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Same-Sex Marriage – A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriage in Europe

Abstract: Marriage is a successful institution and it makes sense to open it to as many people as possible. The issue of same-sex marriage sparked emotional and political clashes between supporters and opponents. Denial of marriage rights to same-sex people can be seen as a kind of discrimination. This paper explores legal recognition of same-sex marriages. It thereby focuses on the role of Constitutional (Supreme) Courts engaging with the legal arguments over same-sex relationship recognition and marriage. It highlights the effects of policy evolution towards same-sex marriage as well as society's attitudes. The paper examines the role of referendum held in five European states (Croatia, Slovakia, Ireland, Slovenia and Romania) devoted to (in general) same-sex marriage. It discusses the results of referendums and voters' choice.

Keywords: dignity, legalisation, partnership, referendum, same-sex marriage

Introduction

The change of approach to homosexuality and to the homosexual relationship took place gradually. In the interwar period and in the first two decades after the Second World War, depenalization of homosexual acts took place in developed countries. The culmination of this stage was the official deletion of homosexuality from the list of mental disorders by the American Psychiatric Association in 1973¹,

1 J. Drescher, Out of DSM: Depathologizing Homosexuality, „Behavioral Sciences” 2015, vol. 5(4), pp. 565-567.

and in 1990 by WHO from the International Classification of Diseases and Health Problems².

In Western European societies, in the post-war period, there was a prevailing conviction that the state should not interfere with the private life of the individual. With the gradual increase in social acceptance of homosexual people³, the conviction about discrimination against homosexuals, especially in the field of civil law in the case of a desire to create a stable relationship, grew⁴. Same-sex relationships could not benefit from legal protection for heterosexual couples after they were registered.

Since the late 1970s, there has been a slow process in Western and Northern Europe to legalize same-sex relationships⁵. Then there was the stage of “semi-marriage” or quasi-marriage, often referred to as partner relationships – when same-sex couples were given the opportunity to conclude lawful relationships with significantly smaller rights in comparison with marriage (half-marriages) or different from marriage only by excluding a few rights – first of all adoption (quasi-marriage)⁶.

At the beginning, the parliaments of many countries offered limited rights to same-sex couples through registered partnerships⁷. Denmark was the first country to allow same-sex couples to register as domestic partners in 1989. Partnership recognition granted property and inheritance rights to same-sex Danish couples enjoyed by heterosexual couples⁸. Nowadays there are only 29 countries that allow same-sex couples to marry. In the majority of them the parliament gave the law. Only in Ireland the citizens positively decided in referendum about the same-sex marriage.

The paper has two aims: first, to analyse the legalisation of same sex-marriage, second, to discuss the results of referenda on the same-sex marriage and their consequences for the society and political system. The hypothesis to be examined is

2 World Health Organisation <https://www.who.int/bulletin/volumes/92/9/14-135541/en/> (access 12.01.2019).

3 A.R. Flores, E.A. Park, *Polarized Progress. Social Acceptance of LGBT People in 141 Countries 1981-2014*, Los Angeles 2018; P. Hart-Brinson, *The Social Imagination of Homosexuality and the Rise of Same-Sex Marriage in the United States*, “Socius: Sociological Research for a Dynamic World” 2016, vol. 2, p. 4.

4 M. King, A. Bartlett, What same sex civil partnership may mean for health, “*Journal of Epidemiology & Community Health*” 2006, vol. 60(3), pp. 188-191.

5 K. Kollman, M. Waites, United Kingdom: changing political opportunity structures, policy success and continuing challenges for lesbian, gay and bisexual movements, (in:) M. Tremblay, D. Paternotte, C. Johnson (eds.), *The Lesbian and Gay Movement and the State: Comparative Insights into a Transformed Relationship*, Farnham 2011, p. 190.

6 V. Vermeulen, Developments in European law and European Union policy on same-sex couples: An overview of judicial, legislative and policy developments in the recognition of same-sex couples in Europe, *Coder* 2008, pp. 8-10.

