CONSTITUTIONAL COURTS, GAY RIGHTS AND SEXUAL ORIENTATION EQUALITY

ANGIOLETTA SPERTI

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CONSTITUTIONAL COURTS, GAY RIGHTS AND SEXUAL ORIENTATION EQUALITY

Over the last 15 years, constitutional issues regarding the rights of gays, lesbians and same-sex couples have emerged on a global scale. The pace of recognition of their fundamental rights, both at judicial and legislative level, has increased dramatically across different jurisdictions, reflecting a growing consensus toward sexual orientation equality.

This book considers a wide-range of decisions by constitutional and international courts, from the decriminalisation of sexual acts to the recognition of same-sex marriage and parental rights for same-sex couples. It discusses analogies and differences in judicial arguments and rationales in such cases, focusing in particular on human dignity, privacy, liberty, equality and non-discrimination.

It argues that courts operate as major exporters of models and principles and that judicial cross-fertilisation also helps courts in increasing the acceptability of gay and lesbian rights in public opinions and politics. Courts discuss changes in the social perception of marriage and family at national and international levels and at the same time confirm and reinforce them, forging the legal debate over sexual orientation equality. Furthermore, by promoting the political reception of the achievements of foreign gay movements in their own jurisdictions, courts play an essential role in breaking the political stalemate.

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Constitutional Courts, Gay Rights and Sexual Orientation Equality

Angioletta Sperti

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To the memory of Alessandro Pizzorusso

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Contents

1

Introduction

I. SETTING THE LANDSCAPE

WHEN IN 1993 the Supreme Court of Hawaii released its groundbreaking judgment in *Baehr v Lewin*,[1] holding, for the first time in the world, that denial of marriage licences to same-sex couples amounted to a violation of equal protection under the State Constitution, only a few commentators would have defined equal marriage as an 'inevitable' constitutional development.[2] Although the case—'possibly the biggest lesbian and gay rights legal victory ever'[3]—was the result of a long-term legal, political and cultural battle for sexual orientation equality starting in the United States as early as the 1950s,[4] the mere prospect of a widespread recognition of the right to marriage for same-sex couples unleashed a political and social firestorm at both state and national level.[5]

Needless to say that in many parts of the world, gays and lesbians still suffer overt discrimination, and full sexual equality is a long-term goal to be achieved through a daily and painful struggle. But since *Baehr*, the pace of recognition of gays' and lesbians' rights at both judicial and legislative level has increased dramatically across different jurisdictions, reflecting a rapidly growing consensus toward equal rights for gay men and lesbians. Many pivotal cases have been released at domestic and international level, and in many countries equal marriage is probably the most significant—and symbolic—achievement in a long series of piecemeal victories of LGBT movements in the last 15 years, ranging from decriminalisation of sexual acts, to family and parental rights, to the right to have relationships legalised, to social and workplace benefits.

Although in many countries, especially in Europe, these victories were mostly the result of legislative reforms, courts—especially supreme and constitutional courts and the European Court of Human Rights (ECtHR)—have played a key role in forging the legal debate over sexual equality and stimulating a 'virtuous cycle' in

[1] *Baehr v Lewin* 74 Haw 530, 852 P2d 44 (1993).

[2] See LH Tribe, 'The Constitutional Inevitability' of Same-Sex Marriage (2012) 71 *Maryland Law Review* 471.

[3] E Wolfson, 'Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique' (1994) 21 *New York University Review of Law and Social Change* 567, 572.

[4] See J Pierceson, *Same-Sex Marriage in the United States. The Road to the Supreme Court* (Lanham, Rowman & Littlefield Publishers, 2013).

[5] WN Eskridge, 'Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States' (2003) 93 *Boston University Law Review* 275, 283 ff.

which every single achievement has led to a further advancement towards sexual orientation equality.

In the past, other social movements mobilised themselves, ensuring historic victories before constitutional courts across different jurisdictions. Similarly to the debate over gay rights, those achievements became conceivable because of the enormous changes in the surrounding social and political contexts.[6]

For instance, in 1973, the United States Supreme Court landmark case in *Roe v Wade*[7] gave rise to a worldwide debate over abortion and women's reproductive rights. It was followed by remarkable constitutional court judgments in Europe,[8] which in turn inspired legislative reforms.

More recently, when the United States Supreme Court released its judgment in *United States v Windsor*[9]—holding it unconstitutional to restrict the federal definition of 'marriage' and 'spouse' to opposite-sex couples—President Obama compared that victory to *Loving v Virginia*,[10] the 1967 case on interracial marriage.[11] The analogy has been also emphasised by scholars[12] and lower courts.[13]

Nonetheless, some peculiarities differentiate the present debate over gay rights.

Since the 1950s, with successive waves of democratisation, the European model of constitutionalism[14]—based on an entrenched and written constitution and its combination with judicial review of legislation—has spread across the world. The establishment of new constitutional courts and the introduction of judicial review of legislation has 'become the norm of democratic constitution-writing',[15] frequently marking the transition to democracy and a new economic system.[16]

[6] MJ Klarman, '*Windsor* and *Brown:* Marriage Equality and Racial Equality' (2013) 127 *Harvard Law Review* 127, 129 ff.

[7] *Roe v Wade* 410 US 113 (1973).

[8] See, Italian Constitutional Court, case no 27 of 22 January 1975; German Constitutional Tribunal, 39 BVerfGE 1 (1975) (Abortion I case); French Conseil constitutionnel, Decision 74–54 DC of 15 January 1975; Austrian Verfassungsgerichthof, decision of 11 October 1974, [1974] *Erklaerungen des Verfassungsgerichtshofs* 221.

[9] *United States v Windsor* 133 S Ct 2675 (2013).

[10] *Loving v Virginia* 388 US 1 (1967).

[11] See also President Obama's Inaugural address, 2013 *Daily Comp. Pres. Doc.* 32, 21 January 2013.

[12] On the *Loving* analogy, see WN Eskridge, *The Case for Same-Sex Marriage. From Sexual Liberty to Civilized Commitment* (New York, The Free Press, 1996) 127 ff. See against Y Merlin, *Equality for Same-Sex Couples. The Legal Recognition of Gay Partnerships in Europe and the United States* (Chicago, University of Chicago Press, 2002) 288 ff.

[13] See eg the Virginia District Court's ruling in *Bostic v Rainey* 970 F Supp 2d 456, 22 (ED Va 2014) and the Court of Appeal for the Fourth Circuit's ruling in *Bostic v Schaefer* 760 F3d 352, 390 (2014). See also 'Virginia gay marriage fight echoes past battles over interracial marriage' in *Huffington Post*, 4 June 2014 (available at www.huffingtonpost.com/2014/04/06/virginia-gay-marriage-ban_n_5100602.html).

