



FACULTY OF LAW
Lund University

Kohylova Katarina

Referenda on Human Rights The example of LGBTI Rights

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CONTENTS

SUMMARY	4
PREFACE.....	5
ABBREVIATIONS	6
1 INTRODUCTION	7
1.1 CONTEXTUAL BACKGROUND.....	7
1.2 GENERAL PURPOSE	8
1.3 RESEARCH QUESTION.....	8
1.4 DELIMITATIONS	8
1.5 METHODOLOGY	10
1.6 MATERIAL.....	10
1.7 STATE OF RESEARCH.....	11
1.8 STRUCTURE	11
2 MAIN ISSUE OF REFERENDUM – AVAILABLE PROTECTION	13
2.1 EUROPEAN CONVENTION OF HUMAN RIGHTS	14
2.2 EUROPEAN COURT OF HUMAN RIGHTS.....	16
3 REFERENDUM ON HUMAN RIGHTS IN SLOVAKIA	18
3.1 SLOVAKIA.....	18
3.2 LEGAL PROTECTION OF LGBTI IN SLOVAKIA	19
3.3 NATIONAL LEGISLATION REGULATING REFERENDA	21
3.4”ANTI – HOMOSEXUAL” REFERENDUM.....	22
4 CONFLICT OF DEMOCRACY AND HUMAN RIGHTS.....	28
4.1 REFERENDA AND CITIZEN’S INITIATIVES	30
4.1.1 REFERENDA	30
4.1.2 CITIZEN’S INITIATIVES.....	32
4.2 REGULATING REFERENDA ON EU LEVEL.....	33
4.3 DIRECT DEMOCRACY AND HUMAN RIGHTS OF MINORITIES	36
5 DISCRIMINATORY REFERENDUM	41

5.1 PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION...	42
5.2 CATEGORIES OF DISCRIMINATION	44
5.2.1 DIRECT DISCRIMINATION.....	45
5.2.2 INDIRECT DISCRIMINATION	46
5.3 THE SCOPE OF EUROPEAN CONVENTION ARTICLE 14 .	47
5.4 ADDITIONAL PROTECTION FOR THE “PERSONAL SPHERE”	48
5.5 ANALYSING THE REFERENDUM.....	50
5.5.1 THE COURT’S APPROACH.....	51
5.5.2 DIFFERENT POINT OF VIEW - EXPLORING THE NATURE OF REFERENDUM.....	53
6 LEGAL PROTECTION FOR FUNDAMENTAL RIGHTS UNDER THE U.S. CONSTITUTION	56
6.1 THE U.S. EQUAL PROTECTION CLAUSE.....	57
6.2 LEVELS OF SCRUTINY	59
6.3 SCRUTINY AND SEXUAL ORIENTATION	62
6.4 ROMER VS. EVANS.....	64
7 ANALYSING THE AVAILABLE PROTECTION UNDER ECHR ..	68
7.1 ANALYSIS	68
7.2 SUGGESTIONS FOR THE COURT’S APPROACH.....	71
8 CONCLUDING REMARKS.....	74
BIBLIOGRAPHY	76
TABLE OF CASES.....	83

Summary

Over the last decades, referenda, as a form of direct democracy, became a popular tool for resolving important questions, such as European Union accession, in particular states, however as the recent developments have shown, the issue of rights of sexual minorities has become a quite popular topic for referenda too. Referenda on human rights, also known as “anti-homosexual” referenda, discriminatory referenda or referenda on the protection of family, are dedicated to resolving the questions of same-sex marriages, partnerships, adoption of children by same-sex couples or non-compulsory sexual education of children, by citizens themselves. Simply put, the majority is deciding about the rights of sexual minority with a great risk that the adoption of referenda results might create discrimination against one community and division in the society on the citizens of the first and second order, by attacking the very dignity of these people. This paper explores the issue of above mentioned referenda on human rights, with the aim to firstly establish the importance of addressing this issue by the European Court of Human Rights. Secondly with the aim to examine what role does European Court of Human Rights has in these cases e.g. what, if anything, it should be able to do and which approach it should adopt. The importance of addressing this issue will be established through the identification of available protection for the victims of such referendum under ECHR, analysis of the impact of direct democracy on the human rights of minorities, including its negative effects, and through analysis of discriminatory nature of such a referendum. The role of European Court of Human rights will be determined through analysis of relevant provisions of ECHR and case law of ECtHR, and the suggestions for the Court’s approach towards this issue will be drawn upon the example of U.S. judicial system, which already has plenty of experience in this area.

Key words: referendum, LGBTI, human rights, protection, discrimination, ECtHR.

Preface

“It always seems impossible until it’s done.”

Nelson Mandela

Before, I delve into the substance of the thesis I would like to thank from the bottom of my heart to all the people that contributed, in one way or another, to the completion of this paper.

Firstly I would like to thank my mother and my father for affording me the opportunity to take part in the International Human Rights Law Master Programme at Lund University and their never ending support and love.

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At the end, thanks to you, reader. If you are reading this line after the others, you at least read one page of my thesis. Thank You.

Abbreviations

AZR	Alliance for Family
CFREU	Charter of Fundamental Rights of the European Union
EC	European Community
ECJ	Court of Justice of European Union
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersexed people
U.S.	United States of America

1 Introduction

1.1 Contextual Background

Democracy is one of the prevailing features and principles common to all member states in European Union. Over the last decades, more and more questions in European states have been decided by referenda, as a form of direct democracy. The referenda have mostly dealt with the European Union accession of particular states however as the recent developments have shown, the issue of LGBTI rights has become a quite popular topic for citizen initiatives (consequently referenda) also.

Referenda on human rights (“anti-homosexual” referenda, discriminatory referenda) already took place in Slovenia, Croatia, Slovakia and Ireland e.g. in the countries of European Union to which tolerance, principle of non-discrimination, equality and respect for human dignity and human rights are the core values. In these referenda, the citizens voted for or against same-sex marriages, partnerships, and the adoption of children by same-sex couples or about the non-compulsory sexual education of children. In other words, the majority was deciding about the rights of sexual minority with a great risk that the adoption of referenda result might create discrimination against one community and division in the society on the citizens of the first and second order, by attacking the very dignity of these people.

Within European Union, a society founded upon the protection of human rights and dignity, where we are all equal and violations of our fundamental rights are not tolerated, this issue needs to be properly addressed in order to achieve justice for the victims of such a referenda.

1.2 General Purpose

The purpose of this thesis is to investigate into the issue of referenda on human rights, which recently took place in some European countries, and thus are not just hypotheses but instead real life events, and should be dealt with by the European Court of Human Rights. The thesis will apprise of available protection under ECHR for victims of this referenda, draw attention to a conflict, into which direct democracy gets with human rights, underlying the possible negative effects of afore mentioned referendum, discuss whether such a referendum complies with the principle of equality and non-discrimination within the legal framework of EU, establish the necessity to address this issue and examine an approach taken towards this issue by more experienced U.S. system upon which the suggestions for the approach of ECtHR will be drawn.

1.3 Research Question

In order to fulfil the general purpose of this thesis, it is crucial to answer the research questions:

- 1. "What is the role of European Court of Human Rights in the cases, when a discriminatory referendum is approved by one of the Member states, e.g. what should the Court, if anything, be able to do about it?"*
- 2. "Should the Court use proactive or reactive approach towards this issue?"*

1.4 Delimitations

This paper is not focused on discussing the specific referendum in Slovakia, described in the third chapter, or on the possibility of challenging this particular referendum and accession of justice for its victims. Referendum

which took place in Slovakia was taken only as an example of referendum on human rights in order for the reader to understand this issue. The focus of the thesis lies on the referenda on human rights in general.

Further this paper does not concentrate on the debate concerning direct democracy vs. representative democracy, on the comparison of these two types of democracy, on undermining of the importance of direct democracy and on the question who is supposed to decide about the matters subject to human rights referendum. The intention of this thesis is to draw attention to the fact that it is possible for direct democracy to come into conflict with human rights, which can have negative effects, and to pose a question to the reader, whether it is suitable to decide such matters by these democratic tools. However, despite the fact, that this thesis is more focused on direct democracy, it is important to highlight that this does not change the fact that also other forms of democracy are often used to underline the rights of minorities. There is no reason to assume that this situation is going to be different when looking at democracy as a whole or when talking about representative democracy. Democracy, simply put, impersonates one person - one vote, thus underrepresentation of minorities is inevitable.

The right to access to justice as a whole, including individuals or a group trying to enforce their rights and possibly obtain remedies, together with the right to a fair trial, is not a subject of analysis in this thesis because in order to determine how can the victims achieve justice it is firstly crucial to explore the existence of legal protection under the given circumstances.

No other legal framework, than specific regulations of European Union, especially ECHR, and case law of European Court of Human Rights are taken into account in the course of analysis. Referendum on Human rights is viewed as violating human rights and thus appropriate human rights instruments were used in order to analyse what can be done against such a referendum.

This thesis is not a constitutional thesis, although it has some constitutional aspects. It does not discuss the constitutional role of ECtHR, but instead the focus of discussion is on the protection of LGBTI because of the subject of referenda.

1.5 Methodology

The present study analyzes the role and the approach of European Court of Human Rights in the cases when a referendum on human rights (discriminatory referendum) has been approved by Member States of European Union. It uses a combination of philosophical and analytical method, related to qualitative method. Philosophical method implies formulation of questions to be answered or problems to be solved with assumption, that the more clearly the question or problem is stated, the easier it is to identify the critical issues. This is projected in the thesis by formulating research questions upon which the arguments of the thesis are founded on. In order to analyze the role of ECtHR in cases of above mentioned referenda, it is firstly necessary to elaborate on the main issue with this referenda, which is the availability of protection for the victims, and secondly, to explain how such a referendum takes place, why it is dangerous, discriminatory and simultaneously violating human rights and thus fundamental to address such a referendum. The analytical method is demonstrated by introducing different arguments regarding these issues in every chapter and their subsequent analysis in a form of small conclusions at the end of chapters. The whole thesis culminates in a big analysis of available protection under the ECHR and within the case law of ECtHR against this referendum, conjointly with the proposal of suggestions for the ECtHR's approach towards the issue, based upon previously examined approach of U.S. courts.

1.6 Material

The research included a review of available literature, examination of a selection of relevant instruments within legislative framework of EU and U.S., review of relevant ECtHR case law, U.S. Supreme Court case law, as well as related human right organizations reports, handbooks and newspaper articles. Because of shortage of literature about this topic, most of the

research is based upon articles, coming from experience of U.S. with this subject. In order to establish the necessity for addressing of this referendum by ECtHR, the attention was placed upon articles discussing the effects of direct democracy on human rights of minorities, in conjunction with analysis of European principle of equality and non-discrimination.

1.7 State of Research

Despite the fact, that the first referendum on human rights, subject to this thesis, took place in 2012 in Slovenia, there has been no specific research done and published about this topic within Europe. Several articles, such as, “*Putting Civil Rights to a Popular Vote*” by Barbara Gamble or “*Do Popular Votes on Rights Create Animosity toward Minorities?*” by Todd Donovan and Caroline Tolbert, regarding the conflict between human rights and direct democracy, based on the experience from U.S., have been published and also included in this thesis. However, except for an analysis of Swiss referenda touching upon human rights issues in publication “*Of Minarets and Foreign Criminals, Swiss Direct Democracy and Human Rights*” by Daniel Moeckli (also included in this thesis), this topic has not been specifically discussed with regards to legal framework of European Union together with the role of European Court of Human Rights in these matters, and thus my thesis fills in a gap and it is an original product.

1.8 Structure

Already stated, this paper examines the role and approach of European Court of Human Rights in cases when a referendum on human rights (discriminatory referendum) has been approved by Member States of European Union. The second chapter identifies main issue of this referendum, which is the availability of protection for its victims under ECHR. An explanation of what amounts to a referendum on human rights, for the purposes of this paper, based on the example of referendum in

Slovakia is provided in the third chapter. In the fourth chapter, the attention is drawn to the fact that it is possible for the direct democracy (not undermining the fact, that it happens in any other form of democracy also) to come into conflict with human rights and gives an insight into two mechanisms of direct democracy – referenda and citizen’s initiatives. In order to establish a discriminatory character of referenda portrayed in the third chapter, the fifth chapter elaborates on the meaning of principle of equality and non-discrimination, including the legal sources of this principle together with types of discrimination, and culminates in a discussion regarding the discriminatory character of such referenda. The sixth chapter gives an insight into the proactive approach of U.S. courts connected to Equal Protection Clause, which purpose is to fight discrimination, in conjunction with methods of scrutiny used by U.S. Courts and concludes with a landmark decision of U.S. Supreme Court related to discrimination based on sexual orientation. A short summarization of this thesis and analysis of available protection, discussed in the second chapter, are provided in the seventh chapter together with a series of suggestions for ECtHR’s approach towards this issue. In the last chapter, a conclusion together with the answer to the research question is presented.

2 Main Issue of Referendum – Available Protection

The European Convention on Human Rights¹ (ECHR) envisages a fundamental human rights instrument within the legislative framework of European Union (EU). It was the first comprehensive treaty in the world in this field, establishing the first international complaints procedure and the first international court for the determination of human rights matters.² With the entry into force of Lisbon Treaty it was provided for EU accession to the European Convention on Human Rights and all Member States of EU had to become parties to the Convention.³

ECHR guarantees protection to all those within the jurisdiction of a Member State, aside from the fact whether they are citizens or not, and even beyond the national territory to those areas under the effective control of the State (such as occupied territories).⁴ At the same time, in Article 19, it provides for a machinery to ensure the observance and enforcement of these rights in the form of the European Court of Human Rights (ECtHR).⁵

The Convention is comprised of three sections.⁶ The first section contains a catalogue of the fundamental rights and freedoms, which the signatory states have to guarantee, and additional rights are enshrined in Protocols to the Convention, which were added as the consensus regarding human rights standards among the contracting states and are binding only to those states which have ratified them.⁷

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 005 (ECHR).

² Philip Alston, Ryan Goodman : *International Human Rights: The Successor to International Human Rights in Context : Law, Politics and Morals* (Oxford University Press, 2013) 891.

³ *Treaty of Lisbon* amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, O.J. C 306/01 (Lisbon Treaty).

