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The protection of gay rights: a collective constitutional enterprise? – on "Constitutional Courts, Gay Rights and Sexual Orientation Equality" (Hart, 2017) by Angioletta Sperti*

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1. Setting the scene: a very promising topic in comparative constitutional law

On 30 June 2017, in a historic vote, the German Bundestag overwhelmingly approved – 393 to 226 and 4 abstensions – a law legalizing same-sex marriage. Less than two weeks later, on 12 July 2017, the Maltese Parliament almost unanimously passed a law allowing same-sex couples to marry. These are just the latest developments within EU Member States of a long and turbulent story for the recognition of civil rights in contemporary democracies. It started with claims for the protection of same-sex couples "families" and of tenancy and social rights. Subsequently, it focused on the right to marry, and most recently to the guarantee of parental rights and duties. The struggle for the acknowledgment of gay rights has featured as one of the most prominent issue of the worldwide debate in constitutional law and in civil society, in a similar fashion as it was the struggle against race discrimination in the US in the 1960s and

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1970s (W.N. Eskridge, *The Case For Same-Sex Marriage. From Sexual Liberty to Civilized Commitment*, NY, Free Press, 1996).

When, in May 2017, Angioletta Sperti's monograph on *Constitutional Courts, Gay Rights and Sexual Orientation Equality* was released by Hart Publishing, the author could not foresee the above mentioned crucial developments in the field of protection of homosexual couples in two very different EU Member States, Germany and Malta. The former being the biggest and the latter. the smallest, both with a solid and deep-rooted Christian culture. This is a confirmation that the topic dealt with by Angioletta Sperti's timely book is one that not only is going to shape the constitutional debate in the years to come, but it is also deeply attached to the everyday life of the people, their sentiments, the full achievement of their personality, and their contribution to the advancement of societal relationships (see A. Schillaci, "Costruire il futuro. Omosessualità e matrimonio", in A. Schillaci (ed.), *Omosessualità, eguaglianza, diritti*, Carocci, 2014, p. 200).

2. A "joint venture of forces" with different temporal achievements

The monograph, written by an author with an in-depth knowledge and expertise on the topic, already shown in her *Omosessualità e diritti: i percorsi giurisprudenziali e il dialogo globale delle Corti costituzionali* (Pisa University Press, 2013) though targeted to a different readership, has many merits. Perhaps, the most valuable contribution of the book – the first to be briefly analysed and the one that inspired most the enjoyable reading of the volume – is to give the sense of the collective constitutional enterprise that has made it possible for gay rights and sexual orientation equality to be enhanced. Namely, in most countries where such an improvement has taken place, it was the result of more or less an implicit and desired cooperation between civil society (gay and lesbian movements, but also individual citizens) or better, the people, legislatures and courts (ordinary, supreme and constitutional, as well as the European Court of Human Rights). In other words, the protection of gay rights has materialized through a "joint venture of forces" that has developed according to a different

timing, timeframe, and sequence depending on the country. Countries such as Canada and South Africa have afforded the acknowledgment of those rights before others, such as France, Ireland, Portugal, Spain and the US at the federal level. There are countries that are still lagging well behind, like Italy, where same-sex marriage has not yet been legalised and a – much criticised – law on civil unions allowing same-sex partnerships (law no. 76/2016) was introduced only one year ago.

In addition, the timeframe changes, depending on whether the process of recognition and protection of gay rights is observed at Member State or at federal level. Moreover, the contribution of the actors involved along the process, the people, as individuals and organized groups, the legislatures and the courts has followed a different sequence among the countries. As pointed out by the author (p. 82) while quoting Eskridge ("Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States", *Boston University Law Review*, vol. 93, 2003, pp. 284-285), in the US states, "[a]ctivists became aware that courts' intervention is more effective after politics and social movements themselves had created a substantially favourable environment for their intervention". Likewise, the Canadian experience in the move for the recognition of same-sex marriage shows "the synergy of legislation and constitutional litigation once a functional definition of the conjugal relationship has generally been accepted by lawmakers" (C. Blumberg, "Legal Recognition of Same-sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective, *UCLA Law Review*, vol. 51, 2004, p. 1583, quoted with approval in the book reviewed, p. 82). In some European countries such as France, Portugal and Spain, Constitutional Courts have set principles and provided guidance to Parliaments to pass legislation enhancing same-sex couples' rights. This sort of implicit "pre-authorisation" by Constitutional Courts has been subsequently confirmed once the legislation approved has been subject to constitutional review, with the public opinion usually endorsing the change.

