

European Institutions, Transnational Networks and National Same-sex Union Policy: When Soft Law Hits Harder

Panel 7E: Practicing citizenship in a non-state: Building a European Citizenship Regime

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Introduction

In the past the twenty years, sixteen West European and three East European countries have adopted national same-sex union (SSU) laws that legally recognize and bestow benefits and duties on gay and lesbian couples who chose to enter such unions. This rather startling case of policy convergence has largely slipped under the radar screen of political scientists and European Union scholars. Despite the lack of attention, the SSU case holds potentially interesting lessons for scholars of Europeanization.

I argue that the EU, the Council of Europe and a transnational network of lesbian, gay, bi-sexual and transgender (LGBT) advocacy NGOs have played a crucial role in this policy convergence by creating a soft law norm for relationship recognition and disseminating this norm to key policymakers in European states. Thus the nature of the influence that European institutions and networks have had on national SSU policy differs from the formal processes of implementing EU Directives and European court decisions often emphasized in the literature. Until very recently SSU convergence was largely the result of the growing acceptance of the relationship recognition norm within European institutions and the subsequent socialization of national elites. In the past three years, however, both the EU and the European Court of Human Rights (ECHR) have begun mandating some minimal legal recognition of same-sex couples.

Using Austria and Germany as comparative cases I argue that, in fact, Europe has had a far greater impact on national policy outcomes when its influence has been felt through the informal processes of norm diffusion and elite socialization than when it has tried to impose formal mandates through court decisions and EU Directives. In Germany, where party elites were influenced by the European Parliament's call for the recognition of same-sex unions as a human right and by the example of SSU adoption in other member states, a fragile national consensus has formed around the idea of granting same-sex couples most of the rights that accrue to marriage. In Austria, by contrast, where European norms are less influential, a European Court of Human Rights' decision that mandated the legal recognition of same-sex

cohabitants was all but ignored by the Christian Democratic-led government. I use this case to draw some lessons about the important, and often underemphasized, role of soft law socialization in Europeanization processes.

The paper proceeds as follows. The next section gives a brief overview of the Europeanization literature and argues that too little attention has been given to the influence of soft law and processes of socialization in these works. The third section introduces the case study and outlines the rather rapid adoption of same-sex union laws across Western Europe over the past two decades. It then traces the development of a soft law norm for relationship recognition within European institutions and policy networks and argues that this norm and these networks are crucial for explaining the wave of SSU adoption described in section three. Section four compares the influence that the this relationship recognition norm has had on the German and Austrian governments and posits that the norm has been more influential when applied in a ‘soft’ rather than ‘hard’ or legally binding manner. The final section offers conclusions and explores the implications of these findings.

Europeanization and Soft Law

Until the early 1990s EU scholarship was focused almost entirely on developments at the supra-national level and very little was written about the effects that regional integration has on European states. In the last decade scholars have made up for lost time and developed a vibrant literature on the question of Europeanization. Although this literature is more coherent than many, the definition of its core concept has inevitably varied from study to study. Some such as Risse, Cowles and Caporasso (2001) define Europeanization as the creation of European governance structures and networks. Most Europeanization studies, however, use the concept to describe how EU structures affect politics in the member states. Ladrech (1994) and Falkner et al. (2005) define Europeanization simply as a top-down process of EU influence in member states. Others such as Radaelli (2003) and Heritier et al (1996) define it more broadly and include both top-down processes of EU influence on member states as well as bottom-up processes of member state influence on EU institutions and decision making processes. Still others see the interaction of EU institutions, member states and transnational actors in less linear terms and argue that the process of Europeanization has to be seen more holistically as a process of fusion (Kohler-Koch and Edler 1998; Wessels 1996).

While many scholars include soft law norms in their definitions of Europeanization, most studies usually mean this to include the non-binding resolutions, decisions or proclamations of

key EU institutions such as the Council, the Commission or the Parliament. Most scholars have largely ignored the perhaps even softer norms created by NGOs, informal transgovernmental networks or the interaction between member states. Radaelli is the most explicit about the narrowness of this conceptualization of soft law and argues that the literature should and usually does focus on processes of 'EU-ization' (2003). In their latest contribution to the debate Tanja Boerzel and Thomas Risse argue that to be useful Europeanization should be narrowly focused on the impact that Europe has on the political processes and outcomes of domestic politics but that scholars should not limit the effects of Europe to those that emanate from the EU (2007: 484-485). Influence from sources such as transnational networks of non-state actors, the Council of Europe and state to state interaction also need to be examined if we are to understand the full 'power' that Europe has on the domestic politics of the region's states.

For the purposes of this paper, I use the wider definition of Europeanization suggested by Boerzel and Risse and take it to mean the processes by which domestic actors confront and react to adaptation pressure exerted by European institutions, networks, policies and norms. By taking a broader view of both what counts as Europe and what counts as soft law, my approach more closely approximates work carried out by constructivists on the domestic effects of European socialization processes (Checkel 1999; 2001; Risse 2001). This approach is necessary to explain the outcomes of my particular case as the EU, the Council of Europe, the European Court of Human Rights, transnational advocacy NGOs and individual governments all have played a role in the creation and dissemination of the SSU relationship recognition norm. However, the influence that this norm has had on domestic policy suggests that this broader definition may be necessary to understand the impact of Europe in certain policy areas, particularly in the field of human rights. It also suggests that the creation of European norms is not the sole purvey of the EU or even the Council of Europe. By ignoring the norms that develop in less institutionalized settings, we may be missing a great deal.

Despite the varying definitions that exist in the Europeanization literature, the categories authors use to describe the impact the phenomena has on European states are surprisingly similar. Almost all studies have concluded that the EU and its policies have a differential impact on member state actors and policy areas. The reaction can take the form of inertia, absorption, accommodation, transformation and retrenchment (Boerzel 1999; Radaelli 2003). That is state actors can try to ignore the adaptations demanded by Europe, they can absorb them with minimal change to core national norms or structures, they can accommodate more substantial changes within stable national structures or they can be forced or persuaded to transform key parts of that

structure. Retrenchment is the one non-convergent reaction where European structures cause national actors to not only resist European mandates for change but go in the opposite direction. As such these measures of Europeanization are closely associated with the related but distinct concept of (degrees of) convergence, although this is only intermittently acknowledged in the literature.

The literature as a whole has also identified four broad, non-mutually exclusive mechanisms through which the EU can influence its member states: institutional compliance or mimicry, altering domestic political opportunity structures, regulatory competition and normative socialization (Knill and Lehmkuhl 1999; Radaelli 2000). The first occurs when European institutions are either forced on or mimicked by states. The second refers to situations in which European policies or institutions shift the relative power or influence of key domestic actors and therefore political outcomes in individual polities. Regulatory competition occurs when economic integration and mandatory mutual recognition of national regulation leads to a regulatory race to the bottom as member states seek to attract business and capital to their national markets. Normative socialization occurs when European legislation or soft-law norms cause domestic policy makers to redefine their interests or identities.

Because scholars have found that Europe's impact differs across states, policy areas and time, most of the research has focused on how certain factors mediate these mechanisms of influence. The literature is dominated by the 'goodness of fit' approach which relies heavily on rational and sociological institutional theory to explain when and how Europe affects political outcomes in member states. Drawing on earlier works such as Francesco Duina's *Harmonizing Europe* (1999) and Andrienne Heritier et al's *Ringing the Changes in Europe* (1996) Risse, Cowles and Caporaso argue that the challenge a particular EU policy poses to an individual member state depends on the compatibility of a European policy and a country's national administrative style (2001; see also Boerzal and Risse 2003). Adjustments and convergence can only occur when a European policy or norm differ from national standard operating procedures and institutional structures.