⁴ See e.g. *Loizidou v. Turkey*, App. no. 15318/89 (18 December 1996).

⁵ ECHR (n 1).

⁶ ECHR (n 1).

⁷ Alston (n 2) 896.

Evolutionary interpretation of Convention is fundamental to the effectiveness of ECHR system and ECtHR's authority.⁸ ECtHR has affirmed that Convention is a living instrument which should be interpreted in the light of present day conditions.⁹ A dynamic reading of ECHR ensures that its rights are made practical and effective and evolutionary interpretation provides a necessary degree of flexibility to ECHR law in a rapidly changing environment.¹⁰

This chapter will introduce the main issues of available protection under ECHR for the victims of referendum on human rights (discriminatory referendum), described in the third chapter.

2.1 European Convention on Human Rights

The referenda on human rights took place in several European Countries. In these referenda, human dignity and human rights of sexual minorities have been put to a vote. In order to determine, whether the victims of such referenda can achieve justice, it is necessary to firstly examine available protection for these victims under ECHR. This chapter will present relevant Articles of ECHR which are eligible to be invoked in the case of referenda on human rights.

Article 6 of ECHR provides for a right to a fair trial. According to this Article, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of his civil rights and obligations or of any criminal charge against him. It further elaborates, in section 2, on the presumption of innocence and in section 3 on the minimum rights granted to persons charged with criminal offence.

Right to an effective remedy is included in Article 13 of ECHR. It declares that everyone whose rights and freedoms, as set forth in this

⁸ Kanstantsin Dzehtsiarou : *European Consensus and the Evolutionary Interpretation of the European Convention on Human Rights*, German Law Journal Vol.12 No.10 (1731, 2011) 1732.

⁹ *Tyler v. the United Kingdom*, App. no. 5856/72 (25 April 1978) s.183.

¹⁰ Dzehtsiarou (n 8) 1732.

Convention, are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The right to a fair trial and the right to an effective remedy together constitute the right to access to justice.¹¹ This right includes also the rights of victims and claimants and its importance lies in the fact that it enables the individuals to enforce their substantive rights and obtain remedy when these rights are violated.¹² In other words, this right secures that the victims of this referendum are entitled to complain, about the violation of their rights, and obtain remedy for the claimed violation.

In relation to the subject of referenda and its discriminatory character, Article 14 in conjunction with Article 8 of ECHR should be invoked. Article 14 affords for the prohibition of discrimination on any ground such as sexual orientation, which is a part of the subject of referendum, since it was directed at LGBTI community.

Article 8 of ECHR incorporates the right to respect for private and family life. It establishes that everyone has the right to respect for his private and family life. In section 2, it also sets out a limitation, that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The subject of referenda consisted of questions regarding the same-sex marriage and adoptions of children which fall within the ambit of Article 8.

There is no autonomous provision within ECHR which would address, stop or prohibit referendum on human rights. The victims of this referendum can rely only on their right to access to justice and provisions

¹¹ Charter of Fundamental Rights of the European Union, 2012/C 326/02 (CFREU); ECHR (n 1).

¹² FRA Annual Report : *Fundamental Rights: Challenges and Achievements in 2010*, Chapter 8 : *Access to Efficient and Independent Justice* <http://fra.europa.eu/sites/default/files/fra_uploads/1644-annual-report-2011-chapter8.pdf> (accessed 21 May 2015) 141.

regarding the discrimination and violation of their right to private and family life.

2.2 European Court of Human Rights

Article 19 of ECHR states, that European Court of Human Rights was established in order to ensure the observance of the engagements undertaken by the High Contracting Parties in the ECHR, and the Protocols, and that it functions on a permanent basis. It's jurisdiction is extended to all matters concerning the interpretation and application of the Convention and the Protocols by Article 32 of ECHR. As mentioned before, ECtHR has affirmed that the Convention is a living instrument which should be interpreted in the light of present day conditions.

Article 35 of Convention makes it clear, that the primary responsibility for its implementation rests with the Member States and the Court may only deal with the matter after all domestic remedies are exhausted. ECtHR provides for both, individual petitions, in Article 34, and interstate complaints, in Article 33. The wording of Convention in these articles establishes that “any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention . . .” and that the “Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto”. In other words, ECtHR responds only to complaints that are made, and this approach is identified as reactive approach.¹³

As far as the research of this thesis has been able to uncover, there has not been a case of referendum on human rights brought to ECtHR and thus there is no special scrutiny developed for these cases as for example in

¹³ Council of Europe, Steering Committee for Human Rights Council of Europe : *Reforming the European Convention on Human Rights : a work in progress : a compilation of publications and documents relevant to the ongoing reform of the ECHR / prepared by the Steering Committee for Human Rights (CDDH) Strasbourg* (Council of Europe, 2009) 348.

United States of America (U.S.). One could only guess why it is so. Maybe one of the reasons behind it is (with the exception of Article 3 of ECHR) mostly the reactive approach of ECtHR. In comparison, the U.S. approach can be seen as proactive because of the fact, that the U.S. courts recognized the necessity for additional protection of certain groups of people, whose rights tend to be more endangered than the rights of others, by establishment of classification of people into “protected classes” and their connection to specific levels of scrutiny, which will be elaborated on further in this thesis.

3 Referendum on Human Rights in Slovakia

A discriminatory referendum, human rights referendum, “anti-homosexual” referendum, referendum “on the protection of family”, selfish referendum, etc., all of these names has been assigned to the referenda which took place in four European countries – Slovenia, Croatia, Slovakia and Ireland. Naturally, one can imagine different scenarios, content and circumstances surrounding such referenda and thus this chapter will explain to the reader, based on the example of referendum in Slovakia, what is a referendum on human rights (for the purposes of this paper).

3.1 Slovakia

Since 1993, Slovakia is an independent state.¹⁴ It can be considered a relatively small country, with a total area of 49,035 sq km and population of 5.4 million people, located in Central Europe.¹⁵ It borders with Austria, Czech Republic, Hungary, Poland and Ukraine.¹⁶ The ethnic groups within the country consist of 80.7% Slovaks, 8.5% Hungarians, 2% Roma people and 8.8% unspecified other groups.¹⁷ The religious groups are represented by Roman Catholics (62%), Protestants (8.2%), Greek Catholics (3.8%), other or unspecified groups (12.5%) and atheists (13.4%).¹⁸

According to Article 1 of Slovak Constitution, Slovak Republic is a sovereign, democratic state, governed by the rule of law, which is not linked to any ideology or religion.¹⁹ The type of government, encompassed within Article 72 of Constitution, is a parliamentary democracy epitomized by National Council of Slovak republic, the highest legislative body. Andrej Kiska, Slovak president whose duties are enshrined within Article 101 of

¹⁴ The World Factbook, Slovakia <<https://www.cia.gov/library/publications/the-world-factbook/geos/lo.html>> (accessed 27 April 2015) (The World Factbook).

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ *Ústava Slovenskej republiky*, Ústavný zákon NR SR č. 460/1992 Zb [Slovak Constitution].

Slovak Constitution, is the head of state. The highest judicial body is the Constitutional Court of Slovakia, which rules on constitutional issues.²⁰

On the 1st of May 2004²¹ Slovakia became a member of European Union and together with the other member states it is bound to respect, promote and protect the fundamental values and principles of EU, set out in Article 1 of the Lisbon Treaty, such as human dignity, liberty, democracy, equality, tolerance, non-discrimination, etc. Despite this fact, a referendum on the choice between protecting human rights and lives of lesbian, gay, bisexual, transgender and intersexed (LGBTI)²² citizens or their deliberate exclusion and degradation on the social ladder, took place in this “European country”.

3.2 Legal Protection of LGBTI in Slovakia

In accordance with European Union Agency for Fundamental Rights (FRA) reports, the attitudes towards LGBTI persons in Slovakia are negative.²³ Strong influence of the Catholic Church has been listed as one of the main reasons for this. The polls have shown that negative attitudes toward LGBTI persons are common among persons with strong religious views²⁴ and taking into account that 62% of Slovak population belongs to Catholic Church²⁵ one may question whether there exists any legal protection for these people.

The provisions regulating Human Rights are embodied in chapter two of Slovak Constitution. Article 12 of the Constitution guarantees the

²⁰ Slovak Constitution (n 19) chapter 7, part one.

²¹ List of countries, EU Member States <http://europa.eu/about-eu/countries/index_en.htm> (accessed 27 April 2015).

²² Denotation used according to ILGA terminology, for more see <<http://ilga.org/>> (accessed 27 April 2015).

²³ See e.g. Danish Institute for Human Rights: *The social situation concerning homophobia and discrimination on grounds of sexual orientation in Slovakia* (March 2009) available at <http://fra.europa.eu/sites/default/files/fra_uploads/390-FRA-hdgso-part2-NR_SK.pdf> (accessed 27 April 2015) (FRA1); European Union Agency for Fundamental Rights: *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity* (April 2010) available at <http://fra.europa.eu/sites/default/files/fra_uploads/1369-LGBT-2010_thematic-study_SK.pdf> (accessed 27 April 2015) (FRA2).

²⁴ FRA1 (n 23) 4.

²⁵ The World Factbook (n 14).

principle of equal treatment by stating that “people are free and equal in dignity and rights”. The criteria for equal treatment included in this Article however include only sex, race, colour of skin, language, faith and religion, political, or other thoughts, national or social origin, affiliation to a nation, or ethnic group, property, descent, or any other status. The criterion of sexual orientation is missing in Slovak Constitution.

Articles 16 and 19 further guarantee the inviolability of the person and its privacy; preservation of human dignity, personal honour, reputation; and the right to protection against unauthorized interference in private and family life.

Following the entry of Slovakia into European Union, legally binding acts of the European Communities and European Union shall have primacy over the laws of the Slovak Republic, as stated in Article 7 of Constitution. Moreover, in this Article, Slovak Constitution establishes that International treaties on human rights and fundamental freedoms shall have primacy over the laws.

The provisions of the Council Directive 2000/78/EC concerning prohibition of discrimination based on sexual orientation in *employment* and *occupation* have been transposed correctly into Slovak legislation. Since 14.02.2008 sexual orientation is recognised as a prohibited ground of discrimination in all areas covered by the legislation, i.e. besides employment, also education, social and health care, and access to goods and services.²⁶ However there is no equality body dealing specifically with discrimination on the ground of sexual orientation. Besides general authorities protecting lawfulness of the state authorities (such as Prosecutors office, Public Defender of Rights, etc.) there is the Slovak National Centre for Human Rights which deals with all kinds of discrimination but has no judicial or executive authority.²⁷

Same-sex partnerships or same-sex marriages are not legally recognised in Slovakia.

²⁶ FRA 2 (n 23) 4.

²⁷ FRA 2 (n 23) 4.

3.3 National Legislation Regulating Referenda

Slovak Constitution establishes, in Article 93, that a referendum is used to confirm a constitutional law on entering into a union with other states, or on withdrawing from that union, and to decide on important issues of public interest. According to Article 95, a referendum is called by the President of Slovak Republic if requested by a petition signed by a minimum of 350,000 citizens or on the basis of a resolution of the National Council of the Slovak Republic. Article further sets out the limitations for the subject of referendum, namely basic rights and freedoms, taxes, levies and the state budget cannot constitute a subject of referendum.

The President of Slovak Republic may, in conformity with Article 95 of Constitution, file a petition with the Constitutional Court of Slovak Republic, before calling a referendum, in order to determine whether the subject of referendum is in compliance with the Constitution or a constitutional law, in cases when referendum was called on the basis of citizen's petition or a resolution of the National Council. This Article further specifies, that in a case when the President of the Slovak Republic files such a petition with the Constitutional Court of the Slovak Republic, the period within which the referendum should be called shall not continue from filing of a petition by the President of the Slovak Republic until the decision of the Constitutional Court of the Slovak Republic becomes effective.

The criteria for the validity of referendum's results are elaborated on in Article 98 of Constitution, and include the participation of more than one-half of eligible voters and endorsement of referendum's decision by more than one half of the participants. It also establishes that the proposals adopted in the referendum shall be promulgated by the National Council in the same way as it promulgates laws and that the National Council of Slovak Republic can amend or annul results of referendum not sooner than three years after the result of the referendum came into effect.

3.4”Anti – Homosexual” Referendum

On April 5 2014, a civic organization - the Alliance for Family (AZR), launched a petition claiming that none of the current efforts of Slovak politicians sufficiently secure a better protection for marriage and family.²⁸ Following this petition, in June 2014, the first striking legislation marginally engaging with the rights of LGBTI Community in Slovakia occurred.

The National Council of Slovakia passed a constitutional amendment changing the definition of marriage in order to improve the protection of “traditional family”. It entered into force on 1st of September 2014 and it defines marriage as a union solely between man and woman.²⁹ This amendment might be vaguely reminiscent of the infamous 1996 Defense of Marriage Act from United States of America, defining marriage as a union of one man and one woman, which was overturned in 2013 by the U.S. Supreme Court because it denied the "equal liberty" guaranteed by the Fifth Amendment to the same-sex couples.³⁰

AZR insisted that it is necessary to go further than “redefining marriage” in the name of the protection of the interests of children, who they say, have the right to grow up in a family with a father and a mother and to be protected from what they call “inappropriate sexual education” in schools.³¹ One of the AZR leaders, Anton Chromik, expressed his opinion that “homosexuals are not asking just for ‘rights,’ but want to shut the mouths of other people. They will be making decisions over other people’s lives, careers, and that has always in history resulted in dictatorships and sometimes even in mass murders.”³² Other anti-gay activist and an

²⁸Michaela Terenzani, “Anti-gay” referendum petitions has signatures, The Slovak Spectator (1.Sept.2014) <http://spectator.sme.sk/articles/view/55095/2/anti_gay_referendum_petitions_has_signatures.html> (accessed 27 April 2015).

²⁹ Slovak Constitution (n 6) Art.41.

³⁰ Dylan Matthews, The Supreme Court Struck Down Part of DOMA, Here is what you need to know, The Washington Post (26 June 2013) <<http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/26/the-supreme-court-struck-down-doma-heres-what-you-need-to-know/>> (accessed 28 April 2015).

³¹ Terenzani (n 28).

