QUEERING COURTS

# Queering Courts

Analysing equal marriage rights cases before the European Court of Human Rights, the Court of Justice of the European Union and the United States Supreme Court

Masuma Shahid

WJS UITGEVERS

Omslagontwerp: Nick van Silfhout, Den Haag
Opmaak binnenwerk: Textcetera, Den Haag



ISBN 978-90-834798-7-3
NUR 820

wjs-uitgevers.nl

*To my parents and my brother, for whom I do all that I do.*

# List of acronyms and abbreviations

| | |
|---|---|
| APA | American Psychiatric Association |
| BLAG | Bipartisan Legal Advisory Group |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CFI | Court of First Instance |
| CJEU | Court of Justice of the European Union |
| CoE | Council of Europe |
| CST | Civil Service Tribunal |
| Ct. | Court |
| CRD | Citizenship Rights Directive |
| DEI | Diversity, Equality and Inclusion |
| DOMA | Defense of Marriage Act |
| DSM | Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association |
| EC | European Community |
| EEC | European Economic Community |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| IACtHR | Inter-American Court of Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESC | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Commission of Jurists |
| IRS | Internal Revenue Service |
| LGBTQ+ | Lesbian, Gay, Bi, Trans, Queer+ |
| OJ | Official Journal of the European Union |
| PACS | *pacte civil de solidarité* |
| RFMA | Respect for Marriage Act |
| SOGI | Sexual Orientation and Gender Identity |
| TEU | Treaty on the European Union |
| TFEU | Treaty on the Functioning of the European Union |
| VCLT | Vienna Convention on the Law of Treaties |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNCAT | United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |

| | |
|---|---|
| UNCRC | United Nations Convention on the Rights of the Child |
| UN IE SOGI | United Nations Independent Expert on Protection from Violence and Discrimination Based on Sexual Orientation and Gender Identity |
| US Supreme Court | United States Supreme Court |
| YP+10 | Yogyakarta Principles Plus 10 |

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# 1 Introduction

**'All animals are equal, but some animals are more equal than others.'**

— *George Orwell ('Animal Farm,' 1945)*

## 1.1 Introduction

**'No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law.'**

These are the famous last words of the majority opinion in the 2015 *Obergefell* v. *Hodges* ruling of the United States Supreme Court (US Supreme Court) that legalised same-sex marriage in all fifty states.[1] Ever since the Netherlands opened up civil marriage to same-sex couples in 2001, there have been almost forty countries around the world that have done the same.[2] While most of these decisions were made through legislative action, same-sex petitioners have increasingly also turned to the highest judicial bodies, such as supreme or constitutional courts and even regional and international courts. Considering marital status is an individual state competence, these highest courts have often been approached by same-sex couples as a last resort to obtain marriage equality, the recognition of foreign concluded marriages or 'equal marriage rights,' i.e. the numerous rights and benefits that are connected or associated with marriage and/or the legal recognition of relationships of same-sex couples.[3] Some courts decided in favour of the applicants, others were deferential to states and their legislature to decide

1 *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015).
2 At the time that this book went to print, these countries were: Andorra, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Denmark (including Greenland), Ecuador, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, Mexico, The Netherlands, New Zealand, Norway, Portugal, Slovenia, South-Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, The United Kingdom, The United States, and Uruguay.
3 This term is further explained in paragraph 1.2.1.

on the matter. Considering the outcomes of cases were quite dissimilar,[4] the question is raised as to why this is the case and how such courts approach the topic. How is it that in some cases before some courts equal marriage rights play a significant role in the decision-making process and the minority rights of same-sex couples are protected against discrimination on grounds of 'sex,' 'gender,' 'sexuality' or 'sexual orientation,' while in other cases other factors play a bigger role and cases are won by states? In times in which there is a noticeable backslide[5] in LGBTQ+[6] rights protection and anti-gender movements targeting the LGBTQ+ community are increasing,[7] do courts exercise judicial restraint in order not to meddle with the competences of the (state) legislature or do they actively choose to protect and advance human rights (in this case, equal marriage rights), especially because there are (LGBTQ+) minorities involved?

