Decision 154/2008. (XII. 17.) AB

IN THE NAME OF THE REPUBLIC OF HUNGARY

In the matter of petitions seeking a posterior examination of the unconstitutionality of a statute and the establishment of an unconstitutional omission of legislative duty – with concurring reasonings by *dr. Elemér Balogh* and *dr. László Kiss* Judges of the Constitutional Court and with dissenting opinion by *dr. András Bragyova* Judge of the Constitutional Court – the Constitutional Court has adopted the following

decision:

1. The Constitutional Court holds the following: it is not unconstitutional to establish the legal institution of registered partnership for persons of the same sex.
2. The Constitutional Court establishes the unconstitutionality of the Act CLXXXIV of 2007 on registered partnership on the basis of the reasons set forth in the reasoning, therefore the Constitutional Court annuls it as from the day of its promulgation, thus the Act shall not come into force.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Reasoning

I

The Constitutional Court received six petitions in the respect of the Act CLXXXIV of 2007 on registered partnership (ARP), promulgated in the Official Gazette 2007/186 on 29 December, 2007, with the planned date of coming into force at 1 January, 2009.

1. The first petitioner asked for the annulment of Section 1 para. (1), Section 2 paras (1)-(2) and Section 3 para. (2) of ARP. In addition, the petitioner requested the Constitutional Court to annul certain provisions of Section 15 of the Act on the amendment of the Law-Decree 17 of 1982 on the marriage procedure and on bearing names (hereinafter: LDM): the Section introducing Section 26/G para. (3) of LDM ("The registration of the partnership is a public and solemn event."), and the second sentence of the section regulating Section 26/H para. (1) of LDM ("The witnesses are to be called by the to-be-partners.").

According to the petitioner's reasoning, Section 2 para. (2) of ARP identifying the registered partnership with the marriage is unconstitutional. As, in fact, there are no differences between the two legal institutions concerning their essence, the formal criteria of their establishment and their legal effects, the registered partnership relation "weakens the institution of marriage protected in the Constitution, discriminating it and finally making it impossible to maintain". As argued by the petitioner, with the adoption of ARP, the legislation established the institution of "almost marriage" which need not be interpreted any more as the union in life of a man and a woman, as it can be established between persons of the same sex as well". In the opinion of the petitioner, the general public will not be able to distinguish the two legal institutions because of their extreme similarity (in particular due to the newly introduced Section 36/G para. (3) of LDM: "The registration of the partnership is a public and solemn event."), and it is expected to cause distortions in the "public opinion and the –practice" also leading to weakening the institution of "real" marriage. The petitioner aimed to support his arguments by citing Decision 14/1995. (III. 13.) AB. According to the petitioner's arguments, Article 15 of the Constitution protects not only the name of the marriage, but on the basis of

the Constitution marriage “is to be considered as protected also in the respect of its real substantive and procedural elements as well as its cultural formalities”. This is why it is unconstitutional to introduce a legal institution which is almost identical with and similar to marriage, with the exception of its name. The petitioner also complains about the fact that the registered partnership is established the same way as marriage, but it can be terminated in a simplified way by a notary public, which is – according to the petitioner – a “serious injury and a discrimination” of the institution of marriage.

According to the petitioner, there is an internal inconsistency in the Act, as Section 3 para. (2) orders to apply to the dissolution of registered partnerships the rules pertaining to the dissolution of marriages, while Section 4 provides for a simplified way of dissolution implemented by a notary public.

However, in the opinion of the petitioner, there is an omission in ARP regarding the lack of guaranteeing the freedom of religion and conscience of the affected officials (registrars, public notaries), therefore they “must contribute – despite of their concerns of conscience, or cultural, religious and moral concerns – to the establishment or the dissolution of a legal institution introduced by a statute ranked lower, besides the institution of marriage”.

The petitioner holds that the Act imposes a negative discrimination on the autonomous organisations of the church and the clergymen, as it is quite evident, that the persons who establish registered partnerships "with the statutory background of ARP, will strive for injuring or weakening the autonomy and the independence of the ecclesiastical organisations that do not support or refuse, disqualify the institution of registered partnership and marriage between heterosexual and homosexual partners, in accordance with their teachings and their self-interpretation”.

Finally, according to the petitioner, ARP can be regarded as the amendment of Article 15 of the Constitution, but the Parliament adopted the institution of registered partnership with simple majority in the form of an independent Act, which is unconstitutional in line with the Decisions 65/2007. (X. 18.) AB and 75/2007. (X. 19.) AB.

Thus the petitioner based the petition on Article 2 para. (1), Article 15 and Article 60 para. (1) of the Constitution and – without quoting Article 70/A para. (1) of the Constitution – made a reference to the prohibition of discrimination as well.

2. The second petitioner challenged ARP by alleging the violation of Article 2 para. (1), Article 15, Article 67 and Article 70/A of the Constitution as well as of Article 16 of the Universal Declaration of Human Rights and of Article 12 of the European Convention on Human Rights.

In the opinion of the petitioner, only marriage deserves protection by the State and it is useless and detrimental to legal certainty to duplicate the content of marriage (Section 2 of ARP). As marriage is the union for life of a man and a woman, the establishment of a parallel legal institution with content identical with that of marriage would be a violation of Article 15 of the Constitution. As held by the petitioner, another regulation “destroying” the institution of marriage is the same solemnity required by the amendment of LDM in the case of both the marriage ceremony and the registered partnership.

The petitioner – just like the first one – holds ARP to be a covert amendment of the Constitution, as – in his opinion – it’s content is essentially extending the possibility of marriage to couples of the same sex.

According to the petitioner, empowering in Section 3 of ARP the public notary – who is unable to gain deeper information about the intentions of the parties – to terminate the registered partnership may result in injuring the interests of the weaker party, in particular, of the affected child, who is not the common child of the parties, violating Articles 15, 16 and 70/A of the Constitution. The petitioner holds that the interests of the affected minors – and this way Articles 16 and 70/A of the Constitution – are violated by the amendments of LDM by Section 15 of ARP, especially by the introduction of Section 26/C para. (3) ("Based on a father's declaration of recognition, the male partner can only be regarded as the father of the child if the partnership is registered within six months from the date of making the declaration.”) In the opinion of the petitioner, this provision would induce any mother

committed in the respect of her child's future, to refrain from having her partnership registered even in the case when the father does not want to marry her. Refraining from having the partnership registered would actually help the settlement of the child's status and of the material conditions of keeping the child by way of recognition of fatherhood.

Finally, the petitioner referred to a conflict between Sections 17, 11 and 15 of LDM and Section 615 para. (2) of the Act IV of 1959 of the Civil Code (hereinafter: CC), however, he failed to identify the essence of the alleged conflict and the injured constitutional provision.

3. The third petitioner primarily claimed the formal unconstitutionality of ARP in the form of invalidity under public law, due to a serious procedural anomaly. According to the petitioner, the failure to put the draft of the Act subject to a professional-society debate and consultation in the public administration, Article 2 para. (1), Article 19 para. (2), Article 35 para. (1) items a) and b), Article 36, Article 37 para. (2), Article 50 para. (1) and Article 51 para. (1) of the Constitution as well as Sections 19-20, Sections 27-28, and Sections 31-32 of the Act XI of 1987 on the Legislation (hereinafter: AL), and Section 39 item e) of the Act LXVI of 1997 on the structure and the supervision of courts [in the context of Article 50 para. (5) of the Constitution] were injured.

However, the petitioner holds that also the content of ARP violates the Constitution. In his opinion, the Act is in conflict with Article 2 para. (1), Article 7 para. (1), Articles 15-16, Article 54 para. (1), Article 67 para. (1) and Article 70/A para. (1) of the Constitution.

In the opinion of the petitioner, as follows from the above mentioned provisions of the Constitution, the legislation may not attach the same legal effects to the registered partnership of persons of the same sex as to the marriage of the persons of different sex. According to the arguments of the petitioner, concretely mentioning Article 54 para. (1) of the Constitution, the freedom of marriage only pertains to links between men and women, as this is "in line with human dignity and this is protected by the right to human dignity". In addition, as held by the petitioner, regulating the registered partnership of persons of the same sex may act against the extra protection that marriage deserves. This way the purpose and the aim of marriage would be neglected, arbitrarily undermining the institution of marriage, violating not only Article 15 but Article 70/A of the Constitution as well. According to the petitioner, ARP violates Article 16 of the Constitution on the protection of the youth and the rights of the children enshrined in Article 67 of the Constitution, in particular the interests of minors granted by the Constitution as "standing above everything else".

4. The fourth petitioner asked the annulment of ARP on the basis of the violation of Article 15 of the Constitution. The petitioner holds that the only aim of ARP is to create an institution essentially identical with marriage for the persons of the same sex.

5. Also the fifth petitioner alleged the violation of Article 15 of the Constitution by ARP. In the opinion of the petitioner, Section 2 of the Act institutionalizes the marriage of persons of the same sex, which is incompatible with the constitutional protection of the institution of marriage. The petitioner also holds that it is unacceptable and "against marriage" that a registered partnership can be an obstacle of marriage and that ARP orders to apply the Act on Family Law as the background Act in the respect of registered partnerships.

In addition, the statute is considered to violate Article 67 para. (1) of the Constitution, as the prohibition of adopting a common child does not prevent the partners of the same sex to raise a child together. As the proper physical, intellectual and moral development of the child cannot be secured in such a situation, the legislation should not support it by acknowledging the living together of persons of the same sex as a *quasi* marriage. As argued by the petitioner, it is discriminative to make a legislative differentiation between registered and non-registered partnerships. In addition, Section 2 para. (2) of ARP is too general, violating the requirements specified in Article 2 para. (1) of the Constitution. To

make the legal uncertainty even greater, several other laws should be amended to make the regulation complete, but there are no guarantees to have them amended until the taking force of ARP. In addition, the petitioner also referred to the violation of legal certainty in the respect of the regulating registered partnerships outside the system of the Civil Code.

The petitioner alleges the violation of AL by ARP – without specifying the actual provisions of the statute concerned – as no calculations have been performed about the budgetary costs and the social effects of extending the scope of the institution of widows' pension to registered partners.

6. The sixth petitioner also referred to the violation of Article 15 of the Constitution, asking for the annulment of ARP. According to the petitioner, the covert aim of the Act is to recognize the marriage of persons of the same sex, which is intolerable on religious and moral basis.