The different timing of the intervention between European Constitutional Courts (at least, most of them) and Supreme Courts

outside Europe, besides country-specific economic and political circumstances, depends most likely on the nature and features – access to and powers of Constitutional Courts – of the centralized model of constitutional review of legislation followed in most EU Member States, where "constitutional courts are more reluctant to determine radical constitutional changes through their judgments" (p. 103). Thus, the book also offers an interesting explanation and a concrete example of the impact of the system of constitutional adjudication on the process of advancement of gay rights and sexual orientation equality. A further element that might have influenced this timing and to which the book indirectly refers, despite the comprehensive analysis of the case law of the European Court of Human Rights, is the potentially "harmonizing role" played by the Court in Strasbourg. Indeed, The Court has provided guidance – or, at least, has tried to provide guidance as its case law on the matter does not always have been followed promptly– to domestic legislatures in adapting their legislation or passing new laws to protect same-sex couples in compliance with the case law of the European Court.

3. The case of California: a prolonged clash between courts and people

However, the consonance of intents described to progress in the acknowledgment of gay rights has not occurred everywhere. For example, in California, well before the decisions of the US Supreme Court in *United States v. Windsor* (2013) and in *Obergefell v. Hodges* (2015), the saga for the guarantee of same-sex marriage was featured by a prolonged and multi-stage clash between courts, the progressive majority of the Supreme Court of the State and federal courts, and the people in its role of ordinary and constitutional legislator, advocating a traditionalist view of marriage and the exclusion of same-sex couples thereof (see G. Romeo, "The Recognition of Same-Sex Couples' Rights in the US Between Counter-Majoritiarian Principle and Ideological Approaches: A State Level Perspective", in D. Gallo, L. Paladini and P. Pustorino (eds), *Same-Sex Couples Before National, Supranational and International Jurisdictions*, Springer, 2014, pp. 15-32). Indeed, the Supreme Court

of California in *In Re Marriage Cases* (43 Cal.4th 747, 2008) invalidated, on the ground of the California Constitution's equal protection and due process clauses, Proposition 22 that modified the state civil code to define marriage as the union of a man and a woman and that had been approved by 61.4% of the state citizens entitled to vote.

The political backlash resulted in a constitutional proposition, Proposition 8, approved few months after the Court's decision and entrenching into the state Constitution the prohibition of same-sex marriage. The extent to which such a Proposition entailed just an amendment to the California Constitution or, rather, a revision that would have required the summoning and approval of an ad hoc Convention as well as a violation of the XIV Amendment of the US Constitution has been at the center of constitutional litigation before state and federal courts (in 2009, by the State Supreme Court in *Strauss v. Horton* upholding the validity of the Proposition; in 2010, by the US District Court for the Northern District of California in *Perry et al. v. Schwarzenegger et al.* and in 2012, by the US Court of Appeal, Ninth Circuit, in *Perry v. Brown* both considering the Proposition unconstitutional; and eventually, in 2013, by the US Supreme Court in *Hollingsworth v. Perry* ruling that opponents of same-sex marriage did not have standing to lodge the appeal). The chain reaction between popular and judicial intervention on same-sex marriage finally resulted in the resumption of same-sex marriage in California under the decision of the US District Court right before same-sex marriage was considered legal by the US Supreme Court in the entire federal territory.

As Angioletta Sperti suggests in her book, the "Rights revolution" could happen only when a consonance of will between courts and the people eventually emerges. However, in the case of California, it has been the outcome of a very tense confrontation, where courts have possibly hastened the achievement before a comparable view was backed by the majority of the population. Nevertheless, the task of courts when performing constitutional review of legislation is not to be deferent to the will of the people, but rather to enforce the Constitution. As the author of the volume convincingly argues, constitutional law would not otherwise impose any restrictions on the legislatures if constitutional interpretation by

courts were bound by the definition of marriage suggested by the public opinion and in statutory provisions (p. 100-101). Furthermore, Constitutional Courts in their function of counter-majoritarian institutions would abdicate to their role if they simply followed the majority view in the public opinion leaving unheard the claims of discriminated minorities.

4. The case of Ireland: conservative courts, progressive people?

The case of Ireland is somewhat reversed to that of California on the relationship between courts and people concerning same-sex couples, although in both cases a tension has emerged. While in California, progressive courts have tried to anticipate – compared to citizens' expectations – and to push, maybe too "early," for the legal recognition of same sex-marriage but have been disappointed by the response of the people as constitutional legislator; in Ireland the long standing conservative approach of the High Court and of the Supreme Court has been "subverted" by the people through the process leading to the *Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015* and its approval by referendum in 2015.

In Ireland Article 41 of the Constitution is devoted to 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 Article contains a very detailed regulation of marriage, to be regarded with "special care" by the State being the foundation of the family, in particular on its dissolution.