[14] M Shapiro, A Stone Sweet, 'The New Constitutional Politics of Europe' (1994) 26 *Comparative Political Studies* 397, describing Western Europe as the epicentre of a 'new constitutionalism', a model of democracy that rejects dogmas of legislative sovereignty and prioritises the protection of fundamental rights through constitutional review of legislation.

[15] T Ginsburg, 'The Global Spread of Constitutional Review' in GA Caldeira, DR Keleman and KE Whittington (eds), *Oxford Handbook of Law and Politics*, Oxford Handbooks on Political Science (Oxford, Oxford University Press, 2008) 81.

[16] R Hirschl, *Towards Juristocracy* (Cambridge MA, Harvard University Press, 2004) at 8 arguing that in post-communist countries the new constitutions and the introduction of the judicial review of legislation are part of a transition to both a Western model of democracy and a market economy.

'Centralised' constitutional courts have been introduced, for instance, in Southern Europe after the collapse of the authoritarian regimes at the end of the 1970s, and in Central and Eastern Europe after the fall of communist regimes in the 1990s. In those countries the constitutional courts became 'the main institutional vehicles for countering the forces of the ancient regime, or of authoritarianism, of rights-threatening nationalism'.[17] In South Africa, a Constitutional Court was established in 1995, after the termination of the apartheid regime, constituting a major forum for the consolidation of the new multicultural regime.[18] More recently, in Canada, the adoption of an entrenched Charter of Rights and of judicial review of legislation marked a departure from the British tradition of parliamentary supremacy, transforming the role of the Supreme Court and leading to the development of human rights jurisprudence.[19] Within continental Europe, both Belgium and France have recently expanded the powers of their constitutional courts: in 2003, the Belgian Cour d'arbitrage acquired the power to control whether statutes comply with all the fundamental rights and liberties laid down in the Constitution, and in 2007 its name was changed in Cour constitutionnelle, to better reflect its current powers.[20] In France, in 2008, a constitutional reform conferred on higher ordinary courts the power to submit questions to the Conseil constitutionnel concerning the constitutionality of statutes that have already entered into force (*question prioritaire de constitutionnalité,* QPC).[21]

The widespread diffusion of constitutional adjudication has largely contributed to the circulation of legal principles and judicial arguments among constitutional and supreme courts. Courts have become increasingly aware of their changing institutional role, and in recent decades both scholars and constitutional judges have been describing the emergence of 'a global community of courts',[22] 'an ideal constitutional judicial circle',[23] where constitutional and supreme courts frequently 'dialogue' with their foreign counterparts. Especially when 'new issues' or claims of new (or newly recognised) groups come before them, courts learn from the experience of other courts that in the past addressed similar issues and take into account, either explicitly or implicitly, their conclusions and legal reasoning.

[17] M Rosenfeld, W Sadurski and R Toniatti, *Central and Eastern European Constitutionalism a Quarter of a Century After the Fall of the Berlin Wall: Introduction to the Symposium* (2015) 13 *International Journal of Constitutional Law* 119 at 121 (discussing the purchase of the paradigm of 'transitional constitutionalism' in the latest Eastern European scholarship).

[18] See Hirschl, n 16 above, 27 ff.

[19] G Gentili, 'Canada' in T Groppi and MC Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Oxford, Hart Publishing, 2013) 44 ff; D Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto, Toronto University Press, 2008), 58 ff.

[20] The Court also obtained the power to control whether statutes comply with the principle of legality in fiscal matters and the principle of equal treatment of foreigners. See M de Visser, *Constitutional Review in Europe. A comparative Analysis* (Oxford, Hart Publishing, 2014).

[21] A constitutional reform approved in 2008 amended art 61, s 1 of the French Constitution and introduced an incidental review of legislation through an application referred to the Conseil constitutionnel by the Conseil d'Etat or the Cour de cassation.

[22] AM Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191, 195.

[23] See former President of the Italian Constitutional Court, G Zagrebelsky, 'Corti costituzionali e diritti universali' (2006) *Rivista Trimestrale di Diritto Pubblico* 297 (transl mine).

Reasons explaining the rise of judicial cross-fertilisation and its many ramifications on significant questions such as universalism of human rights and the convergence between common law and civil law legal systems lie mostly outside the purpose of this book. Nonetheless, I argue that both the rise of constitutional adjudication and the reality of transjudicial dialogue have contributed to the circulation of legal arguments among constitutional and supreme courts in cases concerning the recognition of gay and lesbian rights.

At the same time, today judicial cross-fertilisation is also significantly stimulated by a third factor that also contributes to differentiate the present debate over gay rights: the widespread diffusion of global means of mass communication. Easy Internet searches, legal blogs and forums and online law reviews provide real time and worldwide coverage of new constitutional developments about sexual orientation equality issues. Cases circulate rapidly: the Supreme Court's decision on same-sex marriage in *Obergefell v Hodges,*[24] for instance, received great attention in Italy during the debate over the adoption of a law on same-sex civil unions, and activists emphasised that it demonstrated a prevailing trend towards marriage equality in countries of Western constitutional tradition.

Scholarly and political debates over gay rights also attained a global dimension: the harsh confrontation between opponents and proponents of equal marriage ('*mariage pour tous*') in France, for instance, attracted global attention and at the same time provided scholars and movements worldwide with significant teachings about the relationship between courts and legislators in promoting constitutional change.

II. THE AIMS OF THIS BOOK

Against this background, this book aims at analysing, in a comparative perspective, the legal arguments and rationales that constitutional (and supreme) courts developed in their judgments about the rights of gays, lesbians and same-sex couples. I mainly discuss constitutional and supreme court cases, although in many parts I also take into account lower levels of jurisdiction and the ECtHR, showing how litigation before ordinary courts and international bodies paved the way for intervention by supreme and constitutional courts.

Focusing in particular on four main themes (decriminalisation of sexual acts, recognition of same-sex couples as 'families', same-sex marriage and, finally, parental rights) I analyse how courts expounded fundamental rights to liberty, dignity, privacy, equality and non-discrimination of gays and lesbians. The early cases on decriminalisation of sexual acts between consenting adults of the same sex discussed in particular the right of privacy and personal liberty. Later cases focused instead on the 'social dimension' of same-sex relationships, expounding rights of equality, dignity and liberty of same-sex couples.

I analyse differences and analogies in human rights discourses, but I also show the importance that courts attached to arguments of tradition and nature, and how they replied to objections infused with prejudice against same-sex couples.

[24] *Obergefell v Hodges* 135 S Ct 2584 (2015).