## 1.2 Research focus, question and choices

### 1.2.1 The focus of the book

The research in this book focuses on equal marriage rights and how accessible they are for same-sex couples. 'Equal marriage rights' is to be understood as an all-encompassing notion for the numerous rights and benefits that are connected or associated with marriage and/or the legal recognition of same-sex relationships. Though the research is focused on the rights and benefits for same-sex couples, it occasionally also discusses court cases on the rights of trans individuals where the courts elaborate on their interpretation of equal marriage rights (this is for instance the

4 Examples and the substance of these cases are discussed in detail in chapters 2 to 5 of this book.

5 There is a general LGBTQ+ rights regression noticeable in Eastern Europe and the US. Poland, for instance, has created so-called 'LGBTQ+ ideology free zones' in the past, while Hungary adopted legislation that prohibits content that 'promotes homosexuality' to minors, see T. Wesolowsky, 'The Worrying Regression of LGBT Rights in Eastern Europe', Radio Free Europe Radio Liberty, 23 December 2021, rferl.org/a/lgbt-rights-eastern-europe-backsliding/31622890.html. Furthermore, seven countries have constitutional bans on same-sex marriage (Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland and Slovakia). In the US, so-called 'bathroom' bills' denying access to public toilets by gender, and the 'Don't Say Gay' bills that prohibit schools and teachers from discussing LGBTQ+ related issues, are on the rise. Moreover, the US Supreme Court's decision in *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S._ (2022)) which overturned two major abortion cases, has accelerated fears in the LGBTQ+ community that marriage equality might also be overturned in the near future, considering important LGBTQ+ civil rights precedents stand on these abortion cases. The overturned cases are *Roe* v. *Wade* in which the US Supreme Court struck down a Texas statute banning abortion, effectively legalising it in the first trimester of the pregnancy (*Roe* v. *Wade*, 410 U.S. 113 (1973)) and *Planned Parenthood* v. *Casey* in which the right to an abortion was extended to 24 weeks into a pregnancy (*Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992)).

6 'LGBT+' or 'LGBTQ+' is used throughout this book as an umbrella term for the '*queer*' community, which is commonly used to refer to a group of people with various kinds of gender, sexual and romantic identities and attractions. This abbreviation is not exhaustive, hence a '+' is used to denominate individuals that do not see themselves represented by the letters 'LGBTQ'. In addition, the term 'sexual minorities' is used to denominate groups of people that are in the minority as regards societal views on sexuality and related practices, and commonly refers to LGBTQ+ people.

7 See G. Gilleri, *Sex, Gender, and International Human Rights Law. Contesting Binaries* (Routledge 2024) [hereinafter *Sex, Gender, and International Human Rights Law*]; United Nations General Assembly (UNGA), '*Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity: Practices of Exclusion*' (2021), A/76/152, paras. 6-9.

case where trans individuals are in a relationship with a person of the same-sex). For this reason, the term 'sexual minority' is also used in this research.

Equal marriage rights for same-sex couples touch upon the sensitive and highly politicised issue of marriage and the definition and meaning that states give to it. Marriage has traditionally been defined in most states as a union between a man and a woman of marriageable age. Yet same-sex couples or sexual minorities invoking equal marriage rights challenge that exact definition and ask of courts to extend the scope to include persons of the same 'sex,' 'gender,' 'sexuality' or 'sexual orientation.' In order for courts to be able to do this, they are forced to think about the ways these notions and the institution of marriage is to be interpreted and the role that they play in the application of not only the rules on the institution of marriage, but also the non-discriminatory and equality provisions that might be relevant in the cases at hand. It is for this reason that the interpretation and application of the notions of 'sex,' 'gender,' 'sexuality' and 'sexual orientation' by courts is part of the research on the discourse on equal marriage rights.[8] These notions are defined and explained in more detail in paragraph 1.3.3.

