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Marriage and union for all in Europe:

Review, results and outlook for Europe.

Lecture by Daniel Borrillo at Queer Week Institut français de Prague

Introduction

Marriage has constantly reflected social change. The abolition of segregation laws and the end of colonial empires removed the racial prohibitions that prevented individuals from participating fully in the institution of marriage. The advent of secularism and greater tolerance of faiths other than Christianity have enabled religious minorities to enter civil marriage. Equality for women has also made it possible to co-manage the household and share parental responsibilities. This is why, today, neither race, nor nationality, nor religion, nor even gender is an impediment to marriage. Nor are belonging to the same ethnic group, spiritual communion or the subordination of women barriers to marriage. On the other hand, people of the same sex, whether they are men or women, Jewish, atheist or Catholic, white or black, are not yet recognised in all European countries as couples enjoying the same rights as those formed by people of different sexes. It was not until the end of the 20th century that the issue of marriage for all was really debated in Europe.

The Civil Union

The vast majority of EU countries authorise some form of civil union ('registered partnership' or 'civil partnership') for same-sex couples, such as the PaCS in France. These unions give people certain rights and obligations provided for in marriage, for example in terms of taxation, inheritance, social security and adoption.

Denmark was the first country in the world to recognise same-sex unions in 1989. Norway became the second country to make gay love official in 1993, followed by Sweden in 1994. This year, the European Parliament adopted a resolution calling on Member States to put an end to 'the prohibition on same-sex couples marrying or benefiting from equivalent legal provisions'. Iceland recognised civil unions in 1996 and Belgium in 1998. The Spanish regions of Catalonia, Aragon and Navarre passed legislation in 1998 and 1999 respectively (several other regions have passed legislation recognising couples, most recently Murcia in 2018).

In 1999, France became the first country with a Catholic tradition to enshrine partnership and cohabitation for gays and lesbians. Germany adopted a law on registered partnership in 2000, Portugal followed suit (with a more timid law) in 2001, Finland in 2002, the United Kingdom in 2005, the Czech Republic in 2006, Slovenia in 2006, Hungary in 2009, Austria in 2010, Ireland in 2011, Malta in 2014, Croatia, Estonia and Cyprus in 2015, Italy in 2016 and Latvia in 2024...

In a resolution voted on 5 July 2001, the European Parliament recommended that the Member States of the European Union *« amending their legislation so as to recognise non-marital relationships between persons of the same or different sexes and grant such persons equal rights »* and *“placing the issue of mutual recognition of legally recognised non-marital relationships on the European Union's agenda”*. In a report adopted at the end of 2002, Parliament called on Member States to *« to recognise non-marital relationships, both between people of different sexes and between people of the same sex, and to associate with this type of relationship rights equal to those deriving from marriage, while placing on the political agenda the mutual recognition of non-marital relationships and same-sex marriage »*. In a 2003 resolution, the European Parliament reiterated its request *« to abolish all forms of discrimination - legislative or de facto - to which homosexuals are still subjected, in particular with regard to the right to marry and to adopt children »*.

At present, five European countries do not recognise same-sex unions: Bulgaria, Lithuania, Poland, Romania and Slovakia.

Marriage

The right of same-sex couples to marry exists in 25 European countries: The Netherlands since 2001, Belgium since 2003, Spain since 2005, Norway and Sweden since 2009, Iceland and Portugal since 2010, Denmark since 2012, France since 2013, England, Wales and Scotland since 2014, Luxembourg and Ireland since 2015, Germany, Finland and Malta since 2017, Austria since 2019, Northern Ireland since 2020, Slovenia and Switzerland since 2022, Andorra since 2023, Estonia since 2024, Greece since 2024 and Liechtenstein in 2025.

In 2014, the Slovak Parliament voted to enshrine marriage in the Constitution as ‘the union of a man and a woman’, thereby legally prohibiting same-sex marriage.

On 6 September 2023, the ECHR condemned Bulgaria in the case of *Koilova and Babulkova v. Bulgaria* for a violation of Article 8 of the Convention, due to the authorities 'refusal to register the plaintiffs' marriage in the civil status registers.

On 12 December 2023, Poland's lack of legal recognition of same-sex couples was found to be contrary to the European Convention on Human Rights by the ECHR in the case of *Przybyszewska and others v. Poland*.

In 2023, the ECHR condemned Romania in the case of *Buhuceanu and others v. Romania* for not legally recognising same-sex couples. In the *Orlandi v. Italy* judgment, the ECHR found that the absence of any legal recognition of same-sex unions (in 2012) had left couples in a legal limbo, ignoring their social reality and leaving them facing obstacles in their daily lives. No overriding consideration of general interest had been put forward to justify a situation in which the applicants' relationships were deprived of any recognition or protection. In the Court's view, Italy could no longer ignore their situation, which was a matter of family life within the meaning of Article 8, without offering them a means of safeguarding their unions. Until 2016, no such means existed.

