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Same-Sex Couples before National, Supranational and International Jurisdictions

Foreword by
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Chapter 1
Same-Sex Couples, Legislators and Judges. An Introduction to the Book

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Abstract The volume focuses on the jurisprudence of national, supranational and international jurisdictions (and quasi jurisdictions) as regards the legal status of same-sex couples. The book tries to convey the complexities and controversies that derive from the judicial recognition of same-sex couples across the world, considering the relationship of the judiciary with the executive and the legislature.

The legal discourse on the status of same-sex couples before the courts raises problems in terms of legitimacy, democracy and separation of powers. What is at stake is the balance between the prerogatives of the judiciary and (especially) those of the legislature. The courts of some jurisdictions have been progressive, dynamic, activist and even creative in their interpretation of the law, while others have been conservative, static, literal and *originalist*.

In any case, regardless of the final outcome, it is undisputable that the continuous flow of new decisions has produced a considerable body of jurisprudence that deserves close attention. This is precisely the main objective of the present book.

> We know that people of the same sex often love one another with the same passion as people of different sexes do and that they want as much as heterosexuals to have the benefits and experience of the married state. If we allow a heterosexual couple access to that wonderful resource but deny it to a homosexual couple, we make it possible for one pair but not the other to realize what they both believe to be an important value in their lives [. . .]. The cultural argument against gay marriage is therefore inconsistent with the instincts and insight captured in the shared idea of human dignity. The argument supposes that the culture that shapes our values is the property only of some of us – those who happen to

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> enjoy political power for the moment – to sculpt and protect in the shape they admire. That is a deep mistake: in a genuinely free society the world of ideas and values belongs to no one and to everyone. Who will argue – not just declare – that I am wrong?
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> R. Dworkin, The New York Review of Books, 21 September 2006

> The Constitution does not forbid the government to enforce traditional moral and sexual norms [. . .]. It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.
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> A. Scalia, Dissenting Opinion, 26 June 2013, *United States v. Windsor*

1.1 A Brief Prologue: Harry, Sally and the Present Time

The reasons for this book may be better understood by recalling Rob Reiner's *When Harry Met Sally*. . . (1989). This widely acclaimed movie is about a man and a woman who, after completing their undergraduate studies, share a car trip to New York. When they arrive, they go their separate ways with no particular feelings for each other (except, maybe, some sort of mutual dislike). They meet again 5 years later and, from that moment on, the plot follows the development of their relationship from friendship to love and, finally, marriage. The narrative is brilliantly interspersed with short documentary-style clips of married couples telling the stories of how they met.

In most parts of the world, the type of development described above—which may sound familiar to many—is impossible for same-sex couples. At the time of this writing,[1] most countries in the world do not grant any form of legal recognition to LGBTI (lesbian, gay, bisexual, transgender and intersex) couples; and of the 18 States providing some form of legal recognition other than marriage, only 13 have passed legislation on same-sex marriage.[2]

These asymmetries—in terms of rights protection—between straight and gay couples, on the one hand, and, on the other, among same-sex couples, prompted us to investigate the challenging issue of the legal situation of same-sex couples' relationships in the world. As a consequence, we decided to limit this study to the rights of LGBTI people as couples, leaving aside other important legal issues

[1] Developments in this field are fast, as shown by those occurred in 2013 in Brazil, France, New Zealand, United Kingdom, United States, and Uruguay (all covered in this book).

[2] Countries that have legalized same-sex unions at the national (but not sub-national) level, or where these unions are recognized *de facto,* include: Andorra, Australia, Austria, Colombia, Costa Rica, Croatia, Czech Republic, Ecuador, Finland, Germany, Hungary, Ireland, Israel, Liechtenstein, Luxembourg, Slovenia, Switzerland, and the UK. The following countries have recognized same-sex marriage: Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, The Netherlands, Norway, Portugal, Spain, South-Africa, Sweden. For a comprehensive list of countries, including some sub-national jurisdictions—such as parts of Mexico and the US—where legal partnerships and/or same-sex marriages have been legalized, see www.iglhrc.org/.

arising all over the world from discrimination based on sexual orientation, such as the criminalization of LGBTIs as individuals.[3]

1.2 Aim and Scope

The present volume focuses on the jurisprudence of national, supranational and international jurisdictions (and quasi-jurisdictions, as is the case of the UN Human Rights Committee) as regards the legal *status* of same-sex couples.

