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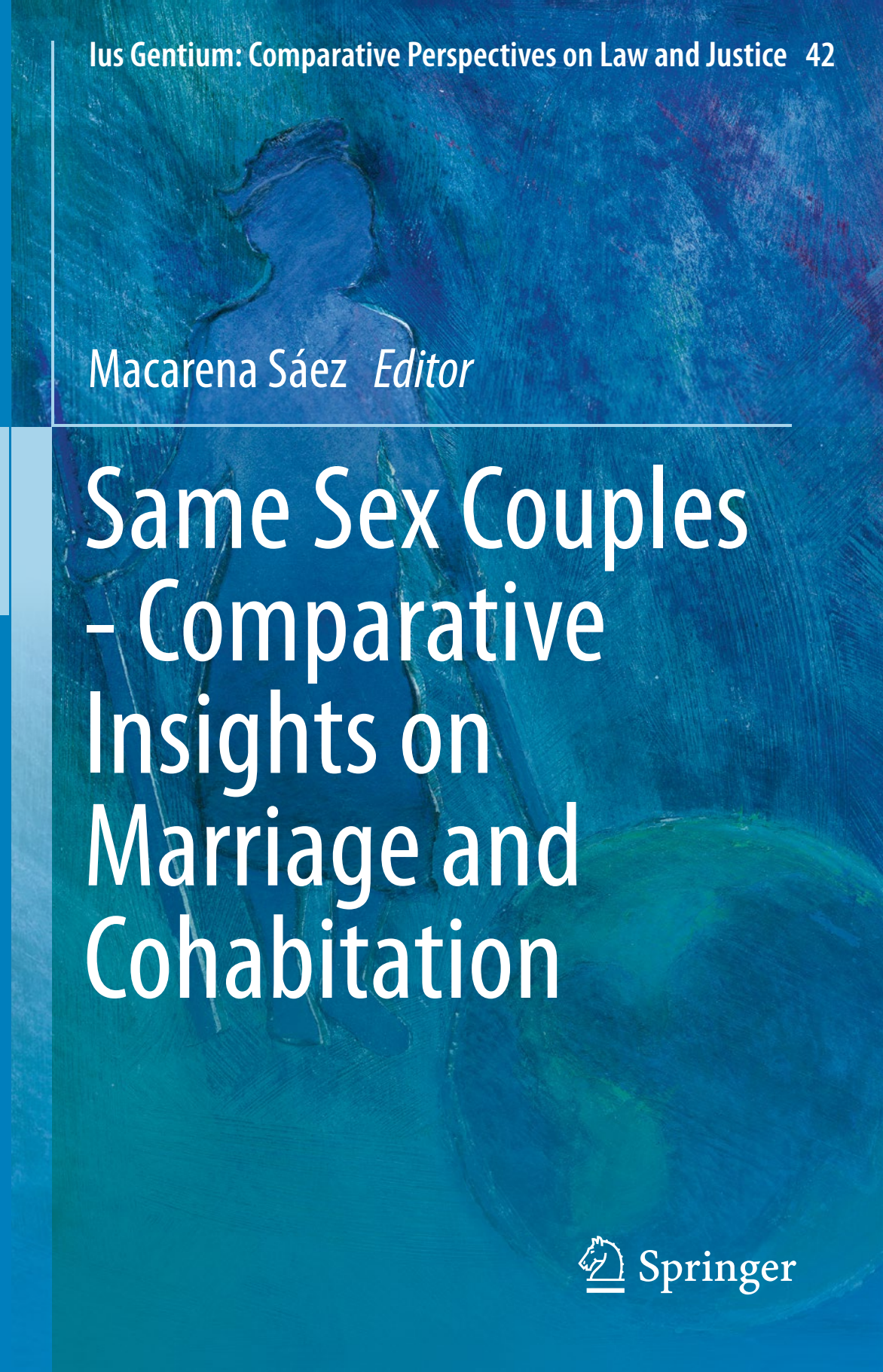

Macarena Sáez *Editor*

Same Sex Couples - Comparative Insights on Marriage and Cohabitation

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Editor

Same Sex Couples - Comparative Insights on Marriage and Cohabitation

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Chapter 1
Introduction

Macarena Sáez

Abstract This chapter summarizes the legal developments of same-sex couples analyzed in the following chapters. It shows that a global discussion on same-sex couples' recognition has sparked discussions on the role of marriage and the legal concept of the family even in countries where same-sex couples are still invisible.