Although most European countries legally recognise same-sex unions in one way or another, it is still difficult to register such unions between different countries. As regards civil unions, Article 515-7-1 of the French Civil Code states: "*The conditions for the formation and effects of a registered partnership and the causes and effects of its dissolution are subject to the substantive provisions of the State of the authority which registered it*". On the subject of marriage, France gives almost absolute recognition to same-sex marriages celebrated abroad after the 2013 law.

Although family law is not a European competence, it seems important to harmonise all union legislation so that if not marriage, at least an equivalent form of civil union can be recognised automatically in all European countries. Equality and the free movement of people are the two pillars of such recognition. Directive 2004/38 of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States is a first step. The CJEU has recognised that the spouse of a same-sex couple who is a national of a non-EU country has the same residence rights as a heterosexual couple. In this case¹, this Romanian-American couple requested that their marriage - concluded in Belgium - be recognised in Romania - which has no national legislation for same-sex couples - to enable

¹ Arrêt Coman, 5 juin 2018

the American citizen to benefit from a derived right of residence. The CJEU has held that the concept of 'spouse' is neutral and must be applied even if the Member State does not have national legislation on same-sex marriage for the purposes of the rights of Union citizens to move and reside freely within the territory of those States.

The long battle for recognition of homosexual unions in France

Today, couples of different sexes or of the same sex who live together or wish to live together can choose between 3 legal forms of union: marriage, civil partnership or cohabitation, also known as 'free union'. Each of these forms of union has its own characteristics, in terms of degree of commitment and effects.

This equality is the fruit of a long struggle by the LGBT movement, which began with the PaCS in 1999 and will end in 2021 with PMA for all and recognition of the registration of children born through GPA abroad.

The Bègles wedding

Twenty years ago, on 5 June 2004, Noël Mamère celebrated the first same-sex marriage in his home town of Bègles in front of a swarm of photographers and journalists, amid hostile demonstrators and cordons of riot police deployed to contain any outbursts. Five years after the adoption of the PaCS, the Right and the Socialists agreed that there was no need to debate same-sex marriage; all that was needed was to improve the effects of the PaCS.

Just as this strange political consensus was beginning to take hold, a tragic incident occurred on 16 January 2004 that changed the course of history. The attack on Sébastien Nouchet, who was burnt alive because he was gay, caused a political commotion. On 11 February, President Chirac wrote a letter to the victim's partner expressing his 'deep indignation' and assuring him that the perpetrators of this 'odious crime' would be 'arrested and punished as they deserve'.

On 12 February 2004, Gavin Newsome, the young Democratic mayor of San Francisco, decided to defy the law and began marrying same-sex couples. A few weeks later, Spanish Prime Minister Rodriguez Zapatero announced a bill opening up marriage and adoption to same-sex couples.

On that occasion, Didier Eribon and I decided to draw up a 'Manifesto for Equal Rights', which stated: 'We believe that it is homophobic and discriminatory to deny gays and lesbians the right to marry and adopt, or to deny lesbians or single women access to medically assisted procreation'. On 17 March, the newspaper *Le Monde* published it with the signatures of

Derrida, Paul Veyne, Michelle Perrot, Jean-Paul Gaultier, Pierre Bergé, Alain Touraine... In addition to these intellectuals and artists, several left-wing mayors were among the signatories.

Our political strategy was to propose a progressive interpretation of article 144 of the Civil Code in order to invite mayors to celebrate same-sex unions. The legal argument we put forward was simple: no need to change the law, just interpret it broadly. Fearing that this might affect the electoral result, Bertrand Delanoë, Mayor of Paris at the time, ordered that no same-sex couples should be married before the end of the regional elections.

With three thousand signatures and the support of around a hundred LGBT associations, *the Manifesto* has become a political event. Against this backdrop, Dominique Strauss-Kahn took everyone by surprise in the pages of the magazine *Libération*. The title of his interview could not be more explicit: '*Pour moi, c'est oui*' ('For me, it's yes'). Forced by circumstances, the Socialist Party took a stand in a delicate debate by adopting, without voting, the principle of recognising same-sex marriage. Ségolène Royal and Lionel Jospin expressed their reservations, and François Hollande exclaimed 'We are a governing party (...) the role of elected representatives is not to transgress the law, but to draft it', to distance himself from Noël Mamère. The positioning of Royal and Jospin highlights the lack of difference between certain Socialists and the Raffarin government. While the Socialist Party reiterated that 'the role of elected representatives is to respect republican law', the Raffarin government quickly went on the offensive: Dominique Perben, Minister of Justice, asked the Bordeaux public prosecutor's office to oppose same-sex marriage.