In same-sex marriage cases, for instance, all the courts addressed the objection by opponents of same-sex marriage that legal tradition mandates gender difference in marriage. The issue at stake went well beyond the proper definition of marriage: it required the courts to answer the objection that recognition of equal marriage was the consequence of 'a judicial revolution'—ie of judicial activism breaking down traditional and established definitions of family law institutions—and to take a position on the opposite argument, considering recognition of equal marriage as the 'inevitable'[25] result of application of constitutional rights of equality, dignity and privacy.

Claims of recognition of parental rights of gays, lesbians and same-sex couples submitted instead to constitutional courts' arguments of nature: assuming that only the opposite-sex couple can 'naturally' procreate, traditionalists assumed procreation as a determinant of marriage. This objection frequently concealed a bias against gays and lesbians, because it implicitly questioned their aptitude for child-rearing, suggesting that children can adequately be brought up only within a 'traditional' family composed of a mother and father, anchored by the bond of marriage. As in same-sex marriage cases, answering these objections forced the courts to clarify the boundaries of constitutional adjudication and to engage in a dialogue with legislators.

This short account of the subject of this book makes it clear that, in my opinion, constitutional cases cannot be analysed in isolation from the institutional context in which they have been released.[26] As notions such as 'marriage' and 'family' are deeply entrenched in cultural and legal tradition, all the constitutional courts frequently faced the objection that revising traditional family law institutions fell outside judicial powers and that it was instead the duty of legislators to understand and convey into law the prevailing sentiments of public opinion on family law issues. But, at the same time, courts could not avoid providing an answer to the minorities that resorted to them for the assertion and the protection of their fundamental rights, especially when national legislators were unable to break the stalemate and adopt legislative reforms upholding the claims of social movements and minorities.

Therefore, in this book, constitutional cases on gay rights also offer me the opportunity to discuss the role of constitutional and supreme courts in promoting constitutional change and responding to public opinion and minorities' demands. Through a narrative describing the path towards legal recognition of same-sex civil unions or equal marriage in many different jurisdictions, I examine the relationships between some constitutional courts and legislators, arguing that constitutional cases on the rights of same-sex couples both shape and are influenced by the prevailing sentiments of public opinion and politics, in a virtuous circle for the advancement of sexual equality. This has been true even when cases have not resulted in an immediate victory for gays and lesbians and same-sex couples, because courts have nevertheless contributed to the dismantling of prejudice and the creation of legal arguments.

Nonetheless, I do not intend to deny the differences in the role of legislatures and courts in promoting and protecting the human rights of gays and lesbians:

[25] Tribe, 'The Constitutional Inevitability' above n 2.
[26] See, on this underlying assumption, Hirschl, *Towards Juristocracy*, n 16 above.

Parliaments—for instance, as Eskridge stresses—tend to address equality issues 'in smaller steps and only after most voters have come to support or acquiesce in it'.[27] Conversely courts, especially constitutional and supreme courts, usually exercise caution in promoting constitutional change, due to their concern for the consequences of a possible backlash on their legitimacy.

At the same time, constitutional and supreme courts should not be assimilated to lower ordinary courts: in a centralised judicial review system—the prevailing model in Europe—constitutional courts are frequently reluctant to determine radical constitutional changes through their judgments, especially when the issue at stake involves traditional family law institutions. Conversely, lower courts tend to address controversial issues.

I show that the outcome of constitutional litigation also depends on the specific procedural and institutional arrangements governing the judicial review of legislation in each jurisdiction.

III. THE COMPARATIVE METHOD

The extensive case law on sexual orientation equality issues forced me to make a selection of topics and jurisdictions.

As far as the choice of the topics is concerned, this book focuses, as mentioned earlier, on four main themes: the decriminalisation of sexual acts between consenting adults of the same sex (Chapter 2); the recognition of the social value of same-sex relationships and their inclusion within the definition of 'family' (Chapter 3); same-sex marriage—in particular, the role of constitutional courts in promoting marriage equality and their institutional dialogue with legislators (Chapter 4, section I); constitutional courts and the value of tradition in the definition of marriage (Chapter 4, section II); arguments of equality, dignity and liberty in same-sex marriage constitutional cases (Chapter 4, section III); and parental rights of gays, lesbians and same-sex couples and the procreative purpose of marriage (Chapter 5).

In recent decades, many constitutional and supreme courts have been asked to decide on the constitutionality of differences based on sexual orientation in those four fields. Courts have addressed quite similar human rights issues, with a large similarity of arguments put forward by parties and amici curiae.

Nonetheless my choice is not only justified by the simple commonality of subjects and arguments among the cases. The meanings of 'family' and 'marriage', 'parent' and 'spouse' have been left largely undefined in many jurisdictions. For instance, as I illustrate in Chapter 4, most of the constitutions and international documents either do not define marriage in heterosexual terms, or do not mention marriage at all. Definitions are instead mostly expressed in civil codes, family law statutes and judicial precedents, and all those sources of the law contribute, as traditionalists argue, to the longstanding legal tradition of marriage. Against this legal background, courts undertake the difficult task of interpreting vague (or silent) constitutional provisions, and they need to justify their decisions of either endorsing an evolutionary

[27] Eskridge, 'Backlash Politics' n 5 above, 297.

interpretation of marriage and family, or leaving the matter to the discretion of the political branches. Therefore, as illustrated earlier, the four subjects also offer me the opportunity to situate the constitutional cases in a broader terrain and to address issues concerning, for instance, the interpretation of the different sources of law, the role of courts and their relationship with legislators. Cases about the legitimacy of statutes that criminalised sexual intercourse between same-sex adults similarly also involve wider issues, such as the courts' role in preserving 'traditional morality' and the legitimacy of intrusion by courts and the State in the personal lives of citizens.

Although many other interesting issues have been submitted to constitutional courts in the last few years that are equally deserving of the constitutional scholar's attention, I opted for singling out cases related to more specific subjects that are mainly regulated at legislative (or sub-legislative) level, such as employment and housing discrimination, access to assisted procreation and surrogacy, and military service by gays and lesbians.

The selection of the main themes has also influenced the selection of relevant jurisdictions. My attention focuses in particular on the European[28] and extra-European[29] constitutional cases dealing with the four selected themes that have attracted greater scholarly attention in recent years, representing at the same time a model for other courts. Within Europe, in particular, I analyse constitutional and supreme court cases from France, Germany, Italy, Spain and Portugal and from Ireland and the United Kingdom. Outside Europe, I mainly focus on the United States, but in many points also discuss cases from Canadian courts and the South Africa Constitutional Court. Finally, as mentioned earlier, I devote great attention to many judgments of the European Court of Human Rights, which largely contributed to promoting sexual equality in Europe, exerting great influence even outside the Council of Europe. Throughout the book I often look at the experience of my own country, Italy, lagging behind many other democracies of the Western constitutional tradition in sexual orientation equality issues.

