Direct Democracy and the Rights of Sexual Minorities

MICHELE DI BARI[1]
University of Padova.

ABSTRACT: Direct democracy is now being regarded as both *an alternative of* and *an adjustment for* representative constitutional democracy. Nevertheless, as is discussed in this article, direct democracy devices, particularly in those legal systems where no *quorum* is provided for validating referendums, can harm minorities. The analysis of "same-sex marriage referendums" can provide an emblematic example of how a minority groups can be easily outnumbered, when decisions are taken using direct popular voting.

KEYWORDS: direct democracy; referendum; judicial review; popular initiatives; minority rights; fundamental rights; same-sex marriage; LGBT rights.

RESUMO: A democracia direta está sendo agora considerada tanto *uma alternativa* quanto *um ajuste* para a democracia constitucional representativa. Apesar disso, como é discutido neste artigo, os dispositivos de democracia direta, especialmente nos sistemas jurídicos em que não há *quórum* para validar referendos, podem prejudicar as minorias. A análise de "referendos de casamento entre pessoas do mesmo sexo" pode fornecer um exemplo emblemático de como grupos minoritários podem ser facilmente superados em número, quando as decisões são tomadas por meio do voto popular direto.

PALAVRAS-CHAVE: democracia direta; referendo; revisão judicial; iniciativas populares; direitos das minorias; direitos fundamentais; casamento de pessoas do mesmo sexo; Direitos LGBT.

INTRODUCTION

The aim of this articleis to analyze whether the risk of compromising the fundamental rights of individuals belonging to minority groups is higher when direct democracy – in particular when no *quorum* is provided there for – is used to decide over laws/regulations granting minorities specific guarantees[2].

1 Orcid: https://orcid.org/0000-0002-8381-4776.

2 This is an updated version of a paper published in 2019. See, M. DI BARI, A majoritarian one-shot, a minority being shot. Direct democracy and the «counter-minoritarian dilemma», in *Percorsi Costituzionali*, n. 2, 2019, p. 571-592.

Nowadays, after failing to achieve their goals through the legislature, it is common for minority groups to be granted rights through judicial activism, despite the mood of the elected majority[3]. This in turn, throws up the issue of the so-called counter-majoritarian dilemma[4].

Hence, when initiatives or referendums to repeal a legislative reform or judicial decisions "*pro minority rights*" take place, they might be perceived as a way to reassert the power of the electoral majority against either the judiciary or the representative legislature[5].

On several occasions in the last decade, referendums on socially delicate issues concerning minority groups have been resorted to. It is of utmost importance to investigate these "backlash phenomena", in order to prevent the danger underpinning direct democracy.

The first section of this contribution provides a brief and general overview of direct democracy devices. For the sake of brevity, and given the attention paid to case studies, the relation between direct democracy and populism will not be analyzed in detail.

In the second paragraph, case studies are examined to verify the outcomes of popular consultations, when the issue of same-sex marriage has been under ballots.

As will be shown in all the cases examined, popular consultation has resulted in a decision against minority groups (namely LBGT people). Given this scenario, is there a *counter-minoritarian dilemma* democratic states should deal with, when permitting the use of direct democracy to decide minorities' rights?

Since this paper adopts a comparative approach to the issue of direct democracy's possible negative outcomes, it is necessary to clarify – though briefly – the methodology adopted. This article's approach will be functional[6]

3 As Barack argues, since human rights are the true essence of democracy, rights of individuals, particularly those belonging to minority groups, "c*annot be left only in the hands of the legislature and the executive, which, by their nature, reflect majority opinion*". A. Barak, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, in *Harvard Law Review*, v. 116, n. 16, 2002, p. 21.

4 A recent interesting analysis is provided by M. C. DORF, in The Majoritarian Difficulty and Theories of Constitutional Decision Making, in *Journal of Constitutional Law*, v. 13, n. 2, 2010, p. 283 ss.

5 T. DONOVAN, Direct democracy and campaign against minorities, in *Minnesota Law Review*, v. 97, 2013, p. 1739 ss.

6 R. Michaels, The Functional Method of Comparative Law, in M. REIMANN, R. ZIMMERMAN(eds.), *Oxford Handbook of Comparative law*, 2006, p. 364 ss.; See, also, R. Michaels, Two Paradigms of Jurisdiction, in *Michigan Journal of International Law*, v. 27, n. 4, 2006, p. 1003-1069. As Van Hocke argues, "comparing

to the extent this analysis will investigate direct democracy devices when used against specific social minorities, i.e. individuals belonging to the LGBT community.

The issue of same-sex marriage referendums will be investigated considering: *(a)* California and Taiwan as examples in which – despite ballot results – judicial review has favored the minoritarian social group; *(b)* Central and Eastern European countries[7], namely Croatia, Romania, Slovenia, and Slovakia, as cases in which LGBT people's rights have either been limited through popular voting, or an attempt for the same has been made, and courts have not intervened to stop these attempts.

In all the cases analyzed, one or more of the referendums[8] have been conducted asking people to decide over same-sex marriage (or civil

domestic law with the way the same area has been regulated in one or more countries has become almost compulsory in doctrinal legal research". M. Van Hoecke, Methodology of Comparative Legal Research, in *Law and Method*, v. 12, 2015, p. 1. As Scarciglia argues *"legal scholars might use comparison to do research, b lawmakers to elaborate new piece of legislation, judges to adjudicate"*. R. SCARCIGLIA, *Metodi e comparazione giuridica*, Cedam, 2018, p.43.

7 See, N. PALAZZO and M. TOMASI, I referendum in materia di diritti delle coppie omosessuali: minoranze e vox populi, in *Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere GenIUS*, n. 1, 2016, p. 89-103.

8 In 2015, in Ireland there has been a referendum to allow the introduction of same-sex marriage through a constitutional amendment. Surprisingly, the Irish referendum is the only example in which, when the population has been directly involved in the decision making process, this has turned into a positive result for LGBT people. It was surprising, given the relevance and influence of the catholic religion in Ireland, and considering that in Ireland, homosexuality was long conceived as a contagious disease even by Supreme judges ((Norris *v.* Attorney General, Supreme Court of Ireland, 22 April 1983). Indeed, according to sections 61 and 62 of the *Offences against the person Act* of 1861, sexual activity between two men was considered a crime. The coming into force of the Irish Constitution did not make any difference on this specific issue until the decision of the 1988 European Court of Human Rights in Norris *v.* Ireland. Further, in 2006, in the case of Zappone& Gilligan *v.* Revenue Commissioners & Ors, the High Court denied recognition to a same-sex marriage celebrated in Canada (Zappone and Gilligan v. The Revenue Commissioners and Others [2006] IEHC 404, p. 63. The full text of this decision can be found at https://www.icj.org/wp-content/uploads/2012/07/Zappone-and-Gilligan-v.-Revenue-Commissioners-and-Others-High-Court-of-Ireland.pdf, last retrieved on 16 September 2019). In this case, following the decision of the Revenue Commissioners to refuse a lesbian couple – married in British Columbia – tax allowances as a married couple, the plaintiffs sought to apply for judicial review, which the High Court of Ireland granted. Interestingly, Justice Dunne acknowledged that "*the Constitution is a living instrument* [and accepted] *the arguments* [...] *to the effect that there is a difference between an examination of the Constitution in the context of ascertaining unenumerated rights and redefining a right which is implicit in the Constitution and which is clearly understood*. [However] *in this case the court is being asked to redefine marriage to mean something which it has never done to date"*. The Court, referring to discrimination suffered by same-sex couples, "[hoped] *that the legislative changes to ameliorate these difficulties will not be long in coming. Ultimately, it is for the legislature to determine the extent to which such changes should be made"* (Zappone and Gilligan *v.* The Revenue Commissioners and Others [2006] IEHC 404, p. 63-69). In 2010, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act was introduced in the Irish legal system. This law provided same-sex partners almost the same rights and duties of married couples, and represented the first step towards equal treatment of partners regardless of their sexual orientation. In 2015, following a strong public debate on the possibility of opening the legal institution of marriage on a more inclusive basis, a constitutional referendum was conducted to modify art. 41 of the Irish Constitution. To modify the Irish Constitution, once a Bill has been presented by the Dáil Éireann, according to art. 46 of the Constitution, it is necessary for the proposal to being voted upon by