Despite pressure from the government, Noël Mamère (who slept in his town hall for fear of being prevented from entering), celebrated the marriage of Bertrand Charpentier and Stéphane Chapin. Following the ceremony, Dominique de Villepin, Minister of the Interior, suspended the MP from his duties as mayor for a month and fined him in damages, thus blocking the possibility of other marriages. After several legal proceedings and appeals, on 13 March 2007 the Court of Cassation annulled the marriage. The ball will now be in the court of the legislature.

Thanks to Bègles, the issue of equality for same-sex couples became politically possible and later became part of the programme of candidate François Hollande, who in 2013 pushed through the law opening marriage to same-sex couples with the massive support of all the forces on the left.

A few sociological facts

In 2023, 235,000 heterosexual marriages and 7,000 homosexual marriages took place. As for PaCS, 200,000 heterosexual marriages and 11,000 homosexual marriages took place. The opening up of marriage to same-sex couples has not replaced PCS unions, which remain popular with same-sex couples and have even increased over the last ten years. In fact, there have been more PaCS than marriages among same-sex couples since 2017. Over the last ten years, same-sex couples have generally married later than heterosexual couples. Among same-sex couples, men say yes later than women. On average, in 2022, women married around the age of 39, while men reached the age of 44. According to INSEE, men are more likely than women to live in large cities.

The opening up of marriage to all has enabled married homosexual couples to adopt a child, whereas the PaCS did not allow them to do so². But this remains limited: since 2013, the Association des parents gays et lesbiens (APGL) estimates, based on its own census and the results of several surveys, that only 200 same-sex parent families have succeeded in adopting (including wards of the State and children born abroad). It is much more common for same-sex couples to adopt each other's children, with 1,261 cases in 2018. In the context of medically assisted procreation (MAP), the 'social parent' can adopt the child of his or her spouse (who is the parent), provided that the couple is married. Since the Bioethics Act (2021), and the opening up of MAP to homosexual couples, the procedure has been simplified. Women in a couple must make an advance joint acknowledgement, which enables them to be recognised as having equal rights and obligations as the child's mothers. For male couples, surrogate motherhood (GPA) remains formally prohibited in France, as it is for all couples.

Conclusion

The record on same-sex marriage is positive. The majority of European Union countries recognise unions either as registered partnerships or as marriages. Same-sex couples have gradually taken hold of these institutions and have benefited from rights relating to family life in both property and non-property terms. Heterosexual couples have also gradually opted for

² Since 2022 'Adoption may be requested by a married couple who are not legally separated, two partners bound by a civil solidarity pact or two cohabiting couples. The adopters must be able to prove that they have been living together for at least one year or that they are both over 26 years of age' art. 343 of the Civil Code. The right to adopt a spouse's child has now been extended to all cohabitantes and partners, including those of the same sex (C. civ., art. 356 and 357), which means that this parent is no longer a parent of intent but becomes a legal parent.

civil unions rather than marriage. While significant progress has been made at couple level, much remains to be done in terms of filiation (adoption, MAP, GPA), not only in the name of equality, but also to better protect the children born into these family configurations.

WHAT IS QUEER 24?

Queer 24 is the result of a cooperation between the Goethe-Institut in the Czech Republic and the French Institute in Prague. We join the mission to uphold the rights of LGBTQ+ people and communities as universal European principles.

Through a variety of events and discussions with experts from music, literature, film, cultural heritage, social sciences and academia, we stimulate debate and celebrate diversity.

The events, which will take place from March to August 2024 in Prague, are organized in cooperation with Czech organizations with the aim of bringing the Czech, French and German views on equality, gender and inclusion closer to the public.

The Queer 24 project is co-financed by the Franco-German Cultural Fund.

