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Same-Sex Marriage Litigation

Introduction
The world's first legally recognized same-sex marriage took place in the Netherlands in 2001 after the legislature amended the definition of marriage to include same-sex couples. In contrast, there has been a highly contentious and visible battle for same-sex marriage in the United States, through both the courts and the political arena. This chapter outlines the different evolutions (or in some cases perhaps revolutions) that resulted in same-sex marriages in some of the jurisdictions where it is currently available.1 The purpose of this is to identify the broad themes that have emerged in terms of the legal arguments that have been made for same-sex marriage rather than to provide a detailed analysis of each jurisdiction. I argue that these common themes are: sameness and formal equality; access to the legal consequences of marriage; the symbolic importance of access to the label ‘marriage’; and the ways in which same-sex marriage would support the institution more generally. Another common theme is the existence of a backlash against same-sex marriage.

The chronologies of the Netherlands and the United States represent opposite ends of the spectrum. While courts in both jurisdictions were considering same-sex marriage claims in the early 1990s, the outcomes of these cases and subsequent paths to marriage differed significantly. In the Netherlands, the marriage statute was challenged on two grounds: that its language was gender-neutral and thus did not preclude same-sex marriage, and that denying same-sex couples marriage licences infringed same-sex couples’ rights to marry and found a family and was discriminatory under Articles 8, 12 and 14 of the European Convention on Human Rights and Articles 23 and 26

1 At the time of writing, same-sex marriage is available in the Netherlands, Belgium, Spain, Canada, South Africa, Portugal, Sweden, Norway, Iceland, Argentina and Mexico City. In the United States, it is available in Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, Washington DC and New York (see National Gay and Lesbian Task Force, 2011; Human Rights Campaign, 2011b).
of the International Covenant on Civil and Political Rights (Maxwell, 2001, pp. 143–4). These arguments were heard in two cases, both of which failed as the Dutch courts were reluctant to be more liberal than the other signatories and the European Court of Human Rights in their interpretation of the treaties. To do so was considered to be within the remit of the legislature but not the courts (Maxwell, 2001, pp. 145–6). In the United States, the courts are much less deferential to the legislature in interpreting constitutional provisions and, unlike the Netherlands’ courts, have the authority to strike down legislation (Maxwell, 2001, p. 201). Additionally, voter referenda have played a significant role in the United States. For example, in Maine same-sex marriage legislation was passed but subsequently overturned by voter referendum (Human Rights Campaign, 2011b). Likewise, in California the Supreme Court had held that prohibiting same-sex marriage was unconstitutional (In Re Marriage Cases 43 Cal 4th 757) but this was subsequently overturned by a constitutional amendment passed by a referendum in 2008, which defined marriage as being between a man and a woman (Proposition 8). The federal District Court then struck down the amendment to California’s constitution in Perry v Schwarzenegger 704 F Supp 2d 921 (ND Cal 2010) as violating the Due Process and Equal Protection Clauses of the US Constitution but this was stayed pending appeal to the federal Court of Appeal (Perry v Schwarzenegger 2010 WL 3212786 (CA 9 (Cal)).

The courts also played a significant role in Canada and South Africa, while Belgium, Spain, Norway, Sweden, Iceland, Portugal and Argentina followed the Netherlands’ legislative route, as did some jurisdictions in Mexico and the United States (Mexico City, Vermont, New Hampshire, Washington DC and New York). In this chapter, I focus on the litigation in order to highlight some of the legal bases for same-sex marriage claims. This provides part of the basis for my analysis of the arguments for same-sex marriage in Chapter 4, which draws on both these arguments and those employed by activists and academics.

The United States

In 1993, the Hawaii Supreme Court ruled in the case of Baehr v Lewin 74 Hawaii 530. The applicants had sought a declaration that the Department of Health’s refusal to issue a marriage licence to same-sex couples was unconstitutional and an injunction to prevent licences from being withheld in the future. The court upheld the claim that the state’s interpretation of the marriage statute (HRS§572-1) violates the right to equal protection and due process under Article I s. 5 of the Hawaii Constitution. This provides that there should not be discrimination on the grounds of race, religion, sex or ancestry. The court held that denial of access to marriage denies couples access to ‘a multiplicity of rights and benefits that are contingent upon that status’