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ARTICLE

Something's Wrong with Traditionalism: LGBTQI+ Rights in Comparative Perspective

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Abstract
This article problematises traditionalist thinking in constitutional adjudication in relation to the rights of same-sex couples, especially those rights that are connected to family life. It identifies two approaches, represented respectively by the case law of the Italian Constitutional Court (ItCC) and the Court of Final Appeal (CFA) of the Hong Kong SAR of the People's Republic of China. The ItCC has expressly stated that preserving traditional family forms is a reasonable objective *per se* for the legislature to pursue. The CFA, on the other hand, has challenged this approach to traditionalist thinking in relation to same-sex unions. Despite some contradictory signals within its case law, the CFA has stated that justifying differential treatment based on sexual orientation with reference to tradition is circular reasoning. Drawing on historical, anthropological, and philosophical sources, this article argues that invoking the preservation of tradition, despite its rhetorical force, is empirically and conceptually criticisable and, ultimately, unpersuasive.

Traditionalism in constitutional thinking: an introduction

Comparisons between European and Asian legal systems have a long history.[1] However, especially when discussing fundamental rights, studies have often framed European legal traditions as the primary reference point, perpetuating what may be referred to as 'methodological Eurocentrism', a hallmark of early comparative law scholarship.[2] This article takes a different approach and offers a tangible example of how instances of Asian constitutionalism can be a source of innovative legal reasoning and inform European jurisprudence. The potential of this comparison is exemplified by the rights of same-sex couples.

The Italian Constitutional Court (ItCC) and the Court of Final Appeal (CFA) of the Hong Kong Special Administrative Region (SAR) of the People's Republic of China have grappled with a common legal dilemma: How should 'tradition' be weighed in the resolution of cases concerning the rights of same-sex couples?[3] The ItCC has repeatedly ruled that individuals in same-sex relationships

[1]Taisu Zhang, 'Beyond Methodological Eurocentricism: Comparing the Chinese and European Legal Traditions' (2016) 56 American Journal of Legal History 195, 196.

[2]Jiunn-Rong Yeh, 'The Emergence of Asian Constitutionalism: Features in Comparison' (2009) 4 National Taiwan University Law Review 39, 46; Jaakko Husa, 'Constitutionalism, Comparativism, and Asia – No More 'Separate but Equal"' (2023) 18 The Journal of Comparative Law 574.

[3]As will be detailed below, comparison is justified by the possibility of identifying a common legal problem addressed by otherwise different jurisdictions. Giuseppe de Vergottini, *Diritto Costituzionale Comparato* (6th edn, CEDAM 2004) 4.

can legitimately be excluded from rights that relate to family life, such as marriage and accessing Assisted Reproductive Technologies (ARTs). Likewise, the recognition of children that same-sex couples have conceived abroad may be limited to a considerable degree. The ItCC has largely justified these limits with reference to the preservation of historically rooted and supposedly 'natural' family models, claimed to be entrenched in Italian culture since, so to speak, the dawn of time. On the other hand, despite some contradictory signals and ongoing evolutions within its jurisprudence, the CFA of the Hong Kong SAR has repeatedly problematised 'long usage', 'tradition', and 'nature' as objectives that can legitimate limits on the rights of same-sex couples. And not merely that: the CFA has held in the landmark case *Sham Tsz Kit v Secretary for Justice* that justifying differential treatment based on such elements is circular reasoning.[4]

This article aims to use the differences in these judgments as a springboard for developing a critique of what we call 'traditionalist adjudication' or 'traditionalist argument'. For the purposes of this paper, this refers to the justification of differential and possibly lesser treatment based on often contested past normative practices. In a nutshell, this article explores two central questions: How can notions such as tradition or a long history of practice result in limitations on the rights of same-sex couples? And what theoretical and empirical criticisms can be applied to this form of reasoning?

To answer these questions, this article advances a two-pronged argument. First, it shows that the case law of the ItCC encapsulates the main elements of traditionalist thinking as defined by Martin Krygier: 'pastness', 'authoritativeness', and 'transmission'.[5] The ItCC has indeed justified the limits imposed on marriage and procreative rights of same-sex couples by claiming, somewhat controversially, that the heterosexual family dates back *thousands of years, mirrors nature*, and, as such, may legitimately *be presumed* to provide a better environment for raising children. For these reasons, the case law of the ItCC, we believe, makes an important contribution to the definition of 'traditionalist' thinking in constitutional law.

Second, the article develops both an empirical and a conceptual critique of traditionalism. Empirically, traditionalism may be inadequate to address novel questions because it can lend a veneer of legitimacy and rhetorical force to answers based on factually and historically inaccurate conceptions. To demonstrate this, we draw on socio-legal,[6] historical,[7] anthropological,[8] and psychological literature,[9] as well as cultural analysis of law.[10] Conceptually, we contend that traditionalist thinking lacks a rational basis for favouring the preservation of past ideas and practices over accommodating

[4]*Sham Tsz Kit (岑子杰) v Secretary for Justice (No 1)* [2023] HKCFA 28, (2023) 26 HKCFAR 385 [194]. See also *QT v Director of Immigration* [2018] HKCFA 28, (2018) 21 HKCFAR 324 [62]–[66] and [67]–[76]. As explained below in the text, the CFA has taken a more cautious approach in a more recent case (*Infinger v The Hong Kong Housing Authority* [2024] HKCFA 29), where the protection of the traditional family has been considered as a legitimate objective in what is arguably an *obiter dictum*. This development, which surely raises new questions for scholars and lawyers, does not impinge on the intellectual value of the ruling on traditionalism contained in *Sham Tsz Kit (No 1)*.

[5]Martin Krygier, 'Law as Tradition' (1986) 5 Law & Philosophy 237, 240.

[6]Stefano Osella, 'When Comparative Law Walks the Path of Anthropology: The Third Gender in Europe' (2022) 23 German Law Journal 920, 928; Marie-Claire Foblets, 'Kinship through the Twofold Prism of Law and Anthropology', in Marie-Claire Foblets, Mark Goodale, Maria Sapignoli & Olaf Zenker (eds), *The Oxford Handbook of Law and Anthropology* (Oxford University Press 2021) 532, 538.

[7]For example, Stephanie Coontz, *The Way We Never Were: American Families and the Nostalgia Trap* (Basic Books 1992).

[8]For example, Maurice Godelier, *The Metamorphoses of Kinship* (Nora Scott tr, Verso Books 2011).

[9]See Susan Golombok, *We Are Family: The Modern Transformation of Parents and Children* (Public Affairs 2020).

[10]We are particularly indebted to Marco Wan, 'The Invention of Tradition: Same-sex Marriage and its Discontents in Hong Kong' (2020) 18 International Journal of Constitutional Law 539. See also Pier Giuseppe Monateri, 'Black Gaius: A Quest for the Multicultural Origin of the Western Legal Tradition' (2000) 51 Hastings Law Journal 479, 507–508; Eric Hobsbawm, *Introduction: Inventing Tradition,* in Eric Hobswam & Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 2012) 1; Krygier, 'Law as Tradition' (n 5); David A Strauss, 'Common Law Constitutional Interpretation' (1996) 63 University of Chicago Law Review 877; Felipe Jiménez, 'Tradition in Constitutional Adjudication' (USC Gould Legal Studies Research Paper Series No 24-9, 2024); Anthony Kronman, 'Precedent and Tradition' (1990) 99 Yale Law Journal 1029, 1031.

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present-day changes in social values and behaviour. This conceptual shortcoming is articulated by the CFA of the Hong Kong SAR, which has, in several cases, dismissed traditionalist reasoning as question-begging.[11]

This article makes four contributions to the existing scholarship – which, particularly in light of recent US Supreme Court decisions, has shown a renewed interest in the role of history and tradition in constitutional thinking.[12] First, it contributes to clarifying the theoretical contours and practical bearing of traditionalism in constitutional interpretation when applied to LGBTQI+ rights. The outspoken preservation of tradition – in this case, to the disadvantage of LGBTQI+ people – is far from being out of fashion and can result in the limitation of fundamental rights. Second, the article contributes to understanding traditionalism in constitutional adjudication across jurisdictions that are not typically featured together in comparative studies, showing that tradition is pressing a challenge in global constitutional discourse. Third, this piece connects the literature on traditionalist thinking to an empirical discussion. Indeed, the shortcomings inherent in using the discourse of tradition in constitutional adjudication have been primarily discussed from a philosophical standpoint. Yet, to date, the use of tradition expressly to limit LGBTQI+ rights can still be questioned with reference to socio-legal literature. Fourth, the article contributes to the literature on gender constitutionalism. It investigates the constitutional aspects of queer people's access to several constitutional rights. To date, gender constitutionalism has primarily focused on women and feminism, even though LGBTQI+ rights have a constitutional dimension that deserves exploration in its own right.[13]

Beyond its scholarly importance, the question of traditionalist thinking is socially consequential. As reactionary and populist waves sweep across countries in Europe and generally the West, and present remarkable challenges for minorities,[14] LGBTQI+ people brace themselves for the backlash against their rights. If traditionalist goals such as the preservation of a (real or imagined) past for its own sake become a constitutionally grounded, legitimate objective, then conservative forces will have gained a powerful rhetorical advantage. To borrow Marc Galanter's notion, judicial decisions have radiating effects, that is, political reverberations that go well beyond the doctrinal content.[15]

The remainder of the article is divided into six sections. Section 2 presents a few methodological clarifications. Section 3 defines the central theoretical notions upon which the argument rests, namely, tradition and traditionalist thinking in the legal context. Section 4 presents the legal and constitutional framework that regulates access to ARTs in Italy and identifies the elements of traditionalist thinking that are present in the case law of the ItCC. Section 5 addresses some socio-legal criticisms of the reasoning of the Constitutional Court. Section 6 discusses the case law of the CFA of the Hong Kong SAR and delivers a logical critique of traditionalist thinking. Concluding thoughts and future directions for research are presented in Section 7.

[11] *QT v Director of Immigration* [2018] HKCFA 28, (2018) 21 HKCFAR 324 [62]–[66]; *Leung Chun Kwong v Secretary for Civil Service* [2019] HKCFA 19, (2019) 22 HKCFAR 127 [70]–[71]; *Sham Tsz Kit (No 1)* (n 4).

[12] Jack Balkin, *Memory and Authority: The Uses of History in Constitutional Interpretation* (Yale University Press 2024); Marc DeGirolami, 'Traditionalism Rising' (2023) 24 The Journal of Contemporary Legal Issues 9; Marc DeGirolami, 'The Traditions of American Constitutional Law' (2020) 95 Notre Dame Law Review 1123 (2020); Jiménez (n 10).

[13] Douglas NeJaime, 'Griswold's Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality' (2015) 124 Yale Law Journal Forum 340; Douglas NeJaime, 'Marriage Equality and the New Parenthood' (2016) 129 Harvard Law Review 1185; Douglas NeJaime, 'The Nature of Parenthood' (2017) 126 Yale Law Journal 2260. For other forms of demands, see Carlos Ball (ed), *After Marriage Equality: The Future of LGBT Rights* (New York University Press 2019).

[14] Alessia Donà, 'Radical Right Populism and the Backlash Against Gender Equality: The Case of the Lega (Nord)' (2021) 13 Contemporary Italian Politics 296; Ruth Rubio-Marín, 'La munición constitucional del movimiento global anti-género' (2023) 52 Teoría y Realidad Constitucional 233.

[15] Marc Galanter, 'The Radiating Effect of Courts', in Keith Boyum & Lynn Mather (eds), *Empirical Theories About Courts* (Longman 1983); Leila Kawar, *Contesting Immigration Policy in Court: Legal Activism and its Radiating Effects in the United States and France* (Cambridge University Press 2015).

