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DOCTRINAL INTERPRETATION OF ARTICLE 23(2) OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The article examines the viability of a broad interpretation of Article 23 (2) ICCPR as a potential legal basis for the human right to conclude a marriage. The author goes on to discuss the issue of interpretation of the commented provision in light of interpretative directives enshrined in Article 31 of the Vienna Convention on the Law of Treaties, having presented the relevant decision of the UN Human Rights Committee in case Joslin et al. v. New Zealand and its scientific criticism. The author argues that while in principle the wording of Article 23 (2) does not impede its dynamic interpretation resulting in States-Parties' obligation to recognize same-sex marriages, the adoption of such an approach by the Committee would be premature due to the lack of the international consensus with regard to the issue in question.

Keywords: human rights, civil rights, right to marry, legal interpretation, principle of non-discrimination.

Якушевич А. Доктринальное толкование статьи 23 (2) Международного пакта о гражданских и политических правах. *В этой статье автор рассматривает целесообразность широкого толкования статьи 23 (2) Международного пакта о гражданских и политических правах в качестве потенциальной правовой основы для права человека заключить брак. Представив соответствующее решение Комитета ООН по правам человека в деле Джослин и другие против Новой Зеландии и его научную критику, автор рассматривает вопрос о толковании комментариев этого положения в свете директив, предусмотренных в статье 31 Венской конвенции о праве международных договоров. Автор утверждает, что, хотя в принципе формулировка статьи 23 (2) не препятствует его динамической интерпретации ввиду обязательства государств-сторон признавать однополые браки, применение Комитетом этого подхода стало возможным в связи с отсутствием международного консенсуса в этом вопросе.*

Ключевые слова: права человека, гражданские права человека, право на брак, юридическое толкование, принцип недискриминации.

Background. The issue of legalizing same-sex marriages is one of the most controversial matters discussed in the area of human rights, especially in the context of the right to marry and to found a family, both at the domestic and international level. The controversy around this issue is determined by manifold and complex religious, political, social and cultural factors that are not grounded purely in legal interpretation [1, p. 643]. From the global perspective, the diversity of approaches to that issue is reflected

in dramatically diverging domestic legislations regulating the status of same-sex couples that range from criminalizing homosexual acts with many years of imprisonment (especially in Asian and African countries of Muslim tradition, as well as in India) to awarding same-sex couples some form of legal recognition, including the right to marry. (The tendency to legalize same-sex marriages has emerged in recent years in some West European and American countries)*.

Given the mentioned divergence of legal solutions with regard to the status of same-sex couples adopted at the national level, the question arises whether the guarantee of the right to marry as enshrined in Article 23 (2) of the International Covenant on Civil and Political Rights (hereinafter: ICCPR or Covenant), which is an instrument for the protection of human rights of universal coverage, has the sufficient potential for imposing some legal standards in this respect. In the only communication concerning the issue in question, that is in the case *Joslin et al. v. New Zealand* 902/1999 (hereinafter: *Joslin*), the Committee of Human Rights (hereinafter: the Committee) found that the right to marry as laid down in Article 23 (2) ICCPR does not apply to homosexual couples, which suggests that domestic authorities remain free to regulate this issue in accordance with the trends prevailing within their societies. The decision in *Joslin*, however, has received some criticism in the legal doctrine; the authors that disagree with the opinion of the Committee challenge its emphasis on literary and therefore «static» manner of interpreting Article 23 (2) ICCP. This gives rise to examining whether the Committee's standpoint is to be regarded as a right or at least sustainable interpretation of the provision in question. At the same time, the issue of whether the right to marry should be extended to same-sex couples should be approached by referring above all to the generally recognized principles of treaty interpretation enshrined in Article 31 of the Vienna Convention on the Law of Treaties (hereinafter: VCLT), which means that extralegal, especially political or ethical arguments should not be accorded a decisive import although, given the political and moral entanglement of human rights, their impact is neither avoidable nor undesirable. Such an interpretation of Article 23 (2) ICCPR is the objective of this paper.

Analysis of recent researches and publications. Among the scientists, who explored the legal issues of Same-Sex Marriage, should be outlined the works of A. Smith (2012), N. Hunter (2012), C. Ball (2014), M. Nussbaum (2009), R. Bacchus (2018), P. Gerber, K. Tay, A. Sifris (2015), L. Paladini (2014), P. Gerber, K. Tay, A. Sifris (2015), L. Paladini (2014) [1–2]. At the same time, despite considerable scientific attention, the issue of legal nature of Same-Sex Marriage has not been finally resolved, which determines the need for its further investigation.

