

## Same-Sex Marriages (or Civil Unions/ Registered Partnerships) in Slovak Constitutional law: Challenges and possibilities

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*I grieve for thee, my brother Jonathan:  
exceedingly beautiful, and amiable to me  
above the love of women.  
As the mother loveth her only son,  
so did I love thee.  
(2 Samuel 1:26)*

### 1. Introduction

As it is even not too difficult to find biblical verses apparently referring to homosexual feelings – as illustrated above in the words of David to his beloved friend Jonathan<sup>1</sup> – neither is it difficult to identify some shifts in the legislation related to certain kinds of civil unions between same-sex persons in some countries which are deemed to have a strong Christian tradition. This is the case, for example, in the USA which is considered to be a country with deep Protestant roots, where the Supreme Court (hereinafter, USSC) found same-sex marriages to be constitutional in 2015.<sup>2</sup> This may also concern Italy, one of the most Catholic-devoted states, which by virtue of a decision of the European Court of Human Rights (hereinafter, ECtHR) was compelled to democratically adopt legislation allowing civil unions or registered partnerships for both same-sex couples and opposite-sex ones, in order to prevent discrimination on the basis of sex.<sup>3</sup> Some older examples are

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1 For more about this issue see J. Harding, 'Opposite Sex Marriage a Biblical Ideal? The Case of David and Jonathan', in A.H. Cadwallader (ed.), *Pieces of Ease and Grace: Biblical Essays on Sexuality and Welcome* (2013), pp. 35-52.

2 Supreme Court of the United States, *Obergefell et al. v. Hodges, Director, Ohio Department of Health et al.*, 26 June 2015.

3 The European Court of Human Rights, *Oliari and Others v. Italy*, 21 July 2015, Applications nos. 18766/11 and 36030/11.

decisions by the Supreme Courts of Canada in 2004,<sup>4</sup> Mexico in 2010,<sup>5</sup> Portugal in 2010, Spain in 2012,<sup>6</sup> as well as the South African Constitutional Court in a series of judgements in the early 2000s.<sup>7</sup>

A similar situation could occur sooner or later in Slovakia where, paradoxically, on the basis of the census of 2011, more than 75 % of the population identify themselves as belonging to one of the many Christian denominations. It is possible that the same or very similar legislation bestowing same-sex couples with a full scheme of rights and privileges which are reserved nowadays for opposite-sex couples (those married as well as unmarried) may also be enacted in this Central European country. This will not take place, however, through the institution of same-sex marriages which are now indirectly prohibited by the Slovak Constitution because marriage has been positively defined as ‘an unique union between a man and a woman’.<sup>8</sup> I will argue below that changing a social environment, economic conditions, as well as a new legal paradigm on the issue in many Western countries could promote the adoption of legislation allowing for same-sex unions (or registered partnerships) in Slovakia.

I begin with a brief sketch of the argumentation of the USSC used recently in *Obergefell et al. v. Hodges, Director, Ohio Department of health et al.* Four US governing principles and traditions are presented on behalf of same-sex marriages. In the following parts of the paper I elucidate that many points of the Court’s argumentation could be used in the case of Slovakia, while some others may not. I seek additional principles which could lay the basis for valid judicial argumentation in a case such as that of Slovakia. I assume that the reasoning behind the legalization of same-sex unions should be grounded on (1) the right to privacy, and in the principles of (2) civic equality, (3) similarity, (4) equal access to the legal and social benefits of marriage, and (5) the democratic state, which constitutes one of the ‘basic principles’ of Slovak constitutionality<sup>9</sup> and

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- 4 The Supreme Court of Canada ruled in *Reference Re Same-Sex Marriage* (3 S.C.R. 698, 2004 SCC 7) on the constitutionality of the Civil Marriage Act enacted by the Canadian Parliament. See more in P.W. Hogg, ‘Canada: The Constitution and same-sex marriage’, (2006) 4 *International Journal of Constitutional Law*, no. 3, <<http://doi.org/10.1093/icon/mol019>>, pp. 712-721.
  - 5 *Acción de inconstitucionalidad 2/2010*: Pleno de la Suprema Corte de Justicia de la Nación, Novena Época, agosto de 2010. For a different judicial experience see B.M. Wilson, ‘Claiming individual rights through a constitutional court: The example of gays in Costa Rica’, (2007) 5 *International Journal of Constitutional Law*, no. 2, <<http://doi.org/10.1093/icon/mom010>>, pp. 242-257.
  - 6 Tribunal Constitucional Portugal, *Ruling No. 121/2010, Case No. 192/2010*, 8 April 2010; Tribunal Constitucional de España, *Constitutional Court Judgment No. 198/2012*, 6 November 2012. These cases are exceptions because both the Portuguese and Spanish Constitutional Courts ruled in favour of the constitutionality of bills on same-sex marriages previously adopted by the Portuguese and Spanish Parliaments, respectively.
  - 7 See more in P. de Vos, ‘A judicial revolution? The court-led achievement of same-sex marriage in South Africa’, (2008) 4 *Utrecht Law Review*, no. 2, <<http://doi.org/10.18352/ulr.72>>, pp. 162-174. For French, Dutch, German, Czech and some other European (legal) debates on registered partnerships/same-sex marriages, see M. Mignot, ‘Le partenariat enregistré en droit international privé’, (2001) 53 *Revue internationale de droit comparé*, no. 3, <<http://doi.org/10.3406/ridc.2001.17945>>, pp. 601-653; D. Borrillo, ‘Pluralisme conjugal ou hiérarchie des sexualités: la reconnaissance juridique des couples homosexuels dans l’Union Européenne’, (2001) 46 *McGill Law Journal*, no. 4, pp. 877-922; K. Waaldijk, ‘Cestou malých změn: Jak se v. Nizozemí prosadilo manželství partnerů téhož pohlaví’, (2002) 0 *Sociální studia*, no. 7, pp. 153-172; D. Borrillo, ‘Who is Breaking with Tradition? The Legal Recognition of Same-Sex Partnership in France and the Question of Modernity’, (2005) 17 *Yale Journal of Law and Feminism*, no. 1, pp. 89-97; D. Elischer, ‘Univerzální registrované partnerství aneb zamyšlení nad francouzskou úpravou alternativních forem soužití - Část I’, (2006) 3 *Právní forum*, no. 5, pp. 178-175; D. Elischer, ‘Univerzální registrované partnerství aneb zamyšlení nad francouzskou úpravou alternativních forem soužití - Část II’, (2006) 3 *Právní forum*, no. 6, pp. 207-216; D. Elischer, ‘Alternativní formy soužití, registrované partnerství v. ČR a v. Evropě’, in S. Radvanová et al., *Rodina a dítě v. novém občanském zákoníku* (2015), pp. 168-184; M. Hottelier, ‘La loi fédérale sur le partenariat enregistré entre personnes du même sexe’, (2007) 69 *Revue française de droit constitutionnel*, pp. 39-55; M. Schüffner, *Eheschutz und Lebenspartnerschaft: Eine verfassungsrechtliche Untersuchung des Lebenspartnerschaftsrechts im Lichte des Art. 6 GG* (2007), C. Robcis, ‘Liberté, Égalité, Hétérosexualité: Race and Reproduction in the French Gay Marriage Debates’, (2015) 22 *Constellations*, no. 3, <<http://doi.org/10.1111/1467-8675.12168>>, pp. 447-461.
  - 8 Constitutional Act No. 161/2014 of the Collection of Laws, Art. 1, para. 1 of 4 June 2014 (author’s translation). Julieta Lemaitre notes that the spread of this kind of constitutional reforms and changes, as well as arguments that support them, ‘is the effect of the political power of the organized lay faithful, and particularly of the power of educated and well connected leaders and their organizers’. J. Lemaitre, ‘By reason alone: Catholicism, constitutions, and sex in the Americas’, (2012) 10 *International Journal of Constitutional Law*, no. 2, <<http://doi.org/10.1093/icon/mor060>>, p. 511. On the topic see also Ch. Knill et al., ‘Die katholische Kirche und Moralpolitik in Österreich: Reformdynamiken in der Regulierung von Schwangerschaftsabbrüchen und der Anerkennung gleichgeschlechtlicher Partnerschaften’, (2014) 43 *Österreichische Zeitschrift für Politikwissenschaft*, no. 3, pp. 275-292. The approval of this constitutional act in Slovakia, however, was rather a matter of political bargaining between the ruling ‘social democratic’ party, the SMER-SD, and a conservative political party, the KDH (Christian Democratic Movement, in Slovak *Kresťanskodemokratické hnutie*). For more about the Slovak political party system see, e.g., P. Rosúlek, ‘Slovakia, Robert Fico and the political party SMER’, in L. Cabada (ed.), *Contemporary questions of Central European Politics* (2002), pp. 309-319; L. Kopeček, ‘Slovakia’, in D.J. Sagar (ed.), *Political Parties of the World* (2009), pp. 516-522; P. Ondria et al., ‘The System of Political Parties of the Slovak Republic’, (2010) 13 *Politické vedy*, no. 2, pp. 89-106; J. Stiskala, ‘Party System of the Slovak Republic and its Stability after 2010 and 2012 Elections in Comparative Perspective’, (2012) 12 *Slovak Journal of Political Sciences*, no. 3, pp. 224-251; V. Žúborová, ‘Newcomers in politics? The success of new political parties in the Slovak and Czech Republic after 2010’, (2015) 8 *Baltic Journal of Law & Politics*, no. 2, <<http://doi.org/10.1515/bjlp-2015-0020>>, pp. 91-111.
  - 9 P. Ondria, ‘Basic Principles of Slovakia’s Constitutionality’, in S. Wróbel (ed.), *Współczesność: Wybrane problemy* (2009), p. 305.

'has not yet been elaborated properly in the practice of the Constitutional Court.'<sup>10</sup> Although some claim that the primary task of constitutionalism is to 'secure' human rights and that those rights as constitutional principles are what provides the 'raison d'être' of constitutionalism,<sup>11</sup> I argue that without the principle of the democratic state and the assurance of the material core of the Constitution, which guarantees the immutability of equal rights and freedoms, any effective protection of human (and civil) rights appears to be unimaginable.

In what follows, I will clarify the circumstances of the Slovak legal and broader social discussion over the issue of same-sex couples' rights. The point of departure will be the judgment of the Constitutional Court of the Slovak Republic (hereinafter, CCSR) from 28 October 2014 which has been adopted as an answer to the incentive of President Andrej Kiska. For the first time in the history of the Slovak Republic since obtaining its independence in 1993, the President utilized one of his prerogatives in accordance with Article 95, Clause 2 of the Slovak Constitution and put forward four potential referendum questions for a judicial review of the CCSR. He had certain 'doubts whether the subject of the referendum does not embrace fundamental rights and freedoms and, then, whether the subject of the referendum is in harmony with the Constitution'.<sup>12</sup>

The proposal for a referendum was signed by more than 350,000 citizens in accordance with Article 95, Clause 1 of the Constitution. The proposed questions then acquired the semblance of public interest. They were thereby considered to be important questions of public interest for which the Constitution allows a referendum to be held.<sup>13</sup> Although the CCSR in its judgment confirmed that the concept of 'public interest is a vague legal concept', it was admitted that 'the fact that 350,000 or even more people demand a referendum on a certain question substantively points to the fact that this question forms a major question of public interest.'<sup>14</sup> Four questions had been initially proposed by Christian pro-life petitioners associated in a conservative civic association called the 'Alliance for the Family' (in Slovak *Aliancia za rodinu*). Although not explicitly connected with same-sex unions or marriages, the oncoming referendum erupted into a wide and ferocious social debate and opened up the question of same-sex couples' rights. I will thoroughly discuss the petitioners' questions, the judgment of the CCSR, as well as two dissenting opinions by Justices Orosz and Mészáros.

The final part of my article briefly deals with one of the most common arguments against same-sex unions, namely that a slight majority of unelected judges are not entitled to decide on such delicate constitutional issues. I will scrutinize the objection that deciding on such issues establishes an inadequate scope of judicial activism, judicializes democratic politics, and jeopardizes the principle of the democratic state.

Although the issues of same-sex unions and the position of homosexuals in the Slovak legal system and society have already been analysed in some respects,<sup>15</sup> the research on this topic is still in its initial phases. Moreover, none of the previously published texts has submitted relevant arguments in favour of or against the possibility of the legal recognition of such unions and their concordance with the Constitution. My aim here is to make such an attempt and to plunge into the debate on the justification of same-sex marriages/civil unions and to argue from non-neutral positions.

### 1.1. A long road towards same-sex marriage in the US

States' Constitutional Courts often tend to be inspired by the decisions of their counterparts in other countries. Courts often quote from these foreign texts in their own decisions and use them to support their

10 L. Orosz, *Odlíšné stanovisko k rozhodnutiu pléna Ústavného súdu Slovenskej republiky vo veci sp. zn. PL. ÚS 24/2014-90 (Dissenting opinion)*, 28 October 2014, pp. 6-7 (author's translation).

11 M. Kusý, 'Human Rights Education, Constitutionalism and their Interrelations in Slovakia', (1994) 29 *European Journal of Education*, no. 4, p. 386.

12 Cited by the Constitutional Court of the Slovak Republic, *Nález Ústavného súdu Slovenskej republiky, sp. zn. PL. ÚS 24/2014-90*, 28 October 2014, p. 3, para. 3 (author's translation).

13 See the Constitution of the Slovak Republic, Art. 93, Clause 2.

14 Constitutional Court of the Slovak Republic, *supra* note 12, p. 27, para. 31 (author's translation).

15 J. Vozár, 'Postavenie homosexuálov vo svetle práva', (1995) 78 *Právny obzor*, p. 1, pp. 63-73; J. Svák & A. Kapišová, 'Právo homosexuálov na rodinný život', 54 (6-7) *Justičná revue*, (2002), pp. 797-806; M. Švec, 'Diskriminácia na základe sexuálnej orientácie cez prizmu európskej judikatúry a legislatívy', (2011) 63 *Justičná revue*, no. 6-7, pp. 887-903; J. Fúsková & M. Kočnerová, 'Identity of homosexual minority in the Central-European surrounding /case study of the Czech and Slovak Republic/', (2011) 5 *The Annual of Language & Politics and Politics of Identity*, pp. 125-132.

arguments. Therefore, I shall now briefly take a glimpse at one of the most important court decisions in the history of the USSC.