partnership) either to introduce a constitutional ban, or to prevent/allow the introduction of an *ad hoc* legislative/constitutional reform. The different cases will be presented from the early (2008) to the most recent (2019) popular consultation[9].

In the concluding section, data will be discussed to explore to what extent direct democracy might affect the rights of minorities, and considering possible solutions to tackle what I call the democratic «counter-minoritarian dilemma».

1 Direct democracy: theoretical models, open issues, and the role of judicial review

During general elections, individuals are asked to vote for a person who will represent them (*acting on behalf*), which is the basis of *representative democracy*. However, in the case of popular initiatives or referendums, there is the possibility for individuals to vote directly on a specific issue or policy, i.e., to exercise *direct democracy*[10].

Thus, in very simple terms, while during elections it is a matter of "*person-voting*", in the case of referendum, it is all about "*issue-voting*"[11].

---

the majority of citizens (art. 47 of the Irish Constitution). On 29 August 2015, the *Thirty-fourth Amendment of the Constitution (Marriage Equality) Act*was approved by the people with a turnout of 60,52 and a majority of 62,07%. This amendment has modified art. 41 introducing this new wording: "*Marriage may be contracted in accordance with law by two persons without distinction as to their sex"*. On October 2015, following the High Court's decision concerning the dispute about the validity of the referendum result, the *Marriage Act 2015* was signed into law. For an overview of the Irish case, see Y. MURPHY, The marriage equality referendum 2015, in *Irish Political Studies*, v. 31, n. 2, 2016, p. 315 ss.; J. A. ELKINK, *Understanding the 2015 marriage referendum in Ireland: context, campaign, and conservative Ireland*, in *Irish Political Studies*, v. 32, n. 3, 2017, p. 370 ss. D. AMRAM, Il cielo d'Irlanda si tinge di arcobaleno, in *Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere GenIUS*, n. 2, 2015, p. 172-178; F. RYAN, Ireland's Marriage Referendum: A Constitutional Perspective. in *DPCE Online*, v. 2015, n.2, p. 4 ss.

9 In 2017, in Australia, citizens have been involved in the so-called *Australian Marriage Law Postal Survey*, a national survey designed to understand citizens' attitude towards the introduction of same-sex marriage in Australia. The survey was held through the postal service between 12 September and 7 November 2017. Unlike voting in elections and referendums, which is compulsory in Australia, responding to the survey was voluntary. This is why the Australian ballot is not considered in this analysis. As for the survey question, it was framed in these terms: "*Should the law be changed to allow same-sex couples to marry?*" The survey returned 7,817,247 (61.6%) "Yes" responses and 4,873,987 (38.4%) "No" responses. An additional 36,686 (0.3%) responses were unclear and the total turnout was 12,727,920 (79.5%). See (last retrieved on 25.09.2019) https://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0.

10 It is possible to list another instrument also for the electoral majority: the *recall*. In this last case, people might decide to remove the elected representative from office.

11 L. Morel, Referendum, in *The Oxford Handbook of Comparative Constitutional Law*, 2012, p. 457 ss.

When analyzing direct democracy instruments[12], a distinction should be drawn between popular initiatives and referendum *stricto sensu*[13]. In fact, while in the first case, individuals are proponents (authors) of a new legislative measure/reform, in the latter, individuals vote on an existing legal text/proposal[14].

The contemporary debate on direct democracy is mainly focused on how, and to what extent, a constitutional democratic system should rely on *direct popular issue-voting,* instead of preferring the classical decision-making process carried on exclusively through representative democratic institutions[15].

Citizens in a purely representative democratic system might exclusively decide which party or candidate to vote into office, having various cues and available information. Accordingly, elaborating an idea on which a party or candidate responds better to one's political view might seem relatively simple. On the other hand, when it comes to direct democracy, matters of popular vote can range from complicated fiscal policy or infrastructure projects to moral politics or political integration (European integration)[16].

In this context, preference allocation is not so obvious. On the contrary, it may take considerable resources to understand complex issues and develop a preference.

12 According to some Swiss scholars, differences in direct democracy devices *"can be classified by two main dimensions. The source of the proposition describes who controls the issues which are subject to a popular vote, or in other words who sets the political agenda. In the Swiss case, this can be either the government or the parliament or the citizens. The other dimension relates to who can call for a vote. This can be either through a constitutional requirement or it can be through collecting signature"*. G. Luts, *Switzerland: Citizens' Initiatives as a Measure to Control the Political Agenda*, in M. SETÄLÄ, T. SCHILLER. (eds.), *Citizens' Initiatives in Europe:* Procedures and Consequences of Agenda-Setting by Citizens, Palgrave Macmillan, 2012, p. 20.

13 Terminology in this specific context might be confusing. Defining correctly what a referendum or a popular initiative is requires a deep analysis of these specific and different instruments of direct democracy. See, M. SUSKI, *Bringing in the People:* A Comparison of Constitutional Forms and Practices of the Referendum, Martinus Nijhoff Publishers, 1993, p.10.

14 For a comprehensive historical and comparative analysis, see M. QVORTRUP, *Referendums Around the World*, Palgrave Macmillan, 2018 E. PALICI DI SUNI ELISABETTA, E. GARCIA, M. ROGOFF, *Gli istituti di democrazia diretta nel diritto comparato*, Cedam, 2018.

15 E. De Marco,Democrazia in trasformazione: i nuovi orizzonti della democrazia diretta, in *Federalismi.it*, n. 1, 2017, p. 3 ss.

16 M. Fatke, Participation and Political Equality in Direct Democracy: Educative Effect or Social Bias, in *Swiss Political Science Review*, v. 21, n. 1, 2014, p. 99-118; P. Selb, Supersized votes: ballot length, uncertainty, and choice in direct legislation elections, in *Public Choice*, v. 135, n. 3, 2008, p. 319-336; M. Kang, Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus"in *UCLA Law Review*, v. 50, 2003, p. 1141-1188.

Scandals associated with corruption and bad administration have led citizens to mistrust political parties and representative democratic institutions[17]. Direct democracy is seen as a possible way to overcome the "inability to respond to societal demands" of the political class[18].