³² Dalibor Rohac, Slovak Politics and Gay Rights, The New York Times (30 December 2014) <http://www.nytimes.com/2014/12/31/opinion/slovak-politics-and-gay-rights.html?_r=0> (accessed 28 April 2015).

outspoken supporter of the referendum, the former Prime Minister of Slovakia, Jan Carnogursky, pointed out that “in Russia, one would not even have to campaign for this because over there, the protection of traditional Christian values is an integral part of government policy”.³³ And this is where the importance of such referenda lies. They took place in Europe and not in the countries such as Russia or Uganda.

The main goal of AZR was to change the attitudes of people towards family values using the mobilization of people in the referendum campaign as a tool.³⁴ In their opinion, based on the experience from other countries, waiting for the other side to act and let it repeatedly put pressure to change the status quo is not a rational and effective way of protecting values of family, marriage and children.³⁵ The success of referendum in Croatia provided an encouragement for AZR to organize their own referendum protecting family, marriage and children, which results were supposed to have an impact on the whole of Europe.³⁶

Within 5 months they managed to gather 400,000 signatures on a petition³⁷ plainly called as an “anti-gay” referendum by its opponents.³⁸ The requirements for calling a referendum under the Slovak legislation have been met and the organisers wanted to pose four questions to the voters:

1. Do you agree that no other cohabitation of persons other than a bond between one man and one woman can be called marriage?

2. Do you agree that same-sex couples or groups shouldn't be allowed to adopt children and subsequently raise them?

3. Do you agree that no other cohabitation of persons other than marriage should be granted particular protection, rights and duties that the legislative norms as of March 1, 2014 only grant to marriage and to

³³ Rohac (n 32).

³⁴ AZR official website <<http://www.alianciazarodinu.sk/english/>> (accessed 29 April 2015).

³⁵ Ibid.

³⁶ Ibid.

³⁷ Terenzani (n 28); The Economist, Uncivil society : A genuine grassroots democratic movement to deny rights to same-sex families, (5 January 2015) <<http://www.economist.com/news/europe/21637820-genuine-grassroots-democratic-movement-deny-rights-same-sex-families-uncivil-society>> (accessed 28 April 2015).

³⁸ Terenzani (n 28).

spouses (mainly acknowledgement, registration, or recording as a life community in front of a public authority, the possibility to adopt a child by the spouse of a parent)?

*4. Do you agree that schools cannot require children to participate in education pertaining to sexual behaviour or euthanasia if their parents or the children themselves do not agree with the content of the education?*³⁹

However, instead of calling the referendum, Andrej Kiska, as a first president in the whole history of Slovak Republic⁴⁰, filed a petition with Constitutional Court in order to examine whether the proposed questions do not contradict the Constitution.⁴¹ His decision was influenced by strong concern that the subject of referendum might involve the fundamental rights and freedoms of people and thus it might not be in conformity with Slovak Constitution.⁴² He stressed out, that it is necessary to interpret the fundamental rights and freedoms in terms of the international commitments of Slovak Republic and not to limit them only to the rights and freedoms guaranteed by the Slovak Constitution.⁴³

Constitutional Court of Slovakia, an independent judicial body⁴⁴ against which ruling there exists no legal recourse⁴⁵, ruled 3 out of 4 questions not to interfere with fundamental rights and freedoms of people. Only question number 3 was ruled to be inadmissible due to the issue of intelligibility and exactness of formulation of legal rules and consecutive necessity of interpretation.⁴⁶ This question was formulated in a way which enabled a double sense of understanding because it did not explicitly specify which forms of cohabitation were in question. By expression “no other forms of cohabitation other than marriage” it enabled the reader to consider

³⁹ *Nález Ústavného Súdu Slovenskej Republiky*, PL. ÚS 24/2014-90 [Decision of Slovak Constitutional Court] s.1 (CCD).

⁴⁰ *Ibid.* s.26.

⁴¹ Czech News Agency, Slovak president postpones referendum on adoption by same-sex couples, Prague Post (3 September 2014) <<http://new.praguepost.com/component/content/article?id=41336:slovak-president-postpones-referendum-on-adoption-by-same-sex-couples>> (accessed 28 April 2015).

⁴² CCD (n 39) s.4.

⁴³ *Ibid.*

⁴⁴ *Ibid.* s.124.

⁴⁵ *Ibid.* s.133.

⁴⁶ *Ibid.* s.112.

all forms of heterosexual cohabitation recognized by Slovak law and granted privileges only to cohabitation in form of marriage.⁴⁷ Hypothetically, if homosexual forms of cohabitation were recognized by Slovak law, they would have been a part of cohabitation which was a subject to this question, however, because they are not recognized, this question was considered by the constitutional court as lowering the standard of fundamental right to protection against unauthorized intervention in private and family life, enshrined in Article 19(2) of Slovak Constitution, of certain group of people.⁴⁸

When addressing the rest of the questions, the court based its argumentation on the case law of European Court of Human Rights. In the 1st question it concluded that despite the fact that this question as a matter of fact falls within the frame of the fundamental right to protection against unauthorised interference with family life, it does not have a form of fundamental right, excluded from being a subject of a referendum, because with regards to the current ECtHR practice⁴⁹ there is a room to express opinion about the same-sex marriage in referendum.⁵⁰ The subject of 2nd question was reviewed as not discriminatory, not a part of a fundamental right to protection against unauthorized interference in private and family life nor an element of the fundamental right of parents to the care and education of children and the right of children to parental care and upbringing⁵¹ based on the ECtHR practice⁵² according to which, there cannot be any discrimination if the law of a particular state does not provide for adoption of children by certain form of cohabitation. And since, in Slovakia, adoption is not granted to any other forms of cohabitation than to a married couple, discrimination of homosexual couples in comparison to unmarried opposite-sex couples is not possible when none of them has a

⁴⁷ CCD (n 39) s.83-89.

⁴⁸ Ibid. s.89,112.

⁴⁹ See e.g. *Schalk and Kopf vs. Austria*, App. no. 30141/04 (22 November 2010) s.63,64; *Hämäläinen vs. Finland*, App. no. 37359/09 (16 July 2014) s.72.

⁵⁰ CCD (n 39) s.58.

⁵¹ Ibid. s.73.

⁵² See e.g. *E.B. vs. France*, App. no. 43546/02 (22 January 2008) s.43,44; *Gas and Dubois vs. France*, App. no. 25951/07 (15 June 2012) s.69,70; *X and Others vs. Austria*, App. no. 19010/07 (19 February 2013) s.98.

right to adopt children.⁵³ The fundamental right to education was also not found to constitute a part of the 4th question because, in the Courts opinion, the question in fact suggested a solution of mutual conflict between the interests of child, embodied in the fundamental right to education, and those of its parents, embodied in article 41 of Slovak Constitution.⁵⁴ In the context of ECtHR this question was found not to interfere with any of fundamental rights because the court concluded⁵⁵ that education in matters of sex can interfere in different ways religious beliefs of people "and sexual questions may relate to "values that are fundamental to understanding many religions and philosophical views".

After the Constitutional Courts decision came into effect, President Andrej Kiska scheduled the above discussed referendum for February 7th 2015.⁵⁶ All of the votes have been counted by the Slovakia's Statistics Office and the final tally showed that between 90.3% and 94.5% of 944,209 Slovaks voting in the referendum agreed to all three questions it asked.⁵⁷ However, only 21.4% of 4.41 million eligible voters cast their ballots, far less than the 50% needed in order for the referendum to become legally binding.⁵⁸

The supporters of LGBTI rights were called upon to stay at home and not vote in order for the referendum to be invalid and thus not binding. But what would it mean if the referendum actually went through?

Despite the fact, that the referendum was not binding, the threat that it is going to happen again, in a different country, is well founded, since within one year it already happened, except Slovakia, also in Ireland. In addition, there are a lot of questions which stayed unanswered after this referendum, such as, why was it necessary to go to such a length, after the

⁵³ CCD (n 39) s.64-73.

⁵⁴ Ibid. s.103.

⁵⁵ *Kjeldsen, Busk, Madsen and Pedersen vs. Denmark*, App. no. 5095/71; 5920/72; 5926/72 (7 December 1976) s.53,54.

⁵⁶ Philipp-Moritz Jenne, Slovakia's Anti-Gay Rights Referendum Flops Due to Low Turnout, Huffington Post (8 February 2015) <http://www.huffingtonpost.com/2015/02/08/slovakia-anti-gay-rights-referendum_n_6641666.html> (accessed 4 May 2015).

⁵⁷ Leos Rousek, Slovakia Referendum on Gay-Adoption Ban Fails, The Wall Street Journal (8 February 2015) <<http://www.wsj.com/articles/slovakia-referendum-on-gay-adoption-ban-fails-1423355269>> (accessed 4 May 2015).

⁵⁸ Ibid.

adoption of Constitutional marriage amendment, to ban homosexual marriages? What about humiliation or discrimination of LGBTI? Of what value are the human rights principles in such a democratic society? Is it even right, to hold such a referendum in a democratic society? The objective of this paper is to provide as much answers for these questions as possible.

4 Conflict of Democracy and Human Rights

Democracy is a government “of the people, by the people, and for the people”.⁵⁹ It indicates an involvement of the people in the functioning of their government. Representative (indirect) democracy and direct democracy are viewed as two varieties of democracy.

Representative democracy is founded on the principle of people electing representatives who then both make laws and put them into practice.⁶⁰ In a direct democracy, the electorate (people) votes for or against laws or policies.⁶¹ Citizens are engaged in making political and institutional decisions through various democratic practises such as referenda, citizen’s initiatives, agenda initiatives or the recall.⁶² Use of these mechanisms is determined either by the constitution or by individual governments through legislation and through the choice and design of the electoral system.⁶³

Discussions of the use of referendums, citizens’ initiatives and recall votes frequently revolve around two opposing positions – strict representative approach and direct democracy enthusiasm.⁶⁴ Strict representative approach maintains that direct voting of any kind undermines the principle of representative democracy and should ideally be avoided.⁶⁵ On the other hand the direct democracy enthusiasts hold the view that there are few situations in which the use of the direct vote of the people is not an appropriate way to determine the will of the people.⁶⁶

However, it is not a purpose of this thesis to choose between these opposing positions or to compare direct democracy with representative democracy. Nor is it to undermine the importance of direct democracy and the usage of referenda and citizen’s initiatives as such. On the contrary, the

⁵⁹ Jonathan Wolff: *An Introduction to Political Philosophy*, 2006, Oxford University Press, 63.

⁶⁰ Ibid. 93.

⁶¹ Ibid. 64.

⁶² Institute for Democracy and Electoral Assistance: *Direct Democracy: The International IDEA Handbook* (2008) <http://www.idea.int/publications/direct_democracy/upload/DDH_inlay_low.pdf> (accessed 7 May 2015) (IDEA) 6.

⁶³ Ibid.

⁶⁴ Ibid. 1.

⁶⁵ Ibid.

⁶⁶ Ibid.

author is of the opinion that taking a direct part in political and institutional decisions of the state as the possibility to bring important issues to a vote by citizens themselves is a necessary part of democratic society. Nevertheless there are some areas, such as human rights, which should not be a subject of voting in a democratic society, where we are all equal and we all have human rights simply because we are humans. The purpose of this thesis is to draw attention to the fact that it is possible for the democracy to come into conflict with human rights and to pose a question to the reader, whether it is suitable to decide such a thing by these democratic tools.

However, despite the fact, that this thesis is more focused on direct democracy, it is important to highlight that this does not change the fact that also other forms of democracy are often used to underline the rights of minorities. There is no reason to assume that this situation is going to be different when taking into account democracy as a whole or when talking about representative democracy. Democracy, simply put, impersonates one person - one vote, thus minorities are going to be underrepresented in any case.

This chapter will give an insight into two mechanisms of direct democracy – referenda and citizen’s initiatives, and will elaborate on the conflict of direct democracy with human rights. The reason behind examining referenda and citizen’s initiative separately is that most of the referenda on human rights were organized under the impulse of citizen’s initiatives. Considering the fact, that citizens’ initiative is a petition calling for a referendum and that the actual referendum is the second step, it is of significant importance to examine both of these tools.

4.1 Referenda and Citizen's Initiatives

Some form of direct democracy is provided in most European countries.⁶⁷ Referenda, above all, have become more common in Europe in the past two decades, when many European states used them to decide whether to join the European Union and whether to ratify EU treaties.⁶⁸ Nowadays, almost all European states provides for referenda in their constitutions.⁶⁹

The terminology used to describe instruments of direct democracy varies between different jurisdictions.⁷⁰ Sometimes, different terms have been used to describe what are essentially the same institutions and processes. For example, referendums conducted by the government have been sometimes called plebiscites – a term that remains in use today in some states.⁷¹ Citizens' initiatives are sometimes also known as popular referenda or citizen - initiated referenda.⁷² The meaning of some of the terms describing different institutions and processes of direct democracy has changed over the time and is a subject to linguistic variations.⁷³ The particular terms relevant for this paper will be explained further and a consistent pattern in usage of these terms will be followed.

4.1.1 Referenda

Referenda are “procedures which give the electorate a direct vote on a specific political, constitutional or legislative issue.”⁷⁴ Usually, referenda take place when a governing body decides to call for a vote on a particular

⁶⁷ except for Belgium, Norway, Netherlands and Cyprus; see Justice Network in Bosnia and Herzegovina: *Regulating Referenda in European States* (Legal Memorandum, June 2014) <http://www.mrezapravde.ba/mpbh/mpbh_files/file/Regulating%20Referenda%20in%20Europe%20June%202014.pdf> (accessed 8 May 2015).

⁶⁸ IDEA (n 62) 12.

⁶⁹ European Commission for Democracy Through Law: *Referendums in Europe – An Analysis of the Legal Rules in European States*, 5 (Nov. 2, 2005) <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)034-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)034-e)> (accessed 9 May 2015).

⁷⁰ IDEA (n 62) 12.

⁷¹ Ibid. 9.

⁷² Ibid. 10.

⁷³ Ibid..