In one of its landmark decisions, *Bowers v. Hardwick* (478 U.S. 186, 1986), the USSC held that the US Constitution does not protect the right to engage in 'homosexual sodomy'. The Court stated that heightened judicial protection under that clause was reserved for rights 'implicit in the concept of ordered liberty' or 'deeply rooted in this Nation's history and tradition.' According to the USSC, 'homosexual sodomy' could not qualify for special protection under either test.<sup>16</sup> Not so long ago, scholars such as H.L.A. Hart, R. Dworkin, J. Waldron, and J. Rawls considered from a liberal viewpoint why any legal hindrances preventing intimate cohabitation between same-sex persons should not be accepted.<sup>17</sup>

One of the largest democracies in the world took a step towards granting the right to marry for persons of the same gender in 2015. Voluminous US academic literature on civil unions which had been published from the 1970s to 2010s showed that the time was ripe for expectations.<sup>18</sup> This was finally confirmed on 26 June 2015 in the historical decision of *Obergefell et al. v. Hodges, Director, Ohio Department of Health et al.* I do not intend to explore in detail all the arguments which the Court used with regard to same-sex marriages or to analyse thoroughly all of the dissenting opinions. It will be useful, though, to devote proper attention to this subject, as it may help to understand what path should or should not be taken in the future argumentation of the CCSR in the case of the legalization of same-sex unions.

Almost twenty years before legalizing same-sex marriages in the USA one of the staunchest opponents claimed that if such a union 'is legalized, it could be one of the most revolutionary policy decisions in the history of American family law'.<sup>19</sup> He was mistaken on two accounts. First, the final decision was not a political (governmental) one but a judicial one, although some judicial decisions concern political issues, as it was in this case. Second, it was an evolutionary, not a revolutionary change, taking into account many social, political and legal changes in American society. As noted by Michael J. Klarman: 'Social and political change can render previously inconceivable Court decisions conceivable.'<sup>20</sup> It cannot be surprising that the Court, which almost thirty years ago quite seriously discussed 'homosexual sodomy', has now diametrically changed its judicial opinion (with a different composition of its honourable members<sup>21</sup>). Certainly 'the Court, like many institutions, has made assumptions defined by the world and time of which it is a part', determined the Majority in *Obergefell*.<sup>22</sup>

The above-mentioned opponent, Lynn D. Wardle, added that in spite of persisting disagreement between advocates and opponents of same-sex marriages over the issue of whether legalizing them would benefit society or not, they did agree, he claimed, 'that it could dramatically alter the core social institutions of marriage and the family, as well as gender relations, sexual practices, and general social stability'.<sup>23</sup> It can

16 For more about the case, see P.A. Cain, 'Litigation for lesbian and gay rights: A legal history', (1993) 79 *Virginia Law Review*, p. 1612 et seq.

17 H.L.A. Hart, *Law, Liberty and Morality* (1963); R. Dworkin, 'Lord Devlin and the Enforcement of Morals', (1966) 75 *The Yale Law Journal*, no. 6, pp. 986-1005; R. Dworkin, *Taking Rights Seriously* (1977); J. Waldron, 'Particular values and critical morality', (1989) 77 *California Law Review*, pp. 561-589, reprinted in J. Waldron, *Liberal Rights: Collected Papers 1981-1991* (1993), pp. 168-202; J. Rawls, *The Law of Peoples with 'The Idea of Public Reason Revisited'* (1999), p. 148.

18 E. Veitch, 'The Essence of Marriage – A Comment on the Homosexual Challenge', (1976) 5 *Common Law World Review*, no. 1, pp. 41-49; R.R. Rivera, 'Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States', (1979) 30 *Hastings Law Journal*, no. 4, pp. 799-956; S. Macedo, 'Homosexuality and the conservative mind', (1995) 84 *The Georgetown Law Journal*, no. 2, pp. 261-300; M.P. Strasser, *The challenge of same-sex marriage: federalist principles and constitutional protections* (1999); M.P. Strasser, *On same-sex marriage, civil unions and the rule of law: constitutional interpretation at the crossroads* (2002); A. Koppelman, *The gay rights question in contemporary American law* (2002); L.D. Wardle et al. (eds.), *Marriage and same-sex unions: A debate* (2003); P.J. Egan & K. Sherrill, 'Marriage and the Shifting Priorities of a New Generation of Lesbians and Gays', (2005) 38 *PS: Political Science & Politics*, no. 2, <<http://doi.org/10.1017/S1049096505056350>>, pp. 229-232; W.N. Eskridge Jr. & D.R. Spedale, *Gay Marriage: For Better or for Worse? What We've Learned from the Evidence* (2006); E. Gerstmann, *Same-Sex Marriage and the Constitution*. 2<sup>nd</sup> ed. (2008); O.G. Encarnación, 'Gay Rights: Why Democracy Matters', (2014) 25 *Journal of Democracy*, no. 3, pp. 90-104; R.J. Kreitzer et al., 'Does Policy Adoption Change Opinions on Minority Rights? The Effects of Legalizing Same-Sex Marriage', (2014) 67 *Political Research Quarterly*, no. 4, <<http://doi.org/10.1177/1065912914540483>>, pp. 795-808; M. Boucai, 'Glorious Precedents: When Gay Marriage Was Radical', (2015) 27 *Yale Journal of Law & the Humanities*, pp. 101-191.

19 L.D. Wardle, 'A Critical Analysis of Constitutional Claims for Same-Sex Marriage', (1996) 3 *Brigham Young University Law Review*, no. 1, p. 3.

20 M.J. Klarman, 'Windsor and Brown: Marriage Equality and Racial Equality', (2013) 127 *Harvard Law Review*, no. 1, p. 135.

21 'Constitutional interpretation depends not only on social and political context, but also on the composition of the Supreme Court, which is partly a function of politics but also partly of fortuity.' Wardle, *supra* note 19, p. 3.

22 Supreme Court of the United States, *supra* note 2, pp. 11-12.

23 *Ibid.*, footnote no. 2.

hardly be imagined, though, how the institution of marriage could be altered by same-sex marriages which, in essence, fall within the definition of marriage offered by the USSC in 1965: 'It is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects.'<sup>24</sup> Indeed, Andrew H. Friedman was right when he wrote that '[r]ather than defining marriage by prescribing who may enter it, the definition of marriage is best explained by describing certain qualitative elements of the state of marriage. Attempting to define marriage by describing its component qualities may prove to be a false step.'<sup>25</sup>

## 1.2. 'Four principles and traditions'

Many years ago Cass R. Sunstein thought that if in the future there is a change in US law over the issue of same-sex marriage, it will be based on the Equal Protection Clause which is part of the Fourteenth Amendment to the US Constitution and provides that no state shall deny to any person within its jurisdiction 'the equal protection of the laws'.<sup>26</sup> Sunstein and many others have tried to prove that preventing same-sex persons from marrying or registering their bond is in fact sex-based discrimination.<sup>27</sup> He claimed that if the USSC decided in favour of same-sex marriages, 'it might cause a constitutional crisis, a weakening of the legitimacy of the Court, an intensifying of homophobia, a constitutional amendment overturning the Court's decision, and much more'.<sup>28</sup> He recommended an incremental and gradual approach to the issue and the Court to be 'extremely reluctant to require states to recognize same-sex marriages'.<sup>29</sup> Therefore, some other conceptions defending such marriages have been discovered, for instance the philosophical concept of 'sexual citizenship'.<sup>30</sup>

It seems that the crucial factor in achieving the rights of same-sex persons 'may lie not in the substance of the legal arguments, but in the way they are presented', as Marc A. Fajer stated at the beginning of the 1990s.<sup>31</sup> This stance appears to be evident in *Obergefell*. The aforementioned four principles and traditions enabling same-sex weddings offered by the USSC read as follows: (1) 'the right to personal choice regarding marriage is inherent in the concept of individual autonomy'; thanks to this enduring bond 'two persons together can find other freedoms, such as expression, intimacy, and spirituality'<sup>32</sup>, (2) 'the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals'; this social institution 'responds to the universal fear that a lonely person might call out only to find no one there; [i]t offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other'<sup>33</sup>, (3) such a right 'safeguards children and families

24 Supreme Court of the United States, *Griswold v. Connecticut*, 381 U.S. 479 (1965), p. 486. Forty years later the same Court reiterated in *Obergefell* that '[n]o 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.' Supreme Court of the United States, *supra* note 2, p. 28. Similarly, Richard D. Mohr writes about marriage: 'Marriage is intimacy given substance in the medium of everyday life, the day-to-day. Marriage is the fused intersection of love's sanctity and necessity's demand'. R.D. Mohr, 'The Case for Gay Marriage', (1995) 9 *Notre Dame Journal of Law, Ethics & Public Policy*, no. 1, p. 226. We should not forget that marriage as a bond based on love while respect is, 'at least in Western cultures, a relatively recent distinction about which there is virtually unanimous consent, despite many implications that remain to be resolved and some ambiguities that will not be resolved'. M.E. Warren, 'Deliberative Democracy and Authority', (1996) 90 *American Political Science Review*, no. 1, <<http://doi.org/10.2307/2082797>>, p. 49.

25 A.H. Friedman, 'Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage', (1992) 35 *Howard Law Journal*, pp. 220-221.

26 See C.R. Sunstein, *Designing Democracy: What Constitutions Do* (2001), pp. 187-188. See also C.R. Sunstein, 'Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection', (1988) 55 *The University of Chicago Law Review*, pp. 1161-1179.

27 See Sunstein (2001), *supra* note 26, p. 200; A. Koppelman, 'The Miscegenation Analogy: Sodomy Law as Sex Discrimination', (1988) 98 *The Yale Law Journal*, no. 1, pp. 145-164; A. Koppelman, 'Why Discrimination Against Lesbians and Gay Men is Sex Discrimination', (1994) 69 *New York University Law Review*, no. 2, pp. 197-287; S.A. Law, 'Homosexuality and the social meaning of gender', (1988) 187 *Wisconsin Law Review*, pp. 187-235.

28 Sunstein (2001), *supra* note 26, p. 206.

29 *Ibid.*, p. 193. See also 'The Legality of Homosexual Marriage', (1973) 82 *The Yale Law Journal*, pp. 573-589.

30 N. Bamforth, 'Sexuality and citizenship in contemporary constitutional argument', (2012) 10 *International Journal of Constitutional Law*, no. 2, <<http://doi.org/10.1093/icon/mor065>>, pp. 477-492.

31 M.A. Fajer, 'Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men', (1992) 46 *University of Miami Law Review*, p. 513.

32 Supreme Court of the United States, *supra* note 2, pp. 12 and 13.

33 *Ibid.*, pp. 13 and 14.

and thus draws meaning from related rights of childrearing, procreation, and education',<sup>34</sup> (4) marriage is a 'keystone' of the American social order; for that reason 'just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. (...) There is no difference between same- and opposite-sex couples with respect to this principle. Yet, by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens.'<sup>35</sup> In the following sections I analyze whether these principles are applicable to the Slovak legal order or the decision-making process of the Slovak Constitutional Court and if so, to what extent.

## 2. At the beginning there were the questions

### 2.1. The Slovak Constitutional Court and its role

The constitutional judiciary today represents one of the most interesting phenomena in both juristic and political science-oriented research. In all liberal democracies, including Slovakia,

[t]ransfer of the form of fundamental rights' and freedoms' protection from the law to the Constitution was accompanied by a transfer of institution that would have to serve it: the legislature has been replaced by a (constitutional) judge. Thus, constitutional judges have become the main defenders of constitutional principles. They represent in fact the main counterweight to the democratic majority; when such majorities control the legislative and executive, they are not balanced by anyone and are able to easily violate constitutional principles; (...) constitutional courts create even higher power over other powers because they are guardians of the supreme act of the country.'<sup>36</sup>

As in many other current liberal democracies, the role of the Constitutional Court in Slovakia has been continually increasing hand in glove with the growing impossibility for elected political elites to deal with certain issues as well as to be able to end their own quarrels in a strictly political manner. Many problems with originally political roots are dealt with through the decision-making procedure of constitutional judges who bear the same portion of responsibility and accountability (if not greater responsibility and accountability) as politicians. Of course, both types of accountability inherently differ from each other. This shift in the point of view on the role played by the Constitutional Court and its judges is also reflected in the position of the Constitution both in a political struggle as well as in everyday judicial practice in all liberal democracies. The Constitution should be deemed to be 'a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life', as claimed by the Supreme Court of Canada in its judgement on same-sex marriages.<sup>37</sup> The issue of same-sex marriages/civil unions thereby constitutes one of the biggest challenges to modern constitutionalism.

Within the Slovak political system, the CCSR is 'an independent judicial body charged with protecting constitutionality'.<sup>38</sup> The Court, just as many of its foreign counterparts, decides on the compatibility of laws

34 Ibid., p. 14.

35 Ibid., pp. 16 and 17. For more on the Court's legal argumentation, especially on the central position played by Justice Anthony Kennedy, see T. Frost, 'The Promise of Liberty to All: The Long March to Marriage Equality', (2015) 36 *Liverpool Law Review*, no. 2, <<http://doi.org/10.1007/s10991-015-9168-5>>, pp. 171-182. On Justice Kennedy's opinion in the case of *Lawrence v. Texas* (539 U.S. 558, 2003) which overturned *Bowers*, struck down or invalidated sodomy laws in some US states and made same-sex sexual activity legal in every US state and territory, see P. Chapman, 'Beyond Gay Rights: *Lawrence v. Texas* and the Promise of Liberty', (2004) 13 *William & Marry Bill of Rights Journal*, no. 1, pp. 245-274.

36 J. Baroš, 'Demokracie, konstitucionalismus a lidská práva', in J. Holzer & P. Molek (eds.), *Demokratizace a lidská práva. Středoevropské pohledy* (2013), p. 121.

37 Cited in Hogg, supra note 4, p. 717.

38 Constitution of the Slovak Republic, Art. 124 (author's translation). It is remarkable that the Constitution of the (First) Czechoslovak Republic of 1920 was the first constitution in the world regulating the establishment and status of the Constitutional Court as a judicial institution empowered to check the constitutionality of laws. Such a court had not existed before. The CCSR then together with the Constitutional Court of the Czech Republic indirectly continues in this noble historical tradition. For more about the history of the Constitutional Court of the (First) Czechoslovak Republic, see J. Blahož, 'Vznik a počátky vývoje ústavního soudnictví (srovnávací přehled)', (1995) 134 *Právník: Teoretický časopis pro otázky státu a práva*, no. 5, pp. 419-447; V. Sládeček, 'Nástin vývoje ústavního soudnictví na území Československa (a České republiky)', (1998) 6 *Právní rozhledy*, no. 11, pp. 544-551; T. Langášek, *Ústavní soud Československé republiky a jeho osudy v letech 1920-1948* (2011).

with the Constitution and with constitutional laws.<sup>39</sup> Furthermore, it decides ‘whether the subject of the referendum to be declared on the basis of a citizens’ petition or a resolution of the National Council of the Slovak Republic (...) is in harmony with the Constitution or constitutional law’.<sup>40</sup> This is an element of the preventive review of constitutionality within the Slovak judicial system, which has been predominantly oriented on the area of the subsequent review of constitutionality.<sup>41</sup> Before an elucidation of the Court’s arguments in the relevant case, it seems useful to introduce the role which a referendum plays in the Slovak political system as well as the main traits of the 2015 referendum.

