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Constitutional democracy in action:
Recognition of same-sex marriage in the
Slovenian Constitutional system

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Abstract

This article presents and discusses three recent decisions by the Slovenian Constitutional Court on the right of same-sex couples to marry and their right to adopt children. The first two decisions relate respectively to the decision of the Slovenian Constitutional Court on the right to marriage of same-sex couples and their right to adopt children. The third decision includes the prohibition of the Constitution Court to hold a referendum on the issue of the right of same-sex couples to marry and their right to adoption, thereby upholding the principle of constitutional democracy. The decisions granted same-sex couples the right to marry and adopt for the first time in any post-communist country of Central and Eastern Europe. However, they have yet to be universally internalized and welcomed in Slovenian Society. They stirred and deepened ideological rupture between different sides of Slovenian society. Nonetheless, they reaffirmed the principle of constitutional democracy, which the Slovenian Constitutional Court should uphold in similar future decisions.

Questo articolo analizza tre recenti decisioni della Corte costituzionale slovena sul diritto delle coppie dello stesso sesso a sposarsi e sul loro diritto ad adottare bambini. Le prime due decisioni si riferiscono rispettivamente alla decisione della Corte costituzionale slovena sul diritto al matrimonio delle coppie dello stesso sesso e sul loro diritto ad adottare bambini. La terza decisione include il divieto della Corte costituzionale a indire un referendum sulla questione del diritto delle coppie dello stesso sesso a sposarsi e sul loro diritto all'adozione, sostenendo così il principio della democrazia costituzionale. Le decisioni hanno concesso alle coppie dello stesso sesso il diritto di sposarsi e adottare per la prima volta in un paese post-comunista dell'Europa centrale e orientale. Tuttavia, le

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stesse devono ancora essere universalmente interiorizzate nella società slovena, avendo suscitato una rottura ideologica tra le diverse componenti della società slovena. Merita tuttavia soffermarsi sul principio della democrazia costituzionale, che costituisce un importante precedente in simili decisioni future.

1. Introduction

The concept of marriage and family life has been contested concept in almost every society. Culture, traditions, and customs have conditioned its definition. Central and Eastern European countries have been traditionally more reluctant to recognize the rights of same-sex persons due to their historical and societal contexts.¹ In the last decade, circumstances have also changed in some Central and Eastern European countries.² As such, this article explores three pivotal decisions in 2022 and 2023 by the Slovenian Constitutional Court regarding same-sex couples' rights to marry and adopt children. The first two decisions focus on the rights of same-sex couples to marry and adopt children, as determined by the Slovenian Constitutional Court. The third decision addresses the Constitutional Court's decision to ban a referendum on same-sex marriage and adoption rights, reinforcing the tenet of constitutional democracy. These landmark decisions mark the first time a Central and Eastern European country has permitted same-sex marriages, although they have not been universally accepted within Slovenian society. These rulings have intensified ideological divisions within the community. Nevertheless, they underscore the commitment to a functioning constitutional democracy, a principle the Slovenian Constitutional Court is expected to continue supporting in future rulings.

This article is divided into five parts. Section 2 discusses the concept of family life in regional human rights law case law. The following three sections (3-5) discuss and analyze three recent decisions by the Slovenian Constitutional Court concerning rights to family life, Decision U-I-486/20-14, Up-572/18-36 of the Slovenian Constitutional Court, U-I-91/21-19, Up-675/19-32 of the Slovenian Constitutional Court and the U-I-398/22. Section 6 analyses the decisions from the perspective of the primacy of the principle of constitutional democracy. It argues that the Constitutional Court reaffirmed the principles of constitutional democracy of popular will. Section 7 summarises the previous sections and provides some concluding thoughts on the ground-breaking decisions.

2. Right to family life and marriage of same-sex couples

The notion of family life has always been a contested concept. It represents the core of human

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- 1 L. Křičková, *Same-sex families' rights and the European Union: incompatible or promising relationship?*, *International Journal of Law, Policy and the Family*, 2023, Vol. 37 (1); F. Hamilton, *The Differing Treatment of Same Sex Couples by European Union Law and the European Convention on Human Rights: The European Union Concept of Citizenship* (2015) in 2 *Journal of International and Comparative Law* 87; D. Kochenov, U. Belavusau, *Same-Sex Spouses: More Free Movement, but What About Marriage? Coman: Case C-673/16, Coman et al. v. Inspectoratul General Pentru Imigrări*, *Judgement of the Court of Justice (Grand Chamber) of 5 June 2018*, EU:C:2018:385, in *Common Market Law Review* 57(1), pp. 227–242, 2020.
 - 2 Council on Foreign Relations, *Marriage Equality: Global Comparisons*, 2022, <https://www.cfr.org/backgrounder/marriage-equality-global-comparisons>. N. Koffeman, *Morally Sensitive Issues and Cross-Border Movement in the EU: The Cases of Reproductive Matters and Legal Recognition of Same-Sex Relationships*, Cambridge, Intersentia, 2015.

existence as an individual and part of society. Its content hinges on a given society's culture, customs, and traditions. The right to family life includes many aspects, from family creation and surrogacy to marriage.³ The European Convention for the Protection of Human Rights (ECHR) and Fundamental Freedoms protects individuals against arbitrary decisions by state authorities.⁴ States carry negative and positive obligations under the right to private and family life. Negative obligations mean that the state shall not interfere with the right to family life, whereas positive obligations require them to adopt positive measures to protect family life and marriage. The European Court of Human Rights (the ECtHR or the European Court) has traditionally interpreted family life as a close emotional bond between individuals. Suppose there is no emotional connection between otherwise biologically related family members. In that case, there will be no family life between them.⁵ State obligations to respect family life »... implies an obligation for the State to act in a manner calculated to allow these ties to develop normally.«⁶ Marriage has been the backbone of family life and a contested concept in any constitutional democracy. Most European countries have recognized same-sex couples' right to civil partnership in recent decades. A minority has also introduced the right of same-sex couples to marry in their constitutional legal framework. However, recognition of same-sex couples right to marry has not been without controversies.

