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Same-sex unions in Europe

Some Observations on European Diversity

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Same-sex unions gained considerable legal recognition in Europe over the last few decades. Denmark (1989), Norway (1993), Sweden (1995) and Iceland (1996) were the first countries that introduced the so-called “civil partnership” for same-sex couples. These partnerships offered some – but not all – rights and duties generally associated with marriage. The provisions that were primarily excluded from these statutes included shared parenthood and the word ‘marriage’. Other West-European countries followed and soon same-sex marriage, including shared parenthood recognition, was legalized. This major transformation spread over Western Europe, from North to South, with some countries joining the general movement quicker than others. From a distance, the changes looked relatively uniform.

The degree to which same-sex couples have taken advantage of these new laws has created significant debate. In 1997, the Danish sociologist Henning Bech noted what he considered to be low union frequencies. He argued that the Danish LGBT movement had been fighting for a legal same-sex union statute but that individual LGBT people were not particularly interested in entering into one. Michael Warner (1999) picked this argument up and turned it into a political stance against same-sex unions. Soon after, Eskridge and Spedale (2006) and Lee Badgett (2009) found that European same-sex union frequencies were not particularly low and concluded that couples did register as soon as they had any interest in doing so. Many scholars joined either side of the debate and discussed normalization, hetero-normativity, gay citizenship and more generally the social organization of sexuality through gay marriage. My research does not argue for or against same-sex union registration. It uses same-sex union registration to analyze the social and political organization of homosexuality. It argues that the apparent legal uniformity of Western European evolution hides important and long-term diversities. The argument relies on two types of evidence: same-sex union registration and same-sex union statutes. Please note I will use the word “union” as a general category for same-sex civil partnerships, marriages, Pacs, etc., and “union registration” (UR) as the act to register the union by marriage or partnership registration.

Patterns of same-sex union registration (UR)

Little research has been done on the demographics of same-sex UR in Europe (Anderson et al., 2006; Digoix et al., 2004; Banens, 2010 and 2011). Some characteristics have been observed in all countries. The first year(s) boom is one of them. The first one or two years after introduction of the statute, enrollment numbers tend to be higher than the following years. This is generally explained by the stock of unregistered couples that had been waiting for the new statute to be introduced, but part of it may also be explained by the intense publicity that generally comes with the legal introduction. For the same reasons, registration numbers may go up again when new major legal changes are introduced, such as when a country that already recognizes same-sex domestic partnerships or civil unions opens the full status of marriage to same-sex couples. And, logically, they may be lower the last year(s) before such changes, because couples may prefer waiting for the new statute that offers increased rights and benefits as compared to options already available to them. Another characteristic that has been observed are the generally lower female UR rates. This reflects differences in the social and psychological organization of male and female homosexuality. Homosexually active men tend to live more frequently in metropolitan areas and show more individualistic and community-oriented behavior than women. Homosexually active women identify more frequently as bisexual and seem more couple-oriented than men. Moreover, male same-sex couples have been estimated as more numerous than female couples. A third observation concerns the diversity of statutes. Surprisingly, different statutes do not appear to be related to registration rates. Civil partnerships may show low UR rates in one country and high in others. The same is true for marriage. Moreover, although the addition of full marriage rights to already existing civil or domestic partnership statutes within a country may boost the UR rates for one or two years, the rates ultimately fall back to where they were previously in all cases.

Regarding UR frequencies, we can distinguish three groups of countries with high within group homogeneity and strong differences between groups. Scandinavia makes up the first group: Denmark, Sweden, Norway, Finland and Iceland. These countries invented the same-sex civil partnership in 1989-2002. These were also the first countries to abandon the civil partnership registration at the introduction of same-sex marriage (2009-2014). Forerunners in the legal recognition of same-sex couples, as they were in many gender and family issues, the Scandinavian countries do not, however, show high rates of same-sex URs, especially in the case of male couples. The number of annual all-male URs is around 4 for 100 000 male inhabitants. Excluding the first year boom, this number is rather stable over time. When the civil partnership changed to marriage, rates numbers increased by one or two points, but fell back to the initial level soon after. The annual number of all-female URs, on the contrary, has been steadily rising. In all Scandinavian countries, all-female URs started very low (1 to 3 for 100 000 female inhabitants), but have steadily increased since then. Female rates surpassed male rates at the beginning of the century. Their actual level holds between 7 and 9. Female

rates are now about twice as high as male rates. No other European country has experienced such differences between male and female rates.

The second group of countries could be called Atlantic: the United Kingdom, the Netherlands, Belgium, France, Spain and Ireland. These countries introduced same-sex UR in the period 1998-20010. They show rather high all-male UR rates, ranging from 9 to 16 for 100 000 male inhabitants (first year booms omitted). Female rates are close to male rates in the UK, the Netherlands and Belgium. They are considerably lower in France, Spain and Ireland, though they are increasing in a Scandinavian-like pattern. Indeed, the Atlantic group is less homogeneous than the Scandinavian group. All countries have in common high male UR rates, at least twice as high as in Scandinavia. But female rates differ. Around the North Sea (UK, Netherlands, Belgium), female rates were almost immediately as high as male rates and have remained so since then. In France, Spain and Ireland, female rates started far below male rates and although they continue to rise, they still trail behind male rates.