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A few methodological clarifications

Before proceeding, a few methodological clarifications are in order. First, the respective case law of the ItCC and the CFA exemplifies two different approaches to traditionalist thinking. Nevertheless, such thinking cannot be simplistically seen as static or monolithic. Reality is complex, and complexity has crept into the jurisprudence of these two courts. We fully acknowledge that the ItCC has voiced non-traditionalist suggestions as well. For its part, the CFA has recently stated that the preservation of the traditional family is a legitimate objective, and that the pursuit of this objective can justify restricting the rights of same-sex couples, though arguably in an *obiter dictum* and in a judgment that has otherwise significantly contributed to LGBTQI+ equality.[16] This complexity, however, does not undermine our argument. Our aim is not to label or taxonomise these two courts as respectively 'traditionalist' and 'anti-traditionalist'. It is not the institutions that we are concerned with. Instead, we wish to examine the arguments that can ground this specific form of constitutional reasoning – which is exemplified by the case law of the ItCC – against several critiques that can be derived from scholarly and judicial sources, such as the judgments of the CFA. In this sense, the positions expressed in *Sham Tsz Kit* remain cogent and instructive.

Second, from a comparative method perspective, this study circumscribes the comparison to specific legal questions by examining how the ItCC and CFA address the role of tradition in the adjudication of several rights of people in same-sex couples. Such rights include equal marriage, recognition of same-sex partnerships, access to assisted reproductive technologies, recognition of family ties created abroad, and housing. While we acknowledge the differences among such rights, this article takes a step up the ladder of abstraction by treating them as instances of the same problem – namely, what we term 'the traditionalist dilemma'. In other words, our analysis highlights a shared characteristic among these rights: the tension between the recognition of new rights for same-sex families and the tradition-grounded resistance to them. As such, the rights selected are fully comparable.

A few words are also due on the selection of jurisdictions. This article engages with what Rosalind Dixon understands as one crucial objective of comparison, namely, trying to understand 'how courts around the world have formulated answers or solutions to common problems'[17]. The argument presented here aims to highlight the potential of the case law of the Hong Kong CFA to offer new perspectives on balancing tradition and modernisation within the global legal discourse concerning the rights of same-sex couples. This focus allows the article to engage with comparative legal studies beyond the 'usual suspects', fostering an analytical understanding of legal challenges across diverse cultural contexts.[18] That being said, we are not advocating a simplistic transposition of the case law of Hong Kong to Italy, as we are cognisant of the institutional and cultural differences between the two courts and, indeed, societies. Nevertheless, these differences should not prevent scholars from engaging in what Sandra Fredman has dubbed 'deliberative comparison', that is, in the context of this article, employing the case law of the CFA not as a *prêt-à-porter* legal solution, but as a source of intellectual engagement that might broaden legal horizons and imaginations.[19] To this purpose, the jurisprudence of both the ItCC and the CFA seems particularly promising. Both courts focus on the notion of tradition, use it in the context of balancing LGBTQI+ rights related to family, and define it in a strikingly similar fashion – though the normative weight given to it is different. Finally, in this article we have deliberately compared the case law of these courts to counteract, at least in part, the

[16] *Infinger v The Hong Kong Housing Authority* [2024] HKCFA 29 [55]–[57]. For clarity, as explained below, there are good reasons to conclude that the critical stance on traditionalism expressed in *Sham Tsz Kit* remains good law.

[17] Rosalind Dixon, 'Comparative Constitutional Modalities: Towards a Rigorous but Realistic Comparative Constitutional Studies' (2024) 2 Comparative Constitutional Studies 60, 61. See also Ralf Michaels, 'The Functional Method of Comparative Law', in Mathias Reimann & Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019).

[18] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* 238 (Oxford University Press 2014). For the use of 'usual suspects', see ibid 39.

[19] Sandra Fredman, *Comparative Human Rights Law* (Oxford University Press 2018) 11.

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Eurocentrism that weakens comparative law, especially when it comes to gender and sexuality rights, where Europe and North America are oftentimes problematically assumed to be *the* model to follow.

All these reasons support our choice of jurisdictions. None of this is to suggest that the role and the use of tradition in comparative constitutional law is new; we acknowledge that other courts have either embraced or criticised traditionalist approaches before. A few non-exhaustive references illustrate the global dimension of this question. The US Supreme Court has recently demonstrated a traditionalist attitude,[20] as has the Constitutional Court of Uganda.[21] The European Court of Human Rights has stated 'that support and encouragement of the traditional family is in itself legitimate or even praiseworthy … [and] that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment on grounds of sexual orientation'.[22] On the other hand, in 2017, the Inter-American Court of Human Rights (IACtHR) initiated a significant line of jurisprudence regarding the recognition of same-sex couples' rights by issuing an advisory opinion.[23] The opinion urged, *inter alia*, signatory states to ensure full recognition of families formed by same-sex couples.[24] The IACtHR reasoned that the influence of culture, religion, and tradition on the recognition of same-sex couples' rights does not exempt states from their obligation to eradicate discriminatory practices.[25] More research would be needed about other courts. For example, in 2009, the German Constitutional Court argued that, while the institution of marriage requires particular protection of the state, such special protection does not, in itself, justify 'unfavourable treatment of other ways of life' – arguably showing an implicit non-traditionalist attitude.[26] The Slovenian Constitutional Court has also showcased interesting arguments challenging tradition.[27]

As for the third methodological clarification, we must reiterate that this article focuses on reference to traditional social practices in the context of legal and, more precisely, constitutional reasoning. We do not aim to discuss other forms of traditionalism in law. Law itself can be understood and interpreted as a traditional practice, one in which the preservation of the past is often institutionalised by recording case law, reiterating interpretations, justifying legal arguments based

[20] *Dobbs v Jackson Women's Health Organization*, 597 US 215 (2022); Balkin (n 12). For a brief discussion of the traditionalist approach in this decision, see also Graziella Romeo, '*Dobbs v. Jackson*: L'Ultima Trasformazione dell'Originalismo Passa dal Corpo delle Donne' [2023] Biolaw Journal 165, 171.

[21] Uganda Constitutional Court, Consolidated Constitutional Petitions Nos 14, 15, 16, and 85 of 2003 of 3 April 2024. The full decision is available at <https://ulii.org/akn/ug/judgment/ugcc/2024/10/eng@2024-04-03/source.pdf> accessed 1 Oct 2025. The Court upheld the constitutionality of the *Anti-Homosexuality Act 2023* (with the exception of a few acts that should not be criminalised, such as letting premises for 'the use for purposes of homosexuality' (Section 9 of the Act) and failure to report homosexual activity to the police). The Court recognised that an individual's 'right to self-determination, self-perception, and bodily autonomy, on the one hand', and the 'communal right' to 'social, political, and cultural self-determination', on the other, call for a delicate balance (para 228). However, the Court of Uganda's argument that 'the recent development in the human rights jurisprudence, including the decision of the US Supreme Court in Dobbs v. Jackson Women's Health Organization … where the Court considered the nation's history and traditions, as well as the dictates of democracy … to over-rule the broader right to individual autonomy' (para 266) suggests that the country's sociocultural norms should be taken into consideration when adjudicating human rights cases.

[22] *Fedotova and others v Russia*, Apps nos 40792/10, 30538/14, and 43439/14 (ECtHR, Grand Chamber, 17 Jan 2023) [207], as well as case law cited therein.

[23] Inter-American Court of Human Rights, Advisory Opinion Oc-24/17 of 24 Nov 2017, requested by the Republic of Costa Rica.

[24] ibid para 228.

[25] ibid para 40.

[26] German Constitutional Court, Order of the First Senate of 7 Jul 2009 (1 BvR 1164/07) paras 100–105.

[27] In 2022, the Constitutional Court of Slovenia also reasoned that the protection of the 'traditional family' cannot justify discrimination against same-sex couples (U-I-486/20, Up-572/18); see Roman Kuhar, 'How the Anti-Gender Movement Contributed to Marriage Equality in Slovenia' (Illiberalism Studies Program, 22 Dec 2022) <https://www.illiberalism.org/how-the-anti-gender-movement-contributed-to-marriage-equality-in-slovenia/> accessed 1 Oct 2025.

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on past authority, and so on. [28] Lawyers and judges are bound by their own sets of traditions.[29] This further dimension certainly complicates the question of traditionalism in law.[30] Here, we are focusing on 'traditional' social practices as the object of legal deliberation, and these can (and must) be differentiated from the law as a traditional practice.

Finally, we do not wish to develop any grand theory about the workings of traditionalist thinking in all circumstances and in relation to all rights. Nor do we intend to offer a general taxonomy of traditionalist adjudication; there certainly may be many more forms of traditionalist adjudication that this article does not account for. More modestly, we aim to engage in an exercise of theory building as we identify elements of traditionalist thinking in the field of LGBTQI+ rights and related criticisms concerning empirical and logical flaws without engaging in a broader challenge to the use of traditional thinking in constitutional adjudication. We, therefore, contend that traditions can be mobilised to achieve different results, and the soundness of these results depends on the type of reasoning developed by courts.

Traditionalist thinking and its limits

Before turning to the constitutional case law of Italy and Hong Kong, we need to define a few theoretical concepts. First, we must engage with the notions of 'tradition' and 'traditionalist thinking'. Second, we need to present some of the main criticisms addressed to the notion of traditions and their normative uses.

The notion of tradition and its normativity

The notion of tradition is elusive. Despite the difficulty of pinning down its content, a useful account is offered by Martin Krygier, who argued that three elements constitute the core of tradition: pastness, authoritativeness, and intergenerational transmission.[31] Intuitively, pastness encapsulates the reliance on past values or practices. Authoritative presence refers to the normative influence of pastness on present-day actions or beliefs. Lastly, transmission from one generation to the next underscores the dynamic interplay between the past and the present, in which participants actively engage. In short, a tradition exists when elements derived from a real or imagined past bear authority today as they are handed down to, and subjectively received by, subsequent generations. Krygier highlights the continuous dialogue between the past and the present. In this sense, the contents of tradition are not fixed but received and creatively perpetuated by a generation that is interested in solving the problems of today. It is not on the basis of intrinsic merits or qualities that tradition is normative; rather, it is the recipient generation's attitude towards the past and their commitment to upholding tradition that allows it to play a decisive role in the present.[32] Along these lines, Felipe Jiménez has defined tradition as a 'complex, long-lasting, collective undertaking that sums up multiple actions, decisions, and patterns, and rationally connects past, present, and future'.[33]

As intergenerational transmission is dialogic and open-ended, traditions can be subjected to change over time.[34] Recipients' engagement signals that traditions are received and elaborated by the present generation, with some elements neglected, others reinforced, and others creatively

[28] Understanding the law as a traditional practice might be particularly pertinent in common law systems, but other legal systems are also bound by their own traditions; see Fernanda Pirie, *Rule of Laws: A 4,000-Year Quest to Order the World* (Profile Books 2021); Patrick Glenn, *Legal Traditions of the World* (Oxford University Press 2014).

[29] Kronman (n 10) 1044; Krygier, 'Law as Tradition' (n 5) 250.

[30] Jiménez (n 10) 20.

[31] Krygier, 'Law as Tradition' (n 5) 240.

[32] Martin Krygier, 'Too Much Information', in Helge Dedek (ed), *A Cosmopolitan Jurisprudence. Essays in Memory of H. Patrick Glenn* (Cambridge University Press 2022) 134–135.

[33] Jiménez (n 10) 18.

[34] ibid 26–27.

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reshaped.[35] Engagement with tradition, however, does not only involve the interplay between the past and the present; the future also takes part in the modes and functioning of the transmission. Jiménez maintains that discussions about traditions often overlook the future's bearing on the present decision to uphold a certain practice, and that '[r]esponsible participation in a tradition, thus, involves a concern for how that tradition might fare in the future, and how our actions today can impact that future. Concerns about the future also affect our reconstruction of the past'.[36]

Jiménez, then, believes that the communication process between generations also involves the current generation's intention to shape the future according to some identified normative commitments. This implies that traditions are upheld today not merely as relics of the past, but as active influences on the future. Patrick Glenn articulates this more succinctly, noting that with tradition, 'the past is mobilized to invent a future'.[37] Hence, traditions are normative by definition because they serve as vehicles for future-oriented influence, grounded in the values and commitments of the present generation.