On the basis of Section 28 para. (1) of amended and consolidated Decision 3/2001 (XII. 3.) Tü. by the Full Session on the Constitutional Court's provisional rules of procedure and on the publication thereof (hereinafter: the CCRP), the Constitutional Court consolidated the petitions and judged them in a single procedure, with regard to their connected subjects.

II.

1. The relevant provisions of the Constitution in the respect of the petitions are as follows:

"Article 2 (1) The Republic of Hungary is an independent democratic state under the rule of law."

"Article 7 (1) The legal system of the Republic of Hungary accepts the generally recognised principles of international law, and shall harmonise the country's domestic law with the obligations assumed under international law."

"Article 15 The Republic of Hungary shall protect the institutions of marriage and family."

"Article 16 The Republic of Hungary shall make special efforts to ensure a secure standard of living, instruction and education for the young, and shall protect the interests of the young."

"Article 54 para. (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights."

"Article 60 (1) In the Republic of Hungary everyone has the right to the freedom of thought, freedom of conscience and freedom of religion."

"Article 67 para. (1) In the Republic of Hungary all children have the right to receive the protection and care of their family, and of the State and society, which is necessary for their satisfactory physical, mental and moral development."

"Article 70/A para. (1) The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever."

2. The provisions of ARP concretely challenged in the petitions:

"Section 1 (1) A registered partnership is established when two persons over the age of eighteen, being jointly present, personally declare in front of the registrar their intention to live together as registered partners."

"Section 2 (1) With regard to the questions not regulated in this Act of Parliament, the rules on marriage contained in the Act IV of 1952 on Marriage, Family and Guardianship (hereinafter: the AMFG) shall be applicable to the registered partnership as well. The rules of AMFG on adoption as common child and on bearing name by the spouses shall not be applicable to the registered partners.

(2) Unless an Act of Parliament provides otherwise,

a) the rules on marriage shall be applicable appropriately to registered partnership,

b) the rules on the spouses shall be applicable appropriately to registered partners,

c) the rules of widows shall be applicable appropriately to the registered partner who lives longer than the deceased partner,

d) the rules on the divorced person shall be applicable appropriately to the person whose registered partnership has been terminated,

e) the rules on the married couple shall be applicable appropriately to the registered partners."

"Section 3 para. (1) The registered partnership shall cease to exist when any of the partners die, or the registered partners get married, and when the registered partnership is terminated.

(2) The provisions on the dissolution of marriage shall be applicable to terminating the registered partnership."

"Section 15 para. (1) The following Chapter II/A, title, subtitle and Sections 26/B-26/H shall be added to LDM: (…)

Section 26/C (3) Based on a father's declaration of recognition, the male partner can only be regarded as the father of the child if the partnership is registered within six months from the date of making the declaration. (…)

Section 26/G (3) The act of registering the partnership is an open and solemn act.

Section 26/H (1) (…) The witnesses are to be called by the to-be-partners."

"Section 16 This Act of Parliament shall enter into force on 1 January 2009."

"Section 17 (1) In the Act IV of 1959 on the Civil Code,

(…)

11. the text "spouse" shall be replaced by "spouse or registered partner" in Section 607 para. (4), Section 615 para. (2), Section 616 para. (1), Section 616 para. (2), the second sentence of Section 616 para. (3) and Section 671 para. (1),

(…)

15. the text "gets married shall be replaced by "gets married or enters into a registered partnership" in Section 615 para (2).

(…)

III.

The petitions are justified for the following reasons:

The Constitutional Court performed a prior examination of whether the review of the Act of Parliament promulgated but not yet put into force and challenged by the petitioners was within the competence of the Constitutional Court.

Based on Section 42 para. (2) of the Act XXXII of 1989 on the Constitutional Court (hereinafter: the ACC), according to the practice of the Constitutional Court, an Act of Parliament (statutory provision) promulgated but not yet put into force can be the subject of an abstract posterior normative review. In the case of establishing the unconstitutionality of the challenged provisions, the Constitutional Court declares that the statute shall not take effect as the result of establishing the unconstitutionality [Decision 28/1993. (IV. 30.) AB, ABH 1993, 220, 225.; Decision 19/1999. (VI. 25.) AB, ABH 1999, 150, 158.; Decision 14/2002. (III. 20.) AB, ABH 2002, 101, 114.].

With regard to the above, the Constitutional Court performed the constitutional review of ARP on the basis of the consolidated petitions.

IV.

1. The Constitutional Court – examining the merits of the contents of the challenged Act and of the petitions – first performed an overview of the meaning of the State's constitutional obligation of protecting the institution of marriage.

1.1. As declared in Article 15 of the Constitution, the Republic of Hungary shall protect the institutions of marriage and family. The mare fact that the institution of marriage and family had been transposed from Chapter VIII to Chapter I as early as in the amendment of the Constitution in 1972, and that the republican Constitution of 1989 maintained it among the "General provisions", listing the fundamental values of the democratic State under the rule of law, is a significant sign about the Constitution holding marriage and the family to be among the fundamental institutions of the Hungarian society.

Article 15 of the Constitution, stating that the Republic of Hungary shall protect the institutions of marriage and family, not only declare an objective and a task of the State – it also establishes an objective obligation of protecting those institutions. "No subjective right can be formed on the basis of this provision, since it establishes the State's obligation to protect marriage and the family: this is an objective of the State to protect the institutions of marriage and family by way of legislation adopting statutes" [Decision 7/2006. (II. 22.) AB, ABH 2006, 181, 207.]. This obligation of protection is enshrined in the Constitution in the form of taking for granted the concepts of both the marriage and of the family; it does not specify concrete rights of the spouses and of the families, and it does not determine concrete tools and obligations of protection for the State. As pointed out in the Decision 48/1998. (XI. 23.) AB: "In some cases, the Constitution specifies the institutionalised protection obligations, while in other cases, they are not specified so; it also happens that the subjective right side remains in the background; and regardless of the differences in wording and emphasis, the fundamental rights contain both subjective rights and – more extensive – objective obligations of the State" (ABH 1998, 333, 341).

In the Decision 14/1995. (III. 13.) AB, the Constitutional Court interpreted Article 15 of the Constitution in line with the general approach of the society and it declared that marriage "typically is aimed at giving birth to common children and bringing them up in the family in addition to being the framework for the mutual taking of care and assistance of the partners. (…) The institution of marriage is constitutionally protected by the State also with respect to the fact that it promotes the establishment of families with common children. This is the reason why Article 15 of the Constitution refers to the two subjects of protection together: The Republic of Hungary protects the institutions of marriage and the family" (ABH 1995, 82, 83). As established in the cited Decision: „In recent decades (…) movements have been started to protest against negative discrimination with respect to homosexuals." In addition, changes can be observed in the traditional family model, especially in terms of the durability of marriages. All these are not reasons for the law to diverge from the legal concept of marriage which has been preserved in traditions to this day, which is also common in today's laws and which, in addition, is in harmony with the notion of marriage according to public opinion and in everyday language. Today's constitutions – among them the Hungarian Constitution concerning its provisions on marriage and the family – consider marriage between a man and a woman as a value and protects it (Articles 15, 67 and 70/J of the Constitution)" (ABH 1995, 82, 83). Thus, in the interpretation of the Constitutional Court, the different sex of the spouses is a constituent element of the concept of marriage. Accordingly, only the couples of partners of different sexes have the right to marriage – based on Article 54 para. (1) of the Constitution. As pointed out repeatedly in the Decision 37/2002. (IX. 4.) AB: "As both heterosexual and homosexual orientations form part of the essence of human dignity, there must be exceptional grounds for making a distinction between them and treating differently the dignity of the persons concerned. Such an exceptional case is, for example, the distinction of homosexual orientation in the respect of the right to marriage [Decision 14/1995 (III. 13.) AB, ABH 1995, 82, 84]." (ABH 2002, 230, 245) Accordingly, also the subsequent decisions of the

Constitutional Court [Decision 65/2007. (X. 18.) AB, ABH 2007, 726; Decision 75/2007. (X. 19.) AB, ABH 2007, 731] maintained the position stating that the institution of marriage is protected in Article 15 of the Constitution as the life union of a man and a woman, and this position is still maintained.

1.2. The outlined practice and the position of the Constitutional Court are in line with the provisions of the most important international treaties on human rights that also interpret marriage as the life union of a man and a woman [Article 16 of the UN Universal Declaration of Human Rights; Article 12 of the European Human Rights Convention (hereinafter: EHRC); Article 23 of the International Covenant on Civil and Political Rights].

Several decisions of the European Court of Human Rights (hereinafter: ECHR) has dealt with the problems connected directly or indirectly to the petition. For example, it examined the question of changing the birth certificate of the persons whose original sex has been modified by way of a medical intervention (transsexual persons) (judgement Nr. 9532/81 of 17 October, 1986 in the Rees v. United Kingdom case, and the judgement Nr. 10843/84 of 27 September, 1990 in the Cossey v. United Kingdom case). As stressed by the ECHR in these cases, the right to marry can be exercised on the basis of the rules specified in the national legal systems of the States parties to EHRC. Restricting the right to marry in the case of persons of the same sex cannot be regarded as a restriction of the essential content of the right granted in Article 12 of EHRC. So far, four States parties to the EHRC allowed the marriage of persons of the same sex. However, as underlined by the ECHR, such a decision only reflects the actual attitude of the State in question regarding the role of marriage in society, and no such obligation may be deducted from the interpretation of the rights granted by EHRC (decision of 28 November, 2006 as to the admissibility of the case R. and F. v. United Kingdom Nr. 35748/05). Later on the practice of ECHR related to Article 12 has been changed in the respect of transsexual persons, interpreting the right to marry and establishing that they may marry persons of the opposite sex as compared to their new gender and not the one of their birth (judgement of 11 July, 2002 in the case Christine Goodwin v. United Kingdom Nr. 28957/95, § 100).

There are several other cases in the practice of ECHR dealing with the problems directly affecting homosexual couples, such as the decriminalisation of homosexual partnerships (judgement of 22 October, 1981 in the case Dudgeon v. United Kingdom Nr. 7525/76, or the judgement of 27 March, 2001 in the Sutherland v. United Kingdom case). The ECHR passed a judgment exempting the State in the respect of restricting the right of adoption in the case of partners of the same sex (judgement of 26 February, 2002 in the case Fretté v. France Nr. 36515/97) while in another judgement the Court condemned the State on the basis of the special circumstances of the case (judgement of 22 January, 2008 in the case E.B. v. France, 43546/02). In the judgement of 24 July, 2003 in the case Karner v. Austria (Nr. 40016/98), the ECHR condemned the defendant State because of refusing to apply the rule allowing the continuation of the tenancy for the spouse who lives longer than the deceased spouse in the case of a homosexual partner living longer than the deceased partner.