The extent to which a member state government will adjust to a 'misfitting' policy depends on how domestic structures and actors mediate the pressure for change. Different authors focus on different mediating factors. Many have emphasized the importance of the number of domestic veto points as barriers to domestic change (Risse et al 2001; Haverland 2004). The capacity of implementing institutions is highlighted by others (Radaelli 2003). Still others have examined the role that domestic interest groups play in 'pulling down' or blocking

the implementation of EU policies (Boerzel 2003; Duina; Falkner et al 2005). Boerzel also looks at the role that the EU Commission plays in ‘pushing’ certain policies on its member states.

As noted above most of these studies have focused on the effects that legally binding EU legislation has on member states during the implementation of these policies. Surprisingly little empirical work has been carried out on how soft law norms have effects in European countries. The work that has been done on soft law norms such as Falkner et al’s recent study on the implementation of EU social policy often examines the effects of non-binding norms that attach themselves to binding EU Directives or less formal Commission decisions (2005).¹ Although the ‘goodness of fit’ and domestic mediating factors approach can be used to interpret the broader processes of Europeanization and normative influence under study in this paper, the paper’s findings do challenge some of the conventional wisdoms associated with the approach.

First the level of cross-country convergence that has occurred in the area of SSU policy, at least in Western Europe, is far greater than the ‘goodness of fit’ approach would imply is likely. Thirty years ago, the level of misfit between the relationship recognition norm and all country’s family policy law was profound. The fact that all West European states except Italy, Greece and Ireland now have a national SSU law in place and two of those exceptions, Italy and Ireland, are now debating such a law in parliament was unthinkable even ten years ago. Of course a great deal of variety exists in the types of laws that have been adopted but the level of policy convergence by any definition of the term is really quite astounding. The reason this level of convergence has occurred I argue is that European institutions and networks have been able to convince governments to redefine their interests or more precisely their definition of what constitutes a rights issue. Thus the mechanism of Europeanization at work here is transnational socialization processes. Because too few scholars have looked at this mechanism in the empirical work on Europeanization, too much of the literature takes the idea of national policy style as a fixed concept, a critique noted by others (see for example Heritier et al 2001). As the SSU case illustrates well, participation in European networks and institutions can cause societies and governments to drastically redefine their interests in certain policy areas.

The different manner in which the Austrian and German governments have reacted to the relationship recognition norm also challenges the idea of ‘fit’ to a certain extent. One of the big differences between the two countries, I argue, is the greater legitimacy that European norms of

¹ Checkel’s work on the impact that norms developed within the Council of Europe’s citizenship regime is an exception to this rule. Other scholars such as Maria Green Cowles’s (2001), Mark Thatcher’s (2000) and Volker Schneider’s (2001) work on the effects of European markets and business associations also take a less formal approach to European influence.

any stripe enjoy in Germany than in Austria.² The issue is not how well the relationship recognition norm fits with pre-existing German and Austrian family and human rights policy, rather it is how willing either society and government is to pay attention to any European norms. The fact that Europe has more legitimacy in Germany made it easier for German LGBT groups to use the norm and examples from other EU member states to put the issue on the political agenda. Profound change can occur to national policy styles through transnational socialization processes but the socializees need to have confidence in the socializers. In some cases European norm legitimacy matters more than norm fit.

The domestic mediating factors found to be important in this case also differ from those commonly cited in the Europeanization literature. In addition to European norm legitimacy, the ideological nature of the governing coalitions also plays an important role in SSU policy outcomes. Because change and convergence occurs through persuasion, the ideological commitments of the majority parties in government are important. Social Democratic and Green parties have proven more open to accepting the argument that denying same-sex couples state recognition amounts to illegal discrimination than Conservative or Christian Democratic parties. Again a state's policy preferences are not static but dependent on a number of variable political factors.

Finally the SSU case also challenges a conventional wisdom often propagated in the wider EU literature, namely that soft law often implies soft compliance (Cini 2001). In the case of SSUs a non-binding norm for relationship recognition has had tremendous influence on domestic policies. As will be shown, somewhat ironically, the harder this norm has become, the more resistance it has encountered. This implies that at least with some policies, soft law norms need to be accepted before hard law can be imposed.

Same-sex Unions Policy in Western Europe: Convergence through Normative Socialization³

This section begins with a short description of the policy convergence that has occurred across West European democracies in the area of relationship recognition since 1989 (see

² In another work, forthcoming, I have argued that differences in religious cultural values are necessary for understanding why some advanced industrial democracies have not adopted an SSU law while the vast majority have. This argument more closely approximates the 'fit' thesis prominent in the Europeanization literature. That is more religious AIDs have rejected the relationship recognition norm because it does not fit with their societies traditional view of family and marriage. I do not argue that 'fit' is unimportant, I simply argue that international norm legitimacy must also be taken into consideration. In the German and Austrian case differences in religious cultural values are in fact quite minimal and therefore cannot explain the differing SSU outcomes.

³ This section draws heavily on a previously published article, k. Kollman, "Same-sex Unions: The Globalization of an Idea" (*International Studies Quarterly*, forthcoming).

timeline 1 and table 1). It then develops an argument about the role transnational European actors and norms have played in this convergence.

Denmark adopted the world's first national same-sex union law in 1989. The registered partnership model adopted by the Danish government was soon emulated by its Nordic neighbors. Norway adopted a similar registered partnership law in 1993, followed by Sweden and Finland in 1994 and 2001 respectively. Unlike some of the subsequent same-sex registered partnership laws adopted by countries outside the region, the Nordic countries have extended most rights and responsibilities that accrue to heterosexual marriage to this new institution. Couples are allowed to register publicly at the town hall, as is the case with heterosexual couples who wish to marry. Same-sex couples who register gain all the tax benefits, inheritance rights, pension rights and mutual liability responsibilities granted to heterosexual married couples. The only major rights that were denied to same-sex registered partners were the rights of adoption, the use of the term husband and wife and the right to a church wedding. Most Nordic countries subsequently have loosened adoption laws so that a member of a registered partnership can adopt their partner's biological child. Additionally, Sweden now allows same-sex couples to adopt a non-biological child jointly. (Merin, 2002: 67-78).

The deliberations over this legislation in the Nordic countries set the stage for how the debate has been carried out in most other western democracies, although it was more muted here than in the campaigns later waged in France and Germany. Human rights oriented LGBT groups first promoted SSU proposals and then sought support among left leaning parties. These proposals were opposed by the conservative parties and, in the Nordic countries, by members of the established Lutheran Churches (Merin, 2002). As a result, most of these SSU laws included assurances that religious institutions would not have to recognize or perform commitment ceremonies for same-sex couples.⁴

By the late 1990s the idea of legalizing SSUs moved out of the Nordic region and onto mainland Europe. The rest of Europe, however, has uniformly accepted neither the norm of legalizing SSUs nor the particular model first developed in Denmark. A number of societies including Italy, Ireland and Greece have not yet adopted such legislation. Additionally, a number of new models have been added to the registered partnership scheme. In 2000, Germany adopted legislation that was similar to the Nordic registered partnership laws albeit with less

⁴ Minority voices within the LGBT community, particularly some lesbian organizations that view marriage as a patriarchal institution, also opposed the legal recognition of same-sex couples. By the mid 1980s the human rights wing of most national LGBT movements had become firmly entrenched as the mainstream voice of the movement.

comprehensive benefits. The UK followed with a proposal for same-sex registered partnerships at the end of 2003.