«Populism», a word that has always been perceived in a negative fashion, is now used with a positive connotation[19] («*the people rule*!»). By distinguishing between "the people" and "the elite", populism emphasizes the power of 'common people', 'the sovereign nation', as opposed to the liberal understanding of democracy and its main features[20] (*e.g.,* rule of law, checks and balances, the protection of minority rights).

Supporters of direct democracy believe that giving citizens the option to vote directly, even overruling previous decisions made by representatives, might be the right corrective tool in all cases where elected representatives fail to follow the electorate's preferences[21]. Some scholars also believe that pushing direct democracy in terms of popular initiatives could allow policy makers to change their preferences based on popular will, before a legislature's choice is annulled by a referendum[22] (a sort of «saving-time device»).

On the other hand, according to the opponents of an extensive recourse to direct democracy, there is no evidence that a referendum or popular initiative can improve the quality of democracies[23]. Therefore, while elected representatives might be in a better position to aggregate preferences

17 See T. GINSBURG, A. HUQ, *How to Save a Constitutional Democracy*, University of Chicago Press, Chicago and London, 2018; G. ALLEGRI, A. STERPA, N. VICECONTE(eds.), *Questioni costituzionali al tempo del populismo e del sovranismo*, Editoriale Scientifica, Napoli, 2019; S. GARBEN, I. GOVAERE, P. NEMITZ (eds.), *Critical Reflections on Constitutional Democracy in the European Union*, Hart Publishing, Oxford, 2019; M.A. GRABER, S. LEVINSON, and M. TUSHNET (eds.), *Constitutional Democracy in Crisis?*, Oxford University Press, Oxford, 2019; W. Sadurski, *Poland's Constitutional Break-down*, Oxford University Press, Oxford, 2019.

18 See, G. Baldini, Populismo e democrazia rappresentativa in Europa, in *Quaderni di Sociologia*, v. 65, 2014, p. 11-29; N. Rossi, Giudici popolo e populismi, in *Questione Giustizia*, n. 1, 2019, p. 14 ss.; P. Serra, Populismo, democrazia e limiti del potere politico, in *Questione Giustizia*, n. 1, 2019, p. 55 ss.

19 S. MOHRENBERG, R. A. HUBER, T. FREYBURG, *Love at First Sight? Populism and Direct Democracy*, (March 1, 2018) available at SSRN: https://ssrn.com/abstract=3375589; J. G. MATSUSAKA, The Eclipse of Legislatures: Direct Democracy in the 21st Century, in *Public Choice*, v. 124, n. 1/2, 2005, p. 157-177.

20 H. KRIESI, The Populist Challenge, in *West European Politics*, v. 37, n. 2, 2014, p. 363 ss.

21 P. LE BIHAN, Popular Referendum and Electoral Accountability, in *Political Science Research and Methods*, v. 6, Issue n. 4, 2018, p. 715-731.

22 See, T. BESLEY, S. COATE, *Issue Unbundling via Citizens' Initiatives*, *in Quarterly Journal of Political Science*, v. 3, 2008, p. 379-397; E. R. GERBER, Legislative response to the threat of popular initiatives, in *American Journal of Political Science*, v. 40, n. 1, 1996 p. 99-128.

23 L. MOREL, *supra* note 11, p. 457.

and discuss properly the consequences of a given political choice of a new legislative measure, the «*people*» themselves tend to follow party lines and stereotypes[24], instead of allocating preferences based on individual speculations.

Further, if popular initiatives or referendums become very frequent, popular participation tends to decrease[25], to the extent that the outcome of direct democracy can become – *de facto* – the reflection of minority views (the proponents' view) on a given subject.

To minimize the potential side effects of direct democracy, judicial review might play a role. Indeed, popular initiatives can be challenged in court through multiple ways. They can be challenged early to keep them off the ballot or later, after voters' approval (as it will be shown through the analysis of selected case studies).

In the majority of legal systems[26]; judicial review mainly covers *the process,* i.e. it is about the rules to be respected: (a) in relation to the demand of a direct vote on a specific issue; (b) the campaigning process; (c) the rules pertaining the voting process itself, in case of referendums whether there is a quorum or not, or in case of popular initiatives, whether the proposal must be written in general terms or as a bill ready for discussion.

In relation to its formulation, i.e. whether the wording of the proposal is clear enough, and whether it narrowly identifies a specific subject, a formal scrutiny may be required (in Croatia[27], California[28]).

As far as the *asked question* is concerned, judicial review might involve an evaluation of both the formal and the material validity of the question[29]. Material validity refers mainly to whether a referendum or popular initiative

24 P. SELB, *supra* note 18, p. 323 ss.

25 S. CHAMBERS, *Constitutional referendums and democratic deliberation*, in M. MENDELSOHN, A. PARKIN (eds.), *Citizens, Elites and Deliberation in Referendum Campaigns*, Palgrave Macmillan, 2011.

26 See, M. FATIN-ROUGE STEFANINI. *Le contrôle du référendum par la justice constitutionnelle*, Presses universitaires d'Aix-Marseille Economica, 2004, p. 167 ss.

27 R. Podolnjak, Constitutional Reforms of Citizen-Initiated Referendum Causes of Different Outcomes in Slovenia and Croatia, in *Revus*, v. 26, 2015, p. 143 ss.

28 D. C. LEWIS, *Direct Democracy and Minority Rights: Same-Sex Marriage Bans in the U.S. States*, in *Social Science Quarterly*, v. 92, n. 2, 2011, p. 364 ss.; T. DONOVAN, supra note 3, p. 1746 ss.

29 See, K. PÓCZA (ed.), *Constitutional Politics and the Judiciary*, Routledge, Oxford, 2018; M. BELOV(ed.), *Courts, Politics and Constitutional Law. Judicialization of Politics and Politicization of the Judiciary*, 1st Edition, Routledge, Oxford, 2019; C. LANDFRIED (ed.), *Judicial power. How Constitutional Courts affect political transformations*, Cambridge University Press, Cambridge, 2019; E. GARCIA, E. PALICI DI SUNI, M. ROGOFF, *supra note* 3, p. 103 ss.

covers a matter which is open to referendum, or the conformity of the popular proposal to the *status quo,* i.e. its compatibility with higher ranking legislation such as fundamental rights embedded in the Constitution or Bill of Rights[30].

Oversight of direct democracy devices might be either automatic or compulsory, and might depend on which social actor is allowed to seize the authority in charge of reviewing the legitimacy of the proposal. In this respect, among the selected case studies, legal systems present different solutions.

2 Referendums on same-sex marriage

The issue of legal recognition of same-sex couples has been widely and intensely debated in recent years.

In Europe as well as worldwide, very different solutions have been adopted to accommodate the demand for recognition of LGBT couples.

Nevertheless, while in many states same-sex partners can register or enter into civil partnership, only in some countries is it possible to find le «*mariage pour tous*», i.e. an equal legal recognition of partners regardless of their sexual orientation.

These social and legal developments never occur without creating social conflicts and opposition. Indeed, as it will be shown in the following subsection, describing each case study separately, in a number of occasions, legal measures – or judicial decisions – approving gay marriage have become an easy[31] target for supporters of a traditional understanding of marriage.

