IXTH WORLD CONGRESS "CONSTITUTIONAL CHALLENGES: GLOBAL AND LOCAL"

OSLO, NORWAY, 16 - 20 JUNE 2014

Paper submitted to **Workshop n. 5**: *Judicial and extra-judicial conversations on the Constitution*

Chairs: Prof. Tania Groppi and Prof. Marie-Claire Ponthoreau

Judicial dialogue and evolutionary interpretations of the Constitutions in cases on same-sex marriage and rights of homosexuals couples

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1. *Introduction*

In the last ten years, scholars have extensively discussed judicial cross-fertilization and the use of foreign case law for constitutional interpretation[1]. In the beginning, the debate was heated by the choice by the United States Supreme Court in *Lawrence v. Texas*[2] to make reference to a case

[1] T. Groppi, M.C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publ., Oxford, 2013. See also, S. Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation,* 74 *Ind. L.J.* 819 (1999) e Id. (ed.), *The Migration of Constitutional Ideas,* Cambridge Univ. Press, Cambridge, 2006; P. Häberle, *Rechtsvergleichnung im Kraftfeld des Verfassungsstates*, Dunker & Humblot, Berlin, 1992; V. Jackson, *Constitutional Engagement in a Transnational Era*, Oxford-New York, Oxford Univ. Press, 2009; B. Markesinis – J. Fedtke, *The Judge as Comparatist,* 80 Tul. L. Rev. 11 (2005) and *Judicial Recourse to Foreign Law. A New Source of Inspiration?*, Cavendish Press, 2006; M.C. 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, at 167 ff.; A.M. Slaughter, *A New World Order*, Princeton, Princeton Univ. Press, 2004.

[2] *Lawrence v. Texas,* 538 U.S. 558 (2003), at 576-7. On this landmark case, see among others, C.A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 Minn. L. Rev. 1184 (2004); S.G. Calabresi, Lawrence, *The XIV Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal,* 65 Ohio St. L. Rev. 1097 (2004); D. Carpenter, *Is* Lawrence *Libertarian?,* 88 Minn. L. Rev. 1140 (2004); M.A. Case, *Of "This" and "That" in* Lawrence v. Texas, 2003 Sup. Ct. L. Rev. 75; M. Coles, Lawrence v. Texas *and the Refinement of Substantive Due Process*, 16 Stan. L. & Policy Rev., 2005, p. 23; B.J. Cooper, *Loose Not the Floodgates*, 10 Cardozo Women L.J. 311 (2004); P. Currah, *The Other "Sex" in* Lawrence v. Texas, 10 Cardozo Women L.J. 321 (2004); W.N. Eskridge, Jr., Lawrence's *Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 Minn. L. Rev. 1021 (2004); J.E. Fleming, Lawrence's *Republic*, 39 Tulsa L. Rev. 563 (2004); K.M. Franke, *The Domesticated Liberty of Lawrence v. Texas,* 104 Columbia L. Rev. 1399 (2004); S.B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 Minn. L. Rev. 1233 (2004); B.E. Harcourt, "*You are entering a gay and lesbian-free zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers,* 94 J. Crim. L. & Crimin. 503 (2004); W. Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in* Grutter *and* Lawrence, 12 Will. & Mary Bill of Rights J. 65 (2003); N.J. Knauer, Lawrence v. Texas: *When "Profound and Deep Convictions" Collide With Liberty Interests,* 10 Cardozo Women L.J. 325 (2004); A. Koppelman, *Interstate Recognition of Same-Sex Civil Unions After* Lawrence v. Texas, 65 Ohio St. L. Rev. 1265 (2004); A. Koppelman, Lawrence's *Penumbra,* 88 *Minn. L. Rev.* 1171 (2004); J.L. Larsen, *Importing Constitutional Norms from a "Wider Civilization":* Lawrence *and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 Ohio St. L. Rev. 1283 (2004); A.H. Loewy, *Morals Legislation and the Establishment Clause,* in 55 *Alab. L. Rev.* 159 (2003); N. Lund, J.O. McGinnis, Lawrence v. Texas *and Judicial Hubris,* 102 Mich. L. Rev. 1555 (2004); C.A. MacKinnon, *The Road Not Taken: Sex Equality in* Lawrence v. Texas, 65 Ohio St. L. Rev. 1081 (2004); M. Oshige McGowan, *From Outlaws to Ingroup:* Romer, Lawrence, *and the Inevitable Normativity of Group Recognition*, 88 Minn. L. Rev. 1312 (2004); A.J. Seligsohn, *Choosing Liberty Over Equality and Sacrificing Both: Equal Protection and Due Process in* Lawrence v. Texas, 10 Cardozo Women L.J. 411

by the European Court of Human Rights (ECHR), *Dudgeon v. UK*[3], dealing with a similar issue. It was the first time that the U.S. Supreme Court mentioned a foreign case in the main text of the majority opinion in order to support a different interpretation of the due process clause of the XIV amendment of the Constitution and to overrule a previous case[4].

In this paper we focus on the dialogue among constitutional (or supreme) courts in cases concerning right to marriage and rights of homosexual couples as they offer a favorable point of view for the study of the passage "from the reception to dialogue" among supreme courts[5].

In the first part of the paper (§ 2) we take into consideration the main features of the dialogue among constitutional courts in this context: we describe the landmark cases which were more influential on courts and try to identify the main "directions" of the dialogue among the courts. We also put into evidence that courts more frequently involved in the dialogue with other jurisdictions are, at the same time, major exporters of models and principles on the protection of human rights.

In the following section (§ 3) we try to put into evidence the reasons justifying judicial dialogue in cases concerning the rights of same-sex couples. We suggest that case law on same-sex marriage and parental rights of homosexual couples reveal, with great clarity, a narrow and reciprocal interaction among constitutional or supreme courts. For this reason, in this field, judicial dialogue is no more an opportunity, but a *necessity* for the courts, especially in the solution of hard cases which involve the recognition of *new* rights or imply an evolutionary interpretation of constitutional clauses.

Then (in § 4) we focus on the way in which judicial dialogue affected the adoption of evolutionary interpretations of national constitutions. As most Constitutions do not explicitly define marriage, the idea that marriage should be referred to an heterosexual couple is often based on (legal and cultural) traditions. Judicial cross-fertilization supports the rejection of traditional definitions of marriage, providing arguments for evolutionary interpretations of constitutional clauses. However, as the notions of "marriage" and "family" are deeply entrenched in national traditions, constitutional courts need to justify the use of foreign cases as an aid to constitutional interpretation. In § 5 we focus on the "cultural objection" to the use of foreign cases in this context.