The right to family life is one of the essential human rights and fundamental freedoms. It creates the state's negative and positive obligation to protect family rights. Family life can be exercised in many different forms. As such, the notion of family life has always been a contested concept. It represents the core of human existence as an individual and part of society. Its content hinges on a given society's culture, customs, and traditions. The right to family life includes many aspects, from family creation and surrogacy to marriage. Marriage has been the backbone of family life and a contested concept in any constitutional democracy. Most European countries have recognized same-sex couples' right to civil partnership in recent decades. A minority has also introduced the right of same-sex couples to marry in their constitutional legal framework. However, recognition of same-sex couple's right to marry has not been without controversies.

The right to marry has been universally recognized between persons of the opposite sex. On the contrary, the right to marry off same-sex-oriented persons has yet to be equally protected across Europe.⁷ Domestic practices differ from country to country. There is a vast discrepancy and coherence gap between countries in northern Europe, Western Europe on one side, and Central and Eastern European countries on the other.⁸ States usually have an obligation not to interfere with enjoying the

3 U. Kilkelly, *The right to respect for private and family life : a guide to the implementation of Article 8 of the European Convention on Human Rights*, Strasbourg : Directorate General of Human Rights, Council of Europe, 2001; S. Sanz Caballero, *Unmarried cohabiting before the European Court of human rights: parity with marriage?*, in *Columbia Journal of European Law*. 2004, vol. 11, no. 1, pp. 151 - 166.

4 European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 4 November 1950.

5 The European Court of Human Rights, *Marckx v. Belgium*, no. 6833/74, 16 June 1979, para. 45.

6 *Ibid.*

7 C. Draghici, *The Legitimacy of Family Rights in Strasbourg Case-Law: 'Living Instrument' or Extinguished Sovereignty?*, Oxford: Hart, 2017; K. Dzehtsiarou, C. O'Mahony, *Evolutionary interpretation of rights provisions: A comparison of the European Court of Human Rights and the US Supreme Court*, in *Columbia Human Rights Law Review*, 2013, 44, 309; D. H. Schraub, *The Siren Song of Strict Scrutiny Symposium: After Obergefell*, in *University of Missouri-Kansas City Law Review*, 2015, 84(3), 859–870; M. Shahid, *The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments concerning Equal Marriage Rights*, in *Erasmus Law Review* [online], 2017, 10(3), 184–198.

8 E. Abrusci, *A Tale of Convergence? Discrimination based on Sexual Orientation in Regional Human Rights Bodies and the Human*

right to family life and the right to marry. They shall undoubtedly create conditions for exercising those rights. However, those conditions cannot be discriminatory and arbitrary. States define family life according to their customs, traditions, and culture. In many countries, family life and marriage are connected to religious freedom and society's religious traditions and customs. The European Court has recognized that the right to family life is mainly based on the emotional connection between individuals. Nonetheless, the biological connection between individuals reinforces family life. European Court of Human Rights grants states a wide margin of appreciation to define family life, what it includes, and who has the right to exercise it.

On the other hand, the concept of a European consensus limits such discretion. This concept is not, in fact, a consensus but rather a majority view. The European Court of Human Rights considers whether a particular aspect of family life is recognized based on its acceptance by most member states of the Council of Europe—that is, if more than 23 member states recognize it. In this context, the right of same-sex couples to marry has not been defended and is not currently regarded as part of the European consensus concerning human rights. Only a minority of the Council of Europe member states have recognized the right of couples and individuals in same-sex relationships to marry. As a result, the European Court of Human Rights is reluctant to extend the protection of the right to marry under Article 12 of the European Convention to same-sex individuals.⁹ Regarding the legalization of same-sex marriages and the adoption rights of same-sex couples, Europe is divided between the Northern and Western European countries on one hand and the Central and Eastern European countries on the other. Most Western countries permit same-sex marriages and adoptions. For instance, the Constitution of Croatia defines how the concept of family should be interpreted—limiting it to a father, mother, and child relationship.¹⁰ Moving further into Eastern Europe, the former Soviet Union countries are even more reluctant. There is a notable difference in cultural values between Northern and Eastern Europe and Central Europe. Yet, on the other side of the former Iron Curtain, Slovenia has become one of the first countries to permit marriages and adoptions for same-sex couples, as explained in this article.