* Same-sex marriage is legally allowed (nationwide or in some parts) in the following countries: Argentina, Belgium, Brazil, Canada, Colombia, Denmark, France, Finland (the relevant law enters into force in 2017), Iceland, Ireland, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, the United Kingdom the United States and Uruguay.

The **aim** of the article is the addressing the issues of Same-Sex Marriage in the context of Article 23 (2) of the International Covenant on Civil and Political Rights.

Materials and methods. The empirical basis of the study is the acts of international and national legislation, materials of jurisprudence, modern scientific and legal research on family and marriage. The study is based on a wide spectrum of knowledge acquisitions. In particular, the dialectical method provided a comprehensive consideration of the issues of Same-Sex Marriage in the unity of its social and legal content. With the deductive method the current state of judicial practice is overviewed. The method of analysis is used to systematize scientific legal researches on the issues of family and marriage, as well as to study the novelties of international, domestic and foreign information legislation.

Results. The Case *Joslin et al. v. New Zealand* and its Criticism in the Legal Doctrine. The authors in the case *Joslin et al. v. New Zealand* (Communication № 902/1999, U.N. Doc. A/57/40 at 214 (2002) – hereinafter: *Joslin*) were two lesbian couples that lived in a *de facto* relationship involving a sentimental link and shared responsibilities for their children out of previous marriages, as well as for their finances and common homes. They challenged the New Zealand's law stipulating that marriage can be concluded only by a man and a woman. They submitted that denying them the possibility to enter into marriage resulted in the violation of a number of the Covenant rights, including Article 17 (right to privacy and family life) and 23 (right to marry). According to the complainants, their relationship met all the criteria of a heterosexual family. They argued that as a result of denying them the possibility to marry they suffered several harmful effects deriving from discrimination, detriment to their dignity, social exclusion, interference with access to some important parental and material rights connected to the marital status, such as adoption, succession, or matrimonial property. Furthermore, the authors contended that by refusing to recognize same-sex marriages the State-Party failed to comply with its positive obligation to protect their family life and to respect their sexual identity. They argued that the interference with their family life was arbitrary and discriminatory, since it was based only on the prejudicial attitudes prevailing in the society. As far as the interpretation of Article 23 (2) ICCPR is concerned, the authors asserted that it should be read in the light of Article 2 (1) of the Covenant which stipulates that the rights enshrined therein are to be exercised without any distinction.

Although the authors invoked various provisions of the Covenant, the Committee considered that their complaints can be boiled down to the right to marry under Article 23 (2). In particular, the Committee noted that «[g]given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using

the term «men and women», rather than «every human being», «everyone», and «all persons». Use of the term «men and women», rather than the general terms used elsewhere in Part III of the Covenant has been consistently and uniformly understood as indicating that the treaty obligations of the State parties stemming from Article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other» (Joslin, para. 8.2 et seq). Based on the above-mentioned assumption the Committee found that the refusal to recognize same-sex marriages did not give rise to any violation of the Covenant.

The outcome in *Joslin* was the result of the priority accorded by the Committee to the textual interpretation of the Covenant, focused on the ordinary meaning of the wording of Article 23 (2) ICCPR as a reflection of what the parties intended. In other words, the Committee applied the first and prior method of interpretation stipulated in Article 31(1) of VCLT [2, p. 545]. It is also noteworthy that the Committee had explicitly subscribed to this method in a previous decision, that is in case J B et al. v. Canada of 1982 (118/1982, para. 6.3).

The Committee's decision in case *Joslin* received some criticism in the legal doctrine. For instance, R. Burchill noted that the Committee «gave the impression that marriage is only an inconsequential status. However, the institution of marriage does create a different status for individuals in comparison to cohabitation or any civil arrangement short of marriage. This in turn impacts upon the ability of individuals to receive the protection afforded by the Covenant» [3, p. 215]. Indeed, by entering a marriage, the spouses acquire some rights or advantages, for instance, in the fields of family law, inheritance, taxation or social security, which are not available for non-married couples. The mentioned implications of the non-recognition of same-sex marriages have been addressed in the concurring opinion of the Committee members Lallah and Scheinin in the case *Joslin*. They argued that in light of the previous jurisprudence of the Committee the difference in treatment does not amount to prohibited discrimination under Article 26 if reasonable and objective criteria that justify such treatment can be adduced. The distinctions in status made between married and unmarried heterosexual couples can as a rule be viewed as justified, since the latter enjoy the right to marry and their cohabitating without having concluded a marriage is a matter of personal choice. Such a choice, however, is not available for same-sex couples, that is why in countries where the law does not allow for same-sex marriage or other type of recognized same-sex partnership with consequences similar to or identical with those of marriage a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under Article 26 ICCPR, unless otherwise justified on reasonable and objective criteria (Individual opinion of Committee members Mr. Lallah and Mr. Scheinin, paras. 3 and 4).