Finally, in § 6, we make a few remarks on how constitutional and supreme Courts engage in a dialogue with national parliaments and take into consideration the national and international context in order to favor the adoption of new regulations of marriage for same-sex couples (§ 6). We argue that confrontation with other countries which previously introduced gay marriage and parental rights for homosexuals, helped courts in drafting solutions that fulfill claims of homosexual community; at the same time the Courts usually tend to leave to national Parliaments the power to bring about legislative responses to the unconstitutionality of traditional definitions of marriage and family. Furthermore, courts played an essential role in increasing the acceptability of new legislation by public opinion and politics.

2. The dialogue among Constitutional court in cases on same-sex marriage and rights of homosexual couples: an overview of the trends

(2004); E. Stein, *Introducing* Lawrence v. Texas: *Some Background and a Glimpse of the Future,* 10 Cardozo Women L.J. 263 (2004); M. Strasser, Lawrence, *Same-Sex Marriage and the Constitution: What Is Protected and Why?,* 65 New Engl. L. Rev. 667 (2004); C.R. Sunstein, *Liberty After* Lawrence, 65 Ohio St. L. Rev. 1059 (2004); C.R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage,* 2003 Sup. Ct. L. Rev. 276; L.H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893 (2004); F. Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality,* 65 Ohio St. L. Rev. 1341(2004); J. Weinstein, T. DeMarco, *Challenging Dissent: The Ontology and Logic of* Lawrence v. Texas, 10 Cardozo Women L.J. 423 (2004); D. Zucco, *Introduction to Symposium: Gay Rights After* Lawrence, 88 Minn. L. Rev. 1017 (2004).

[3] *Dudgeon c. United Kingdom,* case n. 7525/76, judgment October 22, 1981.

[4] *Bowers v. Hardwick,* 478 U.S. 186 (1986).

[5] L'Heyreux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court,* 34 Tulsa L.J. 15 (1998), at 16.

The analysis of the impact of judicial cross-fertilization on the adoption of constitutional amendments and statutes containing new definitions of "marriage", makes it necessary a preliminary evaluation of the entity and features of the use of foreign case law in constitutional cases concerning same-sex marriage and the rights of homosexual couples.

If we would like to identify the landmark cases which have been more influential on foreign Courts we should, first of all, mention *Dudgeon v. UK* (1981), the seminal case of the ECHR holding that Northern Ireland legislation which made certain homosexual acts between consenting adult males criminal offences violated art. 8 of the European Convention of Human Rights (respect for private life). Although the case deals with the decriminalization of homosexual intercourse between men – and does not address issues like discrimination against homosexuals – it can be considered a turning point in the recognition of rights of *gay* persons worldwide.

The rationale of the case has been taken into consideration not only by the courts which addressed the constitutional legitimacy of legislation punishing sexual intercourse between person of the same sex – such as the Ecuador Constitutional Tribunal[6], the South Africa Supreme Court (in *National Coalition*[7]), the Supreme Court of Zimbabwe[8], the *High Court* of Fiji isles[9] and the Hong Kong Court of Appeal[10], the High Court of New Delhi[11] and finally, as we mentioned above, the United States Supreme Court in *Lawrence*[12] - but also by constitutional courts in cases concerning the rights of homosexuals and same-sex couples[13]. It is possible to argue that *Dudgeon* is still a landmark case for Constitutional and Supreme Courts for courts belonging to countries which are not members of the Council of Europe and, therefore, are not bound by the authority of ECHR[14].

The *Lawrence* case of the United State Supreme Court and the *National Coalition* case of the Supreme Court of South Africa can be considered the most influential supreme courts' judgments: references to one (or to both) of them are very frequent in sodomy laws cases and were also taken into consideration in more recent judgments on discrimination against same-sex couples[15].

More recently, addressing claims of discriminations brought by same-sex couples, constitutional courts frequently cite the Canadian cases that, since the Nineties, have been taking into consideration violations of the principle of non discrimination based on sexual orientation.

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[6] Case n. 111-97 TC, November 22, 1997.

[7] *National Coalition for Gay and Lesbian Equality v. Minister of Justice, Case CCT* 11/98, October 9, 1998.

[8] *Banana v. State,* Supreme Court of Zimbabwe, May 29, 2000.

[9] *McCoskar and Nadan v. State*, High Court of Fiji at Suva, August 26, 2005, [2005] FJHC 500.

[10] *Leung v. Secretary of Justice*, High Court for the Hong Kong Special Administrative Region, Court of Appeal, September 20, 2006.

[11] *Naz Foundation v. Government of NCT of Delhi*, New Delhi High Court, July 2, 2009.

[12] *Lawrence v. Texas*, cit.

[13] See, for instance, the cases of the Constitutional court of Colombia, *Sentencia C-481,* September 9, 1998 on freedoms of expression and teaching of an homosexual teacher and *Sentencia C-075,* February 7, 2007 on discrimination against same sex couples.

[14] For the purposes of this paper, only references to foreign cases have been taken into consideration. Reliance on international case law and on cases interpreting international treaties or custom are irrelevant for the topic of this paper. International law should not be considered equal to foreign law: as we clarified in a previous work (see, in particular, A. Sperti, *United States: first cautious attempts of judicial dialogue in the United States Supreme Court,* in T. Groppi, M.C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges,* cit.) "although there are different perspectives on the relationship between international and domestic law (as, in particular, some support a 'monistic' or internationalist approach while others a 'dualistic' approach), international law should not be treated as foreign law for the purposes of constitutional interpretation".

[15] See, for instance, *McCoskar and Nadan v. State*, High Court of Fiji at Suva, cit.; *Naz Foundation v. Government of NCT of Delhi*, cit. (taking into consideration both the cases); *Banana v. State,* Supreme Court of Zimbabwe, May 29, 2000 and *Leung v. Secretary of Justice*, High Court for the Hong Kong Special Administrative Region, Court of Appeal, cit. (mentioning the *National Coalition* case only) and, finally, *Ang Ladlad v. Commission on Elections*, Supreme Court of Philippines, April 8, 2010 and *Zappone and Gilligan v. Revenue Commission*, High Court of Ireland, December 14, 1996 (citing the Lawrence case only).

Cases like *Egan v. Canada*[16] (1995) and *Vriend v. Alberta*[17] (1998) of the Canadian Supreme Court have been widely discussed by many supreme courts[18].

However, as we will put into evidence in § 6, some cases concerning same-sex marriage and the right of adoption for same-sex couples do not follow this trend. Whereas cases on same-sex marriage by the Irish High Court[19], the Mexican *Corte Suprema de Justicia*[20], the Portoguese *Suprema Corte de Justicia*[21] and the case n. 198/2012 of the Spanish Constitutional Tribunal[22] (and the Israeli supreme court on adoption[23]) thoroughly analyze international and foreign case-law, even the Courts that usually engage in a dialogue with other courts – such as the Canadian courts[24] and the South Africa Supreme Court[25] - take into consideration only their own jurisprudence.

From a more general point of view, it is possible to argue that the dialogue involves not only the oldest and most authoritative Courts but also recently established Courts, although the latter ones are more open to confrontation with foreign experiences.