The Charter of the Fundamental Rights of the European Union – with regard to the differences in the national regulations within the Union – states only the following: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.” Thus the Charter does not prohibit the marriage of the persons of the same sex, but neither does it grant any right for them to marry – the national legal systems are authorized to find a solution. However, as established by the Court of Justice of the European Communities in the case D. and the Kingdom of Sweden v. the Council of the European Union (joined cases of C-122/99 and C-125/99), according to the definition *generally* accepted in the Member States, marriage means a union of two persons of the opposite sex.

1.3. The Constitutional Court underlines that the *freedom* of choosing one's partner, the *rights* to marry and to found a family, and the constitutional *obligation* related to the protection of marriage as a *social institution* are closely related to each other.

As stated in one of the earliest decisions of the Constitutional Court, in Decision 4/1990. (III. 4.) AB, "marriage and family is the most fundamental and most natural community of the citizens forming the society. The regulations on marriage and on the family relations were introduced by Section 5 item e) of the Act XI of 1987 on Legislation into the scope of the fundamental rights and obligations of the citizens, but it also results from Articles 15 and 67 of the Constitution, too" (ABH 1990, 28, 30). Decision 995/B/1990 AB added the following: "if the protection granted in Article 15 of the Constitution covers, as a fundamental right, the most important questions related to the legal regulation of marriage and the family, then it is evident from Article 8 para. (2) of the Constitution, that these relations can only be regulated in Acts of Parliament and the essential contents of these rights cannot be restricted. Potential statutory restrictions not affecting essential contents must be proportionate and necessary" (ABH 1993, 515, 519). In addition to the State's obligation of protecting the institution of marriage (specified explicitly in Article 15 of the Constitution), the Constitutional Court also deducted the right to *marry* from the right to human dignity [Article 54 para. (1) of the Constitution]. According to Decision 22/1992 (IV. 10.) AB: "As held by the Constitutional Court, the constitutional protection of the institution of marriage also means that the Constitution, at the same time, guarantees the freedom of marrying. As pointed out by the Constitutional Court in several decisions interpreting the constitutional right to human dignity, this right, as a manifestation of the general personality right, includes the right to self-determination as well[Decision 8/1990. (IV. 23.) AB and Decision 57/1991. (XI. 8.) AB]. As the right to marry is a part of the right to self-determination, this right is under constitutional protection on the basis of Article 54 para. (1) of the Constitution." (ABH 1992, 122, 123)

In the field of securing the right to marry, the primary and minimum obligation of the State is to establish the conditions and the legal framework needed for marrying and founding a family. Accordingly, the legislation may not terminate the institution of marriage, it may not make marrying impossible and it must be especially circumspect in defining the potential preconditions and obstacles of marriage [c.p. for example Decision 22/1992. (IV. 10.) AB, ABH 1992, 122]. However, the obligation of protecting the institution of marriage, as regulated in Article 15 of the Constitution, also implies that the State should not create any legal situation where the position of married couples is, as a whole, less favourable that that of non-married persons or couples. Moreover, the fact that the Republic of Hungary protects the institution of marriage requires a positive approach, activity and support. However, it is not possible to define the upper limit (the maximum extent) of protecting the institution of marriage and family by the State, and neither is it a constitutional question. The State enjoys a relative liberty, within the limits of the Constitution, to decide about its "marriage and family policy" and about the legal tools used in it.

1.4. In the opinion of the Constitutional Court, the right to self-determination results not only in the right to marry but also in the closely connected right to establish a partnership for life.

Nevertheless, as the Hungarian Constitution – in compliance with the international conventions – provides an explicit constitutional protection only for the institution of marriage, the legislation is allowed to adopt different regulations concerning the spouses and life partners who do not get married. As established in Decision 1097/B/1993 AB: "As the relation of life partners – in contrast with the institution of marriage – does not enjoy an explicit constitutional protection, using a flat by the spouses cannot be compared – in terms of constitutional law – to using a flat by life partners and the legal regulations pertaining to such use. Thus, on the basis of the Constitution, these flat uses are not comparable categories (…)" (ABH 1996, 456, 464).

At the same time, the Constitutional Court also established that, according to the Constitution, the marriage bond as a form of living together is to be protected not as a "sole" (exclusive) form, but as a

"special" form (worth of extra *constitutional* protection), i.e. the Constitution does not preclude the *statutory* protection of partnerships other than marriage. Accordingly – taking into account the need to settle the legal status of different types of partnerships – the legislation may recognize and grant statutory protection for forms of partnerships other than marriage. It is within the legislation's right of discretion to assess the statutory recognition of specific forms of partnerships as well as the need and the required extent of protection. Thus, the legislation may regulate in a differentiated way and to different extent the rights and obligations of persons who live in *de facto* partnerships with a looser or stronger binding force, for shorter or longer periods, the persons living in registered partnerships on one hand, and with regard to the spouses on the other hand.

As the Constitution itself does not grant concrete subjective rights or obligations for the spouses, the legislation enjoys a wide discretion in this respect as well: it may decide on the tools (providing benefits, direct or indirect support), the extent and the obligations to be applied to "protect" and support the institutions of marriage and family. At the same time, there is no equality between the abstract obligation to provide extra protection for the institution of marriage on the one hand, and the totality of various concrete supports and benefits supplied to the spouses on the other hand. Thus it is not unconstitutional if the legislation attaches certain legal effects only to the marriage, and neither is it unconstitutional to order the application of certain rules pertaining to marriage to other forms of partnerships – based on case-by-case evaluation and exactly identifying their contents and the potential differences – as well, as long as the contents of this form of partnership is not identified with that of marriage.

2. After having reviewed the practice of the Hungarian Constitutional Court regarding the institution of marriage, the Constitutional Court examined in the petitions those requests, which challenged ARP on the basis of Article 15 and the connected Article 2 para. (1) of the Constitution. In the opinion of the petitioners, a legal institution deceptively similar to marriage is not compatible with the constitutional provision on the protection of marriage. In addition, as held by the petitioners, since marriage is a life union of a man and a woman, it is unconstitutional to allow persons of the same sex to enter into a registered partnership the legal effects of which are essentially the same as of marriage. In the opinion of the petitioners, a legal institution that could be mixed up with marriage would result in legal uncertainty.

2.1. For long time, the legal regulations by the State have not acknowledged – as a legal institution under family law or civil law – any form of living together other than marriage, however, in the recent decades many countries throughout the world opted for implementing legislative changes to react to the changes in the society.

In the ongoing legal process of recognizing partnership relations – ARP being a part of this process – , several models have been developed. In many countries (including Hungary) *de facto* partnership relations are acknowledged without any registration, having statutes, based on the judicial practice, providing to such partnerships legal effects similar to the ones typical in marriages – primarily in the field of property law. Today, the institution of registered partnership exists in many countries, in most cases for persons of the same sex, and in some cases for persons of the opposite sex as well – first introduced in the Nordic countries (Denmark in 1989, Norway in 1993, Sweden in 1994 and Finland in 2001). In these countries, the registered partnership ("life partnership", etc.) grants the partners essentially the same rights as in the case of marriage with differences remaining primarily in the field of the adoption of children. In France, the "civil contract of solidarity" (PaCS) available for couples of both the same and the opposite sex has been introduced in 1999. Although it offers many advantages, it is of basically contractual nature, also marked by the fact that it can be terminated unilaterally. Many advantages are linked to property, for example, tenancy can be inherited in the case of the decease of one of the partners, or the joint liability to repay the debt payable to a third person. In addition, it

implies some social rights as well, such as the right to mourning leave if one of the partners die, and the persons working in the public sphere may ask to be employed at a location closer to their partner. However, there have been intentional efforts to distinguish this status from marriage. For example, the civil law status of the partners does not change: they remain singles.

The solution introduced in Germany in 2001 had offered the registration of the partnership only for persons of the same sex, and then the same restriction was applied in the United Kingdom as well for the institution of the registered partnership introduced in 2005. Thus this institution introduced recently in most of the countries is – with regard to the primary objective of the regulation – a legal institution established for the person of the same sex, replacing the institution of marriage not available for them.

As far as the extension of the rights of the persons of the same sex is concerned, the registered partnership offers more than the previous solutions: almost marriage but less than that. This is reflected in the differences maintained in comparison with marriage (for example, the prohibition of adopting children by couples of the same sex, or of participating in a human reproduction process).

Beyond the possibility of registered partnership, in some countries, the marriage of persons of the same sex is also allowed (e.g. the Netherlands, Belgium, Spain, Canada, South-Africa, two States of the USA and Norway from January 2009 on). However, this trend seems to be stalled for example in the USA, where in 1996 a Federal Act was adopted on the protection of marriage — Defense of Marriage Act — defining marriage as the relation between a man and a woman. At present, the constitutions of more than twenty federal States expressly prohibit the recognition of the marriage of persons of the same sex. On 4 November, 2008, California joined the above group of States, as the referendum held together with the presidential elections amended the constitution with the provision that “only a man and a woman are allowed to get married”, thus annulling the recognition of the marriage of the persons of the same sex that had been introduced six months earlier by the Supreme Court of California.

In the year 2000, the Parliamentary Assembly of the Council of Europe issued recommendation No. 1474 on the situation of same-sex couples, underlining the promotion of tolerance and the importance of the fight against homophobia, recommending, among others, to the Ministerial Committee to call upon the member states to adopt regulations on registered partnerships. This way, the legislations of the states parties were given a wide discretion in deciding when, how and to what extent they join the regulatory process. The reply to the above of 19 September, 2001 by the Ministerial Committee contained nothing more than greeting the recommendation and the proposals contained therein, and the Committee stressed the importance of increasing tolerance (CM/AS(2001)Rec1474finalE / 19 September 2001).