7 K. Waaldijk, Same-Sex Partnership, *International Protection*, „*Oxford Public International Law*” 2013, p. 3.

8 M. Glass, N. Kubasek, E. Kiester, Towards a European Model of Same-Sex Marriage Rights: A Viable Pathway for the U.S., “*Berkeley Journal of International Law*” 2011, vol. 29(1), p. 141.

the following: popular votes (e.g. referendum) are zero-sum and conflict maximising, leading to the possibility that unchecked majoritarianism allows minorities to be oppressed in a way that is unlikely in representative government. The paper is composed of two sections. Section one presents the states in which the same-sex marriage is allowed. The US referenda and legal solutions regarding the same-sex marriage are also discussed. Section two analyses the referenda on the same-sex marriage held in European states. The statistical data methods and legal analyses have been used in this paper.

1. The same-sex marriage regulations

Regarding the same-sex marriage legal regulations, Europe is both, the leader in the number of states that allow same-sex marriage (16) as well as the pioneer, as the first countries that allowed the same-sex marriage were the Netherlands in 2001⁹ and Belgium in 2003¹⁰ and “the sky did not fall”¹¹. Other countries, such as Germany, Croatia, Estonia, Hungary, Slovenia, Czechia and Italy recognise civil unions, or registered partnership, or unregistered cohabitation¹².

Table 1. Legalisation of same-sex marriages in the world

| State | Year of legalisation of same-sex marriage |
|------------------------------|-------------------------------------------|
| Netherlands | 2001 |
| Belgium | 2003 |
| Canada, Spain | 2005 |
| South Africa | 2006 |
| Norway, Sweden | 2009 |
| Portugal, Iceland, Argentina | 2010 |
| Denmark | 2012 |

9 K. Kollman, Pioneering marriage for same-sex couples in the Netherlands, „Journal of European Public Policy” 2017, vol. 24(1), p. 109.

10 T. Scali, S. D’Amore, Same-sex marriage and same-sex adoption: Socio-political context of the rights of gay and lesbian people in Belgium, „Psychology of Sexualities Review” 2015, vol. 6(1), p. 84.

11 L.D. Wardle, The Attack of Marriage as the Union of Man and a Woman, “North Dakota Law Review” 2007, vol. 83, p. 1372.

12 M. Fichera, Same-Sex Marriage and the Role of Transnational Law: Changes in the European Landscape, “German Law Journal” 2016, vol. 17(3), p. 387.

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|-----------------------------------------------------------------------|------------|
| Uruguay, New Zealand, France, Brazil | 2013 |
| England, Scotland, Wales | 2014 |
| Greenland, Luxembourg, Ireland, United States of America ¹ | 2015 |
| Colombia, Estonia, Gibraltar | 2016 |
| Germany, Malta, Faroe Islands | 2017 |
| Austria | Since 2019 |
| Taiwan | Since 2019 |

¹ *The United States Supreme Court made marriage equality federal law in 2015.*

Source: <https://businessinsider.com.pl/international/the-25-countries-around-the-world-where-same-sex-marriage-is-legal/kw38chk> (access 18.11.2018).

The right to marry someone of one's own sex was a fundamental issue not only for regular persons, but also for politicians. In Iceland then-Prime Minister Jóhanna Sigurðardóttir married her longtime partner Jonina Leosdóttir as the law came into effect. In Luxembourg the bill was spearheaded by the country's Prime Minister, Xavier Bettel who married his long-time partner Gauthier Destenay a few months after the legislation passed.

The concept of human dignity has been used in a few states to overturn discriminatory practices. The Constitutional Court of Austria in 2017 ruled that giving same-sex couples only the right to enter into partnerships, not marriages, is a kind of discrimination¹³. The Constitutional Court was examining a complaint about a 2009 law which meant a couple was denied permission to enter a formal marriage by Viennese authorities¹⁴. It said in a statement that "the distinction between marriage and civil partnership can no longer be maintained today without discriminating against same-sex couples," adding that keeping the two institutions separate suggests that "people with same-sex sexual orientation are not equal to people with heterosexual orientation"¹⁵. By virtue of this resolution, persons of the same gender will be able to get married in Austria at the latest in 2019.

Among Asian and African states only one in each continent legally recognise same-sex marriage – Taiwan and South Africa. In May 2017 Taiwan's Constitutional

13 VfGH 04.12.2017, G258/2017: Distinction between marriage and registered partnership violates ban on discrimination (Summary/Bulletin on Constitutional Case-Law 2017/3).

14 H. Horton, Austrian Constitutional Court rules same-sex couples can marry by 2019, „The Telegraph”, <https://www.telegraph.co.uk/news/2017/12/05/austrian-constitutional-court-rules-same-sex-couples-can-marry/> (access 03.01.2019).