However, as in other fields of the law, the use of foreign precedents as an aid to constitutional interpretation follows some prevailing "directions": the most cited precedents are, first of all, those decided by the most authoritative courts, such as the United States Supreme Court. Her cases – like *Lawrence,* but also *Romer, Bowers* and *Loving v. Virginia* - are very frequently taken into consideration by other constitutional courts[26].

Furthermore, judicial cross-fertilization is favored by the belonging of the courts to a common legal tradition. For instance, in the common law area, this can be clearly inferred from the circulation of the definition of "marriage": in the past, common law courts often relied on the traditional definition of marriage as the union between a man and a woman according to *Hyde v. Hyde and Woodmansee* (1866)[27] and *Corbett v. Corbett* (1971)[28]. More recently, common law courts refer to *M.T. v. J.T.*[29] in which the New Jersey Superior Court (1976), for the first time, rejected the principle that marriage should follow birth sex and confirmed the validity of a marriage between a trans-woman and a man[30].

Finally, it is possible to argue that courts more frequently involved in the dialogue with other jurisdictions are, at the same time, the major exporters of models and principles on the

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[16] *Egan v. Canada,* [1995] 2 S.C.R. 513.

[17] *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

[18] See, *McCoskar and Nadan v. State*, High Court of Fiji at Suva, cit.; *Naz Foundation v. Government of NCT of Delhi*, cit.; *El-Al Israel Airlines Ltd v. Danielowitz,* Supreme Court of Israel, HCJ 721/94, November 30, 1994.

[19] *Zappone and Gilligan v. Revenue Commissioners,* cit.

[20] *Acción de inconstitucionalidad 2/2010, Pleno de la Suprema Corte de Justicia de la Nación, Novena Época*, August 16, 2010.

[21] *Acórdão n. 192/2010 Processo n. 192/2010, Plenário.*

[22] Case n. 198/2012, November 6, 2012.

[23] *Yaros-Hakakv. Attorney General,* CA 10280/01, January 10, 2005.

[24] Ontario Court of Appeals, *Halpern v. Canada*, 2003 WL 34950 (C.A. 2003).

[25] *Minister of Home Affairs v. Fourie e Lesbian and Gay Equality Project v. Minister of Home Affairs, Case CCT* 10/05, December 1, 2005 and *Du Toit v. The Minister of Welfare and Population Development, Case CCT 40/01*, September 10, 2002. Instead in *J. v. Director General, Case CCT 10/05,* December 1, 2005 the Supreme Court takes into consideration mainly foreign legislation.

[26] See, the Brasilian case on second-parent adoption (Superior Tribunal de Justiça, *Ministério Público do Estado do Rio Grande do Sul c. LMBG* Recurso especial nº 889.852 - rs (2006/0209137-4), April 27, 2010 (citing *Loving v. Virginia,* 338 U.S. 1 (1967)); *National Coalition* case, cit., by the South Africa Supreme Court (rejecting the rationale of *Bowers v. Hardwick,* 478 U.S. 186 (1986)); the Supreme Court of Zimbabwe case in *Banana,* cit. and *Kanane v. State*, Botswana Court of Appeal, July 30, 2003 (sharing the rationale of *Bowers*); *Vriend v. Alberta,* [1998] 1 S.C.R. 493 by the Supreme Court of Canada and *Asociación Lucha por la Identidad Travesti-Transexual v. Inspección General de Justicia,* November 21, 2006 by the Supreme Court of Argentina and *National Coalition,* cit., by the South Africa Supreme Court (taking into consideration *Romer v. Evans,* 517 U.S. 620 (1996)).

[27] *Hyde v. Hyde and Woodmansee*, (1866) LR 1 P&D 130: "*I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others*". The case is cited by the New Zealand Court of Appeal in *Quilter v. Attorney-General*, [1998] 1 NZLR 523.

[28] *Corbett v. Corbett,* 2 All ER 33 (1971).

[29] *M.T. v. J.T.,* 355 A.2d 204, 205 (NJ Super. Ct. 1976).

[30] See the New Zealand Supreme Court judgement in *New Zealand Attorney General v. Family Court at Otahuhu,* November 30, 1994; the Hong Kong Court of Appeal in *W. v. Registar of Marriages*, October 5, 2010; the High Court of Ireland in *Zappone and Gilligan v. Revenue Commissioners,* cit. and the New Delhi High Court in *Naz Foundation v. Government of NCT of Delhi,* 2009, all referring to common-law case law on marriage.

protection of human rights. The Canadian Supreme Court, for instance, since the adoption of the Canadian Charter of Rights and Freedoms in 1982, has been showing an increasing interest in the use of foreign precedents as an aid to constitutional interpretation[31]. The Supreme Court of South Africa is also very active in the dialogue with other constitutional courts: her cases show extensive and detailed analysis of foreign decisions solving similar issues[32].

Judgments on the recognition of fundamental rights of homosexuals and same-sex couples reveal that South African and Canadian constitutional cases are also frequently cited by other courts: cases like *Halpern* (the 2003 case by the Court of Appeal for Ontario holding that the common law definition of marriage as referred to an heterosexual couple violated section 15 of the Canadian Charter of Rights and Freedoms) and the above mentioned *National Coalition* case by the South Africa Supreme Court can be considered landmark cases not only at national level but also in foreign jurisdictions[33]. We suppose that the great attention paid by Canadian and South African courts to foreign experiences make their cases points of references for other jurisdictions as they offer a complete overview of the solutions of similar issues adopted elsewhere.

3. Reasons that justify judicial dialogue in cases concerning the rights of homosexuals and same sex couples

In most of the cases, the dialogue with foreign experiences seems to be inspired by the purpose to put into evidence the global trends in the recognition of rights of homosexuals and same-sex couples. We could mention, for instance, the *National Coalition* case where the South Africa Supreme Court remembers that the decisions by the European Court of Human Rights are "indicative of the changes in judicial and social attitudes in recent years"[34] and "show a process of change commenced in Western democracies in legal attitudes towards sexual orientation", "culminated, in many jurisdictions, in the decriminalization of sodomy in private between consenting adults".[35]

The Spanish Constitutional Tribunal in 2012, in the judicial review of statute n. 13/2005 that introduced same-sex marriage, holds a similar reasoning: Justice Pérez Tremps argues that "the institution of marriage, as a partnership between two persons irrespective of their sexual orientation, is being gradually laid down, as evidenced by ascertained steps taken in comparative law and European human rights law with respect to the acknowledgement of marriage between same-sex couples"[36].