Traditions are not without merits, and arguments can be made to support referring to them in legal reasoning. To mention a few (without claiming to be exhaustive), Edmund Burke understood tradition as a guarantee that the legacy inherited from the past does not dissipate.[38] Anthony Kronman argued that traditions allow us to experience and perpetuate the 'world of culture' – that complex of artifacts (to which law also belongs) that characterises human life and defines our identities as human beings.[39] According to Kronman, respect for traditions stems primarily from the responsibility to preserve and maintain a 'partnership' between generations that will ultimately contribute to the development and sustainability of the world of culture.[40] Referring to the US context, Marc DeGirolami has generally defended traditionalism, as it leads courts to produce a jurisprudence that is in harmony with entrenched social values.[41] Jiménez believes that 'practical reasoning is situated': we make moral – and, arguably, legal – judgments based on our culturally shaped understandings.[42]

Tradition: conceptual and empirical questions

Numerous criticisms have pointed out the problems inherent in invoking tradition to support one's normative commitment, especially in legal reasoning. Kronman has highlighted how the invocation of the past as authority for present choices has been challenged since at least the time of the French Revolution, which sparked a confrontation between tradition-based arguments and those grounded in human rationality.[43] As Jiménez pointed out:

> [a]s a normative matter, we can never be bound to honor the past just because it is the past. This does not mean that deference to tradition is irrational. But it does mean one must answer why we ought to follow a particular tradition or recognize its authority.[44]

[35] Krygier, 'Law as Tradition' (n 5) 242, 252.

[36] Jiménez (n 10) 13.

[37] Glenn (n 28) 24.

[38] See, generally, Edmund Burke, *Reflections on the Revolution in France* (Frank Turner ed, Yale University Press 2003). One line is particularly clear: 'By this unprincipled facility of changing the state as often, and as much, and in as many ways, as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken' (p 81). This evocative passage is identified (in a larger portion) and commented on by Kronman (n 10) 1048.

[39] Kronman (n 10) 1066.

[40] ibid 1068.

[41] Marc DeGirolami, 'First Amendment Traditionalism' (2020) 97 Washington University Law Review 1653, 1656.

[42] Jiménez (n 10) 16. It should be noted that Jiménez writes from a perspective that seems to be critical of traditionalism, and is more skeptical about whether this feature of practical reasoning ensures the theoretical soundness of traditional arguments in adjudication.

[43] Kronman (n 10) 1047–1048.

[44] Jiménez (n 10) 37.

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David Strauss believed traditionalism to be justified as long as it was motivated by the rational choice of trusting experience and distrusting abstract judgments detached from any reflection upon knowledge, practice, and information that the past can offer to the present.[45] In this context, the past may be seen a storehouse of solutions that can be used to address present issues. But when applied to preserving the past as an end in and of itself, this form of reasoning becomes much more problematic; it is not best-suited to deal with divisive practices, conceptions, or ideas, and reveals a quasi-religious attitude that may be difficult to justify.[46] William Eskridge pointed out that the use of tradition in legal reasoning often entails oversimplification and cherry-picking, and neglects the evolving nature of social practices, which can certainly not be presumed to be ossified in the past.[47]

Empirical critiques add to the conceptual ones. Eric Hobsbawn argued that traditions may be deliberately reconstructed and are often done so in a way that is historically inaccurate. Hobsbawn defined an 'invented tradition' as 'a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual and symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition'.[48] Traditions appeal to values and beliefs and are reinforced by rituals or some other type of formalisation. For Hobsbawn, a tradition is invented through rituals and institutions that rely on the past to either address novel problems or, more broadly, to condition social behaviours or attitudes by imposing repetition. Political and legal institutions can adopt this strategy by using ancient materials for legitimation purposes and in order to establish a continuity between the past and present choices, especially when unprecedented changes are happening.[49] In fact, as Marco Wan has argued, traditionalist arguments may rely on a past that is nothing short of being invented.[50]

Similarly, a number of scholars exploring traditions from a theoretical perspective have argued that traditionalist modes of argument may privilege contemporary policy goals over fidelity to the historical record. Krygier suggests that historical accuracy may not be a top priority in traditionalist thinking; those who rely on traditions seem to be more interested in the storehouse of ideas and solutions that they can offer to present circumstances than in whether they are historically precise.[51] In this sense, traditions are not unearthed from the past as self-evidence of agreement around fundamental truths. Rather, they are crafted in the process of transmission and *then* presumed almost subconsciously to be natural and immutable. As Krygier puts it,

> [t]he authoritative presence of the past in traditions is frequently unnoticed by participants. Indeed, the past is often most powerfully and pervasively present when it is not known to be past or present. It is simply 'obvious' or 'natural', an unremarked piece of the furniture of the world.[52]

Discussing the question of whether a 'western legal tradition' exists, Pier Giuseppe Monateri draws on Foucault to challenge the relationship between tradition and history. According to Monateri, traditions are neither invented nor spontaneously formed. Rather, they are retrospectively created. In fact, traditions might be made up, so to speak, to address present problems or even to pursue strategic choices through law.[53] Lawyers, then, often choose interpretations or legal solutions to deliberately

[45] Strauss (n 10) 891.
[46] ibid 895.
[47] William N Eskridge, 'Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation' (2009) 32 Harvard Journal of Law & Public Policy 193.
[48] Hobsbawn (n 10) 1.
[49] ibid 7.
[50] Wan, 'The Invention of Tradition' (n 10).
[51] Krygier, 'Law as Tradition' (n 5) 248–249.
[52] ibid 246.
[53] Pier Giuseppe Monateri, 'Black Gaius: A Quest for the Multicultural Origins of the "Western Legal Tradition"' (2000) 51 Hastings Law Journal 483.

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design the future rather than to be consistent with a past that carries along theoretical or practical constraints. For Monateri, readings of legal systems that point out the continuity of institutions and interpretations are motivated by a systematic denial of changes that happen in history.[54] Instead of exposing the deliberate aim to design the future, political and legal institutions prefer to describe their decisions as examples of a compelling tradition. Monateri suggests that, when approaching traditions, one must consider the extent to which they have been retrospectively created by the present generation – whether to manipulate the past or in an attempt to legitimate present decisions.

Cass Sunstein offers a different view, suggesting that constitutional lawyers can use the past and traditions 'to put things in a favorable or appealing light without, however, distorting what actually can be found' through historical research.[55] For Sunstein, mobilising what he calls the 'useable past' is not inherently misleading because the constitutional lawyer is 'identify[ing] those features of the constitutional past that are … especially suitable for present constitutional use'.[56] In this way, Sunstein argues, lawyers are building on traditions in a way that contributes to the development of legal culture.

References to tradition, however, *can* clearly be detrimental to LGBTQI+ rights. *Traditionally*, LGBTQI+ people got the shorter end of the stick, after all. A few examples illustrate this point. Focusing on the US, Eskridge has underlined how a traditionalist reasoning was at the centre of *Bowers v Hardwick*.[57] This allowed the majority of the justices of the US Supreme Court to 'conclude, without any evidence in the record, that citizens of Georgia intended their gender-neutral sodomy law to reflect an anti-homosexual morality' that suggested the inclusion of oral sex within the definition of sodomy in a Georgia statute.[58] Stefano Osella has pointed out how the ItCC has essentially affirmed the exclusion of a nonbinary gender identity because of the presumed – and quite contestable – historical existence of only two genders in Italian society.[59]

In all fairness, invocations of the past have been at times used to protect LGBTQI+ people. Eskridge refers to the opinion of Justice Kennedy, who, in *Lawrence v Texas*,[60] researched 'a tradition-based original meaning' for 'liberty', and concluded that there was no long-standing usage of excluding same-sex intimacy from a liberty otherwise 'assured [to] all other Americans'.[61] An ancient tolerance of gender diversity, reportedly entrenched in Indian culture and society in pre-colonial times and then repressed by the British rule, has been recalled by the Supreme Court of India to protect the rights of trans, nonbinary, and queer people in general.[62] These examples demonstrate that, as Sunstein suggests, the past can be 'usable' for various purposes. The inherent ambivalence of tradition, however, underscores the importance of critically examining its role in constitutional reasoning, particularly to assess how well traditional reasoning withstands logical and empirical challenges.

[54] ibid 509. Monateri echoes Michel Foucault's observation about the epistemological relevance of discontinuities in history. For Foucault, this implied that understanding social facts requires acknowledging interruptions in the continuity of human experiences. See Michel Foucault, *L'archéologie du savoir* (Gallimard 1969).

[55] Cass R Sunstein, 'The Idea of a Useable Past' (1995) 95 Columbia Law Review 601, 603

[56] ibid 604.

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

[58] Eskridge (n 47) 196.

[59] Osella (n 6) 934.

[60] 539 US 558 (2003). Eskridge (n 47) 201.

[61] Eskridge (n 47) 201 and the passage cited therein: 539 US 558 (2003) 568 and 571–572.

[62] *National Legal Service Authority v Union of India* (2014) INSC 275; *Supriyo aka Supriya Chakraborty & Abhay Dang v Union of India thr Its Secretary, Ministry of Law and Justice & other connected cases.* It should be noted, however, that even in this case doubts have been raised about the invocations of the past (Stefano Osella & Ruth Rubio-Marín, 'Gender Recognition at the Crossroads: Four Models and the Compass of Comparative Law' (2023) 21 International Journal of Constitutional Law 574).

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Traditionalism at work: the italian case law

To understand the weight of tradition within the Italian system of family law, it is important to provide some context. In this jurisdiction, marriage is, in principle, regarded as an institution oriented toward procreation. It is therefore reserved for heterosexual couples, as is access to ARTs. This situation has emerged from years of public debate on marriage, family, and procreation. Notably, an alliance between conservative movements within Italy and some sectors of the Catholic Church has vocally opposed the recognition of marriage and family rights for same-sex couples.[63]

In 2007, amid parliamentary debates on marriage reform, the Episcopal Conference, a body representing Italian bishops, reminded Catholic legislators of their duty to oppose legislative efforts that would recognise *de facto* families, especially those comprising individuals of the same sex.[64] A few years later, the Episcopal Conference openly discouraged Catholics from participating in a referendum aimed at partially repealing the law regulating medically assisted procreation to make access to ARTs to same sex couples possible. Some political parties have attempted to capitalise on the social climate, aligning themselves with the political claims of traditionalist movements and introducing concepts like 'tradition' into the political discourse to sway legislative outcomes.[65]

The partnership between these parties, certain sectors of the Church, and the Episcopal Conference is largely unprecedented. Sociologists remark that Catholics' involvement in Italian politics has been historically characterised by 'non-confessional Catholicism', which values pluralism and secularism and avoids imposing a single moral view.[66] However, some parties have sought to closely associate Catholic identity with traditional values, even when these values are contested by other significant sectors of the Catholic Church.[67] Consequently, Catholic tradition is sometimes invoked to support political claims hostile to the queer community, thereby creating a misleading impression of an ideological alignment between Catholicism and non-pluralistic views. Shifting from Catholicism to a broader overview of Italian society, demographic data indicate that the percentage of Italians who agree or strongly agree that same-sex couples should have the right to adoption has increased over time. In 1993, only 14 per cent of Italians expressed agreement with the idea of adoption for same-sex couples,[68] while this figure reached 36 per cent in 2020.[69]

When examining Italian case law on the reproductive rights of LGBTQI+ couples, therefore, references to tradition should not be hastily dismissed as merely reflecting a particular ideological stance. Rather, such references reveal how arguments based on very different grounds and underlying assumptions can be intertwined. To fully understand the role of traditionalist reasoning, the case law must be analysed in its broader social context, assessing the extent to which such arguments are grounded in societal values and lived realities.