On the other hand, the European Court has recognized that the right to family life also extends to same-sex persons.¹¹ In *Schalk and Kopf v. Austria*, the ECtHR observed that »Yet sexual orientation is a concept covered by Article 14. The relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of 'family life,' just as the relationship of a different-sex couple in the same situation would...«. ¹² It noted in *Vallianatos and Others v. Greece* ... »... that not allowing a same-sex couple to enjoy the same status and benefits as a different-sex couple, in legal provisions related to family life, constitutes discrimination on the ground of sexual

Rights Committee, in *Nordic Journal of Human Rights*, 2017, 35:3, 240-257; A. Czarnota, M. Krygier, W. Sadurski, *Introduction*. In: A. Czarnota, M. Krygier, Wojciech Sadurski, (eds.) *Rethinking the rule of law after communism*, Budapest: Central European University Press, 2005.

⁹ L. Hodson, *A marriage by any other name? Schalk and Kopf v Austria*, in *Human Rights Law Review*, 2011, 11(1), 170–179; P. Johnson, S. Falchetta, *Same sex marriage and Article 12 of the European Convention on Human Rights*. In: C. Ashford, A. Maine (eds), *Research Handbook on Gender, Sexuality and the Law*, Cheltenham: Edward Elgar, 2020, 91–103.

¹⁰ The Constitution of the Republic of Croatia, Consolidated text, Official Gazette Nos 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14, 15 January 2014.

¹¹ See, for instance, European Court of Human Rights, *Vallianatos and others v Greece*, no. 29381/09 and no. 32684/09, 7. 11. 2013; European Court of Human Rights, *X and others v Austria*, no. 19010/07, 19. 2. 2013; European Court of Human Rights, *Schalk and Kopf v Austria*, no. 30141/04, 24. 6. 2010. See also *Francesca Romana Ammaturo, The Right to a Privilege? Homonormativity and the Recognition of Same-Sex Couples in Europe*, in *Social & Legal Studies*. 2014, vol. 23, no. 2, pp. 175 - 194.

¹² European Court of Human Rights, *Schalk and Kopf v. Austria*, no. 30141/04, 24. 6. 2010.

orientation... Moreover, the Court considers that Greece introduced a registered partnership scheme differentiating between same-sex and different-sex couples, which has not been convincingly explained by the Government and therefore lacks justification under the Court's case-law on discrimination...«.¹³

The European Court first found a European consensus on same-sex persons' right to family life in the case of *Oliari and others against Italy* in 2015, where it held that European consensus existed.¹⁴ The Court noted in *Oliari and Others v Italy* that "... same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and that they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship ... It follows that the Court has already acknowledged that same-sex couples are in need of legal recognition and protection of their relationship.«¹⁵ It also noted that »...repetitive failure of legislators to take account of Constitutional Court pronouncements or the recommendations therein relating to consistency with the Constitution over a significant period of time, potentially undermines the responsibilities of the judiciary and in the present case left the concerned individuals in a situation of legal uncertainty which has to be taken into account.«¹⁶ It added » ... that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.«¹⁷ Since then, it has adopted the same approach in cases stemming from all member states of the Council of Europe, including Eastern European states, where perhaps attitudes toward the right to family life for same-sex couples have not been as in the northern part of Europe.¹⁸ As such, the European Court adopted the European consensus approach, identifying whether the majority of member states of the Council of Europe now recognize same-sex couples' right to family life, meaning whether states recognize the right of same-sex couples to register their partnerships.¹⁹ Therefore, the European Court noted that this stage recognizes the violations of the right to family life in the cases against Russia, Poland, Romania, Armenia, Bulgaria, and others, all

13 European Court of Human Rights, *Vallianatos and Others v. Greece*, no. 29381/09 and no. 32684/09, 7. November 2013.

14 G. L. Neuman, *Import, export, and regional consent in the Inter-American Court of Human Rights*, *European journal of international law*, 2008, 19(1), 101–123; D. Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, in *University of Pittsburgh Law Review*, 2018 79, 412; K. Partin, *The Legal Theory Behind Kim Davis and Same Sex Marriage*, in *University of Miami Law Review*, 2015; D. Popovic, *Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights*, in *Creighton Law Review* [online], 2008, 42(3), 361–39.

15 European Court of Human Rights, *Oliari and Others v. Italy*, Application nos. 18766/11 and 36030/11, Judgment of 21 July 2015 Para. 165.

16 *Ibid.*, para. 184.

17 *Ibid.*, para. 185.

18 European Court of Human Rights, *Chapin and Charpentier v. France*, No. 40183/07; 9 June 2016. See Ignacio Saiz, *Bracketing Sexuality: Human Rights and Sexual Orientation: A Decade of Development and Denial at the UN* (2004) in 7 *Health and Human Rights* 48; Masuma Shahid, *Equal marriage rights and the European Courts*. ERA Forum 23, 397–411 (2023); H. Lau, *Sexual Orientation : Testing the Universality of International Human Rights Law*, in *The University of Chicago Law Review* 2004, 71, 1689.

19 K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge, Cambridge University Press, 2015; G. Willems, *Same-sex marriage as a human right: How the Strasbourg Court could draw inspiration from the US Supreme Court and the Inter-American Court of Human Rights to affirm marriage equality*, in *Oñati Socio-Legal Series*, (2024), 14(1), pp. 176–212; H. Fenwick, A. Hayward, *Rejecting asymmetry of access to formal relationship statuses for same and different-sex couples at Strasbourg and domestically*, *European Human Rights Law Review*, 2017, 6, 544–563.

those countries where same-sex persons do not have the right to register their partnerships.²⁰

As a result, dilemmas exist. Should the European Court award those countries a principal appreciation to respect their culture, traditions, and customs concerning family life? Should it impose top-down this necessity, the necessity that those countries adopt laws on registering same-sex partnerships before state authorities? Indeed, civil society groups would advocate for the first, whereas there is a question: What would such an imposition cause or impose such imposition of registration of same-sex partnerships? What such scope of the right to family life means the credibility and legitimacy of the court politics in Central and Eastern European states. Those states could argue that such an interpretation by the European Court contradicts their traditions, customs, and values contrary to margin operations, which goes against their society and societal values.