Furthermore, the research analyses the highest courts on both sides of the Atlantic where equal marriage rights have been invoked the most by same-sex couples.[9] The chosen courts are the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), and the United States Supreme Court (US Supreme Court). The choice for these specific courts is dependent on various factors. One factor is that the case law on equal marriage rights is more extensive in the jurisdictions of these courts as the states that have legalised same-sex marriage are primarily European,[10] and the US has a long history of dealing with equal marriage rights litigation.[11] Furthermore, even though the two European courts are regional courts based on treaties and the US Supreme Court adjudicates on the basis of the US Constitution, the three courts show resemblance with each other in more than a few ways. The CJEU as well as

8 In chapter 5, these notions are taken as a starting point for the discourse analysis to determine which binaries and hierarchies or dichotomies thereon are prevalent in the equal marriage rights case law of the courts. The ones that are most dominant are presented in Paragraph 5.3.

9 The analysis of cases on LGBTQ+ parental rights (e.g. adoption, recognition of parentage etc.) falls outside of the scope of this research, as this book focuses solely on equal marriage rights, i.e. the rights and benefits that are connected or associated with marriage and/or the legal recognition of relationships, and how accessible they are for same-sex couples. For information on LGBTQ+ parental rights, see A. Tryfonidou, 'Cross-Border Legal Recognition of Parenthood in the EU,' Policy Department for Citizens' Rights and Constitutional Affairs. Directorate-General for Internal Policies (European Union, 2023); A. Tryfonidou, 'The parenting rights of same-sex couples under European law' (2020), 25(2) *Marriage, Families and Spirituality*, pp. 176-194; C.A. Ball, *The Right to Be Parents: LGBT Families and the Transformation of Parenthood* (NYU Press Scholarship Online 2012); E. Mayo-Adam, 'LGBTQ Family Law and Policy in the United States' in *Oxford Research Encyclopedia of Politics* (online ed., 2020).

10 Out of the thirty-eight countries where same-sex marriage is legal, twenty-two are European. Though more and more countries in South-America are legalising same-sex marriage and the Inter-American Court of Human Rights (IACtHR) has also published a ground-breaking opinion on this matter (Advisory Opinion OC-24/17, Ser. A, No. 24, 24 November 2017), this development has only taken off in the last five or so years. It is therefore out of the scope of this research to discuss the same-sex legalisation trend in Latin-American countries.

11 Chapter 4 on the development of equal marriage rights in the US ventures into this fifty year-long battle for same-sex couples seeking marriage equality and equal treatment.

the US Supreme Court can for example be seen as nonspecialised courts of general jurisdiction whose decisions are binding for other courts and both function as courts of first instance as well as courts of last instance.[12] Similarities between the US Supreme Court and the ECtHR are that they engage in a consensus-based analysis trying to find broad support for their decisions[13] and both often apply a form of 'evolutive' or 'dynamic' interpretation[14] (or in the context of the US Supreme Court, a 'due process generationalism'[15]) of rights provisions, meaning that the provisions are, in principle, interpreted in the light of present-day conditions of rights holders.[16] This is however quite different in the case of equal marriage rights, which brings up the question why this might be. Furthermore, certain leading judgments of the ECtHR resonate with ideas and concepts from the US Supreme Court's jurisprudence.[17] Moreover, the three courts regularly cite each other's decisions, considering them as a relevant authority,[18] and frequently engage in trans-judicial dialogue on sensitive topics such as religion, abortion and equal marriage rights.[19] These factors taken together result in the fact that the three courts are quite compatible for comparison.

The case selection analysis in this research takes place on the basis of 'snowball sampling' or 'citation method'. This entails that initially a few key cases in the three jurisdictions are selected and that this process further continues to evolve during the

12 M. Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court' (2006), 4 *International Journal of Constitutional Law* 4, p. 618.

13 E. Bribosia, I. Rorive, and L. Van den Eynde, 'Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience' (2014), 32 *Berkeley Journal of International Law* 1, pp. 1-43 [hereinafter Same-Sex Marriage: Building an Argument], p. 23; P. Annicchino, 'How Wide is the Margin? The United States Supreme Court and the European Court of Human Rights on Religion in Public Schools' (2013), 5 *Annuaire Droit et Religions*, pp. 301-323.