## 2.2. The Referendum of 2015 and its goals

According to the CCSR, from a theoretical point of view, ‘a referendum is an “assurance” for the citizen that Parliament will be advised by citizens about fundamental issues; (...) citizens, by voting in a referendum, take on the responsibility which Parliament does not want, may not, cannot, or is not able to bear’.<sup>42</sup> It is salutary to note that a referendum in Slovakia is a relatively popular, although not very effective tool of democratic citizens’ participation. Only one of the overall eight nationwide referenda has been valid – the one in 2003 on Slovakia’s accession to the EU.<sup>43</sup> The reason for this is that the referendum in Slovakia seems to be an instrument for various political actors rather than an efficacious democratic tool. This is so because of (1) a lack of consensus between political elites and citizens about a referendum’s role in a political system; (2) formal rules and procedures regulating a referendum are too vague, and (3) the existing level of (a low) political culture. Furthermore, (4) the referendum has been directly or indirectly affected and politicized by various political as well as non-political actors, as has even been demonstrated in the referendum of February 2015.<sup>44</sup>

The petitioners from the Alliance for the Family demanded a referendum on the following four issues:

- (1) Do you agree that any other type of cohabitation except for the union between one man and one woman could be called marriage?
- (2) Do you agree that couples or groups of persons of the same sex should not be allowed to adopt children and subsequently to educate them?
- (3) Do you agree that any other type of cohabitation between persons other than marriage can be afforded special protection, rights and obligations that are – thanks to legal standards on the date of 1 March 2014 – granted only to marriage and spouses, in particular the recognition or registration as a life community in the face of public authorities, and the possibility of a child’s adoption by her or his parent’s second spouse?
- (4) Do you agree that schools cannot require the participation of children in education on the issues of sexual behaviour or euthanasia if their parents or the children themselves do not approve of or content to such education?

39 See the Constitution of the Slovak Republic, Art. 125, Clause 1, a). For more about the powers and role of the CCSR in the Slovak political system, see D. Krošlák, *Introduction to the Slovak Constitutional System*, 2<sup>nd</sup> ed. (2013); J. Svák & L. Berdisová, ‘Constitutional Court of the Slovak Republic as positive legislator via application and interpretation of the Constitution’, in A.R. Brewer-Carías (ed.), *Constitutional Courts as Positive Legislators: A Comparative Law Study* (2013), pp. 767-781; D. Ježová, ‘Selected judgments of Constitutional Court of the Slovak Republic regarding the preliminary ruling procedure’, (2013) 13 *International and Comparative Law Review*, no. 1, pp. 85-94; J. Ondrová, ‘Interpretation of the Constitution and constitutional acts presented by the Constitutional Court of the Slovak Republic’, (2012) 3 *Journal on Legal and Economic Issues of Central Europe*, no. 1, pp. 100-105; B. Balog, ‘The principle of proportionality in the decisions of the Constitutional Court of the Slovak Republic’, (2010) 3 *Vesník Kanstytucyjnaga Suda Respubliki Belarus*, pp. 156-165; A. Brösl, ‘The Slovak Republic’, in C.A.J.M. Kortmann et al. (eds.), *Constitutional Law of 10 New EU Member States* (2006), pp. 28-31.

40 Constitution of the Slovak Republic, Art. 125b, Clause 1 (author’s translation).

41 Constitutional Court of the Slovak Republic, supra note 12, p. 22, para. 21 (author’s translation).

42 Constitutional Court of the Slovak Republic, *Nález Ústavného súdu Slovenskej republiky, sp. zn. PL. ÚS 42/95*, 2 May 1996, p. 11 (author’s translation). For more about the referendum in the Slovak political system, see, e.g., E. Láštic, ‘Referendum experience in Slovakia: a long and winding road’, in Z.T. Pállinger et al. (eds.), *Direct Democracy in Europe: Developments and Prospects* (2007), pp. 189-198; J. Ondrová, ‘Constitutional Adjustment of the Whole – National Referendum in the Slovak Republic’, (2010) 13 *Politické vedy*, no. 2, pp. 120-129; E. Kuźelewska, ‘Referendum in the Czech Republic and Slovakia’, (2015) 21 *Annales UMCS, Politologia*, no. 1, pp. 97-110.

43 On the referendum of 2003, see K. Henderson, ‘EU Accession and the New Slovak Consensus’, (2004) 27 *West European Politics*, no. 4, <<http://dx.doi.org/10.1080/0140238042000249885>>, pp. 652-670; A. Sawicki, ‘Referendum Campaign on Slovak Republic’s Accession to the European Union’, (2013) 16 *Politické vedy*, no. 4, pp. 65-84.

44 Cf. E. Láštic, *v rukách politických strán: Referendum na Slovensku 1993-2010* (2011), pp. 113-123.

The referendum was held on 7 February 2015, although only on the above-mentioned question nos. 1, 2 and 4, respectively. The third question had been rejected by the CCSR as it was found to be contrary to the Constitution.

After submitting four potential questions to the CCSR, the petitioners objected that the previous practice of the Slovak presidents who had not submitted referendum questions for a judicial review can be considered stable and worthy of respect. It was further alleged that '[t]he emergence of doubts about the constitutionality of the questions (...) is not sufficiently justified and the utilization of the President's prerogatives is in conflict with the spirit and nature of (...) the Slovak Constitution.'<sup>45</sup> They attempted to question the reasonableness of the President's decision and the utilization of his constitutional prerogative. Nevertheless, such a prerogative always depends on his own and free discretion and is not bound by any unwritten conventions or precedents, except for the Constitution and the law.

In their statement against the President's decision the petitioners made a reference to Article 9 of the Charter of Fundamental Rights of the European Union. The Article reads as follows: 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.'<sup>46</sup> In the same way they relied on the case of *Schalk and Kopf v. Austria* which had been decided by the ECtHR. The Court stated in its judgment that the issue of same-sex unions 'must (...) still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.'<sup>47</sup>

The referendum's purpose was, according to the petitioners, to protect the traditional family (i.e. based on a man, a woman, and their children) family. They voiced this in spite of the fact that the amendment to the Slovak Constitution defining marriage as an union between a man and a woman had already been adopted.<sup>48</sup> The petitioners simply feared that marriage would be redefined in the foreseeable future because the Constitution does not contain an explicit ban on same-sex marriages.<sup>49</sup> This is quite a paradoxical situation: the State is unable to prohibit same-sex marriages just because it does not regard other bonds than those based on a woman-man relationship as a marriage. Put differently, 'the [S]tate cannot defend its prohibition of same-sex marriages simply because it does not believe them to be marriages'.<sup>50</sup>

When it came to the essence of a marriage, the petitioners' argumentation was in fact identical to those offered by Girgis et al.: 'In redefining marriage, the law would teach that marriage is fundamentally about adults' emotional unions, not bodily union or children, with which marital norms are tightly intertwined.'<sup>51</sup> '(...) [A]bolishing the conjugal understanding of marriage would imply that committed same-sex and opposite-sex romantic unions are equivalently real marriages.'<sup>52</sup> The petitioners were well aware of the fact that 'marriage is the single most significant communal ceremony of belonging. It marks not just a joining of two people, but a joining of families and an occasion for tribal celebration and solidarity.'<sup>53</sup> For them, the procreation was a *sine qua non* for the identification and recognition of two adults' cohabitation qua marriage. They held that any other type of life union should not be equated with those rights and privileges that a marriage between two spouses of the opposite sex has in the Slovak legal system.

They did not take into account that 'contemporary constitutionalism does not generally accept arguments about rights that link the aspiration of justice to a metaphysical essence of phenomena (...),

45 Constitutional Court of the Slovak Republic, *supra* note 12, p. 10, para. 14 (author's translation).

46 Charter of Fundamental Rights of the European Union, 2000/C 364/01, Art. 9.

47 The European Court of Human Rights, *Schalk and Kopf v. Austria*, 24 June 2010, Application no. 30141/04, p. 23, para. 105.

48 See note 8, *supra*. To be fair, the claims of marriage equality seek, in fact, the 'social recognition of relationships that resist traditional norms and roles enforced by family and the Church'. R.B. Siegel, 'Dignity and sexuality: Claims on dignity in transnational debates over abortion and same-sex marriage', (2012) 10 *International Journal of Constitutional Law*, no. 2, p. 377.

49 In religion-grounded argumentation as in the case of the petitioners there is a wide spectrum of analogies used in order to defend a ban on same-sex marriages. As Sunstein writes, '[p]eople in position of authority may agree that a ban on same-sex marriages is acceptable because it is analogous to a ban on marriages between uncles and nieces; but the analogy may be misconceived, because there are relevant differences between the two cases, and because the similarities are far from decisive'. C.R. Sunstein, 'Agreement without Theory', in S. Macedo (ed.), *Deliberative Politics. Essays on Democracy and Disagreement* (1999), p. 128.

50 W.N. Eskridge, Jr., 'A History of Same-Sex Marriage', (1993) 79 *Virginia Law Review*, no. 7, p. 1432.

51 S. Girgis et al., 'What is marriage?', (2010) 34 *Harvard Journal of Law and Public Policy*, no. 1, pp. 260-261.

52 *Ibid.*, p. 263. See also T. Strehovec, 'Redefined Family as a Challenge for Modern Society and Bioethics', (2012) 2 *Family Forum*, pp. 31-44.

53 D.L. Chambers, 'What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples', (1995) 95 *Michigan Law Review*, p. 450.

but rather it links these aspirations to concrete historical (and changing) manifestations'.<sup>54</sup> Neither did the religion-grounded petitioners provide even a relevant argument of how the legalization of same-sex unions could jeopardize existing 'traditional' family life, not to mention the fact that the ECtHR had found in *Schalk and Kopf v. Austria* that 'a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.'<sup>55</sup> A few years earlier the Court had found in *X, Y and Z v. the United Kingdom* that 'the notion of "family life" in Article 8 [of the European Convention on Human Rights] is not confined solely to families based on marriage and may encompass other *de facto* relationships (...). When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together (and) the length of their relationship (...).'<sup>56</sup> The ECtHR then more than once 'clearly expressed the view that cohabitation of same-sex persons, living in a stable partnership, falls within the definition of family life (...).'<sup>57</sup> Consequently, 'different forms of protection are considered consistent with the European Convention [on Human Rights].'<sup>58</sup> As laconically put by Paula Ettelbrick: 'Straight or gay, romantic or platonic, sexually monogamous or nonmonogamous, with children or without, the range of family possibilities are endless.'<sup>59</sup>

The above-mentioned judgments of the ECtHR are completely consistent with John Rawls's opinion expressed in his *Justice as Fairness*: '[N]o particular form of the family (monogamous, heterosexual, or otherwise) is so far required by a political conception of justice so long as it is arranged to fulfil these tasks [i.e. to have a sense of justice and the political virtues that support just political and social institutions] effectively and does not run afoul of other political values.'<sup>60</sup> He added that 'this observation sets the way in which justice as fairness deals with the question of gay and lesbian rights and duties, and how they affect the family. If these rights and duties are consistent with orderly family life and the education of children, they are, *ceteris paribus*, fully admissible.'<sup>61</sup> This simply confirms Marta Cartabia's supposition that the ECtHR's case law 'is intertwined with the liberal idea of protecting everybody's right to the freedom of choice on a neutral basis'.<sup>62</sup>

The main problem, however, lay in the fact that – and the President himself had doubts about this issue – fundamental civil rights and freedoms would become the subject of a referendum. In this way, the petitioners sought decision-making to be made on fundamental rights and freedoms by means of a referendum, although the Slovak Constitution does not allow for such an option: 'Fundamental rights and freedoms (...) cannot be the subject of a referendum.'<sup>63</sup> Moreover, their argumentation was based on a false (or at least intentionally mistaken) claim that other types of life unions, except for marriage, do not have the same rights and privileges as a marriage has in the current Slovak legal order. They argued that

'the very wording of the third question implies only the possibility of extending the rights currently attributed solely to marriage to other unions. This question does not affect the rights of spouses and marriage, but enquires about the possibility of extending those rights still belonging exclusively to marriage to other types of unions, regardless of sexual orientation. It is clear from the very wording of the question that such rights are still not attributed to other unions; hence a referendum is not about fundamental rights or freedoms as defined in the Slovak Constitution.'<sup>64</sup>

Such a statement can be considered to be misleading because social as well as judicial practice in Slovakia recognizes the institution between unmarried cohabitation, i.e. a life bond between two opposite-sex

54 Lemaitre, *supra* note 8, p. 510.

55 The European Court of Human Rights, *supra* note 47, p. 21, para. 94.

56 The European Court of Human Rights, *X, Y and Z v. the United Kingdom*, 22 April 1997, Application no. 21830/93, p. 9, para. 36.

57 Švec, *supra* note 15, p. 899.

58 M. Cartabia, 'The European Court of Human Rights: Judging nondiscrimination', (2011) 9 *International Journal of Constitutional Law*, no. 3-4, <<http://doi.org/10.1093/icon/mor043>>, p. 813.

59 P.L. Ettelbrick, 'Wedlock alert: A comment on lesbian and gay family recognition', (1996) 5 *Journal of Law and Policy*, no. 1, p. 121.

60 J. Rawls, *Justice as Fairness. A Restatement* (2001), p. 163.

61 *Ibid.*, footnote no. 42. See also Rawls, *supra* note 17, p. 157, footnote no. 60.

62 Cartabia, *supra* note 58, p. 808.

63 Constitution of the Slovak Republic, Art. 93, Clause 3 (author's translation).

64 Cited by the Constitutional Court of the Slovak Republic, *supra* note 12, p. 18 (author's translation).

consorts. This is not a family-law relationship,<sup>65</sup> although it is very similar to a marriage in its social consequences. Both partners in the long-term purpose-built cohabitation share a common household and do not intend to formalize their mutual emotional and sexual relationship in the form of marriage; they have knowingly waived the formalization of their life union. In some cases the partners jointly care for children. A feeling of freedom is often the main justification for unmarried cohabitation.

As it can be seen from the above-mentioned statements, many proponents of the referendum simply rediscovered various old arguments, which had been used for several years against same-sex marriages/civil unions; for example, (1) the right to marry ‘depends largely upon national experience’;<sup>66</sup> such life bonds are not rooted in the history of nations,<sup>67</sup> (2) ‘the historically protected concept of marriage, recognized by scholars worldwide to be the basic unit of society and deeply cherished by the overwhelming majority’,<sup>68</sup> is exclusively a union between a man and a woman, (3) same-sex marriages could cause ‘great social harms’ which are not comparable to those ‘produced by such divisions by race’,<sup>69</sup> (4) homosexual behaviour ‘is chosen behaviour’,<sup>70</sup> (5) homosexuals ‘demand a special preferred status, not merely tolerance’,<sup>71</sup> (6) ‘legalizing same-sex marriage (...) would send a message that a woman is not absolutely necessary and equally indispensable to the socially valued institution of marriage, weakening rather than strengthening equality for the vast majority of women’,<sup>72</sup> (7) marriage is designed as a framework for rearing children, (8) if the State now allows same-sex marriages, it will be polygamous and incestuous marriage next,<sup>73</sup> (9) a same-sex marriage would threaten the right to religious freedom, for example by forcing believers to participate in the creation of an institution equivalent to a marriage between same-sex couples, or to assist officially during civil ceremonies (weddings) of such unions,<sup>74</sup> (10) same-sex couples already have equal rights, (11) changing the law to allow same-sex marriage thanks to constitutional/supreme courts would be undemocratic; it ‘would not be a prudent, or constitutionally defensible, exercise of judicial authority’,<sup>75</sup> (12) the governments should focus on bigger priorities, (13) ‘a deep, abiding, and overwhelming consensus for the recognition of a right’ is needed and ‘in the absence of such an unequivocal consensus, however, the judicial recognition of such a new right violates principles of both structural and normative constitutionalism’,<sup>76</sup> (14) we should not accept the notion of same-sex unions because of the unexpected long-term consequences of such a decision, (15) it opens up the possibility for paedophiles to require the legalization of man-children relationships.