Until the end of the twentieth century marriage was the only union considered legitimate to form a family. Today more than 40 countries have granted rights to same sex couples, including at least 19 that have included same-sex marriage within their family law systems.[1] Every day there is a new bill being discussed or a new claim being brought to court seeking formal recognition of same-sex couples or of families formed by individuals of the same sex.

This worldwide trend is creating new rights for individuals of diverse sexual orientations and gender identities. In countries where marriage has been granted to same-sex couples, a whole new set of rules has emerged. Immigration regulations, tax statutes, inheritance rights, adoption, surrogacy, and presumption of paternity favoring the husband are some of the areas that have been deeply changed by same-sex marriage. These legal changes have benefited thousands of gays and lesbians who now have access to rights and benefits traditionally exclusive to the heterosexual married family.

[1]By September of 2014 same-sex marriage was available in Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, United Kingdom, Uruguay, parts of the United States, and parts of Mexico. Foreign same-sex marriages were recognized in Israel. Civil unions or some partnership agreement model was available for same-sex couples at least in Australia, Austria, Colombia, Croatia, Czech Republic, Ecuador, Germany, Hungary, Ireland, Lichtenstein, Slovenia, Venezuela.

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These changes have also benefited more people and in more areas than marriage. If gays and lesbians are treated equally in the strict regulatory framework of family law, it gets harder to argue for a differentiated treatment in other areas such labor or housing. Thus, the discussion on marriage has expanded the debate to other areas where gay and lesbian individuals have also suffered discrimination. Additionally, the discussion on same-sex marriage has made visible other individuals who have been politically identified as part of the same group through the now generally identifiable acronym LGBTI,[2] even though redress for the rest of the group, mainly transgender and intersex people, may not be found in marriage. Same-sex marriage has not automatically granted intersex individuals the right to marry. Nor has it allowed for transgender individuals to get a prompt and accessible procedure to gender reassignment or get a simple change of name in their official ID cards. The same-sex marriage debate, however, has made visible, in some places for the first time, the existence of transgender and intersex individuals and the problems of discrimination and violence they face every day.

Same-sex marriage has sparked discussions on the role of family and marriage in countries where legislatures and judges had (and in some places still have) no intention to open up family structures. In every continent there is today scholarly discussion on same-sex marriage, and in every continent there is at least one country that has broken the rigid marriage paradigm as the only gateway to family formation, and as a strictly heterosexual institution. Same-sex marriage was often preceded by models of same-sex partnership.

For same-sex marriage to be possible as a legal institution, it was necessary to accept first that couples of the same sex existed and, regardless of legal prohibitions, made decisions with economic consequences for the individuals involved and others. For example, the death of a person brings sadness to her surviving partner regardless of her sex, but in countries where there is no recognition of same-sex associations death also brings the fear of losing all economic assets jointly accumulated. It also brings the real possibility of eviction from a rented property. Legal protection of same-sex partners is ultimately a matter of fairness. Equality, however, requires more than protecting the weakest party of an emotional association. It requires the recognition of such association as a family unit. It is in this context that the debate on same-sex marriage at different levels is as transformative of family law as same-sex marriage itself. Same-sex marriage has changed the world of family law by making it possible for the first time to envision families that originate in emotional relations between individuals of the same sex, and by allowing individuals the possibility of having legal families regardless of their sexual orientation and gender identity. The mere fact of same-sex marriage being possible in an increasing number of countries each year has the impact of bringing the debate about family formations to countries where this discussion is still at the level of mere hypotheticals. In many countries where there is no

[2]There are several variations of the acronym from LGBT to include Lesbian, Gay, Bisexual and Trans individuals. There is also LGBTI to include intersex, and LGBTQ to include "queer."

recognition of same-sex couples or LGBTI individuals, these theoretical discussions are the beginning of a legal transformation. They are one more element of bigger movements that involve civil society, policy makers and scholars, all doing their share in imagining, and then implementing, changes that shift the role of marriage and family law in general.