Moreover, that could, in turn, also jeopardize and danger the legitimacy and credibility of the Court's decisions in other matters concerning other articles of the ECtHR; the governments could easily argue that the European Court tries to impose their worldview on the concept of family, on the concept of marriage. Moreover, some governments have argued for local-based approaches concerning the rule of law and the right to a fair trial. They could also use the European consensus concerning the right to family life to avoid implementing judgments in other areas. Nonetheless, the European Court has, in the recent case law, insisted that the European consensus nowadays includes the right to family life of same-sex couples, that those persons can register there and can and should register their civil partnerships before the state institutions and public administrations and that all states have, negative and positive obligations to ensure that, that they change their laws, legislation and the judiciary takes a more reformist and more progressive approach.

The European Court has been confident in arguments of legitimacy and credibility and has placed much attention on protecting family life across Europe. Nonetheless, the European Court needs to prepare to take a similar step concerning the right to marry same-sex persons, at least not yet, until the majority of the European majority of member states. Undoubtedly, Europe will change its constitutional and normative platforms, bases for same-sex couples to have a right to marry. The future will tell if the European Court will insist on a top-down approach or whether it will give more importance to a bottom-up approach concerning the deportation of the right to marry same-sex persons.

3. Decision U-I-486/20-14, Up-572/18-36 of the Slovenian Constitutional Court

In contrast to most European states, the Slovenian legal order has recognized the right of same-sex couples to register partnerships for over twenty-five years and a half.²¹ Same-sex couples have enjoyed the same rights as opposite-sex couples in registering their partnerships, including their rights and obligations. Nonetheless, Slovenia has faced challenges regarding whether to extend the rights of same-sex persons to marriage and adoption. Slovenian society has been divided on this

²⁰ See, for example, European Court of Human Rights, *Fedetova and Others v. Russia*, nos. 40792/10, 30538/14, and 43439/14, 17 January 2023; European Court of Human Rights, *Koilova and Babulkova v. Bulgaria*, no. 40209/20, 5 September 2023; European Court of Human Rights, *Przybyszewska and Others v. Poland*, nos. 11454/17 et al., 12 December 2023; European Court of Human Rights, *Minasyan and others v Armenia*, no. 59180/15, 20 July 2018.

²¹ Family Code (Uradni list RS, št. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – odl. US, 94/22 – odl. US in 5/23).

question, with the majority of the population rejecting in 2015 the Act on Amendments and Supplements to the Marriage and Family Relations Act that would already have allowed same-sex persons the right to marry and adopt.²² Changes were engineered in 2022 when a change in the Constitutional Court's judicial ideology allowed for the three groundbreaking decisions.

In the first of three relevant decisions, the Slovenian Constitutional Court assessed whether the current normative framework is compatible with the Slovenian Constitution.²³ The Constitutional Court, in this decision, noted that »...the Constitution must not be interpreted merely in a static manner proceeding exclusively from the context of its enactment. The development and significance of a legal institution that is a subject of constitutional interpretation (in the present case, the institution of marriage) must be taken into account. The strength that can be attributed to the intention of the constitution-framers weakens with the passage of time and with changes in social conditions« (footnotes omitted).²⁴ It added that »different-sex and same-sex partners are thus in essentially the same legally relevant actual positions, and the different treatment concerning the right to marry in the statutory regulation under review is based solely on the ground of sexual orientation. It follows from settled constitutional case law that sexual orientation (although not explicitly listed in the first paragraph of Article 14 of the Constitution) is one of the personal circumstances referred to in this constitutional provision« (footnotes omitted).²⁵ The Court, therefore, concluded that that the existing normative framework »... constitutes direct discrimination, since the condition that marriage may only be entered into by persons of different sexes is inextricably linked to the personal circumstance of sexual orientation« (footnotes omitted).²⁶ The Court, therefore, linked discrimination based on sexual orientation to the prohibition of marriage between same-sex persons. It then considered whether such discrimination was justified and pursued a justified aim.

The Court noted that »Respecting the traditional and majority view of marriage as a union of a woman and a man can, in principle, be an admissible aim of the statutory regulation of this institution. However, the legislature cannot justify the denial of the constitutional right of same-sex partners to non-discriminatory treatment (the first paragraph of Article 14 in conjunction with Article 53 of the Constitution) by reference to the traditional conception of marriage. The argument of tradition cannot justify discrimination. Moreover, the exercise of a human right or fundamental freedom of same-sex-oriented persons may not be dependent on the support of the majority of the population...« (footnotes omitted).²⁷ It also added, »Protection of the family can constitute a constitutionally admissible aim. However, denying same-sex-oriented persons the possibility of entering into marriage is not an appropriate means of achieving that aim. The challenged measure cannot contribute anything to the protection of the traditional family. Firstly, because the founding of a family is not a condition for marriage ..., and, secondly, because denying same-sex-oriented persons the possibility of entering into marriage as such does not have any effect on the life of traditional families that different-sex oriented persons can found« (footnotes omitted).«²⁸ The Court here convincingly explained that the same-sex-oriented person's right to marry would not intervene and impact the family and marriage lives of traditional families. The extension of the right to marriage to same-sex persons is merely an extension and not a denial of the right to marry. The Court thereafter