The constitutional and supreme court cases I examine in this book are from countries sharing a common constitutional tradition and they expound common values and principles of equality, dignity and liberty.[30] Although the idea of a common tradition can be disputed because no fixed and clear boundary can be drawn among legal traditions,[31] it is at the same time undeniable that, despite their structural differences and their different approaches to sexual equality issues, the selected countries have been following a common path towards the recognition of the human rights and equality of gays and lesbians. This path starts with decriminalisation of sexual acts between persons of the same sex, gets through the legal recognition of same-sex relationships and families and, in more recent times, culminates in same-sex marriage and the right of adoption for same-sex couples.

[28] In particular, France, Germany, Ireland, Italy, Spain, Portugal, United Kingdom.

[29] In particular, Canada, United States of America, South Africa.

[30] On the 'most similar cases' logic in comparative law, R Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125, 133 ff.

[31] On the complexity of traditions, see P Glenn, *Legal Traditions of the World,* 5th edn (Oxford, Oxford University Press, 2014) 366.

However, I do not intend to suggest that a step-by-step approach should be advisable,[32] but only to argue that, from the perspective of constitutional law, there is a commonality of outcomes that made it possible for the Spanish Constitutional Tribunal, in its same-sex marriage case of 2012, to describe the emergence of 'a new "image" of marriage, gradually becoming more common … which allows us to interpret the idea of marriage, from the point of view of Western comparative law, as a plural conception'.[33]

IV. SOME REMARKS ON COURTS' USE OF FOREIGN PRECEDENTS

In some of the cases I analyse in the book, constitutional courts openly discuss foreign precedents. Sometimes the influence of foreign cases is instead only implicit, due for instance to the style of judicial opinions[34] or, presumably, to the choice of constitutional judges to rely explicitly only on domestic sources of law when issues so deeply entrenched in culture and legal tradition—such as marriage and family—come into consideration.[35]

As judicial cross-fertilisation is a transversal theme emerging throughout the analysis of constitutional cases on sexual orientation equality, it is necessary to premise some remarks on the variety of reasons justifying courts' citations of their foreign counterparts' cases.

In the first place, courts explain their use of foreign citations arguing that they demonstrate the emergence of 'a new idea' of marriage and family or a growing consensus towards the elimination of discriminations based on sexual orientation. The Constitutional Tribunal of Spain, for instance, cited a large number of foreign cases (and legislative materials) that similarly opened marriage to same-sex couples, concluding that they suggested 'a plural image' of marriage.[36] In its judgment on decriminalisation of sexual acts between persons of the same sex,[37] the Constitutional

[32] My choice to follow a path of recognition starting from decriminalisation of sexual acts and culminating in same-sex marriage is merely instrumental to my analysis and not normative. In other words, I am not arguing that a step-by-step approach towards same-sex marriage would have better chances of success in countries (like Italy) that still do not admit it. My choice comes from the observation that this path has been quite common in European and extra-European countries, and that courts, especially constitutional and supreme courts, have been more sympathetic to gay couples seeking the right to marry when claims of equal marriage had been preceded by the recognition of other LGBT rights. I also discuss this point from a different perspective in Ch 4, section I concerning the role of courts in promoting constitutional change.

[33] Case no 198/2012, 6 November 2012, SCT, para 9.

[34] In Italy, for instance, the style of judicial opinion does not admit separate opinions, footnotes or citations of scholarly works. In France, the style of Conseil constitutionnel opinions is quite concise and made up of a list of *Considérant* ('in light of') clauses, sentence-like assertions taking into consideration what the law is. Citation of foreign precedents are quite rare in the German Constitutional Tribunal's cases, although separate opinions sometimes are more open to citing foreign sources than the majority opinions.

[35] For instance citations of foreign cases recur in cases concerning decriminalisation of sexual acts (Ch 2) whereas they are quite rare in cases about 'family' (Ch 3) and same-sex marriage (Ch IV, sections II and III).

[36] Case no 198 of 2012, n 33 above, para 9.

[37] *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Case CCT 11/98, (1998) ZACC 15.

Court of South Africa cited the European Court of Human Rights' landmark decision in *Dudgeon v United Kingdom,*[38] as illustrative of 'a process of change commenced in Western democracies in legal attitudes towards sexual orientation'.[39]

Finally, in *Lawrence v Texas*,[40]—a landmark case of 2003—the Supreme Court of the United States held sodomy law in Texas unconstitutional, overruling *Bowers v Hardwick*,[41] a 17-year-old controlling precedent. Writing for the Court, Justice Kennedy made special note of the ECtHR's ruling in *Dudgeon v United Kingdom*, stressing that this case, released almost five years before *Bowers,* contradicted the premise in *Bowers* that governmental interest in circumscribing personal choice was legitimate or urgent and complied with the values the United States shares with a wider civilisation.[42] He also emphasised that 'other nations … have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct'.[43]

These examples show that, in cases concerning sexual orientation equality, use of comparative materials, especially of foreign precedents, often plays an evidentiary and confirmatory role. Courts cite foreign cases addressing similar issues in order to demonstrate the existence of a prevailing trend they think should be followed, or to strengthen their conclusion to join the solutions adopted in other jurisdictions.

The South African Constitutional Court, for instance, concluded that the fact that

> a number of open and democratic societies have turned their backs on criminalisation of sodomy in private between adult consenting males, despite the fact that sexual orientation is not expressly protected in the equality provisions of their constitution … fortify the conclusion … that the limitation in question in our law regarding such criminalisation cannot be justified under section 36(1) of the 1996 Constitution.[44]

Similar statements can also be found in the Supreme Court of Mexico's case on same-sex marriage, arguing that 'comparative law reveals, both at judicial and legislative level, an evolution in the recognition of the rights of gays, lesbians and same-sex couples, justifying the suppression of the discriminations they suffered in the past'.[45]

By contrast, other constitutional courts have emphasised the lack of a prevailing consensus about same-sex marriage. The decision of some jurisdictions to legally recognise same-sex civil unions instead of opening marriage to same-sex couples supports the courts' conclusions that the issue should be better addressed at legislative level. In 2010, the Italian Constitutional Court, for instance, dismissed same-sex couples' claims, arguing that the decision about how to regulate same-sex relationships pertains to the legislator: in reaching this conclusion the Court relied, inter alia, on comparative law, observing the lack of a unanimous consensus in other