This book explores the tension between same-sex marriage and traditional structures of family law. It moves from countries that have recognized same-sex marriage and are now adjusting to a new family law structure, to countries where same-sex marriage is viewed as a foreign institution, only possible as an academic theoretical conversation. The book covers analyses of countries as diverse as Turkey, Israel, Jamaica, Colombia, Mexico, Spain, and the United States. It is divided in chapters that look at each country's individual experience in recognizing same-sex couples in general, and same-sex marriage in particular. From systems that still deny the existence of same-sex emotional relations, to systems that have reinforced marriage through the recognition of same-sex marriage, we see countries in transition, dealing with a tension between rigid concepts of family and flexible family structures that allow for protection of families outside the realm of the heterosexual married family. There are some common elements among countries that have recognized same-sex marriage or that are in the process of recognition. At the same time, countries that deny the legal existence of same-sex couples and their families also share common elements.

Chapter 2 is a constitutional analysis of Act 13/2005 that in 2005 opened marriage to same-sex couples in Spain. Professor Jose Maria Lorenzo starts with an examination of different constitutional interpretations about the amendment to the Spanish Civil Code that changed all references of a man and a woman to gender neutral references. The amendment not only opened marriage to same-sex couples but it granted all rights and benefits, including parental rights, to the same-sex spouse of a biological mother or father. The analysis shows that even though a constitutional court may decide a statute to be constitutional or unconstitutional, courts have more than just two options, and in fact their legal reasoning may have the effect of closing a discussion almost irreversibly leaving only in the hands of political majorities the possibility of a change. In the case of same-sex marriage, the Constitutional Court could have interpreted the Spanish Constitution as mandating marriage equality and declaring heterosexual marriage unconstitutional. The Court, however, chose another path by which it interpreted the Constitution as giving special protection to heterosexual marriage, and allowing, at the same time, for the legislature to elevate other types of association to the same category. Given that same-sex marriage does not affect, nor hinders marriage between individuals of different sex, there was nothing in the Constitution that would obstruct the legislature in the political process of deciding to expand marriage to individuals of the same sex.

Professor Lorenzo ends his analysis with a word of caution. Although same-sex marriage was declared constitutional by the Spanish Constitutional Court, same-sex marriage was not, through the Court's decision, equalized to heterosexual marriage. There is still a fundamental difference between one and the other. Whereas the heterosexual marriage enjoys a constitutional protection that prevents

its modification through the regular political process, same-sex marriage can still be modified by the majorities if they chose to do so. As time goes by, stripping away the right to marriage from same-sex couples will become harder and harder. Its constitutional legitimacy, however, will derive then from a different source than today.

Chapter 3 provides a historical analysis of legal marriage in Mexico in order to explain the most recent developments triggered both by legislative and adjudicative processes. Professor Estefania Vela Barba shows that as marriage's ends change, the concept of marriage has changed too. The heterosexual element in marriage was necessary when marriage was specially linked to procreation. She describes the legal construction of marriage in Mexico as a "means-to-ends" logic. Historically, Vela argues, the legal definition of marriage and its regulatory framework had a specific purpose in mind. Men and women were naturally assigned different roles—with women being the exclusive bearers of procreation—and marriage being the channel to ensure procreation in a particular order. She then explains the legal developments that first enhanced those different roles between men and women but that later moved towards a more egalitarian idea of men and women. This move from a pre-assigned role within the family and a gender specific type of marriage to families with flexible functions, was the consequence of the secularization of marriage. Once marriage was no longer under the control of the Catholic Church it became subject to changes by the legislature and to constitutional control by the Supreme Court. The State may had replicated the religious marriage in the Civil Code, but could not ensure its immutability once it entered the legal realm.