This collection of essays is by no means intended to provide an exhaustive treatment of the statement of the law. Our aim is rather to explore the content, functioning and opportunities of the different jurisdictions' reasonings and their contribution to the strengthening of LGBTI rights (and duties). As a consequence, the book tries to convey the complexities and controversies that derive from the judicial recognition of same-sex couples across the world, considering the relationship of the judiciary with the executive and the legislature.

Nowadays, more and more same-sex couples are going to court to claim that their rights are not protected. In response to these issues, the courts of some jurisdictions have been progressive, dynamic, *activist* and even creative in their interpretation of the law, while others have been conservative, static, literal and *originalist*. In any case, regardless of the final outcome, it is undisputable that the continuous flow of new decisions has produced a considerable body of jurisprudence that deserves close attention.

The nature of the claims brought before the courts (or *quasi*-courts) varies depending on the legal system in question.

At the national level, in States where there is a gap in the ordinary law as regards the *status* of same-sex couples, homosexual partners mainly ask that their rights as a 'couple' be recognised, while in countries where same-sex couples can marry, register as partners, or obtain at least the most basic forms of legal protection, judges are asked to recognize more specific (and thus more advanced) rights, such as survivor's pension or adoption rights.

At the supranational and international levels there are more variables. With the exception of international administrative tribunals, which have competence in labour law matters concerning international organizations' staff members, individuals are normally entitled to seek protection once they have exhausted all available domestic remedies. That being said, the legal effect of the decision of a supranational and international judicial (or *quasi*-judicial) body depends on two conditions (a) the extent and limits of the competence of the court (or *quasi*-judicial body),

[3] According to the EU Foreign Affairs Council's "Guidelines to promote and protect the enjoyment of all human rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons" (Brussels, 24th June 2013, para. 15), around 80 States still consider homosexuality as a crime. See www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137584.pdf.

which are generally established in its Statute; and (b) both the efficacy and the role accorded to international norms and judgments by national legal systems.

Given the above, a further preliminary remark is necessary. Focusing on jurisprudential developments does not mean in any way downplaying the importance of the legislature. On the contrary, the essential role of legislative bodies[4] in understanding and providing a legal framework for the changes occurred in society must be acknowledged and taken into account. This holds true especially when what is at stake is the interpretation and application of the principle of non-discrimination, that is, a general principle of law which is evolving and whose content seems to be historically and geographically determined.

Furthermore, the extent to which judges acknowledge the existence of an inviolable core of rights implied in such principle and the way in which they interpret it are two factors that have a strong impact on the powers and functions of the legislature. The interpretation of the courts can, indeed, have the effect of urging or even requiring lawmakers to take action, i.e., to pass new legislation or amend existing laws. In this regard, the dialogue between the judiciary and the legislature shows that the two form an 'inseparable *couple*': in this volume, the first will play the lead, while the second will be the co-star.

1.3 Structure

The book consists of two parts: Part I is on (selected) national jurisdictions; Part II is on supranational and international jurisdictions (and *quasi*-jurisdictions).

1.3.1 Part I: National Jurisdictions

Part I deals with same-sex couples before national jurisdictions. We have tried to cover as many countries as possible,[5] without ever purporting to include all relevant national legal systems. Many Asian countries (such as Nepal)[6] as well as some EU

[4] Not only national but also international and supranational bodies, such as the institutions of the European Union.

[5] As already noted, national legal systems where homosexuality is criminalized—that is, countries where there can be, *a priori*, no case law on same-sex couples' rights—are not discussed in this book.