[38] *Dudgeon v UK* (1981) Series A no 45, [1981] EHRR 5.
[39] *National Coalition* n 37 above, para 51.
[40] *Lawrence v Texas* 539 US 558 (2003).
[41] *Bowers v Hardwick* 478 US 186 (1986).
[42] *Lawrence v Texas* n 40 above, 539 US, 576.
[43] ibid.
[44] *National Coalition* n 37 above, para 57.
[45] See *Acción de inconstitucionalidad 2/2010*, 10 August 2010, para 267. See also the Portuguese Constitutional Court in *Acórdão* no 121/2010 (8 April 2010) and the Constitutional Court of Colombia in *Sentencia* C-577/11 at 169.

jurisdictions due to the fact that some countries had opted for opening marriage to same-sex couples, whereas others had introduced same-sex civil unions.[46]

Analogously the Irish High Court, in *Zappone*,[47] cited extensive case law of American and Canadian courts on same-sex marriage, 'dealing with similar definitions of marriage and the assertion of a right to marry requiring a redefinition of the traditional understanding of marriage as is the case in these proceedings', concluding that

> having regard to the clear understanding of the meaning of marriage as set out in the numerous authorities opened to the Court from this jurisdiction and elsewhere, I do not see how marriage can be redefined by the Court to encompass same sex marriage. The Plaintiffs referred frequently in the course of this case to the 'changing consensus' but I have to say the there is little evidence of that. The consensus around the world does not support a widespread move towards same sex marriage.[48]

However, it should also be noted that in other cases, reliance on comparative materials to demonstrate the existence of a common trend on sexual equality issues also serves the courts' purpose to emphasise their efforts to contribute to a common enterprise. This is important, especially for newly established constitutional courts, which are often motivated by the desire to stress the radical changes in their system of government and to place themselves 'in the mainstream of international democratic practice'.[49] The Constitutional Court of South Africa for instance in the *Fourie* same-sex marriage case referred to the ideals of 'a democratic, universalistic, caring and aspirationally egalitarian society',[50] emphasising how 'the contrast between the past which [the Constitution] repudiates and the future to which it seeks to commit the nation is stark and dramatic'.[51]

Finally, comparative law materials offer the courts the opportunity to evaluate the impact of solutions adopted elsewhere. This appears extremely useful when courts are asked to address a new and difficult issue. As former Justice L'Heureax-Dubé of the Supreme Court of Canada wrote:

> Given the similarities of constitutional drafting and sources, one would not be surprised by the new dialogue among judges and lawyers drawing on the expertise and experience of interpreters of similar documents. Moreover, because the legal protection of human rights is a novel phenomenon in many countries, sometimes little or no previous domestic jurisprudence exists to give meaning to the rights, making judgments from elsewhere particularly useful and necessary. Deciding on applicable legal principles and solutions increasingly involves a consideration of the approaches that have been adopted for similar legal problems elsewhere.[52]

[46] See Case no 138 of 2010, para 8.
[47] *Zappone and Gilligan v Revenue Commissioners* [2006] IEHC 404.
[48] ibid.
[49] See the Constitutional court of South Africa in *Coetzee v Government of the Republic of South Africa* 1995 (10) BCLR 1382 (CC), para 51.
[50] *Minister of Home Affairs and Another v Fourie*, Case CCT 60/04, [2005] ZACC 19, para 60.
[51] ibid, para 59.
[52] C L'Heureax-Dubé, 'From Many Different Stones: A House of Justice' (2003) 41 *Alberta Law Review* 659. G Calabresi expounded a similar idea in his concurring opinion in *United States v Then* 56 F 3d 464, 469 (1995).

The use of comparative law, in particular of foreign cases, as an aid to constitutional interpretation in cases concerning the rights of gays and lesbians, is part of a larger trend to judicial cross-fertilisation in constitutional adjudication, which has attracted great scholarly attention in the last few years, as exemplified by the extensive literature on the subject.[53] The general debate has focused on the many different purposes served by the citation of comparative law materials and on the practical difficulties and the theoretical objections surrounding their use in constitutional interpretation.

The analysis of these wider issues, which I have discussed in earlier writings,[54] falls outside the purpose of this book. Nonetheless it is worth remembering, as far as the field of study of this book is concerned, that the citation of foreign cases has stirred a harsh debate, especially in the United States[55]—in the past mainly an 'exporter' of constitutional principles and doctrines—after Justice Kennedy's citation of *Dudgeon* in the text of his opinion of the Court in *Lawrence v Texas*. Justice Scalia, in an impassioned dissenting opinion, labelled the discussion of foreign views—either in order to show that foreign nations have decriminalised same-sex sexual acts or in order to support the opposite argument that others have retained criminal prohibitions on sodomy—as 'meaningless' and 'dangerous dicta since the Court should not

[53] In the last decade, prominent scholars have analysed the use of comparative materials, especially foreign precedents, in constitutional adjudication. See eg G de Vergottini, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazione* (Bologna, Il Mulino, 2010); GF Ferrari and A Gambaro (eds), *Corti nazionali e comparazione giuridica* (Napoli, ESI, 2006); T Groppi and MC Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Oxford, Hart Publishing, 2013); S Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819 (1999) and S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge, Cambridge University Press, 2006); P Häberle, *Rechtsvergleichnung im Kraftfeld des Verfassungsstates* (Berlin, Dunker & Humblot, 1992); V Jackson, *Constitutional Engagement in a Transnational Era* (Oxford, Oxford University Press, 2009); B Markesinis and J Fedtke, *Judicial Recourse to Foreign Law. A New Source of Inspiration?* (Routledge, London, 2006); MC Ponthoreau, 'Le recours à l'argument de droit compare par le juge constitutionnel. Quelques problèmes théoriques et techniques' in F Mélin-Soucramanien (ed), *L'interprétation constitutionnelle* (Paris, Dalloz, 2005) 167; AM Slaughter, *A New World Order* (Princeton, Princeton University Press, 2004).

[54] A Sperti, 'United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence' in T Groppi and MC Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Oxford, Hart Publishing, 2013) 393 and A Sperti, 'Il dialogo tra le corti ed il ricorso alla comparazione nell'esperienza più recente' (2006) *Rivista di diritto costituzionale*, 125 ff (also available in archivio.rivistaaic.it/materiali/anticipazioni/comparazione/index.html).