[63]We are referring here to various private associations, including the Catholic Forum of Family Associations, which has organised Family Days, a series of public demonstrations advancing claims of protection of the traditional family and opposing the recognition of rights to same-sex families. See *'Pro-family' groups rally in Rome* (BBC News, 12 May 2007) <http://news.bbc.co.uk/2/hi/europe/6649147.stm> accessed 1 Oct 2025.

[64]Luca Diotallevi, 'Meno siamo, meglio stiamo? Il referendum sulla fecondazione assistita e il peso del fattore religioso' (2007) Polis 3 489.

[65]See Pierluigi Consorti, 'Il ruolo del diritto nell'uso politico della religione. L'esperienza italiana da mani pulite all'ascesa della Lega' (2020) Quaderni di diritto e politica ecclesiastica 316.

[66]Luca Diotallevi, 'Osservazioni sociologiche sull'attuale uso politico della religione in Italia' (2020) Quaderni di diritto e politica ecclesiastica 332.

[67]Consorti (n 65) 314.

[68]Marzio Barbagli & Asher Colombo, *Omosessuali moderni: gay e lesbiche in Italia* (il Mulino 2007) 128.

[69]Data from the European Social Survey, see Nausica Palazzo, Graziella Romeo, Gabriele Ruiu & Agnese Vitali 'Le famiglie arcobaleno tra accettazione sociale e ostacoli giuridici' (Neodemos, 29 Sep 2023) <https://www.neodemos.info/2023/09/29/le-famiglie-arcobaleno-tra-accettazione-sociale-e-ostacoli-giuridici/> accessed 1 Oct 2025.

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The right to (non)marriage

A traditionalist attitude can arguably be detected throughout the Italian constitutional case law concerning the rights of same-sex couples.[70] Decision 138 of 2010 lies at the centre of a constitutional framework that treats heterosexual and homosexual unions differently. In this judgment, the ItCC ruled that same-sex couples have a right to be recognised as a 'social formation'[71] in which human personality develops.[72] In this sense, it ensured an important right to same-sex couples and transformed the constitutional landscape in Italy. Yet the Court determined that same-sex couples could not be protected as a 'family' – and in fact, throughout its judgment, the ItCC was careful not to refer to same-sex couples as 'families'. While the ItCC admitted that the notion of family is evolving,[73] it also stressed that the drafters of the Constitution embraced the *traditional* and heterosexual understanding of marriage.[74] Even though homosexuality was known at the time the Constitution was enacted in 1948, the drafters did not mention same-sex marriage; therefore, the ItCC reasoned, they had no intention of protecting it.[75] Excluding same-sex couples from marriage, the Court continued, cannot, therefore, be considered discriminatory. The difference in treatment between same-sex and different-sex couples is justified because the heterosexuality of marriage is grounded in Article 29 of the Constitution, which protects the traditional family as a natural society (*società naturale*). According to the constitutional interpretation, homosexual unions cannot therefore be considered analogous (*omogenee*) to marriage.[76] The crucial difference between same-sex and different-sex couples, the Court established, lies in the potential fertility of heterosexual couples and the infertility of same-sex ones.[77] In brief, despite granting the right to some form of recognition for same-sex couples, the ItCC denied the existence of a constitutional right to marry a person of one's own sex, because marriage is limited to traditional families, which are also the reproductive ones. Nevertheless, it urged Parliament to recognise same-sex couples by way of legislation, without, however, providing any direction regarding the form that this recognition should take.

Indeed, the precise reach of Decision 138 of 2010 has been debated. Some scholars have suggested that the Court was establishing constitutional neutrality towards same-sex marriage, whose recognition is neither forbidden nor required.[78] Others – in our opinion, more faithful to the letter and spirit of the judgment[79] – read the decision as *excluding* same-sex couples from marriage, establishing a constitutional prohibition of same-sex marriage.[80] At any rate, all doubts were dispelled in a 2014 decision concerning the mandatory and *ex officio* divorce of married trans people who have obtained gender recognition. The applicant was a trans woman who had been assigned

[70]For clarity, we are not suggesting that protection of a binding past is the only rationale behind such decisions. Rather, it represents *one* of several public interests that are taken into consideration, and it is a central narrative element of such decisions. We deliberately left out of the analysis decisions concerning surrogacy. While one could argue that a degree of traditionalism is present in those judgments too, they contain a multitude of conflicting interests and rights that complicate the analysis, among which, notably, are the rights of surrogate mothers.

[71]Constitutional Court of Italy, 14 Apr 2010, n 138, in GU 21 Apr 2010, n 16, 8 *in diritto*.

[72]Constitution of Italy (ratified 22 Dec 1947, entered into force 1 Jan 1948) art 2.

[73]Constitutional Court of Italy, 14 Apr 2010, n 138, 9 *in diritto*.

[74]ibid 6 *in diritto*.

[75]ibid 9 *in diritto*.

[76]ibid 9 *in diritto*.

[77]ibid 9 *in diritto*.

[78]Barbara Pezzini, 'Il matrimonio same sex si potrà fare. La qualificazione della discrezionalità del legislatore nella sent. n. 138 del 2010 della Corte costituzionale' [2010] Giurisprudenza costituzionale 2719.

[79]To be clear, the correctness of the Constitutional Court is open to debate. We are certainly not arguing that the Constitution itself forbids same-sex marriage, just that this particular judgment of the ItCC appears to read the Constitution that way.

[80]Marta Cartabia, 'Avventure giuridiche della differenza sessuale' (2011) Iustitia 285, 296; Andrea Pugiotto, 'Una lettura non reticente della sent. n. 138/2010. Il monopolio eterosessuale del matrimonio' (Oct 2010) <https://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0226_pugiotto.pdf> accessed 1 Oct 2025.

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the male gender at birth and who, while still legally classified as a man, had married a woman. The ItCC urged Parliament to provide some form of recognition to married trans people who, after gender recognition, found themselves in a same-sex marriage, as same-sex marriages were simply to be dissolved under the law. Yet the ItCC unequivocally underlined that this recognition *could not* be same-sex marriage; it would have to be a different form of recognition, as same-sex marriage would be at odds with Article 29 of the Italian Constitution.[81]

The reasoning that sustains the preclusion of same-sex marriage – and that requires a two-pronged family recognition in Italian law – contains many references to pre-existing models of family formation and, we suggest, is traditionalist.[82] The three elements of traditionalism that Krygier identifies can indeed be traced in the 2010 ruling of the ItCC: first, *the past*; second, the *authoritativeness*; third, the *transmission* of a past norm to regulate a present practice. The ItCC established that the law that denies marriage to same-sex couples reflects a 'solidified' and 'thousands of years old conception' (*nozione consolidata e ultramillenaria*) of marriage.[83] The invoked and rhetorically powerful tradition – a past stretching back 'thousands of years' – led the Court to affirm the exclusively heterosexual nature of marriage with little scrutiny. Paraphrasing the judgement, marriage is heterosexual because it has *always* been that way.

This reasoning has broader implications: if marriage is strictly tied to procreation, same-sex couples are consequently defined as incapable of fulfilling its primary purpose. In a way, the ItCC seemed to suggest that tradition differentiates between fecund marriages and barren homosexual unions.

[81] Constitutional Court of Italy, 11 Jun 2014, n 170, in GU 18 Jun 2015, n 26, 5.6 *in diritto*. The Constitutional Court recently granted family rights to trans applicants with a decision that might hint at the possibility of reinterpreting traditional norms (Constitutional Court of Italy, 22 Feb 2024, n 66, in GU 24 Apr 2024). The case concerned a person in a same-sex civil union who obtained gender recognition. As the same-sex couple turned into a different-sex relationship following the transition of one of the partners, the same-sex civil union was to be automatically dissolved by law. The Court judged that such automatic dissolution infringed on the rights of the applicant and allowed the temporary permanence of the civil union. Regardless of the content of the decision, it is interesting that the Court mentioned the possibility of 're-reading the most traditional institutions in family law' (4.2).

[82] There has been disagreement on the characteristics of the reasoning in this decision. Some have argued that the decision is originalist. Ostensibly, the judgment presents itself as originalist. However, a more careful analysis allows one to see beneath the veneer. The Court states that the drafters of the Constitution did not intend to protect same-sex marriage, and the legislature, therefore, is under no obligation to provide such protection. So far, so originalist. Yet the ItCC not only declares neutrality towards same-sex marriage – which would be the logical conclusion of an originalist reasoning – it ruled that 'homosexual unions *cannot* be considered analogous to marriage' (*le unioni omosessuali non possono essere considerate omogenee al matrimonio*), thereby precluding the possibility of same-sex marriage under the Constitution (Pugiotto (n 80)). This argument shows that the Court did not simply intend to safeguard the original scope of the constitutional provisions, but went beyond that, that is, it safeguarded another public interest *against* same-sex marriage. Where was this interest to be found? Clearly not in the original meaning of Article 29 of the Constitution. The drafters, the Constitutional Court states, did not even entertain the notion of same-sex marriage. It has been argued that the real reason is to be found in the several references that the court makes to the heterosexuality of marriage that allegedly goes back 'thousands of years' (see Ilenia Massa Pinto & Chiara Tripodina, "'Le unioni omosessuali non possono essere ritenute omogenee al matrimonio". Tecniche argomentative impiegate dalla Corte costituzionale per motivare la sentenza n. 138 del 2010' (2010) Diritto Pubblico 471–494). We find merit in this reading. Scalia and Roberts in *Obergefell v Hodges,* 576 US 644 (2015), for example, took an originalist stance and stated that it was up to the democratic process to determine whether same-sex marriage should be legalised. The Constitutional Court, however, limited the legislature, and the reason could not be the original intent. While the constituent assembly indeed assumed that marriage was heterosexual, it showed no intention of forbidding homosexual marriage either. The question was not presented (which indeed would have been anachronistic at the time), and the constituent assembly did not give an answer to it. Would the framers have protected same-sex marriage if presented the question? Probably not. But we are in the realm of speculation: the point is, they showed no intention of forbidding it. Interestingly, it has been argued that the Constitutional Court often relies on traditionalist or common sense reasonings, and yet it often masks them with other arguments (Ilenia Massa Pinto, *La superbia del legislatore di fronte alla 'natura delle cose'. Studio sulle tecniche argomentative impiegate dalla Corte costituzionale nei giudizi di legittimità costituzionale in cui è invocato l'art. 29 della Costituzione* (Giappichelli 2012)).

[83] Constitutional Court of Italy, 14 Apr 2010, n 138, 6 *in diritto*.

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This differentiation seemed to be justified with reference to nature.[84] Tradition, procreation, and marriage are, apparently, linked in the reasoning of the Court.

Interestingly, Justice Alessandro Criscuolo – who drafted decision 138 of 2010 on same-sex marriage – delivered a speech on the question of same-sex marriage under Italian constitutional law just a few months after the judgment had been published. He underlined that the heterosexuality of marriage constitutes 'an ancient and entrenched tradition'.[85] Heterosexuality, in this understanding, is part of the 'natural essence' of marriage. Criscuolo also stressed that same-sex couples deserve respect and recognition, and that homosexuality is to be understood as a variation of human behaviour. Nevertheless, he also stated that it would be an overreach to equate two situations that are different due to the procreative potential of heterosexual marriage.[86] To paraphrase, traditional marriage, which is to be protected, is understood as procreative. Same-sex couples, who are not traditional, are seen as non-procreative and are therefore excluded from marriage.