[6] In 2007 the High Court ruled on LGBTI rights, asking the Government of Nepal to form a committee in order to produce a study on the issues raised by same-sex marriage. The judgment is available at www.bds.org.np/publications/pdf_supreme_eng.pdf.

Member States, such as The Netherlands[7] or Ireland,[8] are not discussed in the book. Of course, this does not diminish the importance of their legal systems or their courts' positive action in recognizing, and giving 'tangible' meaning to, the rights of same-sex couples.

Part I is divided in two sections. Section 1, entitled "Domestic Law Issues", contains 12 chapters written by scholars and practitioners with considerable expertise in constitutional and public comparative law. While the US[9] and the UK[10] are the subject of separate chapters, other countries are discussed together in chapters concerning different States that share similar legal institutions and concepts[11] or, more frequently, a common historical and geographical background.[12]

Besides purely national legal orders, the three chapters of Section 2 focus on crucial issues of private international law regarding same-sex couples: the law applicable to the formation of same-sex partnerships and marriages[13]; the recognition of foreign same-sex partnerships and marriages[14]; and, finally, the impact of the transnational movement of same-sex families on private international law mechanisms at the national level.[15]

1.3.2 Part II: Supranational and International (and Quasi-*) Jurisdictions*

Part II contains three sections and deals with same-sex couples before supranational and international jurisdictions.

Section 1 concerns supranational courts with human rights jurisdiction. Section 2 is devoted to the Court of Justice of the European Union (CJEU). Section 3, entitled "International Labour Law Issues and *Quasi*-Jurisdictional Bodies", covers both the jurisprudence of international administrative tribunals and the decisions rendered by the UN Human Rights Committee (UNHRC).

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[7] In 2000, the Netherlands were the first country in the world to legalize same-sex marriage. An English version of the Dutch civil code is available at www.dutchcivillaw.com/civilcodebook01.htm.

[8] In Ireland, civil same-sex partnerships became legal in 2011 and the recognition of the right to marry is currently under discussion. For the text of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, see www.irishstatutebook.ie/2010/en/act/pub/0024/.

[9] Chapter 2 by Romeo and Chap. 3 by D'Aloia.

[10] Chapter 8 by O'Neill.

[11] Chapter 4 by Mostacci.

[12] Chapter 5 by Cabrales Lucio; Chap. 6 by Rundle; Chap. 7 by Friðriksdóttir; Chap. 9 by Bodnar and Śledzińska-Simon; Chap. 10 by Reyniers; Chap. 11 by Repetto; Chap. 12 by Fidalgo de Freitas and Tega; Chap. 13 by Drosos and Constantinides.

[13] Chapter 14 by Virzo.

[14] Chapter 15 by Biagioni.

[15] Chapter 16 by Winkler.

Section 1 is divided in three chapters. In Chap. 17, Pustorino conducts an in-depth analysis of the well-known decision of the European Court of Human Rights (ECtHR) in *Schalk and Kopf v. Austria*, examining also the most recent cases before the Court, some of which are still pending. Chapter 18, by Crisafulli, focuses on rights other than the right to marry, which lie at the heart of cases such as *Christine Goodwin v. the United Kingdom* (ECtHR): the right to private and family life, patrimonial rights, parental rights, and the expulsion of aliens. Chapter 19, by Magi, discusses the case-law of the Inter-American Commission of Human Rights (IACHR), as well as that of the Inter-American Court of Human Rights (IACtHR), with particular attention to the decision in *Atala Riffo and daughters v. Chile*. The importance of the jurisprudence of the ECtHR, the IACtHR and the IACHR lies in an innovative interpretation of the notion of 'family' and its impact on the legal orders of Member States.

Section II is devoted to EU law. Chapter 20, by Rijpma and Koffeman, deals with same-sex couples from the point of view of the free movement rights in the EU, in connection with the notions of European citizenship and family reunification. Chapter 21, by Orzan, addresses the issue of employment benefits for same-sex couples, with regard to both EU staff cases and references for preliminary rulings.