The Constitutional Court studied the relevant practice of some constitutional courts in Europe, including among others the decisions of the German Federal Constitutional Court (of 17 July, 2002, 1 BvF 1/01, and of 6 May, 2008, 2 BvR 1830/06), of the French Constitutional Council (of 9 November, 1999, 99-419 DC) and of the Belgian Constitutional Court (of 23 February, 2000, 23/2000, and of 23 January, 2002, 24/2002). In general, the Constitutional Courts pay a special attention to the examination of the concrete legal relations and legal institutions connected to registered partnership. The constitutional courts pointed out that the legislations listed exactly and in details the regulations in the fields of liability, maintenance, family law, inheritance, taxation and others, in the respect of which the registered partnership implies the same legal effects as in marriages, and also those ones that imply similar legal consequences.

In addition, as noted by the Constitutional Court in the judgement of 2002 of the German Federal Constitutional Court – referred to above –, one of the directing principles was the idea that the introduction of registered partnership does not violate the institution of marriage available for person of the opposite sexes as the registered partnership is an option only for the same-sex couples. However, the German Federal Constitutional Court also stressed in 2008 that the legislation had no intention to make the institution of marriage – open only for persons of the opposite sexes – and the registered

partnership – open only for same-sex couples – totally identical; the harmonisation only affected specific points and legal institution – even during the reform of the institution in 2004.

2.2. Also the Hungarian system of family law is traditionally built upon the legal institution of marriage; other forms of living together have not been recognized in the Hungarian law for a long time. The Act IV of 1977 introduced a provision (Section 578, later on: Section 578/G) to the Civil Code, settling the property relations of life partners – a man and a woman living together in a common household without marriage in an emotional and economic union. As stated by the Constitutional Court in the Decision 14/1995. (III. 13.) AB (ABH 1995, 82), the legislative act of attaching rights and obligations, in the case of persons living together in emotional, sexual and economic union, only to those partnership relations that comply with the definition specified in Section 578/G of the Civil Code (between man and woman) was contrary to the Constitution. The new statutory interpreting rule in force since 19 June, 1996 annulled the former legal regulation that had violated the constitutional prohibition of discrimination: according to Section 685/A, life partners – unless otherwise provided in a statute – are two persons living together in a common household without marriage in an emotional and economic union. From this date on, the partnership relations of the persons of both the same sex and of the opposite sexes are equally treated by the law. Placing the above definition among the interpreting regulations reflects the fact that this is a provision applicable not only in the respect of Section 578/G of CC, but in every other case when a statutory provision refers to life partners, save if a separate statute applies a different definition of life partner with regard to the special life situation regulated therein. Accordingly, until now, the relation of life partners has been recognized by the legislation as a legal relation under civil law – with primary aspects in contractual and property law.

2.3. Leaving unchanged the present rules on the *de facto* life partnership and on the legal relation of marriage, the adoption of ARP created a third option offering a chance for persons to have their partnership registered. According to the text and the reasoning of the Act of Parliament, the Hungarian solution was adopted not only for the legal regulation of the relation between persons of the same sex. The introduction of registered partnership was motivated by two joining factors already mentioned above by the Constitutional Court: the number of life partner relations between opposite-sex persons and the proportion of such partnerships as compared to marriages, and the demand for having the partnership of same-sex couples settled by the law. The institution of marriage, implying legally settled consequences – in Hungary, just as in most of the European States – is only open for opposite-sex couples. Section 1 para. (1) of ARP – without making reference to the same or opposite sexes of the two partners – is as follows: “A registered partnership is established when two persons over the age of eighteen, being jointly present, personally declare in front of the registrar their intention to live together as registered partners.” Thus, on the basis of the uniform rule in ARP, the legal recognition of the partnership relation of opposite-sex partners could be classified into three categories: a) marriage, b) registered partnership and c) life partnership. Persons of the same sex may choose from two options: either to opt for a registered partnership or to live together as life partners without registration.

3. The Constitutional Court had to form an opinion in the following questions, on the basis of the petitions: is the obligation of protecting marriage regulated in Article 15 of the Constitution violated by the undifferentiated possibility of entering into a registered partnership and by the given manner of the regulation.

3.1. As the petitioners founded their request upon the alleged sameness of the essential contents of registered partnership (hereinafter: RP) and of marriage, the Constitutional Court first examined the legal nature of RP and its relation to marriage.

The wording of ARP suggests as if RP was closer to the regulation on the existing life partner relation, being only the registered version of it. Nevertheless, the review of the regulations reveals that both the establishment of RP (registration with constitutive effect) and the contents of it make it much more similar to marriage than to life partnership. As contained in Section 2 para. (1) of ARP, with regard to the questions not regulated in this Act of Parliament – actually in all questions related to personal status and common property, with some exceptions –, the rules on marriage contained in the Act IV of 1952 on Marriage, Family and Guardianship (hereinafter: the AMFG) shall be applicable to RP as well. According to paragraph 2 of the same Section, with regard to all other statutes: Unless an Act of Parliament provides otherwise,

a) the rules on marriage shall be appropriately applicable to registered partnership,

b) the rules on the spouses shall be appropriately applicable to registered partners,

c) the rules of widows shall be appropriately applicable to the registered partner who lives longer than the deceased partner,

d) the rules on the divorced person shall be appropriately applicable to the person whose registered partnership has been terminated,

e) the rules on the married couple shall be appropriately applicable to the registered partners."

Based upon the above general rules making references and affecting the whole legal system, RP would become a "*quasi* marriage" and not a real institution of family law, and not only the regulations of family law, but all the rules found in all other statutes pertaining to the spouses and to marriage would become applicable to it – with the exceptions regulated specifically. It would mean that registered partners would enjoy the same rights as the spouses, and similarly the obligations of the spouses would be binding upon the registered partners as well. Consequently, in general, the legal effects of RP are the same as of marriage (e.g. the legal inheritance status of the registered partners, the rules on widows' pension, maintenance obligation, rules on incompatibility etc.). At the same time, the Section 685/A of the Civil Code is amended as well to provide that life partners are the persons living together in emotional and economic union in a common household without getting married or establishing RP. In addition, the closing provisions of ARP in Section 17 amend AMFG, LDM and CC as well: in the above statutes, the terms "registered partner", "registered partnership" are inserted along the terms of spouse, marriage. These amendments, together with all the statutory provisions amended through the general reference provision found in Section 2 put the "registered partner" into the status of "spouse" – in terms on contents and on the merits – creating a new personal status, which is essentially identical with that of a spouse.

The only differences remaining between marriage and RP are the following: a) Only persons of the opposite sex can get married, while a registered partnership can be formed by persons of both opposite and the same sex; b) minors over the age of 16 may marry with the approval of the court of guardianship, while a RP can only be entered by adults of full age; c) in general, the registrar may only fix the date of the marriage to a day following by at least 30 days the date of reporting the intentions of the partners, but this rule is not applicable if the partners wishing to marry each other are living in RP; d) the rules of AMFG on adopting a common child are not applicable in the case of RP, i.e. the provision "the person who has been adopted by both spouses – either jointly or one-by-one – is to be considered the common child of the spouses" is not applicable to RP; e) a registered partner may not adopt the child of the other registered partner (let it be his/her natural child or an adopted one); f) registered partner may not bear each other's name in any form; g) RP can be terminated not only by the application of the rules pertaining to the termination of marriage (divorce), but even by way of a notary public under specific circumstances (e.g. joint request, the absence of a minor or a child to be taken care of; agreement with regard to using the flat and property issues etc.).

Thus there are certain – formal – differences between marriage and RP (different age limit, certain differences regarding their establishment and termination, the rules on bearing names) and some differences of contents as well (rules on adoption).

The Constitutional Court noted that by maintaining the above differences and by ordering the application of the provision of AMFG as "background law", the legislation aimed to show that RP is an institution different than marriage, creating a new legal relation and personal status – that has not been existed before in the Hungarian law – different both from the personal status of spouses and from the legal position of the *de facto* life partners. Still the relation between RP and the constitutionally protected institution of marriage must be examined, with due account to the maintained differences and the method of regulation.

3.1.1. The Constitutional Court started with examining the provisions on adoption.

In one of its earlier decisions, the Constitutional Court established the following: marriage is typically "aimed at giving birth to common children and bringing them up in the family in addition to being the framework for the mutual taking of care and assistance of the partners" [Decision 14/1995. (III. 13.) AB]. By way of excluding joint adoption and excluding the adoption of the other partner's child, it seems that ARP merely recognises and protects the fact of two persons living together in enduring union, and the law does not intend to facilitate the establishment of a family by the registered partners, with a common child. In the case of persons of the opposite sex, adoption is not the only and not even the typical way of creating a family in the legal sense: the spouses of opposite sex may have their own natural child or they can participate in a human reproduction process (Section 167 of the Act CLIV of 1997 on Healthcare). By extending the rules on the presumption of fatherhood – contained in Section 35-44 of AMFG – to registered partners [Section 17 para. (2) items c)-k) of ARP], the registered partners of the opposite sex would enjoy the same status as the spouses with regard to the relations to their natural children and the ones born as the result of a human reproduction process. In the case of registered partners of the same sex, however, a family in the legal sense could only be the result of joint adoption (or the adoption of the other partner's child). By excluding this possibility, the legislation aims not to facilitate the formation of a family in the legal sense.

Based on the above, one may conclude that the ARP's rules on adoption with regard to persons of opposite sexes are not sufficient to create differences on the merits between the RP and marriage.

3.1.2. The Constitutional Court continued with overviewing the rules on bearing names.

Sharing names by the spouses in not only a symbol of their belonging together, it is also a deeply rooted old tradition in the society. Marital status is at the same the time the determining factor of the parties' rights to bear names. The fact of marriage does not imply any automatic obligation to change the name of the man or of the woman [Section 26 para. (1) of AMFG], but since the name can be used to show the individuality and the identity of a person, as the case may be, the name can also have a function (based on the affected person's decision) of representing one's marital status and the longing together of the partners. Based on the choice of the spouses from the options specified in the Act, the chosen name becomes the own name of the affected partner(s). [Cp. Decision 58/2001 (XII. 7.) AB, ABH 2001, 527, 562]

In contrast with marriage, ARP does not allow the registered partners to bear a common name. However, it should be noted in this respect that the partners may change their names to have a common name in the course of a public administration procedure, if they want to show their belonging together by bearing a common name. Although the rules on bearing names are more than provisions of formal importance, these rules are basically of symbolic purpose, as the spouses may also keep their own names after getting married. The fact that the spouses may show externally their belonging together from the date of the marriage also by sharing a common name, while the registered partners do not have this option cannot be regarded as a difference of such weight suitable to make a clear distinction

between the two legal institutions (marriage and RP). The differences in bearing names do not affect the essentially identical contents and functions of marriage and RP.

