’s mind today. Thus, the most recent examples of Germany and Finland, returning to a specific status for same-sex couples, might be understood as a reaction against this new logic.

### ***Alternative narratives***

This is not to say that the narrative underlying the present study is the only one possible. In fact, it is even more interesting if we take into account, not only the elements that confirm the logic of legal modernization and individual rights, but also those that do not quite fit in this picture of emancipation - not that they are left out of the picture, but on the contrary, as they are revealed by this study. The question is not any longer: underneath this liberal movement, is there not in fact a process of normalization? But rather: are there not different, potentially contradictory logics unfolding at the same time, and sometimes at odds in marriage (as well as registered partnership)? In this respect, two elements are of interest. One is particularly visible: parenting. The other does not stand out as much in the tables: citizenship.

To begin with citizenship, it is worth noting that whereas this issue does appear in the category "other legal consequences" (table C, 2 and 3), it is not represented on its own in the pie charts (two out nine motley consequences). This is the question raised in the study itself: do all items matter equally? For example, does the next question (table C, 4), on the right to refuse testimony against one's partner, carry comparable weight? Of course, it depends on the perspective. Moreover, citizenship is also very important as a prerequisite, as much as a consequence (table E, first 10 questions out of 12). This is one issue where the privilege of marriage remains important - and where the benefits of registered partnership are worth a great deal. And this also perhaps an issue where the liberalizing trend underlying the narrative of this study may encounter an opposite trend towards more control: there is no "informalization" of citizenship. Thus, there may be a tension between the logic of same-sex unions, and that of mixed marriages - European states proving more liberal within their borders, and less liberal at their borders.

There is an easy transition to the other question, that of parenting - as it includes issues of international adoption (or even the globalization of the politics of reproduction, for example in access to reproductive technologies). In this study, the specificity of parenting consequences is taken into account. The pie charts based on table A are the ones with the most "pink", and even more "red" - *i.e.* marriage matters most in issues of parenting, even more so for same-sex couples. Limitations of rights attached to same-sex partnerships (see in particular France) and even same-sex marriage are first and foremost related to parenting issues (see for example Belgium). This raises a question: what would another kind of study show, starting from parental rights, and not couple rights? Would the narrative of modernization look very different, if the parental relationship were the lens through which these issues were approached?

What we have here is perhaps a European narrative - not surprisingly, as this is a study conducted by Europeans about European countries. Parental rights may or may not follow from the rights of couples. It may very well be that the narrative would be quite different elsewhere - *e.g.* in the United States. On the other side of the Atlantic, one of the arguments frequently invoked (in the courts and outside the courts) to justify opening marriage to same-sex couples is that gays and lesbians have already established themselves as good parents. Parental rights may then open the way to rights for couples. On this side of the Atlantic, the logic seems to work the other way around: access to reproductive rights is often perceived as a potential consequence of partnership or marriage<sup>2</sup>.

Is the American symmetrical version more or less than the European one based on a narrative of democratic progress? How much weight does the model of the "family" carry on each side - whether the couple's autonomy is represented *a priori* or *ex post*? Or does the question of the family counterbalance (if not undermine) the liberal representation of individuals in either case? This would certainly be worth meditating. Let us just suggest that there is a paradox in both sequences - as births out of wedlock remain much more of a stigma on the other side of the Atlantic than on this one. In practice, babies precede unions more frequently in Europe; but legally, it is rather in the United States that marriage can be justified by the parental status. There is indeed a discrepancy, on both sides, between legal and social representations.

### ***Law and society***

This legal study initiates a discussion with the social sciences - demographers, as well as anthropologists and sociologists. Indeed, it raises anew a classical question on the relationship between law and society, *i.e.* laws and norms or practices. This question usually works in one of two ways: are laws a determining factor in social evolutions - or the other way round? This is of course a variation on the traditional metaphysical joke: which came first, the chicken or the egg? It is not likely to be answered this time either. However, it is worth considering the two sides of the question. Do social evolutions explain legal reforms? And do legal reforms explain social evolutions?