⁷⁴ Ibid.

issue, or when such a vote is required by law under the terms of a constitution or other binding legal arrangement.⁷⁵

Citizens' initiatives, on the other hand, “allow the electorate to vote on a political, constitutional or legislative measure proposed by a number of citizens and not by a government, legislature, or other political authority.”⁷⁶ To bring an issue to a vote, the proposers of the petition must gather enough signatures in support of it as the law under which the initiative is brought forward requires.⁷⁷ It is important to notice, that a citizens' initiative is a petition calling for a referendum on a legal proposal drafted by the citizens.⁷⁸ And that the actual referendum is the second step.

As stated above, in a referendum the electorate votes directly on a specific political, constitutional or legislative issue, called by political authorities. The political authorities are usually defined as the executive and legislative institutions of government.⁷⁹ For example, at the national level the executive may consist of a president and/or a prime minister and cabinet, and the legislative institutions of the parliament or congress.⁸⁰ With them then rests the decision to call a referendum.

Referenda can be regulated by a written constitution or general and permanent legislation.⁸¹ Majority of states in Europe, provide for the organization of national referenda in their constitutions.⁸²

The typical categorization of referenda is as either mandatory or optional. Mandatory referendum is a vote of the electorate which is called automatically under particular circumstances as defined in the constitution or ordinary legislation.⁸³ It is usually restricted to very important political decisions such as constitutional amendments, resolving conflicts between different governmental branches, adoption of international treaties, joining a

⁷⁵ IDEA (n 62) 10.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ visit <<http://www.democracy-international.org/direct-democracy>> (accessed 10 May 2015).

⁷⁹ IDEA (n 62) 41.

⁸⁰ Ibid.

⁸¹ Institute for International Law and Human Rights: *A Comparative Look at Referendum Laws*, (Feb. 2009) <<http://lawandhumanrights.org/documents/compllookreferendumlaw.pdf>> (accessed 10 May 2015) (IILHR) 4.

⁸² Ibid.

⁸³ Ibid.

supra-national organization and issues of national sovereignty or self - determination.⁸⁴

Optional referendum is a vote of the electorate which does not have to be held by law but can be initiated by the government and in some cases by other parties.⁸⁵ The forms of such referendum vary, for example in Spain and Austria they are pre-regulated by constitutional rules or otherwise prescribed referendum rules, or in Norway and United Kingdom they have a form of special (ad hoc) referendum setting forth particular rules to be followed specifically for individual referendum.⁸⁶ These referenda are not regulated in the constitution or any permanent legislation and the decision to hold such referenda must come from the majority of legislature via passage of a specific law authorizing the holding of the special referendum.⁸⁷

4.1.2 Citizen's Initiatives

As mentioned before, most of the referenda on human rights in Europe were organized under the impulse of citizen's initiatives, such as the Alliance for Family mentioned in the example of Slovak referendum. On the grounds that citizens' initiative is a petition calling for a referendum and that the actual referendum is the second step, the issue of citizen's initiatives will be explained below.

Initiative is a procedure which allows citizens to put forward a proposal.⁸⁸ There are two forms of an initiative put forward by the citizens and designed to be concluded with a referendum vote - citizens' initiative and the citizen's demanded referendum.⁸⁹

Citizens' Initiative (also called a 'popular initiative') stands for a number of citizens presenting a political proposal (e.g. draft legislation) and

⁸⁴ IILHR (n 81) 4.

⁸⁵ Ibid. 5.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ IDEA (n 62) 213.

⁸⁹ IDEA (n 62) 61.

registering public support by obtaining a required number of signatures, thereby forcing a referendum (popular vote) on the issue.⁹⁰

A citizen-demanded referendum is an optional referendum, which is initiated or triggered, by a number of citizens referring to existing laws or political or legislative proposals.⁹¹ There are two types of such a referendum. The abrogative referendum which allows repeal of an existing law (or its parts) and the rejective referendum which allows citizens to demand a popular vote on a new piece of legislation that is not yet in force.⁹²

The prevalent feature of these instruments is that citizens (as non-governmental actors) are entitled to act on political or legislative issues by presenting proposals, and can themselves initiate the procedure for a vote of the electorate.⁹³ Initiative instruments are designed to provide additional channels of political expression and participation, emphasizing citizens' ability to articulate their opinions and the openness of the democratic system.⁹⁴ For that reason, initiative instruments should reflect the principles of democratic equality, fairness and transparency.⁹⁵

The number of countries which have initiative instruments is significantly lower than the number that has mandatory referenda or optional referenda.⁹⁶

4.2 Regulating Referenda on EU Level

The topics which must and may be subject to the referendum mechanism should be specified in referendum legislation.⁹⁷ Across the globe, the topics on which referendums are held vary widely. For example, in Australia and most of Europe, referendums are commonly held on issues of major

⁹⁰ IDEA (n 62) 61.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid. 64.

⁹⁶ Ibid. 62.

⁹⁷ IILHR (n 81) 5.

political or constitutional importance.⁹⁸ While in Latin America, referendums are by and large held in regards to internal political issues.⁹⁹

Particular subjects may be constitutionally or legally excluded from being subject of a referendum.¹⁰⁰ Some countries develop an exhaustive list, for example France, of topics which can be sent to referendum or set out certain areas that are excluded from decision by referendum.¹⁰¹ Usually, the exclusions are limited and commonly applied to issues concerning taxes and public expenditures.¹⁰² However, as it was demonstrated in the first chapter on the example of Slovakia, the exclusions may include among the taxes and public expenditures also other subjects, such as fundamental rights. In certain cases, even sensitive subjects, such as sovereignty, might be excluded.¹⁰³

It is very important to determine what issues must, can and cannot be subjected to a referendum of the people.¹⁰⁴ One of the reasons why it is important is also the legal effect of referendum. From this perspective we in fact distinguish between legally binding and purely consultative referenda.¹⁰⁵ If a referendum is legally binding, the government is obliged to implement the proposal based on the referendum's results.¹⁰⁶ On the other hand, if a referendum is consultative, the result of the referendum serves only as an advice to the government.¹⁰⁷ The determination of referendum's legal effect varies widely because it's a matter of particular state's jurisdiction.¹⁰⁸ For example, some states enlist only legally binding referenda¹⁰⁹, in other states the legally binding referenda are the rule but

⁹⁸ IILHR (n 81) 5.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid. for example Columbia, countries where has been recent transition.

¹⁰⁴ Ibid. 6.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid. for example Estonia, France, etc.

consultative referenda are not excluded¹¹⁰, or they make this determination based on the amount of people who vote.¹¹¹

Within the European Union, the regulation of referendum legislation lies upon the individual state's jurisdictions however there are tools to help build a good referendum practice, such as "Venice Commission's codes".¹¹²

The Venice Commission, as an advisory body of the Council of Europe, is composed of independent experts in the field of constitutional law, with a role to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law.¹¹³ It elaborated opinions and guidelines such as Code of good practice on referenda and Guidelines for constitutional referenda on national level, which are not binding for the member states.¹¹⁴ In these documents are listed the principles of Europe's electoral heritage, such as universal, equal, free, secret and direct suffrage, and the conditions for implementing those principles, including respect for fundamental rights, stability of the law, organisation of the ballot by an impartial body, existence of an effective appeal system, adapting them to the specific features of a referendum.¹¹⁵ Specific rules applicable to the referendum, for example unity of substance and form, compliance with all superior law and the entire legal order, including procedural rules are also embodied in these documents with emphasis put on a clear definition of the effect of referendum in the law.¹¹⁶ However provisions pronouncedly advising the states which topics should not be a subject of referenda are missing in these documents.

¹¹⁰ IILHR (n 81) 6; for example Denmark.

¹¹¹ Ibid. for example Poland, Portugal, Slovakia, etc.

¹¹² *Code of Good Practice on Referendums*, Council for Democratic Elections and the Venice Commission, Resolution 235 (2007) <<https://wcd.coe.int/ViewDoc.jsp?id=1133019>> (accessed 12 May 2015); *Guidelines for Constitutional Referendums at National Level*, Venice Commission CDL(2001)010-e <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2001\)010-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2001)010-e)> (accessed 12 May 2015).

¹¹³ The Venice Commission of The Council Of Europe <http://www.venice.coe.int/WebForms/pages/?p=01_Presentation> (accessed 12 May 2015).

¹¹⁴ IILHR (n 82) 6.

¹¹⁵ Venice Commission, Opinions and Studies <http://www.venice.coe.int/WebForms/pages/?p=02_Opinions_and_studies> (accessed 12 May 2015).

¹¹⁶ Venice Commission, Opinions and Studies <http://www.venice.coe.int/WebForms/pages/?p=02_Opinions_and_studies> (accessed 12 May 2015).

4.3 Direct Democracy and Human Rights of Minorities

In a debate evolving around the relationship between human rights and direct democracy there are on one hand, those who depict the people as the absolute sovereign on whose will, finding its expression in direct democratic processes, no limits can be imposed with, and on the other hand, those who argue that in a state based on the rule of law, even the people must comply with certain fundamental rules, including respect for human rights, and that courts can review expressions of the people's will for compliance with these rules.¹¹⁷

A genuine threat, that direct democracy may lend itself to tyranny of the majority was already present in the minds of the founding fathers of the United States when James Madison claimed that with direct participation of citizens in government decision-making, “measures are too often decided, not according to the rule of justice and the rights of the minor party but by the superior force of an interested and overbearing majority”.¹¹⁸ Therefore he maintained that, “it is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part”.¹¹⁹

There are numerous examples of referenda targeting minorities for differential treatment.¹²⁰ The empirical work (scholarly research) testing how direct democracy affects minorities and minority rights is surprisingly sparse and limited to Switzerland and the US states, those parts of the world where by far the largest share of referenda takes place.¹²¹

In a number of studies it is stressed out that minorities are harmed by direct democracy because it allows a majority of voters' fears and prejudices to be expressed in policies that target minorities and restrict minority

¹¹⁷Daniel Moeckli : *Of Minarets and Foreign Criminals, Swiss Direct Democracy and Human Rights*, Human Rights Law Review 11:4 (774, 2011, Oxford University Press) 775.

¹¹⁸ Federalist Papers No 10, available on the website of the Library of Congress at: <<http://thomas.loc.gov/home/histdox/fedpapers.html>> (accessed 12 May 2015).

¹¹⁹ Ibid. no 51.

¹²⁰ Todd Donovan, Caroline Tolbert : *Do Popular Votes on Rights Create Animosity Toward Minorities?*, Political Research Quarterly 66(4) (910, 2013 University of Utah) 910.

¹²¹ Moeckli (n 117) 778.

rights.¹²² The notion, that the public's initial response to questions about "out groups" is almost universally intolerant was established by classic studies.¹²³ Moreover it has been also shown that white voters' racial attitudes and racial animus affect how they vote in candidate contests and thus it comes as a little surprise, then, that voters frequently approve referenda targeting minority groups.¹²⁴

Barbara Gamble looked at the US state and local votes on initiatives and referenda concerning civil rights legislation, probably in the first systematic analysis, and demonstrated that initiatives restricting the civil rights of minorities passed at a much higher rate (78% of cases) than initiatives on all other subjects.¹²⁵ Next study, conducted in California, concluded that there is little overall anti-minority bias in the system of direct democracy, in general, but when proposals explicitly targeted racial and ethnic minorities, these minorities lost regularly.¹²⁶

A US study, which replicated and extended previous research through comparison of direct democracy and representative democracy outcomes, has confirmed for sure, that as far as the rights of homosexuals are concerned, this particular minority is in fact more likely to lose in direct democratic contests.¹²⁷ However, there are also studies comparing pro – minority outcomes (pro-gay/-lesbian) from citizen's initiatives and state legislature, which found that both produced anti-minority results most of the time.¹²⁸ According to these studies, the critics have overstated the detrimental effects of direct democracy.¹²⁹ Based on the assessment of how institutions make policy more or less responsive to public opinion it has

¹²² Donovan (n 120) 910.

¹²³ Ibid. see: Stouffer, Samuel : *Communism, Conformity, and Civil Liberties*, 1995 New York.

¹²⁴ Ibid. see: Kinder and Sanders 1996; Mendelberg 2001; Reeves 1997; Sniderman and Piazza 1993.

¹²⁵ Barbara Gamble : *Putting Civil Rights to a Popular Vote*, 41 *American Journal of Political Science* (245, 1997).

¹²⁶ Moeckli (n 117) 778.

¹²⁷ Haider-Markel, Querze and Lindaman : *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, *Political Research Quarterly* (60,2007) 304.

¹²⁸ Ibid.

¹²⁹ Donovan (n 120) 911.

been concluded that direct democracy does not significantly affect the adoption of gay rights policies one way or another.¹³⁰

There are two sides to everything, and the question which should be raised now is: Can we conclude, after this, that direct democracy does not harm minorities?

One might try answering this question by focusing on policy adoptions. A number of initiatives (especially in US) which affected minority interests have survived the court scrutiny.¹³¹ This means that some racial, ethnic, and sexual orientation minorities have been unfavourably affected by voter approved policies, for example, most initiatives repealing affirmative action and those banning same-sex marriage have survived court challenges.¹³² Liken to Slovak referendum, described in the first chapter, the referendum proposal adversely affecting LGBTI minority also survived the Slovak constitutional's court scrutiny and as a result an "anti-homosexual" referendum could be organised.

Moreover, another important factor which must be taken into account when answering this question is the impact which direct democracy has on minorities. Whether it is a referendum or citizen's initiative, the core feature of direct democracy is the act of having a referendum on a question of public policy and it is of a significant importance to take into consideration whether having a referendum about minority rights can make the public less sympathetic to the group being targeted by the proposal.¹³³ Often, the stigmatizing effect of referenda on minority rights in the terms of public opinion is overlooked.¹³⁴ When placing a question about rights in a referendum, the state experiences a campaign that not only brings attention to the policy question but also produces additional negative information about the group which was made a subject of debate.¹³⁵ It has been established, that campaigns disproportionately focus on negativity, because

¹³⁰ Donovan (n 120) 911.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

they have been found to be more effective.¹³⁶ And thus, placing a question about minority rights on the referendum will produce a campaign context which may increase popular “animosity”¹³⁷ towards members of the minority group.¹³⁸

When majority attitudes towards the group (and the right in question) are particularly unsympathetic, and when recent rights gains may highlight the impending threat of the group, the potential for increased animosity towards a targeted group is escalating.¹³⁹ The potential for a campaign to portray a minority as a threat becomes greater at a moment in time when a minority group is ascendant, in that it may be perceived to be achieving rights that had long been suppressed.¹⁴⁰ What is, unfortunately, still a harsh reality for LGBTI minority rights.