France, however, is an outlier. French male UR rates follow a pattern similar to that of women entering URs in Scandinavia. They started relatively low (with lowest value 7.3 in 2001) but have increased ever since, until they reached 16.6 in 2010, which was the highest rate until 2013 when they spiked to 20.6 after the passage of a French bill recognizing same-sex marriage. So, from 2008 onwards, France turns out to have higher same-sex UR rates than any other European country, in spite of severe internal criticism of their civil union status known as the *Pacs*. The reasons for this outlying pattern are unknown.

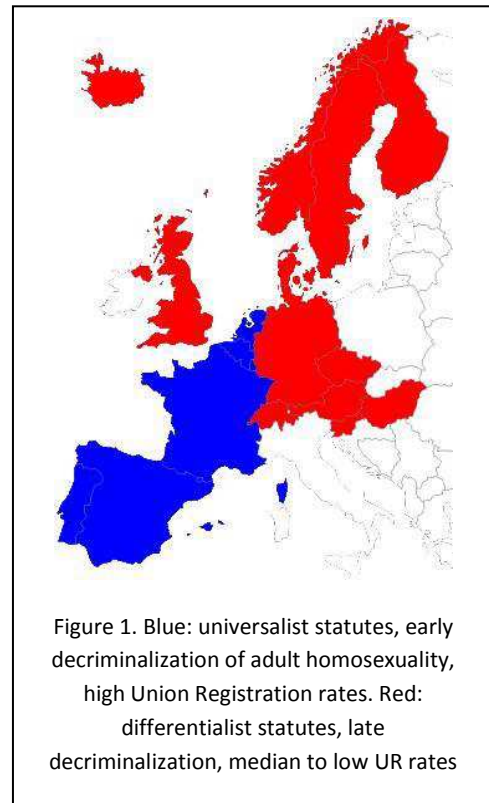
Central Europe offers the third group of countries: Germany, Austria, the Czech Republic, Hungary and Slovenia. They introduced same-sex civil partnerships in 2001-2010. Very low UR rates are their common characteristic. Male rates are between 0 and 5, female rates are between 0 and 4 for 100 000 inhabitants. Another similarity is that these countries, with the exception of Austria, publish data on UR rates irregularly, usually with long delays, and sometimes not at all. That is the case for Germany, where data have been estimated from annual surveys. In these countries, invisibility seems to be the rule not only for same-sex couples but also for State statistics more broadly.

Two countries do not fit these regional classifications. Switzerland has UR rates that are closer to Atlantic than Central European values. Portugal, in contrast, has UR rates that would classify it as a Central European country. Despite these two countries, the demographic analysis offered here cuts along geographical lines: three European regions stand out with distinct UR behavior.

Why different patterns?

Why do different regions show different patterns of same-sex union registration? What motivates cohabiting same-sex couples to register or not? Do same-sex couples cohabit as much in one country as in another? Are there as many same-sex couples in every country? Since Bech (1997), there has been research on all these questions (see for example the works of Festy 2006, Badgett 2009, Banens 2013, Rydstrom 2011), but we still lack answers. This paper highlights one aspect of the question: the type of citizenship – in the sense of national belonging – granted to same-sex partners.

The civil partnerships created by Scandinavian countries were restricted exclusively to same-sex couples. They were based on legal and symbolic separateness: marriage remained reserved for different sex couples while civil partnership was the only option for same-sex couples. In some countries (Germany, The Czech Republic, Hungary, Slovenia), this separateness was associated with unequal rights for same-sex couples in the areas of adoption, fiscal and social policy. In other countries (Scandinavia, England and Wales, Switzerland), legal rights and responsibilities came close to marriage, even if some differences remained like the presumption of parenthood and wedding ceremonies. Most importantly, the separate statutes maintained a symbolic difference: gay rights for gay citizens, straight rights for straight citizens. This plural conception of citizenship fitted into certain national political ideologies but not all. That is why the Scandinavian civil partnership was adopted by Germany, Switzerland, the UK and all Central European countries, but not by the Netherlands, Belgium, France, Spain and Portugal.



In 1998, the Netherlands created the first universal statute (“*geregistreerd partnerschap*”), open to both same-sex and opposite-sex families, though this new legal regime did not offer the full set of marriage rights. The Belgian *cohabitation contract* was the second, the French *Pacs* the third. In the following decade, the Netherlands, Belgium and Spain created same-sex marriage. In these countries, marriage eventually became a “universal statute” open to all couples. Though the Dutch partnership, the Belgian cohabitation contract, the French *Pacs* and the different same-sex marriages do not provide total parenting equality, they do intend to avoid subdividing society into different groups and specific citizenships.