As a consequence, neither of the expressly maintained differences between marriage and RP could be interpreted by the Constitutional Court as a significant one suitable to verify the intentions of the legislation beyond doubt in the respect of intending to make a clear distinction in the Hungarian legal system between the new institution of RP and the institution of marriage.

3.2. Therefore, in the opinion of the Constitutional Court, the relation between RP and marriage is basically determined by the regulatory manner, by handling, in Section 1 para. (1) of ARP, the persons of the same sex and of the opposite sex as a homogeneous group and by the *general* reference rules contained in Section 2 paras (1) and (2). It is hard to be interpreted otherwise than the legislation not intending to review in details all the provisions contained in the Hungarian law about spouses (divorced persons, widows etc.), and it did not want to assess which provisions should be applied and which ones prohibited with regard to the registered partnership of persons of the same sex and of the opposite sex. The legislation performed such an assessment of the concrete provisions only in the respect of the CC, AMFG and LDM, as those statutes have been amended with the explicit provisions of ARP. Accordingly, one may conclude that ARP has created a legal relation, which is not identical with marriage with regard to all the elements and the detailed rules, but as far as their essential character is concerned, both legal relations have the same contents and function under a different name, to be applied without differentiation in the cases of the persons both of different sexes and of the same sex. As held by the Constitutional Court, the unjustified lack of differentiation results in the violation of constitutional equality declared in Article 70/A [Decision 42/2007. (VI. 20.) AB, ABH 2007, 564, 569].

Nevertheless, the Constitutional Court sees a fundamental difference between persons of the same sex and persons of the opposite sex with regard to the rights and the obligations of those who live together in registered partnerships.

3.2.1. Based on ARP, persons of the opposite sex – as already presented in the reasoning of this decision – would have three options regarding the levels of life union: the (*de facto*) life partnership that has already been existed, the marriage bond (these two having significant differences) as well as the registered partnership (RP), which falls in between of the two. Taking into account the regulatory manner applied in Section 2 of ARP, the reference to and the obligatory application of the totality of AMFG's regulations on marriage, and with regard to the fact that the maintained regulatory differences are not significant, RP can be regarded as the duplication of the legal institution of marriage for persons of the opposite sex. If the intention of the legislation was to create a kind of "intermediary institution" between marriage and life partnership (as it was indeed, according to the reasoning of the bill, in the case of persons of the opposite sex), then the new institution should be different than marriage not only in its name but also with regard to its essential elements of contents. The differentiation of the two institutions requires the application of a stricter constitutional standard in the case of opposite-sex persons. However, the legal solution chosen by the legislation – and reviewed now – would make RP a real competitor of marriage. This threat is a fundamental factor affecting the constitutional assessment of RP. In the opinion of the Constitutional Court, the obligation to protect the institution of marriage is more than merely protecting the “marriage” name. Based on the Constitution, marriage deserves real protection as far as its content is concerned. The fact that “the Republic of Hungary shall protect the institutions of marriage and family” is supported by the force of the Constitution and its prominent place in the legislative hierarchy. Placing on the same level an institution regulated in Article 15 of the Constitution and another one protected in an Act of Parliament would identify “constitutional protection” with “statutory protection”. However, as in the legal system the Constitution is at the highest level of the hierarchy, it is not possible to create on statutory level new institutions identical

with the constitutional institutions. This statement is in line with the earlier decision of the Constitutional Court, establishing that "with regard to the two institutions condensed in a single Article, the Constitution protects the institution of marriage in the first place, but it does not provide the same protection for life partnership" (Decision 1097/B/1993 AB, ABH 1996, 456, 464).

The protection regulated in Article 15 of the Constitution includes a further obligation of the State not only to protect the existing marriages but also to establish a legal environment (e.g. by offering benefits for those who live in marriage) encouraging the citizens to choose marriage from the potential forms of living together and to found families. The legislation can only protect marriage effectively against the competing life models, if the different models are actually regulated differently. In this respect, there is a danger of emptying out the obligation of constitutional protection and a legal uncertainty may also be caused, when the persons of opposite sex may choose from two institutions to have their relation acknowledged by the State, if the legal contents of the two institutions are the same, only their names are different. Thus, on the one hand, in the case of persons of opposite sex, marriage and RP have the same function and they can be regarded as "*interchangeable*" legal institutions, but on the other hand, this legal situation – putting constitutional and statutory protection on the same level – violates Article 15 of the Constitution as far as its contents and its significance is concerned. For the sake of maintaining the constitutional protection granted to marriage, partnerships intentionally and wilfully avoiding marriage should not enjoy – by way of a general reference rule – the same level of protection as marriage itself. The full spectrum of the rights and obligations vested on the spouses should not be opened for those persons who have the right to get married, still they opt not to do so. Such a step would result in the constitutionally unacceptable "degrading" of the constitutional value of marriage, causing the decreasing of its social-institutional importance.

Finally, the Constitutional Court points out in this regard: The legislation might attach special legal effects to specific legal facts (e.g. permanent life union, the official registration of the partnership, full community of property, birth of a child) within the scope of *de facto* life partnerships, on the basis of case-by-case evaluation. Consequently, it could be constitutional to establish by the legislation, in addition to *de facto* life partnership and marriage, another statutory protected form of living together by opposite-sex couples, thus creating an – essentially – intermediary institution in addition to the above ones. However, neither the general freedom of action, nor the provisions of the Constitution force any obligation to establish such an institution. With regard to certain aspects of life partnerships – if they are similar to the ones within marriage –, indirect legal regulations could also be applied, i.e. using a rule that makes reference to the applicability of a similar (analogue) rule of AMFG or of CC or another statute. Nevertheless, it is not acceptable to use a single general reference provision calling all the regulations in the legal system pertaining to marriage, the spouses etc. – the institution of marriage – and to order the "adequate" application of such provisions, thus empowering the fora of judiciary to exceptionally refrain from applying certain provisions on the basis of discretion exercised on a casual basis. This solution would lead to a serious legal uncertainty even in property law, but it is unacceptable in the questions related to personal status rights and personal conditions (where the regulations are of *peremptory* and even of *imperative* nature), in line with the requirement of legal certainty [Article 2 para. (1) of the Constitution].

3.2.2. However, it is evident that the above requirement of the constitutional protection of marriage as a fundamental social institution is not enforced with regard to those couples who do not have the right to get married because they belong to the same sex

While opposite-sex couples may choose freely from the options of "marriage or life partnership", same-sex couples do not have a legal option to choose marriage instead of life partnership. Emphasizing the fact that although the State's obligation of "protecting the institutions" of marriage and family as specified under Article 15 of the Constitution does not imply any obligation to protect the partnership forms outside the marriage bond, either in the case of opposite-sex or in the case of same-

sex couples, the permanent partnerships of the persons of the same sex – who do not have the possibility to get married – deserve recognition and protection on the basis of the right to human dignity [Article 54 para. (1) of the Constitution], and the deductible right to self-determination, the general freedom of action, and the right to the free development of one's personality [Decision 8/1990. (IV. 23.) AB, ABH 1990, 42, 45] As stated by the Constitutional Court in an earlier decision, with regard to same-sex partners: "the long-lasting life union of two persons may realise such values that make this partnership deserve legal recognition on the basis of the equal acknowledgement of the personal dignity of the affected partners, without regard to the sex of the persons who live together" (Decision 14/1995. AB, ABH 1995, 82, 84). For same-sex couples, the institution of registered partnership would offer recognition and legal protection – that they have not enjoyed so far – as compared to the *de facto* life partnership. The aim of such a legal institution – a privileged one in comparison with the *de facto* life partnership – could be on the one hand to grant registration, making it easier to prove the existence of the partnership. On the other hand, the registered partnership of same-sex couples, as the legal framework, may be filled up by the legislation with material rights and obligations – of personal and of proprietary nature – to the extent of creating a new personal status for them. In this regard, after performing and overview of details of the regulations pertaining to the spouses, the legislation could order to apply the *appropriate ones* to the registered partners of the same sex, taking into account the necessary differentiation resulting from their sexual orientation – with due regard to the requirement of treating such persons as ones of equal dignity [cp. Decision 21/1996. (V. 17.) AB, ABH 1996, 74; Decision 37/2002. (IX. 4.) AB, ABH 2002, 230].

The status of opposite-sex persons having the right to get married is not affected, injured or threatened by the registered partnership of same-sex couples. The State's obligation to protect, support, and facilitate the institution of marriage – based on Article 15 of the Constitution – can only be interpreted with regard to those persons who have the right and the possibility to get married. In their case, it would be unconstitutional to establish another legal relation "almost" identical with marriage in terms of its contents. However, with regard to same-sex persons, who may not get married according to the Constitution, the legislation should grant them a constitutional way to obtain a legal status – similar to that of the spouses – guaranteeing their treatment as persons of equal dignity [Decision 9/1990. (IV. 25.) AB, ABH 1990, 46, 48-49]. Such a new legal institution would not violate or jeopardise the extra constitutional protection of marriage (Article 15 of the Constitution) or the right of opposite-sex persons to get married, deductible from Article 54 para. (1) of the Constitution. The State's constitutional obligation to protect (recognize, support) the institutions of marriage and family would not be changed as the result of the statutory recognition of the registered partnership of same-sex couples. Marriage of opposite-sex couples, as the traditional form, would not suffer from any disadvantage because of the registered same-sex partners obtaining a status similar to that of the spouses – maintaining the differences resulting from the nature of such a partnership.

Therefore the Constitutional Court decided as established in section 1 of the holdings.

4. Based on the above, the Constitutional Court summarizes the case as follows: Section 1 of ARP, treating as a homogeneous group the partnerships of persons of opposite sex and of the same sex, as well as it's general reference rule (Section 2), making the legal institution of registered partnership identical with marriage in terms of their essential contents (legal effects), violate Article 2 para. (1), Article 15 and Article 70/A para. (1) of the Constitution.

In the opinion of the Constitutional Court, the legislation is bound to define clearly and unambiguously the purpose of the specific legal institutions, making a distinction between the similar ones. I the present case, the legislation failed to meet this obligation as it did not differentiate between the institutions adequately, not providing a recognizable distinction between RP and marriage, and between the RP of opposite-sex couples and of same-sex couples. There is no constitutional way to

adopt legislation on establishing for those who have the right to marry a legal institution that could be mistaken for the constitutionally protected institution of marriage.