The first question leads us to pay attention to what we know of social transformations in these nine countries. In particular, since the starting point of the historical narrative provided by this study is informal cohabitation, what do we know about it? Clearly, the legal chronology here follows the social evolution: throughout Europe, marriage rates have been declining since the 1970s (or to be more accurate declined until the mid-1990s), and cohabitation rates have been rising since the 1980s. Legal rights attached to informal cohabitation and registered partnerships thus reflect this broad social evolution. However, things become somewhat more complex if we look at comparative figures for different countries.

In Southern Europe (and Ireland), cohabitation is low - which helps understand the absence of registered partnership laws, at least until today (Spain should soon force us to revise our preconceptions). But if we only consider countries included in this study, there are interesting revelations. As was to be expected, since

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<sup>2</sup> This argument is developed at greater length in my article: " Same Sex, Different Politics: Comparing and Contrasting 'Gay Marriage' Debates in France and the United States ", *Public Culture*, Spring 2001, vol. 13, n° 2, pp. 215 - 232.

Scandinavia first showed the way for registered partnerships, cohabitation is very high in Nordic countries - but also, more surprisingly, in France. Cohabitation is much lower, as was to be expected, in Germany - but also, more surprisingly, in Belgium and the Netherlands<sup>3</sup>. If we look at another indicator, the same "hierarchy" can be found: extra-marital births are very low in Southern Europe and Ireland, very high in Scandinavia, but also in France, and intermediate in Germany, but also in Belgium and even the Netherlands<sup>4</sup>.

What this probably means is that there is no straightforward equivalence or simple causal relation between social evolutions and legal reforms. The legal ranking displayed in this study does not accurately reflect the social ranking derived from demographic surveys. What is missing from such a picture is the public sphere, in which social realities are articulated into political issues, and then potentially translated into legal realities. Politics is the process of transforming social evolutions into legal reforms, not only as a reflection of preexisting realities, but also as a performative interpretation of society. If the articulation between law and society is to be understood, it should not only take into account demographic facts, not only the way in which social actors experience these facts, but also the way they are represented politically in the public sphere.

Let us bear this in mind as we turn the question around. Are laws the key to social practices? And in particular, can the level of legal consequences be a good predictor of the frequency of partnership registration? Actually, this could also apply to the differences in marriage rates: are they related to varying legal consequences - or (more precisely), are these differences a consequence of such variations (since we already know that cohabitation rights followed the rise of cohabitation, thus decreasing the relative legal value of marriage and perhaps precipitating its statistical decline)? As Kees Waaldijk wisely points out, not only is the so-called "LLC" bound to be just one among many factors, but even that factor may be difficult to appreciate correctly as social actors may not be as knowledgeable about legal consequences as the legal experts who, with considerable effort, assembled the data for this study. We do not know very well why people do marry, or register their partnerships; and they may not know it themselves.

But at the same time, this complexity could be demonstrated thanks to this study. If both the Netherlands and France confirmed relatively high rates of registered partnerships, despite the fact that legal consequences are high in the former country and low in the latter, one could measure how little legal incentives matter. Perhaps partnerships reserved to same-sex couples prove less attractive to gays and lesbians (as seems to have been the case for Scandinavia) as they may be reluctant to endorse a "separate but equal" status<sup>5</sup>. Moreover, in the Netherlands, for same-sex couples, legal consequences are identical for marriage and registered partnership. Studying the intimate strategies of Dutch gay and lesbian couples will thus help understand better why people choose one or the other option - regardless of legal consequences. This may well be a way to approach the symbolic meaning attached to legal institutions.

### ***From answers to questions***

Finally, this study will probably turn out to be as interesting for the questions it raises as for the answers it helps provide. If legal consequences cannot fully account for rates of marriage or registered partnerships, then one has to wonder how the meaning of marriage is transformed by the emergence of registered partnerships, and the new rights attached to informal cohabitation. Political debates reveal a great deal about the new meaning of marriage. In France, opponents of the *pacte civil de solidarité*, in the late 1990s, and again more recently, in 2004, opponents of the recognition of same-sex marriages have been quite willing to concede practical benefits to same-sex couples, as long as they stayed clear from marriage itself. Actually, the very same politicians who had opposed the pacs now only wanted to improve it - in order not to go further in the direction of marriage.