30 An example is represented by the Slovakian Constitution. According to article 93, para. 3, the Constitution provides for the so-called «irrevocability clause» in the field of human rights. In other words, standards of human rights as set in the constitutional text cannot be reduced. "*If the subject of the referendum would reduce human rights to such a degree that it would jeopardize the nature of the rule of law, such a referendum would not be constitutionally acceptable* [...] *In the Slovak Republic, by comparison, the inalterability of constitutional provisions guaranteeing fundamental rights and freedoms is protected primarily by Article 12.1 of the Constitution (Basic rights and freedoms are irrevocable, inalienable, imprescriptible, and indefeasible.), but provisions with the same purpose are undoubtedly included also in Article 93.3 of the Constitution*". Slovakian Constitutional Court decision 2014-3-003, 28.12.2014 is available in English at: https://www.ustavnysud.sk/en/zakladne-pravne-dokumenty (last retrieved on 07.09.2019).

31 I use the adjective *easy* to emphasize how it has been quite simple for conservative parties to promote ballots on LGBT people's rights and win their challenge, being always a very noise minority, yet greater than the LGBT minority.

2.1 California (2008)

In the United States, marriage has been recognized as a legal institution (possibly) open to both heterosexual and homosexual couples, since 2015. The path of recognition has not been without obstacles and the role of the Supreme Court has been essential to override conflicts over this specific social issue. Indeed, in the landmark civil rights case of *Obergefell v. Hodges*[32], the Supreme Court established once for all that the right to marry is open to same-sex partners in the same terms and conditions as opposite-sex couples, given the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution[33].

In 1993, the Hawaiian Supreme Court took the first prudent step towards the recognition of same-sex marriage in *Baer*[34]. In this case[35], the court decided that in order to prevent same-sex partners from entering into marriage, the State should have demonstrated a compelling state interest[36]. This decision prompted an immediate social response by conservative political parties, which, following a struggle, engineered a state constitutional amendment to ban same-sex marriage before the introduction of same-sex marriage provisions by the legislature. Supporters of traditional marriage started popular initiatives in several of the fifty states against the enactment of same-sex marriage.

California represents an interesting and emblematic case in which direct democracy seems to have clashed with other constitutional constraints/

32 135 S.Ct. 2584 (2015).

33 See. D. H .JHERMANN, Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell *v.* Hodges, in *Indiana Law Review*, v. 49, 2015; S. E: ISAACSON, Obergefell *v.* Hodges: The US Supreme Court Decides the Marriage Question, in *Oxford Journal of Law and Religion*, v. 4, n. 3, 2015. Another interesting analysis has been developed in a specific focus published by *Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere, GenIUS,* n. 2, 2015: A. SPERTI: *La sentenza Obergefell v. Hodges e lo storico riconoscimento del diritto al matrimonio per le coppie same--sex negli Stati Uniti. Introduzione al Focus*; S. CHRISS, D. C. WRIGHT: *After Obergefell v. Hodges: the continuing battle over equal rights for sexual minorities in the United States*; N. G. CEZZI: *I dissensi nel caso Obergefell; R. Ibrido: L'argomento sociologico nella giurisprudenza costituzionale in materia diorientamento sessuale. Esperienze e casi*.

34 *Baer v. Lewin*, 852 P.2d. 44 (Hawaii, 1993).

35 A similar, though not identical case has been decided by the Supreme Court of Alaska, namely *Brause v. Bureau of Vital Statistic*, 1998 WL 88743 (Alaska Superior Ct., Feb. 27, 1998). See, K. G. Clarkson, D. Coolidge, W. C. Duncan, The Alaska amendment: the people's choice on the last frontier, in *Alaska Law Review*, v. 16, n. 2, 1999.

36 For an analysis of the levels of scrutiny in the United States, see E. CHEMERINSKY, The Rational Basis Test Is Constitutional (and Desirable), in *Georgetown Journal of Law & Public Policy*, v. 14, 2016, p. 401 ss.; R.H. Fallon, Strict Judicial scrutiny, in *UCLA Law Review*, v. 54, 2007, p. 1267 ss. Case n. 17-cv-1249, *U.S.D.C. E.D.Pa*, (*Order)*, p. 63 ss.

mechanisms and the judiciary had to play a crucial role in redefining the margin of popular sovereignty.

Firstly, in 2000, a banon same-sex marriage was introduced[37]through *Proposition* 22, which changed the California Family Code to formally define marriage in California as between a man and a woman. *Proposition* 22 was a statutory change (i.e. ordinary legislation) through initiative process, not a constitutional change through initiative process[38].

Subsequently, the California Supreme Court ruled in a 4-3 decision[39] that laws directed at gays and lesbians were subject to strict scrutiny; thus, given that the right to marry is a fundamental right under article 1, section 7 of the Californian Constitution, barring same-sex marriage was unconstitutional. Therefore, several municipalities started issuing marriage licenses.

However, opponents of same-sex marriage had already begun their efforts to qualify *Proposition* 8, a popular initiative aimed at amending the Californian Constitution, i.e. imposing a ban on same-sex marriage stronger than the one provided by the *Proposition* 22. *Proposition* 8 was aimed at introducing a constitutional amendment, by adding to the Constitution the words '*Only marriage between a man and a woman is valid or recognized in California*'.

Again, the ballot was successful for its proponents. The turnout among eligible voters reached 50.1%, with "*yes*" prevailing 52.24% over the47.76% "*no*"[40]. Since amending the Californian Constitution requires a simple majority, the ban on same-sex marriage was constitutionali zed.

LGBT advocates immediately brought the case before the Supreme Court of California, aiming to stopping the ballot. According to the opponents of *Proposition* 8, this initiative was not meant to amend the

37 Before *Proposition 22*, in California, there was a statute enacted in 1977 which prevented same-sex partners from getting married. Yet, the rulings delivered in other states concerning the admissibility of gay marriage (*e.g.* Hawaii, and Alaska) raised social concern in all US states and campaigns for the introduction of constitutional bans spread all over the federation.

38 This *Proposition*, provided by art. 2 of the California Constitution, has been voted on by 53,8 % of the voters, with 'yes' prevailing with a majority of 61,40%. See.

39 *In re Marriage Cases*, 183 P3d 384 (Cal. 2008). See, A. S. LEONARD, Backlash and Marriage Equality, in *Indiana Journal of Law and Social Equality*, v. 2, n. 2, 2014.

40 Data can be analyzed in *Supplement to the Statement of Vote Statewide Summary Propositions*, available at https://elections.cdn.sos.ca.gov/sov/2008-general/ssov/10-ballot-measures-statewide-summary-by-county.pdf (last retrieved on 10/09/2019).

Constitution – possibly allowed under art. 2 of the Californian Constitution – but represented a constitutional revision, which, on the contrary, is not allowed. Nonetheless, the California Supreme Court upheld *Proposition* 8 by a majority of 6 to 1. Following the Court's reasoning, while couples married before the ballot could remain married, unaffected by the new law, the ban on same-sex marriage could remain.

In 2010, this decision was repealed by the decision of the District Court for the Northern District of California in Perry *v. Schwarzenegger*[41]. Following Justice Walker reasoning, "*An initiative measure adopted by the voters deserves great respect. [*however*] California's obligation is to treat its citizens equally, not to «mandate [its] own moral code*»"[42]. Hence, the principle of non-discrimination must prevail over moral considerations, and any attempt to undermine fundamental rights cannot be based on stereotypes.