[55] See *United States v Then* 56 F 3d 464, 468–69 (1995) (Calabresi concurring). See eg B Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Vanderbilt Law Review* 771; VC Jackson, 'Constitutional Comparison: Convergence, Resistance, Engagement' (2005) 119 *Harvard Law Review* 109; VC Jackson, 'Comparative Constitutional Federalism and Transnational Judicial Discourse' (2004) 2 *International Journal of Constitutional Law (Icon)* 91; VC Jackson, 'Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse' (2004) 65 *Montana Law Review* 15; HH Koh, 'International Law as Part of Our Law' (2004) 98 *American Journal of International Law* 43, 44; P McFadden, 'Provincialism in United States Courts' (1995) 81 *Cornell Law Review* 4; FI Michelman, 'Reflection' (2004) 82 *Texas Law Review* 1737; M Rosenfeld, 'Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts' (2004) 2 *International Journal of Constitutional Law* 633, 649; Slaughter, 'A Global Community of Courts' n 22 above; E Stein, 'Uses, Misuses—and Nonuses of Comparative Law' (1977) 72 *Northwestern University Law Review* 198; M Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225; K Yoshino and M Kavey, 'Immodest claims and Modest Contributions: Sexual Orientation in Comparative Constitutional Law' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012) 1079, 1086 ff.

impose foreign moods, fads, or fashions on Americans'.[56] He contested the majority assumption that *Bowers* had relied on the values of Western civilisation, arguing that the case had 'rather rejected the claimed right to sodomy on the ground that such a right was not 'deeply rooted in [the United States'] history and tradition'.[57] He concluded: 'Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct'.[58]

Some scholars, in commenting on *Lawrence*, analogously argued that the use of foreign materials determines an allocation of decision-making power to foreign bodies lacking democratic legitimacy.[59]

Described by Markesinis and Fedtke as 'an American objection',[60] this critique assumes the use of comparative materials to be a potential threat to democracy and sovereignty. In the debate over the recognition of rights of gays and lesbians it implies an undemocratic exercise of judicial discretion and improper policymaking by constitutional and supreme courts in a field in which they should confine themselves to enforcing only domestic sources, enacted by democratically accountable representatives of the people.

However, this critique appears, in my opinion, too rigid and in some respects misleading. It is too rigid because it implies that comparative sources cannot even be used as a source of inspiration, although courts claim to be expounding domestic principles values and they emphasise the analogies between domestic and foreign sources. The objection is at the same time also misleading, as Markesinis and Fedtke emphasise, because it implicitly assumes that courts are enforcing a *foreign* source.[61] Instead, when a court finds the foreign idea persuasive, the solution it adopts in solving the case becomes part of domestic law.

In cases concerning sexual orientation equality, the strongest objection is instead that one I name, for brevity's sake, the 'cultural objection'. As institutions like 'marriage' and 'family' are deeply entrenched in local legal traditions, culture and history, this objection stresses the risks of an improper or incorrect use of foreign law and the difficulty of importing solutions and ideas conceived in a different social, cultural and legal environment.

This argument has been advanced, for instance, by the government party before the High Court of New Delhi in a case about the legitimacy of India's sodomy statute.[62] The Government stressed in particular that 'social and sexual mores in foreign countries cannot justify decriminalization of homosexuality in India' because 'in western morality standards are not as high as in India'.[63]

[56] *Lawrence v Texas* n 40 above, 539 US, 598 (Scalia dissenting).
[57] ibid.
[58] ibid (emphasis in original).
[59] See especially RA Posner, 'The Supreme Court, 2004 Term: Foreword: A Political Court' (2005) 119 *Harvard Law Review* 31, 84–90; RA Posner, 'No Thanks, We Already Have Our Own Laws: The Court Should Never View a Foreign Legal Decision as a Precedent in Any Way (2004) 7/8 *Legal Affairs*, also available at http://legalaffairs.org/issues/July-August-2004/featureposnerjulaug04.msp.
[60] Markesinis and Fedtke, 'Judicial Recourse to Foreign Law' n 53 above, 157.
[61] Markesinis and Fedtke, 'Judicial Recourse to Foreign Law' n 53 above, 164.
[62] See *Naz Foundation v Government of NCT of Delhi* (2009) 160 Delhi Law Times 277.
[63] *Naz Foundation* n 62 above, para 24.

In *Zappone,* the Irish High Court admitted that foreign 'authorities are interesting in many respects' because 'they are dealing with similar definitions of marriage and the assertion of a right to marry requiring a redefinition of the traditional understanding of marriage as is the case in these proceedings' and 'many of the arguments in those cases put forward on behalf of the proponents of same sex marriage have been relied upon in the arguments in this case also'. Nonetheless it stressed that 'there is a limit to the assistance that can be drawn from them given the different constitutional framework applicable in this jurisdiction but the approach taken to the proposed re-definition of the freedom to marry is of interest'.

Both courts seemed to suggest that relying on foreign sources implied the risk of disregarding the prevailing sentiments of public opinion and the constitutional principles lying at the base of domestic regulation of family law institutions. The Constitutional Tribunal of Spain was probably aware of that objection in its 2012 ruling on same-sex marriage, which after a detailed examination of legal developments in countries 'sharing the same legal culture',[64] cited many surveys showing that 'in Spain there is broad social acceptance of marriage between same-sex couples'.[65]

The legal culture, the Constitutional Tribunal observed:

> is not only based on a literal, systematic or originalist interpretation of the law, but also depends on observing any legally relevant issues of current society. This does not mean that direct regulatory force should be granted to factual issues; the opinions of legal scholars and advisory bodies established by the law; comparative law applicable in neighbouring social and cultural scenarios and—as regards the construction of legal culture in relation to rights—the international activity of States manifested in international treaties; the case-law laid down by international bodies, and the opinions and reports drawn up by competent bodies in the United Nations system, as well as other recognised international authorities.[66]

The Constitutional Tribunal's reply suggested that relying on foreign materials when solving a case concerning the meaning of 'marriage' means neither enforcing foreign sources, nor disregarding domestic culture and legal tradition, but only enlarging the judge's perspective in constitutional interpretation.

This reply to the cultural objection brings to mind an exchange of views between Justice Scalia and Justice Breyer. In a well-known opinion in *Thompson v Oklahoma*, Justice Scalia wrote that 'we must never forget that it is a Constitution for the United States of America that we are expounding'[67] and in *Printz v United States* also argued that 'comparative analysis [is] inappropriate to the task of interpreting a constitution'.[68]

Responding to this objection Justice Breyer wrote that

> of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own … But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.[69]

[64] Case no 198 of 2012, n 33 above, para 9.
[65] ibid.
[66] ibid (my translation).
[67] *Thompson v Oklahoma* 487 US 815, 868, fn 4 (1988).
[68] *Printz v United States* 521 US 898, 921 fn 11 (1997).
[69] ibid 521 US, 977 (Breyer, dissenting).