Messages associated with campaigns targeting minority rights have also a lot of potential to trigger perceptions, among some people, that the group targeted by the referendum question presents some sort of a threat and activate or perpetuate negative stereotypes and predispositions about this group.¹⁴¹ There are numerous examples, for instance, campaigns promoting “no special rights for gays” referendum measures produced video and print material drawing attention to “the gay agenda,” sexual promiscuity, polygamy, paedophilia, and the idea that homosexuality is a matter of choice rather than biology, and many more.¹⁴²

To conclude, through direct democracy a bare majority of fifty-percent-plus-one can strip entire groups of people of their rights and thus it is duly justified when many argue that no racial, ethnic, or sexual minority group can be secure in their rights. Taking into account the animosity affect of direct democracy on minority groups the presence of possible danger of direct democracy should be clearly visible. In the recent trend of referenda and citizen’s initiatives directed at the rights of minority groups, it is about

¹³⁶ Donovan (n 120) 911.

¹³⁷ Animosity is a strong feeling of opposition, anger or hatred.

¹³⁸ Ibid.

¹³⁹ Ibid. 912.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

the time to ask a question, what is the road of democracy if it allows jeopardy of human rights, and start thinking about what can be done in order to forestall such a treatment.

5 Discriminatory Referendum

On a daily basis, we make choices over issues such as with whom we socialize, where we work, where we shop, and consequently we prefer certain things and certain people over others. Expressing our subjective preferences is commonplace and normal however there are situations when we may exercise functions that place us in a position of authority or allow us to take decision that may have a direct impact on others' lives. And it is in these non-personal contexts when non-discrimination law intervenes in the choices we make.

With the entry into force of the Lisbon Treaty¹⁴³, not only the Charter of Fundamental Rights of the European Union¹⁴⁴ became legally binding but furthermore, it also provided for EU accession to the European Convention on Human Rights¹⁴⁵. Within this context increased knowledge of common principles developed by the Court of Justice of the European Union (ECJ) and the European Court of Human Rights is not only desirable but in fact essential for the proper national implementation of a key aspect of European human rights law: the principle of equality and non-discrimination. For it is at the national level where non-discrimination provisions come to life, and there on the front line that the challenges become visible.

ECHR sets out a general prohibition on discrimination in its Article 14, which guarantees equal treatment in the enjoyment of the other rights set down in the Convention. Protocol 12 (2000) to the ECHR expands the scope of the prohibition of discrimination by guaranteeing equal treatment in the enjoyment of any right (including rights under national law).¹⁴⁶ It was created out of a desire to strengthen protection against discrimination which was considered to form a *core element of guaranteeing human rights*.¹⁴⁷

¹⁴³ Lisbon Treaty (n 3).

¹⁴⁴ CFREU (n 11).

¹⁴⁵ ECHR (n 1).

¹⁴⁶ European Union Agency for Fundamental Rights, Council of Europe: *Handbook on European non-discrimination law* (2010) (FRA Discrimination) 13.

¹⁴⁷ *Ibid.*

In order to establish a discriminatory character of referenda portrayed in the third chapter, this chapter will elaborate on the meaning of principle of equality and non-discrimination, including the legal sources of this principle together with types of discrimination, and will culminate in a discussion regarding the discriminatory character of such referenda.

5.1 Principle of Equality and Non-Discrimination

The aim of non-discrimination law can be characterised as guaranteeing an equal and fair prospect to access opportunities available in a society to all individuals.¹⁴⁸

There are three main legal sources of equality and non-discrimination which are of particular significance in the development of concept of equality and non-discrimination in the European legal context: the constitutional traditions of Member States and the European Economic Area countries; European Community (EC) law; and human rights law, in particular the European Convention on Human Rights.¹⁴⁹ Several different, but overlapping, sources of EC law, such as practice of ECJ and EU Directives, establish general equality and non-discrimination norms binding on EC institutions, and the Member States where they implement, or act within the scope of, Community law.¹⁵⁰

EU Charter of Fundamental Rights, containing a list of human rights inspired by the rights contained in the constitutions of the Member States, ECHR and universal human rights treaties, became a legally binding document when Lisbon Treaty entered into force.¹⁵¹ Article 20 establishes that everyone is equal before the law. The prohibition on discrimination is encompassed within Article 21, according to which any discrimination based on any ground such as sex, race, colour, ethnic or social origin,

¹⁴⁸ FRA Discrimination (n 146) 21.

¹⁴⁹ Christopher McCrudden, Sacha Prechal : *The Concepts of Equality and Non-Discrimination in Europe : A practical approach*, European Network of Legal Experts in the Field of Gender Equality (2009) 10.

¹⁵⁰ Ibid. 11.

¹⁵¹ FRA Discrimination (n 146) 15.

genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, nationality, age or sexual orientation shall be prohibited.

In 2000, two directives were adopted, which significantly expanded the scope of EU non-discrimination law.¹⁵² The Employment Equality Directive¹⁵³ which prohibited discrimination on the basis of sexual orientation, religious belief, age and disability in the area of employment. And the Racial Equality Directive¹⁵⁴, prohibiting discrimination on the basis of race or ethnicity in the context of employment, but also in accessing the welfare system and social security, and goods and services. This expansion recognised that in order to allow individuals to reach their full potential in the employment market, it was also essential to guarantee them equal access to areas such as health, education and housing.¹⁵⁵ In 2004, the Gender Goods and Services Directive¹⁵⁶ expanded the scope of sex discrimination to the area of goods and services however, it can be said that the protection on the grounds of sex does not quite match the scope of protection under the Racial Equality Directive since it guarantees equal treatment in relation to social security only and not to the broader welfare system, such as social protection and access to healthcare and education.¹⁵⁷

All Member States of EU have joined the European Convention on Human Rights which is closely connected to EC law.¹⁵⁸ Article 14 of the ECHR, prohibits discrimination only in relation to the exercise of another right guaranteed by the treaty while in EU non-discrimination law the prohibition on discrimination is free standing, but limited to particular contexts, such as employment.¹⁵⁹ However under Protocol 12 to ECHR, the prohibition of discrimination becomes free standing.

To conclude, protection against discrimination in Europe can be found within both EU law and the ECHR but it is important not to omit that

¹⁵² FRA Discrimination (n 146) 14.

¹⁵³ 2000/78/EC.

¹⁵⁴ 2000/43/EC.

¹⁵⁵ FRA Discrimination (n 146) 14.

¹⁵⁶ Directive 2004/113/EC.

¹⁵⁷ FRA Discrimination (n 146) 14.

¹⁵⁸ Ibid. 17.

¹⁵⁹ Ibid.

while to a great degree these two systems are complementary and mutually reinforcing, some differences do exist.

5.2 Categories of Discrimination

The aim of non-discrimination law, as previously mentioned, is to allow all individuals an equal and fair prospect to access opportunities available in a society.

On one hand, it imposes that those individuals who are in similar situations should receive similar treatment and should not be treated less favourably simply because of a particular “protected” characteristic that they possess.¹⁶⁰ This position is well known as *direct discrimination*. If it is framed under ECHR it is a subject to general objective justification defence, however under EU law defences against direct discrimination are somewhat limited.¹⁶¹

On the other hand, non-discrimination law stipulates that those individuals who are in different situations should receive different treatment to the extent that this is needed to allow them to enjoy particular opportunities on the same basis as others.¹⁶² Hence, the above mentioned “protected grounds” should be taken into account when carrying out particular practices or creating particular rules.¹⁶³ This form is known as *indirect discrimination*. All forms of indirect discrimination are subject to a defence based on objective justification regardless whether the claim is based on the ECHR or EU law.¹⁶⁴

In conclusion, there are two types of discrimination and thus non-discrimination law prohibits not only scenarios where persons or groups of people in an identical situation are treated differently but also where persons or groups of people in different situations are treated identically.¹⁶⁵

¹⁶⁰ FRA Discrimination (n 146) 21.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid. 22.

¹⁶⁵ Ibid.

5.2.1 Direct Discrimination

The definition of direct discrimination is similar under both the ECHR and EU law. According to Article 2 of Racial Equality Directive¹⁶⁶, direct discrimination is “taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin”.¹⁶⁷ Comparably, the ECtHR uses a formulation, based on an identifiable characteristic, that there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.¹⁶⁸ Based on this, it can be concluded, that direct discrimination occurs when an individual is treated unfavourably, by comparison to how others, who are in a similar situation, have been or would be treated and the reason for this is a particular characteristic, falling under protected ground, which they hold.¹⁶⁹

Essential for direct discrimination is the difference of treatment that an individual is subject to and thus evidence of “unfavourable treatment” can be considered as the first feature of direct discrimination.¹⁷⁰ Unfavourable treatment can be for example refusal of entry to a restaurant or shop; receiving a smaller pension or lower pay; being subject to verbal abuse or violence; being refused entry at a checkpoint; having a higher or lower retirement age; being barred from a particular profession, etc.¹⁷¹ This implies that unfavourable treatment will be relevant to making a determination of discrimination where it is unfavourable by comparison to someone in a similar situation, however for example a complaint about low pay cannot be considered as a claim of discrimination unless it can be shown that the pay is lower than that of someone employed to perform a similar task by the same employer and for that reason a “comparator”,

¹⁶⁶ 2000/43/EC.

¹⁶⁷ Similarly: *Employment Equality Directive*, Art. 2(2)(a); *Gender Equality Directive* (Recast), Art. 2(1)(a); *Gender Goods and Services Directive*, Art. 2(a).

¹⁶⁸ FRA Discrimination (n 146) 22.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

person in materially similar circumstances with the main difference between the two persons being the protected ground is needed.¹⁷²

5.2.2 Indirect Discrimination

The fact that discrimination may result not only from treating people in similar situations differently, but also from offering the same treatment to people who are in different situations is equally recognized by both ECHR and EU law.¹⁷³ In the case of indirect discrimination it is not the treatment that differs but rather the effects of that treatment, which will be felt differently by people with different characteristics.¹⁷⁴ In consonance with Article 2(2b) of Racial Equality Directive¹⁷⁵, indirect discrimination occurs there where an apparently neutral provision, criterion or practice puts persons of a racial or ethnic origin at a particular disadvantage compared with other persons.¹⁷⁶ ECtHR has drawn on this definition in its case law by establishing that a difference in treatment can take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group.¹⁷⁷ Thus the elements of indirect discrimination can be summarized as a neutral rule, criterion or practice that affects a group defined by a protected ground in a significantly more negative way by comparison to others in a similar situation.¹⁷⁸

The first requirement is an apparently neutral rule, criterion or practice under which some form of requirement that is applied to everybody is conceived.¹⁷⁹ The second requirement demands that the apparently neutral provision, criterion or practice is placing a protected group at a particular

¹⁷² FRA Discrimination (n 146) 23.

¹⁷³ Ibid. 29.

¹⁷⁴ Ibid.

¹⁷⁵ 2000/43/EC.

¹⁷⁶ Similarly: *Employment Equality Directive*, Article 2(2)(b); *Gender Equality Directive (Recast)*, Article 2(1)(b); *Gender Goods and Services Directive*, Article 2(b).

¹⁷⁷ FRA Discrimination (n 146) 29.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

disadvantage.¹⁸⁰ The focus has moved away from differential treatment to differential effects and this is where indirect discrimination differs from direct discrimination.¹⁸¹ ECJ and ECtHR, throughout considering statistical evidence that the protected group is disproportionately affected in a negative way by comparison to those in a similar situation, searches for evidence that a particularly large proportion of those negatively affected is made up of that protected group.¹⁸² As well as in the course of direct discrimination, the court needs to find a comparator in order to determine whether the effect of the particular rule, criterion or practice is significantly more negative than those experienced by other individuals in a similar situation.¹⁸³

5.3 The Scope of European Convention Article 14

European non-discrimination law prohibits direct and indirect discrimination only in certain contexts mostly because it was introduced in order to facilitate the functioning of the internal market and therefore was confined to the sphere of employment.¹⁸⁴ In contrast, Article 14 of the ECHR guarantees equality in relation to the enjoyment of the substantive rights guaranteed by this convention. Additionally, Protocol 12 to the ECHR expands the scope of the prohibition on discrimination to cover any right which is guaranteed at the national level, even where this does not fall within the scope of an ECHR right however it was not ratified by all EU Member States.¹⁸⁵

ECHR guarantees protection to all those within the jurisdiction of a Member State, aside from the fact whether they are citizens or not, and even beyond the national territory to those areas under the effective control of the State (such as occupied territories).¹⁸⁶

¹⁸⁰ FRA Discrimination (n 146) 30.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid. 31.

¹⁸⁴ Ibid. 57.

¹⁸⁵ Ibid.

¹⁸⁶ *Loizidou v. Turkey*, App. No. 15318/89 (18 December 1996).

As mentioned above, Article 14 guarantees equality in the enjoyment of the rights and freedoms set forth in ECHR. Put into other words, unless the complaints of discrimination do not fall within the ambit of one of the rights protected by ECHR, the ECtHR will not be competent to examine such complaints. So whenever the ECtHR considers an alleged violation of Article 14, it always does it in conjunction with a substantive right.¹⁸⁷ Usually, the applicant alleges a violation of a substantive right and in addition a violation of a substantive right in conjunction with Article 14.¹⁸⁸ Expressly, the interference with the applicant's rights was, in addition to failing to meet the standards required in the substantive right, also discriminatory in that those in comparable situations did not face a similar disadvantage.¹⁸⁹

Because of the fact, that Article 14 is wholly dependent on discrimination based on one of the substantive rights guaranteed in the ECHR, it is extremely important to gain an appreciation of the rights covered by the ECHR.¹⁹⁰ The ECHR incorporates a list of rights, predominantly characterised as civil and political, however it also protects certain economic and social rights.¹⁹¹ It covers an exceptionally wide breadth of rights, such as the right to life; the right to respect for private and family life; and freedom of thought, conscience and religion, etc.