This is not specific to France: in the United States, President George W. Bush has expressed his support for an amendment to the Constitution against "gay marriage", while conceding an interest in civil unions a few days before his 2004 (re-)election. In the same way, dissenting voices in the 2003 Massachusetts Supreme Court decision *Goodridge v. Public Health* were willing to go to great practical lengths to salvage the heterosexual exception of marriage: same-sex and different-sex couples should be equal in rights, as long as they are separate. This means that the opposition to gay and lesbian political claims aims at preserving at least the symbolic meaning of marriage.

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<sup>3</sup> Kiernan, Kathleen. "The State of European Unions: An Analysis of Partnership Formation and Dissolution.", *Dynamics of Fertility and Partnership in Europe: Insights and Lessons from Comparative Research*. Vol. 1. Edited by Macura, M. and Beets, G., UN, 2002, pp. 57-76.

<sup>4</sup> « Evolution démographique récente en Europe » (« Recent Demographic Developments in Europe »), Conseil de l'Europe, 2003 (European Council), Table 3.2, p. 66.

<sup>5</sup> For early comparative elements, see Patrick Festy, « Pacs : l'impossible bilan », *Population & Sociétés*, 369, June 2001. See also different contributions to the volume *Same-Sex Couples, Same-Sex Partnerships & Homosexual Marriages*, Marie Digoix and Patrick Festy eds., "Documents de travail INED", 124, 2004.

This symbolic reading of marriage may be precisely what is at stake in the practices of same-sex couples - as evidenced also in countries where civil marriage is *not* available, whether it be through religious ceremonies in the United States or "private" ceremonies of *pacs* in France. What happened in San Francisco around Valentine's Day in 2004, or a few weeks later in Massachusetts, can be understood symbolically. Many gays and lesbians who do not favor marriage were moved, even tempted by such demonstrations. The meaning of marriage was thus redefined, both for those who did marry and many others, as a form of "coming out" - a coming out for individual gays and lesbians, and a coming out of homosexuality. Marriage is a public language for intimate feelings and private practices.

This perspective is not directly part of the legal consequences studied here; but, thanks to the questions this volume raises, it becomes visible as we realize the importance of symbolic resistance to, and symbolic reclaiming of marriage for same-sex couples. This is all the more interesting as it happens precisely in an age that had been described before as "*démariage*", *i.e.* as a de-institutionalizing of marriage, transformed into a mere private choice. In fact, as the symbolic battle makes clear, marriage may be today more ambiguous than we had realized, and as the symbolic battle makes clear. Marriage as the ultimate form of "coming out" for same-sex couples is perhaps what surfaces from the paradoxes of variable legal consequences.

If the study helps rethink the definition of marriage, it also raises questions about the definition of a couple. What is a couple - today? This question is important, not only in theoretical terms, but also in political terms (who has access to the different rights linked to cohabitation, partnerships, and marriage?), as well as in scientific terms (if demographers and sociologists or anthropologists are to study couples, how are they to define them?). One might be tempted to say that a defining feature is cohabitation. This is after all the way legal rights attach to a relationship that would not otherwise be sanctioned by the State - *i.e.* through informal cohabitation (which usually entails "obviously a joint address", as Kees Waaldijk reminds us). But is cohabitation a defining element of registered partnerships? And what about marriage itself?

In fact, the criterion of cohabitation figures nowhere in this study - neither in the list of consequences, nor even in the list of prerequisites. Couples are not defined here by cohabitation. And indeed, many cohabitants would not be considered as a couple; while quite a few couples do not reside together, out of choice or necessity. Cohabitation is thus simultaneously too broad, and too narrow a criterion to define couples. But, at least in French law, does not the Civil Code state that "spouses mutually oblige themselves to a community of living" (article 215)? And is not the abandon of the home grounds for divorce: "A spouse may petition for divorce by reason of an extended breakdown of community life, where the spouses have lived apart in fact for six years." (article 237)? Certainly, jurisprudence is hesitant. But at least symbolically, does not the presumption of cohabitation still play a role in defining couples - not only according to social norms, but even legally? And is this not what links together, though implicitly perhaps, informal cohabitation, registered partnerships, and marriage?