The Netherlands and Belgium adopted registered partnership laws in 1998 and 2000 respectively that are open to heterosexual as well as to homosexual couples. In addition both countries extended marriage rights to same-sex couples in 2001 and 2003 respectively. Spain became Europe's third country to grant marriage rights to gay and lesbian couples in 2005. France created a new institution called Civil Solidarity Pacts open to both homosexual and heterosexual couples, which is easier to enter into and dissolve and does not accord couples the full set of rights given to married heterosexuals. Finally, Portugal and Austria legally recognize same-sex unions through an unregistered cohabitants model that does not include a formal civil ceremony and which includes less than the full palette of rights and benefits that married couples enjoy (Wintemute, 2005). Although this paper largely focuses on Western Europe, several Eastern European countries have also adopted SSU laws over the past few years. Croatia adopted a registered partnership law in 2003 and the Czech Republic and Slovenia both adopted a similar law in 2006 (ILGA-Europe 2007).

To use the language of the Europeanization literature, family policy in West European countries has been transformed. Although this wave of legislation resulted in a variety of national SSU laws, West European governments have converged around two key principles that were virtually non-existent a mere three decades ago. The first is that the state should offer same-sex couples some form of legal recognition. The second principle holds that states must offer this recognition because to do otherwise represents a form of discrimination that cannot be tolerated by governments committed to the core values of liberal democracy. Thus although the SSU debate has taken place in different cultural and political settings, the contours of this debate have been remarkably similar across these societies. Where LGBT groups and their allies have been able convincingly to frame the SSU question as a human rights issue, they generally have been successful in gaining relationship recognition. Where this framing has been challenged effectively by a cultural/traditional frame, LGBT groups' attempts at relationship recognition have been less successful.

As is argued below, the cross-national similarity of this debate is not merely coincidental. LGBT groups have used European institutions and political forum to create and disseminate a soft law norm for same-sex relationship recognition. These European networks and this norm have not only helped to put the SSU issue on the political agenda of many West European countries over the past decade, they have also shaped the terms of the debate. While changing

attitudes towards religion, sexual minorities and alternative lifestyles clearly paved the way for SSU laws in western democracies, the evidence presented below shows how this European norm in important ways acted as a catalyst for the adoption of these laws.

The Rise of a European LGBT Network and the Creation of a Relationship Recognition Norm

With the advent of the gay liberation movement in western societies in the 1970s, the size and number of international LGBT organizations increased and a nascent transnational network of both international and national LGBT groups began to form. It wasn't until the late 1980s, however, that many of these groups began to use an explicit human rights frame to promote their cause. At this time a number of LGBT organizations, especially the International Lesbian and Gay Association (ILGA), began to pressure more mainstream human rights groups such as Human Rights Watch and Amnesty International (AI) to recognize sexual orientation as a human rights issue. In 1998, after a great deal of internal debate Amnesty International agreed to give issues related to sexual orientation a higher priority within its Action Plans and also began including individuals imprisoned as a result of their sexual orientation in their rolls of 'prisoners of conscience'. Since that time AI has published three major reports that outline the human rights abuses of sexual minorities and has become a key member of the LGBT human rights network (Berger, 2001; Bamforth, 2005).

This transnational strategy has resulted in some successes at the UN level. The most influential transnational LGBT advocacy networks, however, have been formed at the regional level. The West European network is by far the most established and politically successful of these regional networks and is held together by the influential ILGA-Europe. Although ILGA is a global umbrella organization made up of over 400 mostly national organizations from over 70 countries, in the late 1990s, the organization split up into six regional organizations. ILGA-Europe was the first such regional group to form and is much stronger, more developed, more professional, and as a result, more influential than the networks found in other regions. The European LGBT network, of course, is not limited to ILGA-Europe but also includes organizations such as Amnesty International, Human Rights Watch and certain NGOs that make up the social platform of the EU. The network promotes the rights of LGBT people in two ways. First, it helps national groups network and exchange information about lobbying strategies and policy developments in other countries (Interview European LGBT Organization, 8/22/03). The network also promotes its agenda by successfully lobbying intergovernmental organizations to incorporate sexual orientation and relationship recognition into the European human rights regime.

The success of the European network's lobbying efforts partially can be explained by the strength of the larger European political-economic regime, which is centered around but not limited to the European Union. As Thomas Risse-Kappen has argued the ability of transnational networks to affect domestic policies is in part determined by the extent to which the policy field has become institutionalized at the international level (1995). Probably no other non-economic policy area in any region has been as structured by international institutions as human rights policy in Europe. In the wake of the atrocities of World War Two, European countries made a conscious decision to enmesh themselves in a strong European human rights regime that is supported by a number of regional organizations, the two most important being the EU and the Council of Europe.

Since its founding as the European Economic Community in 1958, the EU has insisted that its members honor the rule of law as liberal democracies. The European Council, established in 1949, was created more explicitly to guarantee European citizens' basic human rights. The main purpose of the Council is to monitor and ensure the implementation of the European Convention on Human Rights that contains a set of fundamental human rights to which all of its 41 member states must subscribe. Citizens of these member states can bring suits to the European Court of Human Rights (ECHR) if they feel their rights have been violated (Beger, 2001: 25-31). The Convention has been amended several times to extend rights to various groups, although it still does not explicitly include sexual orientation as a category for non-discrimination.

The campaign to include sexual orientation in the European human rights regime began in earnest in the mid 1980s. In part because of the strong representation of Social Democratic and Green parties in its chambers, the European Parliament (EP) of the EU has been ILGA-Europe's greatest ally in this fight. As early as 1984, intensive lobby efforts by ILGA paid off with the publication of "Sexual Discrimination at the Workplace" by an EP committee that included sexual orientation in its call for more comprehensive anti-discriminatory protections. This was followed ten years later by another EP report entitled "Equal Rights for Homosexuals and Lesbians in the EC", also known as the 'Roth Report' after the German MEP who wrote it. The Roth Report condemned discrimination against European gays and lesbians in a wide range of areas and for the first time criticized European governments for excluding same-sex couples from national marriage laws. The EP has included a section on sexual orientation in all of its annual reports on the state of human rights in Europe since the publication of this report (Beger, 2001: 20-22). As with the 1984 report, ILGA lobbied heavily for and participated informally in the drafting of this publication (Interview European LGBT Organization, 8/22/2003; Interview European Commission Official, 8/23/2003). Although these reports were non-binding, they did a great deal to help define

discrimination against sexual minorities as a human rights issue both at the European level and within member states.

Throughout the 1990s the European LGBT network increased its influence becoming a founding member of the EU's Social Platform of NGOs in 1995 and gaining official consultative status with the Council of Europe in 1998. ILGA-Europe's biggest victory came in 1997, again after years of lobbying, when the EU Intergovernmental Conference agreed to include sexual orientation as a category of non-discrimination in the Amsterdam Treaty, which came into force in 1999. The Amsterdam Treaty was the first and remains the only legally binding international treaty that prohibits discrimination based on sexual orientation.

ILGA-Europe has also had successes at the Council of Europe's ECHR. It has helped a number of gay men and lesbians bring suits in the Court against European governments and employers that they claim have violated their rights. Because the Council of Europe has not included sexual orientation in the European Convention on Human Rights, these claims by gays and lesbians largely have been made under the guise of the right to privacy. These court decisions have among other things forced the UK government to include homosexuals in their military, forbidden the use of sexual orientation against parents in custody battles and forbidden the criminalization of homosexual behavior across Europe (Beger, 2001: 25-27). More recently the ECHR has begun to grapple with the issue of relationship rights. In the 2003 *Karner v. Austria* ruling, the ECHR held that homosexual partners must be granted all the rights and benefits that non-married heterosexual couples receive. To do otherwise, the court ruled, is to engage in unlawful discrimination (European Court of Human Rights 2003). While this ruling does not require signatory countries to adopt SSU laws, it does require governments to grant homosexual couples all the benefits granted to non-married heterosexual cohabitants and thus creates legal domestic partnerships (DP) for homosexuals in countries that have such arrangements for heterosexuals.