Parliament heeded the (repeated) invitation of the Constitutional Court[87] – and the condemnation of the European Court of Human Rights, which had intervened in the meantime[88] – with *Law 76 of 2016*, which grants the right to enter same-sex civil unions.[89] Parliament took great pains to differentiate between same-sex civil unions and different-sex marriage. This differentiation was achieved in part through symbolic actions. The legislature, for example, removed the duties of fidelity and cohabitation (which are required of marriages) from the laws regulating civil unions. This differentiation signified the intention to attach a lesser moral status to same-sex unions, implicitly assuming those involved in them to be promiscuous.[90] The law is likewise very careful to avoid any reference to same-sex couples as 'families', sticking to the constitutionally endorsed 'social formation'. Yet the limits on same-sex unions are not only symbolic; same-sex couples are also stripped of all procreative and parental rights. Law 76 of 2016 seems to enact at the legislative level the traditional understanding of queer people as non-procreative, an understanding that, as we will see shortly, has been validated by the Constitutional Court.[91]

The limits on donor insemination

Preserving the understanding of same-sex couples as non-procreative, the Constitutional Court has not protected the right of same-sex couples to access ARTs and, more specifically, donor insemination with a trend-setting decision in 2019. The case was about a lesbian couple being denied the possibility of using donor insemination in Italy to conceive a child.[92] They challenged *Law 40 of 2004*, which limits access to ARTs to heterosexual couples of potentially fertile age[93] and imposes

[84] Massa Pinto (n 82).

[85] Alessandro Criscuolo, 'Famiglia legittima – matrimonio – filiazione – famiglia di fatto – unioni omosessuali' (Jan 2011) 2 <https://www.cortecostituzionale.it/documenti/convegni_seminari/relazione_criscuolo.pdf> accessed 1 Oct 2025.

[86] ibid 3.

[87] As we will clarify in the text, the Constitutional Court ordered the legislature to provide an alternative framework to marriage for same-sex couples in 2010 (Constitutional Court of Italy, 14 Apr 2010, n 138) and in 2014 (Constitutional Court of Italy, 11 Jun 2014, n 170).

[88] *Oliari and Others v Italy*, App nos 18766/11 and 36030/11 (ECtHR, 21 Jul 2015).

[89] Civil unions are limited to same-sex couples. Heterosexual couples can formalise their union through marriage.

[90] Angioletta Sperti, *Constitutional Courts, Gay Rights and Sexual Orientation Equality* (Hart 2015) 79; Luciano Olivero, 'Unioni Civili e Presunta Licenza d'Infedeltà' (2017) Rivista Trimestrale di Diritto e Procedura Civile 213. For clarity, we do not attach any lesser moral status to forms of union that do not conform to traditional monogamy, as we recognise that there are multiple forms of ethical nonmonogamy and different family and couple arrangements.

[91] There have been minor advancements in relation to parental rights, for example step-parent adoption. Procreative rights, however, have not been granted.

[92] Constitutional Court of Italy, 18 Jun 2019, n 221, in GU 30 Oct 2019.

[93] Law 40 of 2004, art 5.

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hefty monetary sanctions on transgressors.[94] For context, the Constitutional Court has, over time, gradually softened some of the limits imposed on ARTs. For example, the prohibitions against donor insemination for heterosexual couples[95] and pre-insemination diagnosis for heterosexual couples carrying genetically transmissible diseases have been considered unconstitutional.[96] Yet a legal distinction based on sexual orientation remains.

The same-sex couple who brought the 2019 case to court unsuccessfully argued that the preclusion contained in the law violated a generic right to procreate,[97] the right to equality,[98] and the protection of maternity[99] and of health[100] established in the Italian constitution. In substantively ruling against the claim of the applicants, the Court deferred to the discretion of the legislature.[101] According to the Court, the law adopts a strictly medical interpretation of assisted procreation as a technique that should be accessible solely for reasons related to fertility issues. This interpretation, the Court continued, can only be altered by the legislature itself. At the same time, the Court considered the law valid, as it did not find a violation of a more general procreative liberty. Importantly for our argument, the Court maintained that procreative liberty can be limited for the sake of other compelling public interests, especially when the 'naturalistic dynamics of procreation' are altered in such a way that 'the paradigms of family *historically entrenched in social culture*, which underlie the [constitutional provisions concerning the family]' (emphasis added) are fundamentally refashioned. In such circumstances, the Court stated that 'it is not unreasonable' to preserve a historically rooted family form that mirrors nature (*ad instar naturae*).[102]

Furthermore, the Court ruled, it is equally 'not unreasonable' that the legislature aims to grant to future children what are – in the common-sense and traditionalist understanding – the best conditions in which to grow up. The Court acknowledged that sexual orientation should not be presumed to conflict with the best interests of the child, and that there are no 'scientific certainties or data' that being raised in a same-sex household would affect the child negatively.[103] In reaching this conclusion, the ItCC followed a suggestion from the Court of Cassation, which explicitly recognised same-sex couples as being as fit as different-sex couples to adopt children, and which did not find a constitutional prohibition for same sex couples 'to welcome and generate children'.[104] And yet it

[94]Law 40 of 2004, art 12. The heavy penalties established by the law (€300,000 to €600,000) are administrative in nature, which, in essence, means that the individuals subjected to these fines do not enjoy the guarantees associated with a criminal trial. It is worth noting that, in an opinion issued to the President of the Council of Ministers, the National Committee for Bioethics, while recommending that ARTs should not be available to same-sex couples because the heterosexual family model was 'preferable' (p 12), advised against criminal sanctions due to the existence of diverse opinions on the subject. See Comitato Nazionale per la Bioetica, 'Parere sulle tecniche di procreazione assistita' (17 Jun 1994) <https://bioetica.governo.it/media/1911/p16_1994_tecniche-procreazione-assistita_it.pdf> accessed 1 Oct 2025. Albeit not discussed in this article, it should be noted that 'carrying out, organing, or advertising' commercial surrogacy is a crime. Italian citizens are punishable also if they committed these actions in a foreign jurisdiction where they are legal (Law 40 of 2004, art 12(6)).

[95]Constitutional Court of Italy, 9 Apr 2014, n 162, in GU 18 Jun 2016, n 26.

[96]Constitutional Court of Italy, 14 Jun 2015, n 96, in GU 10 Jun 2015, n 23; Constitutional Court of Italy, 21 Oct 2015, n 229, in GU 11 Nov 2015, n 46.

[97]This right was grounded in the general protection of fundamental rights enshrined in Article 2 of the Italian Constitution.

[98]Constitution of Italy, art 3.

[99]ibid art 31.2.

[100]ibid art 32.

[101]Constitutional Court of Italy, 18 Jun 2019, n 221.

[102]ibid 13.1 *in diritto*.

[103]ibid 13.2 *in diritto*.

[104]ibid 13.1 and 13.2 *in diritto*. The Constitutional Court cites Italian Supreme Court of Cassation, Civil Section, section I, 30 Sep 2016, n 19599, where the Court of Cassation maintained that a same-sex family can provide a suitable environment for raising children. In a previous decision, the Court of Cassation had explicitly stated that the sexual orientation of a couple should not prevent them from forming a family relationship with a child, see Italian Supreme Court of Cassation, Civil Section, section I, 11 Jan 2013, n 601. See also Italian Supreme Court of Cassation, Civil Section, section I, 31 Mar 2021, n 9006. Finally, the Court has reiterated the argument in the judgment section I, 25 Feb 2022, n 6383, where it affirmed that a same-sex couple

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acknowledged the legislature's choice to establish a preference for traditional family formations without demanding thorough justifications. In other words, the decision of the legislature to preclude same-sex couples from accessing ARTs is legitimate and can supersede constitutional jurisdictions precisely because the 'historically entrenched' heterosexual families mirror nature and thus allow children to grow up in a supposedly more congenial environment.

The Court also denied the claim that precluding same-sex couples from accessing ARTs violates the right to equality.[105] It recalled the explicit rationale of the law, that is, to offer the possibility of procreation to *heterosexual* couples who suffer from sterility having a pathological cause.[106] Therefore, it concluded, it is not *any* impediment to procreation that should grant individuals access to ARTs, but only those that are the result of a pathological condition. As same-sex couples are not sterile in a pathological sense, continued the Court, they are not comparable to sterile heterosexual couples. Hence, concluded the ItCC, the law does not discriminate against them.[107]

Tradition, narratives about nature, and conceptions of the well-being of children are woven together in this judgment, which has influenced subsequent case law.[108] The past becomes normative, and tradition for its own sake becomes a valid objective, capable of restricting constitutional rights. As Krygier has highlighted, the past, to be authoritative, can be dressed up with other values such as 'naturalness'. The 'historical' family, the ItCC ruled, can be legitimately preferred by the legislature over 'new' forms of family because the former mimics nature while the latter, by implication, goes against it. The normativity of the past, argued Krygier, is often justified as obvious, natural. In that sense, one could argue that traditions can be presented as a matter of 'common sense'. As Clifford Geertz put it, however, 'common sense is what the mind filled with presuppositions … concludes'.[109] Commonsensical judgments are imbued with a sense of 'naturalness' or 'of-courseness', which is rhetorically powerful, but might also be 'thin'.[110]

The CFA of the Hong Kong SAR provides a rebuttal of this 'of-courseness' approach, asserting – as will be detailed below – that the mere invocation of tradition does not, in itself, constitute a valid argument in judicial reasoning. The ItCC faced such criticism when it claimed that the heterosexual couple is the historically rooted family form and yet failed to demonstrate it. The past is here treated as an evident reality – and hence a powerful one. Finally, the Court stated that it is entirely reasonable for the legislature to believe that this historical and natural family is the ideal setting to raise a child, regardless of the concrete capacity of diverse families to provide an adequate environment to children. The Court does not in fact state that heterosexual families offer better environmental conditions. Rather, the ItCC limits itself to ruling that it is reasonable to believe it. By doing so, the Court seems to establish a 'quasi-religious bond with the past': an attitude that even authors more prone to accept traditionalist argument may find questionable.[111] In short, preserving past family patterns and passing them on to the next generation is imbued with a normative dimension, and hence becomes a reasonable and legitimate public interest despite possibly being problematic, as it may be the case with traditions.[112]

(two men in this case) can legitimately adopt a child with the strongest form of legal protection available, known as 'full adoption' (*adozione piena* or *adozione legitimante*), provided that surrogacy was not involved.

[105]Constitutional Court of Italy, 18 Jun 2019, n 221, 12 *in diritto*.

[106]Law 40 of 2004, arts 1 and 4.

[107]Constitutional Court of Italy, 18 Jun 2019, n 221, 12 *in diritto*.

[108]The case has been cited in the following decisions, all of which concern the recognition of children born to same-sex couples through assisted procreation or surrogacy: Constitutional Court of Italy, 28 Jan 2021, ns 32 and 33, 2.2.1 and 5.4, *in diritto*; Constitutional Court of Italy, 21 Oct 2019, n 237, 3.1.1. *in diritto*; Constitutional Court of Italy, 20 Oct 2020, n 230, 5.2, *in diritto*.

[109]Clifford Geertz, 'Common Sense as a Cultural System' (1992) 50 The Antioch Review 221, 232.

[110]ibid 233–239.

[111]Strauss (n 10) 895.

[112]Krygier, 'Law as Tradition' (n 5) 261.

