

SAME-SEX RELATIONSHIPS AND BEYOND

European Family Law Series

Published by the Organising Committee of the
Commission on European Family Law

Prof. Katharina Boele-Woelki (Utrecht)

Prof. Frédérique Ferrand (Lyon)

Prof. Cristina Gonzalez Beilfuss (Barcelona)

Prof. Maarit Jänterä-Jareborg (Uppsala)

Prof. Nigel Lowe (Cardiff)

Prof. Dieter Martiny (Frankfurt/Oder)

Ass. Prof. Velina Todorova (Plovdiv)

SAME-SEX RELATIONSHIPS
AND BEYOND

Gender Matters in the EU

Fully revised 3rd edition

Edited by
Katharina BOELE-WOELKI
Angelika FUCHS



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and Ireland:
NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7 PP
United Kingdom
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free) |
Fax: +1 503 280 8832
Email: info@isbs.com

Distribution for Germany and Switzerland:
Stämpfli Verlag AG
Wölflistrasse 1
Postfach 5662
3001 Bern
Switzerland
Tel.: +41 31 300 66 77
Email: verlag@staempfli.com

Distribution for Europe and all other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21
Email: mail@intersentia.be

Same-Sex Relationships and Beyond. 3rd edition
© The editors and contributors severally 2017

The editors and contributors have asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as authors of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

ISBN 978-1-78068-447-5
D/2017/7849/21
NUR 822

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

PREFACE

Uppsala (2002), Trier (2011), Hamburg (2016): synonyms for three international conferences organised by the Academy of European Law (ERA) on legal recognition of same-sex relationships, followed by the conference proceedings in the European Family Law Series and each with a different focus and direction. The first edition consisted of the very few national laws granting the right to enter a registered partnership; marriage for same-sex partners was at that time only allowed in the Netherlands. The second presented a picturesque landscape of different national registration schemes including same-sex marriage in numerous countries, and initiated the debate on legal aspects of cross-border surrogacy. The present edition, anchored in the recent Hamburg conference of 18–19 April 2016, organised by ERA in cooperation with Bucerius Law School, has considerably broadened the horizon and includes the topic of gender identity. In social networks people can now choose from among more than 50 gender options, mirroring a reality which needs to be addressed in any legal debate.

The opening section of the book describes the current state of play in all EU Member States (and beyond) when formalising a same-sex relationship, steady progress being the keyword in describing the developments in many countries (with the exception of six Eastern European states that object to legislation in this field). The second part concentrates on parenthood and children's rights, notably adoption, surrogacy, multiple parenting and the range of parenting rights for same-sex couples and transsexuals. The third part on gender identity and human rights discusses the legal aftermath of the European Court of Human Rights' judgment in *Oliari* condemning Italy for failing to protect homosexuals' right to family life. Furthermore, it explains EU legislation against discrimination on grounds of sexual orientation and the challenges lesbians, gays, bisexual and transgender applicants are confronted with when reaching Europe as refugees. The book ends with a lively debate on the right to change one's legal sex and raises the fundamental question whether we still need sex as a legal category: gender matters in the EU – or does it?

The editors express their thanks to the authors for contributing to this volume, and to Professor Karsten Thorn for co-organising the Hamburg conference.

Katharina Boele-Woelki and Angelika Fuchs
Hamburg/Trier, 1 January 2017

CONTENTS

<i>Preface</i>	v
<i>List of Authors</i>	xi

PART I. FORMALISING A SAME-SEX RELATIONSHIP: MARRIAGE AND PARTNERSHIP

Northern Europe: Same-Sex Relationships and Family Law

Ingrid LUND-ANDERSEN	3
1. Introduction	3
2. Regulation of Same-Sex Relations	4
3. Cohabitation	10
4. Conclusion and Closing Considerations	15

Legal Recognition of Same-Sex Relationships in Central Europe: Steady Progress

Samuel FULLI-LEMAIRE	19
1. Formalised Relationships: Marriage and Registered Partnerships	20
2. Unregistered Relationships	30
3. Concluding Remarks	37

Southern Jurisdictions: Consolidation in the West, Progress in the East

Cristina GONZÁLEZ BEILFUSS	39
1. Introduction	39
2. Marriage and Other Forms of Legal Recognition of Same-Sex Couples: Spain and Portugal	40
3. Marriage and Other Forms of Legal Recognition of Same-Sex Couples: Italy and Greece	50
4. Concluding Remarks	52

Same-Sex Partnerships in Eastern Europe: Marriage, Registration or No Regulation?

