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

Comparative analysis

by Kees Waaldijk ¹

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.² 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.³

On the basis of the national chapters about the nine countries, and on the basis of the Comparative overview ⁴ 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.⁵ 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).⁶ This condition also applies to same-sex marriage in Belgium and the

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² 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).

³ See the introductory chapter in this report.

⁴ The Comparative overview can be found on the pages before this Comparative analysis.

⁵ 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.

⁶ 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.⁷ Yet, of the 33 legal consequences taken into account in this survey, only twelve consequences apply to different-sex marriage in all countries,⁸ 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.⁹ 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.¹⁰ In all countries registered partnership is conceived as a legal institution *more or less analogous* to marriage.¹¹ 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).¹² 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).

⁷ 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.

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

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

¹⁰ That is in fact why these nine countries have been included in this study.

¹¹ More about that at the end of this paragraph.

¹² 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 partnership¹³ 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,¹⁴ and in Denmark, Iceland and Norway, where the presumption of paternity (A1), medically assisted insemination (A2), and joint adoption (A5) are excluded.¹⁵

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,¹⁶ 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,¹⁷ 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,¹⁸ 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).¹⁹ With respect to medically assisted insemination, discrimination between married and registered women is only unlawful in Finland, France, Belgium and the Netherlands (see D4).

¹³ 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.

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

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

¹⁶ See A1, A2, A4 and A5. See also the previous note.

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

¹⁸ These are: A1, A4, A5, B6, C1 and C3.

¹⁹ 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.²⁰ 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).²¹ 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),²² and different-sex cohabitants to much more.²³

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).²⁴

²⁰ See the introduction in the chapter on Iceland.

²¹ Apart from the obvious possibility of individual adoption (A6).

²² Apart from the obvious possibility of individual adoption (A6).

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

²⁴ 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).²⁵ 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%.²⁶ 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).²⁷ 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.²⁸

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%),²⁹ followed by Iceland (63%), Norway, Finland and Denmark (around 55%), and then by Belgium and

²⁵ 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.

²⁶ 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).

²⁷ 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).

²⁸ 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).

²⁹ 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 a 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.³⁰ 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*'.³¹ The lower LLC of registered partnership in Germany, France and Belgium signals that in these countries registered partnership only has a limited selection

³⁰ 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.

³¹ See note 2, above.

of the consequences of marriage; therefore registered partnership in these three countries can be characterised as '*semi-marriage*'.³² 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%),³³ 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

³² Idem.

³³ 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).³⁴ 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,³⁵ 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).³⁶

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.

³⁴ 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.

³⁵ 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).

³⁶ 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).

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 Norway	Denmark Sweden	France	Belgium	Iceland Germany	Finland	
Legislation against sexual orientation discrimination			Norway	France Denmark Sweden	Netherlands	Finland Iceland	Belgium
First recognition of same-sex cohabitation		Netherlands Sweden		Denmark	Norway France	Belgium (Finland?) (Iceland?)	Germany
Introduction of registered partnership				Denmark	Norway	Sweden Iceland Netherlands France	Belgium Germany Finland
Opening up of marriage							Netherlands 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.³⁷ 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).³⁸ 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.

³⁷ 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.

³⁸ 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.³⁹

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.),⁴⁰ other consequences are clearly disadvantageous (higher taxes, lower social security).⁴¹ 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.⁴² 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).⁴³

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%),⁴⁴ 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

³⁹ 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.

⁴⁰ See A1 to A7, B5 to B13, C1 to C4, C6, C7 and C8.

⁴¹ See B14 to B17.

⁴² See B5, B6, B12, B13 and C8.

⁴³ 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.

⁴⁴ 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).⁴⁵ 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.⁴⁶ 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.

⁴⁵ 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.

⁴⁶ See the points (rather than the percentages) in table O.