14 What 'evolutive' or 'dynamic' interpretation entails and how this is applied by the ECtHR in equal marriage rights cases is further elaborated on in chapters 2 and 5.

15 What 'due process generationalism' entails, how this contrasts with 'due process originalism' and how these forms of constitutional interpretation play out in practice is explained further in chapters 4 and 5.

16 K. Dzehtsiarou and C. O'Mahony, 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court' (2013), 44 *Columbia Human Rights Law Review*, p. 309 [hereinafter *Evolutive Interpretation of Rights Provisions*].

17 G. Nolte (ed.), *Introduction - European and US Constitutionalism: Comparing Essential Elements, Science and Technique of Democracy* (Council of Europe Publishing 2005), p. 13.

18 The ECtHR case of *Schalk and Kopf* (*Schalk and Kopf* v. *Austria*, ECHR (2010), No. 30141/04) was for instance mentioned a few times during the *Perry* litigation (*Hollingsworth* v. *Perry*, 570 US 693 (2013)) at US Supreme Court level; the ECtHR referred in its judgment in *Oliari* (*Oliari and Others* v. *Italy*, ECHR (2015), Nos. 18766/11 and 36030/11) to the US Supreme Court's decision in *Obergefell*. Also see *Ferguson* v. *United Kingdom* where the ECtHR refers to various American decisions (*Ferguson* v. *United Kingdom*, ECHR (2011), No. 8254/11).

19 This started with an official visit by four justices of the US Supreme Court to the CJEU in 1998; these justices were accompanied by other visitors including the Chief Justice of the Supreme Court of Texas. A return visit was paid by the CJEU in 2001, and a further visit from the US Supreme Court in 2003, see F.G. Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice' (2003), 38 *Texas International Law Journal*, p. 554. The US Supreme Court also often meets with the judges of the ECtHR, see M.M. Kwiecinski, 'Supreme Court justices convene with European counterparts,' The GW Hatchet, 1 March 2012, gwhatchet.com/2012/03/01/supreme-court-justices-convene-with-european-counterparts/. Also see R. Bader Ginsburg, 'Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication' (2003), 40 *Idaho Law Review* 1 and L. Helfer and E. Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014), 68 *International Organization 1*, pp. 77-110.

research on the basis of references to cases and keywords in the cases themselves, but also on the basis of scholarly (academic) resources on the matter.[20]

Lastly, the analysis in this book takes place through a *doctrinal* and a *queer legal theory* lens. *Doctrinal legal research* consists of research into the law and legal concepts[21] and takes place 'using reason, logic and argument' and the 'primacy of critical reasoning based around authoritative texts.'[22] *Queer theory* on the other hand, does not lend itself to be easily defined; there is no consensus in academia on its definition in essence.[23] Yet, if one had to explicate, *queer theory* can be considered a theoretical framework that questions underpinnings, assumptions and/or beliefs specifically linked to sex, gender and sexual orientations or identities.[24] *Queer legal theory* analyses the way 'in which legal doctrines, customs, and practices impact on sexual minorities as sexual minorities.'[25] For the research in this book, *queer legal theory* has been chosen as the methodology because it pertains specifically to sexual minorities and facilitates the analysis of the legal construction, interpretation and application of equal marriage rights of same-sex couples by the aforementioned courts. More details and the explanation of these research methods is to be found in paragraph 1.3 on the theoretical framework and methodology.

### 1.2.2 The research question and aims of the research

This book intends to research the issues described in the previous subparagraphs. By utilising a *queer legal theory* perspective, the research is geared towards finding out how the ECtHR, the CJEU, and the US Supreme Court interpret the notions of sex, gender, sexuality and sexual orientation in their equal marriage rights case law.