Accordingly, the Constitutional Court established the unconstitutionality of Sections 1 and 2 of ARP.

However, due to the unity of the statutory regulation, there is no possibility for the Constitutional Court to annul only Sections 1 and 2 of ARP. As the consequence of establishing the unconstitutionality of, and annulling the Sections that indirectly determine the essential content of ARP, the whole legal institution would have been emptied out and it would become inapplicable, thus – with due account to the requirement of legal certainty – the whole Act of Parliament is to be annulled [cp. e.g. Decision 3/1992. (I. 23.) AB, ABH 1992, 329; Decision 8/2007. (II. 28.) AB, ABH 2007, 148]. Therefore the Constitutional Court decided as established in section 2 of the holdings.

5. According to the consequent practice of the Constitutional Court, when the statute challenged in the petition or part of it is deemed to violate a provision in the Constitution and therefore it is annulled, then the Constitutional Court does not examine the merits of the violation of any further constitutional provisions by the statutory provision already annulled. [Decision 44/1995 (VI. 30.) AB, ABH 1995, 203, 205; Decision 4/1996 (II. 23.) AB, ABH 1996, 37, 44; Decision 61/1997 (XI. 19.) AB, ABH 1997, 361, 364; Decision 15/2000 (V. 24.) AB, ABH 2000, 420, 423; Decision 16/2000 (V. 24.) AB, ABH 2000, 425, 429; Decision 29/2000 (X. 11.) AB, ABH 2000, 193, 200; Decision 38/2003. (VI. 26.) AB, ABH 2003, 829, 835] As the Constitutional Court annulled the whole ARP, it did not perform further examinations concerning other provisions of the Constitution, and neither did it examine the request aimed at establishing an unconstitutional omission of legislative duty.

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Budapest, 15 December, 2008.

Dr. Péter Paczolay
President of the Constitutional Court

Dr. Elemér Balogh
Judge of the Constitutional Court

Dr. András Bragyova
Judge of the Constitutional Court

Dr. András Holló
Judge of the Constitutional Court

Dr. László Kiss
Judge of the Constitutional Court

Dr. Péter Kovács
Judge of the Constitutional Court

Dr. Barnabás Lenkovics
Judge of the Constitutional Court, Rapporteur

Dr. Miklós Lévay
Judge of the Constitutional Court

Dr. László Trócsányi
Judge of the Constitutional Court

Concurring reasoning by *Dr. Elemér Balogh*, Judge of the Constitutional Court

I agree with the annulment of the whole of ARP as contained in section 2 of the majority decision's holdings.

I also agree with the majority position found in section 1 of the holdings, stating that regulating the legal institution of registered partnership is not unconstitutional in itself. I also accept the reasoning of the majority decision, but in my opinion the reasoning based on Article 15 of the Constitution does not

support the arguments in point IV.3.2.1 related to the requirement of applying a stricter constitutional standard in distinguishing between marriage and registered partnership.

As declared in Article 15 of the Constitution, the Republic of Hungary shall *protect* the institutions of marriage and family. The relevant provision of the Constitution guarantees joint protection for marriage and family as the most fundamental and natural community of the citizens who constitute the society.

As pointed out in the Decision 14/1995. (III. 13.) AB, in our culture and law, marriage traditionally means the life union of a man and a woman. Accordingly, this form of life union is aimed at giving birth to common children and at raising them up in the family, together with establishing a framework for the spouses living in mutual care and support. Although the ability to procreate and give birth to children is neither the defining element nor the condition of the notion of marriage, the idea that marriage requires the partners to be of different sexes is a condition that derives from the original and typical designation of marriage.

The institution of marriage is constitutionally protected by the State also with respect to the fact that it promotes the establishment of families with common children.

This is the reason why Article 15 of the Constitution refers to the two subjects of protection together: the institutions of marriage and the family. (ABH 1995, 82, 83) Let me note in the context of the cited decision of the Constitutional Court: surely, it is not by coincidence that in the Hungarian language the term "marriage" ("*házasság"*) is rooted in the word "house" ("*ház"*), referring to the location of the joint household where the partners – who are naturally of opposite sex – join their lives to found a family.

I hold that the constitutionally protected legal institution of marriage is an important element of the internal value hierarchy of our Constitution, a constitutional value the safeguarding and the protection of which is the constitutional obligation of the State. As stated by the Constitutional Court in Decision 7/2006. (II. 22.) AB, Article 15 of the Constitution establishes the State's obligation to protect marriage and the family as a raison d'etat: the legislation should protect the institution of marriage and family by way of adopting statutes. Thus the Constitutional Court also protects the family as a social institution. (ABH 2006, 181, 207)

Ordering the protection of marriage and family in the same constitutional provision in a common context is of paramount importance with regard to constitutionality: in the course of regulating the institutions specified in Article 15 of the Constitution and forming their legal framework, and when determining the rights and obligations connected to the status of the subjects within these legal relations, the legislation shall act with due account to the "mutual" relation of the institutions, i.e. attention is to be paid to the interrelations of the protected social relations or such interrelations are to created. Consequently – in my view – the State must protect marriage as a form of life union of the partners, aimed traditionally and typically at founding a family, which is the cornerstone of the society, and at raising up common children. The extra legal protection is considered to be established if the legal recognition of other partnership forms and the rights connected to them are different than that of marriage and of the legal subjects living in marriage. Reinforced protection can be manifested for example in the differentiations regarding the rules on making the establishment and the dissolution of marriage and the other forms of recognized partnerships easier or more difficult – to the "advantage" of marriage –, as well as in the measures encouraging and supporting the responsible family founding of the young, e.g. in the form of legislation aimed at introducing family based taxation, favourable social security regulations, and developing the family support system.

I underline in the respect of the registered partnership relation regulated in ARP under constitutional review that the Constitution protects marriage and not the life partnership; marriage is the constitutionally protected value. The provisions of law regulating the legal institution of marriage – such provisions ordered inaccurately and without differentiation by the reference rule in ARP to be applied to registered partnerships as well – contain several rules aimed at supporting or securing the protection of the constitutionally protected legal institution. As the full extent of the State's objective obligation of protecting the institution of marriage is developed through the legal regulations pertaining to marriage, the legal regulations in force grant a kind of "constitutional level of protection" to the legal institution of marriage.

A share the view contained in point 1 of the holdings of the majority decision, together with the connected reasoning, stating that the legislation is not prohibited by the Constitution in regulating the legal institution of registered partnership. Neither do I argue with the point that the permanent union between two persons may be legally acknowledged on the basis of the equal personal dignity of the persons concerned, irrespectively to the sex of those living together.

However, in the course of regulating the legal institution of registered partnership, the legislation should consider the fact that according to the Constitution's provisions on marriage and family, the constitutional value to be protected is the marriage of a man and a woman. (Articles 15, 67, 70/J of the Constitution) Therefore, when regulating the institution of registered partnership, the State must pay a special attention not to decrease the existing level of protection – granted in the legal system – concerning the constitutional legal institution of marriage, in order to maintain the protection of marriage as a constitutional value.

In my opinion, on the basis of the interrelation between Article 15 of the Constitution on the legal institution of marriage, and the constitutional provisions on marriage and family (interpreting them with regard to each other), the following constitutional restraints are to be applied by the State in the course of regulating the legal institution of registered partnership:

- the legal institution of registered partnership should not empty out the constitutionally protected legal institution of marriage; the constitutionally not protected legal institution of registered partnership should not replace (substitute) the constitutionally protected legal institution of marriage;

- in the course of regulating the legal institution of registered partnership, the legislation must pay attention to the natural differences resulting from the dissimilarities of the sexes;

- the Constitution only requires the legislation to regulate the conditions of marriage between opposite-sex persons equally, and – in my opinion – it does not imply the obligation of granting for the registered partners a legal status identical with that of the spouses;

- in my view, in the course of forming the legal institution of registered partnership, the constitutional requirement is to treat the affected persons equally – within the homogeneous group they constitute – and as persons of equal dignity, i.e. in the elaboration of the regulation, their interests should be taken into account with the same circumspection, attention, impartiality and fairness, and the constitutional requirement does not imply the automatic extension of the constitutionally protected legal institution of marriage – which means the union of a man and a woman – to persons of the same sex;

- in addition, I hold that the legislation should keep on developing the benefits (e.g. tax benefits) and preferential regulations (e.g. various forms of family support) in the various fields of law, pertaining to marriage (and thus to spouses) and family, as constitutionally protected and most closely connected

legal institutions, in order to express the differences between the institutions enjoying constitutional protection and the ones that do not.

Budapest, 15 December, 2008.

Dr. Elemér Balogh
Judge of the Constitutional Court

Concurring reasoning by *Dr. László Kiss*, Judge of the Constitutional Court

I agree with the holdings of the Decision. However, in my view, point 1 and the connected reasoning is too short. In my opinion, the reasoning should have detailed the conditions under which the statutory regulation of the registered partnership of same-sex persons is not unconstitutional.

In the absence of specifying the above conditions, the reasoning presents the danger of regulating the registered partnership relation of opposite-sex persons, threatening the institution of marriage (and family) protected in Article 15, as a threat bigger than regulating the same-sex partnership relations "similar" to marriage.

"Marriage of opposite-sex couples, as the traditional form, would not suffer from any disadvantage because of the registered same-sex partners obtaining a status similar to that of the spouses – maintaining the differences resulting from the nature of such a partnership" – as stated in the decision.

1. The decision establishes correctly that Section 1 of ARP, treating as a homogeneous group the partnerships of persons of opposite sex and of the same sex, as well as it's general reference rule (Section 2), making the legal institution of registered partnership identical with marriage in terms of their essential contents (legal effects), violate Article 2 para. (1), Article 15 and Article 70/A para. (1) of the Constitution. It was well founded to establish that the legislation is bound to define clearly and unambiguously the purpose of the specific legal institutions, making a distinction between the similar ones. In the present case, the legislation failed to meet this obligation, it failed to differentiate adequately and it failed to make a recognizable distinction between the registered partnership of opposite sex persons and marriage. The total conjugation in ARP of the provisions pertaining to opposite-sex and same-sex persons results in the violation of legal certainty. [e.g. "The provisions on the dissolution of marriage shall be applicable to terminating the registered partnership" Section 3 para. (2) of ARP] Another significant legal uncertainty results form Section 2 para. (2) of ARP stating that the provisions listed there shall be applied "appropriately" "unless an Act of Parliament provides otherwise".