15 <https://www.news24.com/World/News/austrian-court-rules-that-same-sex-couples-can-marry-20171205> (access 03.01.2019).

Court issued a judgement¹⁶ in which it recognized a provision of the Civil Code allowing only marriages of persons of the opposite sex to be inconsistent with the Constitution. The Court gave the parliament the period of two years to introduce appropriate legislative changes. If such changes are not introduced, same-sex couples will be entitled to marry by filing an appropriate declaration at the office with at least two witnesses¹⁷. In South Africa the Constitutional Court used dignity as a justification for opening marriage to same-sex couples in the 2015 *Fourie* decision¹⁸. *Fourie* not only opened the space for same-sex couples to access marriage, but on its way to achieving that, it created the conditions necessary for future decisions to focus on the protection of diverse families outside the marriage model¹⁹.

As far as the United States are concerned, same-sex marriage had been legal in 37 out of the 50 US states, plus the District of Columbia, prior to the 2015 ruling. The United States Supreme Court made marriage equality federal law in 2015. In 2015 the Supreme Court of the United States ruled that the Fourteenth Amendment of the Constitution requires all states to license a marriage between two people of the same sex and to recognise a marriage between two people of the same sex when their marriage was lawfully licensed and performed in another state. The same-sex marriage is the law mandated by the Supreme Court's application of the Fourteenth Amendment's promise of due process and equal protection²⁰. Legal recognition and sanctioning of same-sex relationships has occurred in various fits and starts across the United States. The legal battle over the status of same-sex relationships began with a 1993 Hawaii State Supreme Court decision²¹ that publicly suggested discrimination against same-sex couples from marrying might constitute sex discrimination.²² In the subsequent decade, Hawaii and other states moved to enact new laws that explicitly limited the legal institution of marriage to heterosexual couples. The US Congress followed with the Defense-of-Marriage Act of 1996 (DOMA²³), which allowed states to ignore same-sex marriages performed in other states, and defined marriage as

16 Judicial Yuan Interpretation no. 748 and Reasons, www.jirs.judicial.gov.tw/GNNWS/NNWSS002.asp?id=267570 (access 03.01.2019).

17 K. Hikita, Can human rights of a sexual minority in Japan be Guaranteed? A Comparison with Taiwan's efforts for Gender Equality, „Journal of Asian Women's Studies” 2017, vol. 24, p. 1.

18 Case CCT234/15, www.saflii.org/za/cases/ZACC/2016/44.pdf (access 3.01.2019).

19 M. Saez, Transforming Family Law Through Same-Sex Marriage: Lessons from (and to) the Western World, „Duke Journal of Comparative & International Law” 2014, vol. 25, pp. 149-150.

20 S.E. Isaacson, *Obergefell v Hodges*: The US Supreme Court Decides the Marriage Question, „Oxford Journal of Law and Religion” 2015, vol. 4(3), pp. 530-533.

21 *Baehr v. Lewin*, Hawaii's Supreme Court 74 Haw. 645, 852 P.2d 44 May 5, 1993.

22 National Council of State Legislatures. Same Sex Marriage Laws. Washington, DC: National Council of State Legislatures; 2014; B. Lennox Kail, K.L. Acosta, E.R. Wright, State-Level Marriage Equality and the Health of Same-Sex Couples, „American Journal of Public Health” 2015, vol. 105(6), pp. 1101-1105.

23 Pub. L. No. 104-199, 110 Stat. 2419.

“a legal union between one man and one woman.” In 2004, Massachusetts was the first state to fully legalize same-sex marriage. Referenda on same-sex marriage were held in Michigan (2004), Washington (2012) and California (2012). Referring to other states, the Supreme Court’s ruling in *Windsor*²⁴ requires the federal government to recognize legally performed marriages of same-sex couples. The Supreme Court also dismissed an appeal of the federal district court ruling that struck down California’s Proposition 8 (which overturned marriages of same-sex couples in California) as unconstitutional in *Hollingsworth v. Perry*²⁵ leaving intact the district court’s ruling that Proposition 8 is unconstitutional and can’t be enforced.

2. Referenda on same-sex marriage in Europe

In Europe same-sex marriage has been the subject of a referendum in five states: Slovenia, Slovakia, Croatia, Ireland and Romania. Only the Irish supported same-sex marriage by a popular vote. The fundamental question is why the people began to demand a referendum on moral issues? Is it true that political parties have apparently been willing to concede to these demands and to refinish their monopoly on legislating?