Similarly, in 2011 the Constitutional Court of Colombia[37] recognizes the emergence of a different perception of same-sex marriages in European jurisprudence and legislation and in 2010 the Mexican *Corte Suprema de Justicia* puts into evidence how "comparative law shows (…) an

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[31] L. Le Bel, *The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law*, 16 *S.C.L.R.* (2d) 23 (2002). See also A. Warner La Forest, *Domestic Application of International Law in Charter Cases: Are We There Yet?,* 37 U.B.C. L. Rev. 157 at 157-8; F.L. Morton, P.H. Russell, M.J. Withey, *The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis,* 30 Osgoode Hall L.J. 1 (1992) and more recently, G. Gentili, *Canada: Protecting Rights in a "Worldwide Rights Culture". An Empirical Study of the Use of Foreign Precedents by the Supreme Court of Canada (1982–2010),* in A. Groppi, M.C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges,* cit., at 39 ff..

[32] See L.W.H. Ackerman, *La comparazione costituzionale in Sud Africa*, in B. Markesinis, J. Fedtke (a cura di), *Giudici e diritto straniero. La pratica del diritto comparato,* Bologna, Il Mulino, 2009, at 361 ff.; A. Lollini, *Constitutionalism and Transitional Justice in South Africa,* Oxford–New York, Berghahn Books, 2011; C. Rautenbach, *South Africa: Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995–2010),* in Groppi, Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, cit., at 195 ff.

[33] *Halpern v. Canada*, cit; National Coalition, cit.

[34] National Coalition, cit. at § 42.

[35] National Coalitio, cit. at § 52.

[36] Tribunal Constitucional, case n. 198/2012, November 6 2012, at § 9.

[37] *Sentencia C-577/11*, at 169.

evolution in the recognition of rights of *gay* people and their unions that justifies the elimination of discriminations" towards them[38].

Finally, in 2010 the Portuguese Constitutional Tribunal, in order to verify the constitutionality of statute on same-sex marriage, paid great attention to constitutional judgments of European and non-European countries[39]. Similar conclusions could be reached for other courts[40] and for constitutional courts – such as the French *Conseil constitutionnel*[41] or the Italian constitutional Court[42] - whose case writing technique does not allow the citation of scholarly works and foreign case law. It is possible to infer that even these courts are aware of the international developments[43].

Courts usually infer the opportunity and the rightness of their conclusions from the uniform and settled trends in foreign case-law (and legislation): the South Africa Supreme Court, for instance, in *National Coalition,* holds that "there is nothing in the jurisprudence of other open and democratic societies based on human dignity, equality and freedom which would lead me to a different conclusion. In fact, on balance, they support such a conclusion. In many of these countries there has been a definite trend towards decriminalization"[44].

At the same time, in cases concerning same-sex marriage and fundamental rights of gay couples, judicial cross-fertilization has great impact on constitutional reforms or on the adoption of evolutionary interpretations of constitutional clauses defining "marriage" and "family". Comparison with foreign decisions which addressed similar issues, make it possible for the courts to better evaluate the solutions and their impact in other jurisdictions. As Justice L'Heureux-Dube of the Supreme Court of Canada held, «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»[45].

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[38] *Acción de inconstitucionalidad 2/2010* at § 267.

[39] *Tribunal Constitutional, Acórdão n. 192/2010 Processo n. 192/2010*, Plenário.

[40] See for instance *Fitzpatrick v. Sterling Hous. Ass'n, Ltd.*, [2001] 1 A.C. (H.L.) at 27 ff., where the English House of Lords "in order to show the attitudes being adopted in other jurisdictions" on family rights of same-sex couples cites several foreign cases (in particular, *El-Al Israeli Airlines Ltd. v. Danilowitz* of the ISraeli Supreme Court, *Attorney General of Canada v. Mossop* of the High Court of Canada (100 D.L.R. 4th 658) and *Braschi v. Stahl Associates Co.* (1989), 544 N.Y.S. 2d 784, by the Court of Appeals of New York.

[41] On the use of foreign caselaw by French *Conseil constitutionnel*, notwistanding the difficulties arising from the tecnique of the *vu* and the *considérant,* M.C. Ponthoreau, *Le recours à l'argument de droit compare par le juge constitutionnel. Quelques problèmes théoriques et techniques*, cit., at 167 ff.; P. Passaglia, *L'influenza del diritto comparato sul Conseil constitutionnel francese*, in G.F. Ferrari, A. Gambaro (eds.), *Corti nazionali e comparazione giuridica,* Napoli, ESI, 2006.

[42] On the use of comparative law by the Italian Constitutional court, see G. Alpa (ed.), *Il giudice e l'uso delle sentenze straniere,* Milano, Giuffrè, 2006; G. de Vergottini, *Oltre il dialogo tra le Corti. Giudici, diritto straniero, comparazione,* Il Mulino, 2010; G.F. Ferrari, A. Gambaro (a cura di), *Corti nazionali e comparazione giuridica,* Napoli, ESI, 2006, pp. 477 ff.; A. Lollini, *La circolazione degli argomenti: metodo comparato e parametri interpretativi extra sistemici nella giurisprudenza costituzionale sudafricana,* Riv. Dir. Comp. Eur., I, 2007, at 479; L. Pegoraro, *La Corte costituzionale e il diritto comparato nelle sentenze degli anni '80,* Quad. Cost., 1987, at 601 ff.; A. Sperti, *Il dialogo tra le corti ed il ricorso alla comparazione giuridica nell'esperienza più recente, Rivista di Diritto Costituzionale,* 2006, at ; A. Sperti, *I giudici costituzionali e la comparazione giuridica, Giornale di storia costituzionale,* 2006, at 195 ff.; G. Zagrebelsky, *Relazione sui cinquanta anni di attività della Corte costituzionale,* Roma, Palazzo del Quirinale, 2006, in *www.associazionedeicostituzionalisti.it*; Id., *Corti costituzionali e diritti universali,* Riv. Trim. Dir. Pubbl., 2006, at 297 ff.; V. Zeno Zencovich, *Il contributo storico-comparatistico nella giurisprudenza della Corte costituzionale italiana: una ricerca sul nulla?*, Diritto pubbl. comp. eur., 2005, at 1993 ff.

[43] See, infra, fn 67.

[44] *National Coalition,* cit., at § 39.

[45] C. L'HEYREUX-DUBE, *From Many Different Stones: A House of Justice*, 41 Alberta L. Rev. 659 (2003), at 661. See also the concurring opinion of Judge Guido Calabresi in *United States v. Then,* 56 F.3d 464 (1995) at 468 (2nd Cir. 1995)*:* "At one time America had a virtual monopoly on constitutional judicial review and if a doctrine was not tried out here, there was no place else to look. That situation no longer holds. Since World War II, many countries have adopted forms of judicial review which […] unmistakably draw their origin and inspiration from American constitutional theory and practice.