On the other hand, it can be argued that the indiscriminate extension of rights reserved to marriages on (homo- and heterosexual) partnerships

would inescapably lead to blurring the boundaries between the two categories of relationships, which in turn would result in depreciation of the institution of marriage. It is also noteworthy that equalizing the status of civil partnership of unmarried couples (hetero- and homosexual) with the status of the married couples would be inadmissible in countries where the protection of the institution of marriage is explicitly guaranteed in the constitutions[*].

One effect produced by the textual interpretation employed by the Committee is «the de-contextualization of the Covenant from other human rights treaties of the UN system, to which it belongs» [2, p. 546]. Whereas the specific wording of Article 23 (2) allowed the Committee to deny the right to marry for homosexual couples, the same outcome could not be derived so easily from other UN treaties on human rights, should a case similar to *Joslin* be brought before a committee charged with monitoring of their application. For instance, the right to marry as laid down in Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination of 1965 is conferred to «everyone». Similarly, Article 16 of the Convention on the Elimination of Discrimination against Women of 1979 refers to States Parties' «duty to take all appropriate measures to eliminate discrimination against women in all matters related to marriage and family relations, the right to enter into marriage included». It can therefore be argued that the mentioned committees should adopt a more teleological approach in interpreting the said provisions, since the denial of the right to marriage to same-sex couples does not have any justification in the specific wording of those treaties [2, p. 546 et seq.].

It seems clear that the drafters of the Covenant did not envisage homosexual marriages as falling within the terms of Article 23 (2) ICCPR. Neither did they have in mind the problems that might be posed by transsexuals. This is hardly surprising given the social conditions prevailing in times when the text of the Covenant was drafted [4, p. 507]. However, given that at the drafting time of the Covenant the concept of marriage was commonly understood as a union between a man and a woman, the gendered language of Article 23 (2) was not expressly intended to exclude same-sex marriages. The drafting history of the commented provision reveals rather the intention to emphasize the principle of equality between men and women [1, p. 647]. It can therefore be argued that «the reference to «men and women» is descriptive of an assumed reality, rather than prescriptive of a normative structure for all times» [5].

Furthermore, the case *Joslin* was examined by the Committee around 30 years after the adoption of the Covenant and in the meantime a tendency towards recognizing same-sex marriages or at least towards regarding this

[*] For instance, Article 18 of the Republic of Poland states that «[m]arriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland». Article L1 of the Constitution of Hungary states that «Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation's survival».

topic as a human rights' concern has emerged. It has been submitted that the decision in the case *Joslin* runs counter this tendency. In order to support this view, the reference to changes in legislation adopted in countries of European culture, that is, in some countries of Western Europe, USA and Canada, has been made [3, p. 215]. Similar argument has been advanced by M. Nowak who claims that the wording of Article 23 (2) ICCPR does not rule out the adoption of its broader interpretation in the future, given that in many societies dramatic and rapid changes in perception of the essence and functions of marriage can be observed [6, p. 527]. This view, however, seems to be unconvincing and even exaggerated, especially when one takes into account that the Covenant is an instrument for the protection of human rights of the universal character. Although the trend towards legal recognition of same-sex marriages appears to emerge in some countries of the definite cultural tradition, there is still no global consensus on whether such a right is protected at international level. If profound social changes within a country that give rise to introducing legislative measures aimed at setting new legal standards or even at redefining traditional legal institutions were to be regarded as relevant for the purpose of the interpretation of the Covenant, they should occur on a global scale or at least within a considerable number of societies representing various cultural traditions. For the time being, the recognition of same-sex marriages is confined to countries of the single cultural tradition, which renders this trend irrelevant for the purpose of the interpretation of the Covenant. For this reason I subscribe to the view expressed by K. Sękowska-Kozłowska that an attempt to impose upon state parties a duty to legally recognize same-sex marriages would amount to an excessive interference of an international body with domestic law [7, p. 584]. This view finds corroboration in the Human Rights Council's 2011 report on discrimination based on sexual orientation and gender identity. In making reference to *Joslin,* the Council noted that legalizing marriage for same-sex couples is not a required human rights obligation. At the same time, the Council noted that states must permit same-sex couples to receive equal benefits as unmarried couples [8].