Table. European referenda on the same-sex marriage

| State | Date of referendum | Subject of referendum/question | Turnout in % | Results |
|----------|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|-------------------------------|
| Croatia | 1 December 2013 | “Are you in favour of the constitution of the Republic of Croatia being amended with a provision stating that marriage is matrimony between a woman and a man?” | 37.88%. | For 65,87% |
| Slovakia | 7 February 2015 | Do you agree that only a bond between one man and one woman can be called marriage? | 21,4 | For – 94.50%; Against – 4.13% |
| | | Do you agree that same-sex couples or groups should not be allowed to adopt and raise children? | 21,4 | For – 92.4%; Against – 5.54% |
| | | Do you agree that schools cannot require children to participate in education pertaining to sexual behaviour or euthanasia if the children or their parents don't agree | 21,4 | For – 90.3%; Against – 7.34% |
| Ireland | 22 May 2015 | The same-sex marriage | 60,52 | Accepted 62,07% for |

24 *Windsor v. United States*, No. 12-2335 (2d Cir. 2012).

25 *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

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| Slovenia | 25 March 2012 | Amendment to the family code | 30,31 | Not accepted 54,55% |
| | 20 December 2015 | The same-sex marriage | 36,38 | Not accepted (63,51% against) |
| Romania | 6-7 October 2018 | Constitutional amendment to specify that marriage can only be between a man and a woman | 20,4 | Not accepted |

Source: Author's own studies based on Research Centre on Direct Democracy, <http://c2d.unige.ch> (access 28.11.2018); www.portal.statistics.sk (access 28.11.2018).

Before the brief analysis of the data specific for particular states will be done, a few general remarks are given. Firstly, only in five European states the referendum on same-sex marriage was held. Secondly, all countries but Romania have dominant catholic religion. Thirdly, in all states except from Ireland, the turnout was below 50% and here arise two questions – 1) can the people decide in a referendum on issues which many consider to be discriminatory for a certain group of people?; 2) what about legitimacy in the situation where a minority of voters participated in the referendum? Finally, the same-sex marriage was approved by the citizens in a referendum only in Ireland.

In Croatia the referendum on defining marriage as a union between a man and a woman was held on 1 December 2013. Although Croatia has already defined marriage as a heterosexual union in the Law on Family (2009), the citizens' initiative In the Name of the Family (*U Ime Obitelji*) wanted to introduce this definition into the constitution in order to guarantee legal protection of children, marriage, and the family, and to prevent putting the same-sex unions and marriage on equal footing²⁶. All this happened just five months after Croatia became a member of the EU²⁷. The Initiative was a response to the Government's alleged plans to legalize same-sex marriage²⁸. The Catholic organization In the Name of the Family, supported by the Catholic Church, collected 750 000 signatures to complete the condition to call the citizen initiated constitutional referendum. The motion was submitted to the Parliament on 14 June 2013 and voted on 8 November 2013. The Parliament supported the initiative with 104 votes "for" and 13 "against"²⁹. The citizens answered the question: "Are you in

26 V. Trstenjak, General Report: The Influence of Human Rights and Basic Rights in Private Law, (in:) V. Trstenjak, P. Weingerl (eds.), *The Influence of Human Rights and Basic Rights in Private Law*, Springer 2016, p. 37.

27 K. Sloomaeckers, I. Sircar, Croatia, the EU, and the marriage referendum: The symbolic case of LGBT rights, ECPR General Conference 2014, <https://ecpr.eu/Filestore/PaperProposal/f3af562f-e97a-4143-8292-ac4d2150062f.pdf> (access 14.01.2019).

28 R. Podolnjak, Constitutional Reforms of Citizen-Initiated Referendum. Causes of Different Outcomes in Slovenia and Croatia, „*Revus. Journal for Constitutional Theory and Philosophy of Law*” 2015, vol. 26, p. 138.

29 M. Marczevska-Rytko, Direct Democracy in Croatia, (in:) M. Marczevska-Rytko (ed.), *Handbook of Direct Democracy in Central and Eastern Europe After 1989*, Opladen-Berlin-Toronto 2018, p. 79.

favour of the constitution of the Republic of Croatia being amended with a provision stating that marriage is matrimony between a woman and a man?”. The government wanted the Constitutional Court to review the constitutionality of the referendum question because it infringed on the rights of the minorities, provided for in the Constitution. On 13 November 2013 the Constitutional Court ruled that the voting was in compliance with the law and its result was binding³⁰. The final results of the referendum were announced on 12 December 2013. The turnout was 37.88%, 66.28% of the total voters voted “Yes” while 33.72% voted “No”³¹. This law turnout fits the rule that referendum attracts fewer voters than elections and raises the question of the legitimacy³².