I argue that whatever the authoritativeness and the actual pertinence of foreign materials to the solution of the instant case, the courts' final decisions rest always on domestic principles, values and sources of the law. Nonetheless, I do not intend to disregard the relevance of cultural differences: when courts face the delicate task of formulating a definition of 'family' and 'marriage', whose notions are not fixed in time and are also socially constructed, they must devote great attention to analogies and differences among different jurisdictions. Otherwise there is the risk of juxtaposing solutions (or taking into account ideas and principles) adopted in culturally and structurally different environments. The Israeli Supreme Court's ruling in *El Al Israel Airlines v Danielowitz,*[70] concerning the exclusion of a same-sex partner from the possibility of enjoying a free airline ticket, awarded otherwise to married spouses and opposite-sex partners—can be cited as an example of wrong use of comparative materials in constitutional interpretation.[71] In reaching its conclusions, a three-judge panel thoroughly discussed the Canadian human rights cases on sexual orientation equality, disregarding the many differences in local religious feelings between Canada and Israel.

Courts have however usually paid great attention to differences and similarities with other jurisdictions cautioning against a misleading and ill-founded use of foreign materials.

The Constitutional Court of South Africa, in its ruling on same-sex marriage *(Fourie*[72]*)* stressed for instance the difficulty of relying on tradition in constitutional adjudication in South Africa, because the South African Constitution of 1996 'represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all'.[73] The Constitutional Court also emphasised that unlike other jurisdictions, South Africa lacked 'a comprehensive legal regulation of the family law rights of gays and lesbians' and emphasised 'the imperative constitutional need to acknowledge the long history in our country and abroad of marginalisation and persecution of gays and lesbians'.[74]

The Supreme Court of Canada has also consistently stated that although it may undoubtedly benefit from the experience of American and other courts in adjudicating constitutional issues, it is by no means bound by that experience or the jurisprudence it generated. It wrote:

'The uniqueness of the Canadian Charter of Rights and Freedoms flows not only from the distinctive structure of the Charter as compared to the American Bill of Rights but also from the special features of the Canadian cultural, historical, social and political tradition'.[75]

In sum, it can be argued that although courts enrich their arguments and awareness of legal developments looking at other jurisdictions, they always make foreign

[70] *El Al Airlines Ltd v Danilowitz* (1994) 48(5) PD 749.
[71] On the use of foreign materials in *El Al*, see Markesinis and Fedtke, 'The judge as a comparatist' n 53 above, 154.
[72] *Fourie*, n 50 above.
[73] ibid, para 59.
[74] ibid.
[75] *Lavigne v Ontario Public Service Employees Union* [1991] 2 S.C.R. 211, esp 256–58.

ideas and principles their own. At the same time, no court ruling concerning the recognition of the rights of gays and lesbians rests solely on foreign materials. Both the United States Supreme Court in *Lawrence,* and the Spanish Constitutional Tribunal in case no 198 of 2012, for instance, paid careful attention to domestic legal developments (respectively on decriminalisation of sexual acts and same-sex marriage), whereas citations of legal foreign materials played only a secondary role in their arguments.

Although courts should carefully take into account cultural differences when importing foreign solutions or discussing legal arguments and principles expounded elsewhere, cases concerning sexual orientation equality confirm that sometimes the 'cultural objection' can also be raised instrumentally, especially when courts are unwilling to depart from domestic legal tradition in the definition of 'marriage' and 'family'. In other words, the cultural objection can sometimes be advanced to strengthen or to hide critiques of judicial activism and to justify the axiomatic uses of tradition I discuss in Chapter 4.

V. OUTLINE OF THE BOOK

This comparative study of constitutional and supreme court cases on sexual orientation equality[76] starts with *Dudgeon v United Kingdom*,[77] the 1981 ruling of the European Court of Human Rights, which marked a turning point in judicial recognition of the rights of gays and lesbians, putting gay rights at the forefront of legal debate and making them an international issue.

Chapter 2 examines the principles of privacy and liberty the ECtHR expounded in *Dudgeon*, focusing in particular on the construction of homosexuality as an

[76] *A note on terminology:* In order to further define the aims of this book, it is necessary to clarify the meaning of some terms to be used in the following chapters. The word 'sexual orientation' has different meanings, but for purposes of legal analysis, I refer to it in a broad sense, in particular both to the direction of sexual and affectional *attraction* and to emotional-sexual *conduct* in which people actually choose to engage. See, R Wintemute, *Sexual Orientation and Human Rights* (Oxford, Clarendon Press, 1995) 6 ff. Throughout this book I will use the expression 'sexual orientation equality issues' to refer to constitutional issues concerning discrimination on the basis of sexual orientation (whether the discrimination is direct or indirect, as in the case of apparently neutral regulations). I prefer this expression to 'LGBT issues', because the latter has a wider meaning (as it refers also to issues concerning bisexuality and transsexuality, that I do not address in this book) and is also controversial in some respects (sometimes LGBTI or LGBTIQ are suggested as more appropriate variations). The word LGBT appears in this book only when referring to social movements and the community.

As far as constitutional issues concerning discrimination on the basis of sexual orientation in marriage are concerned, as I emphasise in Ch 4, I consider 'equal marriage' the most appropriate term because it implicitly suggests that there is only *one* fundamental and constitutional right to marriage, regardless of people's sexual orientation, and that gays and lesbians are not claiming any special right to marriage. Nonetheless, the expression 'same-sex marriage' also appears in this book because it frequently appears in constitutional courts' cases.

Finally the word 'sex' refers to 'biological' or 'chromosomal' sex. The word 'gender' refers instead to social roles.

I will also use the words heterosexual, homosexual, gay and lesbian to refer to same-sex or opposite-sex sexual orientations and to qualify their acts or relationships. Although I acknowledge that the term 'homosexual' carries a negative acceptation, I use it for the purposes of my analysis only when occurring in judicial discourse.

[77] *Dudgeon v United Kingdom,* n 38 above.

inherent trait of the individual and 'an essentially private manifestation of the human personality'.[78] I analyse the implications of the ECtHR's arguments and the influence these exerted on the constitutional courts and international bodies that—between the end of the 1990s to the early 2000s—addressed similar issues concerning the criminalisation of sexual acts between same-sex consenting adults. In particular, I discuss how courts interpreted the right of privacy, the liberty and dignity of gays and lesbians and I emphasise that the *Dudgeon* legacy lies not only in the right of same-sex couples to engage in consensual sexual conduct as an aspect of individual freedom, but also in the idea that the enforcement of morality cannot be considered a legitimate state interest. In the final part of the chapter I discuss some analogies in the courts' interpretations of the right of privacy, arguing that they perpetuated the 'logic of closet' towards gays and lesbians, delimiting an area of self-determination free from the State's intervention. I finally address the importance of *Dudgeon* as illustrative of a change in legal perspective on sexual orientation equality at a global level.