The above conclusion is also borne out by comparative-law arguments, especially related to Article 12 of the European Convention on Human Rights (hereinafter: ECHR). A comparative reference to Article 12 ECHR seems justified, since, like Article 23 (2) ICCP, it stipulates that the right to marry and to found a family is vested in men and women. According to L. Garlicki, the words «men and women» in Article 12 ECHR suggest unequivocally that the rights enshrined therein are reserved to heterosexual couples only [9, p. 713]. While State-Parties to the ECHR are free to recognize same-sex marriages at the domestic level, they do not have such a duty on the basis of Article 12 ECHR [9, p. 717]. In order to corroborate the validity of this assertion the author resorts to the French version of Article 12 ECHR, where the words «men and women» appear in singular («*homme et femme*»). This interpretation has also been endorsed by

the European Court of Human Rights; in the case *Shalk and Kopf v Austria*, where the applicants contended that the refusal of state authorities to extend the right to marry to same-sex couples amounted to the violation of Article 12 ECHR, the Court stated that «[a]lthough (…) the institution of marriage has undergone major social changes since the adoption of the Convention (…) there is no European consensus regarding same-sex marriage. (…) The Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society» (Shalk and Kopf v Austria, n. 30141/04, judgment of 24 June 2010, para 58 and 62).

Decision in Joslin et al. v. New Zealand in Light of Methods of Legal Interpretation. The decision in case *Joslin* clearly shows that the outcome of a case where an international court or another quasi-judicial body is called to make a determination about the scope of the protection afforded by a right or freedom hinges on the preference accorded by the deciding body to a definite method of interpretation. As a matter of principle, methods of interpretation of international law are the same as methods applicable to the interpretation of domestic law, but the relevance of a specific method in a given case to a high degree depends on agents responsible for applying the law [10, p. 327 et seq.].

As discussed above, the commented case has been resolved on the basis of the literary interpretation. This kind of interpretation by its very nature is «static», i.e. oriented towards establishing the intent of the historical lawgiver. The priority of the literal interpretation is set forth in Article 31 (1) VCLT that stipulates the following: «A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose». The preferential use of the literary interpretation method of international treaties is justified by the fact that undertaking of international duties by the states is tantamount to their (voluntary) restriction on their sovereignty. Furthermore, the addressee of a legal norm cannot be expected to make a guess about the intentions of the lawgiver or to speculate about what legal measure the lawmaker would adopt, if they were aware of new facts or circumstances. For this reason, the teleological or dynamic interpretation, if applicable to a case, cannot go beyond a possible meaning of the terms of the treaty to be interpreted [11, p. 143]. Given that every lawmaking activity is aimed at influencing the conduct of legal subjects, the enactment and operation of law perceived as a social phenomenon presuppose the effective communication between the lawgiver and the addressees of legal norms. Such a communication requires that the lawgiver uses the standard language spoken and understood by the society whose conduct it attempts to regulate. For this reason, a departure from the ordinary meaning of words in the process of the interpretation of legal provisions may raise ethical concerns [11, p. 557]. The

priority of the ordinary meaning to the wording of legal provisions is therefore of paramount importance with regard to provisions targeted at the society as a whole rather than at a narrow group of specialists. This is especially the case with regard to legal instruments such as constitutions or human rights treaties designed to protect essential interests of each individual [13, p. 113].

Furthermore, Article 31 VCLT embodies the *effet util* principle (sometimes called *res magis valeat quam pereat* principle). The assumption behind this interpretative directive is that every provision and word has been included into the interpreted treaty on purpose and carries a definite meaning which cannot be lost or ignored in the course of interpretation. In other words, any interpretation that would completely deprive a provision of its meaning or that would inappropriately limit that meaning is to be regarded as inadmissible. Interpretation of law should rather seek results that safeguard the provisions of the treaty from depriving them of any legal effect as well as from frustrating or distorting the objective which is pursued by their inclusion in the treaty [14, p. 74 et seq.].

It is therefore to be assumed that the wording of a provision constitutes both the point of departure and limit for the interpretative activity [15, p. 26]. The interpretation that would produce results going beyond the wording of the provision in question would be arbitrary, i.e. suffused with extralegal considerations. The limit of the interpretative activity set by the wording of the provision constitutes a guarantee that their «objective element» is preserved even in instances, where an evaluative or dynamic approach has been adopted [16, p. 416].