The 2015 Slovak “Referendum on Family” was initiated not by the political parties, but by citizens’ activists³³. In the referendum of February 2015 the Slovaks answered three questions. The fourth question on registered partnership was interpreted by the Constitutional Court as infringing upon the fundamental rights of citizens from the LGBT community guaranteed by the Slovak Constitution – and finally it was rejected from appearing on the ballot³⁴.

The first question concerned the introduction of the constitutional ban on marriages between same-sex persons, by confirming that the term “marriage” is reserved exclusively for a union between a man and a woman, and cannot apply to any other form of relationship. The question was evidently unconstitutional and that was the stance adopted by the Constitutional Court³⁵. The second question concerned the ban on adoption of children by same-sex couples or groups. The last question was associated with the possibility that children could refuse to attend classes during which sexual behaviours or problems of euthanasia are discussed if the parents or children do not agree with the content of instruction. The initiative to call a referendum on controversial moral questions was launched by a Catholic community organization called Alliance for Family (*Aliancia za rodinu, AZR*).

All the three questions were directly linked with a specific worldview. With their liberal approach to the worldview questions, the Slovaks boycotted the referendum

30 B. Kostadinov, Direct Participation of the People in Public Power – Advantages and Disadvantages of a Referendum, Croatian and European Perspective, (in:) R. Arnolde, J.I. Martínez-Estay (eds.), Rule of Law, Human Rights and Judicial Control of Power. Some Reflections from National and International Law, Springer 2017, p. 119.

31 Državno Izborna Povjerenstvo Republike Hrvatske; Centre for Research on Direct Democracy.

32 H. Butković, The Rise of Direct Democracy in Croatia: Balancing or Challenging Parliamentary Representation?, „Croatian International Relations Review” 2017, vol. XXIII(77), p. 44.

33 M. Rybar, A. Sovcikova, The 2015 Referendum in Slovakia, „East European Quarterly” 2016, vol. 44, no. 1-2, p. 79.

34 <https://www.hr.wg.org/news/2015/02/08/slovakia-low-turnout-scuttles-discriminatory-referendum>(access 14.01.2019).

35 See more: D. Krošlák, The referendum on the so-called Traditional Family in the Slovak Republic, „Central and Eastern European Legal Studies” 2015, vol. 1, pp. 152-153.

hence the turnout was low and the referendum was invalid³⁶. It should be emphasized that from the legal standpoint the 2015 referendum was pointless as the amendment to the Slovak Constitution defining in traditional way a marriage as “a unique union between a man and a woman” has already been adopted³⁷ (Art. 41). The amendment of 2014 excludes the possibility of recognizing the relationship between people of the same sex. This means that the Slovak law does not permit either same-sex marriages or registered partnerships³⁸. It should be also noted that the legal solutions pertaining to the definition of marriage in Slovakia’s Constitution contradict Article 8 of the European Convention of Human Rights³⁹. The referendum was referred to as “anti-homosexual”, “in defence of traditional family”, or “selfish”⁴⁰. The initiators emphasized concern for the protection of traditional family, the interests of children growing up in the family with father and mother, and for stopping inappropriate sexual education at school. The main goal of the AZR was to change the attitude of citizens towards family values, which was the purpose of the referendum. The Catholic Church strongly encouraged people to participate in the referendum. It used emotional language to manipulate the people. In the pastoral letter the promoters of gender equality have been called as “the followers of the culture of death”⁴¹.

The Slovenians voted twice: in 2012 and in 2015. In 2012 the referendum on the family law was held. The National Assembly decided to address the request of civil initiative to the Constitutional Court about the compliance of the proposed referendum with the Constitution. The Constitutional Court rejected the request for a review and the National Assembly called referendum⁴². As Krasovec rightfully states, in accordance with the legislation, the National Assembly is obliged not to pass any law whose content would be in contrast to the will of the people expressed in referendum for a period of one year after the referendum was held⁴³. Very soon in 2014 announced another attempt to introduce equal rights for same-sex couples by

36 E. Kuźelewska, Referendum ogólnokrajowe w Słowacji – nieudany eksperyment, „Acta Politica Polonica” 2018, nr 1(43), p. 57.