This Chapter highlights the role of international law in reshaping both marriage and the family. The reforms of Mexican civil codes in different states were triggered not only by new Mexican constitutions and constitutional amendments. They were also influenced by new international commitments that Mexico subscribed and that would also apply to marriage and family. These changes created a family law framework that, at least in theory, was based on equality between men and women, the acceptance of family formations outside marriage, and the need of the State to protect existing families, regardless of marriage. Vela shows how family law became more protective of diverse family formations when more leftists governments were in power. These changes did not happen at the same pace in adjudication processes. For example, the chapter analyzes the discussion of the Mexican Supreme Court on marital rape. The denial of rape between spouses, in place in Mexican law through legal interpretations and not through express law until 2005, reflects an understanding of marriage essentially tied to procreation. That year, however, the Supreme Court recognized that rape can exist within marriage and reinforced the idea of marriage as a partnership tied to mutual support more than to procreation.

The chapter also gives a brief account of the LGBT rights movement in Mexico prior to the Supreme Court decisions on same-sex marriage. It shows that the intersection between a shifting understanding of the role and purpose of marriage, and a more visible, stronger LGBT movement, created the right momentum for same-sex marriage in Mexico.

Chapter 4 provides a brief analysis of the status of same-sex marriage in the United States after the U.S. Supreme Court issued its two first decisions related to same-sex marriage in June of 2013. Although these decisions were not about the constitutionality of same-sex marriage, they triggered fast changes at state and federal level throughout the country, with judges in states historically conservative issuing decisions favoring marriage equality. The chapter shows that what was unpredictable 20 years ago—marriage equality nationwide—is today a real possibility. At the same time, the chapter shows that not all decisions on same-sex marriage provide the same framework for the future of family protections. Although same-sex marriage may now be an option in several states, families formed outside the institution of marriage are still unprotected and the marriage debate has not opened any more spaces for them. That is a difference with other countries, included Spain, Colombia, Mexico, and Israel. The legal reasoning behind other countries' decisions on same-sex marriage tend to be based on principles of equality and autonomy that could, in the future, become the basis for the protection of unmarried families, regardless of their gender, sexual orientation, and perhaps sexual connotation. U.S. courts, however, have mostly based their decisions on the value of marriage as an institution that perfects society, leaving little space for a legal development in the future affording legal recognition to families formed outside marriage.

Chapter 5 analyses the development of LGBTI rights in Colombia. With a well-developed case law, the Constitutional Court of Colombia (CCC) has become known in Latin America for its rich analysis and articulated decisions based on equality and autonomy. Ms. Natalia Ramirez-Bustamante gives an excellent summary of the history of Colombia's Constitutional Court decisions on LGBTI rights based on individualistic analysis of constitutional rights and how this approach has hindered, at the end, same-sex marriage recognition. The Chapter analyses how Family Law as an area of protection and regulation of families has changed in Colombia through the increasing recognition of same-sex couples and it warns of the risks of an LGBTI movement focused on same-sex marriage to the detriment of the recognition of other family formations outside marriage.

Colombia, like Canada and Australia, started challenging the married family first, and the heterosexual family after. With a constitutional protection of both the married and the unmarried family, Colombia has been legally recognizing mutual rights and obligations of unmarried couples, as if their associations were only different to married couples in the way they were created. Natalia Ramirez-Bustamante explains that during a first period the CCC was willing to recognize individual LGBTI rights but not their family associations. At the same time, it advanced the recognition of unmarried heterosexual couples. During this period, the CCC justified the dichotomy between individual recognition of LGBTI rights and exclusion of same-sex couples in a supposedly heterosexual character of the natural family recognized by the Colombian Constitution and the connection between family and procreation. Despite this distinction, the Court was slowly recognizing the rights of unmarried heterosexual couples. This constitutional development paved the way for the later recognition of same-sex couples' rights viewed as private

associations instead of family associations, and, later, to discuss same-sex couples' rights within the framework of family law as well. The chapter goes beyond an analysis of marriage and provides a reflection on the role of family law and the types of associations that it ought to protect or regulate. It highlights the paradox of LGBTI rights advocates pushing for same-sex marriage while statistics seem to indicate that heterosexual couples are moving away from that institution completely. Natalia Ramirez-Bustamante explains two of the most important reasons for the advocacy of same-sex marriage. The first one has to do with a right to equality that in practical terms includes the right to adoption. The second one has to do with the weight of the word marriage, which makes same-sex couples "morally indistinct" from heterosexual couples. Ramirez-Bustamante challenges the long-term effects of the marriage demand for its risk of reinforcing a system that legitimizes some families—the married families—to the detriment of all others. Same-sex marriage becomes, then, "unacceptably conservative." This chapter is, at the end, a call for a reconceptualization of the same-sex marriage debate to one that includes a discussion of the types of families the Colombian society (and others as well) should protect and embrace.