It should also be noted that the lack of uniform trends in foreign cases and legislation has been instead used by the courts as an argument to dismiss cases brought by homosexual couples: the Italian constitutional court, for instance, in 2010[46], held that the wide number of different solutions adopted elsewhere for the regulation of same-sex unions suggested the opportunity to leave the power to regulate the matter to the Parliament. The Irish High Court reached similar conclusions in 2006 in a case concerning the constitutionality (and the compatibility with the European Convention on Human Rights) of the impediment to the recognition of same-sex marriage. Although the plaintiffs, two women who concluded marriage in Canada, referred frequently to the "changing consensus" on same sex marriage, the Court held that "the consensus around the world does not support a widespread move towards same-sex marriage" in Ireland[47]. Nonetheless the High Court admited that foreign (Canadian and U.S.) decisions "are interesting in many respects. 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 proceeedings. Many of the arguments in those cases (…) have been relied upon in the arguments in this case also". However the High Court concludes that "there is a limit to the assistance that can be drawn from (foreign authorities) given the different constitutional framework applicable in this juridisdiction but the approach taken to the proposed re-definition of the freedom to marry is of interest".[48]

4. Judicial cross-fertilization as a support to evolutionary interpretations of national constitutions on same-sex marriage

The Irish constitutional case of 2006 puts into evidence the underlying difficulties in the adoption of evolutionary interpretations of constitutional clauses on marriage and family.

Although some Constitutions – like the Irish[49] and the Italian Constitutions[50] - do not explicitly define marriage, it has frequently been considered as the union between a man and a women on the basis of (legal, cultural or religious) tradition[51]. The Irish High Court admitted to

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These countries are our constitutional offspring and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children".

[46] *Corte costituzionale,* case n. 138/2010.

[47] *Zappone and Gilligan v. Revenue Commission*, cit., in the "conclusions" of the opinion of the Court.

[48] *Zappone and Gilligan v. Revenue Commission*, cit., ibid.

[49] Art. 41 of the Irish Constitution says: "The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. \\ The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State". The third section specifies that: "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack".

[50] Art. 29 of the Italian Constitution: "The Republic recognises the rights of the family as a natural society founded on marriage. // Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family".

[51] Courts often don't specify the meaning of "tradition". For most of the courts, tradition should be considered as "legal" tradition based on *statutes* which clarify the rights and duties of the husband and the wife. See for instance, the Italian Constitutional Court case n. 138/2010, cit. and case n. 198/20013 by the Spanish *Tribunal Constitucional,* cit. In common law countries, legal tradition is based on old precedents that define marriage as the union between a man and a woman (in particular, *Hyde v. Hyde and Woodmansee*, above at note 27). See, *Zappone and Gilligan v. Revenue Commission,* cit.; the New Zealand Court of Appeal decision in *Quilter v. Attorney-General*, [1998] 1 NZLR 523 and the Canadian precedents in *Halpern v. Canada*, cit., at § 46 ; *EGALE Canada Inc. v. Canada,* [2003] B.C.J. n. 994. The courts of the United States and the U.S. Supreme Court frequently describe tradition as "cultural and constitutional tradition" in connection with the concept of constitutional "ordered liberty". See for instance, *United States v. Windsor,* (n. 12-307), 133 S.Ct. 2675 at 2714 (Alito, dissenting ("But it is well established that any "substantive" component to the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition", as well as "implicit in the concept of ordered liberty", such that "neither liberty nor justice would exist if they were sacrificed"). See also, at state level, Corte Suprema del District of Columbia (*Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995)(holding that "same–sex marriage is not a "fundamental right" protected by the due process clause, because that kind of relationship is not "deeply rooted in this Nation's history and tradition") and the State of New York

"accept that the Constitution is a living instrument" but "also accept[ed] (…) that there is a difference between an examination of the Constitution in the context of ascertaining unenumerated rights and redefining a right which is implicit in the Constitution and which is clearly understood"[52].

In a similar way, the Constitutional Court of Portugal, in 2009 held that - as the Portuguese Constitution does not define marriage - "the Framers did not want to depart from the traditional definition of marriage as the union between man and woman. Otherwise they would had explicitly stated it".[53] For this reason the Constitutional court concluded that art. 36 of Portuguese Constitution neither ban same-sex marriage nor impose it and therefore, that the legislator should be free to admit it and to modify the provisions of the civil code that regulate marriage[54].

On the contrary, courts that reject these assumptions argue that tradition should not put a brake on evolutionary interpretation of constitutional clauses and on the recognition of fundamental rights of gay couples. From this perspective, tradition is considered a weak argument and it shouldn't be preferred to different evaluations based on reason or on the evolution of social customs. As the U.S. Court of Appeals (VIII cir.) wrote in *Perry v. Brown*, "tradition alone could not serve as justification for taking away right from gay s and lesbians to use designation of «marriage» that had already been granted, and thus amendment to California constitution that barred same-sex couples from marrying violated Equal Protection Clause, even though that grant was in derogation of tradition; amendment operated with no apparent purpose but to impose majority's private disapproval of gays and lesbians, through public law, and their relationships, by taking away official designation of «marriage» from them with its societally recognized status"[55].

If we look at the influence of judicial cross-fertilization on evolutionary interpretations of the constitutional clauses on marriage and family, we should first of all take into consideration the decision of the Spanish Constitutional Tribunal that in 2012 held the introduction of same-sex marriage constitutional[56]. In order to verify whether *ley* 13/2005 unconstitutionally modified the "institutional guarantee" of marriage enshrined in art. 32 of the Spanish Constitution – that does not define "marriage" but refers to "man" and "woman"[57] – the Tribunal cites the Supreme Court of Canada case on same-sex marriage and its definition of the Constitution as a "living tree" [58].

"A progressive interpretation allows a constitution to adjust to the realities of modern life as means to guarantee its own relevance and legitimacy. This is so not only because the basic principles of the constitutional text are applicable to situations not envisaged by its founders, but also because the public powers- and the legislator in particular- gradually update these principles. Furthermore and because the Constitutional Court, when ensuring that any such updating conforms to the Constitution, endows the rules with a content to enable their reading in light of modern-day issues and the needs of current society; as otherwise there is the risk of an unfulfilled Constitution"[59].

The "progressive reading of the Constitution" – the Tribunal argued - "is not only constructed further to a literal, systematic or originalist interpretation of the law, but also depends on observing any legally relevant issues of current society". According to the Tribunal "this does not mean that direct regulatory force should be granted to (…) comparative law applicable in

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courts in *Seymour v. Holcomb*, 2005 WL 440509 (N.Y. Sup 2005); *Storrs v. Holcomb,* 645 N.Y.S.2d 286 (Sup. Ct. 1996); *Shields v. Madigan*, 783 N.Y.S.2d 270 (Sup 2004).

[52] *Zappone and Gilligan v. Revenue Commission*, cit., ibid.

[53] Tribunal Constitutional, *Acórdão* n. 359/2009 Processo n. 779/07, I Secção (9 luglio 2009). A commento della sentenza, E. Crivelli, *Il matrimonio omosessuale e la ripartizione di competenze tra legislatore e organo di giustizia costituzionale: spunti da una recente decisione del Tribunale costituzionale portoghese,* in *Rivista AIC*, 2 luglio 2010.