The ECtHR has adopted a wide interpretation of the scope of ECHR rights when applying Article 14.¹⁹² Most importantly, the Court made it clear, that it can examine claims under Article 14 taken in conjunction with a substantive right, even if there has been no violation of the substantive right itself.¹⁹³ Furthermore, the Court has held that the scope of the ECHR extends beyond the actual letter of the rights guaranteed and thus it will be sufficient if the facts of the case broadly relate to issues that are protected under the ECHR.¹⁹⁴

¹⁸⁷ FRA Discrimination (n 146) 60.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid. 61.

¹⁹³ See, for example, *Sommerfeld v. Germany*, App. no. 31871/96 (8 July 2003).

¹⁹⁴ FRA Discrimination (n 146) 61.

5.4 Additional Protection for the “Personal Sphere”

Significant areas exist, where the ECHR affords additional protection.¹⁹⁵ One particularly significant area is the area of private and family life, in which the Member States have not given the EU extensive powers to legislate.¹⁹⁶ Cases brought before the ECtHR in this respect have involved examination of differential treatment in relation to the rules on inheritance, access of divorced parents to children, and issues of paternity.¹⁹⁷ Article 8 is furthermore extended also to matters of adoption even though there is no actual right to adopt enshrined within ECHR.¹⁹⁸ Moreover, the ECtHR sets out the general reach of Article 8, with reference to past case-law:

*“... the notion of “private life” within the meaning of Article 8 of the Convention is a broad concept which encompasses, inter alia, the right to establish and develop relationships with other human beings ... the right to “personal development” ... or the right to self-determination as such. It encompasses elements such as names ... gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8 ... and the right to respect for both the decisions to have and not to have a child.”*¹⁹⁹

On this basis, it is more than recognizable that ambit of Article 8 is extremely wide. Additionally to the parts of private sphere already mentioned, ECHR also has implications for other areas, such as marriage, which is specifically protected under Article 12.²⁰⁰

¹⁹⁵ FRA Directive (n 146) 79.

¹⁹⁶ Ibid.

¹⁹⁷ See e.g. *Mazurek v. France*, App. no. 34406/97 (1 February 2000); *Sommerfeld v. Germany*, App. no. 31871/96 (8 July 2003); *Rasmussen v. Denmark*, App. no. 8777/79 (28 November 1984).

¹⁹⁸ See e.g. *E.B. v. France*, App. no. 43546/02 (22 January 2008).

¹⁹⁹ Ibid. s.43.

²⁰⁰ See e.g. *Muñoz Díaz v. Spain*, App no. 49151/07 (8 December 2009).

5.5 Analysing the Referendum

Previously mentioned referendum on human rights in Slovakia (“on the protection of traditional family”), touched upon three issues: limiting the application of the word marriage only to the union of a man and a woman; a question on preventing same-sex couples from adopting children; and whether or not parents should be able to opt their children out of sex education in schools. The president of Slovak Republic filed a petition with Slovak Constitutional Court, in order to establish whether the referendum questions touch upon human rights issues. He invoked Article 14 in conjunction with Article 8 and pointed towards the possibility of discrimination on the grounds of referendum questions. However the Court ruled 3 out of 4 questions not to touch upon human rights issues and allowed the referendum to go forward.

Reviewing the questions of this referendum, at the first sight, it might appear to many people, that the whole issue is about homosexual marriages or registered partnerships, which in fact cannot be forced upon the EU Member States and then naturally one may ask, what is the purpose of even discussing this issue. But on the contrary, there is more to this issue than meets the eye. This referendum does not represent an isolated event. As has been stated before, very similar referenda already happened in Slovenia, Croatia and Ireland. What these referenda have in common is the fact, that they are directed against one specific minority – LGBTI, and thus the question which we should ask ourselves is why someone should care about LGBTI rights when in fact these rights are not going to have an impact on his/her life.

Two possible approaches of analysing this issue are going to be discussed below. On one hand there is the approach of Slovak Constitutional Court (narrow approach) and on the other hand a different point of view, taking into account the nature of the referenda, will be reviewed.

5.5.1 The Court's Approach

Slovak Constitutional Court, in its ruling, established that the Court's role is to take care of that the extension of the standard of one fundamental right or freedom will not lead to a reduction in the standard of another fundamental right or freedom.²⁰¹ When addressing the question of limiting marriage just to the union of man and a woman the Court based its argumentation on the ECtHR practice, namely case *Schalk and Kopf vs. Austria*, where the court ruled that the Member States of EU are entitled to restrain (limit) the right to marry only for couples of opposite sex in conjunction with Articles 8, 12, 14 of ECHR.²⁰² To support this claim, the case *Hämäläinen vs. Finland* par.72, was invoked, according to which it is not possible to interpret Article 8 of ECHR as an obligation for Member States to guarantee a right to marry for the same-sex couples. Because of the fact, that according to the Article 41(1) of Slovak Constitution, marriage is an exclusive bond of one man and one woman, even if this referendum question was accepted by citizens it would not change the legal status of marriage²⁰³ and thus the standard of right to protection against unauthorized intervention in private and family life, enshrined in Article 19(2) of Constitution, would not be lowered. The Court concluded, that with regards to current ECtHR court practice there is a room to express opinion about the same-sex marriage in referendum²⁰⁴ and despite the fact that, this question as a matter of fact falls within the frame of the fundamental right to protection against unauthorised interference with family life, it does not have a form required by Article 93 of Constitution.²⁰⁵

On the other hand, the ECtHR clarified that sexual orientation is, as one of the prohibited grounds of discrimination, listed in Article 14 of ECHR also in conjunction of enjoyment of the right to private and family life (Article 8). A contra argument to the Slovak Constitutional Court's approach could be found also in the case *Schalk and Kopf v Austria*, where

²⁰¹ CCD (n 39) s.38.

²⁰² *Schalk and Kopf vs. Austria*, App. no. 30141/04 (22 November 2010).

²⁰³ CCD (n 39) s.58.

²⁰⁴ CCD (n 39) s.58.

²⁰⁵ Ibid. s.59,60.

it was highlighted that the reference to "men and women" in the ECHR no longer means that "the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex".²⁰⁶ Moreover it stressed out that it is artificial to maintain the view that, in contrast to different-sex couples, same-sex couples cannot enjoy family life²⁰⁷ and that the exclusion of same-sex couples from the possibility of marriage may result in discrimination in other areas of life such as access to goods and services.²⁰⁸ In case *Kozak vs. Poland*²⁰⁹, ECtHR stated that in the process of finding a balance between the protection of family and protection of rights granted to sexual minorities by Constitution, the state has to take into account the development of society and above all the fact that there is not only one way how an individual can live his life.²¹⁰

An Interesting issue in the Slovak Constitutional Court's decision was the assessment of the question asking not to render special protection, rights and duties to any other form of co-existence of individuals save for the marriage, which was ruled unconstitutional. The Court excluded this question, as pointed out in the first chapter, because it was so broadly worded that it enabled different interpretations and not because it discriminated against homosexual couples. It was assessed by the Court from the perspective that Slovak law does not address registered partnerships, but it acknowledges certain forms of co-existence (such as close people or people sharing the same household without being blood-related) and thus this question would restrict the already existing rights what is not allowed. Although it is questionable how the Court would address this question if it was specifically targeting the registered partnerships since it did not see any problem regarding the voting on the definition of marriage.

The very much disputed referendum question regarding the adoption of children by same-sex couples or groups was seen by the Court as not

²⁰⁶ *Schalk and Kopf vs. Austria*, App. no. 30141/04 (22 November 2010).

²⁰⁷ *Ibid.*

²⁰⁸ Amnesty International Public Statement: *Slovakia: Amnesty International condemns discriminatory constitutional amendment defining marriage as the union between a man and a woman*, AI Index: EUR 72/001/2014 (5 June 2014).

²⁰⁹ *Kozak vs. Poland*, App. no. 13102/022 (02 June 2010).

²¹⁰ CCD (n 39) s.6.

directed only at homosexual (since, as previously mentioned, adoptions are granted only to married couples and no other forms of co-existence have this right) and thus not discriminating.

Considering that Slovak Constitution, in Article 93(3), stipulates, that fundamental human rights cannot be subject to a referendum, it has been silently presumed that these rights can be neither narrowed, nor widened however by its decision, now, the Court has explained the wording of Constitution in the way that human rights only cannot be narrowed in referendum. Discussing the particular arguments of Slovak Constitutional Court by the means of finding contra arguments to each of its arguments would take not only a lot of time and space but more importantly following this approach would mean following the narrow approach which the Court took when addressing this referendum. Omitted by the Slovak Constitutional Court, when deciding this issue, was the very nature of this referenda where the essence of discrimination lies.

5.5.2 Different Point of View - Exploring the Nature of Referendum

As indicated before, expressing our subjective preferences is commonplace and normal however there are situations when we exercise functions that place us in a position of authority, when the decisions we make may have a direct impact on others lives, and in these non-personal contexts the issues of discrimination arise. Citizens of Slovakia have been placed in a position of authority to decide about questions directly impacting personal lives of LGBTI society and despite the fact that referendum did not go through, it is legitimate to question whether they had a right to decide upon such matters.

In contrast to the Court's narrow approach, it is necessary to take into account the nature of this referendum when deciding whether human rights issues and discrimination are involved.

According to ECHR, Article 14, prohibiting discrimination can only be invoked in connection with other substantive right enshrined within the

Convention. In this case, just the title of the referenda “protection of (traditional) family” invokes which Article is in place to be invoked. Moreover, the content of referendum questions includes same-sex marriage and adoption of children which fall within the ambit of Article 8 of ECHR, the right to respect for private and family life. A claim, that this referendum is discriminatory is therefore based on the Article 14 in conjunction with Article 8 of ECHR.

Previously stated, the aim of non-discrimination law is guaranteeing an equal and fair prospect to access opportunities available in a society to all individuals. Direct discrimination occurs when one person is treated less favourably than another is, has been or would be treated in a comparable situation. Applied to the circumstances of this referendum, it was directed against same-sex couples (LGBTI community). Citizens of Slovakia, mostly heterosexuals, were asked to decide whether homosexuals should be able to marry and adopt children. In other words, on one hand there is LGBTI community, about whose rights it is being decided, and on the other hand there are heterosexuals, already having most of the rights. When we compare these two groups and put them into comparable situation, in order to establish whether discrimination occurred, the only plausible conclusion to which we will arrive is that, there would never be a referendum regarding the right to marry and adopt children for heterosexuals. This would never happen to heterosexual couples, since heterosexuality is perceived as normal, natural and automatic component of society. The difference in treatment of these two groups is more than obvious and that is why this referendum is discriminatory.

In addition, if everyone should have equal and fair access to opportunities in society, LGBTI community should be able to equally and fairly represent themselves in this referendum however it is more than apparent that it can never happen, because they are a minority and in numbers they do not stand a chance against majority. Does not this also create discrimination?

Circumstances, taken into account when deciding about these issues, should also include the reasons why the referendum was organized. It was

organized by a group of people, professing the values of “traditional family”, with ties to Catholic Church, and in order to protect the “traditional family” against homosexuals. Indicating, that based on who we love or decide to spend time with, we are different, unequal and thus dangerous and not worth of respect for our human dignity?

But in fact, we are all human, we are all equal and we should not allow the majority to limit the rights of minority, not allow people who fear anyone different from themselves to limit others rights or deny others human dignity.

6 Legal Protection for Fundamental Rights under the U.S. Constitution

United States of America, one of the countries with a largest share of referenda, developed for the purposes of fighting discrimination the system of “protected classes” connected to a particular level of scrutiny. Essentially, U.S. has recognized a problem, by adopting additional protection for certain groups of people, whose rights tend to be more endangered than the rights of others, and by tying the particular protected classes with a specific level of scrutiny for each class, it developed a proactive approach, compared to the reactive approach of European Court of Human Rights.

Aforementioned, a discriminatory referendum took place in four member states, characterised by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men, of European Union which is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights.²¹¹ Respect and protection of human rights can only be guaranteed by the attainability of effective judicial remedies.²¹² Immediately upon a violation of a right of individual (or a group), access to justice is of fundamental importance not only for the injured individual but also because it is an essential component of the system of protection and enforcement of human rights.²¹³ In order to determine whether the European Court of Human rights should adopt (select) a reactive or a proactive approach, for the sake of accessing justice of the victims of this referenda, it is crucial to discuss the proactive approach of U.S. courts.

This chapter will give an insight into the Equal Protection Clause, which purpose is to fight discrimination, in conjunction with methods of

²¹¹ Lisbon Treaty (n 3).

²¹² Francesco Francioni: *Access to Justice as a Human Rights* (Oxford University Press, 2007) 2.

²¹³ Ibid.

scrutiny used by U.S. Courts and will conclude with a landmark decision of U.S. Supreme Court related to discrimination based on sexual orientation.

6.1 The U.S. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides, “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” It was adopted shortly after the Civil War and has been invoked often to invalidate policies such as racial segregation in public schools, the denial of voting rights to African-Americans, and racially exclusive public accommodations.²¹⁴

The U.S. courts use Equal Protection Clause nowadays as a major doctrinal tool for analysing controversies unrelated to race and they have developed a general methodology to resolve equal protection disputes.²¹⁵

Essentially, the command of equality is comparative and requires a comparison of one entity with another entity.²¹⁶ A comparison of two different classes is involved in most of the equal protection cases.²¹⁷ To classify means to identify a trait that makes a person a member of a class, for example all those over age fifty, and then to ascribe a certain treatment, such as forced retirement, for those who, having the trait, are members of the class.²¹⁸ The typical equality challenge to this kind of classification compares those who have trait (one class of persons) with those without the

²¹⁴ See e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²¹⁵ Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and others : *Constitutional Law*, Aspen Casebook Series, 7th edn. (Wolters Kluwer Law & Business in New York, 2013) 498.

²¹⁶ See e.g., *Griffin Indus. Inc. v. Irvin*, 496 F.3d. 1189, 1205 (11th Cir. 2007) (“Adjudging equality necessarily requires comparison”); *Buckles v. Columbus Mun. Airport Auth.*, No. CS-00-986, 2002 WL 193853, at *13 (S.D. Ohio Jan. 14, 2002) (“An equal protection claim simply cannot exist absent an allegation that, compared to others, the plaintiff was treated less favourably.” (emphasis in original)).