Proponents of *Proposition* 8 challenged the District Court decision before the Supreme Court of the United States. However, this decision was not reversed, since Supreme Court Justices argued that the petitioners had not been persuasive in demonstrating they did not lack standing to appeal[43]. Therefore, though indirectly, the Supreme Court supported the lower court decision.

2.2 Croatia (2013)

The Croatian Constitution has undergone several revisions. While in 1991, to run a referendum it was necessary to have the Parliament or the Head of State intervening, now, according to article 87.3 of the Croatian Constitution, citizens – at least a tenth of the electorate – might propose a constitutional or legislative referendum[44]. No quorum is needed to make the ballot valid, so each vote counts (art. 87.4 Croatian Constitution).

41 *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D.Cal. 2010). The full text of this decision is available at https://socialchangenyu.files.wordpress.com/2012/09/perry-v-schwarzenegger_ndca_2010.pdf (last retrieved on 10.09.2019). For an analysis of this case, see C.J. ROSKY, Perry *v.* Schwarzenegger and the Future of Same-Sex Marriage Law, in *Arizona Law Review*, v. 59, 2011.

42 *Ibidem*, p. 82.

43 See, S.L. KAFKER, A. D. RUSSCOL, Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives after Hollingsworth *v.* Perry, in *Washington and Lee Law Review*, v. 71, 2014; R. B. Siegel, Equality Divided The Supreme Court 2012 Term, in *Harvard Law Review*, v. 127, n. 1, 2013.

44 The Fifth Amendment of the Constitution was adopted for the first time in a decision taken directly by the electorate, on a specific proposal to amend the Constitution based on a popular initiative, i.e., based on a proposal to amend the Constitution submitted by voters.

When Croatia was about to enter the European Union, social concern started to rise among conservative parties on the possibility of Croatia legalizing same-sex marriage, as it was happening in several other EU countries. Opponents (mainly the group named U *ime obitelji,* i.e. "on behalf of the family"), started a petition to run a constitutional referendum[45] imposing a constitutional ban on the introduction of same-sex marriage in the Croatian legal system.

As more than 700.000 signatures were collected by May 2013, the *Sabor*, (Parliament) voted in favor of holding a referendum, as per art. 87.3 of the Constitution.

The constitutional popular consultation was held on 1st December 2013, with very low popular participation: just 37.9% of the electorate indicated its preference. Yet, it was enough to make the referendum pass, with 66.28% saying yes[46]. Accordingly, art. 61.2 of the Croatian Constitution was amended thus: "*Marriage is a living union between a woman and a man*"[47].

During the referendum campaign, concern about the constitutionality of the referendum *per se* started to grow in the Croatian public sphere, to the extent that the Parliament voted on a proposal to submit a request for the review of the constitutionality of the referendum to the Constitutional Court.

However, the majority of MPs voted against, and the Constitutional Court was not able to exercise its scrutiny.

However, while confirming the validity of the ballot[48], the Court – taking the opportunity to state its own view – emphasized that *inter alia*, from the substantive law aspect, the Republic of Croatia legally recognized both marriage and common-law marriage, and same-sex unions (through unregistered same-sex unions introduced in 2003). Thus, Croatian law was aligned with the European legal standards regarding the institutions of

45 The asked question was: *Are you in favor of the constitution of the Republic of Croatia being amended with a provision stating that marriage is matrimony between a woman and a man?*

46 Data concerning this popular vote can be found at http://c2d.ch/referendum/HR/5bbc030992a21351232e5775 (last retrieved on 10 September 2019).

47 R. PODOLNJAK, *cit.*, p. 145 ss.

48 *Decisionon the completion of the proceedings of supervision of the constitutionality and legality in implementing the national referendum held on 1 December 2013,* decision No. SuP-O-1/2014 of 14 January 2014, Official Gazette No. 5/14. English versions of decisions are available at: https://sljeme.usud.hr/usud/prakswen.nsf/vPremaDatumuDonos.xsp (last retrieved on 9 September 2019)

marriage and family[49]. The Court stressed how it was"[...] *necessary to point out the following: any supplementation of the Constitution by provisions according to which marriage is the living union of a woman and a man may not have any influence on the further development* [since] *everyone in the Republic of Croatia has the right to respect and legal protection of their personal and family life, and their human dignity*"[50].

Eventually, in 2014, the Life Partnership Act was passed by the Parliament with 89 votes for and 16 against. It was published in the official gazette on 28 July 2014, and took effect 8 days later (except for the part on parental responsibility which came into force on 1 September 2014).

2.3 Slovenia (2012-2015)

In Slovenia, same-sex partners have been granted legal recognition since 2005, according to the Registration of Same Sex Partnerships Act (*Zakon o registraciji istospolne partnerske skupnosti – ZRIPS*), which provided legal guarantees in terms of property rights, but excluded social security rights, i.e. pension rights.

In 2009, the Constitutional Court found the law on registered partnership in violation of the Constitution[51] because it discriminated against partners on the basis of sexual orientation in the context of inheritance rights and other property rights. According to Slovenian constitutional judges – who decided unanimously by all nine – the situation of registered same-sex partners, in relation to the right to inheritance, was comparable with the situation of spouses. Hence, the Court gave the legislature six months to remedy this situation[52].

The National Assembly started developing a new bill introducing a new family code. The 2011 bill expanded the existing same-sex registered partnerships rights, so that partners could have all the rights of married couples, except adoption (excluding step-child adoption).

49 Communication by the Constitutional Court of Croatia, No. SuS-1/2013 of 14 November 2013. English versions of decisions are available at: https://sljeme.usud.hr/usud/prakswen.nsf/vPremaDatumuDonos.xsp (last retrieved on 9 September 2019).

50 *Ibidem*, para. 12.

51 Constitutional Court of Slovenia, case U-I-425/06-10, Blazic and Kern *v.* Slovenia, 2010.

52 *Ibidem*.

However, according to art. 90 of the Slovenian Constitution[53], once a bill has been passed, it is possible – with some limitations – to seek an «*adverse referendum*», i.e. a referendum aimed at rejecting a draft bill under approval[54].

The conservative group "*Civil Initiative for the Family and the Rights of Children*", supported by the conservative-centrist Slovenian People's Party, was able to collect the required signatures to force a referendum on the law.

As doubts were raised on the constitutionality of such a referendum, the Government referred the question to the Constitutional Court, which, eventually, decided on the admissibility of the popular consultation[55].

With a turnout of 30.31% (no quorum was provided by art. 90 of the Constitution in its prior 2013 version) 54, 55% of voters agreed on rejecting the new family code[56].

The Parliament, on 3 March 2015, approved a new bill redefining marriage as a «union of two». Immediately, conservative opponents mounted a campaign against this legislative reform, and gathered enough signatures to force a referendum.

The National Assembly reacted to this attempt to block this new piece of legislation, voting to block the referendum on the ground that it would violate the constitutional provision which prohibits popular votes *on laws eliminating unconstitutionality in the field of human rights and fundamental freedoms* (art. 90.2 of the Constitution). The proponents of the referendum appealed to the Constitutional Court.