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Birth certificates and the rights of step-parents

The Court has repeated its position in subsequent judgments. Deciding on the impossibility of registering two women in a same-sex union as mothers of a child conceived abroad via donor insemination, the Constitutional Court ruled once again that two people of the same sex have not a constitutional right to be the legal parents of a child.[113] The Court conceded the legal parenthood 'of a child born via ART is also connected to the "consent" given, and the "responsibility" consequently assumed, by both parties',[114] thus arguably opening up to forms of social parenting. Nevertheless, it also specified that such forms are limited to heterosexual couples by Law 40 of 2004 on ARTs. Explicitly recalling Judgment 221 of 2019 on access to donor insemination, the Court restated the intention of excluding same-sex couples from procreation not only in the law regulating ARTs, but also in the 2016 law on same-sex civil unions.[115] Such laws, the Court considered, were the result of long and careful discussions. They are based on the idea that a family 'that mirrors nature' offers the best environment in which to raise a child, and that the liberty to become parents

> must be balanced against other interests … [and] constitutionally safeguarded, especially when access to ARTs is discussed. [Such technologies create] *new family forms with respect to the paradigms of parenting and family rooted in social culture*, [around which is built the constitutional discipline of the family].[116] (emphasis added)

The Court reiterated the Constitution's neutrality towards the matter. The legislature, the Court explicitly said, is not forbidden to recognise same-sex parenthood. This important first step towards the equality of same-sex couples, however, is occurring in the context of a constitutional jurisprudence that considers same-sex couples non-procreative by definition and legitimately excluded from parental rights precisely because they are non-traditional. At the same time, this decision also confirms once again that the pursuit of traditions is acknowledged as a legitimate, constitutionally safeguarded, public interest.[117] Although Parliament will have to strike a balance among the various interests in tension,[118] the preservation of tradition for its own sake represents a legitimate objective.[119]

More recently, the Court seems to have shown some further openness to same-sex parenthood.[120] This judgment concerns the lack of legal ties between a woman in a same-sex relationship with the children that she and her partner had conceived abroad through donor insemination and whom she had taken care of for years. Despite being conceived as part of the couple's joint family plan, the children were legally related to the delivering mother only. When the relationship between the two women broke down, the non-birthing mother was denied contact with the children. Although parents in same-sex relationships may pursue stepparent adoption under certain circumstances,[121]

[113] Constitutional Court of Italy, 21 Oct 2019, n 237, in GU 20 Nov 2019.

[114] ibid 3.1.1. in diritto.

[115] ibid 3.1.1. *in diritto*.

[116] Constitutional Court of Italy, 20 Oct 2020, no 230, in GU 11 Nov 2020, 6 *in diritto*, citing no 221/2019.

[117] ibid 7 *in diritto*.

[118] ibid 8 *in diritto*.

[119] The Court of Cassation appeared to have shifted away from the paradigm of preserving a traditional family form. In its judgment section I, 30 Sep 2016, no 19599, the Court asserted that the rule stipulating that the mother is defined as the person who has given birth to the child (Article 269, section 3 of the *Civil Code*) does not constitute a fundamental principle of constitutional value. Consequently, a foreign birth certificate indicating that the child has two mothers is considered valid in Italy when the child indeed has two biological mothers: the one who carried the child and the other who donated the egg. In a later decision the same court reached a similar conclusion, denying the recognition of a birth certificate listing two mothers when no biological link could be established with one of the two; see Italian Supreme Court of Cassation, Civil Section, section I, 4 Apr 2022, no 10844.

[120] Constitutional Court of Italy, 28 Jan 2021, n 32 in GU 10 Mar 2021, n 32.

[121] See Italian Supreme Court of Cassation, Civil Section, section I, 22 Jun 2016, no 12962, where the Court stated that the sexual orientation of the adopter is irrelevant for the purposes of adoption in special cases. Adoption in special cases, as per

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the procedure is complex, not guaranteed, and, at any rate, dependent on the consent of the legal parent – which, in this case, was not forthcoming. This difficult situation would not have presented itself had the law consented to both mothers being registered on the birth certificate. The applicant, therefore, contested the rules that posit that the parents must be of different sexes for parenthood to be recognised.

In this specific case, the Court acknowledged that children born to same-sex couples via ARTs may face discrimination *vis-à-vis* other children, as they are ultimately not guaranteed the possibility of establishing legal relationships with both the biological and the intentional parent.[122] The Court stressed that, 'departing from the traditional notion of the family', 'social parenthood' – and not just biological parenthood – deserves protection.[123] Hence, the ItCC invited Parliament to provide a solution for this complicated scenario by way of legislation. The Court considered that this question is 'ethically sensitive' and concluded that a jurisprudential correction of the legislation would run the risk of generating legal inconsistencies in the system.[124] Yet this decision, while certainly promising, is entirely motivated by the protection of the rights of children. The denial of reproductive rights to same-sex couples for traditional reasons remains, in this sense, unchallenged[125].

The empirical problems with – and the rhetorical advantage of – traditional thinking

Traditionalist thinking appears to offer a rhetorical advantage, as it taps into seemingly powerful 'commonsensical' reasoning. Nevertheless, this type of reasoning can be challenged empirically. In particular, references to tradition by the ItCC seem to oversimplify at least three key issues: (1) that the family model protected by the ItCC dates back 'thousands of years', presenting it – rhetorically, if not literally – as immutable over time; (2) that this model mirrors nature; and (3) that heterosexual families are the ideal environment in which to raise a child.

The 'thousands of years old' family

The Court's use of tradition seems to be rather selective. As Krygier clarified, 'the past is not univocal in complex traditions',[126] yet the ItCC satisfied itself with stating the existence of a tradition without supporting the assertion with sufficient historical and empirical data. This is problematic in a context such as that of the history of the development of family models, where it has been documented that families are far from immutable over time.

In fact, the formation and structure of the family may change according to the varying social, economic, and cultural circumstances. Stephanie Coontz argued that the monogamous and nuclear

Article 44, paragraph 1, letter d) of Law 184 of 1983 does not assume a situation of abandonment of the adoptee and can be ordered when it is concretely verified that the minor's interests lie in the recognition of an emotional relationship already established and consolidated with those who take care of them. The Court has clarified that the decision to grant full adoption to same-sex parents is a discretionary legislative choice; see Italian Supreme Court of Cassation, Civil Section, section I, order, 11 Nov 2019, no 29071.

[122]Constitutional Court of Italy, 28 Jan 2021, n 32, 2.4.1.3. *in diritto*.

[123]ibid 2.4.1.1. *in diritto*.

[124]ibid 2.4.1.3. *in diritto*.

[125]At the final stages of this Article's production, the ItCC issued Judgment 10 Mar 2025 n 68, recognising the right of a child born in Italy – following assisted reproduction performed abroad in accordance with the *lex loci* – to a woman, with the consent of her female partner within a shared parental project, to be legally recognised as the child of both women. The Court's reasoning focuses on the best interests of the child and does not alter the existing case law on access to ART in Italy. While reaffirming that sexual orientation is not constitutionally disfavoured and therefore cannot be presumed incompatible with parenting, the Court does not mandate legislative changes to the law on ART access. In this regard, the judgment is fully consistent with the decision discussed earlier in the text. This doctrine was arguably reinforced with Decision 21 Jul 2025, n 115, where the Constitutional Court ruled that paternity leave should be granted to the intentional mother in a lesbian couple. Further research will be needed to assess the impact of these decisions on the traditionalist take of the Constitutional Court.

[126]Krygier, 'Law as Tradition' (n 5) 242.

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heterosexual family is a relatively new and, all in all, unusual family formation.[127] With specific reference to the Italian context, Marzio Barbagli showed how Italian families have changed over the course of Italian history.[128] A multitude of factors can account for such changes, including social class, ownership of the means of production (perhaps most notably, agricultural land), different farming systems, as well as the size of the farmed land plot. Equally important has been the location – whether urban or rural – of the family. Granted, the nuclear family has been present for a long time in Italy. Yet, Barbagli suggested, its radical prevalence dates back only to the 1950s, following mass industrialisation.[129]

Of course, this is not to say that LGBTQI+ families were a common and accepted reality of the past. In their current form, they may well also be a recent development. It is, however, irrelevant whether they belonged to the past or not, as we do not intend to point to some forgotten family archetype that would legitimise current family arrangements. What we want to emphasise is that the idea that the currently predominant family model is immutable and perennial might be misleading, as families tend to adapt and change over time.

The family in the image of nature

References to the 'image of nature' (*instar naturae*) that the heterosexual nuclear family presumably 'mirrors' are equally problematic.[130] Such references are a particularly important feature of traditionalist argumentation, where 'nature' and 'tradition' are often lumped together in an attempt to reinforce the normativity of the past. However, the Italian Court remains vague about what it means by appealing to the 'image of nature', treating it as a seemingly self-evident notion. To be clear, there is no question that it takes both a male and a female gamete to produce a child. But claiming solely on this basis – without adequate discussion – that only a single form of family organisation is in the image of nature is simplistic and disregards, if not contradicts, the findings of anthropology. To begin with, assuming that a kinship structure that centres on biological ties is, so to speak, more faithful to nature because it is grounded in the science of reproduction seems to be itself a cultural attitude. These assumptions are challenged by the relatively novel and momentous appearance of ARTs and the questions that they present to established notions of kinship. In fact, Marilyn Strathern argued that the advent of ARTs has complexified the Western understanding of kinship and revealed its cultural basis.[131]

ARTs have empowered (among others) people who are not of a procreative age and/or not heterosexual. For example, same-sex couples have largely benefited from ARTs.[132] Same-sex couples are now able to have children with a biological connection to one, and possibly even to two, parents. Corinne Hayden offered the 'obvious and "perfect" option for lesbian families: One woman could contribute the genetic material, and her partner could become the gestational/birth mother'.[133] These new technologies challenge the very notion of same-sex couples as non-procreative.[134] Likewise,

[127]Stephanie Coontz, *Marriage, a History* (Viking Press 2005); Stephanie Coontz, *The Way We Never Were: American Families and the Nostalgia Trap* (Basic Books 1992).

[128]Marzio Barbagli, *Sotto lo Stesso Tetto. Mutamenti della Famiglia in Italia dal XV al XX Secolo* (il Mulino 2013).

[129]ibid 22–27 and 119–121.

[130]Constitutional Court of Italy, 18 Jun 2019, n 221, 13 *in diritto*. We thank our language editor, Dr Brian Donahoe, for this translation suggestion, which is evocative of Biblical language.

[131]Marilyn Strathern, 'Displacing Knowledge: Technology and the Consequences for Kinship', in Faye D Ginsburg & Rayna Rapp (eds), *Conceiving the New World Order: The Global Politics of Reproduction* (University of California Press 1995).

[132]Needless to say, LGBTQI+ people found ways to procreate even before the widespread access to ARTs.

[133]Corinne Hayden, 'Gender, Genetics, and Generation: Reformulating Biology in Lesbian Kinship' (1995) 10 Cultural Anthropology 41, 55. In practice, one could think of an embryo, generated with the sperm of a donor and the egg of one partner in a lesbian couple, being implanted in the uterus of the other partner. Although the connection would not be genetic to both parents, it is debatable whether it would not be biological in a broader sense.

[134]See Linda Stone & Diane E King, *Kinship and Gender. An Introduction* 269 (6th edn, Routledge 2019).

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developments in ARTs further problematise the correlation between sexual intercourse, procreation, and kinship, and 'generate a number of questions about the founding truth constituting a family'.[135] ARTs can also lead to problematising the nuclear family built around the couple as the only site of reproduction. Multiple parties, all possibly longing for a connection to the child, can be involved.

ARTs have created many opportunities to rethink kinship beyond the nuclear and, obviously, heterosexual family. It seems clear that implying that other forms of procreation are 'unnatural' would leave the legislature – as well as the Court itself – theoretically ill-equipped to deal with what are undeniable challenges ahead, and stuck in a binary thinking of normality and abnormality that ultimately fails to capture the complexity of reality. In addition, the Court itself seems to apply the likeness to nature selectively. As noted earlier, the ItCC has ruled that the exclusion of donor insemination for heterosexual couples is unconstitutional, thus allowing heterosexual couples to establish parental links when only one parent is biologically related to the child and, potentially, neither parent is related to it genetically.

At any rate, one does not need ARTs to question the 'traditional' young heterosexual couple's likeness to nature. Ladislav Holy clarified that '[k]inship theorists now generally acknowledge that the nuclear family is neither universal nor inevitable',[136] adding that 'assum[ing] that each person is immediately genealogically connected to two others … does not mean that one has to assume that the unit from which kinship is built is the nuclear family'.[137] Referring specifically to the perceived novelties in family arrangements, Marie-Claire Foblets has argued that '[family] diversity is nothing new'.[138] Families have always taken multiple forms, essentially to accommodate a variety of sociocultural needs. Foblets refers to 'blended families, same-sex unions, the role of fathers, and the alleged sexual permissiveness of contemporary Western societies', and points out how ethnographers have not only documented these, but also connected them to social institutions and other political, religious, or economic considerations.[139]

A few examples may help to understand how the conception of the heterosexual nuclear family is culturally situated, far from representing a natural archetype. Godelier, for one, argued that the notion of parenthood – and, we add, subsequent identification of the parent – can be split into seven 'fields',[140] of which only begetting and bearing are, strictly speaking, biological. In general, he added

[135]Anne Cadoret, 'The Contribution of Homoparental Families to the Current Debate on Kinship', in Jeanette Edwards & Carles Salazar (eds), *European Kinship in the Age of Biotechnology* 79, 81 (Bergahn Books 2009).