²¹⁷ Robert C. Farrell : *The Two Versions of Rational-Basis Review And Same-Sex Relationships*, Washington Law Review, vol. 86 (281, 2011) 283.

²¹⁸ *Ibid.*

trait (second class of persons) and argues that, the members of both classes should be treated similarly because the two classes are similarly situated.²¹⁹

In other words, equal protection claims, in general, involve a challenge to laws that allocate benefits or impose burdens on a defined class of individuals.²²⁰ In an equal protection case the plaintiff claims that the government has drawn the line between the favoured and disfavoured groups in an impermissible place.²²¹ However, a bare fact of treating individuals differently cannot invariably give rise to an equal protection violation.²²² Demonstrated on an example, a law that sets the driving age at sixteen treats fifteen-year-olds differently and seventeen-year-olds differently, classifying on the basis of age, while a decision to set the passing score for the bar examination at 80 treats applicants who scored 79 differently from those who scored 81, classifying on the basis of test performance. And thus, deciding whether under particular circumstances a challenged classification is permissible, represents the real question involved in equal protection cases.²²³

Equal protection analysis consists of three steps.²²⁴ In the first step, judges have to rule whether the challenged law classifies people based on a particular trait.²²⁵ The second step requires the court to determine the level of scrutiny associated with that trait.²²⁶ And after determining the appropriate level of scrutiny, the third step demands its application in order to establish whether the challenged law survives under the applicable test.²²⁷

Determination of who is similar to whom and therefore entitled to similar treatment is critical and at the same time difficult. On one hand, it can be said that, all human beings are similar to all other human beings because they have, for example, a human genome, and are therefore

²¹⁹ Ibid. 284.

²²⁰ Stone (n 215) 498.

²²¹ Ibid.

²²² Ibid.

²²³ Ibid.

²²⁴ Christopher R. Leslie : *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, Cornell Law Review, vol.99 (1077, 2014) 1083.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid. 1085.

arguably entitled to similar treatment.²²⁸ On the other hand, at the same time all human beings are unique (entities with their own genes and life experience) and thus different from everyone else and entitled or subject to different treatment.²²⁹

The Courts resolved the problem of identifying who is similar to whom, for example, by referring to an external criterion - the purpose for which the classification was made.²³⁰ Demonstrated on an example, when all persons over the age of fifty shares a trait that makes them members of a class are they similarly situated to individuals in a class made up of people younger than fifty? This would depend on whether this age classification is relevant to its purpose. If the purpose of the classification would be to identify individuals who still have sufficient vigor to perform a physically demanding job like police work, then the two classes could be considered differently situated, since fitness declines with age.²³¹ However, if the purpose of the classification would be to determine who is eligible to vote, then these two classes would appear to be similarly situated, because physical vigor bears little relation to voting ability.²³² This implies that there must be some correlation between classification and purpose and this way of determining who is similar to who typifies the rational basis review, the minimum judicial review to evaluate the constitutionality of laws in U.S.²³³

6.2 Levels of Scrutiny

Equal protection analysis originated in the famous footnote four in *United States v. Carolene Products Co.* where the Court recognized that “if a law neither burdens a fundamental right nor targets a suspect class, it will

²²⁸ Farrell (n 217) 284.

²²⁹ Ibid.

²³⁰ Farrell (n 217) 284.

²³¹ The example here is based on the example from Farrell (n 217) 284, for further information check n 9 in Farrell.

²³² Ibid.

²³³ Sharon E. Rush : *Whither Sexual Orientation Analysis? : The Proper Methodology When Due Process And Equal Protection Intersect*, 16 William & Mary Bill of Rights Journal, vol. 16, (685, 2008) 693.

uphold the legislative classification so long as it bears a rational relation to some legitimate end.”²³⁴

As stated above, equal protection analysis has three steps: 1.classification of people according to a particular trait, 2.determination of the appropriate level of scrutiny and 3.the application of appropriate level of scrutiny. According to the U.S. Supreme Court there are three levels of *scrutiny*: strict scrutiny, intermediate scrutiny and rational basis review.²³⁵

Under the strict scrutiny, the government has the burden of proving that the challenged law’s classifications represent narrowly tailored measures that foster compelling governmental interests.²³⁶ Under the intermediate scrutiny, the restrictions will survive equal protection scrutiny to the extent to which they are substantially related to a legitimate state interest.²³⁷ Ultimately, under the rational basis review, a statutory classification must be rationally related to a legitimate governmental purpose.²³⁸ Rational basis review is considered to be very deferential because the government does not have any obligation to produce evidence to sustain the rationality of a statutory classification.²³⁹

The level of scrutiny applied can be defined as “a function of the trait upon which the challenged law classifies people.”²⁴⁰ Legal classifications, identified as *suspect*, based on race or national origin and affecting fundamental rights, receive strict scrutiny.²⁴¹ *Quasi-suspect* legal classifications, based on gender and illegitimacy, are subject to intermediate scrutiny.²⁴² Both strict scrutiny and intermediate scrutiny are listed as forms of *heightened scrutiny*.²⁴³ Those classifications which are neither suspect nor quasi-suspect are subject to rational basis review.²⁴⁴ Discrimination based on sexual orientation however does not have a consistent level of

²³⁴ 304 U.S. 144, 152 n.4 (1938) (“Prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry.”).

²³⁵ Leslie (n 224) 1083.

²³⁶ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

²³⁷ Leslie (n 224) 1083.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*1084.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

scrutiny. Some courts have held sexual orientation to be a suspect classification entitled to heightened scrutiny,²⁴⁵ whereas most state and federal courts have applied rational basis review to laws that discriminate based on sexual orientation.²⁴⁶

As established above, in order to withstand the constitutional challenge, the government must show that these classifications serve important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.²⁴⁷ For these purposes, the Supreme Court has identified a number of factors having impact on the decision whether a particular group falls into a suspect or quasi-suspect class: (1) the history of discrimination against the group;²⁴⁸ (2) the political power of the affected group;²⁴⁹ (3) whether the trait is immutable;²⁵⁰ and (4) whether the “characteristic frequently bears no relation to ability to perform or contribute to society.”²⁵¹

Step three of equal protection analysis, as noted above, requires courts to apply the appropriate level of scrutiny to determine whether the challenged law survives under the applicable test. In intermediate scrutiny, for example, the gender classification fails unless it is substantially related to a sufficiently important governmental interest.²⁵² Specifically, if the challenged law fails to satisfy the demands of the applicable level of scrutiny, that law is declared unconstitutional.²⁵³ In evaluating equal protection claims based on analogous state constitutional protections, most

²⁴⁵ See, e.g., *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 989 (N.D. Cal. 2012); (“Here, having analyzed the factors, the Court holds that the appropriate level of scrutiny to use when reviewing statutory classifications based on sexual orientation is heightened scrutiny.”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 430–32 (Conn. 2008) (concluding that sexual orientation should be considered a quasi-suspect classification).

²⁴⁶ See, e.g., *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137 (9th Cir. 2003) (explaining in a parenthetical that *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573–74 (9th Cir. 1990), found that “homosexuals are not a suspect or quasi-suspect class, but are a definable group entitled to rational basis scrutiny for equal protection purposes”).

²⁴⁷ Randall P. Ewing, Jr. : *Same-sex Marriage : A Threat to Tiered Equal Protection Doctrine?*, St. John’s Law Review, vol. 82 (1409, 2008) 1413.

²⁴⁸ *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

²⁵² *Leslie* (n 224) 1085.

²⁵³ *Ibid.*

U.S. state courts employ a similar analytical framework however the level of scrutiny for the discrimination based on sexual orientation differs.²⁵⁴

6.3 Scrutiny and Sexual Orientation

The level of scrutiny applied in challenges to prohibitions against same-sex marriage is largely outcome determinative in U.S. because the courts do not have a consistent approach towards this issue. Some courts applied heightened scrutiny because gender-specific marriage laws classify based on sex, and thus they held that the marriage restriction violates Equal Protection.²⁵⁵ Other courts applied heightened scrutiny after concluding that sexual orientation is a suspect classification, consequently ruling that precluding same-sex couples from marrying or having access to the rights afforded to married couples is unconstitutional.²⁵⁶ However the vast majority of courts have declined to apply heightened scrutiny in challenges to gender-specific marriage laws and upheld these laws under rational basis review.²⁵⁷ Courts which rejected challenges to restrictive marriage laws have explicitly noted that the decisions were driven by the extreme deference that rational basis review requires.²⁵⁸ The fact that rational basis review is lax and the judiciary does not require a legislature to articulate its reasons for enacting the statute have been highly emphasized by these courts.²⁵⁹

Considering that under rational basis review, the state is not required to show that denying marriage to same-sex couples is necessary to promote the state's interest or that same-sex couples will suffer no harm by an opposite-sex definition of marriage, these decisions can be seen as erroneous (vague) given their failure to suggest how denying marriage licenses to same-sex couples in any way advances a legitimate state

²⁵⁴ Ibid.

²⁵⁵ Leslie (n 224) 1086.

²⁵⁶ Ibid.

²⁵⁷ Ibid. 1087.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

interest.²⁶⁰ Nevertheless, they serve as an exemplification of how courts have an easier time upholding prohibitions against same-sex marriage under rational basis review in comparison with heightened scrutiny.²⁶¹

Although, it should not be omitted, that some courts have used rational basis review to actually strike down anti-gay marriage restrictions.²⁶² But still, no court has applied heightened scrutiny and upheld the constitutionality of a gender specific marriage statute.²⁶³

The advocates of marriage equality have argued that gender-specific marriage laws should be evaluated under heightened scrutiny for two reasons. Firstly, they claimed that laws prohibiting same-sex couples from marrying should be subject to heightened scrutiny because these laws infringe the fundamental right to marry.²⁶⁴ Thought, most of the courts have rejected this argument by rationale that there is no fundamental right to same-sex marriage.²⁶⁵ Secondly, they argued that marriage bans should be subject to heightened scrutiny because they discriminate based on sexual orientation and based on sex.²⁶⁶ Why invoking discrimination based on sex? Because, gender-specific marriage laws, by definition, classify people based on their gender and then restrict the ability to marry based on their partners' respective genders, what epitomizes the essence of sex discrimination.²⁶⁷

Unfortunately, most of the courts considering the issue have rejected the argument that sexual orientation is a suspect or quasi-suspect classification entitled to heightened scrutiny. On the other hand, some of federal and state jurisdictions held that gender is a suspect classification what leads to a conclusion that gender-specific marriage laws are subject to

²⁶⁰ Ibid. 1088.

²⁶¹ Ibid.

²⁶² See for example Perry, 671 F.3d at 1094 (invoking the language of “rational basis” and holding of Romer to affirm district court’s invalidation of California’s Proposition 8); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014) (applying rational basis review to strike down Oklahoma’s prohibition on same-sex marriage).

²⁶³ Leslie (n 224) 1088.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Ibid. 1089.

²⁶⁷ Ibid. 1090.

heightened scrutiny if judges recognize that prohibitions against same-sex marriage do, in fact, discriminate on the basis of sex.²⁶⁸

Despite the inconsistency of the court's approaches, considerable achievements in fighting discrimination on the basis of sexual orientation have been already made by the U.S. Supreme Court.²⁶⁹

6.4 Romer vs. Evans

*Romer v. Evans*²⁷⁰ represents a landmark decision of U.S. Supreme Court regarding the issue of discrimination based on sexual orientation.

In this case Colorado enacted, by a state wide referendum, a constitutional amendment (Amendment 2) prohibiting local governments from enacting antidiscrimination measures protecting homosexual, lesbian or bisexual orientation, conduct, practices or relationships.²⁷¹ It provided, that no local governments or its branches should enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships should constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.²⁷²

The State's principal argument in the defence of Amendment 2 was that it put gays and lesbians in the same position as all other persons.²⁷³ So the state basically said, that this measure did not do anything more, than denying homosexuals special rights. Further the State claimed that this amendment served a state's interest to respect freedom of association, particularly the liberties of landlords or employers who have personal or

²⁶⁸ Ibid. 1089.

²⁶⁹ See e.g. *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996).

²⁷⁰ 517 U.S. 620 (1996) (Romer)

²⁷¹ Stone (n 215) 675.

²⁷² Romer 624.

²⁷³ Ibid. 626.

religious objections to homosexuality, and that it conserved resources to fight discrimination against other groups.²⁷⁴

When addressing this case, the U.S. Supreme court leaned upon the heightened rationality review, which is considered to be an exception rather than the rule in the courts practice.²⁷⁵ The “technique of heightened rationality” de facto means that the Court either looks for the evidence of actual purpose and, having identified that purpose, rules it out as impermissible; or that it examines whether the classification actually advances the law’s stated purpose.²⁷⁶

The Court held that Amendment 2 withdrew from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbid reinstatement of these laws and policies.²⁷⁷ It was also unwilling to accept the State’s assertions regarding the purposes of the amendment, calling them “implausible”²⁷⁸ and “impossible to credit.”²⁷⁹ Instead of trying to hypothesize a permissible purpose of this amendment, the Court focused on the “sheer breadth”²⁸⁰ of the amendment in terms of the substantial number of statutes, ordinances, and state regulations and practices it affected.²⁸¹ In conjunction with this approach, the focus was placed as well on the issue against who is this amendment and its adverse consequences directed.²⁸²

The finding determined that the amendment was inexplicable by anything but *animus* toward the class it affected.²⁸³ Moreover, the amendment was regarded as raising the inevitable inference, that the disadvantage imposed was born of animosity toward the class of persons affected²⁸⁴ and it classified gay persons not to further a proper legislative

²⁷⁴ Ibid. 635.

²⁷⁵ Farrell (n 217) 298.

²⁷⁶ Ibid.

²⁷⁷ Romer 627.

²⁷⁸ Ibid. 626.

²⁷⁹ Ibid. 635.

²⁸⁰ Ibid. 632.

²⁸¹ Farrell (n 217) 301.

²⁸² Ibid.

²⁸³ Romer 632.