The aims of the research are threefold. The first aim is to fill in the gaps that currently exist in the literature. Extensive research has been conducted on equal marriage

20 K. Barglowski, 'Where, What and Whom to Study? Principles, Guidelines and Empirical Examples of Case Selection and Sampling in Migration Research' in R. Zapata-Barrero and E. Yalaz (eds.), *Qualitative Research in European Migration Studies*, IMISCOE Research Series (Springer 2018), pp. 151-168. Also see D.R. Songer, 'Case Selection in Judicial Impact Research' (1988), 41(3) *The Western Political Quarterly*, pp. 569-582, and S.O. Chaib, 'Research Methodology for Case Law Analysis: An Appeal for Openness', Strasbourg Observers,10 September 2015, strasbourgobservers.com/2015/09/10/research-methodology-for-case-law-analysis-an-appeal-for-openness/.

21 T. Hutchinson and N. Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012), 17 *Deakin Law Review*, p. 85 [hereinafter *Defining and Describing What We Do*].

22 C. McCrudden, 'Legal Research and the Social Sciences' (2006), *Law Quarterly Review*, p. 633.

23 D. Banović, 'Queer Legal Theory' in D. Vujadinović, A. Álvarez del Cuvillo, S. Strand (eds.), *Feminist Approaches to Law. Gender Perspectives in Law* (Springer, Volume 1, 2023), pp. 73-91 [hereinafter *Queer Legal Theory*].

24 For more information, see A. Jagose, *Queer Theory: An Introduction* (New York University Press, 1996).

25 F. Valdes, 'Coming Out and Stepping Up: Queer Legal Theory and Connectivity' (1993), 1(1) *National Journal of Sexual Orientation Law*, p. 2 [hereinafter *Coming Out and Stepping Up*].

rights in generally one or two jurisdictions,[26] yet comparative research into the equal marriage rights case law of three courts with large jurisdictions as this book intends to conduct, is rare.[27] Second, what makes this research furthermore distinctive and relevant is that the analysis takes place through the theoretical perspective of 'queer theory', more specifically queer *legal* theory. The use of *queer theory* in other disciplines is not uncommon.[28] A similar venture in the field of law and in these three combined jurisdictions however remains largely uncharted.[29] This research accordingly also aims to offer an additional, novel, lens to look at the matter, analysing it from a fresh and different, say, a *queer*, perspective. *Queering* in this case entails that in the interpretation of the relevant fundamental rights and the four notions, the protection of the rights and perspectives of the sexual minorities involved is given special attention and focus. While such approaches to human rights law are not rare, they have significant value alongside the more traditional doctrinal approaches,[30] contributing to a more inclusive idea of the universality of human rights by presenting perspectives that in the past

26 See for instance A. Weiss, 'Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union' (2007), 41 *Columbia Journal of Law and Social Problems*, pp. 81-124; M.G. Crehan, *The Divided States of America: a Comparative Case Study of Same-Sex Marriage in the United States*, Northeastern University (Boston, 2013); Dzehtsiarou and O'Mahony, *Evolutive Interpretation of Rights Provisions*, *supra* note 16, p. 309; Bribosia, Rorive, and Van den Eynde, *Same-Sex Marriage: Building an Argument*, *supra* note 13, pp. 1-43; D. Kochenov and U. Belavusau, 'Same-Sex Spouses: More Free Movement, But What About Marriage? *Coman*' (2020), 57 *Common Market Law Review* 1, pp. 227-242; P. Johnson and S. Falcetta, 'Same-Sex Marriage and Article 12 of the European Convention on Human Rights', in C. Ashford and A. Maine (eds.), *Research Handbook on Gender, Sexuality and the Law* (Edward Elgar Publishing 2021), pp. 91-103.

27 The population in these three jurisdictions concerns over a billion people. Roughly 9% of them identify as LGBTQ+, see 'IPSOS LGBT Pride Report 2025. A 26-Country Ipsos Global Advisor Survey,' IPSOS, 1 June 2025, ipsos.com/sites/default/files/ct/news/documents/2025-06/ipsos-pride-report-2025.pdf. Wintemute briefly discusses the three jurisdictions in his article: R. Wintemute, 'Same-Sex Marriage in National and International Courts: 'Apply Principle Now' or 'Wait for Consensus'?' (2020), 1 *Public Law*, pp. 1-30 [hereinafter *Same-Sex Marriage in National and International Courts*]. Soucek also compares the case law of the ECtHR with that of the US Supreme Court, see B. Soucek, 'Marriage, Morality, and Federalism: The USA and Europe Compared' (2017), 15 *International Journal of Constitutional Law* 4, pp. 1098-1118.