65 The Law on the family (Act No. 36/2005 of the Collection of Laws, 11 February 2005) makes no mention of unmarried cohabitation. On the other hand, the Law on the execution of imprisonment (Act No. 475/2005 of the Collection of Laws, 22 September 2005) explicitly mentions unmarried consorts in two paragraphs. For more about unmarried cohabitation in Slovakia, see J. Mládek & J. Širočková, ‘Kohabitácie ako jedna z foriem partnerského spoluzitia obyvateľstva Slovenska’, (2004) 36 *Sociológia*, no. 5, pp. 423-454; T. Lachová, ‘Zmeny a nové formy rodinného správania na Slovensku. Kohabitácie ako jedna z foriem partnerského spoluzitia’, (2005) 1 *Forum Statisticum Slovacum*, no. 2, pp. 215-254; G. Tydlitátová, ‘Voľby nezobášaného spoluzitia v podmienkach sociálneho a situačného tlaku’, (2015) 47 *Sociológia*, no. 2, pp. 191-216. A general overview on the issue can be found in A. Thornton et al. *Marriage and Cohabitation* (2007); D. Elischer, ‘Několik úvah nad kohabitací’, (2009) 6 *Právní forum*, no. 7, pp. 258-268. On marriages in Slovakia, see also S. Sandtnerová & D. Sivašová, ‘The main changes in marital behaviour in Slovakia’, in J. Pocięcha (ed.), *Statistical analysis of the economic and social consequences of transition processes in Central-East European countries* (2009), pp. 141-148.

66 Wardle, supra note 19, p. 33.

67 Let me cite Justice Roberts’ dissenting opinion in the case of *Obergefell*: ‘The Court today not only overlooks our country’s entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now’. J.G. Roberts, Jr., *Dissenting opinion – Obergefell et al. v. Hodges, Director, Ohio Department of health et al.*, 26 June 2015, p. 22.

68 Wardle, supra note 19, p. 52.

69 Ibid., p. 78.

70 Ibid., pp. 82 and 62.

71 Ibid., p. 60.

72 Ibid., p. 87.

73 ‘If a same-sex couple has the constitutional right to marry because their children would otherwise ‘suffer the stigma of knowing their families are somehow lesser’, (...), why wouldn’t the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry “serves to disrespect and subordinate” gay and lesbian couples, why wouldn’t the same “imposition and disability” (...) serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?’ Roberts, Jr., supra note 67, pp. 20-21. For more on the refutation of the polygamy-same-sex marriage analogy, see J.M. Gher, ‘Polygamy and Same-Sex Marriage – Allies or Adversaries within the Same-Sex Marriage Movement’, (2008) 14 *William & Mary Journal of Women and the Law*, no. 3, pp. 559-603.

74 See C. Thomas, *Dissenting opinion – Obergefell et al. v. Hodges, Director, Ohio Department of health et al.*, 26 June 2015, p. 14.

75 Wardle, supra note 19, p. 53.

76 Ibid., pp. 53-54. For point nos. 7-12, see A. Jowett, ‘“But if you legalize same-sex marriage...”: Arguments against marriage equality in the British press’, (2014) 24 *Feminism & Psychology*, no. 1, <<http://doi.org/10.1177/0959353513510655>>, pp. 37-55.

Slovak voters did not largely agree with these views, as evidenced by their participation in the referendum. The overall turnout was 21.41 %, which was too few for the referendum to be recognized as valid. According to Article 98, Clause 1 of the Constitution, '[t]he results of the referendum are valid if more than 50 percent of eligible voters participated in it and if the decision was endorsed by more than 50 percent of the participants in the referendum'. If a referendum has not attracted an absolute majority of eligible voters and if a decision has not been taken by an absolute majority of participants, then the referendum must be deemed to be invalid from the constitutional point of view.<sup>77</sup> The 'project referendum' ended with a significant setback for the petitioners. In any case, the aforementioned judgment of the CCSR of October 2014 appears to be extraordinarily important for further progress in the issue of the legalization of same-sex unions in the Slovak Republic. Therefore, it deserves due and proper consideration.

### 3. Decisive judgment of the Slovak Constitutional Court

#### 3.1. Marriage: a simple social contract or not?

The CCSR claimed that question no. 3 could harm people of the opposite sex living in a non-marital union. The Court recalled that the phrase 'recognition or registration as a life community before the public authorities' in the third question proposed by the petitioners 'ignores the obvious fact that the Slovak legal order identifies categories of [opposite-sex] persons enjoying some degree of formal legal recognition'.<sup>78</sup> In this way such a question would not only prevent the adoption of legislation on same-sex couples' life unions, but would also complicate the situation of cohabitating unmarried opposite-sex couples.<sup>79</sup>

A potential refusal to grant legal protection to opposite-sex unmarried couples would be completely consistent with the Christian view of the sanctity of marriage on which the petitioners built their worldview. Their 'expression of culturally conservative viewpoints'<sup>80</sup> was based on a religious justification, although it was not directly formulated in these terms in their written statement to the Court.<sup>81</sup> The petitioners' political pre-referendum activities were in fact openly religiously motivated and officially and bluntly supported by the Slovak (Catholic) Episcopal Conference.<sup>82</sup> One can hardly doubt that the Catholic Church would ever change its attitude towards same-sex partners' cohabitation. This is so because '[s]ince God mandated to reproduce ("go forth and be fruitful"), reproductive sex is in fact a core element of God's plan for humankind, and therefore the common human good. However, other forms and expressions of sexuality, such as (...) same-sex relations, and sex outside of marriage are not. Rights cannot protect these choices because rights cannot contradict natural law: they are not legitimate exercises of freedom.'<sup>83</sup> As Benedict XVI proclaimed in 2012 in his speech to the members of the diplomatic corps accredited to the Holy See, the family, from the Catholic viewpoint, is 'based on the marriage of a man and a woman. This *is not a simple social convention*, but rather the fundamental cell of every society. Consequently, policies which undermine the family threaten human dignity and the future of humanity itself.'<sup>84</sup>

77 Cf. M. Čič et al., *Komentár k Ústave Slovenskej republiky* (1997), p. 359.

78 Constitutional Court of the Slovak Republic, supra note 12, p. 42, para. 79 (author's translation).

79 Cf. Constitutional Court of the Slovak Republic, supra note 12, p. 40, para. 75.

80 Wardle, supra note 19, p. 20.

81 This is what Ingrid Creppell calls 'fundamentalism' and the lack of tolerance: 'Fundamentalists lose out here because their particular values are denied realization as the common good, yet toleration asks that even if they consider homosexuality to be antithetical to their deep, religious sense of self, they must recognize that preventing access to it for millions of gays greatly harms the well-being of their fellow citizens.' I. Creppell, 'Toleration, politics, and the role of mutuality', in M.S. Williams & J. Waldron (eds.), *Nomox XLVIII: Toleration and its limits* (2007), pp. 348-349. See also M. Jänterä-Jareborg, 'When "marriage" becomes a religious battleground: Swedish and Scandinavian experiences at the dawn of same-sex marriages', in A. Büchler & M. Müller-Chen (eds.), *Private Law, national – global – comparative: Festschrift für Ingeborg Schwenzer zum 60. Geburtstag* (2011), pp. 849-867.

82 In the mid-1990s, one Slovak legal scholar claimed that due to the strong influence of the Catholic Church in Slovakia and the overall atmosphere in society it was difficult to imagine legislative changes in favour of same-sex unions in the near future. See Vozár, supra note 15, p. 73.

83 Lemaitre, supra note 8, p. 508.

84 Benedict XVI, 'Dum Beatissimus Pater legatis civitatum apud Sanctam Sedem omina ob Novum Annum profert', (2012) 104 *Acta Apostolicae Sedis*, no. 2, p. 96 (emphasis added). See also John Paul II, 'Adhortatio apostolica Familiaris consortio', (1982) 74 *Acta Apostolicae Sedis*, no. 2, pp. 92-93; John Paul II, 'Litterae encyclicae Evangelium vitae', (1995) 87 *Acta Apostolicae Sedis*, no. 5, pp. 448, 449; Leo XIII, 'Litterae encyclicae Arcanum, divinae sapientiae', (1880) 12 *Acta Sanctae Sedis*, pp. 385-402; Pius XI, 'Litterae encyclicae Casti connubii', (1930) 22 *Acta Apostolicae Sedis*, no. 13, pp. 539-592; Francesco, 'Discorso del Santo Padre Francesco in occasione dell'inaugurazione dell'anno

To be sure, 'marriage is not simply a governmental institution: it is a religious institution as well.'<sup>85</sup> It is without any doubt that, on the one hand, '[t]he ancient origins of marriage confirm its centrality,' but on the other, 'it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. (...) The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They arise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our era,' as has recently been pointed out by the USSC.<sup>86</sup> This is the stance of social constructivists who claim that 'the social construction of marriage is dynamic. Linked as it is to other institutions and attitudes, marriage will change as they change'.<sup>87</sup> The model which is currently dominant in many Western liberal democracies, i.e. 'the marriage-centred family, comprised of husband and wife living together in the same household with their immediate offspring (...) is a relatively youthful model. The idea of nuclear family as values' repository *is a social construct* of even more recent vintage.'<sup>88</sup> A new image of marriage emerges in the Euro-Atlantic societies, 'gradually becoming more common though not totally standard as of now, which allows us to interpret the idea of marriage, from the point of view of Western comparative law, as a plural conception'.<sup>89</sup> Therefore, any possible broader definitions of matrimony, even those encompassing social bonds between non-heterosexual couples shall 'continue to allow people who subscribe to a traditional notion of marriage to have a conjugal relationship that is structured on the basis of those values'.<sup>90</sup> To put it differently, 'there is no necessary link between marriage and procreation, and also that extending marriage to homosexual persons does not in any way affect the ability of heterosexual couples, should they so wish, to go on seeing marriage as a means of promoting procreation'.<sup>91</sup>

Actually, both marriage and the family have been evolving over time. As stated by the Portuguese Constitutional Court in its 2010 judgment, '[t]he concept of family (...) is an open and plural one that is adaptable to social needs and realities'.<sup>92</sup> At the beginning of the nineteenth century, for example, 'marriage was indissoluble under the laws of nearly all states'.<sup>93</sup> The original 'traditional' family was characterized by completely different features than its modern counterparts: it was patriarchal, multigenerational (a blood bond was valued higher than any emotional bond), based on a wide membership, authoritative, unemotional, with a poor understanding of the uniqueness of children (children were considered as 'small adults'), and existentially dependent on ecclesiastical (the Church) as well as secular authority (the Monarch). The family was not an autonomous unit living by itself, but was always in the service of larger collectives; it was inherently embedded in the broader society and its individuality was suppressed to a minimum. It was the community, not the members of the very family, which (directly or indirectly) controlled various aspects of family life. As regards marriage, the choice of spouse was a matter for the parents and submission to social conventions and economic needs and interests of the family/tribe. Sexual satisfaction within marriage

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giudiziario del Tribunale della Rota Romana, 22 January 2016', available at <[http://w2.vatican.va/content/francesco/it/speeches/2016/january/documents/papa-francesco\\_20160122\\_anno-giudiziario-rotaromana.html](http://w2.vatican.va/content/francesco/it/speeches/2016/january/documents/papa-francesco_20160122_anno-giudiziario-rotaromana.html)> (last visited 11 May 2016). For more about the Catholic view on marriage, see Ch.E. Curran & J. Hanlon Rubion (eds.), *Marriage* (2009); K.D. Whitehead (ed.), *The Church, Marriage, and the Family* (2007); M.G. Lawler, *Marriage and the Catholic Church: Disputed Questions* (2002). A defence of marriage based on procreation can be found in R.P. George, S. Girgis & R.T. Anderson, *What is Marriage? Man and Woman: A Defence* (2012).

85 Thomas, *supra* note 74, p. 15.

86 Supreme Court of the United States, *supra* note 2, pp. 18-19.

87 Eskridge, Jr., *supra* note 50, p. 1434.

88 C.W. Christensen, 'If Not Marriage? On Securing Gay and Lesbian Family Values by a 'Simulacrum of Marriage'', (1998) 66 *Fordham Law Review*, no. 5, p. 1712 (emphasis added).

89 Tribunal Constitucional de España, *supra* note 6, para. 9.

90 Tribunal Constitucional Portugal, *Ruling No. 359/2009, Case No. 779/07*, 9 July 2009, para. 12. The Portuguese Constitutional Court distinguished marriage as (1) a complete union between a man and a woman that is directed towards the joint education of the children they many have, and (2) a private relationship between two adult persons that essentially seeks to fulfil their own needs (para. 12). Another distinction offered by the Court is very similar to the one cited above and distinguishes between marriage as (1) a social institution that is presented to spouses as possessing a relatively stable meaning, as a union of a man and a woman, which is particularly based on the function for which that union is responsible when it comes to the reproduction of society, and (2) a purely private relationship between two adult persons, without any projection in terms of the reproduction of society (para. 14).