The cited provisions of ARP (also) clearly violate the requirement of legal certainty granted in Article 2 para. (1) of the Constitution, at the same time threatening with the violation of Article 15 granting protection for marriage and the family.

In my view, the undifferentiated regulation applied by the legislation caused in itself the violation of Article 15 and Article 70/A para. (1) of the Constitution, therefore the challenged and the closely connected statutory provisions – finally the whole Act – could have been annulled by the Constitutional Court merely on this basis. This was the phase where I would have ended the examination, as then on the Constitutional Court was forced to perform the assessment of the contents of the provisions that failed to pass the test of legal certainty because of being undifferentiated and containing internal contradictions.

2. According to the reasoning of the decision, the establishment of the legal institution of registered partnership for same-sex persons was stated not to be unconstitutional merely on the basis of the fact that persons of the same sex have no legal option to get married instead of uniting in life partnership. With regard to this, the decision establishes the following – as cited above: “Marriage of opposite-sex couples, as the traditional form, would not suffer from any disadvantage because of the registered same-sex partners obtaining a status similar to that of the spouses – maintaining the differences resulting from the nature of such a partnership.” Accordingly, the Constitutional Court only stated in point 1 of the decision that “it is not unconstitutional to establish the legal institution of registered partnership for persons of the same sex”. Point 1 of the holdings and the reasoning fail to specify the limits of the regulation, for example what could the term “status similar to that of the spouses” mean. In my opinion, based on the State’s obligation of protecting the institution of marriage and family specified in Article 15 of the Constitution, the Constitutional Court should have presented the conditions and the limits under which the new regulation was conform to the constitutional provision on the protection of marriage and family. It seems from point 1 of the decision as if the legislation would be absolutely free to decide how (and with what contents) to re-regulate the registered partnership of same-sex persons – similarly to marriage. Thus the delimitation of the constitutional frame is what I miss from the reasoning of the decision. Although the elements of the arguments can be found in the decision, they were not organised and no conclusions were drawn from them. Let me underline: the Constitutional Court should not have played the role of the legislation, it only should have established the following: what are the conditions to be complied with by the new Act of Parliament re-regulating the partnership relations - "similar to marriage" - of same-sex persons. More specifically: the reasoning should have detailed the “value” content of the marriage, and how should it be taken into account when interpreting the provision on the protection of marriage and family, specified in Article 15.

I hold that the reasoning of the decision – in the part analysing the registered partnership relation of same-sex persons – should have been supplemented as follows.

In the Decision 14/1995. (III. 13.) AB, the Constitutional Court interpreted in details Article 15 of the Constitution and it declared that marriage "typically is aimed at giving birth to common children and bringing them up in the family in addition to being the framework for the mutual taking of care and assistance of the partners. (…) The institution of marriage is constitutionally protected by the State also with respect to the fact that it promotes the establishment of families with common children. This is the reason why Article 15 of the Constitution refers to the two subjects of protection together: The Republic of Hungary protects the institutions of marriage and the family" (ABH 1995, 82, 83).

As also established in the cited Decision: „In recent decades (…) movements have been started to protest against negative discrimination with respect to homosexuals.” In addition, changes can be observed in the traditional family model, especially in terms of the durability of marriages. All these are not reasons for the law to diverge from the legal concept of marriage which has been preserved in traditions to this day, which is also common in today's laws and which, in addition, is in harmony with the notion of marriage according to public opinion and in everyday language. Today's constitutions – among them the Hungarian Constitution concerning its provisions on marriage and the family – consider marriage between a man and a woman as a value and protects it (Articles 15, 67 and 70/J of the Constitution)” (ABH 1995, 82, 83). Thus, in the interpretation of the Constitutional Court, the different sex of the spouses is a constituent element of the concept of marriage, defined as a “value”. Accordingly, only the couples of partners of different sexes have the right to marriage – based on Article 54 para. (1) of the Constitution. As also pointed out in the Decision 37/2002. (IX. 4.) AB: “As both heterosexual and homosexual orientations form part of the essence of human dignity, there must be exceptional grounds for making a distinction between them and treating differently the dignity of the persons concerned. Such an exceptional case is, for example, the distinction of homosexual orientation in the respect of the right to marriage [Decision 14/1995 (III. 13.) AB, ABH 1995, 82, 84].” (ABH

2002, 230, 245) Accordingly, also the subsequent decisions of the Constitutional Court [Decision 65/2007. (X. 18.) AB, ABH 2007, 726; Decision 75/2007. (X. 19.) AB, ABH 2007, 731] maintained the position stating that the institution of marriage is protected in Article 15 of the Constitution as the life union of a man and a woman, and this position is still maintained. This approach is also supported by the Court of Justice of the European Communities establishing that, according to the definition generally accepted in the Member States, marriage means a union of two persons of the opposite sex. This marriage, defined as a "value", is the foundation of the family, which is typically aimed at giving birth to common children and bringing them up in the family in addition to being the framework for the mutual taking of care and assistance of the partners. [Decision 14/1995. (III. 13.) AB] In my view, this is the "value" protected in Article 15 of the Constitution, and not other identical or "similar" life partnerships deserve such a protection. Partnerships of persons of the opposite sex should not enjoy such protection because of competing with the status of marriage, while same-sex partnerships do/can not form a family where giving birth to common children and bringing them up in the family would be possible. Of course, in the latter case – without regard to the above aspect – it is true that "the long-lasting life union of two persons may realise such values that make this partnership deserve legal recognition on the basis of the equal acknowledgement of the personal dignity of the affected partners, without regard to the sex of the persons who live together". [Decision 14/1995.(III. 13.) AB, ABH 1995, 82, 84] This recognition however – in my opinion – should not extend so far as to jeopardise the State's obligation of protecting marriage as required in Article 15 of the Constitution.

Let me note the following: the State's obligation of protecting the institution of marriage (and the family), established in Article 15 of the Constitution, should not be limited to merely recording the fact of the crisis of the institution of marriage and the family, and in particular, the creation of (legal) institutions identical or similar with/to marriage in crisis should not be an answer to the problem. The primary tool of the State's obligation of protecting the institutions – based on Article 15 of the Constitution – is to help and support the family – as a "value" founded on the enduring life union of opposite-sex persons – with all means and methods available (including positive action). The State is to facilitate a process where both marriage and the family as the natural basic institutions of the society rediscover their role aligned with their function of bearing values. In my view, the reasoning of the decision should have included the above clause as well.

3. Summing up: it is not unconstitutional in itself if the legislation regulates certain elements of the relations between persons of the same sex. Nevertheless, the Act of Parliament regulating the registered partnership of same-sex persons can only be regarded constitutional as long as it does not jeopardise the enforcement of Article 15 of the Constitution, protecting marriage as a "value" and the family built upon marriage. In other words: it is not unconstitutional to establish the legal institution of registered partnership as long as the essential contents of this institution is not identical with or similar to the institution of marriage. I hold that these constitutional limits should have been included in point 1 of the decision as well.

The regulatory method selected in ARP does not provide the protection required under Article 15 of the Constitution. The reason of its failure is the "reverse" approach of the regulation: it orders the application of the rules on marriage to the registered partnerships as well, with the exception of bearing names and adoption (without differentiating between persons of the opposite sex and of the same sex). This regulatory approach in itself (may) cause legal uncertainty – according to the standards of the rule of law regulated in Article 2 para. (1) of the Constitution – adding some ambiguity to the protection of marriage – defined as value in Article 15 of the Constitution, as a direct constitutional provision –, based on the enduring life union of a man and a woman. The ambiguity could have been prevented by the legislation by providing an itemized listing of the elements (of the institution of marriage) to be taken into account in regulating the registered partnership of same-sex persons. (This way excluding "all the other" elements.)

Such an exact and closed regulatory manner would clearly be more compliant with the State's obligation of protecting marriage (and the family) specified in Article 15 of the Constitution, than the method applied in Section 2 para. (2) of ARP, according to which the regulations are to be applied "appropriately" "unless an Act of Parliament provides otherwise".

In this case, with the above described regulatory approach, the recognition and the positive regulation of the life partnership of same-sex persons would not lead to "taking over" the role and the essential contents of marriage.

In my opinion, the reasoning of the decision should have included the above as well.

Budapest, 15 December, 2008.

Dr. László Kiss
Judge of the Constitutional Court

Dissenting opinion by *Dr. András Bragyova*, Judge of the Constitutional Court

I agree with the first point of the holdings of the decision: in my view, too, the legal institution of the registered partnership between persons of the same sex is not unconstitutional; nevertheless, I can't second to the majority opinion stating that the registered partnership between persons of the same sex and persons of the opposite sex is unconstitutional as regulated in the annulled Act CLXXXIV of 2007 on Registered Partnership (hereinafter: ARP).

There are two fundamental aspects of the majority decision I do not agree with: (1) the evaluation of the contents and the importance of the constitutional protection of marriage, and the closely related question of (2) regulating the recognition of the legal options on partnerships and certain ways of life, and the applicability of the constitutional norm [Article 54 para. (1) of the Constitution] on equal treatment (equal dignity).

1. The constitutional protection of marriage

The constitutional evaluation of registered partnership is closely related the constitutional protection of marriage (Article 15 of the Constitution). The constitutional protection of marriage has not been part of the classical constitutions and constitutional listings (of citizens' rights) – probably as the institution of marriage (as it has existed) has not required any special protection. All the necessary legal protection was provided in the rules of private law and criminal law. (Explained in details in the work of Rusztem Vámbéry: A házasság védelme a büntetőjogban /The protection of marriage in the criminal law/, Budapest 1901.)

In the new generation of constitutions – such as in Article 119 of the Weimar Constitution – the protection of marriage has been introduced in the constitutional law, following the changed role of family in the society and – in Hungary, too – linked to the protection of the family. The constitutional protection of marriage – alone, or together with the protection of family – is primarily a protection (guarantee) of the institution. As far as the content of constitutional law is concerned, two questions are to be distinguished: (1) the concept of marriage and (2) the essence of the protection.

1.1. The concept of marriage

In order to define the extent of the institutional guarantee, the institution of marriage is to be defined.

