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# Same-Sex Couples before National, Supranational and International Jurisdictions

*Foreword by*  
Prof. Gráinne de Búrca

 Springer

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# Foreword

Recent years have seen exciting developments across many jurisdictions as far as the legal recognition of the rights of same-sex couples is concerned. It seems as though—at least in certain parts of the world—a tipping point has been reached in relation to legal recognition and protection for the rights of same-sex couples. These include the right to workplace benefits, the right to have relationships legally recognized and formalized, and the right to marry. Needless to say, there are a great many parts of the world where harsh forms of discrimination against same-sex couples are still enshrined in law and where few or no legal rights are accorded to same-sex couples. On the other hand, there has also been a cascade of reforms in recent years in Europe, in North and South America, and in many parts of the Commonwealth and elsewhere. Many of these reforms have been triggered or developed through litigation and adjudication before national, regional, and international courts and tribunals, and sometimes before several of these.

This book is a wonderfully timely and an impressively wide-ranging survey of these judicial developments in the law relating to same-sex couples.

Part I of this book contains a series of analyses of these developments in a range of national jurisdictions across the globe. There are chapters dealing with the US and the evolution of American Supreme Court jurisprudence on same-sex relationships, chapters on Canada and a range of Central and South American jurisdictions as well as Mexico, and chapters covering South Africa, Australia, and New Zealand. Some of the chapters are explicitly comparative, such as that which contrasts the legal background to developments within South Africa and Canada, while other chapters point to some of the similarities in context and culture within certain groups of states—such as Mexico and parts of Central and South America—which have traditionally adhered to a more conventional conception of the ‘family’. The chapter covering Australia and New Zealand, by comparison with many of the aforementioned jurisdictions, points to the leading role of the legislature rather than the courts.

The chapters dealing with European states similarly cover what might be called clusters or ‘varieties’ of European jurisdiction insofar as their approach towards judicial recognition of the rights of same-sex couples is concerned. The UK enjoys

a chapter to itself, which outlines the 40-year revolutionary road taken by the UK, by means of its equality law and human rights law, towards significant recognition of the rights of same-sex couples. The Nordic chapter looks at five Nordic states and identifies a lack of radical judicial activism in this field (as in others) and a more significant role for the democratic process—including civil society and governmental entities—in the gradual expansion of same-sex relationship rights. A more sobering chapter covering a range of Eastern European countries, including Croatia, Hungary, Slovenia, and Poland, challenges any conception of unidirectional progress towards greater legal recognition for same-sex couples, outlining the continuing social prejudice and discriminatory attitudes evident even in domestic parliamentary debates. The chapter on France and Belgium similarly points to the primary role played by the political process, and notes that while courts are not the main actors in the same-sex debate in these countries, they have nevertheless played a certain incremental role in framing the debate and advancing elements of legal protection for same-sex relationships. The coverage of Germany, Austria, and Switzerland indicates once again a leading role played by legislatures, but with the constitutional framework of the state setting the contexts for occasional judicial intervention, and ultimately a ‘separate but equal’ regime of registered partnerships rather than marriage for same-sex couples. Perhaps unsurprisingly, the case law from the Catholic-dominated jurisdictions of Italy, Spain, and Portugal demonstrates that the courts are not what the authors call ‘avant-garde’ actors, but instead mainly defer to the legislature against the backdrop both of domestic constitutional law and also, to some extent, the developments of the European Court of Human Rights. Finally, the chapter on Greece and Cyprus similarly refers to the likely future influence of both ECHR law and in this instance also EU law on the question of the legal protection of same-sex couples, even though at the time of writing it seems that same-sex couples can neither marry nor enter civil unions in either jurisdiction.

These national law analyses are followed by a section of the book devoted to private international law issues, with three chapters—one on the law governing *formation* of same-sex marriages, one on the law governing *recognition* of foreign same-sex partnerships and marriages, and one on the treatment of same-sex families (procreation, surrogacy, parenthood, etc.) across borders. These chapters address many of the thorny conflicts-of-law issues raised by the existence of differences in the national legal treatment of same-sex couples when there is a transnational dimension to the relationship.

Part II of this book is then devoted to the treatment by regional (or supranational, as the book calls them) and international courts of issues relating to same-sex couples. There are two chapters on the case law of the European Court of Human Rights—one dealing with the right to marry (not yet recognized by the ECtHR) and the other with other rights of same-sex couples—and a chapter on the jurisprudence of the Inter-American Commission and Court of Human Rights. Two chapters on EU law follow, the first looking at the uneven free movement rights of same-sex couples and the other at employment benefits (where same-sex couples working as EU staff have been accorded greater rights by the CJEU than employees in Member

States), while the last two chapters deal with labor law rulings of international organizations (such as the UN and the ILO administrative tribunals), and finally with the jurisprudence of the UN Human Rights Committee which monitors the International Covenant on Civil and Political Rights.

Overall, this book is a rich compendium of important national and international legal developments in the arena of the legal recognition of the rights of same-sex couples. It contains thorough and up-to-date analyses of these trends across most of the relevant parts of the world in which change has been occurring. The inclusion of chapters on private international law, regional human rights law, EU law, and international human rights law nicely supplements the analysis of domestic jurisdictions in the first half of the book, and makes this work an essential reference point for all of those interested in global legal developments in this important field.

New York, USA

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