22 Constitutional Court of the Republic of Slovenia, U-II-1/15, 28.09.2015.

23 Constitutional Court of the Republic of Slovenia, U-I-486/20-14, Up-572/18-36, 16 June 2022.

24 Constitutional Court of the Republic of Slovenia, U-I-486/20-14, Up-572/18-36, 16 June 2022, para. 30.

25 *Ibid.*, para. 39.

26 *Ibid.*, para. 40.

27 *Ibid.*, para. 40.

28 *Ibid.*, para. 45.

held that »The first paragraph of Article 3, insofar as it provided that marriage is a union of husband and wife, and Article 16 of the Marriage and Family Relations Act... , insofar as it determined that persons entering into marriage must be of different sexes as a condition for entering into marriage, were inconsistent with the Constitution« and that »The first paragraph of Article 3 of the Family Code ... is inconsistent with the Constitution, insofar as it provides that marriage is a union of husband and wife.«²⁹ It asked the National Assembly to reform the laws accordingly within six months.³⁰

As such, the Constitutional Court established the right of same-sex couples to marry on the basis of principles of non-discrimination. The Court emphasized that it does not annul the existing right to marry between members of different sex, but it extends the right to marry to same-sex couples. The Court thereby implemented the principle of constitutional democracy by which the Constitution curtails the popular will of the population. As a result, the Court was heavily criticized by large parts of civil society for omitting to pay attention to the expressed will of voters from several years ago. Nonetheless, it seems that the decision was made months and years after its adoption and slowly internalized in Slovenian society, which has gradually changed, as in many other European countries, its attitudes towards same-sex persons' right to marry and adopt children.

4. Decisions no. U-I-91/21-19, Up-675/19-32 of the Slovenian Constitutional Court

On the same day, the Constitutional Court also delivered another decision concerning the right of same-sex persons, namely their right to adopt children under the equal conditions of any other persons. The constitutional decision is mainly based on the principle of equal treatment of same-sex persons concerning the adoption of children. The Constitutional noted that »...the Government, by relying on the alleged findings of the scientific community, failed to demonstrate that growing up with same-sex partners living in a stable civil union has a negative impact on a child's development and thus on the child's best interests, as compared to children from traditional families«. ³¹ It dismissed such claims as »...have largely remained at the level of blanket references to the importance of the traditional family and to certain general assumptions which cannot justify the absolute exclusion of same-sex partners from joint adoption«. ³² The Constitutional Court added that: »the fact that parenthood by a same-sex-oriented person is already recognized by the Slovene legal...«. ³³ It continued that »...such a statutory regulation is inconsistent as it may lead to a situation where a single (same-sex-oriented) person may already have been identified as a suitable individual adoptive parent, but the eventual conclusion of a civil union subsequently deprives that same person of the possibility of becoming an adoptive parent together with his or her partner« (footnotes omitted). ³⁴ The Court observed that the executive and legislative branches failed to provide evidence again against the joint adoption of same-sex partners living in civil partnerships. ³⁵ It held that ».. the measure of the

29 *Ibid.*, paras. 1-2 of the recital

30 *Ibid.*, para. 3. of the recital.

31 *Ibid.*, para. 65.

32 *Ibid.*

33 *Ibid.*, para. 65.

34 *Ibid.*, para. 68.

35 *Ibid.*, para. 70.

a priori exclusion of partners living in a civil union from the possibility of being included in the list of candidates for adoption is not appropriate for achieving the aim of protecting the best interests of an adopted child ...» (footnotes omitted).³⁶

The Constitutional Court, therefore, held that the existing normative framework placed same-sex persons in unjustifiably discriminatory positions and asked the legislative branch to remedy the found constitutional inconsistencies.³⁷ This decision also sparked criticisms in parts of civil society, which accused the Court of acting against the child's best interest. Nonetheless, following both decisions, the National Assembly adopted the amendments to the Family Code.³⁸ Article 3 (1) now provides that »a marriage is a life union of two persons, the conclusion, legal consequences and termination of which are governed by this Code.«³⁹ Its Article 213 (1) provides that »spouses or common-law partners can only adopt a child together unless one of them adopts the child of their spouse or common-law partner.«⁴⁰ After the amendments were adopted, a part of civil society started to collect signatures for holding referenda against the application of the novel Family Code.