The inclusion of sexual orientation in EU Treaties and the recognition of the rights of gays and lesbians by the ECHR have also led to the creation of a transgovernmental network of judges, legal scholars and policymakers that have come to view sexual orientation-based discrimination and SSUs as a human rights issue. It was national executives and parliaments after all that had to sign and ratify the Amsterdam Treaty. National courts and legislatures have also had to implement the rulings of the European Court of Human Rights. By the beginning of the 2000s a clear, if still controversial, norm against sexual orientation discrimination and for the recognition of gay and lesbian relationships had been established within key European institutions. Additionally a

growing network of transnational actors has come together to promote this norm (see timeline 1 for the progression of these events).

The Influence of the Transnational Network and Norms on National SSU Policies

How have the creation of a relationship recognition norm and the growth of a supportive transnational network influenced national debates about SSU recognition? Interviews with key policy activists and government documents reveal that the transnational network and European human rights regime have influenced domestic policymaking processes through three separate processes: national agenda setting, elite learning and direct policy harmonization. The first of these mechanisms occurs when transnationally networked activists use developments in other countries or the European arena to help put SSU recognition on the agenda in their own country. They further use these examples to frame the issue as a human rights problem. Although transnational influence on agenda setting processes is often subtle, activists and policymakers in Germany and Austria mentioned events in other countries as one of the catalysts that helped put SSUs on the political agenda in their countries (Interview German LGBT Organization, 7/27/03; Interview Austrian LGBT Organization, 12/6/05; Interview Austrian Green Party 12/4/05).

Additionally, evidence of the use of foreign examples can be found in the literature of almost all major LGBT groups in European countries. The websites of these groups very clearly announce the adoption of SSU laws in other countries and use these examples to bolster the human rights claims of their own arguments for relationship recognition. LSVD, a German LGBT organization, for example, issued a special press release in the summer of 2005 when Canada and Spain adopted their same-sex marriage laws. The headline of the press release read “Canada and Spain are in the Passing Lane: Equality in Germany is Long Overdue” (LSVD, 6/29/2005; translation by author). In the UK the decisions of the ECHR have also been important for spurring debate in that country. The incorporation of the European Convention on Human Rights directly into British law in 1998 resulted in a number of lawsuits that challenged the British government in the ECHR to defend several discriminatory laws pertaining to homosexuals both as individuals and as couples. These lawsuits helped put the issue on the agenda in the UK, which resulted in an uncontroversial government proposal for a registered partnership law in 2003 (BBC, 10/2/2000). These examples from other countries both show the timeliness of such reform and help frame SSUs as a human rights issue that an increasing number of liberal democracies are coming to recognize.

There is also evidence that elites do learn from both the international/foreign examples used by LGBT groups and directly from policy elites in other countries and European institutions via the transgovernmental networks they inhabit. In fact activists from several countries mentioned that national policy elites found the legal recognition of SSUs by other governments a far more persuasive argument in support of relationship recognition than the general public (Interview with German Policymaker, 11/18/05; Interview French Policymaker, 10/03/04). The influence of transgovernmental networks is most obvious and strongest in the Nordic countries. These countries historically have recognized marriages performed anywhere in the Nordic region and intermarriage across the region is common. Although the other Nordic countries at first refused to recognize Danish registered partnerships, the controversy over the issue soon died down. By 1995, after Norway and Sweden had adopted a registered partnership law that mimicked the one in Denmark, policy elites from the four countries formed a Nordic Commission on Marriage to discuss the recognition of SSUs. The governments quickly agreed to mutually recognize registered partnerships and such recognition has been in place since the mid 1990s (Merin, 2002: 77-79).

Although the influence of elite networking and learning has been subtler in other countries, it has played a role in almost all national SSU policy debates. In its coalition agreement of 1998, the Red-Green government in Germany justifies its proposal to enact a registered partnership law by quoting the decade-long recommendation of the European Parliament for equal relationship recognition (SPD / Die Gruenen-Buendnis 90, 1998). In the White Paper that the Blair government distributed before introducing its own registered partnership law, the examples of other countries' SSU laws are outlined in great detail (Department of Trade and Industry, 2003). More recently, a Civil Partnership Bill was introduced in the Irish parliament, which the government thus far has failed to bring to a vote. In his justification for the bill, however, the lead sponsor notes the following:

Developments in this area were seen as inevitable in the light of the growing number of case precedents under the law of the European Convention on Human Rights and changes in the laws of individual member states including our close neighbor, the United Kingdom" (Irish Parliament (Oireachtas) 2004).

Policy elites in West European states clearly draw on examples from other countries and developments within European institutions to help frame and justify their own support of SSUs.

As an ever growing have come to offer gays and lesbians legal recognition of their relationships and as more and more I organizations have interpreted their human rights documents to include sexual orientation, it has become easier to persuade elites in these countries that this is something liberal democracies must do.

The final way in which European institutions have affected domestic policy, namely by attempts to directly harmonize policy within supranational institutions, is also the least common. As stated above, no treaty formally recognizes the relationship rights of gays and lesbians and as such states are not legally required to do so. However, European countries are coming under increasing legal pressure to grant some relationship benefits to same-sex couples. The recent ECHR decision that ruled the Austrian government must grant same-sex couples the same benefits enjoyed by heterosexual cohabitants has in essence created a domestic partnership law for gays and lesbians in those European countries that have DPs for heterosexual couples. In its new Directive on the Free Movement Rights of EU Citizens and their families, the EU mandates that member states recognize the legal rights of same-sex civil or registered partners if the host country has such an SSU law in place and if the SSU law of the country in which it was entered into approximates marriage (Directive 2004/58). While these legally binding mandates are quite modest at present, many observers believe it is simply a matter of time before the soft law norm for relationship recognition becomes a hard law mandate. As the comparison with Austria and Germany below illustrates, however, the soft law norm has had a far greater impact on national policy than the legally binding mandates.

The Same-sex Union Debate in Germany and Austria: When Soft Law Hits Harder

The German Lebenspartnerschaftsgesetz: With a Little Help from European Friends

As the two case studies outlined in this section illustrate the relationship recognition norm has not simply been disseminated to and accepted by European governments as part of a frictionless process. The SSU norm, as with all European soft-law norms, has to be applied to national debates and political processes either by newly socialized policy elites, transnationally-linked NGOs or both. The existence of the norm and its endorsement by European institutions and states have helped give national LGBT groups and policy activists the necessary confidence to place the issue on the political agenda and has lent them a ready-made framework for shaping the debate. There is no guarantee, however, that governments or publics will pay particular attention to the new norm nor is there a guarantee that they will be persuaded by the claim embedded in the norm that relationship rights = human rights. As both the Europeanization and

constructivist literatures make clear, domestic structures mediate European pressure for change. In the case of soft law norms it is particularly important that European networks can penetrate the domestic setting and that its influence is considered legitimate. In Germany the make-up of governing coalition in the late 1990s, Germany's longstanding and active participation in European institutions and the legitimacy of this participation in the public's and policymakers' eyes all helped the SSU norm gain traction and change the nature of the debate. As will be shown in the next section, the circumstances were not nearly as favorable in Austria.