It is important to note that the universalist wave did not start in France but in the Netherlands and that Belgium, Spain, and some years later Portugal, followed the Dutch

example, not the French Pacts. Moreover, the differentialist wave did not start in the UK but in Scandinavia and it reached Germany and Switzerland before the UK. European trends in legal recognition of same-sex unions can be described as universalism opposing differentialism, but not as French republican ideology opposing British community-oriented ideology.

As far as homosexuality is concerned, the opposition between universalism and separatism has a long history. The universalist countries decriminalized consenting adult homosexuality at the very beginning of the 19th century. The differentialist countries decriminalized homosexuality more than one century later, not before 1960 in most countries. Despite common opinion, universalist countries never recriminalized homosexuality. Some countries (the Netherlands in 1911, France in 1942) did raise the age of consent for homosexual acts – but not heterosexual acts – to 21 or 18. But higher age of consent for homosexual acts has been the case in both universalist and differentialist countries and has always followed decriminalization. When England and Wales decriminalized adult homosexuality in 1967, the law introduced different ages of consent and this discrimination was not abolished until 2000 (and after judgment of the European Court of Human Rights). Germany decriminalized adult homosexuality in 1969, and introduced different ages of consent that were only abolished twenty years later, in 1989. The main step, of course, was the decriminalization of adult homosexuality and that step occurred in Europe through two distinct waves separated by one and a half centuries.

Quite remarkably, the current recognition of same-sex unions divides Europe exactly along the same dividing line as did decriminalization of adult homosexuality. This shows persisting cultural diversity. The legal reason for this dividing line seems obvious: universalist countries adopted the Napoleonic Code, differentialist countries did not. The Napoleonic Code declared sexuality a private affair, just as religion. Adult consenting sexual practices were decriminalized, with the notable exception of extramarital sexuality of married women. This prohibition was not motivated by sexual or moral considerations, because unmarried women's sexual activities were not criminalized. It intended to guarantee that the husband would be the biological father of the children born inside marriage. Sexuality *per se* was decriminalized, including sodomy in its double signification of homosexuality and zoophilia. At the time, the legislator did not think of homosexuals as a sexual minority, but of homosexuality as a sexual practice. Universalist decriminalization was based on the principle of freedom of sexuality exactly like the separation of state and church was based on the principle of freedom of religion and not on secularization. Both spheres gained freedom in private life, ignored by the State.

Differentialist countries did not decriminalize homosexuality on the principle of freedom but on the principle of equality. The very influential Wolfenden Report (1957) that prepared British decriminalization (1967), stated in very "universalist" terms that homosexual behavior between consenting adults in private was part of the "*realm of private morality and*

immorality which is, in brief and crude terms, not the law's business." However, the arguments were inspired by a concept of homosexuality as distinct from heterosexuality; in this concept, homosexual behavior was unable to be changed through criminalization or other means. At the same time, it was not believed to be contagious either. In other words, homosexuality and heterosexuality were assumed to be totally separated. This separateness made it possible to think in terms of gay rights and to concede them. In countries where separate citizenship is politically conceivable, decriminalization of homosexuality and other gay rights have been obtained on the principle of equality.

There was State ignorance at one hand, specific recognition at the other. It happened twice: once for decriminalizing adult homosexuality, once more for recognizing same-sex unions. This shows strong continuity in the political management of sexuality.

The contrast between universalist and separatist Europe has been noticed and analyzed by many scholars at different levels: in ideology (McCaffrey 2005, Fassin 2003), in grass roots politics (Fillieule and Duyvendak 1999), and even in personal intimacy (Provencher 2007, Stambolis-Ruhstorfer 2013). It remains an important and meaningful dividing line inside of Europe. But we should bring three amendments to this general idea.

1/ Universalism and differentialism may be more or less dominant in different countries; they are never hegemonic. Many internal debates show this. *Outrage* is a universalist UK LGBT movement in a country where separatism is dominant. Irène Théry is an influential differentialist sociologist in France where universalism is dominant. Sweden and Hungary prepared universalist statutes but turned them into differentialist partnerships, etc. However, each country has its special mixture that seems persistent over time.

2/ Universalism is not limited to France. France played a leading role in universalist decriminalization of homosexuality, but it did not in the legal recognition of same-sex unions.

3/ Unlike universalism, there seems to be not one but two differentialisms. One is community-based, identity-based and liberal, producing high visibility. It is bottom-up differentialism, dominant in the UK and, to a lesser extent, in Switzerland. The other is State-organized, vertical top-down differentialism, producing less visibility. It is dominant in the Scandinavian and Germanic countries.

Actual UR behavior seems to reflect these long term dividing lines. Top-down differentialist countries may have high social tolerance for homosexuality but gay and lesbian visibility remains rather low and so do UR rates. Bottom-up differentialist countries, on the contrary, show high visibility and higher UR rates. Finally, universalist countries do not show particularly high social visibility, but they do show the highest UR rates. This observation seems well established, even though more research is needed to explain why.

Maks Banens is the author of *De Homo-aversie* (HUIG, Groningen, 1981) and *Vivre avec le VIH* (Calmann-Lévy, Paris, 2006) (see References for recent english publications on same-sex unions and same-sex couples)

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