1.1 The Road Towards the Recognition of Same-Sex Couples

The movement towards the recognition of same-sex couples began in Europe. It was a European country the first one to implement a registered partnership regime, and it was a European country the first one to expand marriage to same-sex couples.[3] Spain was the third country in the world to recognize same-sex marriage after the Netherlands and Belgium. Although same-sex couples were able to marry in Spain since 2005, only in 2012 the Spanish Constitutional Court settled the issue of same-sex marriage by declaring it constitutional.[4] From 2005 and until this decision, same-sex couples married in Spain enjoyed all the benefits and rights of marriage, but were uncertain about the future of their marriage. The decision not only ended this uncertainty, but it did so with a strong analysis on the rights protected by the Spanish Constitution. As mentioned, Chap. 2 of this book gives a detailed account of the arguments presented to the Spanish Constitutional Court and the legal reasoning chosen by the Court favoring the constitutionality of same-sex marriage. Three more chapters provide similar analyses. Chapters 3, 4, and 5 examine courts' decisions in the area of same-sex marriage.

All these chapters share a common thread: they look at legal reasoning as the source of change in the understanding of marriage and the family in different

[3] In June of 1989 Denmark passed the first Registered Partnership Act in the world. The Netherlands enacted *Staatsblad van het Koninkrijk der Nederlanden 2001, nr. 9 (11 January),* the first statute on same-sex marriage, which became available on April 1, 2001.

[4] *STC 198/2012, of 6th November2012.* Boletin Oficial del Estado (BOE) N. 286, November 28, 2012, pp. 168–219.

countries. We can see from these decisions common arguments provided by groups or government officers opposing to same-sex marriage and similar arguments to advance same-sex marriage as constitutionally possible or even as a constitutional mandate. Three elements stand out as similar in these decisions: First, whether procreation (and therefore heterosexuality) was an essential element of marriage. If procreation was not essential to marriage, an alternative essential element had to be found. This element was found in the right of each individual to make decisions about his/her intimate life, including the decision to share a life with another person; second, the concept of human dignity seems to have tipped the balance in favor of same-sex marriage; and third, all these decisions assume that our understanding of constitutional concepts or institutions may vary in time.

1.1.1 Procreation and Choice

We learn from Chaps. 2, 3, 4, and 5 that the procreative role of marriage was a recurrent argument brought to courts in Spain, Mexico, Colombia and the United States. Heterosexuality was essential to marriage because the objective of marriage was procreation and only heterosexual relationships led to procreation. The counter argument, also common to all these countries, was that procreation could not be essential to marriage. Otherwise, governments could prohibit marriages between elderly people, as well as between people with the inability or no desire to procreate. In none of these countries opponents to same-sex marriage seem to have advanced the argument of procreation to the point of affirming that heterosexual marriages not leading to procreation could be prohibited. An alternative narrative about the essence of marriage brought to courts related to individual choice: marriage was a mutual agreement to share a life plan. These chapters show a tension between a vision of marriage as an institution with a specific role to fulfill in society (procreation), and a vision of marriage as an individual choice within the right of individuals to develop their own life plans. Courts in Mexico, Colombia and Spain speak of a constitutional right to free development of one's individuality.[5] Courts in the United States speak of a liberty interest and a right to privacy embedded in the Due Process Clause of the Constitution. All of them point out to a right to autonomy that prevails over societal conceptions of marriage.