37 M. Sekerák, Same-Sex Marriages (or Civil Unions/Registered Partnership) in Slovak Constitutional law: Challenges and possibilities, „Utrecht Law Review” 2017, vol. 13(1), p. 41.

38 E. Kuźelewska, How Far Can Citizens Influence the Decision-Making Process? Analyses of the Effectiveness of the Referenda in the Czech Republic, Slovakia and Hungary in 1989-2015, „Baltic Journal of European Studies” 2015, vol. 5, no. 2 (19), p. 182.

39 Ruling of the European Court of Human Rights, 2010.

40 E. Kuźelewska, Direct Democracy in Slovakia, (in:) M. Marczevska-Rytko (ed.), Handbook of Direct Democracy in Central and Eastern Europe After 1989, Opladen-Berlin-Toronto 2018, p. 281.

41 P. Durinová, Slovakia, (in:) E. Kováts, M. Pöim (eds.), Gender as a symbolic glue. The position and role of conservative and far right parties in the anti-gender mobilizations in Europe, Friedrich-Ebert-Stiftung Budapest 2015, p. 115.

42 M. Haček, S. Kukovič, M. Brezovšek, Slovenian Politics and the State, Lanham 2017, p. 151.

43 A. Krašovec, The 2015 Referendum in Slovenia, „East European Quarterly” 201, vol. 43(3), p. 305.

redefinition of marriage. In March 2015 the Parliament passed a bill defining marriage as a “union of two” instead a “union of a man and a woman”⁴⁴. According to the proposed law, the union between two consenting adults also would grant the same-sex couples the right to adopt children⁴⁵. The conservatives opponents (supported by the Catholic Church) were successful in collecting signatures to hold a referendum on this issue, however, the parliament refused to organise a referendum on the ground of unconstitutionality of human rights and fundamental rights freedom. The Constitutional Court (by a narrow majority of 5 judges to 4) founded the National Assembly as not entitled to declare referendum unconstitutional and allowed to hold a referendum⁴⁶. In the 2015 referendum Slovenian rejected a law giving same-sex couples the right to marry and adopt children. The voters rejected the bill⁴⁷. Arguments of fundamental rights have been beaten by traditional understanding of family.

Ireland was the first country that approved the same-sex marriage by referendum in 2015. Following the words of Mary McAleese “In a most democratic way possible Ireland became the first country in the world to embrace her gay and lesbian children by way of popular referendum”⁴⁸, Ireland is a unique example of a liberal society (*sic!*). The Catholic Church opposed the referendum⁴⁹. However, the Yes side won by 62.1% to 37.9%, with a high turnout of 60.5%. Roscommon-South Leitrim was the only county to reject same-sex marriage. It is a Catholic, rural constituency with the oldest population in the country⁵⁰. The No vote there finished with 51.4%. The final outcome of the referendum resulted in a new amendment into the Constitution by giving a clause as a new article 41.4: “Marriage maybe contracted in accordance with law by two persons without distinction as to their sex”. That means equal rights to marry for same-sex and opposite sex couples. As McAleese mentioned: “It was wonderful to be able to celebrate the constitutionally recognized equality our only

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- 44 E. Kuzelewska, *Demokracja bezpośrednia w Słowenii*, „*Studia Wyborcze*” 2018, tom XXV, p. 104.
- 45 A. Krašovec, S.P. Ramet, *Liberal Democracy in Slovenia: From Seventh Heaven to the Lobby of Hell in Only Two Decades?*, (in:) S.P. Ramet, Ch.M. Hassenstab, O. Listhaug, *Building Democracy in the Yougoslav Successor States. Accomplishments, Setbacks, and Challenges since 1990*, Cambridge 2017, p. 277.
- 46 P.M. Ayoub, *When States Come Out. Europe’s Sexual Minorities and the politics of Visibility*, New York 2016, p. 186.
- 47 E. Kuzelewska, *Direct Democracy in Slovenia*, (in:) M. Marczevska-Rytko (ed.), *Handbook of Direct Democracy in Central and Eastern Europe after 1989*, Opladen-Berlin-Toronto 2018, p. 299.
- 48 M. McAleese, *Foreword*, (in:) G. Healy, B. Sheehan, N. Whelan (eds.), *Ireland Says Yes: The Inside Story of How the Vote for Marriage Equality Was Won*, Merrion Press 2016.
- 49 F. Ryan, *Ireland’s Marriage Referendum: A Constitutional Perspective*, DPCE Online 2015, vol. 2, p. 16 <http://eprints.maynoothuniversity.ie/8934/1/FR-Ireland-2015.pdf> (access 3.01.2019).
- 50 <https://www.thejournal.ie/roscommon-south-leitrim-voted-no-why-2121899-May2015/> (access 3.01.2019).