Indeed, the supreme rank of literary interpretation does not rule out the possibility of including into the process of interpretation some considerations of teleological character aimed at ascertaining the object and purpose that underlies the legal provision in question. This purpose, however, cannot be identified with preconceptions or wishes of the interpreter. It is rather expressly contained in the text of the provisions or at least can be derived with sufficient precision from its wording and its teleological context [17, p. 190]. This idea has been expressed in the general rule of interpretation of international treaties laid down in Article 31 (1) VCLT. When interpreting an international treaty, it is to be presumed that its signatories had the intentions that can be derived from the ordinary meaning of its wording. Thus, the conception of interpretation enshrined in Article 31 VCLT constitutes an endorsement to a textual (objective) approach, although at the same time it takes into account the directives advocated by adherents of the teleological approach [18, p. 123].

The juridical practice developed in Western culture (both in countries of civil law and common law tradition) accepts the general principle of the primacy of the literal interpretation and in consequence the subsidiarity of the other methods of interpretation. The recourse to the latter is justified only in order to confirm a result of the literal interpretation. Furthermore, the teleological approach is allowed only in cases where the

literal interpretation offers more than one sustainable option. In such a case the recourse to teleological interpretation is aimed at determining an interpretative result that to the highest extent corresponds with axiological foundations of the interpreted legal instrument. Since in the area of human rights the supreme value is to be attributed to human dignity, any teleological interpretation should be aimed at its maximal protection and realization. It has been argued that the decision in *Joslin* is inconsistent with the good faith interpretation of the international treaties as laid down in Article 31 VCLT. A good faith interpretation requires not only considerations of the wording, but also of the context and purpose of the provision. A good faith reading of Article 23 (2) ICCPR makes it difficult to justify a discriminatory treatment of same-sex couples with regard to right to marry enshrined in the legal instruments that emphasizes the principle of non-discrimination [1, p. 649 et seq.].

Furthermore, the principle of the primacy of the literal interpretation could be deviated only if there were highly compelling legal, social and economic or ethical reasons that would justify such a deviation. The departure from the wording would also be sustainable if the results of the textual interpretation led to unacceptable results, that is to consequences perceived as grossly unjust or irrational in the light of the accepted values or if they would frustrate the objectives underlying the interpreted legal instrument [19, p. 69 et seq.].

One could argue, as the complainants in *Joslin* did, that there are compelling ethical grounds justifying the adoption of the interpretation that allows to derive the right of same-sex marriages from Article 23 (2) ICCPR. Such an ethical reason could be viewed in the changing moral standards reflected *inter alia* in gradual expansion of the principle of non-discrimination that tends to embrace more and more emancipated social groups, including the homosexual. For instance, while a hundred years ago the disadvantaged legal status of children born out of wedlock was not perceived as a violation of the principle of non-discrimination, it is viewed as such in the light of current standards. The essence of discrimination consists in different treatment of persons having the same relevant characteristics or in identical treatment of persons having different relevant characteristics. The discriminatory character of «traditional» legislative solutions with regard to right to marry lies in the fact that a heterosexual person has a right to enter into marriage with a representative of a gender he or she is sexually attracted to, whereas a homosexual person can conclude a marriage with a representative of a gender he or she is not sexually attracted to. On the other hand, a heterosexual person is not allowed to enter into a marriage with a representative of a gender he or she is not sexually attracted to, whereas a homosexual person is not allowed to conclude a marriage with a representative of a gender he or she is sexually attracted to. Such law is therefore discriminatory with regard to sexual orientation because all persons negatively affected by its operation belong to the category of the homosexual.

However, the differentiated treatment of a class of people based on their characteristics does not *per se* amount to illicit discrimination. The different treatment is not to be qualified as discriminatory if sufficiently serious and objective reasons can be adduced that rationally justify such a treatment One of the most important factor that could be decisive for establishing of whether there are sufficiently reasonable grounds for excluding same-sex couples from the enjoyment of the right to marry is the determination of the fundamental purpose of the institution of marriage. Such a conclusive determination does not, however, seem to be possible. Whereas the opponents of the recognition of same-sex marriages claim that the fundamental function of marriage is procreation and parenting, the advocates of the legalization of same-sex marriages perceive the essence of the institution of marriage in a mutual sentimental commitment of two persons regardless of whether they are able or willing to have children. The latter approach has been adopted by the lawgiver, since the procreative abilities or plans of the intending spouses in this respect are not regarded as a condition *sine qua non* for a civil law marriage [20, p. 315 et seq .]. Therefore, the reference to the «essence» of marriage does not seem to be a promising method for a conclusive solution to the controversy around the recognition of same-sex marriages.