Chapter 3 focuses instead on the development of a social dimension of same-sex relationships and the rejection of the private–public dichotomy perpetuated by *Dudgeon* and the constitutional cases on decriminalisation of sexual acts. It starts with a premise about the constitutional definition of family as a 'basic social institution' and the 'private/public divide' in some European countries and in common law regulation of family and family relationship. I then focus on the arguments that the ECtHR and some constitutional courts have advanced in order to depart from the traditional definition of 'family' based on gender difference before the recognition of stable same-sex relationships at legislative level. I emphasise that issues concerning the definition of 'family' require courts to take a position between dominant conceptions of family—enforced by laws and supported by a supposed widespread consensus or 'common sense'—and a plural and functional definition of 'family' centred on 'lived lives'. Both approaches raise theoretical objections concerning the proper identification of the essential characteristics of 'family' and bring into question the role of courts and their legitimacy. I conclude this chapter with some remarks on the definition of 'family' in Italian constitutional law, demonstrating how a narrow interpretation of family which excludes same-sex couples has long been advanced by Italian scholarship and courts and how it still, in part, survives after the adoption of law no 76 of 2016, regulating same-sex civil unions.

Chapter 4 focuses on constitutional litigation concerning the recognition of the right to marriage for same-sex couples. This chapter is divided into three sections. Section I focuses on the relationships among courts, legislators and public opinion in the debate over equal marriage for same-sex couples in some significant European experiences (Spain, Portugal, Germany, France and, in some respects, Italy). This digression provides the necessary background for the following comparative analysis of constitutional cases, but at the same time offers me the opportunity to discuss analogies in the role of constitutional courts in promoting constitutional change. As mentioned earlier, constitutional and supreme courts are not the only actors in the debate over sexual equality: I emphasise how they engage in a dialogue with lower

[78] ibid, para 60.

levels of jurisdictions and legislators, providing guidelines, setting deadlines for legislative intervention, clarifying the proper interpretation of the relevant constitutional principles and forging constitutional arguments. I conclude that the general pattern confirms the validity of American scholarship's conclusions on the role of courts in promoting constitutional change, but I also emphasise some peculiarities of European experiences and the differences between constitutional and lower courts ensuing from the specific features of European systems of judicial review of legislation.

Section II of Chapter 4 examines issues concerning the definition of 'marriage' and 'spouse' in constitutional cases about equal marriage. After premising that in most of the jurisdictions, the institution of marriage escapes legal definition, and that constitutions do not mandate gender diversity in marriage, I show that sex difference as a determinant of marriage is mainly inferred from legal tradition. I analyse the different meanings of 'tradition' of opposite-sex marriage in constitutional cases, distinguishing *legal* tradition (which is supported by civil codes, statutes or judicial precedents) from a broader definition of tradition (encompassing religion, morality and culture in a wider sense). I clarify that, in the first place, the legal tradition plays an evidentiary role in same-sex marriage cases: it provides a presumptive (and sometimes conclusive) evidence of the purpose of marriage and its 'essential core'. I discuss the theoretical difficulties raised by the identification of the essential core of marriage in constitutional cases, emphasising how the chance of different outcomes depends on the court's perspective. Then I discuss a second use of tradition in same-sex marriage cases that is related to the identification of 'new' fundamental rights not envisioned in the Constitutional text. This purpose of tradition has been mainly discussed in the United States in cases concerning the judicial interpretation of the Due Process Clause of the XIV Amendment of the Constitution. I argue that although this debate is peculiar to American constitutional law, it casts light on European cases on same-sex marriage, illuminating the nature of tradition and the different normative values it serves in relation to marriage. Finally I focus on progressive interpretations of constitutional clauses on marriage in same-sex marriage cases, discussing courts' efforts to accommodate tradition with 'a new and plural idea' of marriage and, at the same time, to avoid objections of judicial law-making.

Section III of Chapter 4 analyses the arguments of equality, liberty and human dignity that constitutional courts developed in same-sex marriage cases. I start my analysis from equality, emphasising how this principle comes into consideration in same-sex marriage cases both in relation to the 'expressive' value couples and society attach to marriage, and to the rights and responsibilities flowing from marriage. Then I focus on arguments of dignity, emphasising the narrow relationship between dignity, equality and liberty in same-sex marriage cases. The idea of dignity as synthesis of equality and liberty has been thoroughly explored by European constitutional scholarship due also to the influence of German constitutional tradition, but it has been also developed by the United States Supreme Court in recent cases on gay rights. As the concept of dignity is complex and multifaceted, I try to identify its different meanings in same-sex marriage cases: I argue that in the first place, dignity comes into consideration in relation to the sociality of same-sex couples and their aspiration to recognition and respect. Then I address the idea of dignity as equal

value of all human beings, arguing that courts frequently rely on this meaning of dignity in order to emphasise the transition of gays, lesbians and same-sex couples into full citizenship. In this respect, equal marriage symbolises the final achievement of same-sex couples in their long-term battle for equality and the end of the 'separate but equal regime'[79] of civil unions. Finally, I discuss use of dignity discourses in relation to liberty and self-determination of all human beings concerning the most intimate and personal life choices. I conclude my analysis with some remarks about the widespread diffusion of dignity discourse which dominates the present human rights adjudication, and I attempt to explain the reasons underlying 'the great success' of dignity even in sexual orientation equality litigation.

In the fifth and final chapter I examine constitutional court and ECtHR cases on the recognition of parental rights of gays, lesbians and same-sex couples. I discuss in particular traditionalists' objection concerning the 'procreative nature' of marriage, showing how courts have contributed to illuminate the many fallacies of this viewpoint. I also explain that the procreation argument has been advanced before constitutional and international courts in order to justify the governmental interest in guaranteeing 'an optimal environment' for children and their right to 'a normal family life'. I discuss this argument in constitutional cases concerning individual adoption, second-parent adoption and joint adoption, demonstrating how courts have usually found in favour of same-sex couples on the basis of principles of equality and the best interests of the child in the instant cases. I argue that, even in countries like Italy that, until recent times, lagged behind in the recognition of the rights of gays and lesbians, the principle of best interest of the child has offered courts a powerful tool for rejecting the idea that the State may better pursue its interest in optimal child-rearing by limiting the right of gays and lesbians to adopt children. In reaching this conclusion courts have not only assessed the reality of family life of same-sex couples and their children, but also contributed to the eradication of prejudices that portrayed gays and lesbians as unfit for parenting.

[79] *Plessy v Ferguson* 163 US 537 (1896).