[54] In 2010 same-sex marriage was introduced in Portugal and the Constitutional Court, in case n. n. 192 del 2010 (*Acórdão n. 192/2010 Processo n. 192/2010, Plenário)* held it constitutional.

[55] *Perry v. Brown,* 671 F.3d 1052 (2012) at 1095.

[56] Constitutional Tribunal of Spain, case n. 198/2012, cit.

[57] Art. 32 of the Constitution of Spain: 1. Man and woman have the right to marry with full legal equality. 2. The law shall make provision for the forms of marriage, the age and capacity for concluding it, the rights and duties of the spouses, the grounds for separation and dissolution, and their effects.

[58] *Reference re Same-Sex Marriage,* [2004] 3 S.C.R. 698.

[59] Constitutional Tribunal of Spain, case n. 198/2012, cit., at § 9.

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"[60].

The Tribunal enters in a detailed examination of foreign case law and legislation (selecting in particular foreign experiences that share social and cultural affinities with Spain) and writes that "following comparative law, integration of same-sex marriages into the current idea of marriage has been affected by a consolidated equivalence - over the last few years - of different-sex and same-sex marriages in various Western legal systems"[61].

For these reasons the Tribunal held – as we already mentioned above – that "the institution of marriage … is being gradually laid down [in comparative and international law] with respect to the acknowledgement of marriage between same-sex couples" and concludes that "this progress indicates that there is a new "image" of marriage, gradually becoming more common though not totally standard as of now, which allows us to interpret the idea of marriage, from the point of view of Western comparative law, as a *plural* conception"[62].

A similar use of the dialogue with other constitutional courts and of comparative law can be found out in Central and South American constitutional case-law. In 2010 the Supreme Court of Mexico argued that marriage "is not an immutable and cast in stone concept" and that "it is not admissible that its notion could not be modified by the legislative power" "when changes in the society require an answer"[63]. In order to support such a conclusion, the Supreme Court argued that comparative case-law encourages an evolutionary interpretation of the constitutional clauses concerning the protection of fundamental rights[64].

An administrative court in Argentina reached similar conclusions in a notable case of 2009 concerning same-sex marriage[65]: the Court recalled that in other countries constitutional courts stood for or created the conditions for the adoption of new legislation opening marriage to same-sex couples[66].

We can therefore argue that most of the courts rely on comparative arguments in the choice between the adoption or the refusal of evolutionary interpretations of the national Constitution. This is true also for the French and the Italian constitutional courts whose case writing technique (which does not admit footnotes) does allow the justices to engage in a dialogue with foreign counterparts. It is well known, for instance, that the Italian constitutional court – as admitted by her justices – takes into consideration the teachings from foreign experiences as she has at hand detailed reports on foreign jurisprudence on the issues involved in the solution of the case[67].

Furthermore, if we take into consideration cases that engage in a conparison with foreign experiences but reject evolutionary interpretations of the constitutional clauses on marriage and family – like the Irish case mentioned above[68] – use of comparative law analysis seems to prevail on other arguments concerning, for instance, the changes in the social perception of the homosexuality. As in the same-sex marriage case of 2010[69] of the Italian constitutional Court, the Irish court embraces an originalist interpretation of the Constitution, based mostly on the idea that comparative law does not suggest unanimous solutions and does not fit the national constitutional framework. "The definition of marriage to date – the Court argues – has always been understood as being opposite to sex marriage. How then can it be argued that in the light of prevailing ideas

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[60] *Ibidem.*

[61] *Ibidem.*

[62] *Ibidem* (emphasis added).

[63] *Acción de inconstitucionalidad 2/2010*, § 256.

[64] *Ibidem,* at § 254.

[65] *Freyre Alejandro c. GCBA*,

[66] *Ibidem,* at § 15 ("*Cabe señalar que en los casos de Estados Unidos —a través de una sentencia de la Suprema Corte Judicial de Massachussetts, en 2003— y Sudáfrica —mediante el fallo de la Corte Constitucional en "Minister of Home Affairs and another v. Fourie and another", del 01/12/05— fue el impulso judicial el que motivó los cambios en la legislación. A su vez, también en el estado de California, Estados Unidos, más allá de la solución final, los tribunales han sido un contrapunto esencial a la hora de rever su normativa*").

[67] See, for instance, the Report on same-sex marriage written by the *Servizio Studi* of the Italian Constitutional Court, *Matrimonio tra persone dello stesso sesso in alcuni stati europei*, edited by P. Passaglia, march 2010.

[68] *Zappone and Gilligan v. Revenue Commissioners,* cit.

[69] Case n. 138/2010, cit.

and concepts that definition be changed to encompass same-sex marriage? 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 .. to the "changing consensus" but … the consensus around the world does not support a widespread move towards same sex marriage".[70]

However, this kind of argument seems to be "circular": as the arguments based on tradition, the lack of unanimous consensus around the world does not justify or explain the classifications based on sexual orientation but – as the Supreme Judicial Court of Massachussetts argued in its2003 case – it simply confirms them[71]. Instead, using Dworkin's words, [72] "some part of any constitutional theory must be independent on the intention and beliefs or indeed acts of the people the theory designates as Framers. Some part must stand on its own in political or moral theory; otherwise the theory would be wholly circular".

5. Difficulties in evolutionary interpretation of the Constitution in same-sex marriage cases: the weight of cultural differences

As the concepts of "marriage" and "family" are deeply entrenched in national traditions and social customs, constitutional courts usually are prone to look at foreign experiences sharing common constitutional frameworks or belonging to a similar social and cultural context.

Some courts engage in a thorough analysis of the social, cultural and legal analogies and differences with foreign experiences. The South Africa Supreme Court, for instance, in the *National Coalition* case[73], discusses foreign cases concluding for the abolition of sodomy laws, but at the same time takes into consideration cases that reached an opposite conclusion like the U.S. Supreme Court judgment in *Bowers v. Hardwick*[74]. The South Africa Supreme Court, however, decides to disregard this case arguing that the South Africa Constitution of 1996 "differs so substantially … from that of the United States of America" and that "the majority judgment in *Bowers* can really offer us no assistance in the construction and application of our own Constitution". The Supreme Court notes that "the 1996 Constitution contains express privacy and dignity guarantees as well as an express prohibition of unfair discrimination on the ground of sexual orientation, which the United States Constitution does not. Nor does our Constitution or jurisprudence require us, in the way that the United States Constitution requires of its Supreme Court, in the case of ". . . rights not readily identifiable in the Constitution's text," to ". . . identify the nature of the rights qualifying for heightened judicial protection"[75].