A different approach to the issue of legalizing same-sex marriages has been proposed by J. S. Gray [21, pp. 158–170]. The author argues that the relevant question to be asked when dealing with the issue is what social and legal arrangements with regard to the institution of marriage and family are reconcilable with the idea of a well-ordered and just society. In order to provide an answer to this question, the author resorts to the theory of justice by John Rawls. According to the latter, in order to determine how a just society would be ordered and by what principles it would be governed, it is to be ascertained what principles would be chosen by rational people placed in the hypothetical «original position», that is in a situation where everyone makes the choice of principles designed to be applied in a just society from behind the so called veil of ignorance. This «veil» is one that essentially blinds people to all facts about themselves so they cannot tailor principles to their own advantage. As Rawls writes, in the original position «no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities» [22, p. 11]. The veil of ignorance is supposed to ensure that the principles governing the society are chosen in an unbiased way, that is in a way free from influence of one's perception of one's interests and advantages, but also free from prejudices, stereotypes or habitual thinking patterns related to their actual position and role in a given society.

Since the consciousness of one's sexual orientation constitutes a factor that to a high degree affects one's beliefs with regard to the «right» arrangement of the institution of marriage, it undoubtedly would, at least

partially, influence the person's choice in this respect. In order to make an unbiased and unprejudiced choice of principles governing marriage, sexual orientation of the decision-making agents should therefore be covered by the veil of ignorance. The main purpose of the concept of the veil of ignorance, after all, is to preclude the choice of such principles that to a higher degree serve interests and preferences of the social group of the chooser and at the same time disregard the interests of social groups they do not belong to.

The fundamental principle which would be adopted by rational persons acting from behind the veil of ignorance would be the principle that each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others [22, p. 53]. According to J. S. Gray, rational individuals that act from behind the veil of ignorance covering, among other things, their sexual orientation and therefore are not able to know whether they will be hetero- or homosexual would undoubtedly regard the right to marry any person regardless of his or her gender as one of basic freedoms compatible with rights and freedoms of others [21, p. 188 et seq.]. Indeed, the right to marry is a freedom whose denial results in placing people deprived of it in a disadvantaged position in comparison to people who can enjoy it. At the same time, the conferral of that freedom on groups deprived of it would not result in deteriorating the position of others. Thus, a rational person who would not be able to know to which category he or she would belong in a society would not have any grounds for deciding in favor of an unequal distribution of this right. It results therefore that there are serious moral arguments that support the view expressed by the complainants in *Joslin* that the exclusion of same-sex couples from the enjoyment of the right to marry is a consequence of cultural and social prejudice. Such an assumption, if accepted, constitutes a premise that justifies the need to adopt a dynamic interpretation of Article 23 (2) ICCPR. According to such an interpretation, the Covenant should be interpreted as a living instrument whose wording is adjustable to the needs of changing societies. As a consequence, the words «men and women» or «spouses» should be read in a modern context, where sexual orientation is a basis for human rights protection [1, p. 648].

The fact that the drafters of Article 23 (2) ICCPR did not contemplate its applying to same-sex couples should not be perceived as the conclusive argument with regard to its interpretation today. It is noteworthy that the Committee has emphasized that the Covenant should be «applied in context and in the light of present-day conditions» (Roger Judge v. Canada, Communication no 829/1998). This shows that in some cases the Covenant has been approached as a living instrument, which means that the Committee has not consistently adopted the literal interpretation and the principle *generailia specialibus non derogant* [23, p. 690].

The illustrative example for this inconsistency is the Committee's case-law on the right of conscientious objection to military service. Some early cases indicated that the right to conscientious objection cannot be derived from the over-arching right to freedom of thought, conscience and religion set forth

in Article 18 of the Covenant. In the case LTK v. Finland (185/84) the author claimed to be a victim of the violation of Article 18 of the Covenant due to the fact that his status as conscientious objector to military service had not been recognized and in consequence he had been criminally prosecuted for his refusal to perform military service. The Committee found the complaint inadmissible by arguing that the author was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service. In particular, the Committee held that the Covenant does not provide for the right to conscientious objection. Neither Article 18 nor Article 19 (freedom of expression) of the Covenant can be construed as implying that right, especially when one takes into account the wording of Article 8 (3)(c)(ii) of the Covenant [LTK v. Finland (185/84) point 5.2]. Article 8 (a) sets forth the prohibition of forced or compulsory labor. However Article 8 (3)(c)(ii) states that the notion of forced or compulsory labor does not preclude compulsory military service or alternative service «in countries where conscientious objection is recognized». The literal interpretation of this provision clearly suggests that the recognition of the right to conscientious objection to military service has been left to the discretion of the State-Parties.

