Swiss Institute of Comparative Law (SICL)
Video Conference "Family Status, Identities And Private International Law. A Critical Assessment In The Light Of Fundamental Rights", Session IV, May 12th 2022

Comparative overviews on the closing gap between same-sex marriage and partnerships

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Historical situation of unmarried couples

- Antiquity: only legally recognized form of coexistence for couples was marriage between people of opposite sex.

- Coexisting with the admission *de facto* of couples living together.

- Triumph of Christianity (4th century): same-sex relationships were not only not recognized, but even punished (Oscar Wilde, Nazi Germany).

- Heterosexual concubinage: initially tolerated by secular powers but regarded with disfavor by the Church. Liberal State: "laicization" of marriage and a parallel exclusion of concubinage, same-sex relations condemned.

Historical situation of unmarried couples

- Legal regulation of family relationships: "traditional" concept of the family, other family forms not being recognized and protected by law — Strong *heteronormative* conceptualization of marriage.

- 1960s: sexual revolution promoted a change of mentality and a liberalization of conceptions, increasing rate of cohabitation. Same-sex relationships began to be seen acceptable.

Historical situation of unmarried couples

- Paradigm of marriage as family model progressively displaced in Europe towards cohabitation, and a general legal trend towards the recognition of same sex couple's rights in the European area.

- Until the end of the 1980s no legal recognition of same-sex relationships, but from ca. 2000 it has been an important issue discussed around the world.
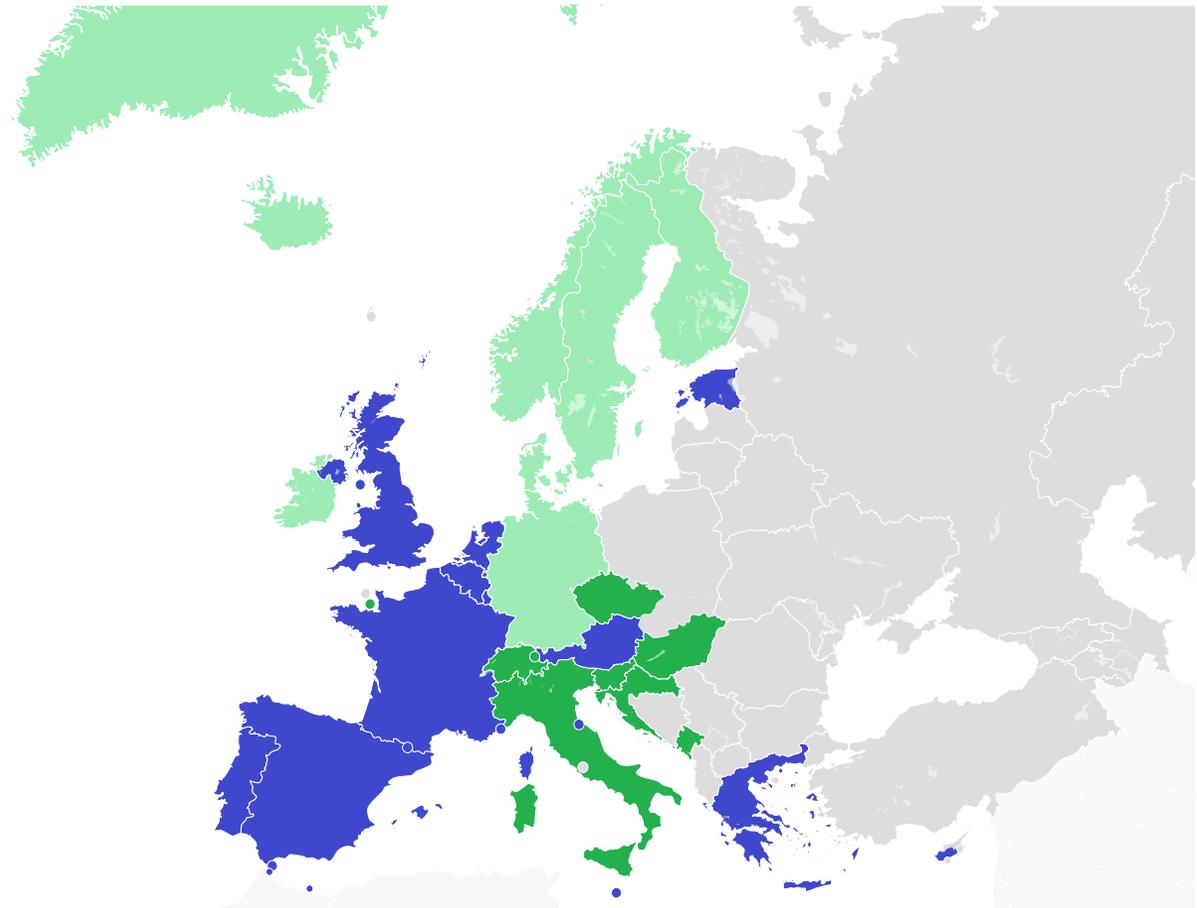
Legal recognition of unmarried couples and same-sex marriage

- Currently 31 of the 50 countries and the 8 dependent territories in Europe recognise some type of same-sex unions, among them 23 Members States of the 27 EU countries.

- Denmark was the first (1989), followed by other European countries.

