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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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Introduction

by Kees Waaldijk¹

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,² 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.³ 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.⁴

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;

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

³ 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.

⁴ 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 shorts 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?