When Germany adopted its Life Partnership Law (*Lebenspartnerschaftsgesetz*; LPartG) in 2000, only three non-Nordic European countries had SSU laws in place and these three—France, Belgium and the Netherlands—had adopted these laws less than two years beforehand. At the time there was little reason to believe that Germany would be an international pioneer on this issue. The processes of secularization while certainly advanced in Germany by 2000 had not gone as far as in the Nordic countries or France. Church attendance levels remain significantly higher in Germany than in its northern and western neighbors (Inglehart and Norris 2004). Additionally, Germany was only the fourth country after France, the Netherlands and Belgium with a substantial Catholic religious heritage to adopt an SSU law. Support for the law was further hindered by the presence of conservative Christian Democratic parties in the German party system, a fractious LGBT movement and a prominent clause in the German Constitution which calls for 'the special protection' of marriage and the family (German Basic Law Art.6(1)). Europe played an important but not exclusive role in overcoming these barriers.

It is only a slight exaggeration to say that the passage of the LPartG was the result of lobby work by two organizations, the Lesbian and Gay Federation in Germany (LSVD) and the German Green Party. Both of these organizations are well integrated into European political networks and both have used European institutions to advance their political agendas, particularly in the SSU case. Although there is long and rich history of LGBT organizing in Germany, LSVD, which is the largest national LGBT group in Germany, is a surprisingly young organization. It was founded as the Gay Man's Federation (SVD) in 1990 in Leipzig, East Germany during the transition to democracy (LSVD 2007). It is precisely because the organization was founded in the East during this period that it was able to adopt an unapologetic human rights frame to advance the position of gay men in German society.

This human rights frame had not been widely used in the West German movement up to that point. Growing out of the student protests of the 1960s and 1970s, the movement had promoted a more radical critique of the heterosexual nuclear family and was not terribly

interested in seeking the legal rights necessary to emulate it. Sexual liberation, not civil rights had always been the frame of choice for most organizations arguing against homophobia. The rights rhetoric was associated with the liberal state and liberal political parties, both of which were categorically rejected by the new social movements in Germany throughout the 1980s (Interview LSVD Member 2005; Interview Schwusos Member 2005). The antipathy towards subsuming the LGBT movement under the human right frame still exists in a number of lesbian feminist groups in Germany as is evidenced by the fact that lesbian activists chose not join forces with the SVD until 1999 when it finally became the LSVD (LSVD 2007).

The founding of LSVD coincided with the creation of ILGA-Europe and that organization's own shift from a focus on sexual liberation to a focus on the common humanity of LGBT people and their rights. LSVD is one of the more active organizations in ILGA-Europe and has both helped shape that organization's strategy as well as used European legislative victories to its advantage in the German political setting (Interview ILGA-Europe 2005). These connections helped reinforce the human rights rhetoric used by LSVD activists by showing them how successful it had been in other countries and how it was being incorporated into European institutions and legal frameworks. As such LSVD became the primary conduit by which European human rights norms were incorporated into the German LGBT movement. Although the rest of the movement was skeptical of this framing of the problem, German politicians and the public reacted quite favorably to their rights based campaigns.

Probably the most successful of these was the Aktion Standesamt which was carried out in 1992. The action involved over 200 gay and lesbian couples who attempted to get married at city hall in various German cities. This action, which used the example of the newly adopted registered partnership law in Denmark to support its claims of marriage rights for same-sex couples, resulted in an unsuccessful court case. More importantly, however, the action gained widespread political and media attention and brought the issue to the attention of the general German public (LSVD 2002). For the most part the media coverage was positive and mimicked the LSVD's framing of the relationship issue as a human rights problem (Interview German Green Party Member 2005; *Der Spiegel* 1/6/1992; *Sueddeutsche Zeitung* 20/8/1992). The LSVD had successfully used a human rights frame and European models to put SSUs on the political agenda in Germany.

If the LSVD helped put same-sex unions on the political agenda, it was the German Green Party that kept the issue front and center by making it a central part of their political program throughout the 1990s. In fact the links between the two organizations are well-known

despite the non-partisan status of the LSVD. Volker Beck, the Green MP who did the most to promote and assure the passage of the LPartG, was the LSVD's national spokesperson until he was elected to the Bundestag in 1994. Like the LSVD, the German Green Party has strong ties with its European counterparts and uses the European political sphere to help promote its political agenda at home. In the case of same-sex unions the European Parliament provided a particularly useful forum in which to advance its cause. The Roth Report discussed above, which was the first EP report to call on EU member states to open marriage to same-sex couples, was written and promoted by a prominent member of the German Green Party, Claudia Roth. This report garnered a great deal of attention within EU institutions and certain member states and made Roth a minor political celebrity as a result of the extensive media coverage that followed (Beger 2001). Claudia Roth and the Green Party became an important importer of the European norm for relationship recognition. A number of activists in Germany mentioned the importance of this report for convincing the German public and policymakers of the legitimacy of relationship rights claims (Interview German Green Party 2005; Interview LSVD 2005; Interview Schwusos 2005).

LSVD and the Greens did a great deal to put the SSU issue on the political agenda as a human rights issue, but there was only so much they could do from outside of government. It was not until the Greens became part of the governing Red-Green coalition in 1998 that passage of the LPartG had a chance of becoming a reality. In fact, both the SPD and the Greens had included a promise to adopt such a law in their election programs in 1998, but the former had largely done so in an attempt to court the latter. The SPD did have some passionate supporters of the LPartG in its parliamentary grouping but these supporters were not particularly well represented in the government that took power in late 1998. It is interesting that the coalition agreement between the Greens and the SPD, which for the most part is a sparsely worded document, takes the time to mention that the planned SSU law seeks to implement longstanding recommendations of the European Parliament (Buendnis '90/Die Gruenen / SPD 1998). In addition to being a nod to Claudia Roth, it also seems to be invoking outside support for what many in the SPD considered to be a controversial law.

The fact that the law was adopted just two years after the new government took office despite reluctance by prominent members of the SPD is a testament to the hard work of the Green Party parliamentary group and Volker Beck in particular (Interview Member of Schwusos 2005; Interview CDU Parliamentary Staff 2005). Although the government had the necessary votes to adopt the bill in the lower house of parliament, two institutional barriers threatened its

passage. First members of the government were afraid that the law could be ruled unconstitutional by the German courts because of the protection of marriage clause in Article 6 of the German constitution. For this reason they decided to model their bill on the Nordic registered partnership laws that neither opened marriage to same-sex couples nor created a new institution open to both different-sex and same-sex couples as the French PaCS law had done (Interview Green Party Member 2005). This model they felt would be interpreted as less threatening to traditional marriage.

The second, and far more immediate threat to the Life Partnership bill was the upper house of parliament, the Bundesrat, which at the time was dominated by the two Christian Democratic parties, the CDU and CSU. Because all bills that affect the federal states in Germany must also gain assent from this upper house and because the Red-Green government knew the bill would not pass this chamber, it split the bill into two parts. The first part created the new institution and granted same-sex couples such rights as the ability to adopt a common last name, the right to remain for non-German partners, and maintenance obligations. This bill did not require approval from the Bundesrat and became the LPartG. The second part, which contained many of the financial and tax benefits granted to married couples and did require approval from the Bundesrat, did not pass the upper chamber. As a result the LPartG was a much less comprehensive law than its counterparts in the Nordic countries on which it was modeled. The difficult birth of the new law demonstrates how necessary the Greens and their European connections were to its success.

The splitting of the law allowed the Red-Green coalition to overcome one institutional barrier but threat of a court challenge still loomed. This challenge came almost immediately after the adoption of the law when three CDU or CSU-led Laender (federal states) launched a constitutional complaint with the Bundesverfassungsgericht (German Federal Constitutional Court) on both procedural grounds and substantive grounds asserting that the law violated the special protection of marriage clause in the German constitution. It is interesting to note that the federal CDU/CSU parliamentary grouping and a number of CDU-led Laender chose not to join the complaint. Although the CDU/CSU fraction had voted against the LPartG in the Bundestag a number of CDU party members were wary of vigorously opposing a bill that was so clearly framed as anti-discrimination measure (Interview CDU Parliamentary Staff Member 2005). Even in the CDU the norm for relationship recognition had had some socializing effects.