91 Tribunal Constitucional Portugal, *supra* note 90, para. 12.

92 Tribunal Constitucional Portugal, *supra* note 6, para. 24.

93 Chambers, *supra* note 53, p. 453.

was almost exclusively associated with procreation.<sup>94</sup> It was the real ‘sexual contract’.<sup>95</sup> This sketch shows that the tradition itself has evolved over time, that “‘tradition’ is itself a construction and, therefore, an arena for contest’.<sup>96</sup>

The petitioners as well as the legislators of the Constitutional Act in 2014 did not take into account that within the basis of each partner life resides a powerful emotional and spiritual union; it is a sexual-romantic relationship between two adults, not solely between those of the opposite sex. This does not mean that other forms of unions could be deemed unnatural because ‘what society attributes to nature is often a *social product*’.<sup>97</sup> Every type of union has a form which is agreed upon by the vast majority of society at a given time and a given place. It is not inherently based on religious truths and beliefs, although these may greatly influence opinions about the optimal form of such an union. ‘Even if we accept the thesis that in all societies there is a binding and objective moral principle (as a minimum of natural law), it is unreasonable to use it as a criterion for the plausibility of constitutional changes and amendments.’<sup>98</sup> In highly pluralistic societies any objections against homosexuality or same-sex unions/marriages/registered partnerships could be ‘a legitimate basis for moral suasions, [but] not for the use of law’.<sup>99</sup> To put it in another way, ‘widely held moral convictions are usually a legitimate basis for law. But such convictions are not *always* legitimate (...)’.<sup>100</sup> As we shall see at length later, the CCSR in its judgment complied with an unwritten obligation ‘to prevent that law from being eroded by the Legislation of transient majorities, or more likely, by organized and well-situated narrow interests skilled at getting their way’.<sup>101</sup>

Religious comprehensive doctrines demanding a change or preserving legislation represent such narrow interests. It is also an expression of moral pluralism, which may have a deleterious effect on the law. Therefore, the role of the law is to prevent such potential deleterious consequences. ‘The more moral pluralism there is in society, the greater is the need for moral neutrality in the law.’<sup>102</sup> In any case, as the issues of religious reasoning for morality and particular values (religious comprehensive doctrines) in a liberal democracy are not the subject of this paper, I include some references to the literature which analyses this subject in detail.<sup>103</sup>

### 3.2. ‘To not diminish an existing standard of human rights and freedoms’

Let us now turn our attention to the judgment of the CCSR and its arguments on the concordance of the four referendum questions with the Constitution. First and foremost, we can leave aside the admissibility of the last question in the referendum and the relevant reasoning of the Court because it relates to the right to participate in education on sexual behaviour and euthanasia and as such does not constitute a ground for refusing same-sex unions. The third question was rejected and was found to be unconstitutional because it harmed and discriminated against opposite-sex unmarried cohabitating couples, as has been mentioned above.

It is important to note that the Court indirectly acknowledged proper legal protection for other types of life unions differing from marriage. The Court’s reasoning is latently based on the concepts of *civic equality*,

94 Cf. Christensen, *supra* note 88, p. 1713-1714; Chambers, *supra* note 53, pp. 453-454.

95 C. Pateman, *The Sexual Contract* (1988).

96 Eskridge, Jr., *supra* note 50, p. 1497.

97 Sunstein (2001), *supra* note 26, p. 198 (emphasis added).

98 O. Preuss, *Klauzule věčnosti: Je možné odstranit liberální demokracii?* (2015), p. 229.

99 Sunstein (2001), *supra* note 26, p. 189.

100 *Ibid.*, p. 193 (emphasis in the original).

101 J. Rawls, *Political Liberalism* (1993), p. 233.

102 T. Sobek, *Právní myšlení. Kritika moralismu* (2011), p. 539, footnote no. 2474.

103 A.D. Steuer, ‘The Religious Justification for Morality’, (1988) 13 *International Journal for Philosophy of Religion*, no. 3, pp. 157-168; T.M. Schmidt, ‘Glaubensüberzeugungen und säkulare Gründe. Zur Legitimität religiöser Argumente in einer pluralistischen Gesellschaft’, (2001) 45 *Zeitschrift für Evangelische Ethik*, no. 4, pp. 248-261; O. Štěch, ‘Dialog sekulárních a religiózních perspektív’, (2009) 57 *Filosofický časopis*, no. 5, pp. 767-774; C.F. Stychin, ‘Faith in the Future: Sexuality, Religion and the Public Sphere’, (2009) 29 *Oxford Journal of Legal Studies*, no. 4, pp. 729-755; V. McCracken, ‘In Defense of Restraint: Democratic Respect, Public Justification, and Religious Conviction in Liberal Politics’, (2012) 32 *Journal of the Society of Christian Ethics*, no. 1, <<http://doi.org/10.1353/sce.2012.0004>>, pp. 133-149; V. Malý & P. Dufek, ‘Náboženské rationale v liberální demokracii: Vyloučení, zahrnutí a hledání třetích cest’, (2013) 10 *Sociální studia*, no. 3, pp. 61-83; D. R. Walhof, ‘Habermas, same-sex marriage and the problem of religion in public life’, (2013) 39 *Philosophy & Social Criticism*, no. 3, <<http://doi.org/10.1177/0191453712473077>>, pp. 225-242. See also J. Gallagher & Ch. Bull, *Perfect Enemies: The Battle between the Religious Right and the Gay Movement* (2001).

*similarity*, and *equal access* to the benefits that had originally been ascribed to marriage and are now extended to other types of cohabitation (in legal practice only to unmarried cohabitation between opposite-sex persons).<sup>104</sup> Examples are the right to silence in cases endangering a close person, the right to access the medical records of a close person after her or his death, or a waiver of the obligation to take the necessary measures to avert the threat of environmental damage in cases endangering the life and health of a close person.<sup>105</sup> A number of legal consequences of marriage are then in practice the consequences of a decision between two adults to live in a stable and lasting union in a common household. As rightly pointed out by Craig W. Christensen, '[b]ecause marriage's legal consequences are the product of statutory invention, it ought to be a relatively simple matter to replicate them in an alternative legal status devised for same-sex couples – if, that is, the political will existed to do so'.<sup>106</sup> Therefore, we may make the comment, together with Sunstein, that 'it is hard to see why the state should deny members of same-sex relationships the same benefits and privileges that they would have if only they were permitted to marry.'<sup>107</sup>

Although the Court currently resigned itself to devise a 'statutory invention' for same-sex couples and went on to address normative issues to the legislature,<sup>108</sup> it seems clear that its equal approach to different forms of (opposite-sex) cohabitation is not based on an inherent quality setting one form of life bond above another, but on the same value of all human beings and their right to have access to an adequate scheme of fundamental rights and freedoms. This is so because equality 'cannot be understood as identity or sameness – it stems from the individuality of each person – but rather as the same or comparable opportunities for everyone'.<sup>109</sup> It is hardly surprising that civic equality could remain in the basement of same-sex couples' demand to be able to enter into a marriage because they 'share the same mix as non-gay men and women of practical and emotional, social and individual reasons for wanting the right to marry.'<sup>110</sup> They yearn for the realization of their individual benefits, including legally and socially recognized life bonds, as do many of their heterosexual fellow citizens. And the government of a liberal democratic state cannot constrain the realization of citizens' individual benefits unless it proves that these benefits represent a clear and present danger to social coherence, security and the public good (*commune bonum*). This is entirely consistent with one of the older CCSR judgments reading as follows:

[T]he right to privacy shall be limited only to the measure which is in accordance with the law, if such a measure is necessary in a democratic society in the interests of national security, public security, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.'<sup>111</sup>

To exclude two persons of the same sex from entering into a legal bond before a public authority is neither associated with any public good, public security, and the economic welfare of the country, nor with the principle of the democratic state, which contains not only a majority-based ruling, but also the protection of minorities and the inalienability of fundamental rights and freedoms. This principle goes hand in glove with a 'material core of the Constitution' guaranteeing the immutability of democratic principles and equal rights

104 I will shed some light on these concepts later.

105 See the Constitutional Court of the Slovak Republic, *supra* note 12, pp. 42-43, para. 81. For an overview of some other legal consequences of marriage (and/or unmarried cohabitation), see Chambers, *supra* note 53; Mohr, *supra* note 24, pp. 227-228. This brief outline of benefits reveals another aspect of the question. Freedom provided by the Government to citizens in a marriage is a positive freedom that ensures the large scope of the legal consequences of marriage. Justice Thomas in his dissenting opinion in the case of *Obergefell* is then wrong when he writes that 'liberty is only freedom from governmental action, not an entitlement to governmental benefits'. Thomas, *supra* note 74, p. 13.

106 Christensen, *supra* note 88, p. 1734 (emphasis in the original).

107 Sunstein (2001), *supra* note 26, p. 193.

108 'The Constitutional Court in the system of constitutional bodies has not been entrusted with dealing with normative and future-oriented solutions to (...) social conflicts. This has rather been entrusted to the subjects possessing legislative power; (...) this power is commissioned to even regulate conflicting social relations in a generally binding way.' Constitutional Court of the Slovak Republic, *supra* note 12, p. 51, para. 107 (author's translation).

109 T. Skarková, 'Rovnost jako právní kategorie', (2013) 8 *Acta Iuridica Olomucensia*, no. 1, p. 11.

110 E. Wolfson, 'Crossing the threshold: Equal marriage rights for lesbians and gay men and the intra-community critique', (1994) 21 *Review of Law & Social Change*, p. 584.

111 Constitutional Court of the Slovak Republic, *Nález Ústavného súdu Slovenskej republiky, sp. zn. PL. ÚS 43/95*, 10 September 1996, pp. 23-24 (author's translation).

and freedoms.<sup>112</sup> It is true that a democratic state must restrain the extreme use of rights and freedoms, coup d'états or revolutionary actions which could achieve a form of government which replaces or at least challenges its democratic nature (i.e. a totalitarian state or dictatorship). Thus, if a democratic state prevents same-sex couples from entering into formal life bonds, it may do so only if it is an 'extreme use of rights and freedoms' threatening its democratic character. If a state fails to prove this, it has no reason to prevent such bonds.

To prevent same-sex couples from living together under the auspices of the State would mean 'to disparage their choices and diminish their personhood'.<sup>113</sup> The democratic State must not impose a burden on citizens unless this is justified by the protection of other people and/or by the State's pursuit to maintain citizens' own well-being – an example is the involuntary placing of some people in facilities for drug addiction or mental hospitals or the compulsory use of safety belts in cars. This is why the State intervenes in people's daily lives. Any imposition of a burden or benefit allocation from the State should be duly justified. As asserted by Cass R. Sunstein, '[t]he distribution of benefits or the imposition of burdens must reflect a conception of the public good. Benefits and burdens may not be based solely on political power or on a naked preference for one group over another'.<sup>114</sup> Reciprocally, the State should allow its citizens to make use of legal benefits at their discretion within a legally defined scope and manner. In doing so, even the State itself is not burdened with a duty. As the ECtHR held in *Oliari*: '[A]n obligation to provide for the recognition and protection of same-sex unions (...) would not amount to any particular burden on the (...) State (...)'.<sup>115</sup>

By rejecting the third question and using the aforementioned arguments, the Court admitted that all adult and mentally sane citizens have the opportunity to choose such (private) life plans and mutual cohabitation which they will most benefit from, without jeopardizing their fellow citizens. This is so because, as stated some years ago by the Portuguese Constitutional Court, '[m]arriage between persons of the same sex will only mean that the space for interpersonal fulfilment, cohabitation, mutual assistance and contribution to the common needs with a view to complete personal fulfilment, which is what the family consists of, will, for those persons too, take on the legal form that results from their reciprocally binding themselves to one another'.<sup>116</sup> The Slovak Court thus unknowingly made use of liberal ideas and enabled every citizen to choose her or his own conception of the good (private) life which does not constitute a threat to others. As aptly put by Marta Cartabia and Milan Znoj, respectively,

'(...) according to liberal ideals, law is to be neutral in order for all personal choices to be allowed and respected. The liberal ideal wants each person to decide for oneself what one values and how one is going to live one's life in the light of these values: one must be entitled to a set of 'deliberative freedoms', allowing one to live following one's personal preference. Non-discrimination is a prominent tool for securing these deliberative freedoms. (...) Non-discrimination is essential to the liberal project because it urges the removal of all hindrances to free choice.'<sup>117</sup>

'All citizens in a liberal state should have an adequate and free space in order to be able to carry out their individual worldviews, their own goods, talents and abilities. A state must prevent the citizens to be mutually combating and disaccording in various efforts of their respective lives. This is impossible in any other way than in lawfully providing the conditions of compatibility for pluralistic goods of citizens. These conditions of compatibility of different goods are in a liberal state linked to the fundamental human (and civil) rights (and freedoms) which comprise the value framework of the compatibility of various human wills.'<sup>118</sup>

In a similar way, more than 15 years ago the CCSR explained that

112 An adequate protection of the Constitution's material core has not yet been translated into the Slovak conditions in practice and remains largely on a theoretical level. See B. Balog, *Materiálne jadro Ústavy Slovenskej republiky* (2014).

113 Supreme Court of the United States, *supra* note 2, p. 19.

114 Sunstein (2001), *supra* note 26, p. 188.

115 The European Court of Human Rights, *supra* note 3, p. 53, para. 173.

116 Tribunal Constitucional Portugal, *supra* note 6, para. 24.

117 Cartabia, *supra* note 58, pp. 809-810.

118 M. Znoj, 'Přednost práva před dobrem (K jedné z idejí politického liberalismu)', (1995) 134 *Právník: Teoretický časopis pro otázky státu a práva*, no. 6, p. 585.

(...) the Constitution in several provisions completes unified rules for the right to privacy, the essence of which is – in a certain sphere of social relations – the ability of an individual to live according to her wishes without undue constraints, commands and prohibitions laid down by the public authority.<sup>119</sup>

It is only the right to privacy which is safeguarded by the State in order to allow citizens to live freely and independently without excessive governmental intrusion. The scope of privacy and the private sphere of civil life have been changed over the centuries and this is also the case for the concept of the family. It is without any doubt that the right to privacy and its exercise in everyday practice is intertwined with the concepts of fundamental civil rights and freedoms. In defining and characterizing these terms we can use two approaches: (1) the viewpoint on values which is inherent in natural law or (2) the viewpoint on the sources of law interconnected with positive law.<sup>120</sup> When deciding on the two remaining questions proposed by the petitioners the Court was apparently inclined to adhere to the perspective of positive law. On the other hand, its judgment suffers from a number of defects and loopholes which I will point out below.

The Court found that the first two questions were not unconstitutional. Its reasoning was based on the fact that the Constitution only places a barrier against questions which – in case of their success in a referendum – ‘could erode the concept of basic rights and freedoms in the form of *diminishing their standard* emerging from international law, as well as the national legal system, to an extent which threatens the character of the legal state (Rechtsstaat). It is impossible to refuse any question which (...) may touch upon fundamental rights and freedoms.’<sup>121</sup> This is so despite the fact that the Constitution explicitly prohibits voting in a referendum on fundamental human rights and freedoms. In this situation the Court ‘is obliged to ensure that a possible extension of a specific fundamental right or freedom will not lead to a parallel lowering of the standard of another fundamental right or freedom.’<sup>122</sup>

In the case of the first question, the CCSR pointed out that it ‘has no ambition to change the legal situation (...) but to confirm it.’<sup>123</sup> The approval of the first question in the referendum would then not have led to a reduction in the existing standard of the fundamental right to protection against unauthorized interference in private and family life. The second question does not consider this right in any way, as held by the constitutional judges. The Court relied on the case law of the ECtHR (on *Schalk and Kopf* among other cases), according to which each state has room to take a stance on the issue of marriages between persons of the same sex. This has been reiterated in the case of *Oliari* in 2015 by claiming that governments are not obliged to grant same-sex couples access to marriage, and it depends on their own free discretion (a ‘margin of appreciation’ doctrine<sup>124</sup>) what kind of legal form they will provide for same-sex persons.<sup>125</sup>

## 4. Some remarks on the October 2014 judgment

### 4.1. Remark no. 1

The problems stemming from the Court’s judgment are manifold. *First*, the Court has created a causal relationship between the two fundamental human rights. All human rights are equal to one another. They are called *human* because they include all people without distinction based on origin, race, religion, gender, sexual orientation, etc. They are called *fundamental* because they are inalienable and none of them is superior to the other. The recognition of one fundamental human right, although it has not yet been recognized, does not imply a reduction of any other fundamental human rights. Similarly, the USSC refused the respondents’ argument that ‘allowing same-sex couples to wed will harm marriage as an institution by

119 Constitutional Court of the Slovak Republic, *Nález Ústavného súdu Slovenskej republiky, sp. zn. II. ÚS 19/97*, 13 May 1997, p. 15 (author’s translation).