The constitutional concept of marriage – and it is tacitly accepted in the decision as well – means marriage as conceived by the society, or, to be exact, by the majority of the society. Thus the changing constitutional concept of marriage reflects the conventional morals of the society (in the sense of customary morals, *mores, Sitte, moeurs*). The constitutional protection of marriage is the institutional guarantee of marriage interpreted according to the prevailing (conventional) social morals. This is why the constitutional meaning of marriage (may) change in line with the changing conventional concept of marriage in the society. The legal norms on marriage must be compliant with marriage as interpreted according to the conventional norms of the society. Beyond doubt, it is hard to identify, especially in a modern society, what exactly the conventional (or majority, determining) social morals are, as the specific groups of the society, age groups and people of different attitudes follow and support quite different norms.

It is in particular true to marriage, sexual morals and the attitude to family. It is evident and well known that the social concept of marriage – together with forms of life, ways of life and attitudes to life – is diverse in time and space. The socially accepted pattern of marriage has changed significantly in the European cultural sphere, especially in the 20th century. For example, in the original version of Code civil (Art. 204 skk.), marriage meant the power of the husband over the wife and the children, a married woman was not allowed to conclude a contract or to engage in a profitable occupation, she could not dispose over her property and she was not allowed to change her residence without her husband's approval, not to mention the strict conditions – or the impossibility – of a divorce.

As the constitutional protection of marriage secures the existence of marriage as interpreted in line with to the prevailing norms of the society (i.e. the actual conventional morals), I share the view expressed in the previous decisions of the Constitutional Court [in particular, in the Decision 14/1995. (III. 13.) AB, ABH 1995, 82, 87; hereinafter: CCDec] and reinforced in the present decision, according to which only a long-lasting partnership between a man and a women is considered as marriage. It means nothing more than I share the view that today, according to the prevailing Hungarian social morals, this is in fact the case. How correct is the society's conventional morals from the aspect of critical morals is another question.

As a consequence, the constitutional definition of marriage may change, and indeed should change, along with the changing prevailing views in the society about marriage and family, as the legislation is expected to follow such changes. It is required all the more so since, according to practical experience, legislation in family law is in general slow in following the social changes of family.

1.2. The tools of protecting marriage

In the constitutional law, three basic forms of protecting marriage can be distinguished. According to the first, the constitutional protection of marriage is to secure the *existence of marriage as a legal institution*: the legislation may not delete the institution of marriage.

In the second case, the protection is stronger: the protection of marriage means giving *preference* to marriage. According to this approach, it is not possible to hold the partnership forms similar to marriage as ones of equal value to marriage. Here, equality means the sameness or the strong similarity of the legal effects and of the status. In line with the above protection of marriage, it is not unconstitutional to recognize the partnerships (without marriage) that show some similarity to marriage, provided that they are not identical with marriage under the law.

The third and strongest protection safeguards the institution of marriage by granting *exclusivity* to it. It was the general view shared by the legislations all through the 19th century and in the significant part of the 20th century – at least where religious and civil marriage was separated (in Hungary, since the Act XXXI of 1894, taking force on 1 October 1895). In theory, this was the approach also shared by the Hungarian legal system until 1977 (the year of enacting Section 578 of the Civil Code at that time), although in the judicial practice the civil law effects of partnerships without marriage – a phenomenon

becoming more and more common – had been acknowledged earlier. In the year 1973, the Supreme Court established in the Board Resolution No. 94 of the Civil Board – amended by the Board Resolution No. 369 later on – that the legal relation of the life partners is a social relation of family character where the property relations of the life partners – according to its economic character – show the elements of civil law partnerships. In addition, the resolution established that the property gained in the course of the cohabitation of the partners as well as the one obtained through a joint business activity would become co-property. The amendment of the Civil Code in 1977 (Act IV of 1977) codified the Resolution No. 94 by introducing Section 578 of CC (re-numbered later on to Section 578/G), defining the notion of life partnership and settling the property relations of the partners.

The legislation aims intentionally to put the non-married life partners and their children into a less preferred position – for example by the disadvantageous (sometimes non-recognized) family law status of the children born outside marriage. The latter approach may even include the protection of marriage under criminal law or civil law (compensation), i.e. imposing sanctions on “anti-marriage” conducts.

2. Registered partnership and constitutional equality

From the three potential protections of marriage described above, the majority decision chose the second one. I can’t second to this decision as I hold that this version of the constitutional protection of marriage (not to mention the third one) is incompatible with a fundamental value of constitutional democracy: the freedom and the equality of the members of the society – their equal freedom and/or free equality. Only the firs version can be regarded as constitutional; the other two versions could only be supported by way of the unacceptable restriction of the constitutional right of equal freedom. The weaker version of the constitutional protection of marriage does not distinguish between persons opting for marriage and the ones who do not, it merely obliges the legislation to maintain the legal institution of the prevailing conventional marriage.

In the evaluation of the legal regulations on the partnerships of same-sex persons, one must deal with the question of constitutional equality (as equal dignity). As stated clearly by the Constitutional Court several times, sexual orientation is a part of the personality, thus deserving the constitutional protection of human dignity. These decisions – such as Decision 21/1996. (V. 17.) AB (ABH, 1996, 74, 88) or the Decision 37/2002. (IX. 4.) AB, ABH 2002, 230, 265 – are cited by the decision approvingly. This, however, implies nothing more than the obligation of protecting (maintaining) the legal institution of marriage, not including the approach presented in the majority opinion, differentiating between the freely chosen – and freely changeable – ways of life and the partnerships, holding that they are of different value.

Consequently, the constitutional protection of marriage cannot be regarded as a *raison d'etat*. The State must treat equally all citizens, including the ones who opt for marriage, the ones who do not want to marry (or not married at that time), and the ones who may not be able get married. The requirement of equal treatment excludes forcing the institution of marriage by way of legal tools and even the facilitating of marriage, for example by way of preferences. Of course, this prohibition applies only to the State: in line with the freedom of communication between the members of the society, anyone may promote publicly the way of life he/she considers to be the right one. According to the Constitutional Court, the right to marry is a part of human dignity (the right of self-determination) (see for example the Decision 102/B/1999. AB, ABH 2000, 797, 798). If the freedom to marry is a constitutional right, the same must be true for the freedom of not to marry. The latter freedom is to be respected by the legislation just as the right to marry.

As I mentioned, I also agree with the majority in stating that registered partnership is a constitutional option for same-sex couples since they cannot marry, therefore the constitutional protection of marriage shall not be extended to the couples who do not fall within the extent of the concept of marriage. If the Constitution required the constitutional protection of pears, protecting peaches the same way as pears

would not violate the constitutional protection of pears. Based on the above arguments, I also accept (as a conventional moral custom – a fact) that the present constitutional concept of marriage *does not contain* the long lasting and legally recognized partnership of persons of the same-sex – either in the form of a personal status, as in the Act on registered partnership. As a consequence of it, the registered partnership of same-sex couples cannot be considered to be in any relation – including a contradiction – with the constitutional protection of marriage. [This way of reasoning can be found clearly elaborated in the decisions No. 1 BvF 1/01 and No. 1 BvF 2/01 (E 105, 313) of 17 July 2002 of the German Constitutional Court.]

In this concept, the similarity between the registered partnership of a man and a woman and the marriage of a man and a woman – being a natural similarity as they regulate the same subject, the legal recognition of enduring partnerships - has no relevance at all with regard to assessing the constitutionality of registered partnerships. In the case the State considers all adult members of the society to be equally free, it may not determine what kind of partnership or family they should live in, even more so, the State may not require them to live in a family or a partnership at all: they are free to live in solitude or as a member of a religious order.

3. The constitutionality of the Act of Parliament on registered partnership

According to the majority opinion of the Constitutional Court, ARP is unconstitutional as the registered partnership shows too many similarities with marriage - the only practical difference being their names. This is the cause of the unconstitutionality of the Act, because of regulating the registered partnership of opposite-sex couples and *not of same-sex persons*. I agree with the decision that the registered partnership of same-sex persons is constitutional, but in my opinion, it is equally constitutional to allow the same in the Act for man-women couples as well (who might otherwise also get married).

I do not second to the majority opinion establishing the unconstitutionality of the regulations on the registered partnership between men and women, on the basis of ordering the application of all rules pertaining to spouses to the registered partner as well, alleged to violate the constitutional protection of marriage. In the majority opinion, the above violation is manifested in creating a real competition between marriage and registered partnership. The majority opinion adopts the challenged approach to the constitutional protection of marriage: according to the reasoning, the registered partnership (of man-woman couples) shows too many similarities with marriage, therefore it is unconstitutional.

I can’t agree with that on the one hand because I consider this approach to the protection of marriage to be false, and also because I hold the registered partnership and marriage to be different in legal terms.

Assessing the level of the differences between the two institutions is a subjective question: it can be many to some and little to others. In my view, there are enough differences to hold them as different institutions – and it is actually possible to imagine more groups of partnership relations: for some couples, in particular for older ones, registered partnership could be a real alternative to marriage. Moreover, there is at least one respect where registered partnership would have protected the institution of marriage better than the regulations in force now. Today, there is no regulation to exclude the establishment of a life partnership under Section 578/G of CC between a married man or woman and another married woman or man – even if the couple in life partnership is of the same sex (although both of them are married persons). This situation, which is far from being beneficial for the institution of marriage would have been clearly excluded by Sections 1 and 2 of the Act: a married person would not be entitled to enter into a registered partnership and a person living in a registered partnership could not marry (without terminating the former partnership) anyone else but his/her registered partner.

According to the majority opinion, registered partnership and marriage were pushed too close to each other by Section 2 of the Act ordering to apply appropriately the rules on marriage to registered

partnership as well, “unless an Act of Parliament provides otherwise”. The decision holds the two institutions made to be too close to each other – I disagree. “Appropriate application” would have offered a chance of exercising discretion by the judge and the by other persons applying the law, while an Act of Parliament could have provided otherwise. About the constitutionality of the differentiated or the same regulations, the Constitutional Court could have adopted a decision when needed, on the basis of Article 70/A para. (1) of the Constitution, to judge upon the constitutional justification of the differentiation or the lack of that. One also should not forget about the fact that in the Hungarian law, the “appropriate application” of certain regulations on marriage to the relations of life partners (not registered partners, of course) has a decade-long tradition in the judicial practice (e.g. BH 1984/6/225).

Budapest, 15 December, 2008.

Dr. András Bragyova
Judge of the Constitutional Court

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