[136]Ladislav Holy, *Anthropological Perspectives on Kinship* 33 (Pluto Press 1996)

[137]ibid 35.

[138]Foblets (n 6).

[139]ibid. The law – including at the constitutional level – clearly distinguishes between breadwinners (men) and caregivers (women), a division that was largely accompanied by a 'naturalising' portrayal of masculinity and femininity that could fit within a heterosexual understanding of the family. It is not by chance that the introduction of same-sex marriage in many jurisdictions the world over has shaken the very foundations of this structure. See Ruth Rubio-Marín, *Global Gender Constitutionalism and Women's Citizenship* (Cambridge University Press 2022) 279.

[140]The seven fields identified by Godelier ((n 8) 222) are labelled:

'1. Begetting and/or bearing.

2. Nurturance, upbringing, protection.

3. Training, teaching, educating.

4. Having rights and duties towards the child. Being considered by society as responsible for the child's acts and accepting this responsibility.

5. Endowing the child at birth with a name, a social status, rights, etc. In the framework of kinship relations as well as in other social relations (son of a Brahmin, a peasant, etc.).

6. Having the right to exercise certain forms of authority over the child and to punish. Expecting certain forms of obedience, respect, even affection.

7. Observing a prohibition on (homo- or hetero-) sexual relations with the child. Applies to those kin for whom this would be incest or improper sexual conduct.'

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that 'there is nothing mechanical about the correspondences between kinship relations, forms of power, and representations of what makes up the identity of a gendered individual'.[141]

To be clear, we do not intend to argue in favour of family diversity by resorting to 'nature'. Rather, we draw on anthropological studies to question the supposed naturalness of the family as described by the ItCC, showing instead that family forms are diverse and context-dependent.[142] We want to emphasise that the structure of the family is not so self-evident as traditionalist thinking might suggest, and that it cannot be found in 'nature'. Kinship and kinship rules – what individuals can or cannot do *vis-à-vis* specific others, and therefore also which individuals are related to one another – are indeed 'mental realities … that are by no means an epiphenomenon of kinship relations but one condition of their production'.[143] Or, to borrow from Claude Levi-Strauss, '[a] kinship system does not exist in the objective ties of descent or consanguinity between individuals. It exists only in human consciousness; it is an arbitrary system of representations, not the spontaneous development of a real situation'.[144] Kinship and, for our purposes, the family, seem therefore to be cultural constructions. To be sure, there is no denying that biological links, genetic connections, and so forth, exist. Yet the value that we assign to those links, what one does with them, and the weight one attributes them in the law seem to be cultural and, of course, political.

The best start in life

The Constitutional Court determined that, in excluding same-sex couples from ART, Parliament might have reasonably believed it was serving the purpose of giving children the 'best start in life'. As noted earlier in the article, the Court has never established that being raised by a heterosexual family does, in fact, provide the best start in life. Rather, the Court avers that it is not unreasonable to believe so. It thus allows the legislature to prevent homosexual couples from pursuing a family project through heterologous fertilisation, a possibility that is now open to heterosexual couples.[145]

However, anthropological findings show 'the paternal and maternal functions can be ensured by persons with no genetic or other link with the child',[146] something that the ItCC is willing to concede,[147] but also that 'the paternal functions are not necessarily attached to a person of the male sex nor the maternal functions to a person of the female sex'.[148] Drawing on a wealth of ethnographic studies, Foblets suggested that 'a child can have a balanced upbringing in any family model'.[149] Adding to ethnographic observations, research in family studies supports Foblets' conclusions. Taking stock of decades of research, sociologist Susan Golombok has demonstrated that children born via ARTs in LGBTQI+ families are not at a disadvantage *vis-à-vis* those born in so-called traditional families. Needless to say, this does not 'mean that all children in new family forms flourish. But it does mean that they have an equal chance of doing well'.[150]

The ItCC seems aware of that when it maintains that 'there are no scientific certainties or empirical data which prove that including a child in a family composed by a same-sex couple can negatively

[141] ibid 225. Particularly instructive for understanding the variability of the notion of the 'natural' family are the differences in kinship terminologies. Among the Baruya of Papua New Guinea, for example, the 'father's brothers are all fathers for the child, and … their children are brothers and sisters'. One famous case is, of course, the 'woman marriage' described by Edward E Evan-Pritchard in his ethnography of the Nuer, whereby a woman – usually sterile – 'marries another woman and counts as the pater of the children born of the wife'. See Edwards E Evans-Pritchard, *Kinship and Marriage Among the Nuer* (Clarendon Press 1951) 108.

[142] Osella (n 6) 928.

[143] Godelier (n 8) 79.

[144] Claude Levi-Strauss, *Structural Anthropology* (Basic Books 1963) 50, cited in Holy (n 136) 15.

[145] Constitutional Court of Italy, 18 Jun 2019, n 221, 13, and Constitutional Court of Italy, 28 Jan 2021, n 32, 2.2.1 *in diritto*.

[146] Godelier (n 8) 551.

[147] Constitutional Court of Italy, 28 Jan 2021, n 32, 2.4.1.1 *in diritto.*

[148] Godelier (n 8) 551.

[149] Foblets (n 6) 541.

[150] Golombok (n 9) 251.

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affect the upringing or development of the child's personality'.[151] Yet, having presumed that the heterosexual family model remains the traditional benchmark to be preserved, the Court fails to conclude that all family forms deserve equal legal recognition. Again, our point here is not to reinvent the historical, anthropological, or sociological literature on kinship and filiation. Rather, we seek to underline how, by invoking the notion of 'tradition', the Court sidesteps meaningful engagement with this body of scholarship, leaving unexamined its departure from evidence that contradicts such traditionalist assumptions.

The jurisprudence of the CFA, or, the conceptual critique to traditionalist adjudication

The critiques discussed earlier are thorough, highlighting both the empirical weaknesses and the rhetorical appeal of traditionalist reasoning. Yet even these evidence-based critiques can occasionally fail to fully grapple with the deeper questions surrounding the justification of traditionalism.

Here, the CFA of Hong Kong, despite some changes in recent case law,[152] offers an incisive logical challenge to the reliance on tradition in adjudicating the rights of same-sex couples. The CFA's questioning of tradition as a legitimate objective, in and of itself, for limiting the rights of same-sex couples is grounded in a demand for reasoned justification. The Court's rejection of traditional thinking developed over time and was affirmed in *Sham Tsz Kit* (岑子杰) *v Secretary for Justice (No 1)* (henceforth 'STK'), which concerned the right of same-sex couples to be legally recognised.[153] In this judgment, the CFA confirmed constitutional neutrality on the issue of equal marriage, which Hong Kong's *Basic Law* – the Territory's 'Mini-Constitution', as it is usually referred to[154] – was found to neither require nor prohibit. In that same judgment, the CFA ordered the Hong Kong Government to define, at a minimum, a framework for recognising the relations of same-sex couples.[155] Whatever the merits of this decision – which, despite all its lights and shadows, can be hailed as a significant achievement for LGBTQI+ people in Hong Kong – the CFA in *Sham Tsz Kit* clearly demonstrated a non-traditionalist attitude to the question of same-sex marriage.

In all fairness, it should be noted that the CFA itself has not always been completely consistent in its challenge to tradition. For example, Michael Ng has demonstrated not only that the CFA recalled notions of tradition when deciding on the effects of marriage and concubinage taking place during the Republican era, but, more importantly, that it misunderstood such notions and offered an 'Orientalist image of traditional Chinese law and custom'.[156] Marco Wan has made a compelling

[151]Constitutional Court of Italy, 18 Jun 2019, n 221, 13.2 *in diritto*; and Constitutional Court of Italy, 28 Jan 2021, n 32, 2.4.1.3 *in diritto*.

[152]*Infinger v The Hong Kong Housing Authority* [2024] HKCFA 29. For a thorough discussion of the case law on LGBTQ+righs in Hong Kong, see Rehan Abeyratne, *Courts and LGBTQ+ Rights in an Age of Judicial Retrenchment* (Oxford University Press 2025) 171-231.

[153][2023] HKCFA 28, (2023) 26 HKCFAR 385.

[154]For a general introduction on the constitutional system of the Hong Kong SAR, please refer to Albert Hung-Yee Chen & Po Jen Yap, *The Constitutional System of the Hong Kong SAR: A Contextual Analysis* (Hart Publishing 2023).

[155]At the time of writing (October 2025), no legislative measure implementing the *Sham Tsz Kit* judgment has been enacted. During the final stages of this article's production, the Hong Kong Government introduced the Registration of Same-sex Partnerships Bill to the Legislative Council ('LegCo') on 16 July 2025. The Bill was voted down by LegCo on 10 September 2025. The Government has since announced that it is considering 'administrative measures to protect the rights of same-sex couples' (Connor Mycroft and Matthew Cheng, 'Hong Kong to Seek Administrative Measures to Protect Same-sex Couple Rights' (*South China Morning Post*, 16 September 2025) <https://www.scmp.com/news/hong-kong/politics/article/3325687/hong-kong-seek-administrative-measures-protect-same-sex-couples-after-bill-defeat> accessed 20 October 2025). These legislative developments invite further research that cannot be conducted here.

[156]Michael Ng, 'Judicial Orientalism: Imaginaries of Chinese Legal Transplantation in Common Law', in Yun Zhao & Michael Ng (eds), *Chinese Legal Reform and the Global Legal Order: Adoption and Adaptation* (Cambridge University Press 2017) 211, 214–215.

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argument on the invention of tradition in the Hong Kong public and judicial discourse about same-sex marriage.[157] Generally speaking, however, there has been considerable improvement in the rights of LGBTQI+ people, especially when we consider the central role of religious institutions in the provision of services.[158] It should also be noted that Article 141(3) of the Hong Kong Basic Law in fact allows religious organisations to 'run seminaries and other schools, hospitals, and welfare institutions and to provide other services' in continuation of their 'previous practice', as long as this 'previous practice' involves their freedom of religious belief and activity.[159] The extent to which this provision might imply consent to the prosecution of traditional (and possibly discriminatory) practices remains to be investigated.

There is no denying, Wan suggests, that the Hong Kong courts have repeatedly resorted to traditionalist logics when it comes to LGBTQI+ rights.[160] In the 2017 *QT* case, the Court of Appeal of the Hong Kong SAR granted to the applicants – an overseas same-sex couple in a civil partnership – a dependant visa. Despite the outcome – favourable to the applicant – Cheung CJHC argued that '[t]here are certainly areas of life which are, whether by *nature* or by *tradition* or *long usage*, closely connected with marriage such that married couples should and do enjoy rights and shoulder obligations which are *unique* to them as married people' (emphasis added).[161] Under this 'uniqueness doctrine', the government only has to justify restricting the rights of same-sex couples when these rights are not among the rights and obligations that are 'unique' or inherent to married couples – in other words, as long as the difference in treatment is not rooted in the 'nature, tradition, or long usage' of the practice of heterosexual marriage. If the right under discussion is among the latter (as determined by nature, tradition, or long usage), the need for justification seemingly did not apply.[162]

Judging on the appeal of the case, however, the CFA rejected the uniqueness argument and stated:

> *Why* [emphasis in the original] should [a certain] benefit be reserved uniquely for married couples? Is there a fair and rational reason for drawing that distinction? *Differences in treatment to the prejudice of a particular group require justification and cannot rest on a categorical assertion.*[163] (emphasis added)

Interestingly, the CFA stated that '[w]hat may seem obvious to some may not be at all clear to others'.[164] In other words, it can be argued that the CFA in *QT* denied the possibility that 'nature', 'tradition', or 'long usage' could exempt the government from justifying the unequal treatment of same-sex couples.