Again, the Court was compelled to decide whether the popular vote was in violation of the Constitution, in particular with the revised version of art. 90.2 which explicitly forbids voting "*on laws eliminating unconstitutionality in the field of human rights and fundamental freedoms or any other unconstitutionality*". In its 2014 decision, the constitutional judges

53 Art. 90 of the Slovenian Constitution allowed one third of the deputies (thus the parliamentary minority), the National Council, or forty thousand voters to call for an adverse referendum. After the 2013 constitutional reform, according to art. 90 of the Constitution, it is now possible to do so only by collecting forty thousand voters' signatures.

54 This kind of referendum is provided only by the Danish and Slovenian Constitutions. See, R. PODOLNJAK, *cit.*, p. 135 ss.

55 Slovenian Constitutional Court, case U-II-3/11. Translation in English is available at http://odlocitve.us-rs.si/en/odlocitev/AN03521?q=U-II-3%2F11 (last retrieved on 13 September 2019).

56 Data concerning this popular vote can be found at http://c2d.ch/referendum/SI/5bbc01bb92a21351232e5593 (last retrieved on 10 September 2019).

upheld that while "[i]*n Slovenia power is vested in the people*"[57], in order to allow or dismiss an *adverse referendum*, the Court must establish whether the law passed by the Parliament is about "*eliminating an unconstitutionality in the field of human rights*".

Following this line of reasoning, the Court went further to observe how it "*has never established that the definition of marriage currently in force and the conditions for entering into marriage are unconstitutional*"[58]. Hence, the new bill passed by the Parliament defining marriage as a «union of two» instead of a «union of a man and a woman» was not to be considered immune from a direct popular decision.

As in 2012, the popular participation was quite low (turnout 36, 38%) but it reached the quorum – *one fifth of all qualified voters have voted against the law* (art. 90.4 of the Constitution) – and votes against the bill prevailed with 63, 51% of no[59].

Finally, in 2016, the Parliament approved a new bill to grant same--sex partnerships all rights of marriage, except joint adoption and *in vitro* fertilization.

2.4 Slovakia (2015)

No legal recognition is provided to same-sex unions in Slovakia, except for some rights granted to those unions legalized in another EU Member State, since the European Court of Justice ruled – in 2018 – that Members States must grant married same-sex couples, where at least one partner is an EU citizen, full residency rights, in light of Directive 2004/38/EC (*Citizens' Rights Directive or Free Movement Directive*)[60].

---

57 Slovenian Constitutional Court, case U-II-1/15, 28 September 2015, para. 31. Translation in English is available at http://odlocitve.us-rs.si/en/odlocitev/AN03847 (last retrieved on 13 September 2019).

58 *Ibidem*, para 52.

59 Data concerning this popular vote can be found at http://c2d.ch/referendum/SI/5caf179361af8403c235ddc9 (last retrieved on 10 September 2019).

60 ECJ, Case C-673/16, Coman and Others *v.* Inspectoratul General pentru Imigr□ri and Ministerul Afacerilor Interne. The *Coman* case, originated from a Romanian man seeking to have his marriage to an American man (a marriage celebrated in Belgium) recognized. Given the opposition of Romanian immigration authorities to provide a residence permit to the American partner, the case was brought before the Constitutional Court, which referred – for preliminary ruling under art. 267 of the Treaty on the Functioning of the European Union– to the European Court of Justice. The EJC thus ruled in favor of the same-sex couples arguing that "*in a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38/EC* [...], *in a Member State other than that of which he is a national, and, whilst there, has created and strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the*

In addition, since 2018, ordinary legislation provides some inheritance rights to «close persons», i.e., brother, a sister, spouse or a person in a relationship; however, according to article 116 of the civil code, the life companions can be considered «close persons» under law only "*if a detriment suffered by one of them is reasonably felt as own by the other*".

The Slovakian case is peculiar, since the Slovak Constitution provided for a specific ban on same-sex marriage (art. 41 of the Constitution).

Therefore, there was no (legal) need to further provide other possible limitations on LGBT couples' rights. In addition, according to art. 93.3 of the Slovak Constitution, "[b]*asic rights and freedoms [...] may not be the subject of a referendum*".

Despite that, the collection of signatures to initiate a referendum was started by the group named Alliance for Family, which was able to gather 400, 000 signatures calling for a vote aimed at preventing a legalization of same-sex marriage and seeking the electorate's opinion on three different interrogatives: (a) *do you agree that only a bond between one man and one woman can be called marriage?;* (b) *do you agree that same-sex couples or groups should not be allowed to adopt and raise children?* (c) *do you agree that schools cannot require children to participate in education pertaining to sexual behavior or euthanasia if the children or their parents don't agree*?

Consequently, a complete list of stereotypes was provided at the ballot.

According to art. 95.2 of the Slovak Constitution, the Constitutional Court may review whether the subject (*question*) of the referendum conforms to the Constitution at the request of the President of the Republic, which the President did in this case.

The Court replied by arguing that "*[t]he irrevocability of human rights means that the standard (level) of human rights as set in the constitutional text cannot be reduced. If the subject of a referendum would lead to the broadening of human rights, such a referendum would be constitutionally acceptable. If the subject of the referendum would reduce human rights to such a degree that it would jeopardize the nature of the rule of law, such*

competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognize marriage between persons of the same sex" (para 51).

a referendum would not be constitutionally acceptable"[61]. Nonetheless, according to the Court, given that marriage in Slovakia is only between opposite sex partners, no rights can be reduced in the absence of rights[62] (i.e., though the right to marry is a human right, same-sex marriage is not, for now at least).

Interestingly, the referendum failed because of the low turnout, which was 21, 4% of the eligible voters, much less than the 50% required by art. 98 of the Slovak Constitution in order to obtain a legally valid result[63].

2.5 Romania (2018)

Romania does not allow any legal recognition of same-sex partners. As far as LGBT people's rights are concerned, Romania is one the last countries in all European statistics[64].

Although the Constitution (art. 48.1) appears to be neutral – i.e. there is only a neutral reference to spouses – the law has been always interpreted as encompassing only the traditional definition of marriage[65] given by the civil code on its art. 259 "*Marriage shall be a freely consented union between a man and a woman, concluded under the law*".

Attempts to introduce a civil partnership have been made in 2013 and 2014, but parliamentary opposition has always been strong on rejecting this[66].

Though other legislative attempts have been made to introduce at least civil partnership, no legal recognition has been awarded to same-sex partners.

---

61 Constitutional Court of Slovakia, decision SVK-2014-3-003. English version of the summary is available at https://www.ustavnysud.sk/documents/10182/71853347/PL_24_2014.pdf/7042a660-ad01-4386-8f31-865f459b8b75 (last retrieved on 12 September 2019).

62 *Ibidem*.

63 Data concerning this popular vote can be found at http://c2d.ch/referendum/SK/5bbc03cd92a21351232e58b7 (last retrieved on 10 September 2019).

64 According to ILGA Europe Rainbow Map, Romania is 25thin the EU when it comes to respecting family life of LGBT people. Data are available at https://rainbow-europe.org/country-ranking#eu (last retrieved on 10 October 2019).