Part II ends with Section 3 on International Labour Law Issues and *Quasi*-Jurisdictional Bodies. In Chap. 22, Gallo focuses on the UN Administrative Tribunal (UNAT) and the ILO Administrative Tribunal (ILOAT) as a privileged instrument of analysis, examining their evolutive interpretation of concepts such as 'spouse', 'couple', and 'marriage' with regard to the internal law governing employment relations in international organizations as well as to the application of the *lex patriae* of the staff members concerned. Chapter 23, by Paladini, investigates the case-law of a *quasi*-jurisdictional body—the UN Human Rights Committee—reporting on several cases concerning the rights of same-sex couples, especially the right to marry and the right to a 'widow's pension'.

1.4 The *Vis Expansiva* of Same-Sex Couples's Rights Across the World and the Role of the Judiciary

Already in 1994 Kees Waldijk, writing about the recognition of same-sex couples' rights across the world, pointed out that:

> [t]here seem to be a general trend of progress: where there is legal change it is change for the better. Countries are not all moving at the same time and certainly not at the same speed, but they are moving in the same direction: forward.[16]

Some years later, Robert Wintemute observed that:

[16] Waldijk (1994), p. 51.

civil marriage will gradually be opened up to same-sex couples in more and more countries.[17]

This book confirms the *vis expansiva* implied in the above quotations, showing how the promotion and protection of same-sex couples' rights have progressed as a result, depending on the jurisdictions and in varying degrees, of the activities performed by both the judiciary and legislature,[18] or mainly by the judiciary,[19] or mainly by the legislature.[20] Said tendency applies equally to the rights of same-sex (registered) partners and those of same-sex (married) spouses.[21] Therefore, we can say, first of all, that there is a general trend towards the recognition of same-sex couples' rights[22] and, second, that this trend has often been due to the courts' interpretation and application of the law.[23] However, the way in which judges have enforced the rights of same-sex couples, and thus, pioneered legal changes and reforms in this area of law, varies from one legal system to another. In fact, when, based on a case-by-case approach, (more or less *activist*) judges recognize certain rights in contexts where there are no laws recognizing LGBTI's rights, that does not resolve the issue of discrimination due to the absence of specific legislation, since it is the task of the legislature to *actively* provide citizens with guarantees and rights.[24] This is even clearer when the executive violates the rights and independence of the judiciary and, by doing so, chooses to deny LGBTI people the legal protections granted to straight couples.[25]

1.5 Interactions, Dialogues and the Rights of Same-Sex Couples

The present volume book shows that the recent progress in the recognition and protection of same-sex couples is characterized, in varying degrees and with different consequences, by horizontal and vertical dialogues between national

[17] Wintemute (2004), p. 594.

[18] See Chap. 2 by Romeo; Chap. 3 by D'Aloia; Chap. 4 by Mostacci; Chap. 5 by Cabrales Lucio, as to Argentina and Brazil for example; Chap. 8 by O'Neill; Chap. 10 by Reyniers; Chap. 11 by Repetto; Chap. 20 by Rijpma and Koffeman; Chap. 21 by Orzan.

[19] See Chap. 5 by Cabrales Lucio, as to Colombia for example, and chapter by Fidalgo de Freitas and Tega, as to Italy.

[20] See Chap. 6 by Rundle; Chap. 7 by Friðriksdóttir; Chap. 9, as to the Czech Republic for example; Chap. 12 by Fidalgo de Freitas and Tega, as to Spain and Portugal.

[21] Depending on the legal system, the term 'spouse' does not necessarily imply marriage. On this point see, for instance, Chap. 22 by Gallo with regard to the Staff Regulations and Rules of international organizations.

[22] But see Chap. 13 by Drosos and Constatinides.

[23] But see Chap. 5 by Cabrales Lucio, as to Chile for example.

[24] See, for instance, the case of Italy discussed in Chap. 12 by Fidalgo de Freitas and Tega.

