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Legal Recognition of Same-Sex Relationships in Europe

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Legal Recognition of Same-Sex Relationships in Europe and EU Anti-Discrimination Law

- ▣ Limited interplay
- ▣ Family law reforms as background for litigation alleging discrimination against same-sex couples (ex. ECJ, *D. and Sweden v. Council*, 2001, C-122 & 125/99P)
- ▣ Conversely: at the margins, EU Anti-Discrimination cases help define the legal regime of formalized relationships open to same-sex couples

→ Broader perspective



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Legal Recognition of Same-Sex Relationships in Europe – Outline

- ▣ Overview
- ▣ Outstanding issues
- ▣ The European rules on prohibition of discriminations: all bark and no bite?



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Legal Recognition of (Formalized) Same-Sex Relationships in Europe – Overview

- ▣ Northern Europe: Denmark, Finland, Sweden
- ▣ Western Europe: Austria, the Benelux countries, France, Germany, the Republic of Ireland, the United Kingdom
- ▣ Southern Europe: Cyprus, Greece, Italy, Malta, Portugal, Spain
- ▣ Eastern Europe: Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia



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Legal Recognition of (Formalized) Same-Sex Relationships in Northern Europe

- ▣ **Denmark, Finland** and **Sweden** have enacted gender-neutral marriage (and simultaneously abandoned their registered partnerships)
- ▣ So-called 'monistic systems' (Ian Curry Sumner): a single, formalized institution is open to both same-sex and opposite-sex couples
- ▣ An enduring challenge of sorts: religious celebrations for same-sex couples (conscientious objection for individual members of the Clergy)



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Legal Recognition of (Formalized) Same-Sex Relationships in Western Europe

- ▣ Steady progress: same-sex couples can marry in all jurisdictions except from Northern Ireland (the Democratic Unionist Party (DUP) has so far managed to block every attempt at a reform; another is currently underway). Germany and Austria tipped over in 2017
- ▣ Dualistic system: **Northern Ireland**
- ▣ Monistic systems: **Germany** and **Ireland** (after both abandoning their registered partnerships)
- ▣ Pluralistic systems: **Austria** (2019, after extending the registered partnership to opposite-sex couples), the **Benelux countries**, **France**. Great diversity
- ▣ The curious case of **Great Britain**



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Legal Recognition of (Formalized) Same-Sex Relationships in Southern Europe

- ▣ Monistic systems: **Portugal** (joint-adoption for same-sex couples since 2016 only) and **Spain** (however: formalization as part of a dual-track model to enter into some of the Autonomous Regions' regimes for unmarried couples)
- ▣ Pluralistic system: **Malta** (marriage and civil unions since 2017)
- ▣ Dualistic systems: **Cyprus**, **Italy** (after *Oliari and others v. Italy*, 2015) and **Greece** (*Vallianatos and others v. Greece*, 2013). Unlike the Italian and Cypriot civil unions, the Greek registered partnership is open to all couples. The effects of all three fall somewhat short of the effects of marriage, particularly with regards to children.



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Legal Recognition of (Formalized) Same-Sex Relationships in Eastern Europe

- ▣ No jurisdiction in Eastern Europe permits same-sex marriages. Most of these countries have constitutional bans on same-sex marriage (Croatia, Lithuania, Latvia, Bulgaria, Poland, Hungary, Slovakia). Strikingly, most of these have been enacted fairly recently: Latvia (2006), Hungary (2011), Croatia (after a referendum, 2013), Slovakia (2014).
- ▣ Dualistic systems: **Croatia, the Czech Republic, Estonia, Hungary, Slovenia**
- ▣ Impossibility for same-sex couples to formalize their relationship: **Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia**. Again, some degree of diversity.



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Legal Recognition of Same-Sex Relationships in Europe – Outstanding Issues

- ▣ Overview
- ▣ **Outstanding issues**
- ▣ The European rules on prohibition of discriminations: all bark and no bite?



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Legal Recognition of Same-Sex Relationships in Europe – Outstanding Issues

- ▣ An EU moving at different speeds or in different directions ? (see implications for PIL in particular) Related question: does *Oliari* apply to all Council of Europe States?
- ▣ The future of the registered partnership: was it a temporary measure (Scandinavia, Germany, Ireland) or can it become a genuine alternative to marriage? If so, should it be (virtually) identical to marriage (Austria, the Netherlands...) or remain distinct (France, Belgium...)? Pluralism v. neutrality.
- ▣ If these issues are not addressed, we could see emerging situations of reverse discrimination (on a formal level)... See the situation in England and Wales, and Scotland
- ▣ The focus turning to unregistered cohabitation (pluralism v. neutrality, again)



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The European rules on prohibition of discriminations : all bark and no bite?

- ▣ All the more striking because the language of equality / the prohibition of discriminations is ubiquitous when the family is involved, and particularly when same-sex couples are involved. Both the general public and academic debates (Honneth's theory of recognition?).
- ▣ The limits placed on the EU anti-discrimination law are well known when it comes to Family law (lack of competence). Still, this is not the whole story – the ECJ's reluctance to apply art. 21 of the Charter, even when it is invited to do so, is striking (see last week ECJ, *Coman*, 5 June 2018, C-673/16).
- ▣ Relatively speaking, the same could be said of art. 14 ECHR, which is semi-autonomous (i.e. a claim must come within the ambit of another protected right). More of a rhetorical device, which can be dispensed with, esp. given the role played by art. 8 ? See *Schalk & Kopf* (2010), *Oliari and Orlandi* (2017) (no need), *Hämäläinen v. Finland*, 2014 (no discrimination, very curt)...



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Thank you very much for your attention!

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