Nevertheless, the Committee reversed this view in its General Comment 22. Namely, the Committee observed that many individuals have claimed the right to conscientious objection to military service on the basis that such right derives from their freedom under Article 18. «In response to such claims, a growing number of states have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to the right to conscientious objection, but the Committee believes that such a right can be derived from Article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.» [para. 11] This reasoning have been confirmed in the case-law [see: Yoon and Choi v. Republic of Korea (1321-22/04), point 8.4; Jeong et al v. Republic of Korea, 1645-1741/07), point 7.3, 7.4; Atasoy and Sartuk v. Turkey (1853-54/08) point 10.4, 10.5].

The above example of the use of dynamic interpretation shows that the Committee is prone to abandon the literal approach provided that clear and unequivocal common trends in development of a human rights have already occurred at national and/or regional level However, it. can hardly be expected, that it would be willing to play a pioneering role in attempting to advance such a development in case where a trend is only emerging. Given the worldwide controversy around the issue of legalizing same-sex marriages and the subsidiary role of international judicial and quasi-judicial bodies in ensuring respect for human rights, an attempt to speed up the development by imposing a standard on State-Parties should not be regarded as desirable.

Conclusion. In its only authoritative interpretation of Article 23 (2) ICCPR the Committee found that the right to marry does not apply to same-sex couples. In order to support this view, the Committee employed the

literal interpretation of the provision in question. Given the primary role of this method of interpretation in international law, as laid down in Article 31 VCLT and substantiated by ethical argumentation, the approach adopted by the Committee is to be regarded as tenable. Nevertheless, the wording of Article 23 (2) ICCPR as such does not preclude the adoption of its dynamic reading. especially if one takes into account that the phrase «men and women» was designed by the drafters of the Covenant to preclude the discrimination of women with regard to the right to marry rather than to explicitly exclude same-sex couples from its scope of protection. Furthermore, there are strong moral grounds related to the prohibition of arbitrary discrimination of same-sex couples that can be adduced in favor of the dynamic approach. However, given the controversy around the issue of same-sex couples, it would be appropriate for the Committee to respect the decisions of national lawgivers and not to hasten the possible development of the right to marry towards the recognition of same-sex marriages.

REFERENCES

1. Gerber, P., Tay, K., & Sifris, A. (2015). Marriage: A Human Rights for All? *Sidney Law Review*. vol. 36, *4* [in English].
2. Paladini, L. (2014). Same-sex Couples Before Quasi-Jurisdictional Bodies: The Case of the UN Human Rights Committee, in: D. Gallo, L. Paladini, P. Pustorino, Same-Sex Couples before National, Supranational and International Jurisdictions. Berlin, Heidelberg [in English].
3. Burchill, R. (2004). Rights of the Family and Children, in: A. Conte, S. Davidson, R. Burchil, Defining Civil and Political Rights. The Jurisprudence of the United Nations Human Rights Committee. Aldershot [in English].
4. Ghandi, S. (1995). Family and Child Rights, in: D. Harris, S. Joseph, The International Covenant on Civil and Political Rights and United Kingdom Law. Oxford [in English].
5. Minister of Home Affairs v. Fourie; Lesbian and Gay Equality Project v. Minister of Home Affairs (2005). Retrieved from http://www.saflii.org/za/cases/ZACC/ 2005/19.html [in English].
6. Nowak, M. (2012). U.N. Covenant on Civil and Political Rights: CCPR Commentary. Kehl [in English].
7. Sękowska-Kozłowska, K. (2005). Ochrona małżeństwa i rodziny, in: R. Wieruszewski (Ed.), Międzynarodowy Pakt Praw Obywatelskich (Osobistych) i Politycznych. Warszawa [in Polish].
8. Human Rights Council, Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity, 19th session, UN Doc A/HRC/19/41 (17 November 2011), para. 68. Retrieved from https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/170/75/PDF/G1117075.pdf?Op [in English].
9. Garlicki, L. (2010). Prawo do zawarcia małżeństwa. L. Garlicki (Ed.), Konwencja o Ochronie Praw Człowieka i Podstawowych wolności. T. I. Komentarz do artykułów 1-18. Warszawa [in Polish].
10. Wyrozumska, A. (2006). Umowy międzynarodowe. Teoria i praktyka. Warszawa [in Polish].
11. Morawski, L. (1997). Wstęp do prawoznawstwa. Toruń [in Polish].
12. Torres Vasquez, A. (2001). Introdicción al Derecho. Teoría general del derecho. Bogotá [in Polish].
13. Badeni, G. (2006). De derecho constitucional, T. 1. Buenos Aires [in English].