5. Decision no. U-I-398/22, 14.12.2022 of the Slovenian Constitutional Court

The Slovenian constitutional system is based on the principle of constitutional democracy. Constitutional democracy guarantees and protects constitutional values, principles, and rules against the democratic will of the people. It is embedded in Article 90 of the Slovenian Constitution, which states: »The National Assembly shall call a referendum on the entry into force of a law that it has adopted if so required by at least forty thousand voters. A referendum may not be called: on laws on urgent measures to ensure the defence of the state, security, or the elimination of the consequences of natural disasters; on laws on taxes, customs duties, and other compulsory charges, and on the law adopted for the implementation of the state budget; on laws on the ratification of treaties; on laws eliminating an unconstitutionality in the field of human rights and fundamental freedoms of any other unconstitutionality.«⁴¹ Therefore, the fundamental constitutional values, principles, and rules limit the convocation of a referendum. Article 90 (2) of the Constitution embodies the concept of constitutional democracy. In any constitutional democracy, popular will provides the basis for its functioning. However, it does not enjoy primacy over the constitutional values of human dignity, equality, freedom, and solidarity.⁴² The precedence of constitutional values over popular will is

³⁶ *Ibid.*

³⁷ *Ibid.*, para. 74-75.

³⁸ Family Code, Official Gazette of the Republic of Slovenia, no. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – odl. US, 94/22 – odl. US and 5/23).

³⁹ *Ibid.*, Article 3 (1).

⁴⁰ *Ibid.*, Article 213 (1).

⁴¹ Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, št. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a in 92/21 – UZ62a), Article 90.

⁴² See, for example, M. Avbelj, *The Sociology of (Slovenian) Constitutional Democracy*, *Hague Journal of Rule of Law* 10, 35–57 (2018); J. Zobec, *Referendum ni pravno sredstvo zoper odločbe ustavnega sodišča*, *Revus* [Spletna izdaja], 14, 10. 12. 2012, <http://journals.openedition.org/revus/1300->; G. Palombella, *Illiberal, Democratic and Non-Arbitrary?*, in *Hague Journal of the*

necessary to protect minority rights against those of the majority.

As noted above, the Constitutional Court protected this principle in both decisions on the right of same-sex persons to marry and adopt children. The Constitutional Court further realized the principle of constitutional democracy in the decision no. U-I-398/22⁴³, as already previously, the Court found the constitutionality of the above decisions of the Constitutional Court. As a result, the fourth mandate of the Constitutional Court moved away from the decision of the third mandate at the Constitutional Court that allowed a referendum on a similar issue.⁴⁴ The Constitutional Court found that the National Assembly correctly implemented the decisions of the Constitutional Court. It observed that »... even if the definition of marriage in Article 1 of the DZ-B actually causes legal consequences (effects) in other legal areas, this does not mean that the DZ-B is not a law in the sense of the fourth indent of the second paragraph of Article 90 of the Constitution.«⁴⁵ As such, it found the proposal to referendum to fall within Article 90 (2), which prohibits the exercise of referendum in certain areas. The Constitutional Court explained that »by adopting Article 1 of the DZ-B, the National Assembly regulated precisely what was dictated by this decision of the Constitutional Court. Even if certain laws attach individual legal consequences to the institution of marriage, these are only indirect effects of the DZ-B on these laws....«⁴⁶ It added that »If such indirect effects of the elimination of unconstitutionality were relevant for the conclusion that the decision of the National Assembly on the inadmissibility of the referendum is unconstitutional and that the referendum should be allowed in this case, this would mean bypassing the will of the founder that referendums on laws that eliminate unconstitutionality are not admissible...«⁴⁷

The Court, therefore, decided that »the decision on the inadmissibility of the call for a legislative referendum on the Act on Amendments to the Family Code (DZ-B, EPA 190-IX) (Official Gazette of the Republic of Slovenia, No. 138/22) is not inconsistent with the Constitution.«⁴⁸ The reasoning of the Constitutional Court is convincing because it follows the principle of constitutional democracy and the rule of law. It is based on the majority views of constitutional democracy as a fundamental pillar of modern European legal states and constitutional democracy. The Constitutional Court, as the guardian of constitutionality in the Slovenian constitutional democracy, cannot remain indifferent to systemic and general discrimination in Slovenian society, especially regarding such core notions as the concept of family and marriage. Societies in Europe and beyond have been chaining over the past decades. They have become increasingly sensitive to historical marginalization and discrimination of vulnerable groups. The majority of the Constitutional Court attempted by prohibiting the conviction of the referendum, at least to some respect, to protect the notion of equal treatment concerning the marriage of same-sex couples and the right to adopt.

Moreover, constitutional theory often emphasizes that the position of the highest courts in a constitutional democracy is as strong as the persuasive power of its decisions. Once the decisions of the highest courts are convincing, the constitutional democracy has to do everything in its power to protect, even at the expense of the majority of popular will. If the Constitutional Court had allowed the convocation of the referendum, it would have undermined the pillars of its existence as one the highest supervisory institutions in the Slovenian constitutional democracy. Any constitutional

Rule of Law 10, 5–19 (2018).

43 Constitutional Court of the Republic of Slovenia, Decision no. U-I-398/22, 14.12.2022.

44 Constitutional Court of the Republic of Slovenia, U-II-1/15, 28.09.2015.

45 Constitutional Court of the Republic of Slovenia, Decision no. U-I-398/22, 14.12.2022, para. 21.

46 *Ibid.*

47 *Ibid.*, para. 21.

48 *Ibid.*

democracy rests on the strength of its supervisory institutions. Article 90 of the Slovenian Constitution protects the legitimacy and credibility of judicial decision-making at the Constitutional Court by prohibiting the convocation of a referendum concerning those matters where the Court previously found unconstitutionality. With the present decision, the Constitutional Court has de facto cemented constitutional democracy based on the protection rights of minorities. It remains to be seen if it will continue to do so in similar cases. After that, the civil society submitted an application to the European Court of Human Rights against the Constitutional Court's decision, which is still pending⁴⁹.