With the exception of a few U.S. state court decisions, these decisions interpreted their constitutions as giving priority to the role marriage played in the life of each person, instead of the role marriage played in the structure of society. Het-

[5]The literal translation of "*Libre desarrollo de la personalidad*" would be "free development of personality." The concept, however, refers to protecting the right of each individual to her own individuality. The Colombian Constitutional Court has stated that "There is a violation of this right when a person is arbitrarily impeded of reaching or pursuing legitimate aspirations or of freely valuing and choosing the circumstances that give meaning to her life." Corte Constitucional de Colombia, Sentencia T 532/92, Sept 23, 1992.

erosexuality was not, therefore, essential to marriage and neither was procreation. What prevailed was the right of individuals to make decisions regarding their life plans. Even the 2012 decision of the Colombian Constitutional Court reached this conclusion, even though this decision did not make same-sex marriage available in Colombia. Chapter 5 explains the development of the Constitutional Court towards a strong protection of sexual orientation and gender identity. Through several decisions about civil unions, access to social security and pensions, among other topics, the Constitutional Court treated sexual orientation as a protected category subject to heightened scrutiny. In the 2012 decision on same-sex marriage the Court applied the same standards of protection and referred to its previous case law. It reinforced its case law on free development of one's individuality as including decisions related to a person's sexual orientation. It recognized the lack of constitutional protection for same-sex couples in the area of marriage, but deferred to the legislature the determination of the model of protection same-sex couples would be afforded. Despite not being a decision favorable to same-sex marriage, the Court's legal reasoning is similar to the Spanish Constitutional Court and the Mexican Supreme Court decisions on same-sex marriage in its rejection of the procreative role of marriage and the reinforcement of individuals to choose their life's plan.

1.1.2 Human Dignity

Another element common to all these decisions was the use of human dignity to justify the right of individuals to make their own life plans. This element gives a final blow to an idea of marriage that would exclude some individuals for their inability or lack of interest in procreating. All these decisions speak of human dignity as linked to a right to autonomy.

They all talk about human dignity as a justification for protecting the free development of one's individuality or the sphere of privacy to make intimate decisions involving marriage and family. None of these decisions seem to develop a concept of human dignity and the chapters that analyzed these decisions do not provide information on how or why human dignity was a prominent element in the decisions. These analyses, however, make clear that at least for these courts there was a connection between the right to autonomy (free development of one's individuality, liberty interest or right to privacy) and the recognition of human dignity. This is less apparent in the 2013 decision of the U.S. Supreme Court *United States v. Windsor,* than in the decisions of Mexico, Spain and Colombia. Chapter 4 provides an account of the different uses of the concept of dignity by the U.S. Supreme Court in the *Windsor* decision, where it seems that the court used two different concepts of dignity. Unquestionably the decision speaks of human dignity as linked to autonomy and privacy. It also speaks, however, of an institutional dignity provided by the marriage institution itself.

1.1.3 Evolution of Concepts

Arguments provided against same-sex marriage in the legal proceedings reviewed in these chapters were often justified in a historical understanding of marriage as a union between one man and one woman. Courts could not deny that marriage had been historically a heterosexual institution. The question all these courts had to answer was how much the history of marriage should weigh in a constitutional interpretation of the right to marry. In all these countries historical interpretations were dismissed because other interpretative tools provided a more accurate understanding of the constitutional protection at hand. All of them, including the United States Supreme Court, understood that institutions evolve. In the *Windsor* decision, the U.S. Supreme Court referred to the tension between the historical and current understanding of marriage:

> The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion . . . ..
>
> [Same-sex marriage in New York] reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.[6]

The U.S. Supreme Court provided an evolving concept of equality. The Spanish Court considered that marriage as an institution had evolved. The Colombian and Mexican courts also understood marriage as an evolving concept.

1.2 Legal Systems That Deny Same-Sex Couples

Chapters 6, 7, and 8 of the book transition the analysis from countries that either recognized or are in a direct process to full recognition of same-sex marriage to countries where same-sex marriage is currently a normative impossibility. Chapter 6 shows a country that while denying the possibility of same-sex marriages celebrated locally, it has, in practical terms, come to accept same-sex marriages celebrated abroad. The lack of recognition of same-sex marriage in Israel does not derive of any expressed prohibition, but from the fact that no formal religion in Israel recognizes such unions. Same-sex couples, therefore, are in the same situation as interfaith marriages when the religion of each spouse does not recognize their marriage, or individuals with no religion. Israel is an example of flexibility, with a Supreme Court that has decided issues related to same-sex couples in pragmatic terms. Thus, same-sex couples married abroad have been able to register their marriages just as any opposite-sex couple married abroad has. These and other developments make Israel a fascinating family law model. By now, there are decisions relating to same-sex

