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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>

Version: Not Applicable (or Unknown)

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Note: To cite this publication please use the final published version (if applicable).

Sociological Questions

An epilogue to « More or Less Together »

by Eric Fassin¹

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 marriage².

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

² 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 Netherlands³. 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 Netherlands⁴.

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" status⁵. 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.

³ 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.

⁴ « Evolution démographique récente en Europe » (« Recent Demographic Developments in Europe »), Conseil de l'Europe, 2003 (European Council), Table 3.2, p. 66.

⁵ 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 couples⁶.

⁶ 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.