65 D. KOCHENOV, U. BELAVUSAU, *Same-sex spouses in the EU after Coman: More free movement, but what about marriage*?, in *European University Institute working paper*, n. 3, 2019, p.3, available at https://cadmus.eui.eu/ (last retrieved on 10 October 2019).

66 See, V. ANDREESCU, Sexual Minorities, Civil Rights, and Romanians' Resistance to Social Change, in *AnALize: Revista de studii feministe*, v. 10, n. 24, p. 38 ss. (available at: https://www.ceeol.com/search/article-detail?id=701125, last retrieved on 12 October 2019).

In 2018, a constitutional referendum was attempted to introduce a ban on same-sex marriage. However, despite proponents collecting over three million signatures[67], substantially more than the 500, 000 required to initiate the process for a constitutional amendment referendum (art. 150.1 of the Romania Constitution), the effort to modify the Constitution failed, since the final turnout was only 21.1%[68], below the required threshold of 30%[69].

2.6 Taiwan (2019)

In May 2017, the Constitutional Court of Taiwan (namely the *Judicial Yuan*)[70] ruled that those civil code provisions preventing a same-sex partner from entering into marriage were in violation of the Taiwanese Constitution. According to the Court, the guarantees and freedoms enshrined in the constitutional text require marriage to be open on equal basis regardless of sexual orientation. According to the *Judicial Yuan Interpretation No. 748* the ban on same-sex marriage in Taiwan's civil code was "*in violation of both the peoples' freedom of marriage as protected by Article 22 and the people's right to equality as guaranteed by Article 7 of the Constitution*"[71].

---

67 The referendum followed a citizens' initiative launched by *Coali□ia pentru Familie* (the Coalition for Family) in late 2015. Thus, following a successful citizens' initiative, the Romanian government announced a referendum. The Chamber of Deputies approved the initiative on 9 May 2017, in a 232-22 vote, but the referendum was conducted on 6 and 7 October 2018. See, D. KOCHENOV, U. BELAVUSAU, *cit.*, p. 4 ss.

68 Data concerning this popular vote can be found at http://c2d.ch/referendum/RO/5d24a16cdc0aeb467bfcc132 (last retrieved on 10 September 2019).

69 Given art. 73.3 of the Romanian Constitution, the organic Law n. 341/2013 (which has modified the previous organic law n. 3/2000), establishes that the validity of a national referendum will be conditional on the fulfillment of two conditions: a turn-out quorum (minimum percentage) of at least 30% of the persons registered on the permanent electoral lists and at least 25% valid votes of voters registered on the permanent electoral lists. Since according to regulations the turn-out quorum does not distinguish between the types of referendum mentioned in the Constitution, it means that it is applicable to all types of national referendums. See, M. SAFTA, National Referendum. Existing regulatory framework and future perspective, in *Juridical Tribune*, v. 4, n. 1, 2014, p. 56 ss.

70 According to Taiwanese scholars, the Taiwanese Constitutional Court (TCC) could only partially be considered a judicial body of specialized constitutional review rooted in the Civil Law tradition, similar to those familiar to a European scholar. Indeed, its official designation, the Council of Grand Justices, suggests something else. When created, the TCC was not obliged to hold any public oral hearings (prior to 1993). Thereafter, things have changed when the constitutional amendment (additional article of 1992) was approved, which first provided for TCC jurisdiction on the dissolution of unconstitutional parties, namely, political parties that were judged to endanger the free and democratic constitutional order. That constitutional provision (currently Amendment V, section 4) was later implemented through the Constitutional Interpretation Procedure Act (CIPA), which replaced its predecessor, the Council of Grand Justices Act of 1958, in 1993. It is important to underline how the last constitutional amendment of 2005 further provides for TCC jurisdiction on the trial of the President and the vice-President with the "judicialization" of (vice) presidential impeachment process. See, SEE J-Y. HWANG, M-S. KUO, H-W. Chen, The clouds are gathering": Developments in Taiwanese constitutional law: The year 2016 in review, in *International Journal of Constitutional Law*, v. 15, n. 3, 2017, p. 753-762.

71 In Judicial Yuan Interpretation No. 748, 2017, the Court has pointed out how "[...] *the five classifications of impermissible discrimination set forth [in] Article 7 are only illustrative, rather than exhaustive. Therefore, different treatment based on other classifications, such as disability or sexual orientation, shall also be*

In this landmark decision[72]. The Court gave the legislature (the Legislative *Yuan*) two years[73] to amend the civil code.

In February 2018, a Taiwanese conservative Christian group opposing same-sex marriage[74] (*the Alliance for Next Generation's Happiness*) proposed different popular initiatives, collecting signatures to allow citizens to vote on this issue[75]. The declared aim was to overturn the ruling by the Constitutional Court[76].

In response to this campaign against same-sex marriage recognition, LGBT activists collected enough signatures to submit their own claims for popular consultation[77].

The Central Election Commission (CEC) approved all the proposals[78]. On 24 November 2018, Taiwanese voters approved the two initiatives against the legalization of same-sex marriage, thus rejecting the pro-LGBT initiative by wide margins[79].

---

governed by the right to equality under the said Article". This decision, translated in English, is available at: http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748 (last retrieved on 10/09/2019). See, D. KC Huang, The Court and the legalisation of same-sex marriage: a critical analysis of the Judicial Yuan interpretation, in *University of Pennsylvania Asian Law Review*, v. 14, 2019, p. 63 ss.

72 See, M-S. KUO, H-W.CHEN, The Brown Moment in Taiwan: Making Sense of the Law and Politics of the Taiwanese Same-Sex Marriage Case in a Comparative Light, in *Columbia Journal of Asian Law*, v. 31, 2017, p. 73-146.

73 As the Taiwanese Court stated: "*The authorities concerned shall amend or enact the laws as appropriate, in accordance with the ruling of this Interpretation, within two years from the announcement of this Interpretation. It is within the discretion of the authorities concerned to determine the formality for achieving the equal protection of the freedom of marriage. If the authorities concerned fail to amend or enact the laws as appropriate within the said two years, two persons of the same sex who intend to create the said permanent union shall be allowed to have their marriage registration effectuated at the authorities in charge of household registration, by submitting a written document signed by two or more witnesses in accordance with the said Marriage Chapter"*. Judicial Yuan Interpretation No. 748, 2017.

74 M.-S. Ho, Taiwan's Road to Marriage Equality: Politics of Legalizing Same-sex Marriage, in *The China Quarterly*, v. 238, 2019, p. 482-503.

75 The two relevant questions were: (i) *Do you agree with using means other than the marriage regulations in the civil code to protect the rights of two people of the same gender to build a permanent life together?*; (ii) *Do you agree that the marriage regulations in the civil code should define marriage as between a man and a woman?.*.

76 See, to have insight on how media have described this movement, https://www.taiwangazette.org/news/2018/10/5/who-is-behind-taiwans-opposition-to-same-sex-marriage-and-why-are-they-so-afraid.

77 The relevant question was: *Do you agree that the Civil Code marriage regulations should be used to guarantee the rights of same sex couples to get married?*

78 J.M.K. CHO, L.Y.L KAM, *Same-Sex Marriage in China, Hong Kong and Taiwan: Ideologies, Spaces and Developments,* in F.L. Yu, D. KWAN(eds.) *Contemporary Issues in International Political Economy*, Palgrave Macmillan, Singapore, 2019, p. 289 ss.