A similar conclusion is reached by the Supreme Court of South Africa with regard to other foreign cases that held sodomy in private between consenting adult males constitutional: arguing that "unlike the constitutions of these countries … the 1996 Constitution (of South Africa) specifically mention «sexual orientation»" as an illegitimate ground of discrimination, the Supreme Court concludes that "there is nothing in the jurisprudence of other open and democratic societies based on human dignity, equality and freedom which would lead me to a different

[70] *Zappone and Gilligan v. Revenue Commissioners,* cit, in the conclusions. The Court remembers how "there has been some limited support for the concept of same sex-marriage as in Canada, Massachusetts and South Africa together with the three European countries previously referred to but, in truth, it is difficult to see that as a consensus, changing or otherwise".

[71] See, *Goodridge v. Department of Public Health,* 440 Mass. 309, 798 N.E.2d 941 (2003) where the Supreme Judicial Court noted that "it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been".

[72] R. Dworkin, *A Matter of Principle,* Cambridge MA, Harvard Univ. Press, 1985, at 57.

[73] *National Coalition*, cit. at § 39 ff.

[74] *Bowers v. Hardwick,* 478 US 186 (1986).

[75] *National Coalition,* cit., at § 55.

conclusion. In fact, on balance, they support such a conclusion. In many of these countries there has been a definite trend towards decriminalization" [76].

The rationale of *Bowers* has instead taken into consideration by the Zimbabwe Supreme Court[77]: the majority suggests that it is significant that the most authoritative Constitutional court in the world did not declare itself persuaded that the sodomy laws of some 25 states should be invalidated.

It is possible to argue that although constitutional jurisprudence on the rights of homosexual couples shows that the Courts usually pay great attention for the factual and socio-cultural affinities justifying judicial cross-fertilization[78], "the cultural argument" could be misused. As Markesinis and Fedke put into evidence, "practice shows that the «cultural differences» card, though both important and delicate, can be overplayed"[79]. The authors give an interesting example of the misuse of foreign jurisprudence remembering the impact of the Canadian Charter on the development of Israeli human rights law. The Israeli Supreme Court in *El-Al Israel Airlines Ltd. v. Danielowitz*[80] - a case on the rights of homosexual couples - "proves as much in one of the most sensitive of areas on which local religious feelings have clear cut views"[81]. The Supreme Court, in fact, takes into account the Canadian case law but does not adequately take into consideration the cultural and religious differences between the two countries.

Some courts are aware of the difficulties underlying the use of comparative law in this context: in South Africa, in *Bernstein v. Bester*[82], Judge Kriegler of the Supreme Court advises against an unjustified use of foreign jurisprudence and the majority in *Fourie* - the same-sex marriage case - remembers that the South Africa constitution is different from other constitutions as it breaks with the past and embraces the ideal of a "democratic, universalistic, caring and aspirationally egalitarian society"[83].

As it is well known, the cultural argument gave rise to a heated debate in the United States when Justice Kennedy, in the main text of the opinion of the Court in *Lawrence,* took into consideration a judgment of the European Court of Human Rights (*Dudgeon v. UK*) as expression of the values that the United States "share with a wider civilization"[84]. The use of foreign cases as an aid to the interpretation of the Constitution (and the overruling of *Bowers*) was severely criticized by Justice Scalia which considered the "Court's discussion of … foreign views (ignoring … the many countries that have retained criminal prohibitions on sodomy)" as "meaningless dicta"[85]. Furthermore Scalia argued that "this Court . . . should not impose foreign moods, fads, or fashions on Americans".

In the United States the "cultural objection" is at the same time a "sovereignty objection" as it is related to the idea that citing foreign law undermines judicial legitimacy by expanding judicial discretion. Furthermore, it implies a critique of the discretionary selection of foreign material, a "cherry picking" selection where courts will surely succeed in selecting a foreign case that best supports their positions and suits the case before them[86].

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[76] *National Coalition,* cit., at § 55.

[77] *Banana v. State,* cit.

[78] See, A. Sperti, *Il dialogo tra le Corti ed il ricorso alal comparazione a fini interpretativi nella giurisprudenza costituzionale nell'attuale dibattito sull'interpretazione,* Dir. Pubbl., Comp. Eur,, 2008, II, 1033 ff.

[79] Markesinis, Fedtke, *The Judge as a Comparatist,* 80 Tul. L. Rev. 11 (2005) at 126.

[80] *El-Al Israel Airlines Ltd. v. Danielowitz,* cit.

[81] *Ibidem.*

[82] *Bernstein v. Bester*, (CCT23/95), 1996 (2) SA 751 (27 marzo 1996) at § 133.

[83] *Minister of Home Affairs v. Fourie e Lesbian and Gay Equality Project v. Minister of Home Affairs*, at §§ 59-60.

[84] «An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization» *(Lawrence v. Texas,* cit., at 573).

[85] *Lawrence,* cit. at 598.

[86] M D Ramsey, 'International Materials and Domestic Rights: Reflections on Atkins and Lawrence', (2004) 98 *American Journal of International Law* 69.

We cannot enter into a detailed analysis of these issues that makes it necessary a discussion on the role and the legitimacy of constitutional judges. However, as we argued in previous writings on this topic[87], the validity of the cultural objection is weakened – even in the context we take into consideration in this paper – by the circumstance that no majority relies *only* on foreign precedents in reaching her conclusions.

Furthermore, as we clarified above, most of the courts take into consideration the solutions adopted elsewhere when they meet the social and cultural peculiarities of their own country. The majority opinion in *Lawrence*, for instance, after citing the ECHR, argues that "in our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement"[88].

The Spanish Constitutional Tribunal, in the 2012 judgement on same-sex marriage, links the developments of the debate on same-sex marriage abroad with the awareness towards the rights of homosexuals in Spain. For this reason the Tribunal concludes that "that Law 13/2005, within the broad margin granted by Article 32 of the Spanish Constitution … develops the institution of marriage in accordance with Spanish legal culture, without making it unrecognizable for the image held of this institution in modern Spanish society"[89].

Finally, the South Africa Supreme Court embraces a similar approach in *National Coalition*, arguing that foreign jurisprudence is coherent with the principles expressed in the South Africa Constitution[90].

In conclusion, courts take into consideration how the principles expressed in foreign case law relate to their national social and cultural context (as in Spain), constitutional framework (as in Spain and South Africa), or national case-law (United States). For this reason, judicial arguments although supported by foreign jurisprudence, should be ascribed only to national judges. Justice Breyer clearly expressed this idea in his dissenting opinion in *Printz v United States*[91]. Replying to Justice Scalia's objections, he clarified: "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".

6. Judicial cross-fertilization as an aid to the adoption of new regulations of marriage.

In the final part of this paper we would like to make a few remarks on how constitutional and supreme Courts engage in a dialogue with national parliaments and take into consideration national and international context in order to favor the adoption of new regulations of marriage for same-sex couples.