What about sex, then? Sex does feature here. As the criterion is somewhat drily described (C9): "partners have a duty to have sexual contact." This is true for Belgium, but only in the case of marriage (both same-sex and different-sex), and more remarkably for France, not only in marriage, but also apparently both for *pacs* and *concubinage*, whether same-sex or different-sex. The French exception thus translates as compulsory sexuality (even compulsory homosexuality!). Again, the Civil Code goes further in prohibiting infidelity - but only in the case of marriage: "Spouses mutually owe each other fidelity" (article 212). But France is an exception - or almost. In addition to Belgian marriage, one could mention Swedish cohabitation (see the note to question C9: "for an informal cohabitation to come under the provisions of the Cohabitation Act, the relationship must be of such a nature, that sexual relations are usually considered an integral part of it.").

Or is it? Is France exceptional in its presumption of sexuality - or only in making it explicit? After all, as the comparative analysis reminds us, for marriage, "in all nine countries the condition applies that neither partner should be a sister, brother, parent or child of the other partner." But the same also applies to registered partnerships: "The only exception is Belgium, where intergenerational and inter-sibling partnerships can also be registered." But is this not the exception that confirms the rule? Was not this possibility preserved in Belgium precisely in order to distinguish partnerships from marriage while marriage was reserved to different-sex couples? In the same way, the Swedish loophole in the legislation may not undermine the rule. Marriage between adoptive parent and child is theoretically possible; but "this has been widely criticised and the Government has on several occasions announced that this possibility will be abolished." (see the note after question E12) In a word, rather than a radical desexualization, the systematic prohibition of incest does confirm some presumption of sexuality throughout Europe, at least for marriage and registered partnerships (questions E11 and E12 are not envisaged for informal cohabitation).

This does not mean that marriage (or registered partnerships, or informal cohabitation) should (still) be defined by cohabitation, nor even by "sexual contact". Rather, there seems to be a tension between two potentially contradictory, though equally modern logics. On the one hand, same-sex couples might point in the direction of a radical modernization (in the sense of privatization and individualization) of marriage, and other

contemporary forms of organization of private life. In this perspective, a couple is defined neither by sex nor by a home. A couple is two people who call themselves a couple - which means there is no institutional definition, but only an individual self-definition.

On the other hand, why two - if not because this reinvention of marriage is to be understood against the background of the history of matrimony? This history should not simply be understood as a legacy of the past and a burden on the present. In fact, this competing logic is no less modern - but differently. Marriage (and the lesser forms of partnership and cohabitation) cannot be understood merely as a practical arrangement, designed in terms of its legal consequences. Rather, this renewed institution should be apprehended as a symbol of gay and lesbian coming out, undermining the hierarchy of sexualities. Therefore, this other logic results in a social gesture, not simply private, as it is a claim for legitimacy, nor merely individual, as it reclaims the form of the couple.

This logic premised on the symbolic redefinition of history can thus be seen as the alternative visage of modernization. And the contemporary evolution of couples, whether same-sex or different-sex, and the legal forms of recognition they appropriate, should be understood as the point of tension between these two competing forms of modernization. There lie capacities for invention, not as the inevitable unfolding of the logic of modernity, but in the tensions of contradictory aspects of modernization, embodied in individuals trying to invent themselves as couples<sup>6</sup>.

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<sup>6</sup> Anthropological and sociological works on this tension could be traced to Kath Weston's pioneering *Families We Choose. Lesbians, Gays, Kinship* (Columbia U.P., New York, 1991), and more recently to *Same Sex Intimacies. Families of Choice and Other Life Experiments*, by Jeffrey Weeks, Brian Heaphy, and Catherine Donovan, Routledge, London and New York, 2001. I have tried to envisage the possibility of invention within marriage and family in: " Lieux d'invention. L'amitié, le mariage et la famille ", *Vacarme*, special issue on " Michel Foucault ", Fall 2004, n° 29, pp. 120-123 ; and : " Couples homosexuels et familles homoparentales ", *Femmes, sexe ou genre. L'état des savoirs*, Margaret Maruani ed., La Découverte, Paris, 2005, ch. 22, pp. 184-191.

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