79 The two «against questions» obtained respectively 72,48% and 61,12% support; the in «favor question» failed with 67,26% of votes. Data concerning this popular vote can be found at https://web.archive.org/web/20181124220825/http://referendum.2018.nat.gov.tw/pc/en (last retrieved on 10 September 2019).

Interestingly, one week before the vote, the Taiwanese government announced that the Constitutional Court ruling would be respected regardless of the referendum results.

Therefore, despite the outcome of popular vote, on 20 February 2019, the *Executive Yuan* presented a draft bill – *Act for Implementation of J. Y. Interpretation No. 748-*[80] *– allowing same-sex partners to create a "a permanent union of intimate and exclusive nature for the purpose of living a common life*" (art. 2). This new piece of legislation covers inheritance rights, medical rights, and adoption of the biological children of their partner.

Penalties for adultery and bigamy are provided, similar to opposite-sex marriages. This new legislation does not amend the existing marriage laws in the civil code, but creates a separate law. In other words, the idea of policy makers was somehow to respect the outcome of the 2018 referendum, while, at the same time, respecting the *Judicial Yuan Interpretation No. 748,* by creating a legal institution which is de *facto* identical to marriage.

3 CONCLUSION

Only in two of the analyzed case studies, namely California and Taiwan, the use of direct democratic process has resulted in popular participation above 50 % of the total number of potential voters. This seems to confirm the assumption that, in general, if popular initiatives or referendums become very frequent, popular participation tends to decrease[81].

In addition, in all the analyzed cases, people have voted against the option of introducing legal provisions introducing same-sex marriage. As has been described, in the case of Croatia, Romania, Slovenia and Slovakia, even when parliaments have displayed readiness to address LGBT rights, they have been hindered or constrained through direct democracy devices promoted by conservative electoral social minorities[82].

80 Available at: https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000008 (retrieved on 10.09.2019).

81 M. FREITAG, I. STADELMANN-STEFFEN, Stumbling block or stepping stone? The influence of direct democracy on individual participation in parliamentary elections, in *Electoral Studie*s, v. 29, n. 3, 2010, p. 472 ss.

82 Indeed, by considering ballot turnouts, it is evident that results have been determined by conservative minoritarian part of voters. In fact, considering the total amount of registered voters, those determining ballot results were: (a) the 24,96% of potential voters in the Croatian 2013 referendum); (b) the 16,37% of potential voters in the Slovenian 2012 referendum, and the 22, 99% in the 2015 referendum; the 20,23% of potential voters in the Slovakian 2015 referendum. These data are available at http://c2d.ch/ (retrieved on 10.12.2019).

Interestingly, both in California and Taiwan, popular vote confirmed the existence of a gap between voters' attitude towards minority rights and judges' decisions. Courts seem to face the so-called «counter-majoritarian difficulty»[83], with no particular trouble in dealing with sexual minorities' fundamental rights.

However, in these two case studies, a distinction must be drawn: while in California, *Proposition n. 8* has been struck down after the ballot, challenging the legitimacy of *Proposition* itself *vis-à-vis* the Constitution, in Taiwan, the decision taken by the majority of voters was delivered after the decision of the Judicial Yuan.

Thus, if on the one hand supreme justices seem to be able to play their role as guardians of fundamental constitutional freedoms despite the actual feeling of the people (either before or after a ballot), on the other hand, it seems reasonable to affirm that popular vote, i.e. the allocation of preferences, does not seem to be influenced/shaped by authoritative decisions such as those from a Constitutional Court.

In both the Californian and Taiwanese cases, the potential conflict between popular sovereignty and constitutional guarantees appear evident, throwing up a highly challenging question to be answered concerning direct democracy: *is it possible to simply discharge a clear-cut popular decision*? In this context, it might be argued that constitutions are there to limit powers, and «the people power» is not exempt from constitutional constraints[84].

The Taiwanese legislature had somehow to reconcile two opposite positions (judicial *v.* popular), and it did so, bypassing (*ideally*) this problem by adopting a legislation introducing same-sex partnership (instead of same-sex marriage), granting rights and obligations overlapping those provided for the civil marriage, but maintaining a distinction between the two legal institutions.

83 See, N. SULTANY, The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification, in *Harvard Civil Rights-Civil Liberties Law Review*, v. 47, 2012, p. 373 ss.; B. Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, in *New York University Law Review*, 1998, p. 333 ss.; W. MISHLER, R. S. SHEEHAN, The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions, in *The American Political Science Review*, v. 87, n. 1, 1993, p. 87 ss.

84 J. E. CASTELLO, The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure, in *California Law Review*, v. 74, n. 2, p. 504 ss.;B.Caravita, I circuiti plurali della decisione nelle democrazie moderne, in *Federalismi.it*, numero speciale 1, 2017, p. 5 ss.; S. Bowler, When Is It OK to Limit Direct Democracy?, in *Minnesota Law Review*, v. 97, 2013, p. 1781 ss.

In addition, given the counter-minoritarian attitude of voters, this brings us to what I call a democratic «counter-minoritarian dilemma», whenever direct democracy is used to decide over/against minorities' rights, especially in cases in which the targeted groups are associated with negative social stereotypes.

This lack of empathy toward minority rights could be related to the idea that rights of minorities represent, somehow, a threat for the others.

In Croatia, Romania, Slovenia, and Slovakia, the turnout in ballots limiting LGBT rights was below 40%, with Slovakia's percentage being just 21.4% of voters. Hence, it is evident that the majority of the voters simply ignored the ballot, allowing conservative voters to achieve their goals easily. This «popular indifference» must be taken into due consideration, and possible solutions need to be investigated in order not to compromise minority groups' rights.

One possible solution could be found in the introduction of a «constitutional irrevocability of *human rights* clause» better framed then the one enshrined in art. 93.3 of the Slovakian Constitution, thereof reconsidering the issue of social minorities, and imposing the adoption of the principle of non-discrimination in the analysis of the validity of the proposed referendum.

Indeed, used as a possible limitation of direct democracy, a generic reference to "human rights" does not seem to configure a real safeguard, given the room for interpretation (as shown in the Slovakian case study). The adoption of the principle of non-discrimination could give judges the option to scrutinize proposals of referendum using a *strict scrutiny* approach, as happens with ordinary legislation passed by parliaments.

To address the issue of the «voting social minority» being able to decide – outnumbering it –the rights of another (smaller) social minority, the introduction of higher quorums of voters might discourage an abuse of direct democracy devices against minorities. Indeed, given the number of voters, this seems to be the most efficient way to avoid the tyranny of conservative minorities over the LGBT minority (or other possible minorities). In other words, what I called the democratic «counter-minoritarian dilemma» could be – if not totally – at least partially solved through a higher quorum required to validate direct voting.

Which is the right quorum? This is an issue that remains open to future investigation.

Sobre a autora:

Michele Di Bari | *E-mail:* michele.dibari@unipd.it

Michele Di Bari is a researcher in Comparative Public Law at the Department of Political Science, Law and International Studies (SPGI) of the University of Padova. He is also a member of the Genius Law Review (www.geniusreview.eu), a law journal focusing on LGBT+ issues.

Artigo convidado.