son can now enjoy. No longer will he be a second-class citizen. Now he has the same marriage rights as his twin and older sister”⁵¹. The referendum had also another significance. The parliament finally passed the Gender Recognition Act 2015 which allowed transgender people to be treated for legal purposes as being of their preferred gender⁵². So, the Irish 2015 referendum was a “wind of good changes” for sexual minorities. The social context seems to be really interesting. Conservative Ireland with a majority Catholic population⁵³ supports a “gay marriage”.

Romania does not recognize gay marriage or civil unions. The president of the pro-referendum Coalition for Family, told the BBC ahead of the vote they were trying “to protect, at a constitutional level, the definition of marriage – between one woman and one man”. The referendum was held in October 2018. The No campaign’s strategy – to boycott the vote in the hope the turnout fell below the 30% needed to validate the referendum – was successful. It should be noted that the marriage is regulated by the Romanian Constitution and the Civil Code. The Constitution in the art. 48(1) states: “The family is founded on the freely consented marriage of the spouses (...)”. The intention of the referendum’s initiators was to include “man and woman” in the definition of “spouses” illustrated by the Civil Code in the art. 258(4) – “the man and the woman united through marriage”. The Civil Code in the art. 259(1) states that marriage is “the freely consented union between one man and one woman”. Moreover, the Civil Code in art. 277(2) states that “marriage shall be prohibited between persons of the same sex.” Furthermore, Article 277 (2) of the Civil Code emphasizes that Romania shall not recognize same-sex “marriages” contracted abroad (either by Romanian or foreign citizens). In accordance with Article 277 (3), the same is applicable to civil partnerships⁵⁴.

Conclusions

The hypothesis has been positively examined. Popular votes, in particular a referendum, seems to be a zero-sum and conflict maximising, leading to the possibility that majority of voters allows sexual minorities to be oppressed. In general, popular votes can be democratic, although they can fail basic democratic norms and can be deployed for non-democratic ends. In Slovenia a civic initiative leading to a referendum resulted in a law voted by the parliament being rejected by

51 M. McAleese, Foreword, *op.cit.*

52 F. Ryan, Ireland’s Marriage Referendum..., *op.cit.*, p. 18-19.

53 J.A. Elkins, D.M. Farrell, T. Reidy, J. Suiter, Understanding the 2015 Marriage Referendum in Ireland: Constitutional Convention, Campaign, and Conservative Ireland, https://www.researchgate.net/publication/283714146_Understanding_the_2015_marriage_equality_referendum_in_Ireland (access 18.11.2018).

54 A. Portaru, Marriage at a Crossroads in Romania, <https://coalitiapentrufamilie.ro/wp-content/uploads/2017/05/Marriage-at-a-crossroads-in-Romania.pdf> (access 22.01.2019), p. 30.

the people. However, the parliament and the government supported equal rights to marry, while citizens turned out to be more conservative. Only the Irish society in the referendum said “yes” to same-sex marriage.

The reasons for “no” to same-sex marriage expressed in a referendum in other analyzed states have been connected with a feeling of erosion of a culture of marriage and marital families. According to the conservatives, marriage establishes the moral core of the family and the moral base-line and standards for society in many ways. Critics argue that changing the definition of marriage as the union of a man and a woman would go against natural law and risk undermining both the institution of marriage and the family’s role in holding society together. The same-sex marriage is legalized on the principle of personal choice and the rule of human dignity. In the XXI century idea to refuse the same-sex marriage can be recognized as a kind of (sexual minority) discrimination. All countries mentioned in this paper are the EU Member States and thus have to implement the general principle of non-discrimination and the directives of non-discrimination in their legislation.

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- Butković H., *The Rise of Direct Democracy in Croatia: Balancing or Challenging Parliamentary Representation?*, „Croatian International Relations Review” 2017, vol. XXIII(77).
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