[25] See Chap. 9 by Bodnar and Śledzińska-Simon, with regard to Hungary.

legislatures and domestic/supranational courts. Although less evident, a dialogue exists also in the case of international tribunals and *quasi*-jurisdictional bodies, i.e. international administrative tribunals[26] and the UNHRC.[27]

In the case of a national legislature, the recognition of same-sex couples' rights may cross-fertilize other national legislatures, with the result that those rights and their legitimacy penetrate from a purely national dimension in different cultural, social and, ultimately, legal traditions. At the same time, however, it must be noted that this transnational legislative transplant can work only if there is some degree of homogeneity between the countries concerned.[28]

As regards the horizontal and vertical dimensions of the judicial dialogue, in some national jurisdictions' reasonings are grounded on comparative law as well as on the case-law of supranational courts, such as the ECtHR[29] and the IACtHR.[30] This shows the "maieutic" force[31] of legal pluralism as well as a desire on the part of national judges to find an external legitimization for their rulings. As to supranational courts, the decisions of the ECtHR,[32] the CJEU's[33] and the IACtHR's[34] have been crucial in paving the way for national legislation recognizing same-sex couples' rights,[35] including, in some countries, marriage equality.[36] Indeed, those courts have elevated 'new' values and principles of equality from a national level to a supranational level. However, they do not require Member States to recognize same-sex partnerships or marriage; instead, they have chosen to opt for the highest possible degree of rights protection, adopting a flexible interpretation, respectively, of the ECHR, EU law and the American Convention on Human Rights. This means, for example, that the Strasbourg Court recognizes the rights of a same-sex couple if the law of the applicant's State of nationality has legalized same-sex marriages and/or registered partnerships. Moreover, another factor contributes to the promotion of LGBTI rights: a teleological, systemic and inclusive interpretation of both Art. 8 and Art. 12 of the ECHR which has enabled the Court to abandon a literal interpretation of the law. When confronted with the protection of same-sex couples, the Court, even though it does not require Member States to adopt specific

[26] See Chap. 22 by Gallo on the cross-references made by the UNAT and ILOAT.

[27] See Chap. 23 by Paladini, on the references made by national and international judges to the case-law of the UNHRC.

[28] Chapter 7 by Friðriksdóttir.

[29] See, for instance, Chap. 8 by O'Neill and Chap. 12 by Fidalgo de Freitas and Tega.

[30] See, for instance, Chap. 5 by Lucio Cabrales.

[31] Von Bogdandy and Schill (2011). See also Von Bogdandy (2008); Walker (2008); Delmas-Marty (2009); Poiares Maduro (2009); Focarelli (2012), pp. 316–321.

[32] Chapter 17 by Pustorino and Chap. 18 by Crisafulli.

[33] Chapter 19 by Magi.

[34] Chapter 20 by Rijpma and Koffeman and Chap. 21 by Orzan.

[35] See, for instance, Chap. 8 by O'Neill and Chap. 11 by Repetto.

[36] See, for instance, Chap. 12 by Fidalgo de Freitas and Tega.

legislation, clearly supports the full recognition of same-sex couples' rights.[37] And yet, one thing is to use a broad interpretation of applicable laws, so as to ensure that applicants' rights will be protected if the State of nationality recognizes same-sex marriage or registered partnership; another thing is to require Member States to adopt such laws. One thing is to encourage national legislatures to step in, or hope that they will do so; another is to impose legislative changes through the "denationalization"[38] of crucial national family-law regimes. Nevertheless, it must be emphasized that the rulings rendered by supranational judicial bodies, as well as the norms adopted by international and supranational institutions, generally lead to large debates, at both legal and social levels, that greatly contribute to a positive and fruitful interaction between international, supranational and national legal—and especially judicial—systems.

Finally, it must be recalled that there is a horizontal dialogue also between supranational jurisdictions, when they act both in the same and different regional context, as shown by the numerous references made both by the CJEU[39] and the IACtHR[40] to the case-law of the ECtHR.