²⁸⁴ Ibid. 634.

end but to make them unequal to everyone else²⁸⁵ and strangers to its laws.²⁸⁶ Equal protection's basic limit on governmental purpose was explained by the Court as not drawing classifications for the purpose of disadvantaging the group burdened by the law but instead, justifying laws by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons.²⁸⁷

Among other things, in this case the Court considered also a repeal of anti-discrimination laws through direct democracy (since Colorado enacted Amendment 2 through a state wide referendum). The Amendment 2 was, as mentioned previously, held unconstitutional because it was not rationally related to any legitimate state interest. In pursuing this line of reasoning, the Court pointed out that the right of the people of Colorado to pass a measure which has the effect of singling out a specific group of persons and denying them protection could not outweigh the right of those persons to participate in the political process.²⁸⁸ Because this group of people was denied their right to seek protections under the law, by this amendment, the right to vote in the exercise of direct democracy had to succumb to the rights of gays, lesbians, and bisexuals.²⁸⁹

The relevance of this case lies further in the fact, that the Court invoked the word "animus" to invalidate the law under equal protection. "Animus" means hostility or ill feeling.²⁹⁰

However, this fact alone did not mean that "animus" makes a law per se unconstitutional.²⁹¹ The Court received critique because it treated animus as if it were analytically just like prejudice towards hippies and persons with mental disabilities.²⁹² But animosity is different in quality from prejudice because, generally, people do not "hate" hippies or persons with mental

²⁸⁵ Ibid. 635.

²⁸⁶ Ibid.

²⁸⁷ Romer 633, 635.

²⁸⁸ Ibid. 1624.

²⁸⁹ John C. Brittain : *Direct Democracy By The Majority Can Jeopardize the Civil Rights of Minority or Other Powerless Groups*, Legislation and Public Policy, vol. 1 (77, 1997)74.

²⁹⁰ Rush (n 233) 718.

²⁹¹ Ibid.

²⁹² Ibid.

disabilities while, on the other hand, many people, including government officials, do express hateful sentiments towards gays.²⁹³

To conclude, Amendment 2 was struck down not because it was motivated by animus but because no other purpose could justify it, nonetheless the recognition of animus as a motive for discriminatory law by the Court should be considered as a valuable achievement. Imagine that the issue in question here would be the referendum described in the third chapter and that the referendum was actually valid. Your mission would be to decide upon the constitutionality of such a law. Let's say that, you would decide to use "just" rational basis review. The first thing you would probably do would be searching for the legitimate purpose of this law. As it was stated before, the whole referendum was called in order to strengthen the protection of "traditional family" by restricting (completely abolishing) gay rights because they want to shut the mouths of other people, they want to make decisions over other people's lives and careers, and this might result in gay dictatorship or even in mass murders.²⁹⁴ Presumably, you will not consider this as a legitimate purpose for such a law and you will find animosity behind the whole referendum. Naturally, you would consider such a law unconstitutional. Going back to the reality, you will realize that such a referendum actually happened in Europe, and the question which needs to be answered now is whether there is anything what can be done against such a referendum within the EU system.

²⁹³ Ibid. 719.

²⁹⁴ See (n 32).

7 Analysing the Available Protection under ECHR

This chapter will provide a short summarization of this thesis and give answers to research questions by analysis of available protection, discussed in the second chapter, under ECHR for victims of this referendum. In a case, that no provisions or case law will be found to stop, prevent or prohibit such a referendum, series of suggestions how to deal with this issue will be provided.

7.1 Analysis

A referendum on human rights already took place in four Member States, characterised by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men, of European Union which is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. The purpose of this thesis is to investigate this issue and provide answer for research questions: What is the role of European Court of Human Rights in the cases, when a discriminatory referendum is approved by one of the Member states, e.g. what should the Court, if anything, be able to do about it? Should the Court use proactive or reactive approach towards this issue?

The referendum, among other things, touched upon conflict into which direct democracy comes with human rights. It has been established long ago, that a genuine threat, that direct democracy may lend itself to tyranny of the majority exists. There have been numerous examples of referenda targeting minorities for differential treatment in history of referenda also. Number of studies have stressed out that minorities are harmed by direct democracy because it allows a majority of voters' fears and prejudices to be expressed in policies that target minorities and restrict minority rights. It has been also proven that as far as the rights of homosexuals are concerned, this particular minority is in fact more likely to lose in direct democratic contests. A number of initiatives which affected

minority interests have survived the court scrutiny, as well as the one described in the third chapter of this thesis. The animosity effect of referenda towards targeted group has likewise been observed. The importance of addressing this issue has been established and it is about the time to put a stop to such referenda.

Moreover, a real threat that such a referendum will be discriminatory is present. As in case of described referendum from the third chapter, on one side there is LGBTI community, about whose rights it was supposed to be decided, and on the other side there are heterosexuals, already having most of the rights. By comparison of these two groups one ends up at a plausible conclusion that this would never happen to heterosexuals, that there would never be a referendum regarding the right to marry and adopt children for heterosexuals since heterosexuality is perceived as normal, natural and automatic component of society, and on these grounds discrimination arose.

One may as well pose a question, why doing the referendum if there is a real danger of discrimination emerging? The answer is simple, it has been provided for in the model referendum, by statement that since the referendum went through in Croatia, the organizers of Slovak referendum felt encouraged to organize their own. In other words, because no intervention was made while the referendum went through in Croatia, it was taken as a signal “to go” by the organizers of Slovak referendum.

Respect and protection of human rights, as already stressed multiple times before, can only be guaranteed by the attainability of effective judicial remedies and in order to establish whether the victims of above mentioned referendum could achieve justice by means of stopping, prohibiting or preventing the referendum, it is important to explore the provisions of ECHR.

Regrettably, there is no autonomous provision within ECHR which would stop or prohibit referendum on human rights. The victims of this referendum can rely only on their right to access to justice (Articles 6 and 13 of ECHR) and provisions regarding the discrimination and violation of their right to private and family life (Article 14 in conjunction with Article 8 of ECHR). However it is very questionable, if not unlikely, that these

provisions would stop, prevent or prohibit such referendum. More importantly, not addressing this issue in ECHR creates a gap in the law and not having a functional system means that you give the perpetrators of such referendum a signal to go.

As far as the research of this thesis has been able to uncover, there has not been a case of referendum on human rights brought to ECtHR. Consequently, there is no special scrutiny developed for these cases as for example in United States of America. One could only guess why it is so. One of the possible reasons behind it might be (with the exception of Article 3 of ECHR) mostly the reactive approach of ECtHR.

It is more than clear that despite the role of ECtHR, as a protector of human rights, the Court would not be able to stop or prevent this referendum. The protection of victims seems very low if even any.

One may perhaps argue that the protection for which this thesis argues is more of a constitutional character, and European Court of Human Rights clearly does not have any constitutional function within EU. However, the Court should still step up, because the protection in question means simply asking for a protection of fundamental rights when your “whole existence” is put to a vote on referendum.

A referendum where citizens themselves decide to restrict human rights of other citizens through form of direct democracy whilst the state's support, should not be left without a proper response of ECtHR, an instrument which purpose is to ensure and observe the compliance of Member States of EU with human rights provisions. In a democratic society, which values EU promotes and respects, as have been established by historical precedence, a failure to protect human rights can lead to a gradual erosion of democracy and pluralism, followed by totalitarianism and dictatorship, and for sure, no one wants to follow the same path again.

7.2 Suggestions for the Court's Approach

As it has been demonstrated above, a very serious referendum on human rights took place in Europe. In order to enable the respect and protection of human rights it is necessary for such a referendum to be stopped, prevented or prohibited. ECHR does not contain any specific provisions which would be able to stop, prohibit or prevent such a referendum and correspondingly, since such a case has not been brought or dealt with at ECtHR, the Court did not develop any approach towards this issue. Whereas in the U.S., the Courts have already dealt with similar cases and also adopted a proactive approach towards the issue of discrimination by development of the system of protected classes. On these grounds, the suggestions for the appropriate approach of ECtHR will be drawn upon the U.S. approach towards this issue.

The first step which needs to be made towards the change, in order to prevent and stop such a referendum, is changing the ECtHR's reactive approach, in other words responding only to complaints that are made. If we want to prevent something and send a clear signal that people should not do it, a proactive approach, meaning looking for the problems before people complain about them, seems like a more appropriate way of tackling the problem.

It is not a new argument that despite the fact, that we are all equal human beings, in reality there are groups of people, possessing certain features (characteristics), which are still treated unequally and regarded as "2nd class people". In order for these people to become equal with everyone else it is necessary to provide them with additional protection. This argument does not amount to asking for more for these people, than everyone else has, even though it might seem like that at the first sight, but on the contrary, it means asking for the same because these people do not have the same rights as everyone else. Within the U.S., during the equal protection analyses, a comparison of one class of persons, those who have a specific trait, with second class of persons, those without the trait, is made. In order to establish who is a member of the "protected class" the Supreme

Court identified a number of factors, such as history of discrimination against the group, etc.²⁹⁵, deciding which people fall within the protected class. Consequently, particular “protected classes” have been connected with particular levels of scrutiny. Essentially, U.S. has recognized a problem, by adopting additional protection for certain groups of people, whose rights tend to be more endangered than the rights of others, and by tying the particular protected classes with a specific level of scrutiny for each class it developed a proactive approach. However, in Europe, we should not need such a classification because we have human rights which are encompassed within ECHR, a fundamental human rights instrument, and directly point out which groups should have additional protection.²⁹⁶

After examining whether the challenged law in U.S. classifies people based on a particular trait, the Court has to determine the level of scrutiny associated with that trait. Despite the Court’s disunited accession of the level of scrutiny for the category of sexual orientation and its success in battling discrimination based on sexual orientation with the rational basis review, it would be more fitting for ECtHR to adopt the strict scrutiny for these cases. In other words, the government would have the burden of proving that the challenged law’s classifications represent narrowly tailored measures that foster compelling governmental interests. Only by taking into account this approach, it would be clear that Slovak government would not be able to defend the referendum, because the protection of family against homosexual couples is not a sufficient governmental interest, since LGBTI community does not pose any threat to heterosexual couples. The referendum was organized and based purely on animosity towards this community.

At the same time as the discussion about the scrutiny starts, it is reasonable to pose a question, whether it should be possible to argue before the referendum or after. With the view of complying with above suggested proactive approach of ECtHR, it should be possible to argue before the referendum starts.

²⁹⁵ the political power of the affected group; whether the trait is immutable; and whether the “characteristic frequently bears no relation to ability to perform or contribute to society.

²⁹⁶ for example ECHR (n 147) Art.14 enumerating the grounds for discrimination.

It can be accomplished for example by adopting a provision, within ECHR, which would establish that human rights cannot be subject to referenda. It could be also amended for provision stating that the government must prove that the law, which should be adopted and occurs as limiting rights of a certain group of people, serves important governmental objectives. Another way can also be including pronouncedly “animus” as a forbidden or not sufficient ground to have a referendum on the rights of minority.

In a case, that proactive approach described above would be considered as impossible or unrealistic, the active role of the Court, when addressing this issue, should be preserved at least in a form of Court’s indispensable advisory opinion on referendum, possibly conflicting with human rights. Upon receipt of Court’s advisory opinion, the State will decide whether to go through with such a referendum or not but most importantly, it would be aware of consequences of its decision.

To conclude, in spite of the absence of special provisions preventing or prohibiting referenda on human rights in ECHR and the absence of ECtHR’s practice in this area, there is plenty of possibilities how to address this issue, nevertheless it is crucial, for the future of human rights, to finally start addressing it.

8 Concluding Remarks

The general purpose of this thesis is to investigate into the issue of referenda on human rights, which took place in few European countries. The thesis aims at providing an answer for research questions: 1. “What is the role of European Court of Human Rights in the cases, when a discriminatory referendum is approved by one of the Member states, e.g. what should the Court, if anything, be able to do about it?” and 2. “Should the Court use proactive or reactive approach towards this issue?”

The importance of addressing such a referendum has been established firstly by the identification of available protection for the victims of such referendum under ECHR. Secondly by demonstrating that the threat of democracy becoming a tyranny of the majority is more than real when it comes to the rights of minorities, and moreover is intertwined with animosity. Thirdly, by exposure of discriminative nature which this referendum has. In a democratic society, where we are all equal because we are all humans, we should not allow the majority to limit the rights of minority, we should not allow people who fear anyone different from themselves to limit others rights and deny others human dignity.

In order to provide an answer for the research questions, and in order to examine whether the victims of such a referenda can achieve justice, the provisions of ECHR with the ECtHR’s case law have been scrutinized. Regrettably, no autonomous provisions which would stop, prohibit or prevent referendum on human rights were found within ECHR. The victims of this referendum are left only with the protection under Articles 6, 13 and 14 in conjunction with Article 8 of ECHR, whereas it is very questionable, if not unlikely, that these provisions would stop, prevent or prohibit such a referendum. Not addressing this issue in ECHR creates a gap in the law and not having a functional system means that you give the perpetrators of such referendum a signal to go.

The answer for the research questions has been provided during the analysis of available protection under the ECHR and ECtHR’s case law. ECtHR is an instrument which purpose is to ensure and observe the

compliance of Member States of EU with human rights provisions, and thus in this situation it should be able to deal with the referendum situation and help the victims achieve justice by means of stopping or preventing this referendum. However, in reality it would not be able to do any of this. There are no cases of referendum on human rights brought to ECtHR; there is no special scrutiny developed for these cases and no autonomous provisions related to the protection of victims. One of the possible reasons, why there are no cases of this character brought to ECtHR, might be the Court's reactive approach.

For these reasons, this thesis has proposed several suggestions, while stressing out the proactive approach of ECtHR, as to what should the Court be able to do about the referendum, based on the example of U.S. judicial system, which already has plenty of experience in this area. The suggestions included the more active role of ECtHR (proactive approach instead of its reactive approach); the use of U.S. strict scrutiny in these cases; the possibility to argue before the referendum starts by adopting a provision within ECHR which would establish that human rights cannot be subject to referenda and several amendments of this provision; and in a case that proactive approach would be considered as impossible or unrealistic, this thesis suggests to at least preserve the active role of ECtHR by Court's indispensable advisory opinion on referendum possibly conflicting with human rights.

Nevertheless, the fact that these referenda happened and touched upon human rights of certain minorities cannot be changed. However, what can and should be changed is the response of ECtHR. It should not stay quiet at times like these, within a democratic society, where a failure to protect human rights can lead to a gradual erosion of democracy and pluralism, followed by totalitarianism and dictatorship.

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