The heart of the challenge lay with the substantive claim that the law violated the marriage protection clause of the Constitution. When the Constitutional Court published its

decision on July 17, 2002 the law had been in force for almost a year and hundreds of same-sex couples had entered the new unions. The decision served only to reinforce their new status. The court not only found that LPartG in no way threatened heterosexual marriage but it also let lawmakers know that they could bestow more of the privileges associated with marriage on the new institution without violating the constitution (BVerfG, 1 BvF 1/01 17/07/2002; Miller and Roeben 2002). This decision, which opponents of the law brought on themselves in what many have called an *Eigentuer* (own goal), did a great deal to solidify the law in German political circles and in the eyes' of the public (Interview *Tageszeitung* Reporter 2005; CDU Parliamentary Staff Member 2005). Edmund Stoiber, the CSU Premier of Bavaria, who was running against Gerhard Schröder in a national parliamentary election and who at one point had threatened to make LPartG a campaign issue, quietly dropped the issue. The Liberal Party (FDP) also dropped its opposition to the law shortly thereafter and now supports its expansion.

The most important consequence of the Court's decision, however, was the confidence it gave the Red-Green government to expand the rights contained in the LPartG to include greater financial benefits and more controversially step-child adoption rights.⁵ The new law, *Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*, which largely was initiated by the Green parliamentary group under the tutelage of Volker Beck, was adopted in 2004 and came into force in 2005. Since this time the debate in Germany has focused on the possibility of opening marriage to same-sex couples. The discussion about rescinding the law, which never really caught on in Germany, has completely faded.

The Court decision clearly solidified the legitimacy of the LPartG in Germany. The influence of European norms and transgovernmental legal networks on this decision are less clear and harder to trace than the links between European political forum and LSVD and the Greens. A number of scholars have written about the influence of European Courts, especially the EU's European Court of Justice, on national judiciaries (Slaughter, Sweet and Weiler 1998; Slaughter 2004; Conant 2001). Anne Marie Slaughter in particular has written about the effects of transgovernmental legal networks in Europe and the 'socializing' effects that they have on national members of the judiciary (2004). Germany has a complicated relationship with the ECJ and has on occasion refused to recognize the superiority of EU law, a legal principle it and other governments usually recognize (Slaughter 2004: 84-85). In its LPartG decision, the Constitutional Court did not refer to any rulings in other countries or by the ECHR to support its

⁵ Step child adoption allows a non-biological partner to adopt their partner's biological child. The law still forbids two same-sex partners from jointly adopting a non-biological child.

own position. This fact is perhaps not particularly surprising given that Germany has a civil and not common law heritage; the former generally do not use prior case law in decisions.

In the introduction to the decision the Court does, however, lay out the history of law and in this brief description it mentions the adoption of SSU laws in other countries as an important precursor to the German debate. Additionally, it uses the human rights frame in describing the purpose of the law as an effort by the legislature to address discrimination against same-sex couples. In this way the Court both made note of examples from other countries as an important precursor to the German law and seems to accept the European framing of relationship recognition as a rights issue. The extent to which this norm and the legal precedents from other countries and the ECHR influenced their decision is difficult to gauge. But there is some indication that European precedents did enter into their deliberation processes.

To sum up, European norms and SSU precedents in other European countries did a great deal to help German LGBT policy activists to put the issue on the agenda in their own country despite the lack of any legally binding mandates to address the issue. Without the backing LSVD found within ILGA-Europe to use an explicit human rights frame, the well-publicized calls from the EP to open marriage to same-sex couples, and the long standing example of their Nordic neighbors, it seems highly unlikely that the Red-Green Coalition would have found the framing or support necessary to promote the LPartG even within their own parties in 2000. As will be seen in the next section, several factors have made the European SSU norm more ‘usable’ in Germany than in Austria. These include the presence of the Green Party in government emphasized above but also the comparatively high level of legitimacy Europe enjoys in Germany. Without this legitimacy as the Austrian case illustrates neither soft nor hard law norms can have the same effect on the political debates within European states.

SSU Recognition in Austria: A European Laggard?

Many of the factors thought to affect the adoption of SSU laws such as levels of religiosity, a Catholic heritage, the strength of the LGBT movement, the presence of Christian Democratic and Green parties do not differ significantly between Germany and Austria (for an overview of these arguments see Kollman 2007). Both countries have similar reported levels of individual church attendance and beliefs and God (Inglehart and Norris 2004). Both have a strong Catholic heritage although Germany does have a mixed Catholic-Protestant heritage. And both countries’ party systems have dominant Christian Democrat parties on the center right and well established Green Parties that generally win just under 10% of the vote in national

parliamentary elections. Nor are there significant differences in the strength or nature of the two countries' LGBT movements. While the Austrian movement does not have the rich history of the German movement, strong national LGBT organizations in the form of Hosi-Wien and Rechtskomitee Lambda have existed for more than twenty and fifteen years respectively (Hosi-Wien 2007; Rechtskomitee Lambda 2007). Further the movement has not had the same difficulty employing the human rights frame as the German movement because these organizations did not come out of the student protests of the 1960s and 1980s. As such both Hosi-Wien and Rechtskomitee Lambda have been intimately involved in European networks and like LSVD in Germany have sought to use European norms and institutions to their advantage.

Despite these similarities, Austria's SSU law is the least comprehensive and least generous law in Western Europe outside of the three countries where no recognition exists. The Austrian government grants same-sex cohabitants the same benefits given to non-married heterosexual couples. While same-sex couples do now have certain financial rights such tenancy rights, tax breaks and some social insurance benefits, these couples are not able to participate in any state sanctioned ceremony. Austria also has the distinction of being the only country in Europe in which this legal recognition was imposed upon them by a European institution, the European Court of Human Rights. This decision, *Karner v. Austria*, was the result of a case launched by a gay man who was denied the right to take over his long term partner's lease after the latter's death. Because Austrian law recognizes the tenancy rights of non-married heterosexual cohabitants, Karner with the help of Rechtskomitee Lambda, ILGA-Europe and Hosi-Wien argued that this amounted illegal discrimination (Rechtskomitee Lambda 2007; ECHR 2003). The ECHR agreed and ordered the Austrian government to grant same-sex cohabitants the same rights as the government grants non-married different-sex cohabitants.

Although this decision was considered a huge victory for same-sex relationship rights and ILGA-Europe and other LGBT groups have touted the success of the legal precedent it set, its effect on the legal and political status of same-sex couples in Austria was surprisingly small. Despite the fact that most legal experts in Austria thought this ruling would necessitate legislative action, the government initially simply changed the wording of a circular about how tenancy laws in Austria were to be implemented (Interview Rechtskomitee Lambda Lawyer 2005). The government did nothing to change laws governing other rights and benefits enjoyed by non-married different-sex cohabitants as the logic of the Karner decision necessitated. Rights such as partner benefits from social insurance programs and tax breaks were not granted to same-sex cohabitants until the Austrian government was forced to do so by Austrian courts that

applied the *Karner* ruling (Rechtskomitee Lambda 2007; Interview Hosi-Wien 2005). An attempt to draft legislation that would anchor the *Karner* decision in law and extend state recognition of same-sex couples by the Justice Minister, Karin Gastinger of the far right wing Alliance for Austria's Future party, was scuttled by the Minister's coalition partner, the Christian Democrats and members of her own party shortly before the parliamentary elections in the fall of 2006 (Interview Justice Ministry Staff Member 2005; *Der Standard* 13/07/06)⁶.