[6] *United States v. Windsor*, 133 S. Ct. 2675, 2689, 2692–2693, 186 L. Ed. 2d 808 (2013).

second parent adoption and other issues that go beyond same-sex marriage. The judiciary has played an important role in protecting diverse families in Israel. With a family law system that leaves to religious denominations what is accepted and what is rejected, judges could have taken a hands-off approach concluding that what is not recognized by religious law, must remain invisible to secular law as well. They have, however, used the principle of equality to register marriages celebrated abroad regardless of the sex of its members.

Chapter 7 enters directly to the reality of same-sex couples in a region where animosity towards LGBTI individuals has become international news. Ms. Toni Holness starts her analysis with a clear account of the violence that LGBTI individuals suffer in the Caribbean region. Violence, many times in the form of torture and murder, is often tolerated and sometimes even authored by state officers. The role of family law in such environment cannot be the primary concern of a community that must put all its energy in survival and safety. Despite this bleak scenario, reality also shows that even in adverse conditions, families form. People fall in love, support and care for each other regardless of their sex, sexual orientation and gender identity. This chapter provides a thorough description of the marriage regulations in different countries of the Commonwealth Caribbean. Not all of these regulations have an expressed heteronormative construction. All of them however, have been consistently applied to the exclusion of same-sex couples. These interpretations are complemented with harsh anti sodomy statutes or buggery laws, which are the primary concern of LGBTI groups in the region. As long as anti sodomy statutes remain in place, it will be hard to advance any type of formal recognition of same-sex couples. This Chapter may provide one of the few, if not the only, thorough review of marriage regulations in the region. LGBTI activists and family law scholars will find here a good starting point for thinking of strategies for the formal recognition of same-sex couples. For example, the fact that non-Commonwealth Caribbean countries have been more flexible and open to same-sex couples could impact future normative changes in the Commonwealth Caribbean. Additionally, Ms. Holness shows that at least some post colonialist marriage regulations were structured mirroring British regulations. Marriage heteronormativity, thus, was inherited from the British Empire and marriage could well follow mutations similar to the ones suffered in the United Kingdom.

In some countries of the region, such as Trinidad, the law recognizes and regulates unmarried heterosexual couples. Many of the Western countries that have recognized same-sex marriage started first by recognizing the role of family law in protecting families socially constructed, regardless of the existence of a formal marriage. Once societies make that shift from a family law that mandates what families must be, to one that protects families formed outside the law, the recognition of same-sex couples tend to follow sooner than later. When unmarried heterosexual couples are accepted the door is open to protect associations that *function* as families. When this happens, it becomes very difficult to justify why heterosexuality is essential to that *functioning* of the family.

The review of anti sodomy statutes also shows the influence of Great Britain. These statutes were a colonialist imposition. At the same time, in those places where

Great Britain still has legal influence, such as in the British Overseas Territories, those statutes have been repealed. There are, therefore, some possibilities of change. Once anti sodomy statutes are lifted, debates on recognition of same-sex families become more common, and the opportunity for legal amendments arise.

Chapter 8 provides another example of a country that struggles with social resistance to same-sex couples and LGBTI individuals in general, and a push for some form of recognition of same-sex couples. Turkey is in a unique position between the Eastern and Western world, with a foot in the European Union and its standards of equality and non-discrimination on the basis of sexual orientation, and another in a system of family law deeply embedded in traditional marriage as a patriarchal, heterosexual institution. As mentioned, some countries that do not recognize same-sex marriage have moved towards the recognition of heterosexual unmarried couples. This is the case, for example, of Trinidad, where recognition of heterosexual family associations outside marriage is legally and socially accepted while homophobia has prevented giving any visibility to same-sex families. Turkey's family law, we learn from this chapter, is still strictly centered on the heterosexual marriage as the exclusive gateway to family formation. This position makes the argument of discrimination based on sexual orientation harder in the context of family law. The differentiation is between married and unmarried couples. The discrimination comes from the fact that same-sex couples cannot access marriage, while heterosexual couples—as long as they meet all legal requirements—could marry if they wish to do so. Many heterosexual couples, however, cannot marry given their specific circumstances, or have not married by the time they needed legal protection. In any case, it is clear that the road towards same-sex couples' recognition may be harder in Turkey than in other countries. The commonly used argument that there is no difference between the family functions performed by unmarried heterosexual couples and unmarried same-sex couples cannot be made simply because unmarried heterosexual couples are as invisible as same-sex couples.