120 Cf. L. Somorová, ‘Ústavná úprava základných práv a slobôd a jej perspektívy’, in L. Orosz et al. *Ústavný systém Slovenskej republiky. Doterajší vývoj, aktuálny stav, perspektívy* (2009), p. 150.

121 Constitutional Court of the Slovak Republic, *supra* note 12, pp. 29-30, para. 37 (emphasis added; author’s translation).

122 *Ibid.*, p. 30, para. 38.

123 *Ibid.*, p. 35, para. 58.

124 See P. Šturma, ‘Interpretace Evropské úmluvy o lidských právech a v. judikaturě Evropského soudu pro lidská práva’, in A. Gerloch & P. Šturma (eds.), *Ochrana základních práv a svobod v. proměnách práva na počátku 21. století v. českém, evropském a mezinárodním kontextu* (2011), pp. 357-358.

125 See the European Court of Human Rights, *supra* note 3, p. 57, paras. 191-192.

leading to fewer opposite-sex marriages.<sup>126</sup> The Court held that '[t]he respondents have not demonstrated a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe that these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.'<sup>127</sup> The Portuguese Constitutional Court claimed in a similar way that 'it seems that the attribution of the right to marry to persons of the same sex does not affect the freedom of persons of different sexes to enter into matrimony, nor does it alter the rights and duties that accrue to them as a result of their marriage, or the representation or image that they or the community might attribute to their matrimonial state. (...) In short: marriage between persons of different sexes remains untouched in terms of the conditions under which it takes place, of its legal effects between the spouses and with regard to the state and third parties, and of its significance as a source of family relations and social commitment.'<sup>128</sup>

Certainly, 'the extent to which the State guarantees fundamental rights can be reduced'.<sup>129</sup> On the other hand, there is no reason for the State to do so unless it is adequately able to justify such a reduction. Otherwise, such a step may prove to be counterproductive. As has been shown that granting suffrage to women has not diminished the performance of the same right by men, we have good reason to think that granting a right to wed or register a partnership (civil union) to persons of the same sex would not reduce the already existing human-rights standards or any specific fundamental human right. Of course, the recognition of such a right would have to mean the availability of these kinds of unions for each adult and mentally capable person, regardless of her or his sexual orientation, i.e. also for couples of the opposite sex, in order to prevent sex-based and sexual orientation-based discrimination. In any case, human-rights standards cannot be increased or diminished by recognizing a right that is indeed new, but only because there has been no social consensus on such a right. As has been rightly pointed out by the USSC, '[t]he nature of injustice is that we may not always see it in our own times'.<sup>130</sup> Thus, it is up to the constitutional court to recognize such a 'new' right not only by relying on sophisticated constitutional principles, but also taking into account any substantive social and cultural changes.

Justice Mészáros writes in his dissenting opinion that the greater scope of one's rights *could* really diminish the freedoms of others. As an example he states that reducing one's time under arrest to one hour could prevent the protection of public order.<sup>131</sup> Nevertheless, he overlooks the fact that such an example only deals with a *temporary* circumscription of a right in order to maintain order in society. We can imagine any situation where the State will temporarily limit one's right in order to ensure others' security. As has been stated above, the State cannot violate citizens' rights unless it proves that these rights represent clear and present danger for social security and the public good. There is no evidence that preventing someone from entering into a marriage or a similar type of formal union with legal consequences which are identical to marriage helps to maintain social security and/or public good. Such an argument is, therefore, flawed.

Justice Mészáros, however, remarks that the Slovak Constitution says nothing about the prohibition on diminishing freedoms, but it contains an explicit ban on discussing freedom in a referendum. Debating fundamental rights and freedoms in private clubs, cafés or wherever is a matter of freedom of speech; however, it is quite another thing to make room for such debates in a referendum with significant legal consequences. In other words, 'freedom cannot be discussed via voting in a referendum'.<sup>132</sup> Therefore, it is not within the Court's authority to explore preliminarily referendum results. This part of his argumentation can certainly be considered to be correct.

126 Supreme Court of the United States, *supra* note 2, p. 26.

127 *Ibid.*, pp. 26-27.

128 Tribunal Constitucional Portugal, *supra* note 6, para. 25.

129 M. Tomaszek, 'Esenciální obsah základních práv jako součást podstatných náležitostí demokratického právního státu', (2015) 24 *Jurisprudence*, no. 2, p. 12.

130 Supreme Court of the United States, *supra* note 2, p. 11.

131 L. Mészáros, *Odlíšné stanovisko k rozhodnutiu pléna Ústavného súdu Slovenskej republiky vo veci sp. zn. PL. ÚS 24/2014-90 (Dissenting opinion)*, 28 October 2014, p. 5, para. 9 (author's translation).

132 *Ibid.*, p. 6, para. 10.

#### 4.2. Remark no. 2

*Second*, the Court – by permitting a vote in a referendum on the possibility to marry (or to register another type of union) for persons of the same sex – rejected its previous above-mentioned precedent that a public authority has a duty to respect the right to privacy. If the referendum had been valid and voting in the referendum would have rejected the right for persons of the same sex to marry or register another similar union, the National Council of the Slovak Republic, according to the Constitution, should then declare such voters' decision to be law. The public authority (Parliament) would thereby be intruding on the right to privacy of those persons of the same sex who would like to register this kind of union before a public authority, i.e. the State. Moreover, it seems highly controversial if a right to decide on the human right in a referendum includes that segment of society which is not directly concerned with the realization of such a right and/or is not endangered by the realization of the right itself. How would it have seemed, for example, if the earlier abolition of racial segregation in the USA had been put to a referendum? The cases of the Croatian, Irish and Slovenian referendums of December 2013, May 2015 and December 2015, respectively, could serve as an example for Slovakia when it held a constitutional referendum, i.e. the referendum amending the Constitution, which is also possible in Slovakia, thanks to one of the previous decisions of the CCSR.<sup>133</sup> The problem, however, is not that citizens should not amend the Constitution by means of a referendum, but that they can decide on the fundamental rights and freedoms of their fellow citizens. Here lies the first risk of such a referendum, although this has been admitted by the CCSR in cases confirming or increasing the standard of fundamental human rights. From the Court's point of view, the construction of an alternative legal institution for same-sex couples increases the standard of fundamental human rights.

Transient majorities in society represent the second risk. On the one hand, the majority in a referendum can vote to 'increase' existing human rights standards (as is allowed by the CCSR), but that majority may also vote against it. There are always many factors that influence voters' decisions in a referendum; one of them could be the existing public opinion or a political campaign that had preceded a referendum. Thus there is a threat that the majority will restrict the rights and freedoms of minorities and democratically erode 'the material core' of the Constitution. In addition, 'if majority is allowed to limit individual liberty to promote what it regards as good, its appetite for doing so will grow and it will gobble up individual liberty until, eventually, even the most precious liberties are threatened.'<sup>134</sup> This also applies to sexual minorities: a negative mood in society can be reflected in the legislation. In this case there is a threat of discrimination based on sexual orientation. The ECtHR clearly decided on this issue some years ago. In the case of *Lustig-Prean and Beckett v. the United Kingdom* the Court emphasised that negative attitudes on the part of a heterosexual majority against a homosexual minority cannot amount to a sufficient justification for discrimination.<sup>135</sup> Clearly, capricious public opinion and transient majorities are neither a correct nor useful basis for the Court's jurisprudence, as claimed by Richard A. Posner:

[P]ublic opinion is not irrelevant to the task of deciding whether a constitutional right exists. When judges are asked to recognize a new constitutional right, they have to do a lot more than simply consult the text of the Constitution and the cases dealing with analogous constitutional issues. If it is truly a new right, as a right to same-sex marriage would be, text and precedent are not going to dictate the judges' conclusion. They will have to go beyond the technical legal materials of decision and consider moral, political, empirical, prudential, and institutional issues, including the public acceptability of a decision recognizing the new right.'<sup>136</sup>

133 'The Slovak Constitution does not prohibit the subject of a referendum, according to Art. 93, Clause 2 of the Constitution, from changing the Constitution or a part thereof.' Constitutional Court of the Slovak Republic, *Nález Ústavného súdu Slovenskej republiky, sp. zn. II. ÚS 31/97*, 21 May 1997, p. 2, para. 1 (author's translation). Irish voters agreed by a majority vote of 62.07 % to 37.93 % to a constitutional amendment stating that 'marriage may be contracted in accordance with law by two persons without distinction as to their sex'. Slovenian voters rejected a bill legalizing same-sex marriage by a 63.54 % to 36.46 %. Croatian voters agreed (66.28 % to 33.72 %) to an amendment to the Constitution defining marriage as a union between a man and a woman.

134 P. de Marneffe, 'Contractualism, Liberty, and Democracy', (1994) 104 *Ethics*, no. 4, <<http://doi.org/10.1086/293654>>, pp. 778-779.

135 The European Court of Human Rights, *Lustig-Prean and Beckett v. the United Kingdom*, 27 September 1999, p. 37, para. 90.

136 R.A. Posner, 'Should there be a homosexual marriage? And if so, who should decide?', (1997) 95 *Michigan Law Review*, no. 6, p. 1585.

One could argue that to refuse public opinion when arguing in favour of same-sex marriages/civil unions necessarily means to reject it when arguing against such life bonds. As the arguments against these bonds should not be based on current and changing social moods, so accordingly the arguments 'for' should not invoke the principle of social change in the understanding of the family and marriage. However, the differences between these cases are twofold. First, there are, on the one hand, temporary moods and atmosphere in society, while there are sustained long-term trends, on the other. That is why the interpretation of human rights in the ECtHR case law 'is not static but dynamic and takes into account the development of political processes and moral values in society'.<sup>137</sup> Second, the major social, political and legal changes have frequently occurred on the initiative of progressive minorities at the expense of dissenting majorities. These changes have proved to be correct over time, even though they had been initially seen as ground-breaking and galvanic. Sometimes it is such a minority which must take the initiative to move society further. In this respect, the recognition of 'new' fundamental rights means only to discover an unknown, but already existing right.

If the hypothetical referendum on 'increasing' the standard of human rights allowed by the CCSR were to be successful and voters had rejected any 'increase' in standards (i.e. if they had refused to approve civil unions/registered partnerships), Parliament would then be obliged to declare voters' decision to be law. Such a law would indeed contribute not only to the fact that human rights would not be 'increased', but it would furthermore preserve the status quo, as well as preventing persons of the same sex from cohabiting in legally recognized life bonds. As was ironically pointed out by Gary Mucciaroni, 'a greater direct democracy usually leads to more restrictive bans on same-sex partner recognition'; i.e. 'the direct initiative's greater openness to popular participation may lead to policy results that are less reflective of public opinion than when policy is made by legislators (...)'.<sup>138</sup> Here lies the third risk which would fulfil the essence of why the ECtHR criticized the Italian Government in the case of *Oliari*:

[T]he Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.<sup>139</sup>

Thus, the Slovak Government would have been intervening in citizens' private lives by failing to provide an adequate legal framework for the regulation of the common life of same-sex persons. It is obvious that if the Italian Government has a positive obligation to legislate on the life bonds of such persons, such an obligation necessarily applies to any government which falls within the jurisdiction of the ECtHR (Contracting States to the European Convention on Human Rights), i.e. also Slovakia. Otherwise, there is a violation of rights under Article 8 of the European Convention on Human Rights, as decided by the ECtHR in *Oliari*.<sup>140</sup> It should be added that the refusal to allow a non-heterosexual person to adopt a child because of his/her sexual orientation 'did not constitute a breach of his [or her] right to private life under Article 8 taken in conjunction with Article 14',<sup>141</sup> as decided in *Fretté v. France* in 2002.<sup>142</sup>

It seems obvious that the CCSR will have to adopt this type of reasoning in any future judgment on this issue,<sup>143</sup> or a possible explanatory report of a draft law on registered partnerships in Slovakia could be rooted

137 P. Šturma, 'Úvod: Teorie a politika lidských práv', in P. Šturma (ed.), *Studies in Human Rights, Vol. 1: Pojem a teorie lidských práv* (2013), p. 17.

138 G. Mucciaroni, *Same Sex, Different Politics: Success and Failure in the Struggles Over Gay Rights* (2008), p. 224. For more about anti-gay rights referenda, see D.P. Haider-Markel et al., 'Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights', (2007) 60 *Political Research Quarterly*, no. 2, <<http://doi.org/10.1177/1065912907301984>>, pp. 304-314; J. Barth et al., 'Community Context, Personal Contact, and Support for an Anti-Gay Rights Referendum', (2009) 62 *Political Research Quarterly*, no. 2, <<http://doi.org/10.1177/1065912908317033>>, pp. 355-365; T. Donovan & C. Tolbert, 'Do Popular Votes on Rights Create Animosity Toward Minorities?', (2013) 66 *Political Research Quarterly*, no. 4, <<http://doi.org/10.1177/1065912913478839>>, pp. 910-922.

139 The European Court of Human Rights, supra note 3, p. 56, para. 185.

140 *Ibid.*, p. 58, para. 200. To be fair, we should recall that the general application of the ECtHR's judgments is widely accepted by the contracting states, but with many reservations. Cf. I. Pospíšil, 'Ústavní soud a lidská práva', in P. Dufek & H. Smekal (eds.), *Lidská práva v mezinárodní politice* (2014), p. 369.