Suzana KRALJIĆ	55
1. Introduction	55

2. Road to Decriminalisation	56
3. Constitutional Regulations	59
4. Legal Regulations	63
5. Final Thoughts	74

PART II. PARENTHOOD AND CHILDREN’S RIGHTS

Parenthood for Same-Sex Couples in the European Union:

Key Challenges

Tim AMOS QC and Joe RAINER	79
1. European Court of Human Rights ‘Ground Rules’	80
2. Marriage: Still the Gold Standard for Parenting Rights	82
3. Two Pairs of Rights	83
4. Step-Child Adoption	86
5. Joint Adoption	87
6. IVF	88
7. Surrogacy	91
8. Multiple Parenting	96
9. Conclusions	98
Appendix	99

Recent Case Law on Cross-Border Surrogacy

Isabelle REIN-LESCASTEREYRES	123
1. Transcription of Foreign Birth Certificates Following a Cross-Border Surrogacy: A Question Only Half Answered	124
2. Establishment of Parentage and International Rules of Private Law: A Need for Reform	132
3. Immigration and Nationality Issues	137
4. Conclusion	140

Law and Practice of Intercountry Adoption

Geoffrey SHANNON	143
1. Introduction	143
2. 1993 Hague Convention	144
3. Brussels II <i>bis</i>	148
4. Council of Europe Conventions	148
5. European Convention on Human Rights	150
6. Re-Adoption	154
7. Anonymity and Privacy	155
8. Conclusion	160

PART III. GENDER IDENTITY AND HUMAN RIGHTS

Homosexuality and Human Rights After *Oliari v. Italy*

Marilisa D'AMICO and Costanza NARDOCCI	163
1. Preliminary Remarks	163
2. Italian Legal Background	164
3. ECtHR's Case Law on Homosexuals	169
4. <i>Oliari</i> Case: Is There a Positive Obligation to Provide Same-Sex Couples with Legal Recognition of their Unions?	173
5. Beyond the <i>Oliari</i> Case	176

European Law Against Discrimination on Grounds of Sexual Orientation

Robert WINTEMUTE	179
1. Discrimination Against Lesbian, Gay, and Bisexual (LGB) Individuals	180
2. Discrimination Against Same-Sex Couples	191
3. Conclusion: Potential Future European Case Law	202

LGBT People as Refugees and Immigration Rights

Neža KOGOVŠEK ŠALAMON	205
1. Introduction	205
2. LGBT People as Refugees	206
3. LGBT People and Immigration Rights	220
4. Conclusions	229

'The Legitimate Aim of Harmonising Body and Soul'

Changing Legal Gender: Family Life and Human Rights

Marjolein VAN DEN BRINK	231
1. Introduction	231
2. Gender Identity and Human Rights	233
3. National and International Developments	236
4. What Next?	247

LIST OF AUTHORS

Marilisa D'Amico

Professor of Constitutional Law, Department of Italian and Supranational Public Law, University of Milan, and Lawyer in the case *Oliari and others v. Italy*

Tim Amos QC

Barrister, Collaborative Lawyer and Resolution Mediator, Chambers of Lewis Marks QC, Queen Elizabeth Building, Temple, London

Katharina Boele-Woelki

Dean and Claussen Simon Professor of Comparative Law at Bucerius Law School, Hamburg; President of the International Academy of Comparative Law; Member of the Curatorium of the Hague Academy of International Law; Chair of the Commission on European Family Law

Angelika Fuchs

Dr iur; Head of Section European Private Law, Academy of European Law Trier (ERA)

Samuel Fulli-Lemaire

Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law (Hamburg) and PhD Candidate at Panthéon-Assas (Paris II), University of Paris

Cristina González Beilfuss

Head of External and Institutional Relations of the Spanish Judicial School and Professor at the University of Barcelona

Neža Kogovšek Šalamon

Dr iur; Director and Researcher at the Peace Institute, Institute for Contemporary Social and Political Studies, Ljubljana, Slovenia; Postdoctoral Fellow of the Slovenian Research Agency on Fundamental Rights of Citizens and Foreigners in the EU (2014–2016); Visiting Researcher at the University of Palermo (2016)

Suzana Kraljić

Dr iur; Associate Professor at the University of Maribor

Ingrid Lund-Andersen

Professor of Family Law, Centre for Studies in Legal Culture, Faculty of Law, University of Copenhagen

Costanza Nardocci

Doctor of Philosophy in Constitutional Law, Department of Italian and Supranational Public Law, University of Milan

Joe Rainer

Barrister, Chambers of Lewis Marks QC, Queen Elizabeth Building, Temple, London

Isabelle Rein-Lescastereyres

Partner, BWG Associés, Paris

Geoffrey Shannon

Dr iur; Solicitor, Special Rapporteur on Child Protection for the Irish Parliament, Dublin

Marjolein van den Brink

Dr iur; Assistant Professor, Utrecht University

Robert Wintemute

Professor of Human Rights Law, King's College London