28 See for instance M. Ball, *Criminology and Queer Theory: Dangerous Bedfellows? (Critical Criminological Perspectives)*, (Palgrave Macmillan 2016); C. Weber, *Queer International Relations: Sovereignty, Sexuality and the Will to Knowledge (Oxford Studies in Gender and International Relations)* (Oxford University Press 2016); D. Compton, T. Meadow, and K. Schilt (eds.), *Other, Please Specify: Queer Methods in Sociology* (University of California Press 2018); K. Brintnall, J. Marchal, and S. Moore (eds.), *Sexual Disorientations: Queer Temporalities, Affects, Theologies (Transdisciplinary Theological Colloquia)*, (Fordham University Press 2018).

29 Some ventures in the field of law more generally are for instance by F. Valdes, 'Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society' (1995), 83(1) *California Law Review*, pp. 1-377; F. Valdes, 'Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors' (1998), 75(4) *Denver University Law Review*, pp. 1409-1464; N. Beger, 'Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)potency of Rights Politics at the European Court of Justice' (2000), 9(2) *Social and Legal Studies*, pp. 249-270 [hereinafter *Queer Readings of Europe*]; A. Gross, '*Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?*' Proceedings of the ASIL Annual Meeting (American Society of International Law, 2007), pp. 129-132; D. Otto, '*Taking a Break" from "Normal": Thinking Queer in the Context of International Law*', Proceedings of the ASIL Annual Meeting (American Society of International Law, 2007), pp. 119-122; D. Otto, *Queering International Law. Possibilities Alliances, Complicities, Risks* (Routledge 2018); D. Gonzalez-Salzberg, *Sexuality and Transsexuality under the European Convention on Human Rights* (Hart Publishing 2019) [hereinafter *Sexuality and Transsexuality*]; Gilleri, *Sex, Gender, and International Human Rights Law*, *supra* note 7.

30 D. Gonzalez-Salzberg and L. Hodson (eds.), *Research Methods for International Human Rights Law. Beyond the Traditional Paradigm* (Routledge 2020) [hereinafter *Research Methods for International Human Rights Law*]. Gonzalez-Salzberg and Hodson offer different and 'new' research methods to topics of international human rights law.

may have been overlooked, unnoticed or unseen.[31] Third, this research aims to expose any underpinnings, assumptions and/or beliefs that underlie the interpretations of the institution of marriage and the notions of sex, gender, sexuality and sexual orientation. Equal marriage rights cases touch upon some of the most fundamental rights a person has, such as the right to marry, the right to private and family life, the right to non-discrimination and so on, and the outcomes of the cases result in far-reaching legal and social consequences. As Gilleri explains, 'norms have the inherent power to shape the subject by influencing their formation.'[32] *Queering* or *queerifying* the case law offers possibilities of a critical reflection on the interpretations and 'constructions' of the aforementioned notions by judicial institutions. Exposing underlying assumptions and/or beliefs that the courts might hold could in the future facilitate a *queerer* and also more universal and inclusive interpretation of the fundamental human rights involved. Therein lies the societal relevance of this research, underscoring its need in times in which the protection and promotion of LGBTQ+ rights is backsliding in most parts of the world.[33]

## 1.3 Theoretical Framework and Methodology

### 1.3.1 The use of 'internal' and 'external' research methods

Research within international human rights law is most commonly conducted 'doctrinally.'[34] The analysis in chapters 2 to 4 on the three courts, the context they operate in and their case law in the field of equal marriage rights, takes place primarily using doctrinal legal research.