- In seven of them the law on cohabitation applies only to same-sex couples establishing a registered "partnership", where in other countries it applies with different denominations to both same-sex and different-sex couples, and in other the partnership regulation has no reference to the couple's sexual orientation.

Legal recognition of unmarried couples and same-sex marriage

Countries performing partnerships in Europe

Gender-neutral civil unions.

Civil unions for same-sex couples only.

Former civil unions for same-sex couples, replaced by marriage.

Civil unions never performed.

Source: DaddyCell, Media Commons

Legal recognition of unmarried couples and same-sex marriage

- **Same-sex marriage**: first admitted in the Netherlands (2001).
- At present, 16 European States provide marriage for same-sex couples.
- In another 13 States in Europe, same-sex couples cannot marry but can enter a registered partnership or some form of contract or registration in some way similar to marriage.
- 6 EU Member States currently provide no legal recognition for cohabitation in general or especially same-sex relationships, although Poland and Slovakia recognise private contractual cohabitation (regardless of sexual orientation) for limited purposes.

Legal recognition of unmarried couples and same-sex marriage

Laws regarding same-sex partnerships in Europe

- Marriage
- Civil union
- Limited domestic recognition (cohabitation)
- Limited foreign recognition (residency rights)
- Unrecognized
- Constitution limits marriage to opposite-sex couples

Source: Silje L. Bakke, Media Commons

Legal recognition of unmarried couples and same-sex marriage

- Approximation in rights between same-sex partnership and marriage has been growing, tending in many cases to a practical identification of content.

- In some countries the figure of registered union in practice was as an alternative to marriage: when same-sex marriage has been regulated, registered partnership has been suppressed.

- Definition of marriage is an expression of the *national identity* of a country, and remains a national competence. Some EU Member States ensure a constitutional definition of marriages as the "traditional" heterosexual ones.

Legal recognition of unmarried couples and same-sex marriage

- Denmark: partnership gives status very similar to the spouses; in the other countries rules for the legal recognition of same-sex couples have been modelled on the model of marriage.

- Italy: *Cirinnà* Act (2016) attributes to the partners of a *unione civile* a large part of the rights and duties of married couples; Slovenia's Civil Partnership Act (2017) gives partners the same rights as married couples, except for access to joint adoption and *in vitro* fertilization.

- Poland: does not regulate at all cohabitation, even when they were concluded abroad (at least until the *Coman* doctrine will produce effects).

Home recognition of unions constituted abroad

- Differences between EU Member States in legal recognition for same-sex couples: they may encounter difficulties when travelling, moving to or residing in other EU Member States.

- Art. 52 (3) of the CFREU: the meaning and scope of the rights guaranteed by the ECHR are to be the same as those laid down in the Convention: within the EU, the rights guaranteed in Art. 7 of the Charter correspond to those in Art. 8 of the ECHR.

Home recognition of unions constituted abroad

- **ECtHR case law**: all the States should ensure that their legislation —even not recognizing same-sex marriage— provides registered same-sex couples with the same rights and benefits as married or registered different-sex couples.

- *Schalk and Kopf v. Austria* (2010): a same-sex couple in a stable relationship would have to be considered as a family-like union. It does not mean that Member States have to allow same-sex couples to marry.

- *Vallianatos and Others v. Greece* (2013): when a new form of non-marital relationship is disciplined by the law, it must be accessible both to heterosexual and homosexual partners; stable *de facto* same-sex partnership also falls within the notion of "family life".

# Home recognition of unions constituted abroad

- *Oliari and Others v Italy* (2015): obligation to provide legal recognition for same-sex couples.

- *Chapin and Charpentier v. France* (2016): the States "enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition" of same-sex relationships and its differences concerning the rights and obligations conferred by marriage.

- *Orlandi and Others v. Italy* (2017): need for same-sex couples to be legally recognised and protected, and their rights would be fulfilled if they could register their overseas marriages as civil unions with a legal status equal or similar to marriage in many respects.

Home recognition of unions constituted abroad

- **CJEU:** *Coman and Others v. Romania* (2018) has obliged Member States to recognize same sex marriage, for the purposes of free movement. The term "spouse" in the Free Movement Directive is gender-neutral — although some Member States are not implementing the *Coman* ruling (European Parliament, 2021).

- US Supreme Court in *Obergefell v. Hodges* (2015): all US States must open marriage to same-sex couples and recognise same-sex marriages validly performed in other jurisdictions, but the EU does not have the competence to require the Member States to open up marriage for same-sex couples.

Home recognition of unions constituted abroad

- Case law on the Directive on Equal treatment in employment and occupation (cases *Maruko*, 2008; *Römer*, 2011; and *Hay*, 2013): when a Member State has created some form of union for same-sex partners, it may not create an arbitrary difference in treatment between marriage, not open to such partners, and this form of union. — It could cause a sort of "reversed discrimination".
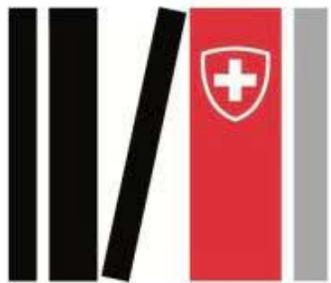
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Thank you for your attention!