At the same time, however, the protection of 'traditional marriage' – with all the theoretical questions that such a notion presents – remained a legitimate objective. This was expressed clearly by the CFA in the 2019 decision in *Leung Chun Kwong v Secretary for Civil Service*, a case on the exclusion of an overseas married same-sex couple from tax benefits available to married heterosexual couples.[165] Recalling the rejection of the uniqueness argument, the CFA also stated that restricting rights to married couples simply because they are married is circular reasoning. It further stressed that acknowledging that preserving the traditional marriage is a valid goal does not logically lead to

[157] Wan, 'The Invention of Tradition' (n 10).

[158] Amy Barrow & Joy Chia, 'Pride or Prejudice: Sexual Orientation, Gender Identity and Religion in Post-Colonial Hong Kong' (2016) 46 Hong Kong Law Journal 89.

[159] *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754 (HKCFA).

[160] Marco Wan, 'Sexual Orientation and the Historiography of Marriage in Leung Chun Kwong v Secretary for the Civil Service' (2018) 48 Hong Kong Law Journal 605, 605–606.

[161] *QT v Director of Immigration* [2017] 5 HKLRD 166 (HKCA) [14].

[162] For such an interpretation, see Kai Yeung Wong, 'An Incomplete Victory: The Implications of QT v Director of Immigration for the Protection of Gay Rights in Hong Kong' (2018) 81 Modern Law Review 874, 879–880.

[163] *QT v Director of Immigration* [2018] HKCFA 28, (2018) 21 HKCFAR 324 [66].

[164] ibid [67].

[165] *Leung Chun Kwong v Secretary for Civil Service* [2019] HKCFA 19, (2019) 22 HKCFAR 127 [62].

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the conclusion that same-sex couples should be denied equal tax and benefit rights. Furthermore, it held that there is no clear connection between restricting the rights of same-sex couples and promoting heterosexual marriage.[166] To put it plainly, differential treatment still needed to be justified, even though the preservation of tradition was considered a legitimate objective. There was, we suggest, a contradiction within the case law. As Wan put it, the preservation of traditional marriage remained good law. However, the traditionalist thinking that supported the 'uniqueness' doctrine was considered circular.

The 2023 decision in the *Sham Tsz Kit* case – concerning the possibility of recognising same-sex marriage and alternative forms of same-sex unions – assumed an even more critical stance towards traditionalism. In fact, the main opinion offered by Ribeiro PJ and Fok PJ seems to represent a further step away from using tradition as a legitimate objective *per se* to limit the rights of same-sex couples.[167] The Secretary for Justice – the respondent in the case – contended that denying recognition to same-sex couples 'in stable, committed, relationships' had the legitimate aim of 'uphold[ing] and maintain[ing] the *uniqueness and tradition* of marriage as an institution, and as a concept, involving heterosexual couples only *and the traditional family founded thereon*' (emphasis added), thus justifying the difference in treatment.[168] The protection of same-sex relations would, the respondent advocated, challenge the unique status that heterosexual marriage has traditionally enjoyed.[169]

The Secretary for Justice's argument was unsuccessful. We read in the opinion of the Court that 'in any event' this 'uniqueness' argument is 'circular and not a basis for establishing a legitimate aim'.[170] This entails that recognition of same-sex couples, though in a form different from marriage, cannot be denied because of a threat to traditional marriage *per se*. The pursuit of tradition, in other words, was not deemed to satisfy the first limb of the proportionality test. The mere fact that a practice occurred in the past and has been transmitted across generations with a particular normative intent arguably was not, by itself, considered to be a legitimate objective to restrict a *prima facie* right. The philosophical critique of traditionalism seems to be well-reflected in this approach. As Jímenez put it, '[a]s a normative matter, we can never be bound to honor the past just because it is the past'.[171] A different justification is required.

In November 2024, the CFA appeared to have tempered the doctrine developed in *Sham Tsz Kit* in *Infinger v The Hong Kong Housing Authority*.[172] With this judgment, the CFA has granted people in same-sex unions equal rights to receive housing benefits designed for low-income families. At the same time, the CFA stressed that '[t]here is no dispute that the Family Aim [that is, the support of 'existing traditional families'] is a legitimate aim as such',[173] seemingly distancing itself from *Sham Tsz Kit* and reaffirming the position of *Leung Chun Kwong*. It should, however, be noted that the parties did not dispute the legitimacy of the 'family aim' before the CFA; therefore, the proclaimed

[166] *Leung Chun Kwong v Secretary for Civil Service* [2019] HKCFA 19, (2019) 22 HKCFAR 127 [72].

[167] These criticisms are varied. The opinions presented here were expressed orally at a seminar at the Faculty of Law of The University of Hong Kong on 7 November 2023. Cora Chan and Po Jen Yap highlighted doctrinal shortcomings in the majority and minority opinions, respectively. Kelley Loper underlined the poor equality-based reasoning of the majority opinion (see, with reference to the previous stage of the decision, Kelley Loper, 'Equality, Dignity, and Same-sex Marriage: Reflections on Developments in Hong Kong' (2023) 51(1) Hong Kong Law Journal 37). To date, these criticisms have not yet been published.

[168] *Sham Tsz Kit (岑子杰) v Secretary for Justice (No 1)* [2023] HKCFA 28, (2023) 26 HKCFAR 385 [193].

[169] For a very clear explanation and critique of the 'uniqueness' argument, see Wong (n 162) 879.

[170] *Sham Tsz Kit (No 1)* [194].

[171] Jiménez (n 10) 37.

[172] On the same day, the CFA also decided *Li Yik Ho v Secretary for Justice* [2024] HKCFA 30 and protected inheritance rights within same-sex couples married overseas. This decision recognises a consequential right to same-sex couples. As this case does not discuss the question of traditionalism, we decided not to include it. The fact that the question of the protection of the traditional family was, however, not addressed in the decision might indicate a movement of the CFA towards non-traditionalist positions. Yet this question remains to be investigated.

[173] *Infinger* [55]–[57].

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legitimacy of the 'family aim' should probably read as an *obiter dictum*.[174] Furthermore, the CFA did not show a particular propensity to traditionalism in the reasoning. For instance, Chief Justice Cheung, who drafted the unanimous decision, acknowledged that same-sex families were not considered when the Basic Law was drafted in the 1990s, as the question was 'non-existent'.[175] However, he also added that this fact does not imply that the drafters of the Basic Law intended to deny equality – specifically, welfare rights – to same-sex couples.[176]

On the same day, the CFA rendered one more decision in *Li Yik Ho v Secretary for Justice*.[177] This case concerned the inheritance rights of persons in same-sex couples married overseas. The CFA did not discuss the question of traditionalism. Nevertheless, it stated that limiting rights to married heterosexual couples based on the special status of marriage under the Basic Law is circular reasoning.[178] Although not expressly cited, the CFA's rejection of the uniqueness argument – and of its traditionalist overtones – arguably resonates in this conclusion.

In conclusion, it can be argued that the non-traditionalist approach remains good law before the CFA. Research, however, is needed to confirm this with greater certainty, especially in light of the ongoing developments. What is crucial for our argument is that the intellectual cogency of the CFA's reasoning in *Sham Tsz Kit*, and the sharpness of its critique, remain intact, particularly with respect to each of its components. Where the Hong Kong CFA appealed to 'long usage', the ItCC relied on 'historical' models of family rooted in Italy or the 'thousands of years old' conception of marriage. Both the Hong Kong CFA and the ItCC also invoked 'nature' to justify differences in treatment. Finally, the 'commonsensical' attitude to the subject of law, and the 'of course-ness' – the sense that the Court should decide in one sense or another as a matter of self-evidence – is considered in both cases. What seems to differ entirely is the acceptance of these elements for their own sake.

Conclusions

Courts are often confronted with novel issues for which no straightforward legal solution is available. In those cases, invoking tradition can be an argumentative move that helps legitimise decisions in a context in which more than one legal answer is conceivable. Nevertheless, relying on traditions is far from straightforward: they are hard to pin down and demonstrate, logically questionable, and, at the end of the day, give a significant advantage to those who oppose granting equal treatment to groups that, for whatever reason, were *traditionally* discriminated against.

In the Italian case, the ItCC does not engage with historical records or evidence. Instead, it simply asserts the existence of a traditional family in the 'image of nature' dating back millennia, and defends the weight that such tradition carries when judges choose arguments that will justify their decisions. The ItCC entertains a normative argument whereby supposedly traditional families (heterosexual couples, preferably married and with children) are favoured over new ones (same-sex couples with or without children). Yet, it does not provide convincing evidence to back up such argument. Rather, it maintains a rhetoric of 'of-courseness', which ultimately fails to be persuasive from a legal standpoint.[179]

The devotion to a binding (and questionable) past explains why the ItCC contends – without explaining the contradiction – that beliefs and behaviours change (thus calling for law to recognise and protect them), and yet these beliefs and behaviours cannot be accommodated if doing so entails

[174]We thank Cora Chan for making this suggestion during the seminar 'LGBTQI+ Rights in Hong Kong: Steps Forward and Open Questions', organised by the Centre for Comparative and Public Law at the Faculty of Law of The University of Hong Kong (14 Jan 2025).

[175]*Infinger* [40].

[176]ibid [40]–[41].

[177]*Li Yik Ho v Secretary for Justice* [2024] HKCFA 30.

[178]ibid [35].

[179]Constitutional Court of Italy, 28 Jan 2021, n 32 and 33; Benedetta Liberali, 'L'importanza delle parole e della tecnica decisoria in due recenti pronunce della Corte costituzionale in materia di omogenitorialità' [2021] Studium Iuris 1193.

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overriding the tradition. For example, the ItCC acknowledges that same-sex couples are fully capable of taking on the role of parents – something for which it deserves credit. However, it still defers to the legislature and does not grant them equal access to parenthood, for reasons entirely related to the traditional understanding of the concept of family.[180] The ultimate effect of this approach seems thus not to be to persuasively defend the preference for the heterosexual family model on its merits[181] but, through a rhetorical move, to avoid having to provide such a justification.

For its part, the CFA of the Hong Kong SAR challenges, despite some contradictions, the use of tradition as a conclusive argument. According to the Court in *Sham Tsz Kit* and in the contestation of the 'uniqueness' doctrine, differential treatment necessitates a rational justification, whereas resorting to tradition or long usage merely provides a dogmatic answer rooted in the subjective preference for one model over the other. In this sense, the CFA questions the use of tradition as the determinant of the correctness of the legal solution. The Hong Kong CFA – perhaps unwittingly – elaborates the most severe criticism of the Italian case law, as it exposes the circularity inherent in traditional thinking, thereby undermining it at its very roots.

This comparison between the ItCC and the CFA in no way provides a full picture of the uses of traditionalist thinking in legal reasoning. It does, however, offer some insights into different ways of addressing the legal relevance of traditions. In so doing, this article tries to heed Sherally Munshi's call to expand beyond Eurocentric frameworks and foster an enriching dialogue between systems that are indeed very different but that should not, for that reason alone, be avoided when it comes to comparative analyses.[182]

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[180] In particular, Constitutional Court of Italy, 18 Jun 2019, n 221.

[181] For an example of such an approach, see Ron Crews, 'No Court Ruling Can Change the Fact that Marriage is About One Man and One Woman', in Robert M Baird & Stuart E Rosenbaum (eds), *Same-sex Marriage: The Moral and Legal Debate* (2nd edn, Prometheus 2004) 99, 100.

[182] Sherally Munshi, 'Comparative Law and Decolonizing Critique' (2017) 65 American Journal of Comparative Law 207.

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