6. The primacy of the principle of constitutional democracy

Slovenian constitutional democracy is based on the rule of law and respect for human rights, even though challenges remain.⁵⁰ The Slovenian Constitutional Court, on 16 June 2022, adopted two critical decisions for constitutional democracy, by which it recognized the right to same-sex marriages and the right to adoption by same-sex couples. The Court was the first highest Court among Central and Eastern European Constitutional Courts to recognize the rights of same-sex couples to marry and adopt children. It marked the first time that a country in Central and Eastern Europe adopted the rights of same-sex couples to marry and adopt. It translated the expectation of changing societal norms towards marriage and the notion of marriage in Slovenia into its domestic legal system. The Court, in its decision, recognized that it does not annul the right to marry of heterosexual couples. However, it only extended the right to marry to same-sex couples and also the right to adoption to same-sex families. As expected, the decision stirred many positive and negative reactions from most Slovenian society. One must remember that the population of Slovenia, the electorate, voted in 2015 on a similar Act on Amendments to the Marriage and Family Relations Act, which at that time proposed the introduction of the right of same-sex couples to marry and the right to adopt.⁵¹ However, two-thirds of the individuals who attended the referendum overwhelmingly rejected the proposal in the Act.⁵²

Reactions were critical due to what critics submit was disrespect by the current mandate of the Court towards the decision adopted by the majority of the Slovenian electorate seven years ago. The decisions themselves also reflected the still-present overwhelming division of Slovenian society between more liberal progressive approaches towards the notion of family life and adoption and, on the other hand, more conservative approaches to the notion of family. Large parts of Slovenian society

⁴⁹ Text of application available at: <https://blazbabic.si/post/661503/application-to-the-european-court-of-human-rights-slovenia-violation-of-art-6-and-13-of-echr>.

⁵⁰ Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (Official Gazette of the Republic of Slovenia [Uradni list RS], Nos 1/91-I and 19/91 – corr.); See M. Avbelj, J. Letnar Čerňič, *The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond*. Oxford, Hart (Bloomsbury), 2020; J. Letnar Čerňič, *Responding to the Conflict of Interest Risks in Central and Eastern Europe: Case of Slovenia*, in *Croatian and Comparative Public Administration*, HKJU-CCPA, 22(4), 575–604; J. Letnar Čerňič, Jernej, M. Avbelj, M. Novak, D. Valentinčič, *Reforma demokratične in pravne države v Sloveniji (The Reform of Democracy and the Rule of Law in Slovenia)*. 1st edition. Kranj: New University, Faculty of Government and European Studies. 2018.

⁵¹ Referendum o Zakonu o spremembah in dopolnitvah Zakona o zakonski zvezi in družinskih razmerjih (Referendum on the Act on Amendments to the Marriage and Family Relations Act), 20 December 2015, https://www.dvk-rs.si/arhivi/zzzdr2015/udel_vo_sort_ime.html.

⁵² *Ibid.*

still consider the family as the union of a man, a woman, and a child. The decisions recognized a plurality of worldviews on the notion of family and family life and adoption in Slovenia. Nonetheless, the evolving nature of the Slovenian constitutional order requires a more novel or progressive interpretation of the concept of family and family life. Slovenia recognized same-sex couples' right to family life in the late 1990s when it introduced the right to register same-sex partnerships; for almost 25 years, same-sex couples could register their relationship before the administration units. As such, non-discrimination of same-sex couples was introduced into the Slovenian domestic legal system a long time ago.

However, non-discrimination has not been internalized in many areas of the Slovenian social order in the daily life of the Slovenian state and society. Nonetheless, the question concerning the decisions of the Court has to be whether the decision is persuasive and also whether it was adopted on a legal basis and not exclusively adopted based on the ideological preferences of the justices in the current mandate of the Slovenian Constitutional Court for judicial decisions to be legitimate and credible. They should be internally consistent and based on the values of the Slovenian constitutional order and the rights and freedoms that the Constitution protects. Even though the current mandate of the Slovenian Constitutional Court could be described as progressive, thereby perhaps more ideologically inclined to recognize same-sex marriages and adoption by same-sex couples. Nonetheless, the examined decisions are one of the few in the current mandate of the Court that are persuasive and authoritative from a legal point of view. By decision, the Court recognized and protected the rights of minorities in society. It is hoped that the Court will decide similarly in the future case, which will be ideologically further away from the examined cases.⁵³

One has to emphasize that same-sex couples and persons with same-sex orientation have been historically, as in many European countries and beyond, discriminated against. Therefore, the Court put much effort into explaining why the recognition of the right to marry for same-sex couples and the right to adoption for same-sex couples is necessary to ensure the implementation of a principle of equal treatment. This principle is the implementation or realization of the non-discrimination principle in the Slovenian Constitutional Court case law. It also recognizes and emphasizes at several instances in the examined decisions that the recognition of the right to same-sex marriages and the right of same-sex couples to adopt does not take away any right from the existing concept of marriage and heterosexual persons; it merely extends the right which was already protected and existing in the Slovenian social order to same-sex couples. Therefore, the Court attempted to provide legally persuasive and authoritative legal reasoning needed for its decision to be accepted by a large part of Slovenian society. Whether such a decision has been well received in public and whether such a decision is legitimate and credible is highly debatable and controversial more than two years after the initial decisions. One can then assert that the attempt by the Constitutional Court to persuade the Slovenian public by persuasive legal reasoning and argumentation has yet to be entirely successful.