141 S. Choudhry & J. Herring, *European Human Rights and Family Law* (2010), p. 150.

142 The European Court of Human Rights, *Fretté v. France*, 26 February 2002, Application no. 36515/97.

143 For more about the application of ECtHR case law by the CCSR, see J. Ondrová & R. Svitana, 'Aplikácia judikatúry Európskeho súdu pre ľudské práva v rozhodovaní Ústavného súdu SR a Európskeho súdneho dvora', (2004) 7 *Politické vedy*, no. 3, pp. 133-141; T. Lalík, 'Vplyv judikatúry Európskeho súdu pre ľudské práva na rozvoj ľudských práv v Slovenskej republike', (2009) 61 *Justičná revue*, no. 12, pp. 1305-1324; J. Svák & B. Balog, 'Trends in the judicature of the European Court of Human Rights and the execution of judgements of the

therein. We should not forget that in 2010 Slovakia, as a Member State of the Council of Europe, was invited, together with other Member States, to 'ensure legal recognition of same-sex partnerships when national legislation envisages such recognition,' as well as 'to provide the possibility for joint parental responsibility of each partner's children, bearing in mind the interests of the children.'<sup>144</sup> Thus, there is a clear positive obligation for the Slovak Republic resulting not only from the principle of the democratic state ensuring the protection and inalienability of fundamental rights and freedoms, but also from international documents, judgments of the ECtHR and Slovakia's membership of international governmental organisations. It is possible that in the near future someone will object to a violation of his or her rights to have equal access to a legally recognised life union at the CCSR. The Court will have no choice but to remind the State of its positive obligation to recognize the possibility of registering a partnership between same-sex persons before a public authority, even in spite of potential public opposition: 'An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.'<sup>145</sup>

### 4.3. Remark no. 3

*Third*, by acknowledging that there is a large amount of benefits guaranteed by the Government for two persons of the opposite sex living outside of marriage, the CCSR admitted that there is also a strong similarity between cohabitation, which is formally accepted by society but not recognized by the public authority, and two persons of the same sex living in a similar life bond. In the case of opposite-sex couples it is a voluntary cohabitation without a marriage. The cohabitation of same-sex couples living in a long-term relationship shows exactly the same characteristics as the cohabitation of unmarried different-sex couples. As the ECtHR held in *Eweida and Others v. The United Kingdom*, 'same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship (...)'<sup>146</sup> The same situation applies in the case of children born outside wedlock; there is the constitutional principle of non-discrimination against these children.<sup>147</sup> Unlike unmarried cohabiting different-gender couples, many of the same-sex couples are interested in a formal recognition of their life bond before a public authority. With regard to the existing strong similarity between these types of cohabitation, there is certainly room for legalizing the latter. If the State has decided not to intervene in the private lives of unmarried cohabiting couples of the opposite sex and to grant them considerable benefits and rights which are intrinsic to spouses, there is no reason why it should limit the life bonds of cohabiting citizens of the same sex and why they should be denied such benefits and rights. As remarked by Kenneth L. Karst,

'[f]or doctrinal purposes, the similarity means that both sets of cases invoke the same sliding scale of justification for state interference with the association, and in particular that any effort by the state to forbid intimate homosexual association must be justified by the same sort of heroic state interests that would be necessary to justify forbidding heterosexual marriage or other forms of heterosexual association.'<sup>148</sup>

This has a close connection with the second referendum question as well. The question dealt with the right of adoption of same-sex couples. The intention of the petitioners was to prevent such couples from adopting a child. This is evident not only from their written response to the decision of the President to send the questions for a judicial review, but also from the whole pre-referendum campaign, from their multiple oral statements, as well as from misleading information posted on the website of the Alliance for the Family.<sup>149</sup> Justice Orosz wrote in his dissenting opinion that such a question is in conflict with constitutional principles, such as the protection of fundamental rights, the prohibition of discrimination and

European Court of Human Rights in Slovakia', in *Efektynowość europejskiego systemu ochrony praw człowieka: efektywność mechanizmów ochrony praw człowieka Rady Europy, Unii Europejskiej i obwe* (2012), pp. 291-298.

144 Resolution 1728 (2010) of the Parliamentary Assembly of the Council of Europe, paras. 16.9 and 16.10.

145 Supreme Court of the United States, *supra* note 2, p. 24.

146 The European Court of Human Rights, *Eweida and Others v. The United Kingdom*, 15 January 2013, p. 38, para. 105.

147 See the Constitution of the Slovak Republic, Art. 41, Clause 3.

148 K.L. Karst, 'The Freedom of Intimate Association', (1980) 88 *The Yale Law Journal*, no. 4, p. 685.

149 <<http://www.alianciazarodinu.sk/>> (last visited 19 April 2016).

the principle of the democratic state. According to him, any ‘attempt towards anchoring the constitutional ban on such adoptions through the referendum does not correspond with (...) the democratic principle of our Constitution, nor with adequate esteem and respect for human rights’.<sup>150</sup>

The adoption of children by same-sex persons has been possible in Slovakia for many years. Current laws do not address in any way the future sexual orientation of adoptive parents. If a non-heterosexual person applies to adopt a child as an individual, i.e. as a so-called sole person, the public authority will not investigate her/his sexual orientation. However, only that sole person will be declared to be the child’s legal representative, not his/her partner. Even though an explicit ban on adoptions by same-sex couples does not exist, the processes related to adoption is for them just as difficult as it is for everybody. All applicants, regardless of their sexual orientation (which is not examined), must take into account the visits by social workers. They will examine their housing or family circumstances. They will also be subjected to the preparatory process which involves psychologists and other experts. It is almost impossible for an applicant to conceal a partner of the same sex or her/his own sexual orientation. Everything depends more or less on the clerks who assess the applicant. Current anti-discrimination law which is valid throughout the EU excludes any refusal of adoption based on sexual orientation. The adoption and care of a child cannot be rejected if the applicants or an applicant meets the statutory conditions. Otherwise, it would amount to an unequal treatment. Justice Orosz was certainly right when pointing out that a ban on child adoption by same-sex persons would violate their fundamental rights. On the other hand, there is still no CCSR judgment which would specifically allow such adoptions.

One of the possible inspirations for a potential decision on this issue could be a judgment by the Austrian Constitutional Court of December 2014. The Court held that any different treatment of same-sex registered partners in comparison with married couples of the opposite sex is neither legitimate nor necessary. It is impossible to demonstrate, the Court claimed, that same-sex registered couples are less suitable than their opposite-sex counterparts in general. Therefore, same-sex couples are in a comparable situation with those of a different sex: ‘The legal status of registered partners corresponds largely to that of married couples, particularly with regard to the reciprocal obligations of the partners and dissolubility of the partnership. Same-sex couples are just as well suited to educate and raise children as different-sex couples. Children would not need heterosexual or homosexual, but caring and loving parents.’<sup>151</sup> Thus, a ban on the joint adoption of children by partners of whatever gender living in a stable relationship can no longer be regarded as legitimate. It should be admitted that the living conditions of a child reared by couples of the same sex are at least as good as in the case of different-sex couples.

#### 4.4. Remark no. 4

The CCSR, referring to the European Convention on Human Rights, left open the issue of the legalization of same-sex unions and reiterated that the respective states are not obliged to allow same-sex marriages and have a wide spectrum of possibilities as to what kind of benefits, privileges and legal consequences they will ascribe to potential civil unions or registered partnerships. Furthermore, it stated that ‘[t]he status of spouses, including child adoption, can be treated differently than the status of registered partners, or unmarried couples.’<sup>152</sup> It means, therefore, that this would create two different types of life bonds (‘first’ and ‘second-class’ bonds) with unequal rights, which would be a violation of the principle of civic equality and the equal treatment of citizens by the public authority. Of course, one could rely on *Oliari and Vallianatos and Others v. Greece*, respectively, where the ECtHR ruled that

‘[I]n the absence of marriage, same-sex couples (...) have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in

150 Orosz, supra note 10, p. 7.

151 Der Verfassungsgerichtshof, G 119-120/2014-12, 11 December 2014, p. 4, para. 6 (author’s translation).

152 Constitutional Court of the Slovak Republic, supra note 12, p. 37, para. 66 (author’s translation).

the form of core rights relevant to a couple in a stable and committed relationship – without unnecessary hindrance. (...) This recognition would further bring a sense of legitimacy to same-sex couples (...)<sup>153</sup>

[C]ivil partnerships as an officially recognised *alternative* to marriage have an intrinsic value for [the same-sex couples] irrespective of the legal effects, however narrow or extensive, that they would produce.<sup>154</sup> This is so because 'same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Same-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples.'<sup>155</sup>

The Slovak Constitutional Court declared, in accordance with the judgments of the ECtHR, that it is up to the State's own discretion which benefits and rights will be given to potential registered partnerships or other kinds of life bonds for same-sex couples. However, this opens the door for a solution which involves two types of life bonds granting unequal legal consequences to the respective bonds. This means that the potential acknowledgement of registered partnerships or civil unions 'might provide only parts of the package of legal consequences that now attaches to marriage.'<sup>156</sup> Similarly, in 2003 the California Supreme Court was of the view that 'reserving the historic designation of "marriage" exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect (...)' thus 'perpetuating an understanding of gay individuals and same-sex couples as "second-class citizens".'<sup>157</sup> In other words, the alternative institutions available to same-sex couples who are not allowed to marry impose many important restrictions in comparison with married opposite-sex couples, such as 'the need to prove their relationship is significant, non-recognition in other jurisdictions and the feeling of being separated from the rest of society.'<sup>158</sup> Not to mention a symbolic role played by marriage in many cultures as the act of social inclusion and the recognition of two persons' mutual intimacy as a public institution. A marital status would mean that same-sex couples 'would have the same opportunity as heterosexual couples to make the public self-identifying statements implicit in marriage, but also that the state recognized their status as an acceptable one in society rather than one deserving of stigma'.<sup>159</sup>

The legal recognition of diverse forms of cohabitation with different rights could be, at first glance, a sign of the social tolerance of same-sex couples' cohabitation, but this would in fact be a distorted idea of tolerance. It would only be a half-hearted tolerance or a tolerance with reservations, because tolerance can be seen as being 'based on reciprocal respect for the life benefit of the other. When I tolerate the other I accept that she will have enough room to adhere to her own beliefs and, on the contrary, I expect that she will also give me enough room for my life plans.'<sup>160</sup> It is impossible to fully realize one's life plan with only half of the rights that someone possesses in comparison with the rights of her fellow citizens. From

153 The European Court of Human Rights, *supra* note 3, p. 53, para. 174.

154 The European Court of Human Rights, *Vallianatos and Others v. Greece*, 7 November 2013, p. 28, para. 81 (emphasis added).

155 *Ibid.*, pp. 28-29, para. 81.

156 Chambers, *supra* note 53, p. 488. 'There can be no doubt, wherever adopted and by whatever name, domestic partnership laws have brought some measure of civic legitimation to same-sex relationships where before there was none. And in substantial numbers of particular cases, they have supported gay and lesbian family life by the provision of needed tangible benefits. What is equally clear, however, is that even the most beneficent of these enactments is second-class as compared to the laws supporting marriage. Only if companionate cohabitation among gays and lesbians is deemed less worthy of state support can domestic partner laws fairly be seen as reasonable substitutes for marriage.' Christensen, *supra* note 88, p. 1745.

157 Cited in Siegel, *supra* note 48, p. 375.

158 G. Zukaite, 'Does the prohibition of same-sex marriages violate fundamental human rights and freedoms?', (2005) 2 *International Journal of Baltic Law*, no. 4, p. 23.

159 Karst, *supra* note 148, p. 684. There are, however, some advocates of homosexual rights who oppose same-sex marriages. They claim 'that legal equality with heterosexuals will not produce social equality with heterosexuals, since their freedoms are founded on homosexual oppression; their rights are heterosexual rights, and gaining those will not transform non-heterosexuals into their equals'. M. Rahman, 'Sexuality and rights: Problematising lesbian and gay politics', in T. Carver & V. Mottier (eds.), *Politics of Sexuality. Identity, gender, citizenship* (1998), p. 80. '[T]he desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.' N.D. Polikoff, 'We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage', (1993) 79 *Virginia Law Review*, no. 7, p. 1536. See also Eitelbrick, *supra* note 59. An opposite road – how to justify marriage equality without assimilation of queer identities into heteronormative identity – has been recently paved by L. Richardson-Self, *Justifying Same-Sex Marriage: A Philosophical Investigation* (2015).

160 Znoj, *supra* note 118, p. 586. This is a stance which is typical of 'comprehensive liberals' because the principle of toleration as such is here 'derived from its more fundamental moral commitment to ethical autonomy and is not the fundamental liberal commitment itself'; K.-Ch. Tan, *Toleration, Diversity, and Global Justice* (2000), p. 51 (emphasis in the original). Admittedly, such a concept can be deemed to

this perspective, the decision of the ECtHR involving two different types of life bonds seems weak and insufficient.

When deliberating on tolerance, Ingrid Creppell comes to the conclusion that '[i]f toleration is about protecting the integrity of the person, and instrumental to that integrity is access to important sources of economic, political, social, and cultural well-being, then society must give homosexuals access to marriage rights'.<sup>161</sup> Likewise, Ronald Dworkin writes that '[p]rohibitions on same-sex (...) marriage constrain foundational choices, and they are almost always motivated by a desire to protect some conceptions of living well and blot out others'.<sup>162</sup> A similar reasoning has also been adopted by Cass R. Sunstein: '[I]t is hard to see why the state should deny members of same-sex relationships the same benefits and privileges that they would have if only they were permitted to marry'.<sup>163</sup> Seen from a different point of view, 'the primary reason why same-sex couples should be allowed to marry is that prohibiting them from doing so amounts to discrimination'.<sup>164</sup> In order to put an end to these thoughts we can say, together with Craig W. Christensen, that

'[i]t is hard to imagine any action more likely to lift the sexual outlaw onus than the legalization of same-sex marriage. In one step, society would confer, perforce, the symbolic legitimation of intimacy that is always implicit in the celebration of a marriage. It would be a civic recognition of shared humanity like no other that gay people have ever experienced. But it could only come with marriage. There is no simulacrum that would do the same.'<sup>165</sup>

## 5. Judicial activism and the judicialization of politics

From the point of view of the long-term social and political situation in Slovakia it seems unrealistic that registered partnerships will be formalized through governmental or parliamentary initiatives. Hence, the most likely road to be followed appears to be a decision of the CCSR. It seems obvious that for constitutional courts in liberal democracies all over the world 'the protection and promotion of constitutional human rights against executive (and legislative) encroachments has become the most important activity, the most relevant justification for their eminent position in the political system, and the basis for their high public esteem'.<sup>166</sup>

For the remainder of this article I will discuss one of the most serious caveats put forth by the opponents of same-sex marriages/civil unions, i.e., that in a democratic republic a decision on the legalization of such life bonds 'should rest with the people acting through their elected representatives' and not with unelected judges 'who happen to hold commissions authorizing them to resolve legal disputes according to law', as Chief Justice Roberts wrote in his dissenting opinion in *Obergefell*.<sup>167</sup> This was obviously the basis of Wardle's objection voiced almost 20 years before the legalization of same-sex marriages in the USA: 'Litigants asserting constitutional claims for same-sex marriages [(or civil unions) may try] to follow the avenue taken successfully by advocates of legalized abortion-on-demand, i.e., seeking to have the courts provide a shortcut to law reform that is not readily obtainable through the democratic process'.<sup>168</sup> The main problem could apparently be judicial activism and the undemocratic procedure of decision-making and law-making. As Dworkin put it, '[a] phalanx of like-minded justices can indeed strike down popular laws, impair

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be quite controversial. However, every concept of tolerance assumes more or less a high degree of reciprocity, respect and congruence as well as sufficient space in allowing the expression of one's own beliefs and opinions without intentionally harming others.