14. Kałduński, M. M. (2005). Kilka słów na temat interpretacji w prawie międzynarodowym. Uwagi na tle uchwały Sądu Najwyższego z 19 lutego 2003 r. (I KZP 47/02). L. Morawski (Ed.) Wykładnia prawa i inne problemy filozofii prawa. Toruń [in Polish].
15. Hesse, K. (1993). Grundzüge des Verfassungsrechts der Bundesrepublik chland. Heidelberg [in Duets'].
16. Bidart Campos, G. J. (1989). Teoría General de los derechos humanos, México.
17. Pavcnik. M. (2005). Interpretation and Understanding of the Constitution, in: P. Winczorek, Teoria i praktyka wykładni prawa. Warszawa [in Polish].
18. Frankowska, M. (2007). Prawo traktatów. Warszawa [in Polish].
19. Morawski, L. (2005). Zasady wykładni prawa. Toruń [in Polish].
20. Pietrzykowski, T. (2005). Etyczne problemy prawa. Zarys wykładu. Katowice [in Polish].
21. Gray, J. S. (2004). Rawls' Principle of Justice as Fairness and its Application to the Issue of Same-Sex Marriage. *South African Journal of Philosophy*. Vol. 23, *2* [in English].
22. Rawls, J. (1999). A Theory of Justice. Revised Edition, Cambridge. Massachusetts [in English].
23. Joseph, S., Castan, M. (2013). The International Covenant on Civil and Political Rights: Cases, Materials and Commentary. Oxford [in English].

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Якушевич А. Доктринальне тлумачення статті 23 (2) Міжнародного пакту про громадянські і політичні права.

Постановка проблеми. *Питання легалізації одностатевих шлюбів є одним з найбільш дискусійних аспектів реалізації права людини на шлюб та сім'ю. Його дискусійність обумовлена широким переліком релігійних, політичних, соціальних і культурних чинників, а також кардинальними розбіжностями національних законів, які регулюють статус одностатевих пар. У різних країнах позиція законодавця щодо одностатевих шлюбів коливається від кримінальної відповідальності до всебічного сприяння. Враховуючи розбіжності у прийнятті правових рішень на національному рівні, виникає питання, чи гарантоване право на шлюб статтею 23 (2) Міжнародного пакту про громадянські та політичні права (МПГПП), яка гарантує право людини на шлюб.*

Аналіз останніх досліджень і публікацій. *З огляду на неабияку соціальну гостроту проблематики одностатевих шлюбів, вона знайшла висвітлення в наукових працях багатьох сучасних правників. Водночас, попри великий науковий інтерес, питання одностатевих шлюбів все ще далеке від свого остаточного вирішення.*

Метою *статті є визначення сутності одностатевих шлюбів в аспекті статті 23 (2) МПГПП.*

Матеріали та методи. *В основу статті покладено широкий перелік методів наукового пізнання, що дало змогу розглянути явище одностатевих шлюбів у поєднанні його соціально-правових аспектів. Емпіричну основу роботи становлять акти міжнародного та національного законодавства, матеріали судової практики, сучасні наукові дослідження з питань сім'ї та шлюбу.*

Результати дослідження. *Спираючись на відповідні рішення Комітету ООН з прав людини та їхню критику в правовій доктрині, здійснено доктринальне тлумачення статті 23 (2) МПГПП у світлі директив Віденської конвенції про право міжнародних договорів.*

Висновки. *Доведено, що хоча в принципі формулювання статті 23 (2) МПГПП не перешкоджає її динамічному тлумаченню, яке передбачає зобов'язання держав-учасниць визнавати одностатеві шлюби, загальне прийняття такого підходу нині є передчасним через відсутність міжнародного консенсусу в питаннях шлюбу та сім'ї.*

Ключові слова: права людини, цивільні права людини, право на шлюб, юридичне тлумачення, принцип недискримінації.