The cases mentioned in the previous pages of this paper reveal that some constitutional courts look at social and cultural changes in their own national experiences in order to evaluate whether foreign solutions could be imported and positively accepted. Case n. 198/2012 of the Constitutional Tribunal of Spain is significant in this respect: as we mentioned above, after a detailed examination of the foreign jurisprudence, the majority of the Tribunal argues that changes in Spanish society suggest a similar approach towards the claims of homosexual couples. For this

[87] See, A. Sperti, *United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence,* cit., at 393 ff.

[88] *Lawrence,* cit., at 573.

[89] Case n. 198/2012, cit., at § 9.

[90] *National Coalition*, cit., at § 57 ("A number of open and democratic societies have turned their backs on the 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 constitutions. Their reasons for doing so, which are refer-red to above, fortify the conclusion which I have reached that the limitation in question in our law regarding such criminalisation cannot be justified under section 36(1) of the 1996 Constitution").

[91] *Printz v United States*, 521 U.S. 898 (1997) at 977 (Breyer dissenting).

reason the Tribunal holds that in Spain it is possible "to interpret the idea of marriage, from the point of view of Western comparative law, as a plural conception"[92].

The Administrative Tribunal of Buenos Aires adopted a similar approach in the *Freyre* case: after recalling the judgments of the United States Supreme Court on discrimination based on race and sexual orientation, the majority argues that a different perception of marriage can be also seen in Argentina[93].

Other courts engage in an extended analysis of foreign case-law on the recognition of single rights of homosexuals couples but tend to rely on their own jurisprudence when addressing issues concerning same-sex marriage and family. This is probably due – as mentioned above – to the fact that notions of "marriage" and "family" are deeply entrenched in national traditions.

In 1999, in *M. v. H.*[94] the Supreme Court of Canada took into consideration the definition of "spouse" in s. 29 of the Family Law Act. The Act drew a distinction by specifically according rights to individual members of unmarried cohabiting opposite-sex couples, which by omission it failed to accord to individual members of same-sex couples. The Supreme Court argued that same-sex couples were victims of an unconstitutional discrimination and held that "the appropriate remedy was to sever s. 29 of the Act such that it alone was declared to be of no force or effect". However she suggested that "this remedy should be temporarily suspended for a period of six months in order to give the legislature some latitude to address the possible repercussions of the severance in a more comprehensive fashion".

In 2004, a reference question was submitted to the Supreme Court of Canada on the constitutionality of the *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes*[95] which extended the capacity to marry to same-sex couples. At that time, right to marry for same-sex couples was recognized by most of the courts of the Provinces and there was a general acceptance of same-sex marriages in Canadian society. The Supreme Court argued that the meaning of "marriage" is not constitutionally fixed: "the «frozen concepts» reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation"; "our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life"[96]. The Supreme Court put also into evidence that "the recognition of same-sex marriage in several Canadian jurisdictions as well as two European countries belies [this] assertion"[97] but did not cite foreign case law.

The South Africa Supreme Court followed a similar path.

Although her case law on the rights of homosexuals pays great attention to the international debate, her judgments on same-sex marriage and child adoption engage only in a dialogue with the Parliament: in *Du Toit*[98] and *J.*[99] the Supreme Court declared unconstitutional the exclusion of same-sex couples from adoption and artificial insemination. The cases granted these rights to same-sex couples although there was no regulation of same-sex marriage at that time in South Africa; the Supreme Court justified her conclusions on the basis of the protection of the best interest of child[100]. In 2004 the Supreme Court addressed the issue of same-sex marriage in the *Fourie* case holding that the *common law* definition of marriage – as referred to an heterosexual couple – was unconstitutional.

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[92] Case n. 198/2012, cit., at § 9.

[93] *Freyre Alejandro c. GCBA,* cit., at § 10 ("*En Argentina la institución matrimonial se ha modificado sensiblemente a la luz de una serie de cambios sucedidos desde la organización nacional hasta nuestros día*")

[94] *M. v. H.,* 2 S.C.R. 3, [1999].

[95] *Reference re Same-Sex Marriage,* [2004] 3 S.C.R. 698.

[96] Ivi, at § 22.

[97] Ivi, at § 26.

[98] *Du Toit v. The Minister of Welfare and Population Development,*cit.

[99] *J. v. Director General,* cit.

[100] *Du Toit v. The Minister of Welfare and Population Development,* §§ 41-2: "I have no doubt that the provision of effective protection for children upon termination of a same-sex partnership can best be cured by the passing of legislation by Parliament. However, in the interim, I am of the view that the interests of the siblings and prospective adoptive children in general can adequately be addressed by the high courts as the upper guardian of all minor children. In exercising that role, the high courts will seek to develop the constitutional standard of the best interests of the child. The flexibility of that standard will ensure that the welfare and best interests of children are protected".

It is interesting to point out that, although references to foreign cases are not present in the case, the Supreme Court recalled that "the hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner"[101]. However the Supreme Court left to the national Parliament the power to introduce a new regulation of marriage: "This is a matter that touches on deep public and private sensibilities. I believe that Parliament is well-suited to finding the best ways of ensuring that same-sex couples are brought in from the legal cold. The law may not automatically and of itself eliminate stereotyping and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse. It needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is in the frontline in this respect. One of its principal functions is to ensure that the values of the Constitution as set out in the Preamble and section 1 permeate every area of the law"[102].

In 2006 the South Africa Parliament passed the Civil Union Act, recognizing to same-sex couples the alternative between marriage and a registered civil union.

We can conclude that although the Canadian and South Africa Supreme Courts cases on same-sex marriage lack references to foreign cases, the Courts are always aware of the international debate. Furthermore, a short description of foreign legislation is expressed by majority in a footnote of the opinion of the Court.[103]

We can finally argue that these cases – like other examples we took into consideration above[104] - show a propensity of the Courts to take into account the national context in order to evaluate the possibilities of reception of foreign solutions and principles. This makes it possible to argue that Constitutional (and Supreme) Courts carry out a double role in cases concerning same-sex marriage and the rights of homosexual couples: first of all, they take into consideration the changes in the social perception of marriage and family (first of all at a national but also at the international level) and confirm and strengthen them, favoring the reception of the achievements that gay movements obtained elsewhere. Secondly, courts play an essential role in increasing the acceptability of *new* rights by public opinion and politics.

[101] *Fourie,* cit., § 95.

[102] *Fourie,* cit., at § 138.

[103] See, J. Cit. at 26, remembering how "numerous European countries have passed comprehensive legislation granting legal recognition to same-sex partnerships".

[104] See the High Court of Hong Kong judgment in *Leung v. Secretary for Justice,* 20 September, 2006; the *National Coalition* case, at § 42; and, on adoption by same-sex couples, the judgment of the *Superior Tribunal de Justiça* of Brasil in *Ministério Público do Estado do Rio Grande do Sul c. LMBG*, Recurso especial nº 889.852 - rs (2006/0209137-4), 27 aprile 2010, at § 3; and the Supreme court of Israel case in*Yaros-Hakak v. Attorney General,* CA 10280/01, January 10, 2005.