Although there is no textual prohibition of same-sex marriage in the Irish Constitution, until the thirty-fourth constitutional amendment was passed, same-sex marriage was considered as excluded from the definition of marriage as a matter of interpretation in courts as well as in statutory provisions. In 2004, as described by Angioletta Sperti, the *Civil Registration Act* considered as an "impediment" to marriage the same-sex of the parties in a couple. From 2002 to 2006 the parliamentary Committee on the Constitution, composed of all political parties, considered the

opportunity to reform Article 41 Const. However, also based on the numerous public hearings held, it decided not to alter it. Moreover, at the end of 2006 the Irish High Court in *Zappone and Gilligan v Revenue Commissioners* [2006] IEHC 404 expressly excluded that same-sex marriage could be acknowledged under the Constitution by adopting a traditionalist interpretation of the institution of marriage (A. Sperti, p. 139) and by rejecting the thesis according to which a rising consensus had been formed transnationally about same-sex marriage. More recently, the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* has granted to same-sex couples rights that are comparable but not equal to those given to married couples.

The real change, instead, came through a bottom-up political process which entailed a stage of innovative participatory constitution-making, passed through the Government and the Parliament, who approved the thirty-fourth constitutional amendment that eventually was supported by an overwhelming majority at the constitutional referendum of 22 May 2015. The constitutional amendment procedure in Ireland requests the passage of the bill in both houses of parliaments (without a special majority) and then a mandatory constitutional referendum (Article 46).

The "wind of change" started to blow in 2012 when the Irish Parliament passed a resolution upon a proposal of the Committee on the Constitution, to set up a Constitutional Convention, not provided as such under Article 46 Const. The resolution detailed the composition and the mandate of the Convention: 100 members with the Chairperson appointed by the Government, 2/3 of the members (66) chosen randomly as to represent the different segments of the Irish society and the remaining one third of politicians representing all political parties, including those of Northern Ireland that accepted to participate (on the pros and cons of this Constitutional Convention, see in detail, E. Carolan, *Ireland's Constitutional Convention: Behind the hype about citizen-led constitutional change*, in *International Journal of Constitutional Law*, vol. 13(3), pp. 733-748 and S. Suteu, *Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland*, in *Boston College International and Comparative Law Review*, vol. 38(2), pp. 251-276).

The Convention was assigned the task to report in one-year time on seven issues mandated by the Parliament, among which there was the legalisation of same-sex marriage through the Constitution, plus others that might have been considered once those assigned were concluded. The Government committed itself to respond to the report of the Convention in four months and to indicate a timeframe to submit accepted recommendations to the constitutional amendment procedure. The Convention worked intensely, received thousand submissions by individuals and NGOs, in particular on same-sex marriage. Of the several items discussed and reported the Government eventually chose to provide a constitutional follow up only on the proposed legalisation of same-sex marriage and on lowering of the age eligibility requirement for the presidency from 35 to 21 years. Hence, following parliamentary approval, the two constitutional amendments were subject to referendum and only that of same-sex marriage could enter into force, the other being rejected. 62% of the people who voted in the referendum, counting for 61% of the voters, supported the insertion into Article 41 of the Irish Constitution of new section 4 reading as follows "Marriage may be contracted in accordance with law by two persons without distinction as to their sex".

The case of Ireland on same-sex marriage is probably the first example of legalisation of same-sex marriage through a constitutional referendum and through a highly participatory process on the part of citizens. In contrast to the greatest part of the examples reported in the book, courts have played a limited role. Rather they have opposed to such an achievement. Politics and civil society have taken the lead and have supported a constructive deliberative process resulting into an advancement in the protection of fundamental rights. The Irish case, though, remains exceptional, being the dominant trend that of progressive courts v. conservative people and legislatures from which the phenomenon of political backlash, well explained by Angioletta Sperti, originates.

5. The structure of the volume

The book, which is divided in five chapters, firstly focuses on the private dimension of homosexuality (chapter 2); second, it moves on to the gradual acknowledgment of same sexual couples as families (chapter 3); thirdly, it considers the recognition of same-sex marriage (chapter 4); and forth, it deals with parental rights, in particular adoptions (chapter 5). The progression of the topics analysed, with a certain imbalance in favour of same-sex marriage, by far the issue on which the book focuses the most, reflects historically the statutory and judicial evolution in matters of gay rights and sexual orientation equality. The evolution started with the decriminalization of sexual acts between consenting adults and proceeded through the inclusion into the notion of "family" of same-sex couples. The legalization of same-sex marriage has appeared as constitutionally inevitable in light of the consonance of will highlighted above, to respond to the question put in the title of chapter 4 (judicial revolution or constitutional inevitability?). The final development, so far, has been the protection of parental rights of gays and lesbians.