The *Karner* ruling also had only a marginal effect on political discourse in Austria. The media reported on the ruling but did not hype it or its consequences. In the eyes of the LGBT activists the political elites, especially those in the ruling Christian Democrat / Alliance for Austria's Future coalition, were not forced by the press to respond to the ruling. As a result very little public debate followed from it (Interview Hosi-Wien Staff Member 2005; Interview Rechtskomitee Lambda 2005; Interview SoHo Member 2005). The decision did help embolden the two left-wing parliamentary opposition parties, the Greens and the Social Democrats (SPOe), to promote the issue more forcibly in parliament. Both parties had been calling for same-sex relationship recognition since the late 1990s. Using the example of the Nordic countries the two parties independently drafted and sponsored parliamentary bills for the creation of a registered partnership scheme in 2004 and 2005. The Green Party bill also called for the opening of marriage to same-sex couples in addition to introducing RPs (Hosi-Wien 2007).

As in Germany European norms and examples have been imported into Austria via the left wing parties and transnationally linked NGOs. Unlike in Germany, however, neither these norms nor a legal mandate from the ECHR have led to significant policy change. Even the newly elected Social Democrat-Christian Democrat coalition, which is led by an SPOe Prime Minister, has decided to tread softly on the issue. Despite the SPOe's past pledges to introduce a registered partnership law, the coalition agreement is largely silent on the issue (SPOe-OeVP 2007). Since coming to power in early 2007, there has been no indication that the government plans to move on this issue any time soon. The Christian Democrats, although the junior coalition partner, still appear able to block any SSU initiatives at least for the time being.

How can we explain this? Why has Europe had more of an impact on German SSU policy than on Austrian policy despite obvious similarities between the two countries and despite the fact that Austria is the only country in Europe that has been mandated by the ECHR to

⁶ The government did pass a law in the summer of 2006 recognizing the rights of same-sex cohabitant in social insurance programs. This law was passed after an Austrian court based on the *Karner* ruling had ordered such a change. See Hosi-Wien, *Positionen und Forderungen der Hosi-Wien*, http://www.hosiwien.at/?page_id=31 (downloaded 07/05/07).

recognize same-sex couples? Two factors seem particularly important in explaining these outcomes. First, the most obvious reason Austria has not adopted a more comprehensive SSU law lies in the fact that the conservative OeVP has been in government longer than the existence of the European relationship recognition norm. It was particularly unfortunate for proponents of SSUs in Austria that the Christian Democrats became the leading governing party and formed a coalition with the far right wing Freedom Party in 1999 just as the norm was reaching a tipping point in Western Europe. Up until 1999, the OeVP had spent most of the post-war era ruling with the SPOe in Grand Coalition governments. In this way the influence of the European relationship recognition norm and even the ECHR mandate of recognition has been blocked in Austria. Although not widely recognized in the Europeanization literature, party composition of implementing governments does matter.⁷ The Christian Democrats, as their counterparts tried to do in Germany, have been able almost single-handedly to block SSU legislation in Austria.

This explanation can only take us so far, however. Party systems in general are not particularly good predictors of which European countries have adopted SSU laws and which have not. Although Green parties were a vital conduit of the SSU norm in Austria and Germany, neither the presence of a Green party in parliament nor its participation in government is a necessary condition for SSU adoption. In fact the vast majority of governments that have adopted these laws did not include a Green party in the ruling coalition. While almost every SSU law has been passed by a center-left government, Social Democratic parties have proven quite capable of promoting and instituting these laws in Western Europe. Austria in fact had SPOe-led government throughout most of the 1990s and since the beginning of this year. Yet none of these governments adopted an SSU law.

Furthermore, it is curious that the Austrian public has not questioned the OeVP to a greater extent on its stance towards SSUs in the wake of the *Karner* decision and subsequent *Karner*-based Austrian court rulings. Despite the very public failure of Gastinger's draft SSU bill last summer directly before the election, the topic never became a high profile campaign issue (Interview Austrian Green Party MP 2006). The CDU in Germany has clearly decided to drop its active opposition to SSUs since 2002. The OeVP despite having an ECHR decision against them has publicly embraced an anti-SSU position. There is little evidence to suggest the party has been punished for this stance by the electorate or other political elites even though public opinion polls show 49% of the public supports the idea of opening marriage to same-sex

⁷ Falkner et al.'s study on the implementation of EU social policy is an exception to this and the authors encourage scholars to pay more attention this variable.

couples, just 3% lower than the proportion of the German public that supports it (Angus Reid 2006).

The second and perhaps more important reason Austria lags behind other West European countries in implementing a comprehensive SSU law has do with the lack of power European norms have in the Austrian political setting. The European SSU norm and the example of other European countries has shaped the debate in Austria as it has elsewhere in Western Europe. LGBT NGOs, the Greens and the SPOe have used European examples and the *Karner* decision to push the issue higher onto the political agenda and to justify their framing of the issue as a human rights problem. The difference in Austria lies in the reception of the norm. Unlike Germany, Austria has not spent all of the post-war era inside the EU. Because of its location in the heart of central Europe the allies designated it as a neutral buffer state in the postwar settlement between the US and the Soviet Union. Although neutrality was imposed upon them, Austrians embraced this new status and incorporated it into the country's postwar national identity (Kovacs and Wodak 2003; Thaler 2001). Germany used its position at the heart of the EU to restore its image after the catastrophe of World War Two; Austria used its neutrality. While this national conception of neutrality is more flexible than that of its Swiss neighbor, the fact that Austria did not join the EU until 1994 has influenced its views of Europe. The controversy surrounding the EU's condemnation of the inclusion of Jorg Haider's Freedom Party in government in the early 2000s further eroded support for the EU in Austria.

Not surprisingly Austria is one of the Union's most Eurosceptic member states. In the latest Eurobarometer poll, the Austrian public was the second least satisfied with EU membership of the 25 member states. Only the UK public was more dissatisfied. With just 36% of the population saying that EU membership was a 'good thing', Austria's satisfaction levels were almost 20 percentage points below the EU average. By contrast 58% of Germans concur that EU membership is a 'good thing' (Eurobarometer 2006). Similarly when polled about their identity, Austrians were comparatively reluctant to say they viewed themselves as Europeans. 51% of Austrians said they would identify themselves as Austrian only while only 11% have a predominantly European identity. Only four of the twenty-five member state publics have a higher percentage of 'national-only' identifiers. In Germany only 34% of the public has a 'national-only' identity and 18% of the German public report feeling predominantly European (Eurobarometer 2003). Although Austria has been a member of the Council of Europe since the 1950s, its role in Austrian politics is still contested by prominent members of the political elite (Interview Austrian Justice Ministry Staff Member 2006; *Der Standard* 14/11/2006).

For these reasons European norms simply do not have the influence in Austria that they have in Germany. The SSU norm has helped shaped the debate there, but neither the Austrian public nor its political elites feel as compelled to follow the lead of European institutions or states. While Germany has felt compelled to abandon its penchant for the *sonderweg*, Austrians remain comfortable going their own way on certain issues. What is interesting in the SSU case is that even as the soft law norm for relationship recognition hardened, Austrians felt no more compelled to comply with it than they had before.

To sum up, although the SSU debate has unfolded in very similar manners in Austria and Germany, policy outcomes have diverged quite dramatically. The German public and political elites largely have accepted the legitimacy of the European created SSU norm and have translated this norm into an increasingly comprehensive and generous registered partnership law. Certain parts of the Austrian political establishment by contrast continue to view the central claims of the relationship recognition norm skeptically despite its incorporation into the Austrian political debate. The ECHR *Karner* decision against the Austrian government did very little to change this situation. Prominent members of the OeVP continue to reject the legitimacy of the norm. As opinion polls and church attendance levels show, this is not because the Austrian public is more conservative than the German public. Rather the answer seems to lie in the fact that European norms are simply less powerful in Austria than in Germany and not powerful enough either to persuade mainstream OeVP members of its legitimacy or to have the public hold them accountable for this position.