161 Creppell, supra note 81, p. 348.

162 R. Dworkin, *Justice for Hedgehogs* (2011), p. 369.

163 Sunstein (2001), supra note 26, p. 193.

164 Zukaite, supra note 158, p. 16.

165 Christensen, supra note 88, pp. 1783-1784.

166 F. Schimmelfennig, 'Competition and community: constitutional courts, rhetorical action, and the institutionalization of human rights in the European Union', (2006) 13 *Journal of European Public Policy*, no. 8, <<http://doi.org/10.1080/13501760600999557>>, p. 1251.

167 Roberts, Jr., supra note 67, p. 3. The Portuguese Constitutional Court similarly held in its judgment in 2009 that it is the legislator, not the court, which is obliged 'to create rules which ensure that same-sex unions possess a functional content that is equivalent to marriage', Tribunal Constitucional Portugal, supra note 90, para. 13. The same court ruled that '[t]he core consequence of the inevitable acceptance of the sovereignty of the people and the enshrinement of the system of the separation of powers implies not only yielding to the decisions handed down by impartial, independent organs like the courts, but also accepting that the task of reforming the legal order pertains to the organs that directly represent the popular will and are given the power to make choices of a political/legislative nature', Tribunal Constitucional Portugal, supra note 90, para. 12.

168 Wardle, supra note 19, p. 25.

popular policies, and critically alter our electoral institutions and processes. They can make very serious mistakes in exercising that power.<sup>169</sup>

Basically, there are two camps of scholars in terms of the role played by constitutional justices in politics: those who advocate judicial decision-making in delicate cases pertaining to fundamental rights and those who reject this. The latter claim that '[i]mplementing any rights-based policy requires the acquiescence and often the active cooperation of the whole population of a country; (...) all rights have both a collective dimension and raise matters over which we disagree.'<sup>170</sup> In other words, the 'judiciary in a democratic parliamentary system is not entitled to limit the process of democratic law making (...)'.<sup>171</sup> When constitutional judges decide in such cases, the latter claim, people are denied from having a voice in democratic decision-making and are replaced by a committee of 'unaccountable and unelected'<sup>172</sup> elite lawyers who can hardly mirror a majority of the People. These lawyers then usurp powers which they are not entitled to.<sup>173</sup> Thus, the People are robbed 'of the most important liberty' asserted in democracy: 'the freedom to govern themselves.'<sup>174</sup> To put it radically: 'A system of government that makes the People subordinate to a committee of (...) unelected lawyers does not deserve to be called a democracy.'<sup>175</sup>

The former say that there is nothing wrong with deriving rights from judicial process and an appropriate legal interpretation by the constitutional courts (the constitutional court as a negative legislator). In addition, these courts cannot evade the responsibility of deciding on delicate constitutional questions as parliaments can, for instance, by waiving and postponing their legal obligation (for example, until the next term), or putting it before the constitutional court. Especially in the matter of fundamental rights and freedoms the constitutional courts are privileged *political* institutions which are competent to decide in such delicate cases within the division of powers. 'Legal interpretation does not constitute an act of will but it is a fruit of knowledge of the law. Nowadays, a judge in the existing institutional practices, laws and precedents reveals widely recognized values of (human) rights.'<sup>176</sup> A mere fact that something is a political issue, or is/could be the subject of a political struggle does not mean that the court cannot decide in that case. What is more, '[t]he political nature of the issue in the process of decision-making will not go away just because it is being solved by an independent and impartial body (...)'.<sup>177</sup> But at the same time it should be said that 'the clearer and more direct role of the constitutional court as the final protector of the substantive features of a democratic legal state that is played, then the more evident should be its internal awareness and self-restraint.'<sup>178</sup>

The court's legal opinion shall be delivered whenever requested and without delay. Finding an excuse for the risks of the majority principle, as made by the dissenting Justices in *Obergefell*, is then flawed. Even decisions in elections or referendums are based on the rule of the majority; it is a genuine democratic rule. Every judgment of the constitutional court is inevitably a *political* one, regardless of the origin and nature of the case in question, because of deep *political* implications which such a precedent has or could have in the foreseeable or distant future. As Dworkin wrote, '[s]ubstantive judicial review certainly creates a limited, but within its limits vast, disparity of *political* impact.'<sup>179</sup>

169 Dworkin, *supra* note 162, p. 397.

170 R. Bellamy, *Political Constitutionalism* (2007), p. 51.

171 P. Holländer, 'Soumrak moderního státu', (2013) 152 *Právník: Teoretický časopis pro otázky státu a práva*, no. 1, p. 19.

172 Roberts, Jr., *supra* note 67, p. 25.

173 Cf. S.A. Alito, Jr., *Dissenting opinion – Obergefell et al. v. Hodges, Director, Ohio Department of health et al.*, 26 June 2015, p. 7; Roberts, Jr., *supra* note 67, p. 27.

174 A. Scalia, *Dissenting opinion – Obergefell et al. v. Hodges, Director, Ohio Department of health et al.*, 26 June 2015, p. 2.

175 *Ibid.*, p. 5. See also Thomas, *supra* note 74, pp. 2-3.

176 Baroš, *supra* note 36, p. 123.

177 J. Kysela, 'Stát jako obr na hliněných nohou. Opožděné poznámky k seriálu o budoucnosti státu', (2014) 153 *Právník: Teoretický časopis pro otázky státu a práva*, no. 11, p. 963, footnote no. 73. This is what a debate on the so-called political question doctrine is all about. For more about the issue, see F.W. Scharpf, 'Judicial Review and the Political Question: A Functional Analysis', (1966) 75 *The Yale Law Journal*, no. 4, pp. 517-597; L. Henkin, 'Is There a 'Political Question' Doctrine?', (1976) 85 *The Yale Law Journal*, no. 5, pp. 597-625; M.H. Redish, 'Judicial Review and the "Political Question"', (1984) 79 *Northwestern University Law Review*, no. 5 and 6, pp. 1031-1061; G. Sinner, 'Misunderstood, misconstrued, and now clearly dead: The political question doctrine as a justiciability doctrine', (2014) 29 *The Journal of Law & Politics*, no. 3, pp. 427-480; M. Hailbronner, 'Judicial Self-reflection and Institutional Awareness', in *Traditions and Transformations: The Rise of German Constitutionalism* (2015), Ch. 6, <<http://doi.org/10.1093/acprof:oso/9780198735427.003.0006>>; K.R. Doyle, *Constitutional Inquiries: The Doctrine of Constitutional Avoidance and the Political Question Doctrine* (2015).

178 Preuss, *supra* note 98, p. 240.

179 Dworkin, *supra* note 162, p. 396 (emphasis added). On the other hand, judicial review 'does not police compliance by the executive with political (as opposed to legal) principles of right conduct – this is primarily a task for Parliament via the various accountability mechanisms

Furthermore, a degree of caution in judicial review always seems appropriate. As held by the CCSR in its October 2014 judgment, there is ‘a clear need for restraint and natural [the Court’s] self-restraint when making authoritarian interference possible in the process of announcing the referendum’.<sup>180</sup> There is certainly a danger of judicial activism and the judicialization of politics via judicial review, not only in the case of deciding on the constitutionality of potential referendum questions.<sup>181</sup> All decision-making by the constitutional court, however, is supposed to involve those fundamental principles and tenets which are neither based on the interests of the parties concerned, nor on the individual opinion and preferences of judges, whose duty is to act as ‘faithful guardians of the Constitution’, as stated by Alexander Hamilton in the *Federalist No. 78*.<sup>182</sup> This is the basic premise according to which all constitutional/supreme courts in democratic countries are entrusted with wide authority to act as the court of last resort when deciding on the constitutional foundations of the State. As concisely put by John Rawls,

‘[t]he justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people’s religious or philosophical views. Nor can they cite political values without restriction. Rather, they must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason. These are values that they believe in good faith, as the duty of civility requires, that all citizens as reasonable and rational might reasonably be expected to endorse.’<sup>183</sup>

Due to the fact that a judge must detect parties’ rights even in cases where there is no clear legal rule thereon in cases which involve such delicate issues as same-sex marriages/civil unions, she/he is obliged to refer to the argumentation of principles that are not an expression of her/his own individual preferences, but would be reasonably and rationally endorsed by all citizens.<sup>184</sup> She/he is able to do so because of devoting her/his life to the ‘long and laborious study’<sup>185</sup> of the constitutional law of and the society in which she/he lives. ‘In a system where justice is a public value (...) judges must apply their reason and experience in the attempt to achieve justice, at times by rectifying or eliminating injustice. That is their role and their responsibility – to the law, to the judicial institution, to the public, and to the litigants.’<sup>186</sup> A judge is obliged to reconstruct the principles through thinking about the essence of justice in society, in order to determine whether the intended principle could be provided as an establishing rule of appropriate jurisdiction. In doing so, a judge reveals the principle which is in essence the principle of justice.

With due respect for the mentioned principles of justice, we can hardly talk about exaggerated judicial activism in democratic politics. As mentioned above, any decision of the constitutional court is, thanks to the nature of the institution, at the same time a political one. No court, as a representative democratic institution *sui generis*,<sup>187</sup> can avoid the responsibility – towards the law, towards the public, and towards the litigants – to decide on issues of significant social importance. Thus, for the future the basis has already been laid down for the Slovak Constitutional Court regarding a decision on the legalization of civil unions/registered partnerships of same-sex couples. The relevance and cogency of such a decision, however, will

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by which it performs the function of scrutinising the conduct of executive government. Nor is judicial review primarily concerned with establishing and policing bureaucratic (as opposed to legal) principles of “good administration”. P. Cane, ‘Understanding judicial review and its impact’, in M. Hertogh & S. Halliday (eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004), p. 18.

180 Constitutional Court of the Slovak Republic, *supra* note 12, p. 50, para. 104 (author’s translation).

181 See A. Stone Sweet, ‘Judicialization and the construction of government’, (1999) 32 *Comparative Political Studies*, no. 2, pp. 147-184; L. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); R.C. Den Otter, *Judicial Review in an Age of Moral Pluralism* (2009); J. Zaiden Benvindo, *On the Limitations of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism* (2010).

182 A. Hamilton, J. Madison & J. Jay, *The Federalist Papers* (2008), p. 384.

183 Rawls, *supra* note 101, p. 236.

184 Cf. M. Večeřa, *Spravedlnost v právu* (1997), p. 143.

185 Hamilton, Madison & Jay, *supra* note 182, p. 385.

186 D.E. Edlin, *Judges and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review* (2008), p. 121.

187 In terms of an ‘argumentative/discursive representation’, as proposed by Robert Alexy. See his ‘Balancing, constitutional review, and representation’, (2005) 3 *International Journal of Constitutional Law*, no. 4, <<http://doi.org/10.1093/icon/moi040>>, pp. 572-581. See also M. Kumm, ‘Alexy’s Theory of Constitutional Rights and the Problem of Judicial Review’, in M. Klatt (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (2012), pp. 201-217.

have to be based on justifiable principles of justice. In Slovak constitutional law the only such principles could be the principles of: civic equality, the similarity of unmarried cohabiting couples with their married counterparts, equal access to the legal and social benefits of marriage, the democratic state, and, last but not least, the right to privacy.

## 6. Concluding remarks

'We live in societies in which we are increasingly less able to refer to a single or primary level as the one on which the basic identity of social agents is constituted. This means, on the one hand, that social agents are becoming more and more "multiple selves", with loosely integrated and unstable identities; and on the other, that there is a proliferation of the points in society from which decisions affecting their lives will be taken', wrote Ernesto Laclau two decades ago.<sup>188</sup> The referendum held in Slovakia in February 2015 showed that there are certainly many 'multiple selves' among its citizens, particularly concerning their view on the possible legalization of same-sex civil unions. The CCSR's judgment which had preceded it, however, had left the door ajar for such an option. In spite of many defects and weaknesses inherent therein, the judgment implicitly 'proliferates' some new points of departure for the legal recognition of such unions. I have tried to cast some light on a couple of them. I do not claim, though, that some others cannot be found.

It is beyond any dispute that same-sex marriages cannot be legalized in Slovakia unless the Constitution's crucial paragraph defining marriage as a male-female union is amended. Meanwhile, it is necessary to find ways of how to compel the State to fulfil its 'positive obligation' to give such couples the social and legal benefits which have already been granted to its citizens who have entered into a marriage or live in unmarried cohabitation. Because even when the law is conservative by nature and should not be changed dramatically, legal regulations cannot overlook its certain inner dynamism. 'An ideal law, and the more so the constitution, should reflect and produce a real picture of society.'<sup>189</sup> After all, the arguments as to why same-sex couples should be allowed to enter into a marriage with each other are based on 'the decisions of the judiciary and the development of a number of constitutional conventions'.<sup>190</sup>

The State cannot impose a social and/or legal burden on part of the population and to leave the other part unburdened. The impossibility of legalizing their spiritual, romantic and intimate relationship based on mutual trust, bilateral loyalty and love represents such a burden. This fact seriously undermines the principle of civic equality. Furthermore, to prohibit same-sex couples from registering such a life bond before a public authority (either through a referendum or otherwise) violates the right to privacy. Such a step, i.e. the legalization of civil unions, will probably not be possible without adequate judicial review, as the American case has demonstrated. I have attempted to show that if the CCSR bases its future judgment on the principles of justice, it cannot be a case of excessive judicial activism. And it would certainly not be a judicialization of democratic politics because every issue judged by the constitutional courts has a political dimension *sui generis*; all constitutional courts in liberal-democratic countries participate in legislation not only via making propositions or in a discursive manner, but also owing to their institutional and/or authoritative democratic dimension.<sup>191</sup>

Love, as well as justice, is indeed blind. It is 'blinded by the light – because the lover is stutteringly bedazzled by the beloved. In love, we overlook failings in those whom we cherish. And the beloved's happiness, not the beloved's respect, is love's central concern.'<sup>192</sup> One of the reasons why people associate themselves with and reside in (democratic) states is to seek not only life and liberty, but also the pursuit of happiness. A liberal democratic state can fulfil its positive obligation to ensure this pursuit if and only if it offers an adequate scheme of fundamental rights and freedoms. The ambition of two loving and mentally capable adults to have their mutual commitment recognized to establish a firm and stable companionship before the State, Law and Society *is* such a right. ■

188 E. Laclau, *Emancipation(s)* (1996), p. 99.

189 Preuss, *supra* note 98, p. 217.

190 Choudhry & Herring, *supra* note 141, p. 148.

191 See Alexy, *supra* note 187, p. 578.

192 Mohr, *supra* note 24, p. 231.