Doctrinal legal research usually analyses legal rules and principles through the 'perspective of an insider in the system,'[35] often reflecting the viewpoint of the participant in the legal system studying the texts of the law.[36] It is therefore often considered by academics to being an *internal* research framework method or approach. Research reveals that a majority of contemporary legal researchers acknowledge the importance of building on doctrinal research conclusions by using sociological or other 'outsider' perspectives.[37] This can take place through '*external*' research framework methods or approaches that reflect 'the conceptual resources of extra-legal disciplines' and involve studying the law in practice.[38] This could consist in the types of research that study law 'from an independent theoretical framework, which consists of concepts, categories and

31 Gonzalez-Salzberg, *Sexuality and Transsexuality*, *supra* note 29, p. 3.
32 Gilleri, *Sex, Gender, and International Human Rights Law*, *supra* note 7, preface, p. XV.
33 For instance, see A.R. Flores, M.F. Carreño and A. Shaw, 'Democratic Backsliding and LGBTI Acceptance,' The Williams Institute, September 2023, williamsinstitute.law.ucla.edu/wp-content/uploads/GAI-Democracy-Sep-2023.pdf.
34 Gonzalez-Salzberg and Hodson, *Research Methods for International Human Rights Law*, *supra* note 30, p. 2.
35 *Ibid.*; T. Hutchinson, *Researching and Writing in Law* (Reuters Thomson 2010), p. 36; T. Hutchinson and N. Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012), 17 *Deakin Law Review*, pp. 83-119 [hereinafter *Defining and Describing What We Do*], p. 101 and Gonzalez-Salzberg and Hodson, *Research Methods for International Human Rights Law*, *supra* note 30, p. 2.
36 Hutchinson and Duncan, *Defining and Describing What We Do*, *supra* note 35, pp. 114-115.
37 *Ibid.*
38 *Ibid.*

criteria that are not primarily borrowed from the legal system itself and that include historical studies, socio-legal research, philosophy, political theory and economy.'[39]

*Queer (legal) theory* is such an *outsider* external research framework methodology or approach that will be employed in chapter 5 to analyse the equal marriage rights case law of the three courts and the legal contexts they operate in more in-depth, but also to critically reflect on how the courts not only interpret, but also contribute in the 'construction' of the notions of sex, gender, sexuality and sexual orientation, and what the consequences of this are for same-sex couples seeking equal treatment through judicial means. The *queer* analysis also reveals the key factors and reasons behind the courts' reasoning.

### 1.3.2 Methodological approaches to queer legal theory

*Queer legal theory* is employed as the lens though which the selected courts, the context they operate in and their equal marriage rights case law are analysed. There are various methodological approaches to *queer legal theory*.[40] One approach seeks an equal moral status[41] of gender (identity and expression) and sexual orientation in relation to hetero-[42] and cisnormativity.[43] According to Banović, this approach is 'guided by egalitarianism as a political and legal principle' and 'does not criticise the very concept of law, but expands the existing concepts and introduces new ones.'[44] This approach is also known as 'LGBTQ+ rights theory.'[45] Another approach to *queer legal theory* can be seen as a critique of law and legal conceptualisations as objective and neutral practices.[46] Because this approach analyses the factors that contribute to the legal and political exclusion of sexual and gender minorities, it also remains within the law and analyses it from within.[47] It can therefore be called 'insider *queer legal theory*.'[48] A third approach to *queer legal theory* is a postmodern one akin to

39 P. Westerman, "Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law", in M. van Hoecke (ed.), *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011), p. 94; Hutchinson and Duncan, *Defining and Describing What We Do*, *supra* note 35, pp. 33-34.

40 See Banović, for instance, who explains this well, Banović, *Queer Legal Theory*, *supra* note 23, p. 74.

41 *Ibid.*

42 Heteronormativity is defined by Berlant and Warner as 'the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent – that is, organised as a sexuality – but also privileged. Its coherence is always provisional, and its privilege can take several (sometimes contradictory) forms: unmarked, as the basic idiom of the personal and the social; or marked as a natural state; or projected as an ideal or moral accomplishment,' see L. Berlant and M. Warner, 'Sex in Public' (1998), 24(2) *Critical Inquiry* pp. 547-566, p. 548.

43 'Cisnormative' is the belief that 'cisgender' people (individuals whose gender identity corresponds with the sex that was registered at their birth) are the norm for how people should identify their gender.

44 Banović, *Queer Legal Theory*, *supra* note 23, p. 74.

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*