Conclusions

Although not widely researched by political scientists, the wave of SSU policy adoption in Western Europe over the past eighteen years represents one of the most remarkable cases of policy convergence in recent times. This convergence is all the more remarkable for the fact that it largely has occurred in the absence of legally binding international or European mandates for this recognition. Instead the soft law norm for relationship recognition was cobbled together through a series of resolutions from the EP, the incorporation of sexual orientation into the Treaty of Amsterdam's discrimination prohibitions, the models provided by Nordic states and more recently key decisions by the ECHR. These models and precedents were shaped by a transnational network of LGBT policy activists who also helped disseminate them to European states after their creation. The influence of the SSU norm and these European networks is

reflected not only in the regional and temporal clustering of these laws but also in the rhetoric and justifications used by European governments when adopting them.

The SSU case demonstrates that diffusely created soft law norms can have profound and transforming effects on European states' policies. Scholars should not underestimate the power of European networks to 're-socialize' domestic publics and elites. National policy structures and styles are not always as fixed as the dominant approaches in the Europeanization literature would imply. However, the homogenizing effect of the European SSU norm should not be exaggerated as the German and Austrian comparison illustrates. As in other Europeanization studies, the evidence presented here suggests that pressure for same-sex relationship recognition is filtered through domestic mediating factors. The filters emphasized in this study, party composition of ruling coalitions and European norm legitimacy, are not often highlighted in the literature. Their importance for explaining SSU outcomes may be related to the soft law nature of the norm. I suspect, however, that these factors also influence the implementation of more traditional and legally binding European laws and should be given greater consideration in the literature. As such my findings partially echo those of Falkner et al, whose study of EU social policy implementation also made note of the importance of parties in explaining outcomes (2005).

The findings of this study also suggest that soft law norms are more than just an additional way in which Europe can have power in domestic settings. As the Austrian case illustrates, hard and soft law do not come in mutually exclusive packages. In the SSU case, and I would guess in many policy fields, the attempt by European institutions to impose binding mandates on European states only comes after soft law norms have laid the ground work. Imposing binding rules on states or governing parties that have not internalized the core principles of the new law is courting trouble. As the Austrian reaction to the ECHR *Karner* decision shows hard law will not always make much difference where soft law has failed. So far Europe has had far greater luck influencing domestic SSU policies when its influence has been soft rather than hard in nature. The importance of using soft law as a precursor to legal mandates may become even more important in an expanded Europe. The level of Europe's legitimacy varies greatly across the new member states but many of these societies have more in common with Austria than with Germany in terms of their relationship with the European polity. In Austria the legal mandate to recognize same-sex cohabitants was met with mild resistance and inertia. In certain Eastern European countries such as Poland and Latvia the hardening of the European SSU norm has led to retrenchment. Both governments have been curtailing the rights

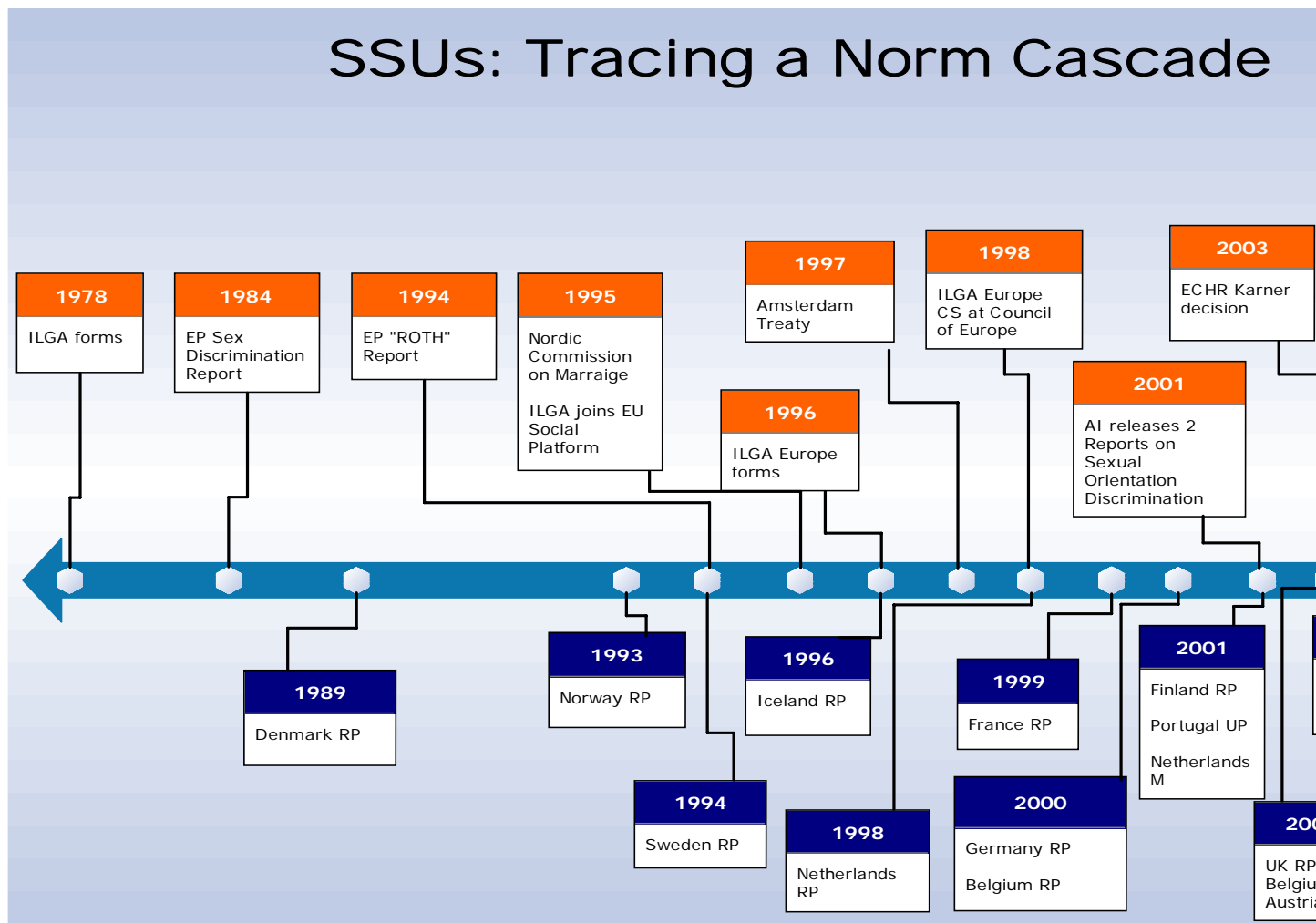
of LGBT people over the past two years and the Latvian government has adopted a constitutional amendment defining marriage as institution between one man and one woman. These developments suggest that Europe needs to proceed carefully in this area. 'Soft' talk may be cheap, but it may also be very necessary.

Table 1. Same-sex Union Legislation in Western Democracies

Marriage	Registered Partnership	Unregistered Partnership	No Recognition
Netherlands	France	Austria	Ireland
Belgium	Denmark	Portugal	Italy
Spain	Norway	Hungary	Greece
	Sweden		
	Germany		
	UK		
	Finland		
	Switzerland		
	Czech Republic		
	Slovenia		

Source: Wintemute "From 'Sex Rights' to 'Love Rights': Partnership Rights as Human Rights", 2005.

Timeline 1. SSU Timeline



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