1.3 Conclusion

This volume shows the legal development towards the recognition of same-sex marriage in different countries. Spain. Mexico, the United States and Colombia have accepted or are in the path towards full acceptance of same-sex marriage thanks to the role of their courts. Israel's legal system formally does not recognize same-sex marriage not because of a stance against it, but because family law is regulated by personal religious law. Israel's courts, however, have allowed for the registration of same-sex marriages performed abroad, creating a system where in practical terms same-sex marriages enjoy at least certain rights. This book shows a group of countries where same-sex couples are still invisible both to legal and social systems. Turkey and countries in the Commonwealth Caribbean are still at a stage where gay and lesbian individuals suffer discrimination. Courts are not willing to side

with individual rights when it comes to family law, but instead, they have chosen to reinforce institutional roles within the family. Thus, marriage is a hierarchical institution where men and women fulfill different functions. In these countries, however, there are efforts from civil society and academia to show the problems produced by this lack of recognition. Even in these countries there is a movement aimed at breaking down barriers in family law. The fact that the world around these countries is changing also has an impact. The analysis of decisions on same-sex marriage in different countries can provide courts in countries with incipient litigation in the area of family law and same-sex couples with new arguments that may support their legal reasoning. Decisions that support same-sex couples are the result of arguments brought by opposing parties that refer not only to local statutes, but also to legal principles that may transcend their national boundaries. At the same time, these decisions apply international law not only when it is binding for them. International law is sometimes used to support decisions as some sort of trend in the international arena. International human rights also play an important role. The European Court of Human Rights decisions with regards to sexual orientation and family law will sooner or later help move some boundaries in Turkey and in other countries of the region. Hopefully the Inter-American Court of Human Rights will do the same in countries of the Caribbean region as well as in the Americas. The role of these courts, however, must be accompanied by academic discussions, such as the ones presented here, on the role of legal systems in protecting or discriminating against individuals and their families.

Chapter 2
And the Story Comes to an End: The Constitutionality of Same-Sex Marriages in Spain

José María Lorenzo Villaverde

Abstract In January 2005 the Spanish Government introduced a bill amending the Civil Code to allow same-sex marriage. The bill was approved in July of 2005 with a small majority and the Conservative Popular Party challenged the new Act's constitutionality before the Spanish Constitutional Court. In 2012 the Constitutional Court decided the challenge upholding the constitutionality of the same-sex marriage statute. This chapter presents an overview of the debate on the constitutionality of Act 13/2005. It discusses the constitutional basis for the enactment of the statute as well as the arguments presented to challenge its constitutionality. It also presents a brief comparative analysis between the Spanish decision on same-sex marriage and the decision by the Constitutional Court of Portugal in the same issue.

In March of 2004, the Spanish Socialist Party (PSOE) won the General Elections and established a new majority. In January 2005, the Government introduced a bill amending the Civil Code (CC) to allow same-sex couples[1] to marry. When the Congress approved the bill in a second reading, it became Act 13/2005 of

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[1]The expressions "same-sex marriage" or "gender-neutral marriage" are used indistinctly, acknowledging that the notion of "sex" refers to a biological category whilst "gender" is a social construct. See further SCHUSTER, A.: "Gender and Beyond: Disaggregating Legal Categories" in Schuster (Ed.): *Equality and Justice: Sexual Orientation and Gender Identity in the XXI Century*, Editrice Universitaria Udinese srl, Udine, Italy, (2011), p. 31 and ff.

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