Large parts of Slovenian society have been challenging decisions since their adoption. The European Court is still handling the case. One cannot conclude that most judges in the Court achieved their objectives by trying to provide persuasive and authoritative legal reasoning. The Court's decisions, as we mentioned, differ from the opinion of the Slovenian electorate at the 2015 referendum.⁵⁴ However, they also differ from the decisions and judgments of the European Court in

⁵³ See, J. Letnar Čerňič, *Protection of human dignity, plural democracy and minority rights in the case law of the Constitutional Court of Slovenia*. In: M. Krešič, D. Banović, A. Carrio Sampedro, J. Pleps (eds.), *Ethnic diversity, plural democracy and human dignity : challenges to the European Union and Western Balkans*. Cham: Springer, 2022, pp 187-206.

⁵⁴ Referendum o Zakonu o spremembah in dopolnitvah Zakona o zakonski zvezi in družinskih razmerjih (Referendum on the Act on Amendments to the Marriage and Family Relations Act), 20 December 2015, <https://www.dvk->

the decisions on the right to marry; the European Court at the moment does not recognize the right to marry and right to adopt of same-sex couples given that it stands on the position that there is at the moment still no European consensus or a majority of member states of the ECHR. The majority of 46 states still do not consider or do not recognize the right of same-sex couples to marry in their domestic legal systems. Nonetheless, the European Court in the past years has fairly established that, in turn, such consensus does exist concerning the right to marry of same-sex couples. The right to marry means states have negative and positive obligations to ensure their domestic legal systems allow it.

The European Court recognized that same-sex couples can register their partnerships before the state administration. The European consensus has been formed concerning the right to family life but is still in the making concerning the right of same-sex couples to marry. In this way, the decision of the Slovenian Court and the ensuing change in the Family Code also have to be understood as an attempt or a step in forming a European consensus. Based on the mentioned Constitutional Court's decisions, the Slovenian parliament reformed the Family Code in September 2022. Also, some other countries in Central and Eastern Europe have been considering the change of family codes. Most recently, Estonia has adopted changes to the family code, and it now recognizes the right to marry same-sex persons.⁵⁵ Consequently, one must understand these decisions as a step toward forming the European consensus concerning the right to marry.

Another take on the examined decisions is that the court exercise protected the Slovenian constitutional legal order, namely the principle of constitutional democracy. The principle of constitutional democracy means that democracy is limited and curtailed by constitutional values, social norms, rights, and principles and that it can happen that the Constitution also goes against the popular will of the electorate in some cases. These cases are textbook examples of such a decision where the Court went against the public will, and the opinion of the public on this issue, and it connected the recognition of the right to marry and adopt by same-sex couples to the notion of human dignity, equality, also freedom, freedom, and solidarity. It connected it to the main pillars of Slovenian social order in a way that human dignity has both an individual and a collective dimension, which depends on individual views on political rights or values. Human dignity has changed in Slovenia, Europe, and beyond in recent decades. The concept of family has evolved and is different from what it used to be. The definition of marriage differs from what it used to be several decades ago. The Slovenian Constitutional Court recognized such changes in society by noting that individuals are not anymore limited by the collective dimension of human dignity, which is reflected in customs, traditions, and culture, acknowledging the right to equal treatment or the principle of equal treatment based on sexual orientation, and through that also that individuals have the right to marry the same-sex person and same-sex couples have the right to adopt children.

7. Conclusions

The right of same-sex persons to marry and adopt has divided societies in Europe and beyond. Civil society organizations have argued for recognition of the rights of same-sex persons as a measure to remedy historical and systematic discrimination. On the other hand, most governments of the Member States of the Council of Europe have been reluctant to extend protection to such vulnerable groups. They argue that recognition would go against the traditional understanding of family and

rs.si/arhivi/zzzdr2015/udel_vo_sort_ime.html.

⁵⁵ S. Musaddique, *Same-sex couples able to marry in Estonia from New Year's Day*, in *The Guardian*, 1 January 2024, <https://www.theguardian.com/world/2024/jan/01/same-sex-couples-able-to-marry-in-estonia-from-new-years-day>.

other societal values, customs, and traditions. The Slovenian constitutional democracy has not been an exception in this regard. It has protected the right of same-sex persons to family life since the second half of the 1990s. However, it has been reluctant to extend their rights to same-sex marriages.

Nonetheless, in over three decades, the Slovenian Constitutional Court has developed the concept of constitutional democracy, which protects the rights of minorities against those of the majority. The Constitutional Court, in three examined cases, decided to protect the rights of same-sex persons to marry and adopt from the top down. It based its decisions on the principle of constitutional democracy, which trumps the rights of minorities over the rights of the majority. It held that the non-extension of the right to marry and adopt children to same-sex persons would undermine the values, principles, and rules of the Slovenian constitutional democracy. As a result, it extended the right to marry and adopt children to same-sex persons. Although one could submit that such decisions were only possible due to the current structure and judicial ideology at the Slovenian Constitutional Court, decisions illustrate a textbook example of applying the principles of constitutional democracy to one of the constitutional dilemmas.