Compared to the vast amount of analytical examination of legislation and case law, the reach of the comparison between different legal systems and the tricky nature of the topic studied, presented in a critical but neutral way (elsewhere often subject to moral assessments and value-judgments), the final concluding remarks of the book could perhaps have been more articulated. This is not to say that the contents of the volume are not well-systematised and explained to the reader. Rather, it is impressive how the author manages at the beginning and at the end of each chapter to guide the reader through her sophisticated reconstruction of the legal arguments, the reasoning of courts, and the explanation of certain trends emerging from the comparison.

6. Sinchronic and diachronic comparison

Indeed, another great value of the volume is the ability to provide a detailed analysis of gay rights and sexual orientation equality by offering a massive diachronic and synchronic comparison of constitutional provisions, legislation and case-law

encompassing a variety of countries with different legal traditions: Austria, Belgium, Brazil, Canada (and its provinces), Colombia, Ecuador, France, Germany, Hong Kong, Hungary, India, Ireland, Israel, Italy, Mexico, Portugal, South Africa, Spain, the UK, the US and its states (California, Hawaii, Massachusetts, New York, Vermont, just to mention few), as well as the Council of Europe and the United Nations. Hence, the book provides an exhaustive picture of a moving subject since the 1990s, in almost every angle of the world.

In doing so, it guarantees a detailed account of legal arguments and judicial reasoning employed in the four main sub-categories under which the topic is illustrated – private dimension of homosexuality, same-sex couples as families, same-sex marriage and parental rights – and revolving around four main rights: privacy, liberty, equality and dignity. The author highlights how the choice of courts to use each of those rights often implies a different understanding of their meaning and interpretation and can thereby make the advancement of gay rights more or less suitable. In particular in the case of dignity, the careful hermeneutic work carried out by Angioletta Sperti on the case law reveals that the meaning attached to this right in constitutional adjudication on sex equality orientation and especially on same-sex marriage is multi-faceted and is often defined in relation to other rights such as equality, liberty and self-determination (pp. 149-170; see, also, R. B. Siegel, "Dignity and Sexuality: Claims of Dignity in Transnational Debates Over Abortion and Same-Sex Marriages", *International Journal of Constitutional Law*, vol. 10, 2012, p. 355 ff).

7. Judicial cross-fertilisation

Another strength of the volume relates to the emphasis placed on mutual influences among jurisdictions on the interpretation of gay rights and the proof of existence of judicial cross-fertilisation in this field (p. 137); even in the US as a "recipient" of foreign precedents (see, for instance, the very famous case *Lawrence v. Texas* in 2003 and, amongst many, V.C. Jackson, "Constitutional Comparison: Convergence, Resistance, Engagement", *Harvard Law Review*, vol. 119, 2005, pp. 109 ff). As well known, there are indeed

supporters and opponents of this practice among judges and legal scholars (see, extensively, G. Halmai, *The Use of Foreign Law in Constitutional Interpretation*, in M. Rosenfeld and A. Sajò, *The Oxford Handbook of Comparative Constitutional Law*, OUP, 2012, pp. 1328-1348). The first, like Associate Justice Anthony Kennedy of the US Supreme Court, consider the citation of foreign sources of law, mainly with an evidentiary role, as an aid in constitutional interpretation in the reasoning of the court without determining the outcome of the judgment, which ought to be grounded in domestic law. The second group, instead, in which former Associate Justice of the US Supreme Court, Antonin Scalia, can be placed, argues that the use of foreign law in domestic decision is illegitimate and constitutionally problematic, for example, for the practice of "cherry-picking", and it makes courts unresponsive toward their "own constituents" who hold a reasonable expectations to comply with and to be judged according to national norms. Drawing on the categorisation developed in T. Groppi and M.-C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, 2013, in the field of sexual orientation equality foreign precedents are used indifferently, depending on the court, on the jurisdiction and on the particular circumstances of the case, as to provide a "guiding horizon", in the form of "probative comparison" and "a contrario" thereby supporting the idea that the citation of foreign case law *per se* is a neutral instrument serving multiple purposes. Over the last few years, however, in the field of constitutional adjudication on gay rights the dominant trends appears to be the use of foreign precedents either as "guiding horizon" or, more likely, as "probative comparison". The sense given, again, is that of a collective constitutional enterprise among civilized nations for the protection of gay rights (and with little influence from the divide between civil law and common law countries), in which Constitutional and Supreme Courts have paved the way for a new rights revolution in synergy with other institutional and societal actors and which is expected to produce further results in the years ahead.