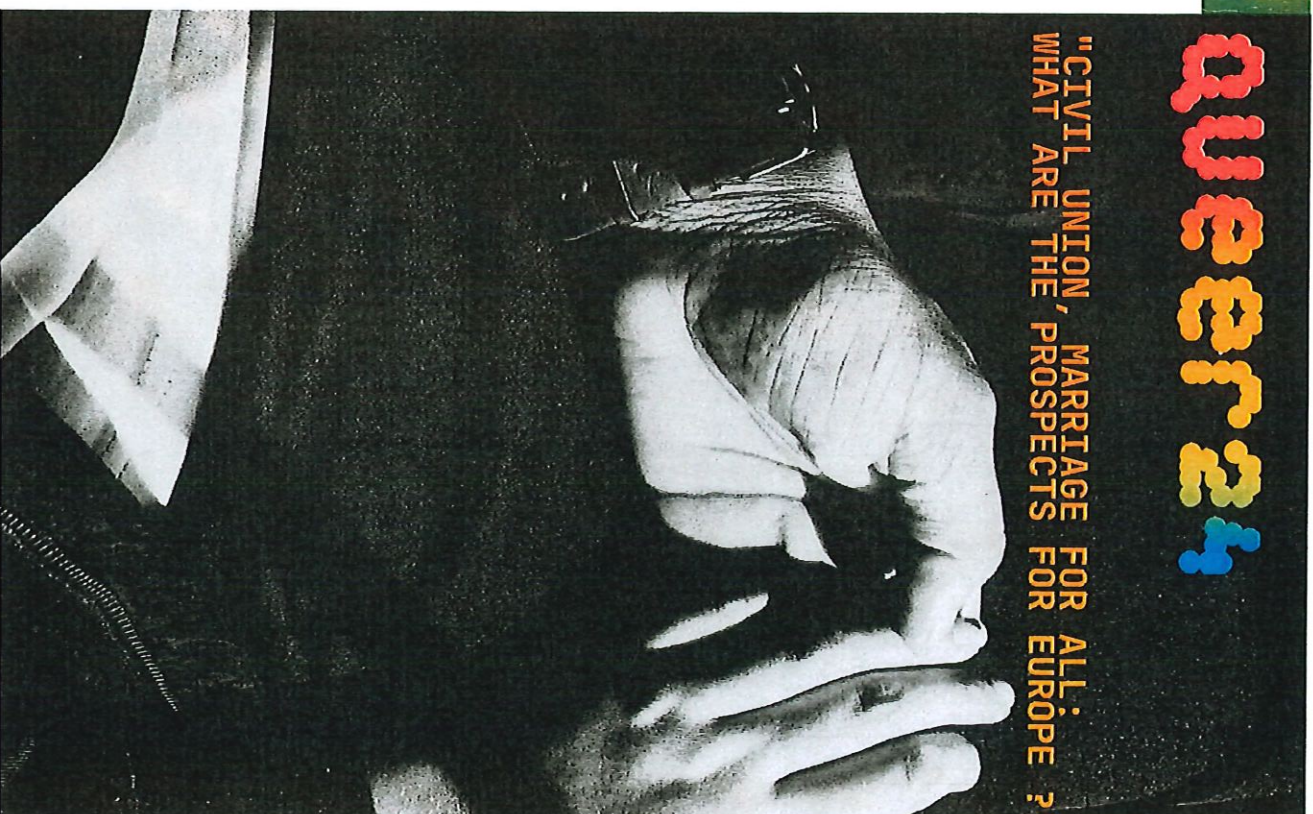


Learn more about Queer 24
(including access to a glossary
on LGBTQ+-related terms)

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"CIVIL UNION, MARRIAGE FOR ALL: WHAT ARE THE PROSPECTS FOR EUROPE ?"

With the Czech Republic having just passed a civil union bill for same-sex couples in 2024, where do we stand at European level on progress towards marriage for all, a subject that is fuelling a lively social debate?

In 2001, the Netherlands became the first country to authorise same-sex marriage. Since then, 16 other European countries have followed suit: Belgium in 2003, Spain in 2005, Sweden four years later, Portugal in 2010, Denmark in 2012, France in 2013, Luxembourg and Ireland in 2015, Malta, Germany and Finland in 2017, Austria two years later and Slovenia in 2022. In 2024, Greece will become the 16th country in the European Union and the first Orthodox Christian country to legalise marriage and adoption for same-sex parents.

What assessment and feedback can be shared today on this right acquired in France, Germany, Belgium and the Czech Republic? What are the prospects and remaining challenges for inclusion and access to equal rights for homosexuals in these countries ?

OUR PANELISTS



David Paternotte is a lecturer at the Université libre de Bruxelles, where he is co-director of STRIGES (Structure for interdisciplinary research on gender, equality and sexuality). His research focuses on gender, sexuality and social movements, with a particular interest in transnational mobilisations and, more recently, anti-gender movements.



Daniel Borrillo, a researcher and lawyer, is a CNRS research associate at the University of Paris II Panthéon-Assas. An activist in the fight against AIDS and for the rights of LGBTIQ people, Daniel Borrillo helped to draw up the civil solidarity pact (PACS) in France and, with writer Didier Eribon, co-initiated the Bègles marriage (the first same-sex marriage in France in 2004).



Martin Speer, author, activist and consultant, he is the driving force behind the *EstZeit* political campaign, which advocates opening up marriage to same-sex couples in Germany.

OUR MODERATOR



The discussion will be moderated by **Lucia Zachariášová**, a lawyer with the *Jsmé fér* initiative, who campaigns for the legalisation of equal marriage for LGBTI+ people in the Czech Republic. She is the Chair of the Committee for the Rights of LGBTI+ People established within the Government Council for Human Rights. She has worked for the Office of the Government of the Czech Republic and the Ministry of Labour and Social Affairs as a lawyer and then as head of the gender equality unit.