1.6 'Couple', 'Family', 'Marriage', 'Sex' in Context and Related Problems Concerning Legitimacy, Democracy and the Separation of Powers

The legal discourse on the *status* of same-sex couples before the courts raises problems in terms of legitimacy, democracy and separation of powers. What is at stake is the balance between the prerogatives of the judiciary and those of the legislature. The issue becomes even more complicated when, as in the present book, the courts in question are not only national but also supranational, and when their jurisprudence has an impact on both national legislators and judges. In this case, legitimacy, democracy and the separation of powers tend to be naturally seen as a matter of State sovereignty in family law—that is, in an area no longer solely within the scope of national jurisdiction.

In this context, the authors of the following chapters try to answer a number of questions. To mention a few: what is the boundary between judicial activism and the judicial recognition of human rights as a remedy to the inertia of the legislature? When can legislative action, insofar as resulting from the democratic process, no longer be regarded as the best way to ensure that the rights of citizens are protected? To what extent can judges urge/require the legislature to take the rights of 'same

[37] Chapter 17 by Pustorino and Chap. 18 by Crisafulli.

[38] De Búrca and Gerstenberg (2006). See also Nollkamper (2010).

[39] Chapter 20 by Rijpma and Koffeman and Chap. 21 by Orzan.

[40] Chapter 19 by Magi.

sex-couples' seriously'? Judges do not create the law,[41] but they interpret and even shape it—in addition to protecting it—and thus represent an indispensable antidote against populism, as well as a fundamental barrier to the tyranny of the majority, no matter whether that majority exists among the people or the members of Parliament. It is our conviction that, when rights resulting from social and cultural changes are at stake, the courts, without being necessarily 'creative'[42] agents of change, should be active in acknowledging the socio-cultural transformations occurred in modern society and providing a legal framework for them.

The problem with a static, *originalist*, formal constructivist interpretation of the law is that it leads us to establish an *ex-ante*[43] connection between the law and the specific period in time when it was enacted, whereas concepts such as equality and discrimination change over time. It is also in this process of change that lies the universal—but not immutable—nature of human rights, as well as that of the fundamental international, supranational and national norms aimed at their protection.

Therefore, the issue of same-sex couples and their *status* before the courts serves as a privileged touchstone for assessing the rationale, scope, potential and limits of judicial activity, especially with regard to the role of judges when facing issues that are replete with cultural, religious, social and, in a broad sense, political implications.[44] In this respect, the jurisprudence examined in the next 22 chapters of this book clearly shows the existence of different kinds of judicial behaviour: from a deferent and/or self-restrained interpretation of the law, to a resilient/flexible or even activist approach.

Considering the position adopted by national, supranational and international jurisdictions vis-à-vis same-sex couples, we can conclude that the legal protection of LGBTI people is, ultimately, a matter of equality. In particular, as observed by Nussbaum, the right to marry:

> is a fundamental liberty right of individuals, and because it is that, it also involves an equality dimension: groups of people cannot be fenced out of that fundamental right without some overwhelming reason. It's like voting: there isn't a constitutional right to vote, as such: some jobs can be filled by appointment. But the minute voting is offered, it is unconstitutional to fence out a group of people from the exercise of the right. At this point, then, the questions become, Who has this liberty/equality right to marry? And what reasons are strong enough to override it?[45]

[41] In these terms Klabbers et al. (2009), p. 127.

[42] On the risks deriving from such 'creativity' see Cappelletti (1984) and Waldron (2006).

[43] See Rubenfeld (2001), p. 188.

[44] See, in this perspective, the relationship between constitutional/supreme/high courts and legislatures as discussed in Zagrebelsky (2005).

[45] Nussbaum (2009). See also Nussbaum (2010).

1.7 A Working Tool

This book is addressed to academics, legal practitioners (mostly lawyers and judges) and policy makers who work in the fields of international law, constitutional law, private law, comparative law, EU law and human rights, and who must face the issue of the protection of LGBTI rights. Throughout its chapters, it tries to combine an informative account and a critical analysis of the jurisprudence of international, supranational and national courts.

This volume, however, is not for legal 'experts' only, but also for readers who wish to know more about this complex, fascinating and evolving issue, which represents a crucial test for modern democracies and contemporary societies.

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